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## NOTES



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# ARTICLE

# JUSTIFYING LEGISLATION: A PRAGMATIC, INSTITUTIONALIST APPROACH TO THE MEMORANDUM OF LAW, LEGISLATIVE THEORY, AND PRACTICAL REASON

ROBERT B. SEIDMAN*

*While decision-making by the judiciary is characterized by formal, written opinions and the influence of a considerable body of theory to guide their critique (e.g., stare decisis, conception of judges as dispassionately "applying law to facts," etc.), the legislative process essentially lacks such guideposts. Moreover, post-modernist theory suggests that the discretionary value choices pervading the legislative process simply do not admit of objective, rational justification.*

*In this Article, Professor Seidman takes the perspective of a legislative aid or congressional committee staffer charged with drafting a bill, and describes the elements of a theory of legislation helpful in making drafting decisions and justifying them in an accompanying memorandum of law. Professor Seidman argues that it is possible rationally to justify and critique such decisions, even where the drafter and the critic hold divergent personal and political values. Professor Seidman offers a practical guide to drafting and justifying legislation so as to promote such dialogue.*

The gods did not reveal, from the beginning,
All things to us, but in the course of time
Through seeking we may learn and know things better.
But as for certain truth, no man has known it,
Nor shall he know it, neither of the gods
Nor yet of all the things of which I speak.
For even if by chance he were to utter

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* Professor of Law and Political Science, Boston University. B.A., Harvard University, 1941; J.D., Columbia University, 1948. I am indebted to Professors Adeno Addis, Joseph Brodley, Victor Brudney, Alan Feld, William B. Harvey, Robert Merges, Joseph Singer, Avi Soifer, and the members of the Boston University School of Law Thursday Afternoon Workshop; mistakes are, of course, my own. Most of these ideas developed not in the study of U.S. institutions, but of Third World ones; that endeavour was a collaboration with Professor Ann Seidman and more recently also with Professor Neva Makgetla. I am also indebted, for research assistance, to Kristen Fredericks and Grace Pasigan, and for the graphics, to Caye Sarber. This Article had its origins in a brief outline of the memorandum of law for a course on legislative drafting at Boston University School of Law, published in Robert B. Seidman, *The Memorandum of Law*, 15 SETON HALL LEGIS. J. 319 (1991).

> The final truth, he would not himself know it:
> For all is but a woven web of guesses.
>
> —Xenophanes[1]

The principal legal device by which the organized political community attempts to resolve pervasive social problems has become not appellate court decisions but legislation.[2] If law constitutes governmental social control,[3] today legislation embodies its usual form.

The legislative process requires ideas—ideas both about general policy and about how to transform policy into legislation.[4] The focus of American legal scholarship has failed to follow the shift from appellate decisions to legislation as the principal source of law.[5] We have no theory of legislation to aid in the

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[1] BRYAN MAGEE, KARL POPPER 21 (1973).

[2] *See* William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 691 (1987) (noting "the twentieth century's 'orgy of statute making,' which has transformed our policy into one where law is not only primarily statutory, but also increasingly statutorified"); *see also* Roman Tomasic, *Towards a Theory of Legislation: Some Conceptual Obstacles*, 1985 STATUTE L. REV. 84, 84 (1985) (noting "the widely held assumption of 20th century lawyers and policy makers that statute law is an unquestionably appropriate response to a social problem or task"); KARL RENNER, THE INSTITUTIONS OF PRIVATE LAW AND THEIR SOCIAL FUNCTIONS 4, 258–60 (O. Otto-Kahn ed. & Agnes Schwarzchild trans., 1976) (suggesting that the modern attitude involves the "idolatry of legislation"); David Miers, *Legislation, Linguistic Adequacy and Public Policy*, 1986 STATUTE L. REV. 90, 106 ("English law has . . . been based more and more on statute law. Without statute law, our society could not have moved from its rural condition at the beginning of the 19th century, through the industrial revolution, through two world wars in the 20th century and now be negotiating the technological and electronic revolution.") (quoting Lord Scarman in 437 PARL. DEB., H.L. (5th ser.) 634 (1982)). *But cf.* RONALD DWORKIN, LAW'S EMPIRE 407–10 (1986) (arguing that courts are "the capitals of law's empire" and that "[g]eneral theories of law, for us, are general interpretations of our own *judicial* practice.") (emphasis added).

[3] DONALD BLACK, THE BEHAVIOR OF LAW 2 (1976); *see also* ANTONY ALLOT, THE LIMITS OF LAW (1980); Antony Allot, *The Effectiveness of Law*, 15 VAL. U. L. REV. 229, 233 (1981); Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1886 (1988) ("The most basic problem with the current mode of standard legal scholarship is that it is addressing a decision-maker [the judge] that the modern state has demoted to a subordinate position.").

[4] JACK DAVIES, LEGISLATIVE LAW AND PROCESS IN A NUTSHELL 141 (1986). These two tasks constitute but two sides of a single coin. Transforming ideas about policy into legislation obviously transforms the ideas about policy: means affect ends as much as ends affect means. An adequate theory of legislation must address the problem of legislative policy as a unitary task, not as two distinct steps.

[5] *See* Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 369–71 (1989). Why American legal scholars fixate on courts rather than legislatures constitutes an intriguing arena for research. I suggest four hypotheses. First, as their core task, law schools must prepare students for the practice of the law. From the perspective of practitioners, as Holmes long ago remarked, the law itself means what courts do, not what legislatures do. *Cf.* Ross F. Cranston, *Reform Through Legislation: The Dimension of Legislative Technique*, 73 NW. U. L. REV. 873 (1979). Thus, most legislation courses are concerned with statutory interpretation, not with the

generation of ideas to guide the legislative process, "no general account of how such statutes should be designed, and what makes them effective or ineffective, desirable or undesirable."[6] This Article addresses the need for such a general theory. It does so from the perspective of a committee staff or a legislative drafter, confronting the task of writing a report or a memorandum to justify a bill addressing a social problem. Nonetheless, to explain the prescriptions that this Article proposes for accomplishing that practical task requires that we address the question of legislative theory.

Nobody who reads committee reports and legislative memoranda can avoid dismay at their poor quality. On the state level they hardly exist. On the federal level, memoranda justifying congressional bills typically include a section entitled "Purpose," usually a one-paragraph statement of the bill's thrust in the narrowest terms; a brief history of the legislation; a catch-all section entitled "Statement," which usually only states the problem at which the legislation aims, with little or no causal analysis; a section-by-section analysis; views of relevant administrative agencies; a cost-benefit estimate; and, in the Senate, a statement of the bill's impact on the regime of regulations. In practice, most such reports do little more than to state the problem and then the legislative solution in non-legalese. Cost-

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legislative process. *See* Eskridge & Frickey, *supra* note 2, at 700. Second, a legal order under the control of judges reflects the dominant ideology of a competitive market economy. *See generally* RICHARD A. POSNER, THE ECONOMIC ANALYSIS OF LAW (2d ed. 1972) (reflection on 19th-century judicial hostility to statutes); JAMES W. HURST, DEALING WITH STATUTES 64 (1982). Third, "the case method of teaching down-grades legislation." Cranston, *supra* this note, at 873–74. Finally, "much law is taught along conceptual lines instead of how it relates to particular social phenomena. Were the latter approach adopted, the importance of legislation . . . would be immediately apparent." *Id.* at 874.

[6] Rubin, *supra* note 5, at 369; *see also* WILLIAM TWINING & DAVID MIERS, HOW TO DO THINGS WITH RULES 198–99 (1976) (suggesting that we need a "new Theory or Science of Legislation suited to modern conditions"); Richard L. Abel, *Redirecting Social Studies of Law*, 14 LAW & SOC'Y REV. 805, 816 (1980). Professor Rubin distinguishes between two sorts of legislature-enacted norms: "law," by which he means rules, enforced by courts and addressed primarily to non-officials, and "legislation," by which he means "in its essence . . . an institutional practice by which the legislature, as our basic policy-making body, issues directives to the governmental mechanisms that implement that policy." Rubin, *supra* note 5, at 372. His article therefore discusses only statutes that "allocate resources, create administrative agencies, issue vague guidelines or general grants of jurisdiction to those agencies, and enact a wide range of other provisions that bear little resemblance to our traditional concept of law." *Id.* This constitutes a purposely skewed view of the body of legislation. *See infra* note 72 (on Rubin's exclusive focus on "intransitive" legislation). His criticism of lawyers' lack of a theory concerning statutes controlling government action should apply to all sorts of legislation, not merely those on which he focuses.

benefit estimates rarely discuss social costs and benefits, but restrict themselves to out-of-pocket expenditures from the federal budget.[7]

This Article focuses upon how legislation should be justified in a memorandum. Because of the resonance between memoranda and theory,[8] however, the Article first discusses the problem in theoretical terms, and then fleshes out that theory by directly addressing specific issues in the writing of memoranda.

Part I discusses the function of legislative theory as a guide to justifying legislation. On the most superficial level, we need an appropriate outline for an adequate memorandum of law. That outline would direct the drafter's attention to the data required to justify the draft. An outline of that sort serves as a functional reflection of a theory of legislation and of the specifications of practical reason. Our political culture justifies the passage of a law either in terms of personal interest and power or public interest and reason. The drafter's position, however, forces her to justify legislation from the standpoint of public interest, using the tools of data and reason. A theory of legislation that will serve a legislative drafter must therefore focus on justifying legislation in these terms.

Such a theory must explain how to justify legislation in terms of "practical reason," reason informed by experience. It will not provide a generalized model of the world, nor an "ideal type" serving to deepen academic discourse about problems. Instead, it will serve the heuristic function of guiding the investigator to data likely to help resolve "social problems," repetitive patterns of behavior that the lawmakers identify as harmful. An adequate

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[7] Consider some examples from a single volume of legislative reports: S. REP. No. 583, 97th Cong., 2d Sess. (1982) (Missing Children Act); S. REP. No. 331, 97th Cong., 2d Sess. (1982) (amendments to international extradition legislation); S. REP. No. 336, 97th Cong., 2d Sess. (1982) (appropriations for various earthquake forecasting services); H.R. REP. No. 885 (1982) (Migrant and Seasonal Agricultural Worker Act). Frequently, significant provisions appear without any explanation. *See, e.g.*, S. REP. No. 334, 97th Cong., 2d Sess. (1982). This bill, The Potato Research and Promotions Act, provided that the National Potato Promotions Board, which until then had included only representatives of the potato producers, would begin to include public members. The report explained that this new provision was based on experience with similar national commodity research and promotion programs, and then stated without further explanation that "the number of such public members . . . is subject to approval by the producers in a referendum."

Occasionally, a committee report shines for its clarity and depth of analysis. *See, e.g.*, S. REP. No. 384, 97th Cong., 2d. Sess. (1982) (Futures Trading Act of 1982).

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

theory of legislation must direct the drafter to data to help her devise legislation likely to change the problematic behavior.

In Part II, this Article describes the necessary elements of a legislative theory capable of fulfilling its function. Theory, in general, consists of three elements: methodology, perspectives, and categories. Rejecting "ends-means" and "incrementalist" methodologies, the theory advanced here rests upon a four-step problem-solving agenda of defining the behavior that constitutes the social problem, finding causal explanations for it, proposing a solution, and finally implementing and monitoring it.

Drafters cannot justify legislation simply in terms of their personal value choices. They must justify their choices from the perspective of Grand Theory, that is, broad-scale explanations of social behaviors that, in principle, data can "falsify," or disprove. This Article argues that, despite some claims to the contrary, such falsification does lie within our capabilities.

Categories serve to direct the researcher's attention to relevant sets of data. To understand the behavior of an actor in the face of a rule of law, the researcher must examine not only the law, but the constraints and resources in the actor's milieu, including the behavior of implementing agencies and the sanctions those agencies may impose. Vigorous dispute rages, however, concerning which elements in the actor's milieu the drafter should take into account. Sociological theories tend to emphasize subjective values and attitudes. Law and Economics focuses on material incentives. Institutionalism, the approach this Article advocates, suggests a broader range of categories, including the rules and their communication, the opportunity and capacity to obey, the personal interests and ideology of the law's targeted addressee, and the process by which the addressee decides to obey or disobey. This model suggests that frequently a solution turns on the behavior not of the law's direct addressee, but of the implementing agency. Such an agency almost always constitutes a collectivity—not the equivalent of a single rational actor, but a collection of interacting individuals functioning in an input-output decision-making system.

Part III of this Article applies the theory to a number of particular matters that arise in drafting a memorandum of law. Following a four-part problem-solving methodology, the memorandum first ought to specify the behavior constituting the social problem at which the legislation aims, and specify the

parties presently advantaged and disadvantaged by that behavior.

Second, in connection with explaining the problem, the drafter must distinguish between conditions, that is, constraints and resources in the milieu about which the legislation can do nothing, and causes, that is, influences that the drafter believes she can use legislation to manipulate. An adequate explanation must have a logical structure and in principle be subject to diswarrant by data. As a guard against biasing the process, the drafter should put alternative explanations to the test of facts, teasing those explanations out of alternative Grand Theories. In addition, the drafter must try conscientiously to falsify all her proposed explanations.

Third, the drafter must propose a solution to the difficulty. She first must propose alternative solutions, drawing on all available sources, including history and comparative law. She must then choose among those alternatives. An adequate solution must address the causes identified in the explanation of the difficulty, and be likely to induce the behavior prescribed by the legislation. Effectiveness requires that the drafter apply to the proposed solution the same categories used to explain the behaviors; that she select an adequate implementing agency and therefore analyze a variety of factors that affect that selection; and that she provide for an appropriate set of conformity-inducing measures that the implementing agency can (and will likely) apply. The drafter then must apply a social cost-benefit analysis to the alternative solutions that survive this analysis, so that she may choose the most cost-effective solution.

The fourth step of the theory's problem-solving methodology requires the drafter to include measures to monitor and evaluate the legislation's success or failure, so that the laws will continue to be refined and improved.

## I. The Justifying Function of Legislative Theory

### A. *The Unity of Memorandum, Theory, and Practical Reason*

This Article has a trinitarian thrust, simultaneously addressing three issues that at bottom make one: legislative theory, the content of the memorandum, and the nature of that "practical

reason" that lies at the heart of the neo-republican agenda.[9] We can begin to build a legislative theory useful to a drafter by considering the committee report or memorandum that the committee staff or the drafter usually writes to explain and justify legislation.[10] In accordance with the republican strain in our political culture, a bill's proponents must justify legislation in terms of the public interest.[11] The drafter's role requires him to meet that norm in the memorandum accompanying the bill. The memorandum explains the proposed legislation and, through the process of explaining, justifies it.

Justifications, of course, bear a systematic relationship to decision-making.[12] In order to learn how judges go about making decisions, lawyers mainly study judicial (especially appellate) opinions. Few judges, however, reach decisions in the orderly fashion they describe in their opinions.[13] The opinion constitutes the judge's attempt to explain or justify a decision made earlier.[14] Because the judge knows that she must do this in a written opinion that conforms to commonly-held professional norms,[15] the rules for writing opinions also constitute powerful constraints on the decision-making process itself. That process constitutes one of society's principal procedural devices to ensure intellectual controls over judicial value choice.

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[9] By "neo-republican" I mean recent scholarship advancing the republican notion that it is possible to think of politics in terms of public (rather than exclusively parochial or factional) interest that has developed basically in opposition to Public Choice theory (which postulates that public officials such as legislators respond only to wealthy or powerful interest groups). *See generally* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 61 (1988).

[10] Hereinafter I refer to the drafter and her memorandum, but everything I say about them applies as well to committee staff and the committee report.

[11] *See infra* text accompanying note 35.

[12] Cass R. Sunstein, *Interest Groups in American Pubilc Law*, 38 STAN. L. REV. 29, 84 (1985) [hereinafter Sunstein, *Interest Groups*] ("The requirement that measures be justified rather than simply fought for has a disciplining effect on the sorts of measures that can be proposed and enacted."); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1544 (1988) [hereinafter Sunstein, *Republican Revival*].

[13] JEROME FRANK, LAW AND THE MODERN MIND 109–10 (1930).

[14] RICHARD A. WASSERSTROM, THE JUDICIAL DECISION 28 (1961).

[15] *See* GIANDOMENICO MAJONE, EVIDENCE, ARGUMENT AND PERSUASION IN THE POLICY PROCESS 29 (1989). So powerful does the constraint imposed by judicial justifications for decision become, that the requirement probably has become part of the common law. *See* Rochin v. California, 342 U.S. 165, 170 n.4 (1952); *see also* Max Radin, *The Requirement of Written Opinions*, 18 CAL. L. REV. 486, 486 (1930) (describing opinions as tending "to purity and honesty in the administration of justice" (quoting 2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 949 (1880))). Some state constitutions impose an obligation on the judge to write an opinion. *See, e.g.*, CAL. CONST. art. 6, § 24.

In the same way, the memoranda accompanying bills serve to justify the drafters' legislative choices. In their quality, however, memoranda contrast unfavorably with judicial opinions. Judicial opinions tend to exhibit a remarkably high degree of consistency in their form and content. The memoranda accompanying legislation do not. The difference between opinions and memoranda reflects the existence of some common agreement as to what constitutes an adequate judicial opinion, and the absence of such agreement about the content of an adequate memorandum. That in turn reflects substantial agreement among the relevant readership (lawyers and judges) about what constitutes an adequate justification of a judicial decision, therefore about what constitutes an adequate way to make such decisions, and therefore upon a theory of judicial decision-making—and an absence of similar agreement about legislative decision-making.

At one level, this Article addresses the question of the appropriate content of the memorandum by proposing a checklist to guide the drafter writing a justification for her bill. At another level, it proposes a set of heuristics to guide decision-making about legislation—that is, a theory of legislation. Just as the rules for justifying judicial decisions become norms for making those decisions, so do norms for justifying legislation become norms for creating it.

On a third level, this Article addresses the content of "practical reason," a concept that lies at the heart of the neo-republican enterprise. As Professor Sunstein describes it,

> [t]he republican conception carries with it a particular view of human nature; it assumes that through discussion people can, in their capacities as citizens, escape private interests and engage in pursuit of the public good. Moreover, this conception reflects a belief that debate and discussion help to reveal that some values are superior to others. Denying that decisions about values are merely matters of taste, the republican view assumes that "practical reason" can be used to settle social issues.[16]

"Practical reason" has no agreed-upon definition.[17] Plainly, it includes the notion of dialogue that must encompass the subjects

[16] Sunstein, *Interest Groups*, *supra* note 12, at 31–32.

[17] I use the term "practical reason" as substantially synonymous with what John Dewey called "practical judgments." *See* JOHN DEWEY, ESSAYS IN EXPERIMENTAL LOGIC 335 (1916).

of a suggested policy initiative. For purposes of this Article, it also includes some concept of relatively non-subjective policy-making;[18] for reasons that later appear,[19] here I mean reason informed by experience.

This Article explores that conception of practical reason in two ways. First, as a central constraint on decision-making, the concept of practical reason embodies the institution of dialogue. The memorandum accompanying legislation (in the U.S. Congress, usually the Committee Report) has a significant function in that dialogue.[20]

Second, the simple trust that "dialogue," undefined and unspecified, can of its own force transform political conversation and its participants threatens to collapse into the kitsch that Professor Abrams sees hovering over the neo-republican enterprise.[21] As Professor Smith tells us, "[t]he hard question is not whether people should talk, but rather what they should say and what (among the various ideas communicated) they should

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[18] For some authors concerned mainly with the role of judges, "practical reason" means the use of judgment or intuition in evaluating provisions of law. *See, e.g.*, Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1645–46; Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1605–06 (1985) (considering concerns with "prudentialism"); *cf.* Karl Llewellyn, *Remarks on the Theory of Appellate Decision*, 3 VAND. L. REV. 395, 397 (focusing on a court's "sense of the situation"). *But see* ALISDAIR C. MACINTYRE, AFTER VIRTUE 69 (rev. ed. 1984), *quoted in* Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 434 (1990) ("[O]ne of the things that we ought to have learned from the history of moral philosophy is that the introduction of the word 'intuition' by a moral philosopher is always a signal that something has gone badly wrong with an argument."). A legislative drafter cannot justify her decisions in subjective, intuitional, or judgmental terms. *See infra* text accompanying notes 48–54.

[19] *See infra* notes 57–60 and accompanying text.

[20] The memorandum does not necessarily state the legislature's reasons for the legislation. *See* Sunstein, *Interest Groups*, *supra* note 12, at 77. It states only the drafter's reasons for the bill, and serves as a guide only to its author's decision-making. As evidence of legislative purposes, however, American courts have usually permitted evidence of the memorandum accompanying legislation, usually committee reports. *See, e.g.*, United States v. Pub. Util. Comm'n of California, 345 U.S. 295 (1953). In Britain, the courts refuse to admit legislative history as extrinsic evidence to aid in construing statutes, except for the report of the commission which drafted the statute, and even that is admitted only to identify the difficulty at which the statute aimed. *See* RUPERT CROSS, STATUTORY INTERPRETATION 158 (John Bell & George Engle eds., 2d ed. 1987).

[21] Kitsch . . . is the dazzling insipid smile that human beings use to cover what is "essentially unacceptable in human existence." Unwilling to confront the banality or brevity of life, people reach for sunnier images to capture their experience . . . . The power of kitsch lies in the reassurance it provides that the viewer is at one with the rest of the world in grasping the essential meaning of the human condition.

Kathryn Abrams, *Kitsch and Community*, 84 MICH. L. REV. 941, 941 (1986) (book review) (citation omitted).

believe."[22] The notion that dialogue can resolve our endless disagreements constitutes kitsch—unless the participants can agree on a reasonably precise foundational premise to govern the matter at hand, so that the only issue left for discussion is how the principle should be applied to the problem. The pluralist opposition to the republican vision, however, arises precisely because no agreement on those reasonably precise foundational propositions ever appears. How could it? Our "values" do not arise from the genes, but, as it were, seep in through our pores from our social environments—our "webs of life."[23] Those webs range broadly. Surely it strains credulity to imagine that a person born and bred in the inner city of Detroit or Chicago will have the same values as a WASP aristocrat educated at Hotchkiss and Yale, with a lifetime in the higher reaches of society and government, or as a cowboy riding the Western grasslands, or as a worker on a General Motors assembly line.[24] A common set of foundational propositions seems illusory.[25]

"Without absolutes we are left with the need to persuade."[26] Bereft of reasonably precise, agreed-upon foundational premises, we must agree on what constitutes a valid justification, or else the dialogue that lies at the heart of the republican conception cannot become a forum for persuasive justifications, but instead transmutes itself into its opposite, that is, interest-group bargaining.

In our time, a valid justification must appear rational.[27] Rationality, however, finds its measure in justifications: an action

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[22] Smith, *supra* note 18, at 434. Professor Abrams rightly rejects a possibility that Professor Sunstein advances in *Beyond the Republican Revival*, *supra* note 12, at 1555, that, in the majority of situations, dialogue can result in agreement if the participants bring to it "a commitment to political empathy, embodied in a requirement that political actors attempt to assume the position of those who disagree." Kathryn Abrams, *Law's Republicanism*, 97 YALE L.J. 1591, 1600 (1988).

[23] WILLIAM J. CHAMBLISS & ROBERT B. SEIDMAN, LAW, ORDER, AND POWER 59 (1st ed. 1971); *see* JACK W. BREHM & ARTHUR R. COTTEN, EXPLORATIONS IN COGNITIVE DISSONANCE (1962); LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957).

[24] Whether the consensus or conflict model of society has greater empirical warrant has received a great deal of attention in the literature. *See, e.g.*, CHAMBLISS & SEIDMAN, *supra* note 23, at 35–36; Ralf Dahrendorf, *Toward a Theory of Social Conflict*, 2 J. CONFLICT RESOLUTION 170 (1958).

[25] *See* JEREMY BENTHAM, THE THEORY OF LEGISLATION 7 (C.K. Ogden & Richard Hildreth trans., 1931) (arguing that individual moral sense, "common sense," "understanding," "eternal and immutable rule of right," "the law of nature," "truth," or a claim to be an "elect" all constitute arbitrary groundings for prescriptive claims); *but see* Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988).

[26] Joan Williams, *On Virtue*, 33 NOMOS (forthcoming 1992) (manuscript at 18, on file with author).

[27] *See* Anthony Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1045 (1990)

becomes "rational if it can be explained and defended by arguments acceptable to a reasonable audience."[28] At the end of the day, the republican project can avoid becoming kitsch only if it can specify the agreed criteria for what constitutes an acceptable—read rational—argument. This Article focuses on what properly constitutes those arguments. It does so in what may at first appear a roundabout way: by seeking to provide a guide to writing a memorandum in support of legislation—that is, a guide to matters to which a decision-maker ought to turn her attention in persuasion. Because of the drafter's peculiar role in the legislative process, however, that guide simultaneously suggests the matters to which she should turn her attention in decision-making. Thus this Article touches on an aspect of practical reason and, accordingly, the republican project itself.

As discussed below,[29] *theory* also serves the function of directing attention to what counts as important in justifications and in decision-making, and a practical proposal about what the memorandum ought to contain necessarily implies a legislative theory. Checklist for memoranda, theory of legislation, and practical reason: these have a necessary unity. We can propose a theory of legislation abstractly, or by considering what the memorandum ought to contain, or by specifying the content of practical reason. This unity in diversity holds, however, only for a legislative theory that focuses not on issues of power, but of substance—the "ideal element" in legislation.[30]

### B. *Power and Substance in Legislative Theory*

Considerations of both power and substance enter into determining whether to enact legislation. An adequate descriptive theory of legislation ought to address both aspects. Drafters, however, focus on issues of substance. Because this Article addresses the normative problem of justifying legislation from a

(interpreting the writings of Max Weber to mean that "civilization of the modern West . . . is based upon a system of beliefs that to every independent-minded person must appear more rational than those that underlay its premodern counterparts").

[28] MAJONE, *supra* note 15, at 34; *see also* LOUISE G. WHITE, IMPLEMENTING POLICY REFORMS IN LDCS: A STRATEGY FOR DESIGNING AND EFFECTING CHANGE 50 (1990) (noting that policy analysts select policies not according to their truth, but their credibility, which turns on the sorts of arguments used to support them).

[29] *See infra* text accompanying notes 73–88.

[30] *Cf.* DAVIES, *supra* note 4, at 134 (citing "ideas" as "the raw material of legislative institutions").

drafter's point of view, it offers a theory concerning only the substance of legislation.

### 1. Two Strands in the Political Culture

When deciding whether to adopt a law, and its precise content, lawmakers must take into account three related but conceptually distinct factors: power, substance (the "ideal element"), and the form of expression.[31] Issues of power address the question of whose claims and demands become law, and why, i.e. who supports a bill and who opposes it, their relative bargaining strengths, and the procedures for consideration and enactment of legislation as they affect power relationships.[32] Issues of substance address the merits of the legislation—the social problem that the proposed legislation addresses and how well it will attend to that problem. Issues concerning the form of expression address the dynamic between the form and content of a bill.

With respect to legislation, our political culture hovers between substance and power.[33] The republican strain holds that

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[31] These factors interact with each other. *See, e.g.*, Roger Purdy, *Professional Responsibility for Legislative Drafters: Suggested Guidelines and Discussions of Ethics and Role Problems*, 11 SETON HALL LEGIS. J. 67, 97 (1987) ("Choice of language, organization, and clarity, not only make for elegance and readability; they also affect the meaning and operation of the law."). Because legislation always expresses itself in words, the problem of the form of expression generally seems the drafter's sole concern; practically all writing directed at legislative drafters concerns problems of expression. *See, e.g.*, REED DICKERSON, LEGISLATIVE DRAFTING (1954); ELMER A. DREIDGER, THE COMPOSITION OF LEGISLATION (2d ed. 1983); COURTENAY ILBERT, THE MECHANICS OF LAW MAKING (1914); SIR ALISON RUSSELL, LEGISLATIVE DRAFTING AND FORMS (4th ed. 1938); G.C. THORNTON, LEGISLATIVE DRAFTING (3d ed. 1987); HENRY THRING, PRACTICAL LEGISLATION (1902).

[32] Professor Rubin's theory of legislation mainly addresses the way in which the process should be carried out. His theory aims at understanding and exploding some ideas, and their associated legal doctrines, that he holds have become archaic: the common assumption that legislation constitutes only a legislatively-created rule directed to the behavior of ordinary citizens; the sorts of judicial constraints appropriate to control legislation in an era of the administrative state; and our notions of the appropriate level of generality in statutes that empower administrative agencies to make rules. Rubin, *supra* note 5, at 371–72.

[33] Intriguingly, a vast scholarly literature on legislation (mainly in the so-called discipline of political science, rather than law) focuses almost exclusively on issues of power. For a convenient collection, see ESKRIDGE & FRICKEY, *supra* note 9. By contrast, the literature on the judicial process (mainly in legal journals) focuses equally exclusively on the ideal element—that is, how judges go about and ought to go about deciding what the law ought to be. *See, e.g.*, FRANK, *supra* note 13; Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930); Llewellyn, *supra* note 18; Julius Stone, *The Ratio of the Ratio Decidendi*, 22 MOD. L. REV. 597 (1959). Three reasons for the different foci in legislative and judicial studies suggest themselves. First, our popular myths perceive courts as "independent" and concerned with sub-

political actors can, should, and sometimes do act out of consideration not of private but of the public good.[34] The continuing virility of that strain finds evidence in the norms that require substantive justifications for legislation.[35] Like our culture generally, our political culture requires a person advancing a normative proposition to give a grounding for it.[36] "Even when a policy is best explained by the actions of groups seeking selfish goals, those who seek to justify the policy must appeal to the public interest and the intellectual merits of the case."[37] The memorandum that accompanies proposed legislation responds to that felt imperative. Even when legislation is in fact merely

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stance, but legislatures as concerned with special interest groups. Second, the legacies of analytical positivism in law and methodological positivism in political science support those myths, for they suppose that courts merely apply "law" to "fact," *see, e.g.*, GEORGE W. PATON, JURISPRUDENCE 175 (3d ed. 1964) (arguing that the task of the court is to make findings of fact and declare rules of law "which, in light of the findings of fact and the issues to be decided, justify the way the court resolves the issues"); Frederick Schauer, *The Determinants of Legal Doubt*, 89 MICH. L. REV. 1295, 1299 (1991); Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 522–23 (1988), while legislatures make value judgments. *See, e.g., infra* note 40. This may be contrasted with writers in the Critical Legal Studies movement who argue that, since words have no ascertainable meaning, all judicial decisions respond to power vectors. *See, e.g.*, Joseph W. Singer, *The Player and the Cards: Nihilism in Legal Theory*, 94 YALE L.J. 1 (1984); Mark V. Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683, 686–88 (1985) (presenting an argument that the Constitution's requirement that a president be at least 35 years old could be construed to permit a 16-year-old to become president). Finally, institutional structures tend to support these myths, for judges seem "independent," whereas legislatures must seek re-election. Both of these views seem simplistic. *See generally* Ben W. Heineman, *The Law Schools' Failing Grade on Federalism*, 92 YALE L.J. 1349, 1349–50 (1983) ("Does any reader . . . seriously believe that ideas do not count in the legislative arena or that judges do not often render broad, 'legislative' decisions by making value judgments first and justifying them later?").

[34] *See* WHITE, *supra* note 28, at 11 (noting that one perspective "assumes that political officials have some autonomy and can influence the policy process. Ideas and policies do more than reflect political pressures.").

Some republicans pass from normative to positive theory, creating an irrebuttable presumption that politicians always legislate in the public interest. *See infra* note 86.

[35] *See* Sunstein, *Interest Groups*, *supra* note 12, at 31–35, 49–55 (maintaining that, in our legal culture, appeal to the "public interest" rather than political strength legitimates an invidious classification); *cf.* Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 134 (1982).

[36] ALEXANDER SESONSKE, VALUE AND OBLIGATION: THE FOUNDATIONS OF AN EMPIRICIST ETHICAL THEORY 13 (1964); MAJONE, *supra* note 15, at 19 ("[I]n politics, as in the law (but not in the market), decisions must always be justified."); BENTHAM, *supra* note 25, at 6 ("No man . . . is bold enough to say openly, 'I wish you to think as I do, without giving me the trouble to reason with you.' Everyone would revolt against a pretension so absurd."). Not only the culture, but the very nature of scientific proof requires justification, not only of normative but also of positive propositions. As Popper has shown, in the nature of things, even in the hard sciences one cannot prove the truth of statements. KARL POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY 108–11 (2d rev. ed. 1968). A scientist can at most *justify* his preference for one proposition over another.

[37] MAJONE, *supra* note 15, at 2; *see* JOHN W. KINGDON, AGENDAS, ALTERNATIVES AND PUBLIC POLICIES 131–34 (1984).

symbolic,[38] its proponents justify the law as though they intend that the substantive content will accomplish the purported purposes.[39]

An alternative, equally virile strain in our culture purports to describe how legislators in fact decide those questions in terms of power. Political and other decision-makers, according to this strain, act only out of unrestrained individualism, protecting their own interests and therefore the interests of the constituencies to whom they owe their power. A heterogeneous tribe of political theorists that includes adherents of pluralism, Marxism, and Public Choice articulates that strain.[40] Its members claim to ground their thought in hard-nosed realism. They assert that the contrary perspective, republicanism, mistakes the wish for the deed and constitutes only woolly pointy-headedness.[41] In our

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[38] "Symbolic legislation" means legislation enacted with the motive not of alleviating the social problem at which the legislation purports to aim, but at symbolically satisfying the claims and demands of a particular interest group. *See* JOSEPH R. GUSFIELD, SYMBOLIC CRUSADE: STATUS POLITICS AND THE AMERICAN TEMPERANCE MOVEMENT 99 (1963) (arguing that the force behind Prohibitition in the United States was not so much the policy of reducing the alcohol consumption as it was the need for a dying rural class of land-holders to create a symbol of its power). All legislation bears some symbolic weight. *See* MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS (1964). Of course, the proponents of a piece of legislation concern themselves with their constituents' perception of the legislator's attention to constituent interests. Even the most obviously symbolic legislation, however, almost invariably has some substantive content. *See* W.G. Carson, *The Sociology of Crime and the Emergence of Criminal Laws*, *in* DEVIANCE AND SOCIAL CONTROL 67 (Paul Rock & Mary McIntosh eds., 1974). Some years ago, a friend drafted an anti-miniskirt statute in Kenya. Although the purpose of the law was plainly to tell modernizing young women that they had better remain in their customary subservient place, the drafter had to consider questions—how many inches above the knee a skirt must come to qualify as a miniskirt; whether the bill should prevent all wearing of miniskirts, or only their use in public; and what the appropriate sanctions would be—in other words, the substantive content of the law.

[39] When the bill aims at a highly instrumental objective, the title may invoke symbolism that obscures its real purpose. For example, the Lockheed Aircraft Corporation bailout bill had the powerful title of "The Emergency Loan Guarantee Act." The Emergency Loan Guarantee Act, Pub. L. No. 92-70, 85 Stat. 178 (codified as amended at 15 U.S.C. §§ 1841–52 (1982)). *See* H.R. REP. No. 379, 92d Cong., 1st Sess., 3 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1270, 1272 ("If the Committee bill is enacted into law, there is no doubt but what [sic] the Lockheed Aircraft Corporation would be the first applicant for a guaranteed loan under the legislation."). (I am indebted to Professor Robert Merges for this observation.)

[40] *See, e.g.*, THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC IN THE UNITED STATES (2d ed. 1979) (interest group liberalism); DAVID B. TRUMAN, THE GOVERNMENTAL PROCESS (1951) (pluralism); RALPH MILLIBAND, THE STATE IN CAPITALIST SOCIETY (1973); STATE AND CAPITAL: A MARXIST DEBATE (John Holloway & Sol Picciotto eds., 1979) (Marxism); JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962) (Public Choice theory).

[41] *See* Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 873 (1987) (reporting that in 1982, over 60% of respondents agreed that government was "pretty much run by a few big interests looking out for themselves"

political culture, these two contradictory strains hunt together uneasily. This Article does not attempt their reconciliation;[42] it focuses only upon the republican, substantive strand. Most of the time, a legislator does not explain her vote in detail, and we cannot drill a hole in her head to spy out her true motivations. Because of her position, however, the drafter uniquely must explain the reasons for her bill, and those explanations must conform to the republican norm. In so doing, drafters and committee staff generally become the principal bearers of the republican ideal.

### 2. The Drafter's Position and Justifications for Legislation

The republican ideal resonates with the imperatives of the drafter's role. Less than any other actor in a bill's long passage from inception to enactment need a drafter concern herself with issues of power. At the same time, because legislation addresses complex social problems,[43] she usually must do much more than merely put into legalese the policy dictates of the bill's sponsor. In many cases (probably most), legislators exercise their policy function by identifying a difficulty and throwing some resources at it—in the first instance, the legislative drafter.[44] She must draft before the legislators vote; in a real sense, she defines their options. In practice, "[t]he drafter's role is, generally speaking, to assist the legislature in preparing legislative solutions to social problems."[45] As Purdy concluded after an empirical study of drafting practice, a drafter "plays a role in formulating sub-

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rather than "for the benefit of all the people" (quoting Miller, *Is Confidence Rebounding?*, 6 PUBLIC OPINION 16, 16–17, (1983))). Many pluralists went beyond positive description. They argued that a well-regulated state structure contains devices analogous to the economists' ideal type of a competitive market, in which the institutions so perfectly balance off competing private interests that the resulting policies coincide not merely with private but with the public interest. That position has historical antecedents in Madison's perceptions of the political arena. *See* THE FEDERALIST No. 10 (James Madison).

[42] *See generally* Sunstein, *Public Interest*, *supra* note 12.

[43] *See infra* text accompanying note 81.

[44] Purdy, *supra* note 31, at 80.

> The typical view of drafter as mere "translator," zealously serving the legislator-client's wishes, moreover, assumes the legislator has a clear conception of the law he or she wants drafted. Often, reality differs. The legislator may have no more than a vague idea of a problem, or a simplistic complaint from a constituent. In such cases, the drafter often may end up defining, formulating, or even instilling such ideas in the legislator, then drafting them.

*Id.*

[45] *Id.* at 82.

stance, and shaping the implementation, if not the policy itself, of laws drafted."[46] Her professional expertise concerns the ideal element in legislation, not the power element.[47]

A drafter has no constituency. Nobody elected her to her post, and the norms defining it give her no legitimated power to decide. Unlike an elected official or even, in some views, a judge,[48] to justify a proposed bill she cannot appeal to her personal intuition, subjective values, or judgment. The central problem for a theory of legislation lies in finding ways for a drafter to justify the normative decisions that legislation embodies in "objective" terms.

This implies that the drafter ultimately must rely upon facts to justify her bill. What Professor Rubin said of legal scholars talking to legislators holds as well for drafters:

> [Their] recommendations must be supported by empirical data, not by doctrinal argument. Data provides the intellectual framework of legislative or administrative action, just as doctrine provides the framework of judicial action. That does not mean that legislators always reach their decisions on the basis of data, any more than judges reach their decisions on the basis of doctrine. What it does mean is that the discourse of legislative debate is heavily empirical as well as normative. To the extent that scholars can persuade policy-oriented decision-makers, they will do so only by

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[46] *Id.* at 97. This view contradicts the traditional one, which perceives the drafter's role as "clerical" and "technical"—"[w]e cannot furnish *ideas*." CHARLES MCCARTHY, THE WISCONSIN IDEA (1912), *reprinted in* ROBERT LUCE, LEGISLATIVE PROCEDURE: PARLIAMENTARY PRACTICES AND THE COURSE OF BUSINESS IN THE FRAMING OF STATUTES (1922), *quoted in* Purdy, *supra* note 31, at 95. To borrow a simile from Llewellyn, a drafter who denies involvement in policy decisions is like a Victorian virgin tubbing beneath her nightie. In this the drafter resembles lawyers generally, "for whom the role of 'technician' divorced from the merits of their clients' claims provides 'an expedient escape from the contexts of ethical complexity.'" *Id.* at 96 (quoting Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 701 (1981)). On the ethical responsibility of the drafter, see Purdy, *supra* note 31; *see also* DAVIES, *supra* note 4, at 138 ("Legislative authorship almost always means fronting for the real creators.").

[47] Politicians need advice on the ideal element; on the power element, they have their own expertise. If, in order to conform to power configurations, the client requires changes in the original draft, the drafter can always change the draft as required. A drafter will, of course, frequently insert particular provisions in a bill in order to meet objections of particular interest groups. A justification that acknowledges this does not violate the principle that drafters should draft in the public interest and write their justifications accordingly. *Cf.* THORNTON, *supra* note 31, at 113 (citing Thring's often-quoted aphorism, that bills are made to pass, as razors are made to sell). (Thring in 1869 was appointed Britain's first Parliamentary Counsel and invented the modern tradition of legislative drafting.)

[48] *See supra* note 18.

> presenting empirical arguments, connected to clearly stated normative positions.[49]

Legal scholarship always has prescriptive overtones. Most often, legal scholars address judges. They address "that part of the [judicial] decision-making process that is amenable to reasoned discourse."[50] In the legislative decision-making process, the drafter seems the most amenable to that sort of discourse.

The memorandum cannot serve its function if the drafter becomes merely an advocate for her bill. Advocacy necessarily treats truth as instrumental to the goal of persuasion.[51] The drafter's role, however, demands that she owe allegiance not to the particular legislator who initiated the drafting process, but to the legislative process itself.[52] That process requires that the drafter adhere to high standards of scholarship in research and drafting, or else she will fail in her primary duty. Thus scholarship wars with advocacy.[53] The drafter's institutional position coerces towards the truth, tending to make her memorandum a useful moment in the processes of practical reason. Like the scholar's speciality, the drafter's is "not practical judgment but structured argument, not general intuition but specialized knowledge, not ad hoc decision-making but systematic analysis."[54]

This Article focuses on the role of the drafter and her tasks in preparing an adequate memorandum. It focuses, in short, on the republican strain in legislating, and speaks in terms not of power but of substance. It argues that part of the explanation for the pervasive denial of republican norms lies in the inadequacy of most theories that purport to guide legislative justifications and therefore legislative decision-making. As a solution, it proposes a theory to serve as a checklist for a drafter in considering what she ought to include in her memorandum.

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[49] Rubin, *supra* note 3, at 1887 (citations omitted).

[50] Rubin, *supra* note 5, at 410–11.

[51] Anthony T. Kronman, *Foreword: Legal Scholarship and Moral Education*, 90 YALE L.J. 955, 961 (1981).

[52] Purdy, *supra* note 31, at 77–78 ("The drafter's primary duty is to the legislative process, and the legislature as a whole . . . . Where a legislator . . . seeks to have the drafter act in a way that is . . . substantially deceptive to the legislature . . . the drafter should take reasonable steps to protect the interests of the legislature and legislative process . . . ."). In Britain, Parliamentary Counsel (who drafts all legislation) has extraordinary power over the form of bills and thus, to a degree, over substance. *See* W. IVOR JENNINGS, PARLIAMENT 224 (2d ed. 1957).

[53] Kronman, *supra* note 51, at 967.

[54] Rubin, *supra* note 3, at 1879.

Although directed at substance, such a checklist would fail in its substantive purpose if it did not take account of power as well as substance elements. As discussed below, the checklist requires the drafter to *explain* the behavior that constitutes the social problem that the legislation must address.[55] Because frequently a strong explanation for unwanted behavior, and for the existing law that supports it, lies in class and interest-group power,[56] the drafter must take into account power elements both in explaining the unwanted behavior and in designing a solution.

Like all checklists, a checklist for writing a memorandum serves to direct the drafter's attention to matters deemed important, and away from unimportant ones. This also constitutes the principal function of theory.

### C. *Legislative Theory: Its Principal Criterion and Function*

#### 1. The Criterion of "Reason Informed by Experience"

An adequate justification (and therefore an adequate theory of legislation) has a principal necessary characteristic: it must have at its foundation "reason informed by experience," and therefore must possess the potential for self-correction. That characteristic, however, contradicts the imperatives of hierarchy.

What people believe constitutes an adequate justification differs from era to era. In ancient Greece, many believed that a decision had adequate grounding if it came from the babbling of a crazed old woman at the Oracle of Delphi. In more recent times, the fact that a Great Leader made a decision has validated it in the eyes of many people.

World-wide social experience, however, teaches that certain justifications lead to better decisions than others. In our time, in social affairs, decisions based on reason informed by experience, or "practical reason," have proven their power to create sound results more reliably than decisions made on any other basis. Very few would advocate returning to the babblings of the Oracle as a foundation for social decisions.

By a decision based on practical reason I mean one that rests upon propositions that experience warrants. Who decided that

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[55] *See infra* text accompanying notes 107 and 187.

[56] *See, e.g., infra* note 169 and accompanying text.

a hammer might take the marvelously different forms it does—the carpenter's claw hammer, the ball peen hammer, the lather's hammer, the cabinet maker's Warrington Pattern hammer, the furniture maker's magnetic tack hammer, and so on and on and on? Without experience, nobody ever would have dreamed that a hammer ought to take another shape. Always, the decision to redesign the hammer rested on reason reflecting upon experience. "We are not bemused by the fact that a hammer is an instrument devised in action for the purposes of action, and improved in action for purposes of action that themselves improve with the improved possibilities the hammer's improvement opens up."[57]

So it might become with our notions of what counts as an adequate grounding for a policy decision. "The evaluatory enterprise, like that of science, can have a humanly significant, ongoing, self-corrective career."[58] Mostly, however, it does not. To learn from experience not only about hammers but also about policy requires that policy find its basis not merely in power, but in reason reflecting upon experience. This denies social power structures.

Almost all decision-making institutions in our society have a hierarchical structure. We are born in hierarchically-organized hospitals, we receive our education in hierarchically-organized schools, we work in hierarchically-organized enterprises, and when we die we go to rest in hierarchically-organized cemeteries. The very conditions of property ownership clothe a few individuals, the owners, with power to determine ends, and the rest of us, at best the power to determine means. Despite our democratic pretensions, we extrapolate from daily life to the political order, and reaffirm in our social practices Ulpian's dictum that "[b]ecause it pleases the prince, it has the force of

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[57] Norton E. Long, *Foreword* to EUGENE J. MEEHAN, VALUE JUDGMENT AND SOCIAL SCIENCE at v, vii (1969); *cf.* HANS GEORG GADAMER, WAHRHEIT UND METHODE [TRUTH AND METHOD] 355 (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 1989). Gadamer suggests that an experienced person proves to be not someone who knows everything and knows better than others, but a person

> radically undogmatic; who, because of the many experiences he has had and the knowledge he has drawn from them, is particularly well equipped to have new experiences and to learn from them. The dialectic of experience has its proper fulfillment not in definitive knowledge but in the openness to experience that is made possible by experience itself.

*Id.*

[58] Long, *supra* note 57, at vii.

law."[59] The rejection of rationality in favor of power as the principal mode of policy-making reflects the interests of power and privilege.

Most legislative decision-making agendas respond to those interests. Those agendas rest upon a positivist epistemology and its correlate, an ends-means methodology.[60] Positivism tells us that we cannot use experience to discipline value choice. Ends-means methodology orders the drafter to seek ends prescribed by higher authority and insulates those ends from interrogation by research. Both assert that, in the end, policy cannot help but rest upon power rather than reason. Both resonate with hierarchy, in which superiors give orders to subordinates, and the subordinates can only determine the best way to carry them out.

Since they lack legitimate authority, however, drafters cannot justify their bills by *ipse dixit*, but only by persuasion in a rational mode. As its central criterion, an adequate theory for decision-making in a rational mode must generate particular decisions resting on reason informed by experience, and also provide devices for testing and improving the theory itself in the light of reason informed by experience.

Reason informed by experience commands that decisions and their groundings must have bases both in reason and empirical data. What constitutes an adequate justification in these terms? The answer begins with a consideration of theory's function.

### 2. The Normative Function of Theory

No general agreement exists upon the appropriate function of theory. In practice, whether admitted or not, all legal theory has, among others, a normative function: the theorists perceive theory as a guide to legal actors, whether in their judicial, legislative, or administrative roles. This Subsection discusses three perceptions of how theory guides law-making—metaphorically, critically, and heuristicly—and argues that the latter function is the most useful to the legislative drafter.

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[59] *Quoted in* Alexander Elder Anton, *Legislation and Its Limits*, 5 DALHOUSIE L.J. 233, 233 (1979).

[60] *See infra* text accompanying notes 92–97.

a. *The Metaphorical Function*

Some writers—law and economics theorists seem especially prone—justify policy proposals solely by appeal to a logical construct that they call their theory.[61] The formula that computes the acceleration of an object falling in an absolute vacuum, which never exists in reality, nevertheless predicts fairly accurately the speed of heavy objects falling in the atmosphere. In the same way, in policy-making by metaphor, the decision-maker's construct need bear no relationship to reality. Its test has a dual thrust: the theory's logical coherence and its capacity to predict accurately most of the time.[62] Policy-makers in this tradition examine an existing situation, decide that it resembles in some aspects their logical construct of a competitive market, and then, based on that construct, propose a legislative solution for the real-world situation. They take their construct of a free market as a metaphor for the existential situation—the real world behaves "as if" it were their construct—and then propose policies based not on the real-world position but on the metaphor.[63] Professor Makgetla[64] wrote that it is as if a swain said that his love was like a red, red rose, and then wooed her with dew and well-rotted fertilizer.[65]

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[61] *See, e.g.*, Elizabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978); Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59 (1987). *But see* Jane M. Cohen, *Posnerism, Pluralism, Pessimism*, 67 B.U. L. REV. 105 (1987); Tamar Frankel & Frances H. Miller, *The Inapplicability of Market Theory to Adoptions*, 67 B.U. L. REV. 99 (1987).

[62] Milton Friedman, *The Methodology of Positive Economics*, *in* ESSAYS IN POSITIVE ECONOMICS 3, 7 (1953); POSNER, *supra* note 5, at 13. *But see* Neva S. Makgetla & Robert B. Seidman, *The Applicability of Law and Economics for Policymaking in the Third World*, 23 J. ECON. ISSUES 35, 42–44 (1989); *cf.* Charles K. Wilber & Jon D. Wisman, *The Chicago School: Positivism or Ideal Type*, 9 J. ECON. ISSUES 665 (1975). Even the analogy to the free-falling object, beloved of writers in this strain, *see, e.g.*, POSNER, *supra* note 5, at 13, does not hold. A ballistic missile in whose design the engineer did not take atmospheric forces into account would miss the target, and the engineer probably would soon be sending out job resumes.

[63] DONALD N. MCCLOSKEY, THE RHETORIC OF ECONOMICS (1985).

[64] Neva S. Makgetla & Robert B. Seidman, *A Note on Gary Becker's Use of Metaphor*, 26 J. ECON. ISSUES (forthcoming 1992); *cf.* PETER WINCH, THE IDEA OF A SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY 135–36 (1958) ("[A] 'sociological law' may be helpful in calling one's attention to features of historical situations which one might otherwise have overlooked and in suggesting useful analogies," but "no historical situation can be understood simply by 'applying' such laws . . . . Indeed, it is only insofar as one has an *independent* grasp of situations like this that one is able to understand what the law amounts to at all.").

[65] *Cf.* BENTHAM, *supra* note 25, at 69 ("[M]etaphors are not reasons."); Kronman, *supra* note 27, at 1057. Kronman refers to Edmund Burke's criticisms of the "'coxcombs of philosophy'" who,

> viewing every political question "in all the nakedness and solitude of metaphysical abstraction," presume to possess, in their powers of rational reflection,

The problem with using theory as metaphor in this way is that a justification for legislation must find its principal foundation not in the theory or intuitions of the drafter but in the facts of the specific social problem addressed.[66] First, an adequate justification must persuade the reader that its propositions make sense. Except to those who already have bought into the same logical construct or who possess the same intuition, a drafter cannot legitimate legislation simply because a particular construct commands her allegiance, or because it echoes her personal intuitions of justice, but rather only by appeal to the facts of the case at hand.

Second, the uniqueness of human experience makes it dangerous to rely solely on theory to justify a proposal for intervention. In the physical sciences, the subject matter of theory usually behaves the same way in similar situations. The formula $E=mc^2$ holds in every time and place. Atoms do not have individual personalities. Human beings, however, do. Every human situation has its own unique qualities.[67] Nobody sees the moon from the same angle that I do.[68] Without empirical research into the specific existential situation at hand, no drafter can assure her client that her proposed solution will work.

Finally, the human mind can dream up explanations and solutions that seem logical but are practically useless.[69] Recall, in this vein, the imaginary solutions for some quadratic equations, involving the square root of negative one, or any of the long-discarded theories that once ruled the scientific enterprise, like the phlogiston and caloric theories. Without empirical warrant in the specific situation, how can a drafter assert that her solution is not imaginary?

That theory cannot supplant a search for facts does not mean, of course, that with facts a drafter can "prove" rigorously the desirability of legislation.[70] It does say that to justify legislation,

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> everything they need to answer them. That is a foolish presumption and one, Burke insists, that is certain in the long run to diminish the happiness of the human beings who live in any regime that adopts it . . . .

*Id.*

[66] Much of this Article consists of an attempt to show how this unfashionable proposition does not create an impossibility.

[67] Gunnar Myrdal, *The Social Sciences and Their Impact on Society*, *in* SOCIAL THEORY AND SOCIAL INVENTION 145, 148 (Herman D. Stein ed., 1968).

[68] *Cf.* WINCH, *supra* note 64, at 37.

[69] *Cf.* NORWOOD R. HANSON, OBSERVATION AND EXPLANATION: A GUIDE TO PHILOSOPHY OF SCIENCE 12–15 (1971).

[70] *Cf.* Majone, *supra* note 15, at 22.

drafters so far as possible must rely upon evidence of what goes on in the world, not what goes on in an ideal type.

### b. *The Critical Function*

The critical mode derives theory from an approach that is "pragmatic rather than descriptive or normative. It is designed to bring to light the values implicit in our own social practices and then to advance those values incrementally, by a process of self-reflection."[71] Thus did Max Weber design his ideal type, like Rubin's, as an intellectual construct based on the theorist's understanding of reality, distorting reality to emphasize what the theorist counts as important.[72] By definition, empirical data cannot warrant or diswarrant an ideal type; as Professor Rubin says, his theory does not claim to be "descriptive." Its function becomes to deepen conversation about the subject matter. It can do that precisely because it caricatures reality; that is, it exaggerates the aspects of reality the theorist deems important.

The critical function of theory appeals particularly to academics, who have the time and opportunity to contemplate social practice from the outside, as it were. Practitioners need more functional versions of theory that they can use to guide their

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[71] Rubin, *supra* note 5, at 370; *cf.* JURGEN HABERMAS, KNOWLEDGE AND HUMAN INTERESTS 17–23 (Jeremy J. Shapiro trans., Beacon Press 1971); Gareth Morgan, *Research as Engagement: A Personal View*, *in* BEYOND METHOD: STRATEGIES FOR SOCIAL RESEARCH 11, 18 (Gareth Morgan ed., 1983). Morgan asserts that

> the practice of social research can proceed most effectively if we replace the view that science involves a quest for certain knowledge that can be evaluated in an unambiguous way, with the view that it involves modes of human engagement on which we can and should reflect . . . . [S]cience is not simply about the acquisition of knowledge but is a means of expressing ourselves—and of forming, transforming and generally coping with our world . . . .

*Id.*

[72] *See* MAX WEBER, THE METHODOLOGY OF THE SOCIAL SCIENCES 89–94 (Edward A. Shils & Henry A. Finch eds. and trans., Free Press 1949); *cf.* TALCOTT PARSONS, THE STRUCTURE OF SOCIAL ACTION: A STUDY OF SOCIAL THEORY WITH SPECIAL REFERENCE TO A GROUP OF RECENT EUROPEAN WRITERS 603 (Free Press 1986) (1937) (stating that the ideal type "involves a one-sided exaggeration (*Steigerung*) of certain aspects of concrete reality, but is not to be found in it").

In order to make his point, Professor Rubin subsumes in his model only highly intransitive legislation (that is, legislation granting the administrative agency great power and discretion to create laws). Rubin, *supra* note 3. That view of legislation distorts reality; in fact, a great deal of legislation, especially on the state level, details the desired behavior by the ultimate addressee. Professor Rubin's emphasis on the intransitiveness of legislation, while distorting reality, helps our understanding of the problems associated with that sort of legislation, and the dangers of using the same rules of judicial control over legislation for that as for highly transitive legislation. On transitive and intransitive legislation, see *infra* note 205.

everyday operations. Without denigrating the critical function of theory, here I propose another, more directly utilitarian function: theory as a source of heuristic propositions to guide policy-oriented research into specific social problems.

c. *The Heuristic Function*

As argued above, a proposal for new legislation must find its justification in the specific existential social problem at issue. The human condition requires that we must "learn from the facts."[73]

However, literally construed, this translation of Deng Xiaoping's aphorism states an impossibility. First, if no human situation constitutes a homologue for another, in what sense can we "learn" from those facts? One learns something only to the extent that it makes one better able to deal with a new, emergent situation. But if the earlier situation does not resemble the later one, how can a theory based on the earlier situation help determine an appropriate policy to resolve the later social problem?

Second, if by his aphorism Deng means that we can merely look at the current "facts" and deduce from them what we need to learn, he errs. Because reality always vastly overwhelms our capacity to see, the facts we choose to take into account always constitute a select portion of reality.[74] Research resources always come in short supply. Whatever data a researcher collects, they will fall far short of the total experience. The research ditty-bag cannot resemble that of an idiot, full of feathers, brightly-colored glass, and curious pebbles.[75] And even if resources sufficed, nobody could make sense out of a bag of randomly collected data. Which facts we choose to see depends upon an interaction between what lies "out there" and the blinders we use to focus our attention. We do not merely experience

[73] According to one translation of Deng Xiaoping's phrase.

[74] In this sense, all history constitutes fiction. Just as an author must select the details to include in a novel, so must an historian choose the facts to include in a history. So too must a researcher examining legislation choose the facts relevant to her research and therefore to be included in her memorandum.

[75] ROBERT S. LYND, KNOWLEDGE FOR WHAT? THE PLACE OF SOCIAL SCIENCE IN AMERICAN CULTURE 16 (1964); *cf.* WINCH, *supra* note 64, at 15; Matilda White Riley, *Sources and Types of Sociological Data*, *in* ROBERT E. LEE FARIS, HANDBOOK OF MODERN SOCIOLOGY 976, 980–81 (1964) (claiming that a researcher's "way of selecting certain facts and his search for order among them is guided by some prior notions or theories about the nature of the social phenomenon under study").

reality; in a real sense we *construct* it out of the boundless reaches of the existential world.

Without bounded rationality,[76] the research enterprise becomes impossible. We need some systematic way of deciding *in advance* which part of the domain will likely prove fertile, and which barren. We need not construct our reality blindly. Research requires criteria of relevance, and theory provides one way of deriving those criteria.

Whence does theory derive those criteria of relevance? Theorists generate their propositions by an interplay between logic and experience, in which the theorist formulates logically linked propositions in light of experience drawn from particular past situations.[77] Out of her general theory, she teases "middle-level" propositions that according to her theory explain the problem. These middle-level propositions become hypotheses that she will put to empirical test using data from that problem. To the extent that the theory generates middle-level propositions that the empirical situation does not falsify, the research tends to warrant the theory itself. Thus does theory arise out of reason informed by experience.

In contrast to the metaphorical and critical notions of the uses of theory, in the perspective we discuss here those linked propositions become guidelines for the investigation of the new, unique situation at hand. Those guidelines can never say more than that in the past *this* and not *that* part of the field proved worthy of the plow, and therefore that in the new situation it will likely economize research resources to start in *this* part of the field. Instead of treating theory as metaphor or source of conversation, theory serves an *heuristic* function; that is, it is a source of propositions telling the researcher where to look in

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[76] *See* JAMES G. MARCH & HERBERT A. SIMON (with the collaboration of HAROLD GUETZKOW), ORGANIZATIONS 169–71 (1958); Herbert A. Simon, *Human Nature in Politics*, 79 AM. POL. SCI. REV. 293, 303 (1985).

[77] We are always already endowed with categories and ideas given us by our culture. And we can never gather data or consult experience in an atheoretical way. Consequently, the process of constructing, criticizing, and revising theories inevitably involves a back-and-forth motion in which experience-based theory is adjusted in light of theory-laden experience.

Smith, *supra* note 18, at 431–32. The statement in the text holds even for ideal types. The great ideal types—the economist's model of the perfectly competitive market, Max Weber's construct of bureaucracy, *see infra* note 134, Hans Kelsen's model of a legal system, *see* HANS KELSEN, GENERAL THEORY OF LAW AND THE STATE (1945)—all come from scholars with deep knowledge of how those institutions operated in the real world. They constructed their ideal types with that reality always in view.

attacking a specific social problem. Thus practical reason—reason informed by experience—guides the search for policy.

For example, suppose a policy-maker adhering to a market model of the economy investigates the social problems concerning the adoption of babies. Using theory in the metaphorical mode, the policy-maker would identify the problem in the real world (a shortage of white, adoptable babies), consult the model (the ideal type of a perfectly competitive market), determine what solution would solve a similar problem in the logical world of the model (remove governmental constraints on the economic actors), and then recommend a solution to solve the real-world difficulty based on what the model advises (abolish laws prohibiting the sale of babies for adoption).[78] Using theory in the critical mode, the policy-maker would use the model to construct an ideal type of the adoption system, exaggerating reality in ways that seemed fruitful for further conversation.[79] Using theory in the heuristic mode, she would consult the model to tease out of it some hypotheses about what caused the difficulties she identified, and then investigate the real-world situation to see if those hypotheses hold.

In this view, theory does not constitute a dogma that dicates results, as it does in the metaphorical mode. It also does not constitute an intellectual toy for academics to play with in journals and at conferences. Instead, it constitutes a guide to address real-world problems. To be sure, in writing a memorandum in support of legislation, a drafter must decide what aspects of reality to include. Explicitly or implicitly, the drafter's theory underpins the memorandum, providing criteria by which she determines what the memorandum includes, and what it omits.

The criteria that a theory supplies, then, must depend upon the sort of problem the theory generally addresses. Theory arises to solve perceived, existential problems,[80] and a theory of legislation that will help a legislative drafter must address the sorts of problems that she faces.

Nobody writes legislation merely for her own amusement. In its instrumental function,[81] legislation arises because its sponsor

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[78] *See, e.g.*, Landes & Posner, *supra* note 61.

[79] *See, e.g.*, Cohen, *supra* note 61.

[80] Peter Dorner, *Needed Redirections in Economic Analysis for Agricultural Development Policy*, *in* LAND REFORM IN LATIN AMERICA 5, 8 (Peter Dorner ed., 1971).

[81] For the proposition that all legislation incorporates some symbolic functions, see *supra* note 38. Focusing on legislation's instrumental function does not deny that it frequently has symbolic ones, but "[b]y desanctifying legal actions, we can become

perceives a social problem. All social problems consist of some repetitive pattern of social behaviors that somebody defines as undesirable.[82] Superficially, the social problem may appear as an abstraction—an oversupply of hospital beds, environmental pollution, or "hot" money. Nevertheless, all result from human, social behaviors. Hospital managers expand hospital facilities beyond the demand;[83] industrial managers release toxic wastes;[84] individuals launder money.[85]

To solve a social problem therefore requires that these behaviors change. Ostensibly, all legislation aims at changing them. In that sense, all polities today legitimate legislation on instrumental grounds.[86] As we have

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aware of their range of uses and focus on the underlying norms that these actions are intended to implement . . . . [R]ecognizing them as purely instrumental directives provides a way to take control of the legislative process and use it for the purposes we choose." Rubin, *supra* note 5, at 379 (describing the views of J. Habermas).

[82] *Cf.* HARRY MORTON JOHNSON, SOCIOLOGY: A SYSTEMATIC INTRODUCTION 639 (1960). Changes in governmental policy necessarily require changes in repetitive patterns of social behaviors. Since a repetitive pattern of social behaviors constitutes an *institution*, "policy reforms require changes in institutions." WHITE, *supra* note 28, at 7. *See* Abel, *supra* note 6, at 805–06.

Most legislation performs one of two functions: the institution-changing function, and the salvage function. The institution-changing function looks to prevent social messes from arising; the salvage function looks to repair a social mess after it has occurred. We use criminal punishment supposedly to deter criminal behavior, hopefully to prevent a social mess from arising. We conceive that alimony serves not to deter husbands from improper behavior, but to salvage the social mess that arises when a family dissolves. Both functions address social problems; both require changed behavior (if only by requiring some individuals to pay money to others), so that the theory advanced in the text applies to both functions.

[83] *Cf.* MASS. GEN. LAWS ANN. ch. 111, § 25B (West 1983) (requiring that before constructing or substantially altering a health care facility, department of health must determine that need exists).

[84] *Cf.* National Environmental Policy Act of 1969, 42 U.S.C. § 4331(a) (1988) (in which Congress recognized "the profound impact of man's activity on the interrelations of all components of the natural environment").

[85] *See* Sarah N. Welling, *Smurfs, Money-Laundering and the Federal Criminal Law: The Crime of Structuring Transactions*, 41 FLA. L. REV. 287 (1989).

[86] For the history of this notion, see Eskridge & Frickey, *supra* note 2. In the original "legal process" paradigm, *see* HARRY M. HART & ALBERT SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF THE LAW (Tentative Edition 1958), the authors argued that "[e]very statute must be conclusively presumed to be a purposive act. The idea of a statute without an intelligible purpose is foreign to the law and inadmissible." *Id.* at 1156. By a "purposive" act, Hart and Sacks meant "a continuous striving to solve the basic problems of social living." *Id.* at 166.

Even its detractors agree that the instrumentalist perception of the law constitutes the modern "legal ideology." John Griffiths, *Is Law Important?* 54 N.Y.U. L. REV. 339, 346 (1979). A variety of authors denigrated the Hart and Sacks presumption, and then went beyond it to deny that any law included an "ideal element." Griffiths argued that the instrumentalist conception reflects a fundamental misconception: that law comes from outside the society to change the society, whereas in fact it constitutes an artifact of the very society that it purports to change—really no more than a sophisticated version of the sociological categories. *See infra* text accompanying note 144; *see also*

seen,[87] willy-nilly, the drafter usually must make many, if not most, of the substantive decisions about the bill and justify those decisions. To help a drafter in making and justifying those decisions, an adequate substantive theory of legislation must teach her where to look to find useful data. Since such a prescription must rest upon knowledge of how law influences behavior, a theory of legislation must provide a guide for investigating social behavior in its relationship to law (in this the theory resonates with sociology of law).[88] The three elements that comprise an adequate theory contribute to providing that guide.

## II. The Elements of Theory

Three aspects combine to perform theory's heuristic function: methodology, perspectives, and categories.[89] For our purposes no theory suffices without all three elements, but pride of place belongs to methodology.

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Robert L. Kidder, Connecting Laws and Society: An Introduction to Research and Theory, 112–46 (1983) (describing the "vaccine" theory of the impact of law). Of course legislation constitutes an artifact of society; nevertheless, notwithstanding Griffiths, it plainly sometimes changes society. Who paid income tax before an income tax law? Obviously, people pay income tax because the political system decided to levy income tax. They also pay because the law-making system decided to pass the income tax statutes. The enactment of the necessary legislation, however, constituted a key moment in that decision-making process. To say with Griffiths and Kidder that the key decision was "only" or "merely" political understates the importance of its specifically legislative form and the consequent task thrust upon the authors of the legislation and its accompanying justification. Other writers became so bemused by considering the power elements in legislation that they denied any ideal elements—a position as extreme in the one direction as Hart's and Sacks's position in the other. *See, e.g.*, the Public Choice literature discussed in Farber & Frickey, *supra* note 18.

[87] *See supra* text accompanying notes 43–56.

[88] Here the issue for a drafter differs from that defined by some scholars. Kidder, for example, focuses on the "impact" of "the law" on behavior, seeking to isolate the independent effect of the rule of law from the manifold factors that affect behavior. He rightly says that the researcher can almost never disentangle those effects from the effects of self-interest, ideology, the informative function of the rule, and so forth. Kidder, *supra* note 86, at 119. For the drafter, the question appears much broader in scope: taking account not only of "the law" but also of the other factors affecting behavior, how does one explain behavior in the face of a rule? For the implications for the memorandum of law flowing from the fact that the difficulty addressed by legislation always consists of a social problem, see *infra* text accompanying note 185.

[89] *See generally* Robert B. Seidman, The State, Law and Development 49–55, 69–78 (1978) (describing elements of a theory of law and development).

### A. *Methodology*

In the context of drafting legislation, "methodology" can be understood on three levels. On the most elementary level, the methodology of a theory of legislation consists of an outline for a memorandum justifying proposed legislation, telling the author what to include in and exclude from her justification for her bill. Because of the nexus between justifications and decision-making,[90] that outline also constitutes an agenda for decision-making. Finally, an agenda for decision-making must rest upon an adequate analysis of what it means to know something—that is, upon an adequate epistemology.

In principle, we can define three different agendas for justifying legislation: ends-means, incrementalism, and problem-solving. The choice made among them depends upon the goals of the researcher:

> Just as we select a tennis racquet rather than a golf club to play tennis because we have a prior conception as to what the game of tennis involves, so too in relation to the process of social research; we select or favor different kinds of methodology because we have implicit or explicit conceptions of what we are trying to do in our research.[91]

Here we assess these three types of methodology from the perspective of a drafter addressing a social problem with a view to formulating, and justifying publicly, a legislative solution. The problem-solving method will be shown to be best suited to this task.

#### 1. Ends-means

The ends-means methodology effectively places a critical aspect of decision-making—the determination of ends—outside the purview of empirical research. It argues that "in order to decide rationally, the policy-maker must specify his objectives,[92]

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[90] *See supra* text accompanying note 12.

[91] Morgan, *supra* note 71, at 19.

[92] John Dewey distinguishes between "generalized ends" and "ends-in-view." A generalized end constitutes the flip side of a discontent: that I want new housing only shows discontent with my present housing. An end-in-view constitutes the proposal that emerges from a careful consideration of the constraints and resources available—the plan for the new house. The ends-means methodology always demands an end-in-view as the "end" specified in the methodology. Otherwise it becomes impossible to measure success or failure in the enterprise. DEWEY, *supra* note 17, at 371–73.

lay out the alternatives by which the objectives may be accomplished, evaluate the consequences of each alternative, and choose the action that maximizes net benefits."[93] Ends-means methodology rests upon positivist notions of the discontinuity between "values" and "facts." It *posits* the desirability of a defined state of affairs. Since this involves "values," research cannot test the choice of ends.[94] Research can help only by revealing efficient means to accomplish the desired ends. This methodology reflects the Weberian view that a social scientist can help a policy-maker only by showing him the consequences of alternative possible courses of action; which course the decision-maker adopts depends upon the sort of person he is.[95] By placing the ends of legislation beyond the scope of research, ends-means methodology makes it impossible for a drafter to justify her choice of ends.[96] This paradigm resonates with hierarchy and power, not justification through reason informed by experience.

Since discovering an efficient means is the only problem ends-means methodology poses to the drafter, she usually need neither seek nor support any explanation for the social problem at hand. When using the ends-means methodology, the decision-maker leaps from the difficulty whose resolution constitutes the end, directly to alternative possible solutions, without an intervening search for explanations. The core of the academic en-

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[93] MAJONE, *supra* note 15, at 12 (using the term "decisionism" to denote what "ends-means" here denotes); *see also* CHARLES E. LINDBLOM, THE POLICY MAKING PROCESS 13 (1968). As Majone points out, ends-means assimilates economic and political decision-making. That lends itself readily to rational-choice theory. *See, e.g.*, BUCHANAN & TULLOCK, *supra* note 40; *cf.* EDITH STOKEY & RICHARD ZECKHAUSER, A PRIMER FOR POLICY ANALYSIS 320–29 (1978).

[94] *Cf.* WINCH, *supra* note 64, at 54 (Hume asserted that "reason is, and ought to be only the slave of the passions." Winch adds, "[o]n this view the ends of human conduct are set by the natural constitution of men's emotions; those ends being given, the office of reason is mainly to determine the appropriate means of achieving them."); LONG, *supra* note 57, at v. Long offers the extreme positivist view that puts social scientists

> in the unhappy position of seeming to believe that reason and evidence have persuasive roles in scientific inquiry but are somehow either absent, or radically different in their efficacy in evaluation. Since it is through evaluation that we determine what is important, it comes perilously close to saying of the important that we have nothing important to say.

*Id.*

[95] WEBER, *supra* note 72, at 53–55.

[96] *Cf.* MAJONE, *supra* note 15, at 24 ("In the decisionist view, rational policy analysis can begin only after the relevant values have been authoritatively determined. In fact, these values are neither given nor constant, but are themselves a function of the policy-making process that they are supposed to guide.").

terprise, however, lies in explaining social phenomena[97]—in the sociology of law, explaining how the law relates to social behaviors and institutions. This important explanatory step becomes unnecessary for the drafter locked into an ends-means methodology. Thus, ends-means as a methodology for policy-making divorces "academic" from "policy" research,[98] and deprives the drafter of the benefits of the former.

Legislative aids who draft bills, however, have no hierarchical superiority. They must justify in accordance with a democratic tradition that endows no one in the legislative system with unchallengeable authority. Ultimately, an ends-means methodology justifies legislation by relying on the unquestioned hierarchical authority of the person who declares legislative goals. Thus this methodology can never effectively serve the drafter.

### 2. Incrementalism[99]

In practice most real-world decision-makers adopt the incrementalist methodology.[100] Incrementalism denies the possibility of doing empirical research on policy issues. It rests on the same philosophical position as ends-means, but holds that mere humans can never accomplish the ends-means project.[101] This inability is attributed to three factors: the choice of ends has no basis beyond individual values; we can never adequately research the possible alternative means;[102] and smaller interventions permit feedback and therefore course-adjustment in ways that large-scale programs do not. To avoid the risks of failed legislative intervention, incrementalism maintains that optimal

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[97] *See* David Braybrooke, *Introduction* to PHILOSOPHICAL PROBLEMS OF THE SOCIAL SCIENCES 2 (David Braybrooke ed., 1965).

[98] *See* James S. Coleman, *Introduction* to PUBLIC POLICY EVALUATION 19 (Keneth S. Dolbeare ed., 1975). Many decision-makers who purport to follow an ends-means methodology in fact transform it into a problem-solving methodology by denoting as their "end" a "generalized end." *See supra* note 92. To determine the "means," they must of course first address the question of explanations—as the problem-solving methodology teaches. *See infra* text at note 107.

[99] *See generally* DAVID BRAYBROOKE & CHARLES E. LINDBLOM, A STRATEGY OF DECISION: PUBLIC POLICY AS A SOCIAL PROCESS (1970); LINDBLOM, *supra* note 93; MARCH & SIMON, *supra* note 76, at 136–71; KARL POPPER, THE OPEN SOCIETY AND ITS ENEMIES 156 (1950); Charles Frankel, *The Relation of Theory to Practice: Some Standard Views*, *in* SOCIAL THEORY AND SOCIAL INVENTION 15 (Herman Stein ed., 1968) (describing incrementalism as "piecemeal social engineering").

[100] LINDBLOM, *supra* note 93, at 13–20.

[101] *Id.* at 24–27.

[102] *See* KARL POPPER, THE POVERTY OF HISTORICISM 67 (2d ed. 1960) ("The piecemeal [social] engineer knows, like Socrates, how little he knows.").

legislative reforms attempt the smallest possible improvement in the present situation, rather than the largest. Incrementalism is therefore another name for muddling through. It constitutes a useful methodology in cases where the drafter cannot acquire sufficient data upon which to base a decision, but where the situation nevertheless merits intervention.[103]

Because the incrementalist methodology denies that we can truly understand social problems, it denies the efficacy of research in the drafting enterprise. Without research of the problem, and the data research generates, a drafter cannot effectively justify legislation that aims to effect significant change. Since by definition it can never result in a radical or revolutionary solution to a social problem, incrementalism, like ends-means, sits comfortably with established authority.[104]

### 3. Problem-solving

Problem-solving rests upon a variety of philosophical positions that contradict sharply those implicit in both ends-means and incrementalism: that "facts" and "values" (and therefore means and ends) form not discontinuous concepts, but continuous ones, so deeply intermingled that each affects the other;[105] that human beings can apprehend the real world sufficiently to bring their concepts and ideas in progressively closer alignment with reality;[106] and that unless solutions aim at the causes of social problems, they will likely do no more than bandage the wound.

Problem-solving has four steps. It begins with a statement of the social problem—the difficulty that the legislation aims to

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[103] Lindblom suggests seven useful "dodges" for dealing with the uncertainties and complexities of the decision-maker's real world: "satisfying," "the next chance," "feedback," "remediality," "seriality," "bottlenecks," and "incrementalism." LINDBLOM, *supra* note 93, at 24–26; *see also* MARCH & SIMON, *supra* note 76, *passim*.

[104] *See* Kronman, *supra* note 27, at 1056 (noting that, as Edmund Burke teaches us, "even the most needed reforms ought to be carried out . . . in a spirit of 'infinite caution' that proceeds only with the greatest hesitation 'to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society'" (quoting EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (C. O'Brien rev. ed. 1969) (1790))).

[105] DEWEY, *supra* note 17, at 340, 371–72; JOHN DEWEY, THEORY OF VALUATION 40–50 (1939).

[106] RICHARD BERNSTEIN, PRAXIS AND ACTION: CONTEMPORARY PHILOSOPHIES OF HUMAN ACTIVITY 73–75 (1972).

help resolve.[107] Second, the researcher must propose alternative possible explanations for the difficulty, and then choose among them on the basis of data. Third, the researcher must propose a variety of possible legislative solutions for the difficulty,[108] each addressed to the cause (or causes) that survive the effort to falsify the proposed explanations. This step of the process also requires that the researcher choose among these potential solutions on the basis of a cost-benefit analysis that includes frequently hard-to-quantify social consequences. Finally, the agenda requires the implementation and monitoring of the proposed solutions. Since no legislation ever works completely as anticipated, the fourth step always discloses a new social problem, and the process begins all over again.

Better than either ends-means or incrementalism, problem-solving meets the requirements of a drafter for a decision-making agenda and for justifying decisions. It calls for empirical research at every step of the process: to determine whether the difficulty at hand constitutes a true or imagined social problem; to choose among potential explanations; to determine the most socially efficient solution; and to study the actual consequences of implementation. The first two steps—issue-identification and explanations—constitute the core of the academic enterprise; problem-solving makes academic research available and useful to the drafter.[109] Because it calls into question *every* aspect of the enterprise—issues, explanations, solutions, and implementation—the problem-solving methodology requires a democratic rather than a hierarchical decision-making structure.[110] Finally, it has no preconceived bias against radical solutions, although in practice problem-solving's emphasis on the costs and benefits of solutions frequently finds unjustifiable the cost of radical changes aimed at solving relatively minor social problems.

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[107] In some versions this discontent becomes a "generalized end." *See supra* note 92. The statement of a social problem always involves a discussion of who benefits and who loses from the problem's existence.

[108] These constitute ends-in-view. *See supra* note 92. The "proposal for solution"—here a mid-point in the investigation—constitutes the beginning of the ends-means research.

[109] A principal difference between academic research and policy research lies in the time constraints usually imposed on policy research. Academics have the luxury of delaying publication until they have satisfied themselves with the amount of research completed; policy research always falls under the guns of time. *See* Coleman, *supra* note 98.

[110] *See* AID AND DEVELOPMENT IN SOUTHERN AFRICA: EVALUATING A PARTICIPATORY LEARNING PROCESS (Denny Kalyalya et al. eds., 1988).

Problem-solving finds its ultimate warrant in data. That it makes no sharp distinction between facts and values, however, does not imply that it avoids the questions of value choice.

### B. *Perspectives and Grand Theory: The Intellectual Control of Value Choice in the Public Interest*[111]

The research that leads to legislation always culminates in a normative proposition: The law ought to become thus-and-so. Propositions of that sort plainly involve what positivists call "value choices." Yet as we have seen, the drafter, par excellence a technician and not a politically responsible official, cannot justify her proposals by the claim that her *personal* values compelled her choices. Politicians frequently try to do that, sometimes by claiming popular support (recall President Johnson's habit of justifying the Vietnam War by pulling out the most recent public opinion poll showing a favorable majority), sometimes by asserting that a proposal is "fair" or "just," or sometimes by including in the preamble of the legislation a statement of the values it seeks to advance. As we have seen,[112] however, a drafter must justify her bill in a way that compels assent from those who have no reason to trust her personal intuitions of "justice" or "fairness."[113] In a society whose public ethic glorifies rationality, in the absence of value consensus, she can only compel such assent by justifying her choices in rational terms. The theory that guides her justification must, therefore, provide for intellectual control over value choice.[114] To provide a useful basis for justifying legislation, a theory bottomed on reason informed by experience must be able to respond to two questions: First, is it possible within this theory to achieve intellectual control over the domain assumptions that control choice? Second, can one convincingly falsify *any* hypotheses in a world

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[111] *See generally* Robert B. Seidman, *To What Extent Can We Use Experience to Decide What Is Just? A Case Study from Zimbabwe*, 29 AM. J. JURIS. 1 (1984).

[112] *See supra* text accompanying note 48.

[113] *Cf.* SESONSKE, *supra* note 36, at 18 ("[N]o statement is admitted as genuinely ethical unless its felt authority is justifiable, unless the demand made is shown or believed to be a reasonable demand and not merely an expression of personal whim or caprice.").

[114] *Cf.* GADAMER, *supra* note 57, at 277 (proposing that the fundamental epistemological question becomes: "What is the ground of the legitimacy of prejudices? What distinguishes legitimate prejudices from the countless others which it is the undeniable task of critical reason to overcome?").

in which we seem to see only the data that our world-view permits?

### 1. Intellectual Control over Domain Assumptions

How does value choice work itself through the several decision-making methodologies? In ends-means, the researcher must first consider how she values the ends she desires to achieve; she must then rank those and all other values that the proposed solutions are likely to affect[115]—an all but impossible task. Incrementalism throws up its hands at the problem; one reason for preferring the incremental solution consists of dismay at solving the value choice issue.[116] By contrast, the problem-solving methodology does not require investigation and hierarchical ordering of the researcher's tastes or sentiments, but narrower, more manageable choices.

At *every* stage in the problem-solving methodology, the researcher must make discretionary choices.[117] She must decide how to state the difficulty that occasions the research; she must decide what range of alternative explanations to put to empirical test, how to phrase those explanations, and what counts as falsification; she must decide what range of alternative solutions to subject to a cost-benefit analysis, what counts as a cost or a benefit, and what value to assign to it; she must decide what counts as adequate implementation. The question of value choice reduces itself to these discretionary choices, for it is on their outcomes that the ultimate proposal for new legislation depends. How can a drafter impose intellectual control over these discretionary choices?

Drafters can make (and therefore can justify) these choices in different ways. Most frequently, the drafter chooses on the basis of her domain assumptions[118]—that is, the (usually unstated and

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[115] *See, e.g.*, STOKEY & ZECKHAUSER, *supra* note 93, at 116.

[116] LINDBLOM, *supra* note 93, at 15–18.

[117] *See* Rubin, *supra* note 3, at 1840 ("The problems people perceive, the categories they establish, the hypotheses they generate, the methodologies they employ, the arguments they use, and the criteria of validity they accept are all specific choices, made in the midst of history, as part of ongoing intellectual traditions."). Sometimes people imagine that only when selecting the problem to examine does value choice enter the problem-solving methodology. In fact, it enters at every stage of the methodology—as it does in ends-means and in creeping incrementalism. *See* DEWEY, *supra* note 17, at 367–74.

[118] ALVIN W. GOULDNER, THE COMING CRISIS OF WESTERN SOCIOLOGY 31, 49–51 (1970).

unexamined) propositions that we all hold that explain the world and assert our preferences.[119] To justify on the basis of her personal domain assumptions, the drafter can only declare them at the outset[120]—in effect, to state that "that is the sort of person I am."

Alternately, a drafter can attempt to put domain assumptions into some sort of coherent order. In doing so, she will likely end up with a utopian ideal of the state of affairs she desires—a "free market," or "democracy," or "socialism." She will then make the discretionary choices required by the problem-solving methodology in terms of that "ideal type."[121] This, too, depends upon her taste in utopias.

Finally, a drafter can bottom her discretionary choices upon her broader explanations for the world—her "Grand Theory." Adam Smith did not write a mere tract in favor of capitalism. He wrote a careful explanation of mercantilism and the wealth of nations. Karl Marx did not spend twenty years in the British Museum writing a tract in favor of socialism; indeed, it is said that in the four volumes of his major work, *Capital*, that word does not appear. Rather, he wrote an explanation of the nineteenth-century British political economy.

Granted, a follower of Adam Smith will likely make much the same sorts of discretionary choices as someone who advocates the utopian ideal of a market economy, and a Marxist will likely make the same ones as a utopian socialist.[122] But utopian models differ from explanations in one critical respect. In principle, data cannot falsify a utopian model, whereas data *can* falsify a proposed explanation. By justifying the choices she makes in terms of Grand Theory, a drafter opens the possibility of providing empirical warrant for her choices.

Different Grand Theories, however, identify different difficulties that demand explanation. Neo-classical economics, for example, argues that the principal difficulty confronting society consists of inefficiency (meaning the lack of fit between the use

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[119] *See infra* text accompanying note 171.

[120] *See* Myrdal, *supra* note 67, at 151.

[121] *See, e.g.*, STOKEY & ZECKHAUSER, *supra* note 93, at 293–94 (describing a market-oriented economy in which the explanation for all difficulties lies in market failures, such as information costs, transaction costs, lack of relevant markets, presence of market power, externalities, and commodities that are public goods).

[122] Indeed, some—probably most—Grand Theory is shaped in the first instance by the theorist's utopian ideals, rather than the reverse; certainly a correlation exists between the two. The *author's motivation* for Grand Theory, however, makes no matter. Only its *justification* counts, and that in principle can consist of data.

of limited resources and dollar-backed demand) and interferences with freedom (meaning state constraints on individual decision-making). Marxism, by contrast, holds that the principal difficulty consists of the relative impoverishment of the mass of the population and its lack of freedom (meaning freedom through collective action to change the conditions of social life). Obviously, in the short term, the neo-classical definition of the difficulty must lead to a solution that protects the interests of those with dollars to back up their demands, and people whose conditions of life give them some substantial choices (for example, entrepreneurs). The Marxist problem statement focuses upon the interests of the poor and powerless. Each claims that its analysis and attendant solutions will in the long run benefit all of us. They cannot both have it right.

How should one choose between such claims? Using reason informed by experience, there is a strategy available to the drafter that will allow her to make and justify this choice rationally. The supporters of explanatory hypotheses always invoke middle-level propositions drawn from Grand Theory to explain particular social problems or to predict the consequences of proposed solutions. For example, implicitly invoking a neo-classical economics model, President Bush claimed that, but for a high saving rate by the ultra-rich, investment would dry up, and that therefore, despite its seeming unfairness, to reduce the capital gains tax rate advances the public interest. Research can test that proposition. To disprove a middle-level proposition draws into question the Grand Theory upon which it rests.[123]

Thus a drafter can falsify Grand Theory. By making her discretionary choices in terms of Grand Theory, the researcher generates hypotheses that she must try to falsify by examining the data of the case at hand. By making the discretionary choices that arise in the course of problem-solving in light of a Grand Theory that has survived efforts at falsification of middle-level

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[123] *Cf. infra* text accompanying notes 228–29; POPPER, *supra* note 36, at 33 (arguing that if "singular statements" deduced from theory "have been *falsified*, then their falsification also falsifies the theory from which they were logically deduced"); HANSON, *supra* note 69, at 8 (suggesting that a philosophical "middle way" must recognize "*significant* observations within a science as those which at once meet the criteria of relevance embodied within extant theory, while also being capable of *modifying* that theory by the hard, stubborn recognition of 'what is the case,' of *the facts*"). That available evidence confirms the proposition probably does little to prove its validity. *See infra* text accompanying note 196.

propositions drawn from it, she can in effect use reason informed by experience to make value choices.

### 2. Falsification: Cutting the Hermeneutic Circle

At every step, practical reason depends upon falsifying hypotheses.[124] Some argue, however, that falsification lies beyond our capacities, either because the world has so many complexities that we cannot unravel it,[125] or because Grand Theory itself supplies the lenses we use when we try to perceive reality. "In fact, our very perception of reality, the things 'out there' that empirical disciplines believe themselves to be describing, is also a product of our thought processes, and possibly our language."[126] Upon this view, it becomes impossible to test an hypothesis and to justify it except to somebody who has already accepted the same world view. Since one cannot falsify, one cannot use reason informed by experience to understand the world, or to compare world views,[127] let alone to persuade a person who has a different world view. It therefore becomes logically impossible to claim that "the facts" falsify an explanation.

If hypotheses cannot be falsified, then it becomes impossible to guide discretionary choices by verifiable hypotheses drawn

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[124] *Cf.* GADAMER, *supra* note 57, at 353 (arguing that creation of knowledge "cannot be described as the unbroken generation of typical universals. Rather, this generation takes place as false generalizations are continually refuted by experience and what was regarded as typical is shown not to be so.").

[125] KIDDER, *supra* note 86, at 119–24.

[126] Rubin, *supra* note 3, at 1840; *see* HANSON, *supra* note 69, at 13 (suggesting that if "'phenomenal facts' meet the boundary conditions of no extant theory whatever (e.g., inversion layers in ancient Greece, lodestone-magnetism for Charlemagne, firefly luminescence in Galileo's day, ESP today) then the subject matter in question is . . . 'beyond science'"); GADAMER, *supra* note 57, at 222 ("'The first condition of possibility of a science of history is that I myself am a historical being, that the person studying history is the person making history.' What makes historical knowledge possible is the homogeneity of subject and object." (quoting 7 WILHELM DILTHEY, GESAMMELTE SCHRIFTEN 278 (n.d.))); *id.* at 542; WINCH, *supra* note 64; ANTHONY GIDDENS, A CONTEMPORARY CRITIQUE OF HISTORICAL MATERIALISM: POWER, PROPERTY AND THE STATE 46–48 (1981); Morgan, *supra* note 71, at 14 (challenging "this notion of objectivity, for it emphasizes the crucial link between observer and observed, and by implication, questions the very possibility of neutral observation or evaluation"; following Godel, "it is not possible to judge the validity or contribution of different research perspectives in terms of the ground assumptions of any one set of those perspectives, since the process is self-justifying").

[127] *Cf.* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 112 (2d ed. 1970) (noting that paradigms can be "incommensurable"). *But cf.* CRITICISM AND THE GROWTH OF KNOWLEDGE (Imre Lakatos & Alan Musgrave eds., 1970); LARRY LAUDAN, SCIENCE AND VALUES (1984).

from Grand Theory. The invalidation of the falsification process makes impossible "learning from experience," and thus also policy-making based on reason informed by experience. That returns both policy-making and the choice of Grand Theory to the regime of taste. I like Marxism, and you like neo-classical economics, in the same way that you like chocolate and I like vanilla ice cream. We reach a version of the hermeneutic circle:[128] to falsify an hypothesis drawn from Grand Theory involves the utilization of categories drawn from the same Grand Theory—and hence falsification becomes an impossible dream. If falsification cannot occur, then we can never warrant or disprove causal hypotheses, never discover probable causes, and therefore (except in relationship to ends dictated by our passions and desires) never act purposively or rationally.

This makes the enterprise of justifying legislation on the basis of reason informed by experience impossible. Scholars can justify their results, but only to others in the same community, sharing the same world view. Drafters, however, must justify not only to those in the same circle, but to society at large—and unless we believe in myths of consensus, no common world view seizes any complex society. If we cannot falsify hypotheses, then the republican strain in the political culture counts only as kitsch—mere myth to persuade the peasants of government's legitimacy. The enterprise seems doomed, and only those who focus on power—pluralists, Marxists, Public Choice theorists—have it right.

There is, however, reason to doubt this attack on falsification. First, consider the analogy to a paradox proposed by Charles Dodgson (alias Lewis Carroll).[129] The Traveler sees Achilles trying to persuade the Turtle of the inevitability of logic. Achilles tells the Turtle that if he concedes A and that A implies Z (B), then logic *requires* the Turtle to admit Z. "Why?" inquires the Turtle. "Because if you concede that A is true, and if you concede that B is true, then you must concede that Z must be true," answers Achilles. "All right," says the Turtle, "write that down. Call it C." "Now," says Achilles, "you see that Logic forces you to admit that Z is true!" "Why?" says the Turtle. Achilles answers, "Because if you concede that A is true, and

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[128] *See* GADAMER, *supra* note 57, at 265–77.

[129] LEWIS CARROLL, *What the Tortoise Said to Achilles, in* COMPLETE WORKS 1104 (1936); *see* WINCH, *supra* note 64, at 55.

if you concede that B is true, and if you concede that C is true, then you must also concede that Z must be true!" "All right," meekly answers the Turtle, "write that down. Call it D." "Now, you see," says Achilles, "logic compels you to admit that Z is true!" "Why?" asks the Turtle . . . . When the Traveler returned two months later, they were still there, and Achilles had almost filled his notebook.

Fortunately, hypotheses that cannot be falsified within the logical system in which they were developed often can be falsified when set against the reality within which the logical system functions.[130] People do act purposively, and in so doing affirm that they have experienced causality and believe that it exists. To grow a tree, we plant not stones but seeds. We *experience* causality. To act purposively, we rely upon our interpretations of experience. When our actions miss the mark, we reconsider the causal hypotheses on which we premised action, and sometimes even the conceptual lenses through which we originally perceived the project.

We have also the capacity to try on different blinders to observe reality, and thus can enhance our peripheral vision. With respect to economic matters, we can consciously put on a Marxist hat, a Marshallian hat, and an institutionalist hat, and in *each* guise propose a proposition to explain the phenomenon at hand. The process of attempting to falsify each of these propositions necessarily involves the use of peripheral vision; nobody can so immerse herself in one or the other paradigm so as to exclude data in principle invisible from that perspective. A researcher who conscientiously tries to formulate a proposal from a Marxist perspective can hardly avoid considering issues of class and exploitation when she simultaneously tries to falsify a proposition based on neo-classical economics and, conversely, when she tries to falsify a Marxist hypothesis, to consider issues of efficiency. Further, new participants in the political arena bring new perspectives. White males, for example, have come to understand the imperatives of solving the social problems of racial and gender inequity. They changed their perspectives because of the agitations and struggle carried on by blacks and women over the past four decades.

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[130] WINCH, *supra* note 64, at 57, 100 (stating that "criteria of logic are not a gift of God, but arise out of, and are only intelligible in the context of, ways of living or modes of social life").

Testing theories against reality, working with more than one set of blinders, and responding to continuing social struggle all combine to teach us that perspectives can change. If perspectives can change, then one way or another, over time, we can falsify even our most dearly held social myths. Falsifying causal hypotheses thus does not necessarily exceed our grasp, although the methodological critique does warn us to treat empirical results warily. Nevertheless, at the moment of truth, practical reason need not abandon the field. The republican strain in the political culture need not constitute merely kitsch.

### C. *Categories*

Sound methodology and freedom of perspective by themselves will not guarantee that all possible causes will be included in the range of proposed explanations. Some causes still will never be considered because the researcher never proposed explanations based on those causes. Devising a range of potential hypotheses to explain phenomena is therefore the first step towards discovering the specific causes that the legislation must address.

The milieu of any set of targeted addressees, however, contains myriad factors, far beyond the capacity of any researcher to examine exhaustively. The researcher therefore needs a set of *categories* (or "vocabulary") to define the sorts of data she should investigate. By "categories" I mean the concepts that the researcher has in mind before addressing the research task. Such categories determine the sorts of hypotheses she will generate to explain the difficulty. A researcher who follows the Law and Economics vocabulary will generate hypotheses explaining behavior in terms of incentives, transaction costs, and other market imperfections; a researcher with a sociological set of categories will generate hypotheses explaining behavior in terms of values and attitudes; a Marxist, in terms of class. The categories used by the researcher instruct her about what is important.[131] They identify the key constraints and resources in the addressee's milieu, which the explanatory hypotheses may iden-

[131] WINCH, *supra* note 64, at 15 ("[I]n discussing language philosophically we are in fact discussing *what counts as belonging to the world* . . . . The concepts we have settle for us the form of the experience we have of the world . . . . The world *is* for us what is presented through those concepts.")

tify as causes. Those hypotheses then direct the researcher's attention to relevant data that will explain the problem being addressed and thus justify the resulting legislation.[132]

Of course, such categories must be specific enough to enable the researcher to identify what data may be useful.[133] At the same time, however, the precision that good social science requires of middle-level hypotheses seems counterproductive. We use categories to help generate educated guesses about the behavior at issue. A certain vagueness in those categories can only help in generating guesses, since nobody can know in advance precisely what data will prove useful.

Whence does a theory derive its categories? The categories chosen indicate what the theorist thinks important. An ideal type serves the same function, emphasizing the variables that the theorist believes explain the phenomenon at issue. Usually, a theory derives its categories from an ideal type, such as Max

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[132] In this view, categories, and the ideal types frequently used to define and to justify them, constitute only *heuristics*, that is, propositions that focus the researcher's attention on those facts that past experience and logic suggest will have relevance in explaining the difficulty. Note that the reliance on hypotheses to guide research contrasts with the more common empiricist approach, in which researchers accumulate data and then induce general statements about the material. *See* MAGEE, *supra* note 1, at 19; *see also supra* note 74 and accompanying text.

[133] As noted in the preceding Section, one can tease out of Grand Theory propositions that help explain a problem. For example, the Coal Mine Health and Safety Act of 1969 required mandatory inspections of mines. 30 U.S.C. § 813 (1988). Nevertheless, the Act did not clearly reduce injuries as expected. *See* David C. Hardesty, Jr., Note, *A Case Study of Legislative Implementation: The Federal Coal Mine Health and Safety Act of 1969*, 10 HARV. J. ON LEGIS. 99 (1972). In fact, the required inspections did not occur. *Id.* at 113. A Marxist scholar might hypothesize that the failure of inspections resulted from subservience by the inspectors and the Bureau of Mines to the mine owners. *Cf.* Andrew Hopkins & Nina Parnell, *Why Coal Mine Safety Regulations in Australia Are Not Enforced*, 12 INT'L J. SOC. L. 179 (1984) (arguing that the Marxist-inspired distinction between enactment and enforcement is overdrawn because enacted legislation itself often contains loopholes that impede enforcement). That proposition, however, still remains on too high a level of generality to help a drafter very much. It does identify a potential cause for examination, that is, the connections between the mine owners and the inspectors. To explain that relationship, however, calls for much more specific propositions than that drawn from the Marxist paradigm. The categories of a *legislative* theory serve to generate middle-level, explanatory propositions upon which a drafter might base a legislative solution—for example, hypotheses like "where the law grants inspectors discretion, they will likely exercise their discretion in favor of parties who can exacerbate strains and provide rewards for the inspectors and the bureaucracy of which the inspectors are a part" (based on a category that might be called "Interest," *see infra* text accompanying note 169) or "the inspectors' decisions, to inspect or not, will respond to the interests of those who provided inputs to their decision-making" (based on a category that might be called "Process," *see infra* text accompanying note 175). Thus do the categories of a theory of legislation and the perspectives provided by Grand Theory combine with methodology to guide the researcher through the shoals of data.

Weber's model of bureaucracy,[134] neo-classical economics' model of a perfectly competitive market, or Professor Rubin's generalized description of the relationship between legislation and administration.[135]

As I have argued, a drafter concerns herself with behavior in the face of a rule of law. That issue has concerned legal scholars since the advent of American Legal Realism and its concern with the tension between the law-in-the-books and the law-in-action, the words of the laws and the behavior that follows. Although at sharp odds over which variables to examine in order to explain behavior, all the children of the Realists agree on the general formulation of the problem. This Section first puts forward that general understanding, and then examines the categories advanced by Realism's three principal contemporary offshoots, denoted here as the Sociological, Law and Economics, and Institutionalist positions, with an emphasis on the Institutionalist approach as the most useful to the drafter.

### 1. Behavior and the Legal Order in General

What elements ought one take into account in explaining why people behave as they do in the face of a rule of law? As explained by Fredrik Barth,[136] the simplest model of action consists of individuals and collectivities making choices in a physical, social, economic, and psychological context made up of constraints and resources to activity (the "arena of choice"). By describing that milieu, we "explain" behavior. For example, if an armed robber dominates an individual's immediate milieu with the demand, "Your money or your life," describing that milieu explains why the individual would hand over his wallet. If we describe the constraints and resources of a farmer's milieu—the availability of credit, the nature of her land, the climate, the available water, the market for various crops, the relative cost of growing them, the government programs available, the technology used, the farmer's expertise, local customs,

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[134] MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 344 (Talcott Parsons ed. & A.M. Henderson & Talcott Parsons trans., 1947).

[135] *See supra* note 72 and accompanying text.

[136] FREDRIK BARTH, MODELS OF SOCIAL ORGANIZATION (Royal Anthropological Inst. Occasional Paper No. 23, 1966); *see also* Alasdair MacIntyre, *A Mistake About Causality in the Social Sciences*, *in* PHILOSOPHY, POLITICS AND SOCIETY 48 (Peter Laslett & W.G. Runciman eds., 2d series 1962); S.F. Nadel, *Social Control and Self-Regulation*, 31 SOCIAL FORCES 265 (1953).

and so forth—we explain the farmer's relative productivity and why she grows soy beans instead of wheat or cotton.

In this milieu, the legal order's commands and opportunities appear to its addressees like other factors in the milieu: something that perhaps one can work around, perhaps something one must obey, but always something that to some degree one must take into account.[137] Describing an ideal type of the legal order's structure follows classical analytical positivism.[138] Lawmakers utter norms that either command obedience from addressees (as in tort and criminal law) or offer them opportunities (as in contract law and most of corporation law), while simultaneously addressing related implementation orders to appropriate agencies (administrators, courts, police, and so forth)[139] (Figure 1). The addressee—call him a "role occupant"[140]—may constitute every member of society (e.g., "thou shalt not commit murder"), a defined class of non-officials (e.g., "no director of a corporation may use insider knowledge for her private benefit"), or an official (e.g., "the Public Utilities Commission shall prescribe

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[137] *See* Mark Tushnet, *Lumber and the Legal Process*, 1972 WIS. L. REV. 114.

[138] *See generally* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 1–27, 109–67 (2d ed. 1861); JEREMY BENTHAM, OF LAWS IN GENERAL 140–44 (H.L.A. Hart ed., 1970); KELSEN, *supra* note 77, at 58–64.

[139] Some authors suggest that the norm addressed to the individual citizen or corporate actor constitutes the "primary" or most important form of the law, and thus emphasize the primacy of obligation. *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW 18–35 (1961). Others maintain that the directive addressed to the law-implementing agencies holds priority, and thus emphasize the primacy of coercion. *See, e.g.*, KELSEN, *supra* note 77, at 15–29. The amount of obligation that a given norm in fact induces in an actor varies with the content of the specific norm (laws against murder or rape carry different moral connotations than laws requiring that appellate briefs have a margin of not less than one and one-half inches), the social morality of the day (laws against adultery carried a greater degree of obligation in Victorian times than in our own), and the actor's socialization. In the view taken here, it hardly matters which is the "primary" form (for convenience, this Article labels the target of Hart's primary norm as the "primary" addressee). Legislation invariably addresses some individuals or collectivities whose behaviors are at issue and, either explicitly or implicitly, some implementing agency. *But cf.* Rubin, *supra* note 5, at 375 (noting that in the modern administrative state some directives are aimed solely at government agencies, without any explicit threat of sanctions against any individuals).

[140] In the sociological vocabulary, "role" means the obligations of a social position (that is, the target of a norm). *See* HARRY M. JOHNSON, SOCIOLOGY: A SYSTEMATIC INTRODUCTION 16–19 (1960). The particular individual or sets of individuals who occupy a particular role constitute, therefore, "role occupants." As suggested by Fig. 1, every rule of law aims at both a primary role occupant (some group of individual or collective actors in society) and some implementing agency. In this Article, both types of addressees are analyzed as "role occupants," though the analysis of agencies involves special considerations, *see infra* notes 176–183 and accompanying text.

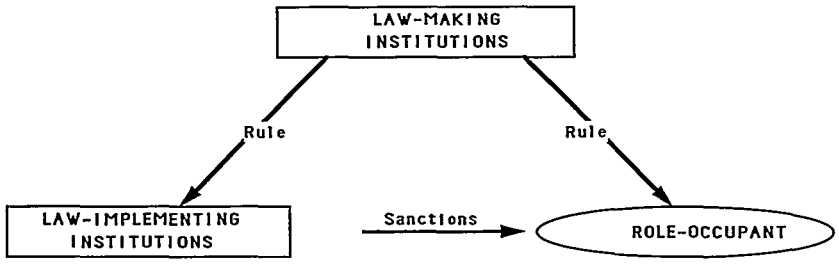


Fig. 1.

fair and reasonable rules for the generation and distribution of electricity").

We combine the behavioral insights of Barth's model and the formal structures of Hans Kelsen's (Figure 2). This model teaches that in deciding how to act in the face of a rule of law, the primary role occupant takes into account all the constraints and resources of her arena of choice, including the strictures of the law itself and the potential for sanctioning behavior by the implementing agency. Agency behavior also consists of a series of choices it makes in light of its own arena of choice, including the rules addressed to it.

The model assimilates directives addressed to lay persons as well as those directed to officials.[141] A directive addressed to officials, like a norm addressed to lay persons, aims at inducing behavior which will carry out the legislative purposes. Such directives operate by the use of conformity-inducing measures imposed by some sort of an implementing agency.

The categories a drafter employs in her research determine what data she will catch to generate explanations and to propose solutions in specific situations. Whether investigating the behavior of an official or a lay role occupant, the drafter ought to inquire about (1) the content of the directive addressed to the role occupant, (2) the arena of choice of the role occupant,

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[141] Professor Rubin makes a sharp distinction between these. *See* Rubin, *supra* note 5, at 380–81.

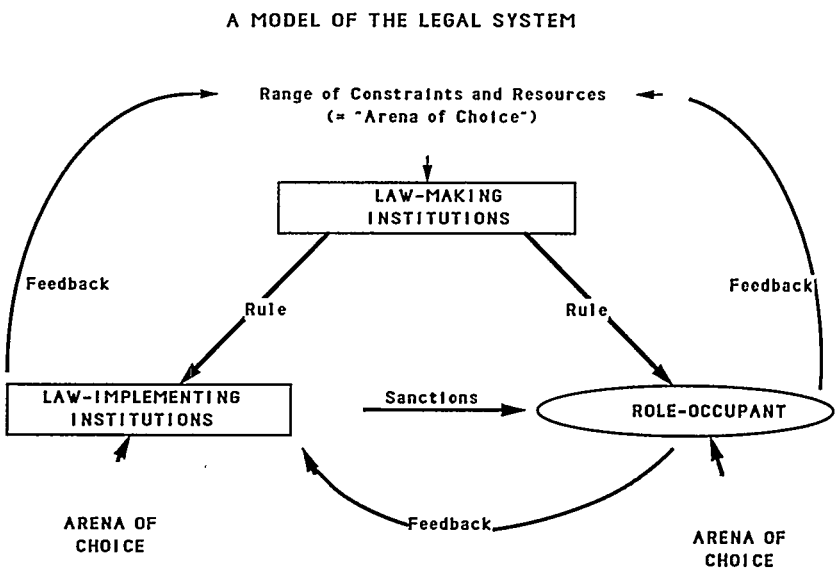


Fig. 2

(3) the norm addressed to the implementing agency (including the conformity-inducing measures it empowers the implementing agency to employ), and (4) that agency's arena of choice.[142] These constitute the primary categories for investigation.

Except for one wing of the Critical Legal Studies movement, all the descendants of the Realists would probably agree with all of this.[143] It leaves as a formless residual category the ele-

[142] Although Professor Rubin distinguishes between "law" and "legislation," he of course agrees that the legislature must ensure implementation of directives to officials. Rubin, *supra* note 5, at 408. The categories proposed in the text direct the researcher's attention to this issue.

[143] If the words that express the legislation have no ascertainable meaning, so that every role occupant and implementing official has unrestricted license to construe it as she will, then the whole enterprise of influencing behavior through law becomes impossible. The model in the text therefore assumes that the words that express rules of law have some minimal core meaning that does not depend upon the "political" choices of the interpreter, although it admits that interpretive choices inevitably exist within the penumbra of the words. *See generally* HART, *supra* note 139, at 121–50. One wing of Critical Legal Studies has at times seemed to deny any cultural agreement on the meaning of words; the possibility of deconstruction always exists. *See supra* note 33. Others in that movement deny that the relationship between law and behavior can be

ments that define an individual's arena of choice. As to which elements in the arena of choice are relevant to behavior, however, the descendants of the Realists have differed strenuously.

### 2. The Sociological School

The earliest statement of why people obey laws rested on the assertions of sociologists that people generally behaved in accordance with their subjective values and attitudes.[144] From that premise, they argued that only those laws that matched people's values and attitudes could change their behavior.[145] Along with President Eisenhower,[146] for example, they predicted that desegregation laws would not change white behavior until white attitudes towards blacks changed.[147] Professor Lawrence Friedman generalized this point of view when he postulated that "the network of values and attitudes relating to law . . . determines when and why and where people turn to law or government."[148] That led to a paradox: laws would not change behavior unless they coincided with already existing values and attitudes; but in

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known, and hence must deny the implications of the model. *See, e.g.*, KIDDER, *supra* note 86, at 112–43; Griffiths, *supra* note 86, at 351–56, 371–73. Some of those who assert the indeterminability of legal texts in principle, however, agree that various factors—the structure of legal argument, the categories of the law, and the common legal culture of judge and lawyers—nevertheless provide a degree of predictability in the law. *See* Singer, *supra* note 33, at 19–25.

[144] *See* WILLIAM G. SUMNER, FOLKWAYS 55–57 (1906); *cf.* Cranston, *supra* note 5, at 875–76 (identifying three reasons for the successful implementation of legal change: public attitudes, the behavior to be changed, and the nature of those regulated). *See generally* ROSS CRANSTON, LAW, GOVERNMENT AND PUBLIC POLICY (1987).

[145] *See* Plessy v. Ferguson, 163 U.S. 537, 551 (denying that "social prejudices may be overcome by legislation" and asserting that social equality "must be the result of natural affinities . . . and a voluntary consent of individuals"); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 262 (1969); Harry V. Ball et al., *Law and Social Change: Sumner Reconsidered* 67 AM. J. SOC. 532, 540 (1962) (arguing that laws cannot change folkways); John P. Roche & Milton M. Gordon, *Can Morality be Legislated?*, N.Y. TIMES MAG., May 22, 1955, at 10 ("[I]n the United States . . . no piece of legislation, or judicial decision, which does not have its roots in community beliefs, has a chance of being effectively carried out.").

[146] TAYLOR BRANCH, PARTING THE WATERS: AMERICA DURING THE KING YEARS, 1954–63 213 (1988).

[147] Roche & Gordon, *supra* note 145, at 10.

[148] Lawrence M. Friedman, *Legal Culture and Social Development*, 4 LAW & SOC'Y REV. 29, 34 (1969).

that case there is no need for laws, since behavior would presumably already reflect people's values and attitudes.

Values and attitudes as the *sole* determinants of behavior seem inadequate as the only significant categories for investigation, both because of their circularity and their failure of empirical warrant. First, the "explanation" for behavior—that it responds to values and attitudes—usually rests upon the same empirical basis as the perception of the behavior. For example, suppose that a drafter "explained" the high rate of teenage pregnancy by citing teenage "cultural values." That explanation likely rests on the same data that proves the existence of the difficulty—that is, that many American teenagers become pregnant. The "explanation" chases its own tail. Second, as the psychological theory of cognitive dissonance predicts,[149] it often appears that people do change their behavior in response to a law, although often not precisely in the way the law demands. Bit by bit, schools in the South did desegregate, and attitudes towards desegregation changed.[150] People do alter their driving behavior in response to highway safety laws, although they do not obey them exactly.[151] People pay income taxes even though, when the income tax laws first appeared, people's values and attitudes did not conform to the new tax laws. The extreme sociological position—that people will only obey laws that conform to their values and attitudes—seems empirically false.

### 3. Law and Economics[152]

The Law and Economics school has evolved over time into two clearly defined wings, the first conservative, as exemplified

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[149] The theory of cognitive dissonance predicts that if behavior contradicts values and attitudes, the latter will change to conform to behavior. *See* FESTINGER, *supra* note 23, at 18–24. In this view, the sociologists have it backwards.

[150] *See* Margaret A. Parsons, *Parents' and Students' Attitudinal Changes Related to School Desegregation in New Castle County, Delaware, in* METROPOLITAN DESEGREGATION 185, 207 (Robert L. Green ed., 1985).

[151] *See, e.g.*, Leon S. Robertson, *An Instance of Effective Legal Regulation: Motorcyclist Helmet and Daytime Headlamp Laws*, 10 LAW & SOC'Y REV. 467 (1976). *But cf.* Roberta S. Cohen & Harvey S. Cohen, *Fatal Errors with Fatalities Data: A Comment on Robertson's "An Instance of Effective Legal Regulation,"* 11 LAW & SOC'Y REV. 589 (1977) (arguing that Robertson's data did not prove that behavior changed in response to legal regulation).

[152] *See generally* POSNER, *supra* note 5; Edmund W. Kitch, *The Intellectual Foundations of "Law and Economics,"* 33 J. LEGAL EDUC. 184 (1983). For critiques of Posner's analysis, see Makgetla & Seidman, *supra* note 62; Frank I. Michelman, *Reflections on Professional Education, Legal Scholarship and the Law-and-Economics*

by Professor Posner,[153] another liberal, exemplified by Professor Calabresi.[154] With one exception, they use the same categories. They explain the choices people make with a single factor: self-interest. Judge (then Professor) Posner says that the pursuit of one's own interests constitutes a powerful regularity in human behavior.[155] Like the neo-classical economics which it takes as a given, Law and Economics rests its entire structure upon that pinhead. Since in its view self-interest finds free expression only in a free, competitive market, it holds that the ideal organization of every aspect of human society—even those that do not seem to relate to economic concerns, like the family, adoption of children, and so forth—resembles such a market. In that view, all social problems constitute market failures. To identify these failures, Law and Economics employs a list of possible market imperfections—transaction costs, externalities, imperfect information, and so forth.[156] It then uses the entries on that list as additional categories to help discover explanations for the behavior at issue, and to propose solutions to eradicate the market failure. Liberal Law and Economics adds an important additional category, which especially distinguishes it from the conservative wing: it considers distributional as well as resource allocation factors in making policy proposals.

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*Movement*, 33 J. LEGAL EDUC. 197 (1983); and Warren J. Samuels, *The Coase Theorem and the Study of Law and Economics*, 14 NAT. RESOURCES J. 1 (1974).

Law and Economics has three well-defined spheres of interest: (1) how legislatures function (which became the jurisprudence of Public Choice theory), *see* Eskridge & Frickey, *supra* note 2, at 702–10; (2) an historical claim that the substantive rules that common law judges articulated by and large reached an "efficient" result, *see* POSNER, *supra* note 5, *passim*; and (3) the assertion that the use of Law and Economics as the basis for policy-making leads to wise and sensible results. Here we examine only this last claim.

[153] *See generally* POSNER, *supra* note 5.

[154] *See, e.g.*, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); *see also* Richard S. Markovits, *Duncan's Do Nots: Cost-Benefit Analysis and the Determination of Legal Entitlements*, 36 STAN. L. REV. 1169 (1984).

[155] POSNER, *supra* note 5, at 1.

[156] *See* STOKEY & ZECKHAUSER, *supra* note 93, at 297–308. In practice, the liberal wing seems much less easily convinced than the conservative wing that existing markets operate free of market imperfections. For example, in the Third World, the International Monetary Fund (which in practice adopts a conservative Law and Economics position, *see generally* THE IMF, THE WORLD BANK, AND AFRICAN DEBT—THE SOCIAL AND POLITICAL IMPACT (Bade Onimode ed., 1989); CHERYL PAYER, THE DEBT TRAP: THE IMF AND THE THIRD WORLD (1974); ANN SEIDMAN, MONEY, BANKING AND PUBLIC FINANCE IN AFRICA 233–68 (1986)) seems much more reluctant than the World Bank (which in practice adopts a liberal Law and Economics position, *see* INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, THE WORLD BANK, WORLD DEVELOPMENT REPORT, 1987 58–77 (1987)) to explain economic difficulties by monopolization, sticky factor mobility, or institutional dysfunctions.

The methodology and categories derived from Law and Economics theory seem unduly restrictive. First, save in cases where the market plainly seems an impossible—*really* impossible—dream, they exclude from consideration non-market solutions.[157] In today's world, however, every economy contains many non-market relationships.[158] Because it contains no relevant categories, Law and Economics makes a poor guide for how to research such relationships. Second, many, and probably most, human relationships look like markets only if one ignores their most human aspects. To perceive love and marriage in terms of the arm's-length, self-seeking behavior of the competitive market surely misses most about what makes the family a refuge from the workaday world, rather than that mundane world's mere domestic analogue.

Finally, the notion that people behave only in terms of their self-interest—that human beings are rational utility-maximizers—seems either empirically false or trivial. Robert Ellickson looked for an empirical test of the Coase Theorem.[159] In doing so, he made a surprising discovery: the ranchers, farmers, officials, and insurance people he interviewed did not act in ways

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[157] In practice, Law and Economics scholars scurry about trying to create markets where none exist. *See, e.g.*, Landes & Posner, *supra* note 61 (arguing that a free market for babies should replace non-market adoption and foster care); Richard Stroup & John Baden, *Externality, Property Rights, and the Management of our National Forests*, 16 J.L. & ECON. 303 (1973).

[158] In the United States, examples of non-market relationships include the uranium industry; most military procurement; national forests; public education; most prisons; and a great deal of health care delivery. In most countries of the world, such examples include railroads; harbors; the national airline; the telephone industry; broadcasting; the telegraph industry; and the post office.

[159] The Coase Theorem holds (roughly) that, absent transaction costs, the market will reach the same social allocation of resources, however the law assigns rights and duties. It lies at the very foundation of Law and Economics. Neo-classical economics holds that the principal interferences with a free market come from government interventions. All law constitutes a form of government intervention. Without law, however, a market cannot exist; law *precedes* the market. *See* POSNER, *supra* note 5, at 10 (reasoning that a system of legally sanctioned property rights is essential to an agricultural products market).

This is a paradox that Karl Popper identified long before anybody thought of Law and Economics: that a consistent anti-interventionist position trips on itself, "since its supporters are bound to recommend political intervention aimed at preventing intervention." KARL R. POPPER, THE POVERTY OF HISTORICISM 61 (2d ed. 1960). The Coase Theorem rescues Law and Economics from this paradox, by asserting that whatever the legal framework, the market will nevertheless reach the same social allocation of resources. Of course, the law may advantage this group or that; but this constitutes an allocational issue, to which conservative Law and Economics expresses indifference. Thus Law and Economics can advocate different laws to help eradicate market imperfections, and still assert that government interventions in decision-making constitute the prime evil.

that would maximize material wealth. Instead of following the formal law when that might advantage them, they followed what might be called the Code of Good Neighbors, an informal but strongly-held code that differed markedly at many points from the allocation of rights and duties prescribed by formal law. He demonstrated what must appear upon any close examination: people often behave in ways that defy material wealth-maximizing.[160]

To meet that empirical challenge, some Law and Economics advocates trivialize the concept, arguing that people wealth-maximize only in the sense that they maximize what they value. This reasoning is circular: people behave as they do because they value what they do; we know they value what they do because they so behave. The extreme Law and Economics position, that people behave *only* in response to self-interest, will not serve to direct the drafter to all the relevant data or helpful hypotheses.

### 4. Institutionalism[161]

As we have seen, people make behavioral choices in light of the constraints and resources in their milieu. Both the sociological school and Law and Economics look mainly for some single, overriding motive that leads to action ("values and attitudes," or "wealth-maximization"). In contrast, Institutionalism postulates a more complex process of choosing and tries to understand the multitude of factors people consider in that process.

An individual will choose to obey a law depending upon the nature of the law itself, the range of choices available to the

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[160] ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991); Robert C. Ellickson, *On Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986). Other examples frequently suggested include philanthropy and voting: why should anyone think that it was in her economic material self-interest to take the time to vote, when the chances of one vote making any difference seems most remote? *See* Michelman, *supra* note 152, at 198.

[161] *See generally* Robert B. Seidman, *Why Do People Obey the Law? The Case of Corruption in Developing Countries*, 5 BRIT. J.L. & SOC'Y 45 (1978); *cf.* H.W. JONES, THE EFFICACY OF LAW (1968); Allott, *supra* note 3, at 236–39 (identifying three reasons for the ineffectiveness of laws: failure to communicate the rule; conflict between "the aims of the legislator and the nature of the society in which he intends his law to operate"; and failure of implementation); William M. Evan, *Law as an Instrument of Social Change*, *in* APPLIED SOCIOLOGY: OPPORTUNITIES AND PROBLEMS 285 (Alvin W. Gouldner & S.M. Miller eds., 1965); Sally M.A. Lloyd-Bostock, *Explaining Compliance With Imposed Law*, *in* THE IMPOSITION OF LAW 9 (Sandra B. Burman & Barbara E. Harrell-Bond eds., 1979).

individual, the incentives and disincentives created by the milieu, the individual's perception of her environment, and the process by which she decides. One's environment also includes the behavior of implementing agencies and the conformity-inducing measures ("sanctions") they impose. This Subsection discusses the major factors affecting addressees' choices and the role of implementing agencies.

a. *Factors Affecting Behavior of Addressees*

The factors affecting addressees' choices may be represented by the acronym ROCCIPI: Rule, Opportunity, Capacity, Communication, Interests, Process, and Ideology. The ROCCIPI categories require the drafter to turn her mind systematically to each of these seven variables, and generate hypotheses based on them.[162] Since hypotheses require empirical confirmation, the existence of the hypotheses serves to guide the research into the social problem at hand. Thus these categories serve their heuristic function with respect to the addressees of laws.

(1) *The rules.* By definition, the existing rules of law constitute part, but only part, of the milieu within which the role occupant chooses. The discovery that behavior responded not merely to the rule but to all the forces of the social and physical milieu constituted, of course, the great discovery of sociological jurisprudence, whose legacy the Realists inherited.[163]

Adequate solutions address identified causes, not immutable conditions of the milieu. Since the drafter's solution—legislation—always constitutes a change in the law, then *part of the cause of the difficulty must always lie in the existing legal order.* People act, or make choices, within a whole framework of existing laws and implementing agencies. For example, water polluters act not only in light of the sort of laws conventionally labelled "water pollution law," or "environmental law." They also act within a framework of property law, contract law, water law, tax law, constitutional law, and many others. Every legal system permits that which it does not forbid. Unless the prop-

[162] Frequently, one or more of the categories will seem obviously satisfied. For example, if analyzing an official as a role occupant, usually the situation makes it obvious that the official knows of the rule and its content.

[163] Morton Horwitz, Lecture at Boston University School of Law, Legal History Group (Oct. 9, 1990).

erty law or some other law forbids a landowner from polluting a stream that runs through her property, she has a legal right to pollute it. Moreover, the legal order includes not only the text of the rules, but also implementing agencies. If the agencies do not adequately enforce anti-pollution laws, the polluter will take that into account in choosing how to act.

In short, role occupants choose and act within the constraints and resources created by the legal order itself. The legal order roughly consists of normative rules, implementing agencies, and conformity-inducing measures to channel role occupants into desired behavior. Every justification of legislation must therefore contain a statement of the rules of law that affect the behavior at issue, which usually will include much more than the specific laws explicitly aimed at it.

(2) *The requirement of choice: opportunity, capacity, and communication.* Unless the role occupant can choose to obey, obedience to law is trivial. To say that a babe in arms "obeys" the law against speeding misuses the word "obeys." Obedience requires choice. This occurs only if three factors coincide.

First, the role occupant must have the *opportunity* to choose to obey or disobey; that is, her environment must permit her the choice. For example, the existence of an open stream through a landlord's property gives her the opportunity to pollute it, or to obey a law prohibiting pollution. Similarly, a court's opportunity to enforce a statute depends upon the willingness of aggrieved parties to bring lawsuits.

Second, the role occupant must have the *capacity* to obey, that is, she must have the skills and resources to do the task.[164] For example, some years ago the Coast Guard promulgated regulations requiring ships to have inboard tanks to receive wastes, and prohibiting pumping wastes into the sea. Ships could empty their waste tanks only at shore facilities having the necessary pumps and tanks.[165] No regulations, however, pro-

[164] In a case in which the plaintiff argued that Parliament had imposed on the City of Edinburgh an absolute duty to keep the gas lamps turned on during the hours of darkness, no matter what the wind, Lord Sands remarked: "Great as are the powers of the legislature, it can control and give directions to persons only—not to things. It can say to the Corporation 'Light,' but it cannot say to the material universe 'Let there be light.'" Keogh v. Magistrates of Edinburgh, 1926 S.L.T. 527, 531 (Scot. 1st Div.), *quoted in* Anton, *supra* note 59, at 236. In cases involving the salvage function of law, *see supra* note 82, the capacity usually required of the role occupant concerns only the depth of her pocket.

[165] 33 C.F.R. §§ 158–159 (1989).

vided for the installation of such pumps and tanks, and (with rare exceptions) no shoreside facilities appeared. Many role occupants thus lacked capacity to obey the law, because they did not have the necessary equipment or shoreside facilities.[166]

Third, the rule must be *communicated* to the role occupant. For example, if a law prohibits pollution, but the landlord does not know of the law, she will "obey" it only accidentally. Under this heading the drafter ought to consider two sets of issues. First, she should consider the appropriate form of legislation to communicate her intention: the form of words, the generality of the text, goal-oriented provisions, and so forth, which are the subject of most manuals on legislative drafting.[167] Second, the drafter should consider how the law can be effectively communicated to its addressees.[168]

(3) *Interests.* Whatever the limitations of the Law and Economics vocabulary, material incentives clearly constitute a powerful motive in human affairs. The researcher must therefore investigate whether the behavior at issue lies in the material interests of the role occupant. Obviously, a role occupant is less concerned with the paper penalty for criminal activity than the probability of being caught and punished by the implementing authorities. Sanctions by authorities may include actions outside those provided by law. For example, if in practice jobs in industry do not go to former officials who implemented agency rules to the detriment of large industrial organizations, the interest of many officials will lead them to enforce rules in ways that favor industry, perhaps in conflict with the legislated agency mission.[169]

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[166] The Coast Guard also lacked the capacity to implement the law, for it did not have anywhere near the resources necessary to monitor the discharges of every small boat. *Cf.* Anton, *supra* note 59, at 244 (noting that many activities are carried on well out of reach of implementing agencies, which may explain why United Kingdom customs and excise authorities no longer prohibit brewing home beer).

[167] *See supra* note 31; Allott, *supra* note 3, at 236–37 (suggesting that legislative language not in common use is unlikely to be effective); Rubin, *supra* note 5, at 408–26 (suggesting that modern legislation could seek desired results by defining either legislative goals for the implementing agency to pursue, or methods and strategies the agency should use in the course of implementation).

[168] *See* Daniel J. Gifford, *Communication of Legal Standards, Policy Development, and Effective Conduct Regulation*, 56 CORNELL L. REV. 409 (1970); John A. Robertson & Phyllis Teitlebaum, *Optimizing Legal Impact: A Case Study in Search of a Theory*, 1973 WIS. L. REV. 665, 695–99, 714–15; Robert B. Seidman, *The Communication of Law and the Process of Development*, 1972 WIS. L. REV. 686.

[169] One of the things that happens to all administrative tribunals is that it first is opposed by the industry and then it becomes controlled by the principal in-

(4) *Ideology.* How people view their world affects their behavior in two different ways. First, a particular sentiment or value may dominate the choices people make. For example, women in China are so deeply socialized in traditional values of a large family that they frequently try to evade the laws aimed at limiting the number of children women may bear.[170] Second, and more pervasively, people's subjective understanding, or "domain assumptions,"[171] gives meaning to their actions.[172] If a person turns over to another some thin metal discs, a researcher cannot explain the action unless she knows how the actor perceives the discs: perhaps as medals, and the recipient as a craftsman who will polish them; perhaps as religious objects, and the recipient as a priest or shaman; or perhaps as money, and the recipient as a tradesman who receives them in payment for goods.[173] Because a drafter concerns herself not with particular role occupants but the whole set of role occupants, she will necessarily focus on their commonly-held beliefs about action—

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> dustry . . . . That is due to the fact that young men in Government careers want to get the best jobs they can in the specialties and there is this social pressure to be a sound man . . . because if you are an unsound man, you will never get a job in the industry.

*Hearings Before a Subcommittee of the Senate Labor and Public Welfare Committee to Study Senate Concurrent Resolution 21 Establishing a Commission on Ethics in Government*, 82d Cong., 1st Sess. (1951) (statement of Thurman Arnold), *quoted in* CARL A. AUERBACH, ET AL., THE LEGAL PROCESS: AN INTRODUCTION TO DECISION-MAKING BY JUDICIAL, LEGISLATIVE, EXECUTIVE, AND ADMINISTRATIVE AGENCIES 853 (1961); *see* MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955). *But cf.* Louis L. Jaffe, *The Independent Agency—A New Scapegoat*, 65 YALE L.J. 1068 (1956) (book review) (criticizing Bernstein's attack on independent agencies). Where the proposed bill relates directly to economic affairs, sophisticated economic analysis based on the material interest of the role occupant becomes particularly relevant—for example, in legislation relating to restrictions on competition, developing new transportation routes or systems, the supply of energy, and the like.

[170] *See* Tyrene White, *Implementing the "One-Child-per-Couple" Population Program in Rural China: National Goals and Local Politics*, *in* POLICY IMPLEMENTATION IN POST-MAO CHINA 284, 288–95 (David M. Lampton ed., 1987).

[171] *See supra* note 118 and accompanying text.

[172] *See* WEBER, *supra* note 134, at 87–115; Talcott Parsons, *Introduction* to WEBER, *supra* note 134, at 10–14; Alfred Schutz, *The Social World and the Theory of Social Action*, *in* PHILOSOPHICAL PROBLEMS OF THE SOCIAL SCIENCES, *supra* note 97, at 53, 62. Unlike in the hard sciences, in the social world it does not suffice

> to refer the fact under consideration to other facts or things. I cannot understand a social thing without reducing it to the human activity which has created it and, beyond it, without referring this human activity to the motives out of which it springs. I do not understand a tool without knowing the purpose for which it was designed, a sign or a symbol without knowing what it stands for, an institution if I am unfamiliar with its goals, a work of art if I neglect the intentions of the artist which it realizes . . . .

*Id.* at 60.

[173] *See* 1 MAX WEBER, ECONOMY AND SOCIETY 7 (Guenther Roth & Claus Wittich eds., 1968); WINCH, *supra* note 64, at 117; Kronman, *supra* note 27, at 1051.

that is, the socially acquired and transmitted norms defining the activity at issue.[174] To explain behavior, the researcher must investigate the actor's ideology and whether it is consistent with the desired norm.

(5) *Process of decision.* Whether the role occupant is an individual or collectivity, role occupants' decisions depend in part upon the process by which they decide.[175] For example, an agency in charge of managing national parks that makes resource-allocating decisions after secret negotiations with commercial users of the parks will likely make different decisions than an agency that first holds a public hearing at which private environmental-protection groups testify.

b. *Implementing Agencies and Other Collectivities as Addressees*

Unless implementing agencies perform their assigned tasks, the whole project of legislation fails—indeed, the whole project of the Rule of Law fails.[176] The world around, people complain that "good" laws remain unimplemented, but this characterization seems false. Unless the legislation provides for adequate implementation, it will inevitably fail and cannot be called "good." Good legislation must therefore pay adequate attention to implementing institutions and to conformity-inducing measures.[177] A failure of implementation thus evidences a failure of law-making. An adequate law must therefore induce conforming

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[174] Omar K. Moore & Alan R. Anderson, *Puzzles, Games, and Social Interaction*, *in* PHILOSOPHICAL PROBLEMS OF THE SOCIAL SCIENCES, *supra* note 97, at 68, 73–74 ("[*S*]*elf-consciously acting in accordance with a rule* (or formulating such rule) is one of the fundamental aspects of social interaction, and any experimental studies which neglect this point simply have nothing to do with that topic."); WINCH, *supra* note 64, at 24–33 (suggesting that language itself arises out of rule-driven social behaviors).

[175] *See infra* notes 176–183 and accompanying text.

[176] *See* Robert B. Seidman, *Drafting for the Rule of Law: Maintaining Legality in Developing Countries*, 12 YALE J. INT'L L. 84, 85–86 (1987).

[177] *See* JEFFREY L. PRESSMAN & AARON WILDAVSKY, IMPLEMENTATION: HOW GREAT EXPECTATIONS IN WASHINGTON ARE DASHED IN OAKLAND; OR, WHY IT'S AMAZING THAT FEDERAL PROGRAMS WORK AT ALL, THIS BEING A SAGA OF THE ECONOMIC DEVELOPMENT ADMINISTRATION AS TOLD BY TWO SYMPATHETIC OBSERVERS WHO SEEK TO BUILD MORALS ON A FOUNDATION OF RUINED HOPES 143 (2d ed. 1979) ("We have learned one important lesson from the EDA [Economic Development Administration] experience in Oakland [the subject of the authors' case study]: implementation should not be divorced from policy. There is no point in having good ideas if they cannot be carried out . . . . The great problem, as we understand it, is to make the difficulties of implementation a part of the initial formulation of policy.").

behavior in the implementing agency as well as the primary addressees. The researcher must frequently treat the implementing agency as a role occupant, and explain why it behaves as it does in the face of the rules of law addressed to it.[178] This usually raises the special question of how to explain the behavior of a collectivity—whether an implementing agency or a primary addressee—as a role occupant.

Social problems frequently arise out of the behaviors of collectivities—corporations that pollute, savings and loan institutions that make reckless loans, legislatures that act in undemocratic ways, courts that make unreasoned decisions. Because nearly every implementing agency constitutes a relatively complex organization, the question of explaining the behavior of a collectivity arises whenever the drafter must investigate the behavior of an implementing agency—that is, in almost every case.

We commonly use the metaphor of a single rational actor for a complex organization.[179] Using that metaphor, the drafter purports to explain the organization's behavior by explicating the constraints and resources in the organization's arena of choice. An organization, however, consists of not a single actor, but many. It exists as an organization because of the repetitive interacting patterns of behavior of the individuals who comprise it. That means that to state the social problem involved in collective behavior, the drafter frequently will have to analyze the collectivity to identify the key role occupants. For example, to explain water pollution by a large industrial corporation, the memorandum may have to address not merely the behavior of the corporation as a collectivity, but also the different behaviors of directors, the chief executive officer, foremen, and perhaps even the workmen who actually dump the toxic wastes into the streams. To explain the response of the Environmental Protection Agency to pollution, the drafter will likely have to analyze the behavior of not only the Director, but also office managers,

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[178] An analogous question arises with respect to the proposal for solution. *See infra* note 202 and accompanying text.

[179] GRAHAM T. ALLISON, ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS 32–35 (1971); *see also* Floyd H. Allport, *Logical Complexities of Group Activity*, *in* PHILOSOPHICAL PROBLEMS OF THE SOCIAL SCIENCES, *supra* note 97, at 27. Allport suggests a nice example. We say that a football team failed to complete a pass. Unless we disaggregate the concept of "team" into the eleven actors who compose it, and examine how each player performed when the pass failed, we can never adequately explain why "the team" failed to complete the pass. *See id.* at 28–29.

field inspectors, the lawyers involved, and so forth. In turn, the proposed legislation may have to address each of these sets of behaviors. The organization's decisions result from choices made by all these individuals choosing within the framework of the organization.[180]

Explanations based on the rational actor metaphor usually overlook this fact and therefore misfire. The researcher must ask the ROCCIPI questions about each of the actors in the decision-making system.[181] For example, if courts do not try to punish polluters, the drafter should ask the ROCCIPI questions about all the relevant actors in the judicial system—not only the judges, but also prosecutors, private plaintiffs, and so forth. What rules control the several actors' behaviors? What opportunities, capacities, interests and ideologies do they have in instigating cases and punishing offenders? Has the law been communicated to the relevant actors? And so on.

Collectivities usually constitute relatively complex organizations. The *capacity* of a complex organization to make decisions of a desired sort frequently depends not merely on the capacity of the individuals involved, but also on the structure and processes of the organization. We can capture the problem involved by a simple input-output systems model (Figure 3).[182]

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[180] *See, e.g.*, Sarah Henry, *The Poison Trail: How Environmental Cops Tracked Deadly Wastes Across the Border*, L.A. TIMES, Sept. 23, 1990 (Magazine), at 20; *Why Big Green is Such a Disappointment*, L.A. TIMES, Oct. 29, 1990, at B4.

[181] The results obtained by using ROCCIPI here come very close to those reached by Allison under what he calls "A Governmental (Bureaucratic) Politics Paradigm." *See* ALLISON, *supra* note 179, at 78–96, 162–81. For a completely different set of categories for analyzing institutional change, see MAJONE, *supra* note 15, at 100 (identifying the critical factors as: "(a) the group of actual and potential policy actors; (b) the resources available to them under different institutional arrangements, including (c) the amount and quality of information, skills and expertise available to the various actors; and (d) environmental factors and constraints such as existing policies, societal values, ideologies, public opinion, and cognitive paradigms") (citing Victor P. Goldberg, *Institutional Change and the Quasi-Invisible Hand*, 17 J.L. & ECON. 461 (1974)).

[182] The usual input-output decision-making model purports to explain particular decisions by examination of particular inputs, feedbacks, and how the conversion process worked in that instance. *See, e.g.*, EDGAR F. HUSE & THOMAS G. CUMMINGS, ORGANIZATION DEVELOPMENT AND CHANGE 35–38 (3d ed. 1985). This model was sharply criticized on the grounds that it did not explain "non-decisions," that is, the failure to address issues which never even entered the system. *See* Peter Bachrach & Morton S. Baratz, *Decisions and Nondecisions: An Analytical Framework*, 57 AM. POL. SCI. REV. 632 (1963). The model therefore becomes static, a device to ensure that change never threatens the structures of power. The model in the text aims at avoiding this problem by examining not particular inputs, but the processes and structures that determine the *range* of inputs, feedbacks, and conversion processes, and therefore the *range* of outputs. *See* SEIDMAN, *supra* note 89, at 194.

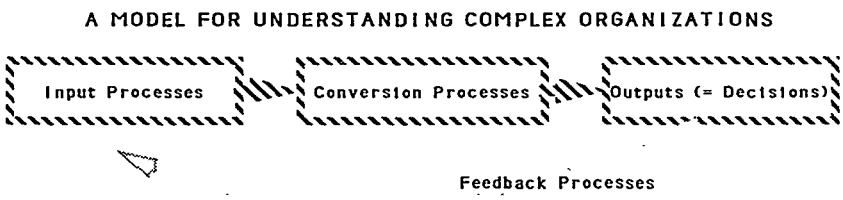


Fig. 3.

This model tells us that the range of decisions of a complex organization results from the sorts of inputs (issues, facts, theories, personnel) that the institution's structure and processes admit into the decision, the sorts of feedbacks they admit (that is, how the institution learns about the consequences of previous decisions), and the conversion processes (how these various elements come together). The drafter must therefore inquire not only about individual decisions, but more generally about the processes that filter inputs and feedbacks, and determine how the conversion processes work.

Processes consist of the behaviors of the role occupants in the various posts of a complex organization.[183] To explain the behavior of collectivities, therefore, the model outlined in Figure 3 suggests an additional set of questions to ask about the various role occupants involved in the organization's processes. That these questions require answers denies the validity of the single rational actor model.

### D. *Summary of Theory*

A theory useful in addressing the ideal element—the substance—of legislation must consist of a guide to investigating

[183] *See* HUSE & CUMMINGS, *supra* note 182, at 36; DANIEL KATZ & ROBERT L. KAHN, THE SOCIAL PSYCHOLOGY OF ORGANIZATIONS 179 (1966) (describing a role as consisting of "one or more recurrent activities . . . which in combination produce the organizational output").

particular social problems that legislation addresses. It includes three elements: methodology, perspectives, and categories. The problem-solving methodology, the use of Grand Theory to guide perspectives, and the categories that I have called Institutionalism can, I argue, best serve that function. These elements also serve to structure the memorandum of law.

## III. The Application of Theory to Justify Legislation: The Memorandum of Law

Decision-making and justifications march together.[184] This Part addresses in more particularity the problems of justifications, thus giving flesh to the theory just proposed. It does so in terms of the problem-solving agenda: identification of the difficulty, causal explanations, proposals for solutions, and implementation and monitoring.

### A. *The Difficulty*

The difficulty never consists of existing legal rules; it *always* consists of some repetitive social behaviors.[185] If a drafter's client asks her to prepare a revision of existing law, that request invariably arises because the existing legislation permits or encourages undesirable behavior (if only due to the difficulty of official and lay role occupants in understanding what the law requires). The existing law always plays a part in explaining existing behavior; it never constitutes part of the social problem itself. The first task of the memorandum consists in identifying precisely *whose* and *what* behavior constitutes the social problem that the legislation aims to remedy.

Such identification, however, reflects not some objective reality, but rather what the researcher carries about in her head. For example, suppose that a researcher must address a problem labeled "teenage pregnancy." The researcher must decide whether the problem consists primarily of the behavior of teenage mothers, or whether she should include the father's behavior in her purview. She must also decide whether she should limit her description of the role occupants to the general category

[184] *See supra* text accompanying notes 11–28.
[185] The rules help to explain the behavior. *See supra* text accompanying note 163.

"teenager," or whether she should further define the role occupant in terms of additional categories (e.g., socio-economic status, ethnicity, or education level). By asking such questions, the researcher "delivers [her] domain assumptions from the dim realm of subsidiary awareness into the clearer realm of focal awareness, where they can be held firmly in view," and thus "brought before the bar of reason or submitted to the test of evidence."[186]

The issues the researcher has selected, the history on which she has focused, and the groups she has identified as benefitting from the proposed legislation require empirical justification. In some cases, the main thrust of the research involves this empirical work, but in most cases such work concentrates around the explanation stage.

### B. *Explanations*

Unless legislation addresses the causes of a problem, it can do no more than poultice symptoms. The causal explanations adopted as warranted therefore suggest the normative outcomes.[187] The second step in the problem-solving methodology consists of identifying explanations of the social problem addressed. This Section first distinguishes between causes and

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[186] GOULDNER, *supra* note 118, at 35.

Recall that the problem-solving methodology implicates discretionary value choices at *every* step, *see supra* text accompanying notes 108–109. By demanding that the drafter address the question of what behaviors of which role occupants constitute the social problem, the drafter largely avoids the failings of the ends-means mode, *see supra* notes 92–98 and accompanying text. Even this may not suffice. The initial labeling of a social problem as, say, "teenage pregnancy" admits of value choice as well; does teenage pregnancy *per se* warrant our concern, or does the resulting increased incidence of high school dropout rates and single-parent families, which in turn may lead to poverty and crime, and so forth? All problems in today's complex, interconnected world simultaneously function as *causes* of other problems. A drafter attempting to follow the problem-solving method by searching rigorously to identify the behaviors that constitute the problem of teenage pregnancy may do so as a step in an ends-means methodology—looking immediately for ways to achieve an end (a lower incidence of teenage pregnancy) prescribed by a superior. Alternatively, the drafter might specify "high school dropout rate" as the difficulty and, in a problem-solving mode, identify teenage pregnancy as one of the causes of that difficulty. *Cf. supra* note 98 (noting that identification of a "generalized end" can effectively transform ends-means methodology into problem-solving). The drafter, after all, must begin *somewhere*—even with a problem label supplied by a hierarchical superior—but must also justify *all* her choices, including her point of departure, in the language of practical reason or Grand Theory.

[187] "[A]ll descriptive concepts, once they are used to organize reality and guide behavior, become normative . . . ." Chris Argyris, *Some Limits of Rational Man Organizational Theory*, 33 PUB. ADMIN. REV. 265 (1973).

conditions in an explanation; second, it explicates in more detail what constitutes an adequate explanation; and, finally, it discusses the problem of empirical falsification of explanations.

### 1. Causes and Conditions

On casual inspection, some of the constraints in the role occupants' social and physical milieu will seem plainly beyond the reach of legislative solution. (Call these "conditions.") Other constraints seem at least conceivably susceptible to legislative intervention. (Call these "causes.") To write efficacious legislation, the researcher must identify both causes and conditions. She identifies causes because these her legislation might change. She identifies conditions in order to devise solutions that work around them.

The classification of constraints and resources as causes and conditions appears to be a factual issue. Appearances deceive. Whether a set of facts constitutes a condition or a cause is a normative judgment. For example, suppose that a drafter must devise a legislative solution for the problem of low agricultural productivity in a particular region. If one asked a geographer the explanation for that problem, the geographer might well respond that the cause lay in the area's excessive aridity. It is likely, however, that the researcher looking for a legislative solution would take aridity as a condition, not a cause. She would treat it, therefore, as something about which a drafter can do nothing.

This decision constitutes a normative, not a technical, judgment. No doubt, if the will to do so existed, the State could change the region's aridity, by irrigation, or by digging deep wells, or perhaps even by chemically seeding clouds to cause rainfall. The example teaches us to take care lest we treat as a technical issue what in fact constitutes a preliminary policy decision. Conditions as well as causes help explain behavior; both require elucidation.

### 2. Adequate Explanations[188]

The memorandum explicates causes by proposing alternative explanations and then putting them to empirical test. This Sub-

[188] Sociologists and philosophers of science have advanced many more criteria for an

section addresses three criteria for adequate explanations: logical structure; falsifiability; and derivation from among a broad range of sources.

a. *The Logical Structure of an Explanation*

Practical reason rests on experience *and* reason. An explanation must meet both criteria; it must have a logical form, and it must have a grounding in experience. To meet the former requirement, an explanation must meet two criteria. First, it must consist of a general proposition that subsumes the facts of the particular case.[189] (This conforms to theory's heuristic function.) Second, that general proposition must fit into a coherent structure relating to the field at issue. Explanations that merely recite a sequence of historical events, or that merely state in general terms what happened in a particular instance, do not explicate the theoretical blinders that directed the researcher to these and not to other data.

Moreover, an explanation cannot logically implicate a cause by stating the *absence* of the proposed solution. It makes no sense, for example, to say that inflation has as its cause the lack of control over the money supply. The cause consists in the activities of various money managers that expanded the money supply. Improved control over the money supply constitutes a proposal for solution. To state the absence of a proposed solution as a cause transforms problem-solving into an ends-means methodology.

b. *Falsifiability*

When push comes to shove, a justification must ultimately rest upon data. An "explanation" that one cannot in principle put to such a test—that is, that in principle could not be falsified—does not count as an explanation. This frequently bedevils "explanations" that rest on subjective values and attitudes.[190]

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adequate explanation than suggested here. *See, e.g.*, PETER ACHINSTEIN, THE NATURE OF EXPLANATION (1983); CONTEMPORARY SCIENCE AND NATURAL EXPLANATION: COMMONSENSE CONCEPTS OF CAUSALITY (Denis J. Hilton ed., 1988); JOHAN GALTUNG, THEORY AND METHODS OF SOCIAL RESEARCH (1967); CARL G. HEMPEL, ASPECTS OF SCIENTIFIC EXPLANATION (1965). In my experience, the criteria mentioned in the text seem most to concern drafters.

[189] HEMPEL, *supra* note 188, at 246.

[190] *See supra* text accompanying note 148.

c. *Sources of Alternative Explanations*

Whence does the drafter derive the alternative explanations that she throws out for testing? As we have seen, guiding those discretionary choices constitutes the principal function of Grand Theory.[191] In thinking about explanations, therefore, it seems a wise course for a drafter to consider the sorts of explanations that all the relevant Grand Theories might suggest. For example, if considering a question of criminal behavior, she might want to examine the several different explanations that alternative criminological Grand Theories might suggest (for example, anomie theory,[192] Marxist criminology,[193] and differential association theory[194]).

### 3. Falsifying Proposed Explanations

The first stage of generating an explanation consists of proposing hypotheses defining its causes. But these hypotheses constitute only the preliminary step. The second step consists of trying to find data to winnow out those hypotheses that do not hold.[195]

As Karl Popper has shown, falsification and verification bear a logical asymmetry.[196] No matter how many times I boil water at 100 degrees centigrade at sea level in an open pot, I do not warrant the proposition that water always boils at 100 degrees centigrade, as a single experiment with boiling water at 5000 feet altitude will demonstrate. A researcher warrants her explanations by her assurance to the reader that she has searched conscientiously for falsifying data, but has found none; the most

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[191] Popper argues from science's point of view, it does not matter whence one derives her hypotheses; that is a private matter. Only the question, "How did you test your theory?" has scientific relevance. Karl R. Popper, *The Unity of Method in the Natural and Social Sciences*, *in* PHILOSOPHICAL PROBLEMS OF THE SOCIAL SCIENCES, *supra* note 97, at 32, 36. That may hold for hard sciences. But because the proposal for solution—here, the proposed legislation—depends on the explanations that survive the testing phase, the range of explanations proposed for testing becomes critical in the development of policy. In justifying legislation, the source of the alternative hypotheses proposed constitutes a public, not a private matter.

[192] *See* ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE 131–60 (rev. & enlarged ed., 1957).

[193] *See, e.g.*, RICHARD QUINNEY, CRITIQUE OF THE LEGAL ORDER (1974); William J. Chambliss, *Vice, Corruption, Bureaucracy, and Power*, 1971 WIS. L. REV. 1150.

[194] *See* EDWIN H. SUTHERLAND, WHITE COLLAR CRIME (1949).

[195] Popper, *supra* note 191, at 35.

[196] POPPER, *supra* note 36, at 41.

that she can do with verifying evidence is to offer anecdotes or perhaps evidence of probabilities.

The falsification principle implies that the drafter must conscientiously look for facts that *prove her hypotheses wrong*, not merely facts that prove them correct.[197] A drafter must assure her client that she has searched for contrary data, but could not find any.[198]

The falsification principle explains why in social science it is typically the case study and not survey data that provides the evidence that refutes contrary hypotheses. For practical reasons, it becomes impossible to provide a truly random sample of many of the sorts of entities that occupy the policy sciences. Who would ever have the resources to do a meaningful empirical study of forty different police departments to test an hypothesis relating type of structure to discrimination against blacks, for example? On the other hand, every case study of particular departmental practices opens the possibility of falsification, and leads to richer, more detailed hypotheses.[199]

### C. *The Proposed Legislation as a Solution*

Having identified and explained the behavior that constitutes the social problem, the memorandum must then demonstrate how the proposed legislation will provide the most efficient solution. The memorandum must first describe alternative possible solutions; second, it must describe the proposed legislation, and show how it addresses the causes earlier explicated; third, it must demonstrate how the proposed legislation will induce the behavior it prescribes; and, finally, it must include a cost-benefit analysis of the proposed legislation.

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[197] *Id.* at 33.

[198] Most graduate courses on methodology in the social sciences consist mainly of detailed instructions for collecting data and determining whether it falsifies the hypothesis at issue. *See, e.g.*, WILLIAM J. GOODE & PAUL K. HATT, METHODS IN SOCIAL RESEARCH (1952). *But see* GALTUNG, *supra* note 188; MATILDA WHITE RILEY, SOCIOLOGICAL RESEARCH (1963).

[199] Applied to normative propositions, the falsifiability theorem implies that we cannot learn from success, but only from failure: "Experience . . . inevitably involves many disappointments of one's expectations and only thus is experience acquired." GADAMER, *supra* note 57, at 356.

1. Alternative Possible Solutions

The drafter can develop alternative possible solutions from many sources, including history, comparative law, scholarly writing, the claims of interested parties, or theory. This Subsection considers two of the more useful sources: history and comparative law.

a. *History*

We learn through experience. The problem that proposed legislation addresses rarely arose yesterday, like Athena, fully dressed and fully grown at birth. As a society, more frequently than not, we have addressed the same problem before, and tried other solutions for it. History provides a source for learning from experience, about what has worked, and what has not, and why. For example, landowners have polluted for many decades, and states everywhere have tried to deal with that problem. A review of that history may help reveal what works, what does not work, and why.

b. *Comparative Law*

No law works the same in one place as another, for the arena of choice of its addressees in one place will never precisely duplicate the arena of choice elsewhere.[200] We can, however, learn from the experience of other states and countries that have addressed analogous problems—another way of learning from experience. A discussion of other jurisdictions' efforts to solve the problems will almost always turn up interesting material.

A mere description of the black-letter texts of foreign laws dealing with similar subject-matter never suffices. For all one knows, those laws fail in their countries of origin, and properly should serve as examples of what *not* to do.[201] One must try to learn how the foreign laws work in their own milieu.

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[200] SEIDMAN, *supra* note 89, at 34 (the "Law of Non-Transferability of Law"); *cf.* BENTHAM, *supra* note 25, at 44 ("[T]he same verbal law would not be the same real law, if the sensibility of the two nations was essentially different . . . .").

[201] For example, China is presently drafting a banking law. Considering the recent record of the United States with respect to savings and loan institutions, should Chinese drafters even dream of trying to copy United States banking law?

Having described and discussed these (and other) alternative possible solutions and the merits or faults that the drafter finds in them, the memorandum should then address the drafter's preferred solution. What criteria determine the adequacy of that solution and of her justification for it?

### 2. The Criteria of an Adequate Solution

Three criteria determine the adequacy of the justification of a solution, and therefore of the solution itself: its fit with the explanations advanced; its probable effectiveness in channelling the role occupants' behaviors as prescribed; and its cost-effectiveness.

#### a. *Does the Solution Address the Explanation*

Unless a solution addresses the causes earlier explicated, it does not reach the roots of the problem. This section of the memorandum describes the bill, and shows how its prescriptions address the causes defined in the explanations section. It must do so in some detail, discussing each significant provision, and explaining the reason for its inclusion.

#### b. *Effectiveness*

Unless legislation induces the behavior it prescribes or facilitates, it remains a paper tiger. To support her bill, the drafter must persuade the reader that the bill will induce the prescribed behavior, or rather, that the legislation would be a feasible intervention with a high probability of inducing the prescribed behavior. To demonstrate this, the drafter can invoke the same categories that she used to explain existing behavior in face of laws, that is, the factors bearing on individual behavior identified by ROCCIPI, the nature of the proposed implementing agency, and the impact of the proposed conformity-inducing measures.[202]

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[202] Some authors suppose that there exists a list of factors that make a law unfeasible. *See, e.g.*, Anton, *supra* note 59 (suggesting that laws will not succeed that defy the physical laws of nature; that introduce contradictions and complexities in the legal order; to which the legislature gives inadequate financial support; that fail to communicate their content to the affected populace; or whose sanctions have only limited effectiveness); *cf.* JONES, *supra* note 161, at 15–35 (identifying five patterns of inefficacy of law: failures "of communication"; "to enlist supportive action"; "to forestall avoid-

(1) *ROCCIPI.* The ROCCIPI categories purport to direct attention to data that are likely to explain why people behave as they do in the face of a rule of law. The categories also serve to help predict how people will probably behave in the face of a new rule of law, and to direct the search for data to support those predictions. The drafter should justify her proposed bill in terms of those categories.

(2) *The proposed implementing agency.* The choice of implementing agency raises a number of issues: What sort of an agency? Should it be an existing or a new agency? What are sources of input and feedback connected with a particular agency, and by what process will it convert these into decisions? And finally, what discretion will it have, and how will this be controlled?

What sort of an implementing agency is appropriate? In general, only five sorts of implementing agencies exist: courts, nonjudicial tribunals, departments/administrative agencies, public corporations, and private businesses that will contract to perform the implementation. The memorandum should include a brief justification of the agency choice.

Should it be an existing or a new implementing agency? Existing institutions come complete with personnel and procedures. They may or may not meet the precise demands of the new legislation. On the other hand, the start-up costs of the new program loom greater when a new agency must be created to implement it. The memorandum should justify the choice made.

What will be the input and feedback processes? Decisions depend in part upon who supplies inputs and feedbacks—data, theories, issues and personnel—to the decision-makers. For implementing agencies to produce decisions appropriate to the

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ance"; "of enforcement and of obligation"); Allot, *supra* note 3, at 235. Allot writes that the

> effectiveness of a law . . . is measured by the degree of compliance; in so far as the law is *preventive, i.e.*, designed to discourage behavior which is disapproved of, one can see if that behavior is indeed diminished or absent. In so far as a law is *curative, i.e.*, operating *ex post facto* to rectify some failing or dispute, we can see how far it serves to achieve these ends. In so far as a law is *facilitative, i.e.*, providing formal recognition, regulation and protection for an institution of the law, such as marriage or contracts, presumably the measure of its effectiveness is the extent to which the facilities are in fact taken up by those eligible to do so and the extent to which the institution so regulated is in fact insulated against attack.

*Id.*

legislation, the bill must ensure that appropriate inputs and feedbacks enter their decision-making processes. Because the process of practical reason requires dialogue, the decision of who may engage in this dialogue has power implications. In practice, that question generally finds an answer in terms of who may supply inputs and feedbacks to the decision-makers.[203]

How does a given agency convert input and feedback into decisions? Conversion processes comprise the procedures and structures that take inputs and feedbacks and process them into a decision. Obviously, the sorts of conversion processes used helps determine the range of decisions generated. A requirement that a decision have unanimous support from a multi-member agency will likely lead to different outcomes than one that permits decision by a bare majority vote. A requirement that the decision-makers prepare a written statement of reasons for decision will also lead to different results than a decision-making process that permits decision-makers to decide without justification.

How much discretion should the agency have and how will it be controlled?[204] Discretion carries with it the potential for abuse.[205] Without discretion, however, the agency cannot experiment to find an appropriate solution to the problem it must address. Where appropriate, the memorandum should address the question of discretion and its control.

(3) *Conformity-inducing measures*.[206] The specific technique of the law in channelling behavior consists in the application of

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[203] Seidman, *supra* note 176, at 108–10.

[204] A vast literature exists on this subject. *See, e.g.*, KENNETH C. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969); JOEL F. HANDLER, THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY (1968); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); William H. Simon, *Legality, Bureaucracy and Class in the Welfare System*, 92 YALE L.J. 1198 (1983).

[205] Some writers have used the words "transitive" (that is, having broad discretion and a relatively unfocused mission) and "intransitive" (that is, having confined discretion and a relatively focused mission) to indicate the different functions of implementing agencies. *See supra* note 72; Diver, *supra* note 204. In practice, of course, neither completely transitive nor completely intransitive statutes frequently appear. Practically every statute requires the implementing agency to engage in some interpretative activity, and even when the statute leans towards the intransitive end of the continuum, it indicates to the agency the purposes for which it granted the power. The question becomes, whether the legislature—in a democracy, the ultimate source of legitimate and authoritative policy initiatives—has sufficiently indicated to the agency what it requires.

[206] *See generally* SEIDMAN, *supra* note 89, at 146–59.

conformity-inducing measures by implementing agencies. Whether a proposed solution will accomplish its purposes depends in large part upon its selection of those measures.

For historical reasons, lawyers tend to use the word "sanctions" to denote such measures. Traditionally, sanctions meant punishments applied directly to the role occupant following her breach of the law.[207] That limits conformity-inducing measures to measures addressed directly to the role occupant, and affecting only the Interest component of the factors included in the ROCCIPI analysis. Since behavior by role occupants can find an explanation in terms of the other factors included in ROCCIPI, however, the appropriate measure to induce conformity will only occasionally address solely the Interest component. The word "sanctions" obscures the necessary range of measures that a drafter must consider.[208] We can categorize these as *direct* measures, which include punishments and rewards addressed to the role occupant;[209] *roundabout measures*, in which the drafter seeks to change the behavior of some other actors in order to change the opportunity, capacity, interest or procedural factors in the role occupant's arena of choice; and *educational measures*, addressed to the factors subsumed under the category of Ideology.

The rather clumsy phrase "conformity-inducing measures" seems better adapted than "sanctions" to the problems faced by a drafter. She must find a measure to address every explanation for the behavior that constitutes the social problem at issue. For example, she may invoke direct punishment, such as criminal sanctions and civil damages. She may use direct rewards, such as price supports for agricultural products, or tax incentives for investment in depressed areas. She may use roundabout measures, frequently creating or changing an institution, such as creating an agricultural bank to provide credit for farmers, or,

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[207] WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 56 (1765) ("With regard to the *sanction* of laws, or the evil that may attend the breach of public duties;[sic] it is observed that human legislators have for the most part chosen to make the sanction of their laws . . . to consist rather in punishments than in . . . rewards"); BENTHAM, *supra* note 25, at 60 ("Legislation can have no direct influence upon the conduct of men, except by punishments.").

[208] *Cf.* RICHARD ARENS & HAROLD D. LASSWELL, IN DEFENSE OF PUBLIC ORDER: THE EMERGING FIELD OF SANCTION LAW (Greenwood Press 1985) (1961). The authors found themselves in constant difficulty because of the punishment-orientation of the word "sanction"; in fact, they address the whole range of conformity-inducing measures.

[209] *See generally* POLICY IMPLEMENTATION: PENALTIES OR INCENTIVES (John Brigham & Don W. Brown eds., 1980).

creating a school of mining engineering in the State university to increase mining productivity. To meet problems of ideology, governments frequently run educational or propaganda campaigns ("Just Say No!").[210] The technique of the law involves much more than mere punishments.[211]

When the role occupant is an official or a government agency, and the rules at issue mainly empower the agency to devise and run a discretionary program, roundabout measures usually constitute the only possible devices that a drafter can devise to change behavior. As we have seen, in principle, such a rule does not differ from a rule prescribing behavior by a lay role occupant.[212] In both cases, the legislature proposes to induce prescribed behavior by the role occupant. In practice, however, it becomes all but impossible for the legislature to use direct measures (punishments or rewards) to coerce officials. Usually, the only direct measures available constitute no more than the vague threat of loss of a job if the agency official does not perform as the law-making authorities expected—not much of a threat in any event, and even less significant when the official has civil service protection.[213]

The problems of designing adequate conformity-inducing measures for power-conferring bills, and of selecting institutions to implement those measures, lie at the heart of the problem of accountability.[214] To induce prescribed official behavior, these

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[210] The very existence of a law may have some effect on changing ideology. *See* Underhill Moore & Charles C. Callahan, *Law and Learning Theory: A Study in Legal Control*, 53 YALE L.J. 1 (1943); Richard Schwartz, *A Learning Theory of Law*, 41 S. CAL. L. REV. 548, 558–63; Evan, *supra* note 161, at 285.

[211] *See* Robert S. Summers, *The Technique Element in Law*, 59 CAL. L. REV. 733 (1971). Cranston, *supra* note 5, at 875, contains a useful discussion of different conformity-inducing measures to control business activity, and their different strengths and weaknesses (for example, broad statutory standards; administrative regulation, including compelled disclosure of information, imposition of detailed standards, and control of trade practices; and licensing). *See also* DAVIES, *supra* note 4, at 95–109.

[212] *See supra* text accompanying note 141.

[213] It took a $300 *billion* loss for the sanction of discharge to reach M. Danny Wall, the head of the Savings & Loan Board, who presided over the savings and loan catastrophe. *See Community Standards*, WALL ST. J., Dec. 6, 1989, at A14.

[214] Many writers have addressed the perceived insufficiency of courts to carry out these functions in most cases. *See, e.g.*, Henry J. Abraham, *The Need for an Ombudsman in the United States*, *in* THE OMBUDSMAN: CITIZEN'S DEFENDER (Donald C. Rowat ed., 1968) 234, 235; Ralph Nader, *Ombudsmen for State Governments*, *in* THE OMBUDSMAN: CITIZEN'S DEFENDER (Donald C. Rowat ed., 1968) at 240, 243 ("The courts, as presently constituted and under the well-established judicial acceptance of a limited reviewing function over administrative behavior, cannot be considered as a practical source of remedies [for complainants] except in the more egregiously abusive acts."). Many suggest alternative control institutions, *see* THE OMBUDSMAN: CITIZEN'S DEFENDER (Donald C. Rowat ed., 1968), *passim*; WALTER GELLHORN, OMBUDSMEN AND

bills usually invoke roundabout measures, for example, the creation of a new governmental agency, or changes in the processes or structures of existing ones.[215] For example, when, because of the contradiction between its primary mission of encouraging increased mineral production and its responsibility to implement mine health and safety legislation, the Department of the Interior did not adequately enforce safety and health regulations, Congress did not impose a punitive sanction on the Department. Instead, it prescribed an institutional change: it transferred to the Labor Department responsibility to enforce the health and safety legislation.[216]

The drafter must justify why she chose certain measures and not others. This implicates in part the last of the three criteria of an adequate solution: cost-effectiveness.

c. *Cost-effectiveness*

As well as addressing the causes identified in the explanations, and giving promise of effectiveness, legislation must economize.[217] The cost-benefit analysis serves all three criteria. The drafter must make an estimate of the costs and benefits of the new law, whether or not easily quantified, and including the costs and benefits to various social groupings and to govern-

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OTHERS: CITIZENS' PROTECTORS IN NINE COUNTRIES (1966), or increased control from below by increased participation in governmental processes. *See* Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980); Karl T. Hudson-Phillips, *A Case for Greater Public Participation in the Legislative Process*, STAT. L. REV. 76 (1987); Sunstein, *Republican Revival*, *supra* note 12, at 1544; *see generally* Seidman, *supra* note 176, at 85.

[215] The Organizational Development ("OD") literature canvasses these issues extensively. *See, e.g.*, RICHARD BECKHARD, ORGANIZATIONAL DEVELOPMENT: STRATEGIES AND MODELS (1969); WARREN G. BENNIS, ORGANIZATIONAL DEVELOPMENT: ITS NATURE, ORIGINS AND PROSPECTS (1969); PAUL R. LAWRENCE & JAY W. LORSCH, DEVELOPING ORGANIZATIONS: DIAGNOSIS AND ACTION (1969).

[216] 30 U.S.C. §§ 801–960 (1969); *see* Hardesty, *supra* note 133.

[217] The Law and Economics literature contains much of the most sophisticated discussions of cost-benefit analysis. *See, e.g.*, Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Programs: A Critique*, 33 STAN. L. REV. 387 (1981); Richard S. Markovits, *A Basic Structure for Microeconomic Policy Analysis in our Worst than Second Best World: A Proposal and Related Critique of the Chicago Approach to the Study of Law and Economics*, 1975 WIS. L. REV. 950; Richard S. Markovits, *The Causes and Policy Significance of Pareto Resource Misallocation: A Checklist for Micro-Economic Policy Analysis*, 28 STAN. L. REV. 1 (1975); *see generally* JAMES T. CAMPON, BENEFIT COST AND BEYOND: THE POLITICAL ECONOMY OF BENEFIT-COST ANALYSIS (1986); Arnold M. Rose, *Sociological Factors in the Effectiveness of Projected Legal Remedies*, 11 J. LEG. ED. 470 (1959) (stating that the effectiveness of a law may be predicted in part by measuring the benefits conferred by a proposed rule against disadvantages associated with its enforcement); Anton, *supra* note 59, at 244–45.

ment. In short, she should identify winners and losers.[218] She should compare that estimate with the costs and benefits of doing nothing, and with the costs and benefits of the leading alternative candidate solutions.

How much will the new program cost in budgetary terms? A new task imposed on an existing agency adds to the cost of running the agency (or court). The memorandum ought to consider both capital costs and running expenses of the proposed program.

Budgetary costs and benefits do not exhaust the costs and benefits of a program, however. A drafter should also take care every time she proposes creating a new bureaucratic structure. Whatever the monetary costs of a new bureaucracy, the very creation of more bureaucracies makes some people shudder. The bill may demand it, but surely the memorandum must justify it. Second, the logical consistency of a legal order has some value. A new law that violates the internal consistency of the system creates a cost by its very inconsistency.[219] Finally, the drafter should consider the costs and benefits of the proposed legislation as they affect various groups in the civil society, for example, environmental costs or detriments to human rights. In a conflict society, ineluctably containing contradictory and conflicting interests, any proposition prescribing behavior ineluctably favors some and disadvantage others. Even a law changing driving from the right-hand side to the left-hand side of the road disadvantages those who now own automobiles.[220] A memorandum ought to consider who gets hurt and who reaps the benefits.[221]

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[218] *Cf.* Anton, *supra* note 59, at 242.

> In Bills presented to the United Kingdom Parliament, there is always attached an "Explanatory and Financial Memorandum" which explains the financial effects of the Bill upon the public purse. This Memorandum, however, will totally ignore the financial and manpower implications of the proposed legislation for commerce and industry, and for society as a whole. The financial implications for commerce may be burdensome and the manpower implications, particularly for higher management, extremely serious.

*Id.*

[219] KARL MARX, SELECTED WORKS OF KARL MARX AND FRIEDRICH ENGELS IN ONE VOLUME 686 (1968), *cited in* Anton, note 59, at 238–39 ("The law must . . . be an *internally coherent* expression which does not, owing to inner contradictions, reduce itself to naught.").

[220] It is said that when Sweden changed from driving on the left to driving on the right-hand side of the road, it set up a fund to compensate present owners of right-hand-drive vehicles.

[221] It seems likely that the Tian'anmen Square demonstrations of June 1989, which triggered massive repressions by the Chinese authorities, had their origins in a decade

Taking feasibility considerations and non-obvious constraints into account frequently leads to legislation that superficially seems at best a second-best solution.[222] Unless the memorandum describes these constraints, it cannot persuade the reader of the appropriateness of the proposed legislation.

The drafter should also be attuned to a solution's consequences for the law. An existing law always has a constituency that uses it—lawyers, judges, bureaucrats, businessmen, and so forth. Whatever its deficiencies, to change any requires those actors to learn the new law. That constitutes a cost that should enter the calculation.

Finally, sometimes no proposal for solution will really improve the situation very much.[223] In that case, a drafter may want to consider an incrementalist solution,[224] or select the "status quo alternative" by doing nothing at all.

### D. *Implementation and Monitoring*

The last step of the problem-solving methodology consists of implementing and monitoring the new legislation. Because of the falsification principle, we hold even our knowledge about the physical world tentatively; nothing has the assurance of permanent truth.[225] Life constantly generates new evidence, some of which will necessarily falsify the truths we yesterday held most dearly. We learn from experience.

In the social world, the implementation of our plans constantly generates new data that test every moment in the problem-solving process.[226] If the bridge falls down, that catastrophe calls into question its construction, its design, its engineering, and even the theories of physics and mechanics that under-

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of reform legislation that had a great many unidentified losers. These individuals expressed their resentment in the demonstrations, using as a rallying call the code-word "democracy." *See* Robert B. Seidman & Ann Seidman, What Happened in China? (Nov. 8, 1989) (paper delivered at Union of Radical Political Economists annual conference (1989), on file with the *Harvard Journal on Legislation*); *cf.* WILLIAM HINTON, THE GREAT REVERSAL: THE PRIVATIZATION OF CHINA 1978–1989 (1990).

[222] MAJONE, *supra* note 15, at 75.

[223] *Cf.* Anton, *supra* note 59, at 246.

[224] *See supra* notes 99–104 and accompanying text.

[225] *See* MAGEE, *supra* note 1, at 24 ("Popper's notion of 'the truth' is very like this: our concern in the pursuit of knowledge is to get closer and closer to the truth, and we may even know that we have made an advance, but we can never know if we have reached our goal.").

[226] DEWEY, *supra* note 17, at 346.

pinned its engineering. A law that fails to resolve the social problem it addresses similarly calls into question every step in the problem-solving agenda that resulted in the bill's enactment.

Every social intervention, including all legislation, necessarily generates new data; each constitutes an experiment. Unless we monitor a law, we never learn whether the explanations and solutions adopted serve to induce behavior apt to resolve the original difficulty.[227] Unless we so learn, not only can we never improve particular legislation, but we can never use that experience in an organized way to improve our general knowledge of how legislation works, and how to write better statutes.

From the implementation and monitoring of legislation we also test the discretionary value choices made in the course of the research. If the legislation does not work, it forces the researcher to ask whether she made appropriate discretionary choices along the way, including even whether she addressed the appropriate difficulty in the first place.

All legislation should therefore contain provisions so as to make periodic assessment of its performance likely. These can take a variety of forms: reports to the legislature by an administrative agency; a "sunset clause"; a special commission to assess the legislation after a specified period of time; and so

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[227] An extensive literature has developed concerning implementation. *See, e.g.*, EUGENE BARDACH, THE IMPLEMENTATIONS GAME: WHAT HAPPENS AFTER A BILL BECOMES A LAW (1977); PRESSMAN & WILDAVSKY, *supra* note 177, at 143. For studies on Third World implementation, see POLICY IMPLEMENTATION IN POST-MAO CHINA (David M. Lampton ed., 1987); POLITICS AND POLICY IMPLEMENTATION IN THE THIRD WORLD (Merilee S. Grindle ed., 1980); and WHITE, *supra* note 28. Surprisingly few studies on implementation have appeared in the past decade. The implementation literature, however, produced relatively little theory. BARDACH, *supra* this note, at 55, contains long lists of heuristic propositions, each generalizing from some instance that Bardach discovered in his wide researches, but with little coherence.

Grindle writes that policy implementation depends upon the substance of the policy, and its context. She identifies several substantive aspects of policy: the extent of opposition scratched up; the degree of behavior change prescribed; the geographical extent of required implementation; who is charged with executing the programs; and the form in which the agency states policy goals. Other variables affect the context of policy: the various bureaucratic actors and their interests; bargaining with various interested groups; a proper balance between making bureaucracy responsive to the needs of clients, and maintaining control over the distribution of resources; the extent of decentralization, which may defeat central government policy; and the structure of political institutions and the type of regime within which the implementation takes place. Merilee S. Grindle, *Policy Content and Context in Implementation*, *in* POLITICS AND POLICY IMPLEMENTATION IN THE THIRD WORLD, *supra* this note, at 3–22; *cf.* Tomasic, *supra* note 2, at 97 ("[I]t is virtually impossible to evolve a single general theory of the implementation process in view of what Bardach has described as 'the fragmentary and disjunctive nature of the real world.'").

forth. The memorandum should describe the monitoring device employed, and justify its use.

## IV. Conclusion

A theory concerning the ideal element in legislation—its substance in terms of "the public interest"—serves the same function as a checklist defining what ought to go into a memorandum supporting proposed legislation. Both serve to guide investigations into specific social problems, looking ultimately to the development of an appropriate solution. To fulfill that function, theory serves as a criterion of relevance in the search for data into specific social problems. Theory's three elements—methodology, perspectives, and categories—contribute to that function. Resting upon a problem-solving methodology, the theory proposed here aims at providing a guide to discovering answers to questions concerning the relationship between the legal order and behavior. It holds that value choice takes place when the researcher makes the discretionary choices required by that methodology, and argues that by employing Grand Theory as a guide, in principle the researcher can gain intellectual control over such choices. It puts forward the categories defined by the ROCCIPI mnemonic, and suggests some specific issues in connection with writing legislative memoranda.

Legal scholarship in this country (and many others) seems myopically fixated on the judicial role. Legislation, however, has long since superceded court decisions as a primary source of new initiatives in the legal order. Legal scholars may have avoided discussing legislation and theories about either its process or its substance because they failed to perceive any actor amenable to their sort of reasoned discourse. In fact, legislative drafters constitute key players in the process. Usually lawyers, they seem as receptive as other legal actors to the sorts of arguments and theoretical discussions that make up the grist of legal scholar's mill. Addressing the legislative drafter, this Article suggests a start towards a theory of the ideal element in legislation.

Legislation always operates in the future. Humankind, however, does not stand on a high peak in Darien, looking out over the future as Keats' sonnet tells us Balboa did over the broad Pacific. The human condition forces us to sail into the future

with our gaze fixed on the past, plotting our course not on charts that detail the shoals and ledges of the seas ahead, but on the only charts mankind possesses—and they depict only the seas astern. Theory teaches us both how to map the waters already under the counter, and how to plot a course through those uncharted waters before the bows.

The key to the neo-republican project lies in ensuring that not private interest but practical reason underpins legislation. Practical reason requires not only appropriate institutions,[228] but also an appropriate decision-making theory. The key to that theory lies in Xenophanes' caution that while we never know absolute truth, we can over time learn better.[229] We must therefore through experiment and trial seek to improve knowledge, practice—and theory. Without theory to guide the search, we will likely discover only trivia. To succeed, theory must build into its prescriptions for practice that cautious, tentative, experimental mode that holds all knowledge—whether practical, empirical, or theoretical—tentatively.

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[228] *See* Sunstein, *Interest Groups*, *supra* note 12, at 68.

[229] *See supra* text accompanying note 1.

# ARTICLE

# WHY CONGRESS SHOULD REPEAL THE FEDERAL EMPLOYERS' LIABILITY ACT OF 1908

THOMAS E. BAKER*

*The Federal Employers' Liability Act of 1908 establishes a fault-based system of recovery for railroad employees suffering workplace injuries. The FELA requires that injured workers show that their injuries are attributable, in whole or in part, to the negligence of officers, agents, or employees of the railroad in order to be compensated.*

*Professor Baker examines the current system under the FELA and argues that the societal, industrial, and legal environments that warranted the FELA's enactment in 1908 do not justify the statute's continued existence today. He argues that the FELA fails when measured against the contemporary public policy criteria of encouraging safety, assuring just compensation and rehabilitation, providing administrative efficiency, and pursuing sound transportation policy. Finally, the author concludes that the FELA should be repealed and that railway employees' claims should be subsumed under state workers' compensation statutes.*

This Article explains why Congress should repeal the Federal Employers' Liability Act of 1908 ("FELA"), the liability system for injured railroad workers.[1] Whatever else might be said about the merits of this proposal, the timing appears propitious. In 1988, the Senate subcommittee charged with overseeing Amtrak entertained the possibility of a three-year experiment to transfer Amtrak employees' injury claims to the various state workers' compensation laws.[2] In late 1989, a House of Representatives

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[1] Pub. L. No. 60-100, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. §§ 51–60 (1988)).

[2] *See FELA in Relation to Amtrak: Hearing Before the Senate Subcommittee on Surface Transportation of the Committee on Commerce, Science, and Transportation*, 100th Cong., 2d Sess. (1988) [hereinafter *Senate Hearing*]. Bills were introduced, but nothing came of them. *See, e.g.*, S. 2320, 100th Cong., 2d Sess., 134 CONG. REC. S4695 (1988).

subcommittee held the first FELA oversight hearings in fifty years.[3] Bills were introduced in both houses of the 101st Congress to repeal the FELA.[4] The United States Secretary of Transportation has called for the repeal of the FELA in a comprehensive 1990 report on national transportation policy.[5] It is likely that the current administration will go forward again this year with a proposed bill to repeal the FELA.[6] It is apparent that transportation policymakers have focused as of late on the need to repeal the FELA. My goal is to encourage policymakers to continue their examination of the existing FELA system in order to maintain momentum toward reform.

## I. BACKGROUND

In order to understand my recommendation in the proper context, I will provide a brief background of the FELA. I will then explain the recommendation of the Federal Courts Study Committee regarding the FELA, which is the point of departure for this Article. Previous efforts at reforming the FELA are also instructive.

### A. *The Federal Employers' Liability Act of 1908*[7]

The FELA enables railroad employees to recover damages for any injury incurred in interstate commerce "resulting in

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[3] *Federal Employers' Liability Act: Hearing Before the House of Representatives Subcommittee on Transportation and Hazardous Materials of the Committee on Energy and Commerce*, 101st Cong., 1st Sess. (1989) [hereinafter *House Hearing*].

[4] H.R. 5853, 101st Cong., 1st Sess., 136 CONG. REC. E3301 (1990) (introduced by Rep. Robert W. Whittaker, R-Kan.); S. 3214, 101st Cong., 1st Sess., 136 CONG. REC. S15,558 (1990) (introduced by Sen. Robert W. Kasten, Jr., R-Wis.).

[5] U.S. DEP'T OF TRANSP., MOVING AMERICA—NEW DIRECTIONS, NEW OPPORTUNITIES, A STATEMENT OF NATIONAL TRANSPORTATION POLICY STRATEGIES FOR ACTION 70, 120 (1990) [hereinafter NATIONAL TRANSPORTATION POLICY]. *See also* 136 CONG. REC. S17,296 (daily ed. Oct. 26, 1990) (transmitting a Department of Transportation draft of proposed legislation to repeal the FELA).

[6] Council for Court Excellence, Discussion Group: FELA Repeal 87 (May 20, 1991) (on file with the *Harvard Journal on Legislation*) [hereinafter Discussion Group] (remarks of Thomas M. Fiorentino, Counselor for the Department of Transportation). *See also* Gary Taylor, *Is FELA a Runaway Train?*, NAT'L L.J., Apr. 30, 1990, at 1, 1 (noting the backing of the Bush administration).

[7] Pub. L. No. 60-100, 35 Stat. 65 (1908) (codified as amended at 45 U.S.C. §§ 51–60 (1988)). This account is adapted from Report to the Federal Courts Study Committee of the Subcommittee on the Role of the Federal Courts and Their Relation to the States 375–86 (Mar. 12, 1990), *reprinted in* 1 FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS (1990) [hereinafter SUBCOMMITTEE REPORT].

whole or in part from the negligence of any of the officers, agents, or employees of [the railroad], or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."[8] In *New York Cent. R.R. v. Winfield*,[9] the Supreme Court held that the FELA provides the exclusive remedy for railroad employees injured while engaged in interstate commerce.[10]

While it may seem anomalous today that there is a federal remedy for workplace injuries *only* for railroad employees, the FELA has its origins in the unique role of railroads in nineteenth-century America. The historic importance of the railroad, both practically and as a romantic institution of American expansion, is well-known. The federal government was deeply involved in subsidizing the early development of the railroads; such government involvement was unique to railroads. Between 1850 and 1871, the federal government granted railroad developers 175 million acres of land.[11] The railroad industry also became the first industry subject to direct federal control with the passage of the Interstate Commerce Act of 1887.[12] By the end of the nineteenth century, however, public attention had focused on abuses by the railroads, including a perceived industry indifference to the hazards facing railroad workers. The injury rate among railroad employees in the late nineteenth century was horrific—the average life expectancy of a switchman was seven years, and a brakeman's chance of dying from natural causes was less than one in five.[13] This came to be considered a national problem.[14]

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[8] 45 U.S.C. § 51 (1988).

[9] 244 U.S. 147 (1917).

[10] *Id.* at 149–51.

[11] ROBERT L. FREY, ENCYCLOPEDIA OF AMERICAN BUSINESS HISTORY AND BIOGRAPHY: RAILROADS IN THE NINETEENTH CENTURY xviii–xxi (1988).

[12] Act of Feb. 4, 1887, ch. 104, 24 Stat. 379 (codified as amended at 49 U.S.C. §§ 10301–10388 (1988)).

[13] Melvin L. Griffith, *The Vindication of a National Public Policy Under the Federal Employers' Liability Act*, 18 LAW & CONTEMP. PROBS. 160, 162–63 (1953) (citing *Third Annual Report of the Interstate Commerce Commission* 85 (1989)). "Heavy industrial expansion combined with volatile economic conditions to create an environment in which economic progress was favored notwithstanding the human costs. High immigration rates made labor plentiful and cheap. Employee rights of any kind were virtually unknown." J. Thomas Tidd & Daniel Saphire, The Case for Repeal of the Federal Employers' Liability Act (Washington Legal Foundation working paper) 4 (1988) (on file with the *Harvard Journal on Legislation*).

[14] Griffith, *supra* note 13, at 163.

Congress responded in 1893 by enacting the Federal Safety Appliance Act,[15] which required railroad engines and cars to be equipped with particular safety equipment and safety features. Nonetheless, this Act did not improve conditions significantly. Then, in 1906, Congress passed the first version of the FELA.[16] The Supreme Court held this FELA legislation unconstitutional, however, on the ground that it exceeded Congress' power under the Commerce Clause of the Constitution.[17] Congress enacted the present law in 1908, and this time the Supreme Court found the statute constitutional.[18] Before the FELA of 1908, common law tort principles had made recovery by an injured employee very difficult. Therefore, the principal policy objectives of the FELA of 1908 were to ease recovery for injured railroad employees by (1) doing away with both the fellow-servant rule and the doctrine of assumption of risk, and (2) replacing the common law principle of contributory negligence as a complete defense with a rule of comparative negligence.[19]

If Congress were debating how to provide compensation to injured railroad workers today, it undoubtedly would create a workers' compensation program; however, when the FELA was passed, workers' compensation was still a novel idea of uncertain validity. New York had adopted the first American workers' compensation law in 1910,[20] but the New York Court of Appeals almost immediately struck down the state statute as unconstitutional.[21] The validity of workers' compensation laws under the

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[15] Act of Mar. 2, 1893, ch. 196, 27 Stat. 531 (codified as amended at 45 U.S.C. §§ 1–7 (1988)).

[16] Pub. L. No. 59-219, 34 Stat. 232 (1906).

[17] The Employers' Liability Cases, 207 U.S. 463, 499 (1908).

[18] Pub. L. No. 60-100, 35 Stat. 65 (1908); Second Employers' Liability Cases, 223 U.S. 1, 53 (1912). The Court distinguished the FELA of 1908 from the 1906 statute because the FELA of 1908 "deal[t] only with the liability of a carrier engaged in interstate commerce for injuries sustained by its employes [sic] *while engaged in such commerce*." *Id.* at 51–52 (emphasis added).

[19] *See* Report of the House Judiciary Committee, *reprinted in* WILLIAM W. THORNTON, A TREATISE ON THE FEDERAL EMPLOYERS' LIABILITY AND SAFETY APPLIANCE ACTS 557 (3d ed. 1916). Under some circumstances, the carrier is 100% liable if found to have been negligent to any degree. *See* Safety Appliances Act, 45 U.S.C. §§ 1–43a (1988); Boiler Inspection Act, 45 U.S.C. § 23 (1988); Fairport, Painseville & Eastern R.R. v Meredith, 292 U.S. 589, 598 (1934); Green v. River Terminal Ry., 763 F.2d 805, 810 (6th Cir. 1985). *See also* William P. Murphy, *Sidetracking the FELA: The Railroads' Property Damage Claims*, 69 MINN. L. REV. 349 (1985).

[20] *See* RICHARD A. EPSTEIN ET AL., CASES AND MATERIALS ON TORTS 913–17 (4th ed. 1984). England enacted the first modern workers' compensation law in 1897. *Id.* at 913.

[21] Ives v. South Buffalo Ry., 94 N.E. 431 (1911).

Constitution was not generally established until 1917.[22] Thus, it is not surprising that Congress did not consider workers' compensation a viable legislative option in the turn-of-the-century debates over the FELA.[23]

The Supreme Court's early approach to interpreting the FELA was to rely on traditional concepts of fault and proximate causation.[24] Later Supreme Court interpretations, however, diluted these concepts.[25] In a series of decisions, the statute was interpreted and reinterpreted into the curiosity it is today—a kind of fault system that for practical purposes is not based on fault. The Supreme Court has held that a FELA case must be allowed to go to the jury on the question of fault if "employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."[26] A "scintilla" of evidence of fault is sufficient basis for a jury verdict.[27] In addition, the Supreme Court has adopted a causation requirement for the FELA which is much less stringent than the common law tort requirement of proximate cause. A case must be allowed to go to the jury if the employee can produce "evidence that *any* employer negligence caused the harm, or, more precisely, enough to justify a jury's determination that employer negligence had played *any* role in producing the harm."[28]

As for the amount of damages, those "[s]ituations in which employees fail to establish some degree of negligence on the part of the railroad . . . define the lower end of the FELA

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[22] New York Cent. R.R. v. White, 243 U.S. 188, 208 (1917).

[23] *See* HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 130 (1973). Subsequent legislative amendments and judicial interpretations are summarized in Murphy, *supra* note 19, at 355–64.

[24] The literature is extensive. For two commentaries, *compare* Jerry J. Phillips, *An Evaluation of the Federal Employers' Liability Act*, 25 SAN DIEGO L. REV. 49, 50–51 (1988) (pro-FELA) *with* Victor E. Schwartz & Liberty Mahshigian, *The Federal Employers' Liability Act, a Bane for Workers, a Bust for Railroads, a Boon for Lawyers*, 23 SAN DIEGO L. REV. 1, 4–6 (1986) (anti-FELA).

[25] *See, e.g.*, Lavender v. Kurn, 327 U.S. 645 (1946) (establishing a more relaxed standard of proof by enabling juries to rely in part on speculation and conjecture in finding a defendent liable for negligence in a FELA case).

[26] Rogers v. Missouri Pac. R.R., 352 U.S. 500, 506 (1957) (footnote omitted).

[27] *See* Joseph G. Manta, Comment, *Federal Employers' Liability Act—Certiorari Practice—Review of the Sufficiency of Evidence*, 6 VILL. L. REV. 549, 559 (1961).

[28] Gallick v. Baltimore & Ohio R.R., 372 U.S. 108, 116 (1963). The facts of *Gallick* illustrate the extent to which causation has been diluted. The employee had been working near a stagnant, insect-infested pool of water on railroad property. He was bitten by an insect; the bite became infected and, tragically, resulted in the amputation of both of the employee's legs. The employee alleged that the railroad was negligent in maintaining the pool. The Supreme Court ruled that the jury could base an award on a determination that the events were foreseeable. *Id.* at 117. *See generally* John Scarzafava, *A Safe Place to Work—Actions Under FELA*, 17 TRIAL LAW. Q. 62 (1986).

payment range"[29]—zero recovery. The upper limit is less determinable. Recoverable damages include lost wages, medical expenses, estimated future earnings, and payment for pain and suffering.[30] The federal courts defer to the jury and virtually never set aside a FELA award for excessiveness.[31]

Although the societal, industrial, and legal environments at the turn of the century warranted the enactment of the FELA, the current societal, industrial, and legal environments do not justify the statute's continued existence. As a result of Supreme Court interpretation, the FELA has become a most curious fault system.[32] While liability has not truly been based on fault, the assessment of damages under the FELA has been determined by reference to traditional tort principles. A contemporary public policy justification is required for the continued use of such an anomalous system.

### B. *The Federal Courts Study Committee*[33]

In 1988, Congress created the Federal Courts Study Committee ("FCSC") as an ad hoc committee within the Judicial Conference of the United States, the policy-making organ for the federal courts.[34] The FCSC was a congressional response "to mounting public and professional concern with the federal

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[29] Arnold I. Havens & Anthony A. Anderson, *The Federal Employers' Liability Act: A Compensation System in Urgent Need of Reform*, 34 FED. B. NEWS & J. 310, 313 (1987).

[30] *Id.*

[31] "[A]bsent an award so excessive or inadequate as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial, the jury's determination of the fact is considered inviolate." Barnes v. Smith, 305 F.2d 226, 228 (10th Cir. 1962), *quoted in* Havens & Anderson, *supra* note 29, at 313. *See also* Pierce v. Southern Pac. Transp. Co., 823 F.2d 1366, 1370 (9th Cir. 1987) ("slight" or "minimal" evidence is sufficient to support a jury determination of fault or causation in a FELA case); Pehowic v. Erie Lackawana R.R., 430 F.2d 697, 699–700 (3d Cir. 1970) ("zero possibility" of fault is required for the issue of employer negligence to be withdrawn from the jury in a FELA case).

[32] *See generally* Marc I. Steinberg, *The Federal Employers' Liability Act and Judicial Activism: Policymaking by the Courts*, 12 WILLAMETTE L. REV. 79 (1975).

[33] The author served as Associate Reporter to the Subcommittee on Administration, Management, and Structure of the Federal Courts Study Committee (1989–1990). This account of the Federal Courts Study Committee is adapted, in part, from Thomas E. Baker, *Shaping a Court System for the '90s*, TEX. LAW., May 28, 1990, at 32.

[34] Federal Courts Study Act, Pub. L. No. 100-702, § 102, 102 Stat. 4644 (1988). *See generally* William K. Slate, *Report of the Federal Courts Study Committee: An Update*, 21 SETON HALL L. REV. 336 (1991); Joseph F. Weis, Jr., *The Federal Courts Study Committee Begins Its Work*, ST. MARY'S L.J. 15 (1989); *Federal Courts Symposium*, 1990 B.Y.U. L. REV. 1; Symposium, *The Federal Court Docket: Issues & Solutions*, 22 CONN. L. REV. 615 (1990).

courts' congestion, delay, expense, and expansion."[35] The fifteen-person committee (appointed by Chief Justice William H. Rehnquist) was given the task to examine the current status of the federal courts in order to develop a long-term plan for the judicial branch. Congress specifically asked that the FCSC assess, among other things, the types of disputes that federal courts should resolve.[36]

Membership of the FCSC included academics, lawyers, state government officials, and representatives of the three branches of the federal government. The FCSC members were thus broadly representative of those individuals and entities who have a compelling interest in the work of the federal courts. The FCSC first identified possible agenda items by surveying members of the federal judiciary and by soliciting views from citizens' groups, bar organizations, research groups, academics, civil rights groups, and others.[37] In March 1990, public outreach meetings were held in Atlanta, Boston, Chicago, and Pasadena, California. More than seventy-five witnesses appeared.[38]

The FCSC organized itself into three thematic subcommittees. The FELA came under the Subcommittee on the Role of the Federal Courts and their Relations to the States ("Subcommittee").[39] After study and debate, the Subcommittee proposed that the FCSC recommend that the FELA be repealed and that railroad employees be covered by state workers' compensation statutes.[40] The Subcommittee estimated that repeal of the FELA would reduce the national docket of the United States District Courts by two percent and the national docket of the United States Courts of Appeals by one percent.[41] Furthermore, the

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[35] FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 3 (Apr. 2, 1990) [hereinafter STUDY COMMITTEE REPORT].

[36] Congress also asked the FCSC to assess the following: alternative methods of dispute resolution, court structure, court administration, and the problems of intra-circuit and inter-circuit conflicts. Baker, *supra* note 33, at 32.

[37] *Id.*

[38] STUDY COMMITTEE REPORT, *supra* note 35, at 32.

[39] Subcommittee members were: Judge Richard A. Posner, Chairman, United States Court of Appeals for the Seventh Circuit; Rep. Robert W. Kastenmeier (D-Wis.); Chief Justice Keith M. Callow, Supreme Court of Washington; President Rex E. Lee, Jr., Brigham Young University; Professor Larry Kramer, Reporter, University of Chicago Law School. SUBCOMMITTEE REPORT, *supra* note 7; STUDY COMMITTEE REPORT, *supra* note 35, at 193, 195–97.

[40] SUBCOMMITEE REPORT, *supra* note 7, at 384–85.

[41] These figures were based on 1987 and 1988 data and included the effect of a related recommendation to repeal the Jones Act, 46 U.S.C. app. § 688(a) (1988), which permits a seaman injured in the course of his employment to sue under the FELA. SUBCOMMITTEE REPORT, *supra* note 7, at 383 n.25. The Subcommittee reported the following:

Subcommittee study disclosed that FELA cases go to trial and require a jury disproportionately more often than other civil cases; therefore, based on 1988 figures, repeal of the FELA would eliminate 4.6% of all federal civil trials and 7.5% of federal civil jury trials.[42]

Anticipating policy debate beyond issues of federal jurisdiction, the Subcommittee went on to consider alternatives to the FELA. Workers' compensation statutes provide the same advantage as the FELA—eliminating the common law doctrines that made recovery difficult—and go even further by eliminating altogether the burden of proving that the employer was negligent. The Subcommittee also concluded that the state administrative system was faster and less costly than the federal court remedy.[43] Overall, the Subcommittee noted that "the unanimous verdict of states, unions, and workers in every other field favors workers' compensation over a traditional judicial remedy."[44] The Subcommittee found comparisons of benefits paid under the FELA and under state workers' compensation systems to be inconclusive.[45] Ultimately, the Subcommittee concluded: "While there may have been a time when singling railroad employees out for special treatment by the federal government seemed logical and necessary, that time has passed. We see no reason to treat railroad employees differently than other workers."[46]

The FCSC received the Subcommittee's FELA recommendation and included it among the Tentative Recommendations for Public Comment in December 1989.[47] Five thousand copies

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> In 1988, there were 2540 FELA cases and 2413 Jones Act cases out of total district court civil filings of 239,634; in 1987, there were 2436 FELA cases and 2939 Jones Act cases out of total district court civil filings of 238,982. At the appellate level, in 1988, there were 91 FELA appeals and 241 Jones Act appeals out of 32,686 total appeals, while in 1987, there were 80 FELA appeals and 245 Jones Act appeals out of 30,798 total appeals.

*Id.*

[42] *Id.* at 384.

[43] *Id.* at 381.

[44] *Id.*

[45] The Subcommittee observed that government studies did not take into account delay, attorneys' fees, or court costs. The Subcommittee also observed that the studies only compared cases in which there actually was an award; therefore, "zeroed" plaintiffs, those who could not prove employer negligence, were left out of the studies. Also, the studies did not evaluate the effect of FELA payouts on the industry wage scale and on railroad hiring practices. *Id.* at 382–83.

[46] *Id.* at 385.

[47] Federal Courts Study Committee, Tentative Recommendations for Public Comment 51–54 (Dec. 22, 1989), *reprinted in* 2 FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS (1990).

of the Recommendations were distributed.[48] In January 1990, public hearings were held in nine cities.[49] More than 270 witnesses testified at the public hearings and hundreds more sent in comments.[50]

More than thirty witnesses responded to the tentative recommendation to repeal the FELA. Basically, four arguments were made for retaining the FELA status quo:

> (1) Railroads remain one of the most hazardous industries, and the FELA encourages safety;
> (2) Overburdened state workers' compensation systems deliver, after long delays, only a small portion of employees' true losses;
> (3) Eighty-five percent of FELA cases are settled without the railroad worker hiring a lawyer; and
> (4) Abolition of the FELA will not have a substantial effect on the caseload of the federal courts.[51]

Nonetheless, upon further discussion and review, the FCSC found the arguments to abolish the 1908 statute more persuasive and recommended that Congress repeal the FELA, over only one dissenting vote.[52] On April 2, 1990, the FCSC Final Report recommended that Congress repeal the FELA and that "[c]laims by railway employees should be subsumed under state or federal workers' compensation systems."[53]

As was true of the more than 100 other recommendations from the FCSC, the recommendation to repeal the FELA was made in light of an overriding concern for the federal courts, i.e., in order to "prevent the system from being overwhelmed by a rapidly growing and already enormous caseload; and . . .

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[48] STUDY COMMITTEE REPORT, *supra* note 35, at 32.

[49] Specifically, the public hearings were held in Dallas, Des Moines, Miami, New York, Salt Lake City, Seattle, San Diego, Washington, D.C., and Madison, Wisconsin. *Id.* at 32–33.

[50] *Id.* at 33; Baker, *supra* note 33, at 32.

[51] Memorandum from Steven G. Gallagher, Counsel, Federal Courts Study Committee, to Committee Members, Staff, and Reporters 5 (Feb. 15, 1990) (on file with the *Harvard Journal on Legislation*).

[52] Memorandum from William K. Slate II, Director, Federal Courts Study Committee, to Committee Members 1 (Feb. 21, 1990) (on file with the *Harvard Journal on Legislation*). *See infra* text accompanying note 78.

[53] STUDY COMMITTEE REPORT, *supra* note 35, at 62. The Report continued:

> Were Congress today to establish a program to provide compensation for injured workers, it would undoubtedly adopt a workers' compensation program . . . . We believe that today's state workers' compensation laws are—or a federal system created by Congress would be—adequate to cover injuries to railway employees. Such mechanisms have compensated workers in every other form of interstate transportation.

*Id.* at 63.

[to] preserve access to the system for those who most need it."[54] The FCSC determined that the federal court system was overcrowded and threatened by an increased caseload.[55] Given the limitations of the federal court system, the FCSC concluded that the federal courts should be considered a scarce resource reserved for cases involving truly federal claims or diverse litigants. In September 1990, the Judicial Conference of the United States unanimously endorsed the FCSC recommendation and agreed to support the effort to repeal the FELA.[56]

An informed student of federal courts would not find the recommendation to repeal the FELA particularly breathtaking. The FELA has been a target of past court reformers. In his classic 1929 study of federal courts, Professor Felix Frankfurter—later a Supreme Court Justice—described this source of jurisdiction as "prodigal of the Court's time and indifferent to the Court's significance."[57] In his famed James S. Carpentier

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[54] *Id.* at 4.

[55] *Id.* at 3.

[56] JUDICIAL CONFERENCE OF THE UNITED STATES, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 82 (1990) [hereinafter JUDICIAL CONFERENCE]; Letter from L. Ralph Meckham, Director of the Administrative Office of the United States Courts, to court personnel (Sept. 18, 1990) (on file with the *Harvard Journal on Legislation*).

[57] FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 209 (1928) (footnote ommitted). *See also* Ray Mitchell, Note, *Federal Employers' Liability Act: Apostasy of Sufficiency of Evidence Policy*, 42 MISS. L.J. 418 (1971).

As a member of the Supreme Court, Justice Frankfurter was equally disapproving of the claim of this category of cases for federal jurisdiction:

> These observations are especially pertinent to suits under the Federal Employers' Liability Act. The difficulties in these cases derive largely from the outmoded concept of "negligence" as a working principle for the adjustments of injuries inevitable under the technological circumstances of modern industry. This cruel and wasteful mode of dealing with industrial injuries has long been displaced in industry generally by the insurance principle that underlies workmen's compensation laws. For reasons that hardly reflect due regard for the interests of railroad employees, "negligence" remains the basis of liability for injuries to them. It is, of course, the duty of courts to enforce the Federal Employers' Liability Act, however outmoded and unjust in operation it may be. But so long as negligence rather than workmen's compensation is the basis of recovery, just so long will suits under the Federal Employers' Liability Act lead to conflicting opinions about "fault" and "proximate cause." The law reports are full of unedifying proof of these conflicting views, and that too by judges who seek conscientiously to perform their duty by neither leaving everything to a jury nor, on the other hand, turning the Federal Employers' Liability Act into a workmen's compensation law.

Wilkerson v. McCarthy, 336 U.S. 53, 65–66 (1949) (Frankfurter, J., concurring). *See also* Stone v. New York, Chicago & St. Louis R.R., 344 U.S. 407, 410–11 (1953) (Frankfurter, J., dissenting) (the application of common law principles of negligence is inappropriate because those injuries addressed by the FELA are inevitable by nature); Urie v. Thompson, 337 U.S. 163, 196 (1949) (Frankfurter, J., concurring in part) ("the common law concept of negligence is an antiquated and uncivilized basis for working

Lectures some forty years later, Judge Henry J. Friendly exhorted:

> The most obvious and compelling instance for a change from a judicial to an administrative remedy is afforded by the Federal Employers' Liability Act . . . . If there is any good reason why, in contrast to almost all other workers in the United States, this particular group should still be put to the burden of maintaining a court action or have the benefit of an unlimited recovery, I have not heard of it.[58]

More recently, Judge Richard A. Posner—a member of the FCSC—conducted a general review of the federal courts in 1985 and examined the FELA to conclude, "[t]here is no apparent reason of contemporary significance for the alternative federal venue."[59] Thus, in several significant reviews of the federal courts, the FELA stands out as an historical anomaly of jurisdiction.[60]

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out rights and duties for disabilities and deaths inevitably due to the conduct of modern industry").

[58] FRIENDLY, *supra* note 23, at 129–30. Judge Friendly went on to observe:

> There does not seem even to be any real need that the compensation scheme for railway workers should be federal; workers in other forms of interstate transportation, such as bus lines, truckers, and airlines, have been handled quite satisfactorily under the workmen's compensation law of the states. However, with the political difficulties such as they are, a federal railway worker's compensation act might be more acceptable, as well as furnish a model for the upgrading of outmoded state statutes.

*Id.* at 131 (footnote omitted).

[59] RICHARD A. POSNER, THE FEDERAL COURTS—CRISIS AND REFORM 184 (1985). Judge Posner's point is that there is little apparent reason to federalize this area of the law and no reason to allow these cases into federal court. His full comment reads:

> Although the area of labor relations is a good example of the general point that federal court jurisdiction sometimes is warranted in order to deal with a problem of interstate spillovers, the same cannot be said for federal jurisdiction to enforce the Federal Employers Liability Act, a tort statute for railroad workers that explicitly allows suits to be brought in either state or federal court. There is no apparent reason of contemporary significance for the alternative federal venue. The statute is pro-worker, if it is anything (since wages are not regulated, workers may in effect give back in wages what they gain in accident benefits from FELA). And whatever may have been true when the railroads were the most powerful industry in America, no one believes that state courts today are biased in favor of railroads in deciding tort suits against them. Putting aside the even more fundamental question of why accidents to railroad workers should be governed by federal law but accidents to travelers at railroad crossings by state law—a question of substantive law reform—I can think of no reason why state courts cannot be trusted to enforce the FELA. Concern with prejudice against railroads cannot explain the alternative federal venue, since a railroad is not permitted to remove to federal court a FELA case filed in state court.

*Id.* (footnote omitted).

[60] *See also, e.g.*, Susan N. Herman, *Beyond Parity: Section 1983 and the State Courts*, 54 BROOK. L. REV. 1057, 1106–07 (1989) (noting that "federalized" FELA litigation in state courts may be applied to the detriment of plaintiffs); Daniel J. Meador, *Federal*

### C. *Previous Efforts at Reform*[61]

Efforts were made to replace the FELA with a no-fault compensation system soon after its enactment. Only two years after enacting the FELA, Congress established the Employers' Liability and Workmen's Compensation Commission, commonly named after its chairman, Senator George Sutherland (R-Utah).[62] The Sutherland Commission found the FELA inadequate when compared to the then-evolving workers' compensation systems and recommended that Congress repeal the FELA and "put[] in the place of it a law *based not upon fault* but upon the *fact* of injury resulting from accident in the course of the employment."[63] The Commission "recommended a bill to provide compensation in the form of annual payments as an exclusive remedy for injured employees of railroads engaged in interstate commerce."[64] President Taft endorsed this proposal, noting the "great injustice" of the FELA.[65] Different versions

*Law in State Supreme Courts*, 3 CONST. COMMENTARY 347, 356 (1986) (determining that FELA cases should be heard exclusively in state courts); Louis H. Pollak, *Amici Curiae*, 56 U. CHI. L. REV. 811, 823 (1989) (reviewing PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (3d ed. 1988)) (citing Chief Justice Rehnquist as in favor of "confining FELA . . . cases to the state courts").

[61] This discussion of the post-legislative history relies on two previous summaries. Havens & Anderson, *supra* note 29, at 310–11; Schwartz & Mahshigian, *supra* note 24, at 11–13.

[62] Havens & Anderson, *supra* note 29, at 310–11 (citing Act of June 25, 1910, Pub. Res. No. 45, 36 Stat. 884 (1910)). Schwartz & Mahshigian, *supra* note 24, at 11. *See also* Clarence A. Miller, *The Quest for a Federal Workmen's Compensation Law for Railroad Employees*, 18 LAW & CONTEMP. PROBS. 188, 190–91 (1953).

[63] REPORT OF COMMISSION TO INVESTIGATE THE MATTER OF EMPLOYEES' LIABILITY AND WORKMEN'S COMPENSATION, S. DOC. NO. 338, 62d Cong., 2d Sess. 15 (1912), *cited in* Havens & Anderson, *supra* note 29, at 311. The Commission was:

> unanimously of the opinion that the existing system of employers' liability based upon negligence, with the defenses of assumption of risk, fellow-servants fault, and contributory negligence, no longer met the requirements of modern industrial conditions; . . . and in operation resulted in waste, deplorable antagonism between employer and employee in giving to a few injured employees large and sometimes extravagant damages, while leaving the great majority to bear the entire burden without any recompense whatever.

*Id.* at 12, *cited in* Havens & Anderson, *supra* note 29, at 311.

[64] Schwartz & Mahshigian, *supra* note 24, at 11–12.

[65] Havens & Anderson, *supra* note 29, at 311; Schwartz & Mahshigian, *supra* note 24, at 12. President Taft elaborated on themes that remain relevant today:

> The great injustice of the present system, by which recoveries of verdicts of any size do not result in actual benefit to the injured person because of the heavy expense of the litigation and the fees charged by the counsel for the plaintiff, will disappear under this new law, by which the fees of the counsel are limited to a very reasonable amount. The cases will be disposed of most expeditiously under this system, and the money will be distributed for the support of the injured person over a number of years, so as to make its benefit greater and more secure.

48 CONG. REC. 2228 (1912) (President Taft's transmittal message) *cited in* Havens & Anderson, *supra* note 29, at 311. *See infra* text accompanying notes 129–148.

of the proposal passed the House and the Senate; the proposal then expired in conference committee—apparently the victim of union factions that could not agree.[66]

The current debate over the FELA in many ways seems to be an echo of earlier debates. In 1922, the American Federation of Labor ("A.F.L.") created a committee to conduct a study of workers' compensation laws generally and inconsistencies between state and federal laws particularly.[67] The A.F.L. committee recommended repealing the FELA and replacing it with a no-fault federal statute patterned on state workers' compensation statutes.[68] Again bills were introduced in Congress, but again they died in committee.[69] In 1928, a committee created by the Brotherhood of Locomotive Firemen and Enginemen criticized the FELA because the fault-based statute often resulted in a low recovery or no recovery for injured workers.[70] In the 1930s, Senator Robert Wagner (D-N.Y.) became a persistent congressional champion for reform, but his efforts came to no avail because of the opposition of unions and of the FELA bar to reform.[71] Wagner's persistent efforts, however, resulted in the 1939 amendments which made recovery under the FELA more likely, although the fault feature of the statute was formally preserved.[72] These amendments represent the last occasion for earnest congressional consideration of the FELA until the present round of inquiry.[73] In the years since, there have been episodic calls for reform from the American Bar Association[74] and

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[66] Havens & Anderson, *supra* note 29, at 311, 315 nn.23, 24 (citing H.R. REP. No. 1441, 62d Cong., 2d Sess. (1913); S. REP. No. 553, 62d Cong. 1st Sess. (1912)). In the opinion of Secretary of Labor W.N. Doak, "the bill failed to become law because of the opposition of the Sutherland Railroad Trainmen to the bill." *Id.* at 311. *See also* Schwartz & Mahshigian, *supra* note 24, at 12 (citing Miller, *supra* note 62, at 191).

[67] Miller, *supra* note 62, at 194.

[68] *Id.* at 195. *See also* Havens & Anderson, *supra* note 29, at 311; Schwartz & Mahshigian, *supra* note 24, at 12.

[69] Schwartz & Mahshigian, *supra* note 24, at 12 (citing Miller, *supra* note 62, at 198–204).

[70] Havens & Anderson, *supra* note 29, at 311, 316 n.29 (citing Cornelius Cochrane, *Railway Employees' Accident Compensation*, 18 AM. LAB. LEGIS. REV. 341, 342 (1928)).

[71] Havens & Anderson, *supra* note 29, at 311, 316 n.30 (citing S. 3630, 73d Cong., 2d Sess., 78 CONG. REC. 8982 (1934); S. 1320, 73d Cong., 1st Sess., 77 CONG. REC. 1624 (1933); S. 4927, 72d Cong., 1st Sess., 75 CONG. REC. 13,760 (1932)); Miller, *supra* note 62, at 198–203.

[72] Havens & Anderson, *supra* note 29, at 311.

[73] *See supra* notes 2–6 and accompanying text.

[74] Schwartz & Mahshigian, *supra* note 24, at 12. In 1949, the ABA House of Delegates adopted a resolution proposing that the FELA should not apply to workers who suffered an injury in a state that had a workers' compensation statute applicable to the injury. *Proceedings of the House of Delegates, St. Louis, Missouri, September 5–9, 1949*, 74 A.B.A. ANN. REP. 101, 108–09 (1949). A similar resolution was passed in 1964. *Proceedings of the House of Delegates at the 1964 Annual Meeting*, 89 A.B.A. ANN. REP.

sharp criticism of the FELA from members of the Supreme Court.[75] Even labor unions themselves have disagreed about the relative advantages of the FELA over no-fault alternatives.[76] In addition, federal judges, who in effect administer the system, have consistently expressed their discontent with the FELA.[77]

Substantive criticisms of the FELA have not changed much over the years, except to become more acute. What is encouraging about the current policy environment is that there are signs that efforts to reform the FELA may be gathering momentum.

## II. Public Policy Analysis

In this Article, I have made every effort to allay the concerns of FCSC member Congressman Kastenmeier (D-Wis.), whose solitary dissent on the FELA recommendations described them as "substantive" and beyond the expertise of the FCSC.[78] I agree with his position that the debate over the FELA is not limited to matters of federal court jurisdiction. The inquiry must be broader. A public policy analysis of this issue reveals criteria for a sound compensation system. I will summarize these criteria and explain how and why the FELA is found so obviously wanting. The question then becomes what should replace the FELA, and my answer is that the presumed replacement is the workers' compensation system already in place in each state. Recognizing certain political realities, however, I will identify alternatives to my preference.

### A. *Public Policy Criteria*

In its 1972 Report to the President and Congress, the National Commission on State Workmen's Compensation Laws identified five major policy objectives for a sound compensation program:

365, 386 (1964). The silence since is ambiguous; "one can only speculate what position the ABA would take today." Schwartz & Mahshigian, *supra* note 24, at 14.

[75] Schwartz & Mahshigian, *supra* note 24, at 12–14. *E.g.*, Wilkerson v. McCarthy, 336 U.S. 53, 76 (1949) (Jackson, J., dissenting); Bailey v. Central Vt. Ry., 319 U.S. 350, 354 (1943); Tiller v. Atlantic Coast Line R.R., 318 U.S. 54, 71 (1943) (Frankfurter, J., concurring). *See also supra* note 57.

[76] Schwartz & Mahshigian, *supra* note 24, at 14 n.72 (citing instances of disagreement).

[77] *Id.* at 14. *See supra* notes 57–59. For a recent example, see Reed v. Philadelphia, Bethlehem & New England R.R. Co., 939 F.2d 128, 132 (3d Cir. 1991).

[78] Study Committee Report, *supra* note 35, at 63–64 (Rep. Robert W. Kastenmeier, dissenting).

(1) Encouragement of safety: Economic incentives in the program should reduce the number of work-related injuries and diseases.
(2) Broad coverage of employees and of work-related injuries and diseases: Protection should be extended to as many workers as feasible, and all work-related injuries and diseases should be covered.
(3) Substantial protection against interruption of income: A high proportion of a disabled worker's lost earnings should be replaced by workmen's compensation benefits.
(4) Provision of sufficient medical care and rehabilitation services: The injured worker's physical condition and earning capacity should be restored promptly.
(5) An effective system for delivery of the benefits and services: The basic objectives should be met comprehensively and efficiently.[79]

The objective of encouragement of safety will be discussed first. The next three objectives, all related to compensation and rehabilitation, will be grouped together. The objective of administrative efficiency will be discussed third. Finally, the implications of FELA reform for the United States' transportation policy are sufficiently important and distinct to merit consideration in addition to the other listed objectives.

### 1. Safety

The first priority of public policy in our country's transportation system must be the encouragement of safety. There must be economic incentives in the employees' compensation program to reduce the number of work-related injuries and diseases. Defenders of the FELA argue that its repeal would result in a less safe workplace for railroad employees because the prospect of FELA claims provides an economic incentive for railroads to operate safely.[80] Even if I were to accept the premise that the primary incentive for railroads to prevent injuries is to prevent injury claims, the same economic incentive would exist

[79] 1 NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 15 (July 1972) [hereinafter NATIONAL COMMISSION] (The objectives have been reordered here to give priority to safety.).

[80] *See, e.g.*, Phillips, *supra* note 24, at 51–55; Griffith, *supra* note 13, at 161, 183–87.

under a no-fault workers' compensation system, provided that total damage awards remained the same after the repeal of the FELA. Indeed, various other hazardous industries have experienced improvements in safety records without the FELA system. Furthermore, it is difficult, if not impossible, to measure the general efficacy of the FELA as a safety measure for two reasons. First, because the statute dates back to 1908, there is nothing else in modern railroading history with which to compare the FELA. Second, and more importantly, workplace safety is the result of multiple factors over time. For example, standardization of equipment is generally given credit for significant improvements in the railroads' safety record, even by defenders of the FELA.[81]

The safety impact of the FELA, as opposed to traditional workers' compensation systems, is even more difficult to determine for non-employees. Even if one assumes that the FELA creates a measurable safety incentive for the railroad as to employees, speculation about the spill-over effect for the safety of third parties is questionable.[82] One reason for this is that employees and non-employees, for the most part, are injured in different types of accidents. In 1987, almost two-thirds of the non-employees injured were injured at grade-crossing incidents; however, grade-crossing incidents accounted for less than one percent of employee injuries.[83] The FELA creates no additional incentive for the considerable railroad expenditures to minimize hazards at grade crossings even though, typically, fault lies with the motor vehicle operator.[84] The financial liability due to suits by injured passengers would remain under state workers' compensation programs and, to the extent this financial liability provides an economic incentive toward safety, repeal of the FELA would make no difference.[85]

The choice between the FELA and a workers' compensation system is of similar low consequence from the perspective of the shipper whose concern is for the safety of the lading being

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[81] *See* Safety Appliance Acts, 45 U.S.C. §§ 1–43a (1988); Arnold B. Elkind, *Should the Federal Employers' Liability Act Be Abolished?*, 17 FORUM 415, 418 (1981).

[82] Daniel Saphire, *FELA and Rail Safety: A Response to Babcock and Oldfather The Role of the Federal Employers' Liability Act in Railroad Safety*, 19 TRANSP. L.J. 401, 408–09 (1991).

[83] *Id.* at 408 n.37 (citing Federal Railroad Administration, Accident/Incident Bulletin, Calendar Year 1987, 24 (Table 13 (1988))).

[84] *Senate Hearing*, *supra* note 2, at 49 (statement of William H. Dempsey, President, Association of American Railroads).

[85] Saphire, *supra* note 82, at 408.

shipped. Having to respond in damages for breach of contract or for negligence is a profound economic incentive for railroads to exercise due care with goods and cargo. Furthermore, surface transportation is a highly competitive industry. If safety were not a railroad priority and if rail transportation were not dependable and reliable, the freight railroads would simply go out of business.[86] Indeed, many of the shippers who have addressed the issue seem to favor repeal of the FELA because repeal would reduce shipping rates, which currently include excessive FELA administrative costs being passed on by the railroads.[87]

Repeal of the FELA, in any event, would not set aside the humanitarian instincts that I believe railroad executives possess, notwithstanding the rhetoric of labor/management relations. In addition, obvious economic incentives toward safety would continue in any replacement compensation system. As has been mentioned, under workers' compensation there would be an economic incentive to prevent claims, but the economic consequences of an accident go beyond such direct costs. Other economic consequences for the employer include the following: the loss of the availability of the injured employee; the disruption of operations; the loss of good will with employees; the expense of investigation; the administrative expense of settling claims; and the diminution of business good will with passengers, shippers, and the public. An unsafe railroad would be an unprofitable railroad and, eventually, a failed railroad. These economic factors, along with contemporary attitudes toward safety in the workplace, are more than sufficient to prevent a return to the abuse of employees that characterized the turn-of-the-century industrial revolution and gave rise to the FELA.

Essentially, the FELA is a compensation statute; it is only indirectly a safety statute. To the extent that the FELA indirectly provides safety incentives, by definition the incentives are limited to the workplace. Furthermore, simple logic confirms that a no-fault system would bolster these incentives. Under the FELA, the employer is liable for the *negligence* of its officers and agents. There is no liability for employee injuries caused by the injured employee's negligence or misjudgment. Under a no-fault system, the employer is absolutely liable for any injury.

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[86] *Id.* at 49 (statement of William H. Dempsey).

[87] *See House Hearing*, *supra* note 3, at 90 (statement of William D. Shaw, Former General Transportation Manager, Bethlehem Steel Corporation); *id.* at 216 (statement of Reva Wilson Spry, Operations Assistant, ANR Coal Company).

Such a no-fault system provides a more complete incentive for the employer to train and to supervise employees and to instill safety consciousness. The broad consensus is that no-fault compensation systems create better safety incentives, evidenced by the fact that out of all the industrial groupings in this country only the railroad industry has a fault-based system.[88]

It is difficult, if not impossible, to demonstrate a general statistical relationship between a workers' compensation system and safety "because there are so many variable factors that influence accident rates."[89] As for the FELA, the General Accounting Office has "not seen through [its] own study or through any other work [it has] going on that there is a direct link between the type of compensation system involved and rail safety."[90]

Factors beyond the FELA—such as labor relations, shipper concerns, deregulation, and societal constraints—most certainly serve to reinforce a management safety objective. What statistics we do have suggest that the railroad industry is safe relative to other heavy industries.[91] Department of Labor Statistics for 1988, the latest year available at this writing, showed railroads had a lower injury/illness rate (6.9 per 100 workers) than that of all private U.S. industries combined (8.6 per 100 workers) and ranked 75th in safety among 245 industrial groups.[92] Railroad safety ranked roughly in the middle of various transport modes; trucking had roughly twice the injury/illness rate (13.9 per 100 workers) of railroads.[93]

Some have attributed the marked improvement over the past decade in the railroad industry's safety record to a combination of *general deregulation*, primarily the Staggers Act which enabled railroads to make overdue capital improvements,[94] and a greater priority given to *regulation of safety* by the Congress

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[88] *House Hearing*, *supra* note 3, at 241 (testimony of Gilbert E. Carmichael, Administrator, Federal Railroad Administration).

[89] NATIONAL COMMISSION, *supra* note 79, at 96–98.

[90] *Senate Hearing*, *supra* note 2, at 14–15 (testimony of Neal P. Curtin, Deputy Director, Resources, Community, and Economic Development Division, General Accounting Office).

[91] *See* Railroad Alliance for Improved Liability Systems, The True Story About Railroad Safety 4 (1990) (providing data from the Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Injuries and Illnesses in the U.S. by Industry, 1988*, Table 1 at 7-21 (1990)) (on file with the *Harvard Journal on Legislation*).

[92] *Id.* at 1–2.

[93] *Id.* at 6.

[94] Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (codified as amended in scattered sections of 45 & 49 U.S.C.). *See infra* text accompanying notes 176–182.

and the Federal Railroad Administration ("FRA").[95] The FRA has broad authority to promulgate and enforce safety regulations that cover all aspects of rail operations.[96] The agency has more than 300 inspectors who can levy fines as high as $20,000; in 1987, more than $7 million in civil penalties were assessed.[97] The FRA would continue these enforcement efforts after repeal of the FELA. In addition, the federal emphasis on safety could be heightened by the simple legislative expedients of allocating more resources to the FRA and continuing congressional oversight.

Because the FELA is based on fault, it actually can undermine efforts to create a safer work environment. Assuring workplace safety is a cooperative undertaking of labor and management.[98] The FELA, in effect, encourages management and labor to place the blame on each other, thus truncating the investigation of a specific accident and inhibiting broader safety programs. A book informing railroad employees of their rights under the FELA may be the best evidence of this attitude in investigating specific accidents.[99] The book recommends that when filling out the Personal Injury Report, rather than fully answer the question "[w]hat could have been done to prevent this accident," employees should respond only that "[t]he full extent of the carrier's negligence is unknown at this time."[100] The book suggests that employees "[a]lways take . . . time and stop to think before . . . answer[ing]" questions about accidents.[101] Employees are entreated to "say as little as possible."[102] Under a no-fault sys-

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[95] *Senate Hearing*, *supra* note 2, at 32–33 (answers of John H. Riley, Administrator, Federal Railroad Administration).

[96] 49 U.S.C. § 103 (1988).

[97] *Senate Hearing*, *supra* note 2, at 33 (answers of John H. Riley); Railroad Safety Appliance Standards, 49 C.F.R. § 231.0 (1990).

[98] *See generally* National Railroad Passenger Corporation 1989 Legislative Report (Feb. 15, 1989), *reprinted in Amtrak Reauthorization: Hearing Before the House of Representatives Subcommittee on Transportation and Hazardous Materials of the Committee on Energy and Commerce*, 101st Cong., 1st Sess. 54–55 (1989) [hereinafter Legislative Report].

[99] Saphire, *supra* note 82, at 412.

[100] JOHN H. BLOUNT & J. EDWARD DVORAK III, JUSTICE FOR THE INJURED RAILROAD WORKER (AND HOW TO ACHIEVE IT) 3 (1987). *See Senate Hearing*, *supra* note 2, at 86 (biographies of authors).

[101] BLOUNT & DVORAK, *supra* note 100, at 3.

[102] *Id.* The full advice given in the book for this question is as follows:

> Q. *Describe how the accident happened.* If you answer this question inaccurately, the carrier can reduce the value of a possible claim. It is a very tricky question. *Always take your time and stop to think before you answer this one.* Remember, you are not a doctor, so you do not know how badly you are injured; you are not a lawyer, therefore you do not know, according to the

tem, employees would have no reason to withhold information because the circumstances of the accident would not affect the employee's right to compensation.

For another account of how the fault basis of the FELA inhibits safety programs, one may consider Amtrak's 1989 Legislative Report.[103] Amtrak established Employee Safety Committees, comprised jointly of labor and management, in order to assess work areas and to assure compliance with safety regulations, to investigate accidents and injuries, and to seek ways to avoid accidents. Separate investigation committees were created to analyze and report on every job-related accident.[104] The Report was critical of the inhibiting influence of the FELA:

> Despite the great potential for these committees to bring management and labor together to improve workplace safety, their goal is undermined from the start. The members cannot work together with complete honesty when the determination of the cause of an accident may also determine whether and to what extent an injured employee will receive any compensation benefits. In such an investigation, a committee member who represents management may be inclined to place blame with the employee; at the same time, a union employee may be inclined to place blame on the corporation, since a finding of fault on the part of the corporation is a prerequisite for FELA compensation and a finding of employee fault could bar any recovery. Consequently, the ob-

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law, whether the carrier would have been able to prevent the accident; you are hurt and shaken up and you are not qualified to perform an in-depth government-qualified test of equipment, machinery, tools or premises. Therefore, in describing how the accident happened, *remember all the unknowns* in the above examples and use that tone in answering "how" the accident happened. *Say as little as possible.*

Why keep it brief? An injured person often has reduced the value of a possible claim by answering a general question about the accident before knowing the full extent of his injury. For instance, the railroad may later point out that while you originally said you hurt your neck now you are claiming to have a lower back injury.

If your injuries are so traumatic that you are unable to fill out an injury report at the time of the accident, *do it when you are able. Carrier officials are often willing to assist an injured person in filling out an accident report.* Beware. *Carrier officials in their supervisory capacity may inadvertently tend to slant the report in favor of the railroad.* Always fill out your own personal injury report!

A personal injury report may be the most important document you ever fill out. Take it seriously, no matter how slight the injury seems at the time you fill out the form. Many serious physical problems appear minor at first and may not even show up on x-rays until over a year later. Study the sample personal injury form in this book to help you answer the questions.

*Id.* at 3, 5.

[103] Legislative Report, *supra* note 98, at 55–56.

[104] *Id.* at 55.

> jective of these committees and the most important task for Amtrak following any injury—to learn from past accidents in order to prevent future ones—is as a practical matter made far more difficult. The FELA causes this strangulation of our safety improvement efforts and thus constitutes bad public policy.[105]

Railway safety is a public policy priority. Repealing the FELA, however, is not likely to reduce the safety incentive in the industry. More importantly, there are persuasive arguments that substituting a no-fault system would improve safety incentives. Certainly, the safety incentives which are independent of the FELA would survive its repeal. There is a conceded danger in railway work, but the industry danger to employees is nowhere near the horrific levels that justified the 1908 statute. In 1907, the year before the FELA was enacted, one estimate reported that there were nearly 12,000 fatalities among the more than one million railroad employees;[106] in 1989, forty-nine lives were lost on duty among a workforce of about one-quarter million.[107] The obvious public policy conclusion is that there is less need for the FELA today and, in fact, that the fault basis of the current law actually interferes with the goal of encouraging safety.

### 2. Compensation and Rehabilitation

Grouped together here are the policy goals of broad coverage of employees' work-related injuries and diseases, substantial protection against interruption of income, and provision of suf-

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[105] *Id.* at 55–56. Likewise, the FELA may inhibit the railroad from making necessary safety corrections out of a concern that the correction or change will be used as some evidence of negligence or responsibility in FELA litigation. Discussion Group, *supra* note 6, at 35. Of course, the "subsequent repair rule" generally prohibits admission of evidence of subsequent repairs to show negligence. *See* FED. R. EVID. 407. This rule applies in FELA cases. *E.g.*, Albrecht v. Baltimore & Ohio R.R., 808 F.2d 329, 332 (4th Cir. 1986).

[106] Schwartz & Mahshigian, *supra* note 24, at 3. This figure is disputed by the railroad industry. *See* Letter from Railroad Alliance for Improved Liability Systems to William K. Slate, II (Aug. 23, 1991) (citing Interstate Commerce Commission, Statistics on Railways in U.S. from 1908, 99 (1909)) (on file with the *Harvard Journal on Legislation*) (setting the figure for employee fatalities in 1907 at just over 4500).

[107] Table of Statistics provided by the Association of American Railroads (citing Association of American Railroads, Annual Claims and Litigation Reports and U.S. Department of Transportation, Federal Railroad Administration Accident/Incident Bulletin) (on file with the *Harvard Journal on Legislation*) [hereinafter Association of American Railroads FELA Statistics].

ficient medical care and rehabilitation.[108] A sound compensation system should be designed to provide prompt, fair, and certain compensation and to encourage a speedy return to work. It should compensate all work-related injuries and diseases on a no-fault basis. Benefits should be based on the employee's actual wage loss resulting from the injury and any subsequent disability. Wage replacement rates should be high enough to maintain the worker and his or her family at a reasonable standard of living but should not be so high as to create a disincentive to return to work. Benefits should include medical payments and necessary rehabilitation. Dependents should be entitled to reasonable survivors' benefits when the injury is fatal.

The fault basis of the FELA interferes greatly with the goals of compensation and rehabilitation because the statute denies full recovery to an injured employee unless and until he or she can prove that the injury resulted from the company's negligence. As a result, some injured employees and their families receive nothing and must depend on personal resources and public assistance. Recoveries are made more unpredictable by the apportionment of fault and the resulting reduction in damage awards based on the degree to which the employee was at fault. Rehabilitation often becomes a secondary consideration. The FELA system is characterized by irreconcilable, even irrational, outcomes for employee and employer alike.

Awards under the FELA are inequitable in terms of who receives an award and how much is awarded. Between 1979 and 1987, somewhere between nineteen and thirty-three percent of FELA cases that went to trial ended with a defense verdict where the employee took nothing.[109] A sample survey of FELA cases involving claims of $500,000 or more that went to trial from 1984 through 1987 revealed that slightly more than one out of five employees, many of them seriously injured, left the courtroom with nothing.[110] Additionally, a significant number of

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[108] *See* NATIONAL COMMISSION, *supra* note 79 and accompanying text. *See also* Eugene W. Herde, *FELA—Should It Be Abolished?*, 17 FORUM 407, 408–09 (1981) (discussion focused on the FELA).

[109] *Senate Hearing*, *supra* note 2, at 30 (testimony of John H. Riley).

[110] *Id.* at 23. *See also* Letter from Daniel Saphire to William K. Slate II, at 2 (June 20, 1991) (on file with the *Harvard Journal on Legislation*) (analyzing study of Association of American Railroads); Elkind, *supra* note 81, at 419 ("The experience is that of the serious cases at least 90% are settled, and very often the fact of a trial to completion is brought about not by a difference in the valuation of the case but a dispute between the defendants as to whether or not an indemnity agreement or a sidetrack argument is applicable.").

employees who take their cases to trial end up with a small verdict, often substantially less than was offered by the railroad in settlement.[111] Indeed, in 1973, the National Commission on State Workmen's Compensation Laws concluded overall that FELA "awards won are, in large proportion, rather low compared to the moderate benefits usual under workmen's compensation."[112]

Besides the unacceptable "zero" outcomes, the amount that an injured railroad worker recovers is highly unpredictable.[113] Again, because of the fault basis and the apportionment of damages based on the employee's negligence, two employees with similar work-related injuries can receive dramatically disparate recoveries. The literature is full of such "believe-it-or-not" grim comparisons.[114]

An effective compensation system should process claims quickly and should guarantee injured employees immediate benefits to meet day-to-day financial responsibilities. The FELA does not ensure prompt payment because the existing federal law forces the employee and employer to argue about who was at fault or the extent to which each side was at fault. The result is lengthy investigations, protracted settlement negotiations, and often extensive trial proceedings followed by successive levels of appeal. Under the FELA, unlike workers' compensation, the employee is assured compensation only when the process is completed. It is not unusual for FELA claims to take more than a year (on average 66 weeks) from injury to settlement, compared to a matter of months for processing a claim in the workers' compensation administrative system.[115] According to a

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[111] *House Hearing*, *supra* note 3, at 49 (testimony of William H. Dempsey). In practice, the railroad usually pays medical expenses under an insurance policy and many railroads have wage continuation programs. *See* Schwartz & Mahshigian, *supra* note 24, at 7. *See also* 45 U.S.C. §§ 351–367 (1988) (providing sick benefits for illness and injury).

[112] NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS, COMPENDIUM ON WORKMEN'S COMPENSATION 52 (1973) [hereinafter COMPENDIUM].

[113] Schwartz & Mahshigian, *supra* note 24, at 7–9.

[114] *See, e.g.*, Havens & Anderson, *supra* note 29, at 313; Tidd & Saphire, *supra* note 13, at 13–14. "It is true that a few railroad employees are better off under FELA, in the sense that they will receive compensation awards far out of proportion to the extent of their injuries and greater than they would have under a workers' compensation system." *Id.* at 17.

[115] *Senate Hearing*, *supra* note 2, at 14, 18, 22 (statement of Neal P. Curtin). With the statistical inevitability of growing federal court backlogs, these delays can soon be expected to lengthen considerably. Indeed, some predictions are that the growth in the criminal docket will result in an indefinite moratorium on all civil cases in some districts. *See* Baker, *supra* note 33, at 32. Furthermore, the "mix" of cases in the district courts

study of two states, even settled FELA claims took, on average, ten months and fourteen months respectively to negotiate. Yet, under those same two states' workers' compensation systems, the injured employees would have begun to receive benefits within thirty days of their injuries.[116] For a wage earner without a steady paycheck, facing mortgage payments and other family living expenses, the delay in delivery of compensation under the FELA can make a drastic difference.

Any sound compensation system should create incentives for rehabilitation of injured workers and for prompt return to the job or other meaningful work. According to the National Commission on State Workmen's Compensation Laws, the FELA does not create such incentives:

> [I]n contrast to workmen's compensation, railroad workers have no rehabilitation services. Under the FELA system, the employer, having paid for the injury, has no economic incentive or responsibility for the worker's future employability. Further, as much of a worker's claim is based upon his income loss expected because of disability, his claim might be weakened by early rehabilitative measures. Under FELA, neither employer nor employee have an incentive to cooperate with rehabilitation services. To the contrary, the system has built-in disincentives.[117]

Although many railroads have voluntary wage continuation programs, the fault-based FELA system offers no legal incentive for employers to finance rehabilitation before liability is established. In state workers' compensation systems, because fault is not an issue, employers have a financial incentive to encourage immediate rehabilitation to limit their damage exposure. From the injured employee's perspective, FELA litigation strategy calls for presenting the most sympathetic case to the jury and building up special damages. This may create pressure on the employee to avoid or to postpone the most prudent and effective medical and rehabilitative treatment. Yet promptness is most often critical to rehabilitation. More perversely, the FELA may affect the treatment regimen to encourage more

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has changed over the years so that the so-called complex or large cases which demand greater time and attention account for a greater percentage of the docket and, consequently, larger backlogs and greater delays.

[116] Havens & Anderson, *supra* note 29, at 314, 316 nn.89–91 (citing Arnold I. Havens & Anthony A. Anderson, A Comparison Between the Federal Employers' Liability Act and State Workers' Compensation Plans in Maryland and Pennsylvania 16 (unpublished 1987)).

[117] COMPENDIUM, *supra* note 112, at 52.

expensive diagnostic tests, when it is not otherwise indicated, for the purpose of upping the ante on damages. A one-time FELA award also "does not take into account the possibility the disability may deteriorate and the employee might need additional compensation or medical care."[118] Workers' compensation, by contrast, provides both immediate and long-term medical care, and compensation is based on a disability classification that may be changed administratively if the employee's condition changes.[119]

Since FELA damage awards tend to increase with the number of days the employee misses work, there is a built-in incentive to delay return to productive employment. The emphasis in the FELA is on "recovering *for* the injury rather than *from* the injury."[120] The 1989 Legislative Report that Amtrak filed with Congress reported two examples: (1) two years after one particular accident only one employee out of eleven who had filed FELA claims had returned to work; and (2) in a minor derailment in which no passengers reported injury, all fifteen on-board employees filed FELA claims and more than half had not returned to work after several months.[121] State workers' compensation provides the opposite incentive. Because fault is not in question and damages are fixed by schedule, there is every incentive to pursue medical rehabilitation without regard to legal strategy.

The FELA is a system of extremes. On the employee's side the worst extreme is to be injured seriously or even to be disabled, to suffer the attendant delay and costs of litigation,

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[118] Schwartz & Mahshigian, *supra* note 24, at 9.

[119] *Id. See generally* DONALD T. DECARLO & MARTIN MINKOWITZ, WORKERS' COMPENSATION INSURANCE AND LAW PRACTICE: THE NEXT GENERATION 77–84 (1989).

[120] Discussion Group, *supra* note 6, at 59 (emphasis added) (remarks of Kenneth L. Gipson, Corporate Director, Safety/Health and Statutory Benefits, Weyerhaeuser Corporation).

[121] Legislative Report, *supra* note 98, at 54. Company statistics at CSX, for example, suggest a worrisome recent trend that the percentage of employees returning to work after filing a FELA claim is declining:

| *Year* | *FELA claims* | *Employee did not return to work* |
|---|---|---|
| 1987 | 3,115 | 403 (12.9%) |
| 1988 | 3,126 | 452 (14.5%) |
| 1989 | 3,001 | 502 (16.7%) |
| 1990 | 1,986 | 565 (as of 5/91) |

Discussion Group, *supra* note 6, at 69.

and in the end to be "zeroed" by some jury—to take nothing, not even one dollar in compensation for the injury. On the industry's side, FELA claim payments represent an ever-escalating and relatively uncontrollable cost of doing business. Including damage awards, administration, and defense expenses, the FELA costs the railroad industry about $1 billion annually, approximately 3.6% of gross revenues.[122]

The trends do not make sense. Costs have risen dramatically in the last decade, while exposure has decreased.[123] Railroad employment has *decreased 45%* (1980: 475,930; 1989: 261,063).[124] Reportable injuries have *decreased 60%* (1980: 56,428; 1989: 22,232).[125] FELA payouts over the same period have *increased 130%* (1980: $343 million; 1989: $789 million).[126] The 1990 payout was $88 million above 1989's payout even though there were 6402 fewer employees in the industry.[127] Again, these trends occurred in the safest decade in railroading

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[122] *House Hearing*, *supra* note 3, at 47 (statement of William H. Dempsey). By comparison, a recent article in the *New York Times* reported on the "serious trouble" in state workers' compensation systems because private employers were facing insurance premiums of 2.3% of their *payroll*, with higher percentages for some industries. Milt Freudenheim, *Costs Soar for On-the-Job Injuries*, N.Y. TIMES, Apr. 11, 1991, at D1.

[123] The following chart demonstrates the combination of rising costs and decreasing exposure under the FELA since 1979.

**FELA: Annual Trends**

| *Year* | *Railroad Employment* | *FRA Reportable Injuries, Deaths & Illnesses* | *FELA Payout (in millions)* |
|---|---|---|---|
| 1979 | 487,534 | 67,025 | $296 |
| 1980 | 475,930 | 56,428 | 343 |
| 1981 | 459,711 | 47,903 | 398 |
| 1982 | 385,136 | 36,110 | 410 |
| 1983 | 353,418 | 30,477 | 406 |
| 1984 | 354,639 | 33,423 | 504 |
| 1985 | 312,489 | 29,868 | 526 |
| 1986 | 286,417 | 22,444 | 585 |
| 1987 | 273,429 | 22,037 | 686 |
| 1988 | 268,208 | 22,616 | 811 |
| 1989 | 261,063 | 22,232 | 789 |
| 1990 | 254,661 | N/A | 877 |

Association of American Railroads FELA Statistics, *supra* note 107. *See also Senate Hearing*, *supra* note 2, at 23–24 (statement of John H. Riley); *House Hearing*, *supra* note 3, at 47–48 (statement of William H. Dempsey).

[124] *See supra* note 123 (statistics can be found in the chart).

[125] *Id.*

[126] *Id.*

[127] *Id.*

history.[128] Measured by outcomes, what happens under the FELA compensation system is simply irrational.

### 3. Administrative Efficiency

The procedural objective of any compensation system is that the basic goals of encouraging safety, providing full and fair compensation, and assuring rehabilitation all be accomplished comprehensively and efficiently. An efficient system minimizes the extent to which it burdens the court system. An efficient system does not allow attorneys' fees and administrative costs to become disproportionate when measured as reductions in employees' recoveries or as increases in employers' costs. Once again, the FELA fails; transaction costs in federal courts are high, expenditures on attorneys' fees are exorbitant, and the FELA has a net negative impact on workplace harmony.

From the standpoint of federal court jurisdiction, repealing the FELA and shifting those cases into state administrative forums may be considered a kind of specialized adjudication.[129] Employees with small claims actually may be better off in less elaborate and less expensive workers' compensation administrative proceedings.[130] More importantly, "given the limitations on federal judicial resources, one must ask whether it is rational to devote scarce judge time to claims that can be resolved fairly and easily in simple proceedings."[131] My answer is that continuing FELA jurisdiction in federal courts is not rationally justified.

Although the FELA system may have been justified in 1908, the development of workers' compensation long ago ended the need for this statute. Workers' compensation statutes provide the same advantage of the FELA—eliminating common law doctrines that often prevented recovery—but go further, relieving the employee of the burden of proving that the employer was at fault. Furthermore, the administrative remedy is faster and less costly than a lawsuit in federal court.[132]

As a percentage of federal courts' caseload, FELA cases do not appear to add up to much on first impression. The FCSC estimated that repealing the statute, and thereby eliminating

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[128] *See supra* Part III.A.1.
[129] SUBCOMMITTEE REPORT, *supra* note 7, at 375.
[130] *Id.*
[131] *Id.*
[132] *Id.* at 381.

standard and Jones Act claims under the FELA, would effect a net reduction of only two percent of the national docket of the United States District Courts and one percent of the national docket of the United States Courts of Appeals.[133] It is noteworthy, however, when considering the federal court workload, that repealing the FELA in 1987 and 1988 would have saved five percent of all civil trials and eight percent of all civil jury trials.[134] In an era of growing dockets and lengthening backlogs,[135] this is a significant savings of federal court resources. A relatively small decrease becomes more significant in a besieged court system. Characterized already by an inadequate capacity to meet current demands, the federal judicial system is benefited disproportionately by even marginal reductions in caseload. Technical issues in FELA cases, such as determining who comes under the statute, can oblige considerable expenditure of federal appellate, even Supreme Court, resources.[136]

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[133] STUDY COMMITTEE REPORT, *supra* note 35, at 62. The recommendation included related Jones Act claims, see 46 U.S.C. app. § 688(a) (1988), and were based on 1987 and 1988 data. *See* SUBCOMMITTEE REPORT, *supra* note 7, at 383–84 nn.25–26. *See also supra* note 41 (describing claims under the Jones Act).

The statistics on the FELA itself have been relatively constant. As a percentage of civil cases, FELA accounted for:

| | *District Courts* | | *Courts of Appeals* | |
|---|---|---|---|---|
| *Year* | *Total Civil Cases* | *FELA Cases* | *Total Civil Cases* | *FELA Cases* |
| 1980 | 168,789 | 1,990 (1.18%) | 14,854 | 43 (.29%) |
| 1985 | 273,670 | 2,221 (0.81%) | 23,571 | 84 (.36%) |
| 1990 | 217,879 | 2,741 (1.26%) | 27,116 | 69 (.25%) |

Data compiled by the Director of the Administrative Office of the United States Courts and reprinted in: JUDICIAL CONFERENCE OF THE UNITED STATES, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 366–67, 373 (1980) (tables B7, C1); JUDICIAL CONFERENCE OF THE UNITED STATES, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 272–73, 280 (1985) (tables B7, C2); JUDICIAL CONFERENCE, *supra* note 56, at 130–31, 137 (tables B7, C2).

[134] STUDY COMMITTEE REPORT, *supra* note 35, at 62.

[135] *Id.* at 4–6.

[136] Inconsistent application of the FELA can be ascribed to its many technical requirements. For example, one issue that has created incongruous results is the question whether a plaintiff was "employed" by the railroad. *Compare* Kelley v. Southern Pac. Co., 419 U.S. 318 (1974) (holding that the employee of a trucking company which was a wholly owned subsidiary of a railroad could argue a "master-servant relationship" in the trial court and, thus, state a claim under the FELA) *with* Hebert v. Southern Pac. Transp. Co., 429 U.S. 904, 906 (1976) (denying certiorari to a case that was described by the district court as "[d]irectly on point" with *Kelley*) (Blackmun, J., dissenting).

A second vexing issue is whether the employee was engaged in interstate commerce at the time of the injury. *See* Reed v. Pennsylvania R.R., 351 U.S. 502, 503–06 (1956) (holding that a clerical employee of a railroad company, injured in her office when a cracked window pane blew in on her, was employed in interstate commerce at the time

Litigation in federal court can be costly. Besides court costs and filing fees, litigation expenses include investigation expenses, medical examination fees, deposition and other discovery expenses, expert witness fees, travel expenses, and various other expenses. In the aggregate, these expenses can be considerable and, like attorneys' fees, they are paid "off the top" of the FELA award—before the injured employee receives anything.

The highest transactional cost in FELA cases is attorneys' fees. Attorney involvement in FELA cases has increased sharply in recent years. In 1988, attorneys were involved in approximately one-third of FELA cases. However, the cases in which the claimant was represented accounted for almost three-fourths of the total industry payout for FELA claims.[137] The contingency fee arrangement, endemic to tort litigation, is generally used in FELA cases. As a result, FELA attorneys are the beneficiaries of awards under the FELA fault system.[138] The contingency fee arrangement entitles the employee's attorney to a percentage of the total settlement or jury verdict.[139] The typical percentage can range from twenty-five percent, even for a claim when no suit is filed, to thirty-three percent, for a claim on which suit is filed.[140] In this way, a large portion of all money

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of the injury). *But see* Felton v. Southeastern Pa. Transp. Auth., 757 F. Supp. 623, 625–26 (E.D. Pa. 1991) (holding that a railroad trackman, injured while lifting a tie from the track, was involved in intrastate, not interstate, commerce because this particular subsidiary provided city subway service).

An additional example of the illogical applications of the FELA is the treatment afforded state-owned railroads due to the eleventh amendment. In 1987, the Supreme Court of the United States overruled precedent which had permitted a state employee to bring a claim under the FELA against a state-owned railroad. *See* Parden v. Terminal Ry., 377 U.S. 184 (1964), *overruled by* Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468 (1987). *But see* Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990) (holding that state's consent to suit constituted a waiver of the sovereign immunity doctrine and enabled a litigant to file a FELA action).

[137] *House Hearing*, *supra* note 3, at 48 (statement of William H. Dempsey). *See also* BLOUNT & DVORAK, *supra* note 100, at 89 (quoting a judge to say "A FELA case can only be lost if you have an idiot for an attorney, or if the client has not been truthful to his attorney" and advising the injured employee that "an attorney will usually get you more—even after deducting his fee—than you could get on your own"). Add to this the perception by at least some that district judges assert pressure to settle FELA cases without a trial. Discussion Group, *supra* note 6, at 53 (remarks of Kenneth L. Gipson).

[138] Apparently through specialization, a FELA bar has developed which obviously has high stakes in preventing any reform. Discussion Group, *supra* note 6, at 106 (remarks of Robert W. Blanchette, Special Counsel, Railroad Alliance for Improved Liability Systems).

[139] The FCSC recommended that Congress should not adopt a "loser pays" rule. STUDY COMMITTEE REPORT, *supra* note 35, at 105.

[140] *Id.*

paid out under the FELA never reaches the injured employee. For example, a General Accounting Office study of 1984 FELA payments estimated that Amtrak's total FELA payments were $24 million. Of this total, $21 million was paid in claims in which the employee was represented by an attorney; based on the typical contingency fee of twenty-five to thirty-three percent of paid claims, one can estimate that attorneys received contingency fees totaling $5 to $7 million in these cases.[141]

Transaction costs of the FELA are high for the employers as well.[142] One large railroad estimated additional costs to defend against FELA claims of $17 million, over and above a $129 million payout in 1987.[143] A second railroad estimated expenses of $18.2 million for corporate counsel, outside counsel, claims staff, investigation, and litigation expenses, added to a 1988 payout of $88.4 million.[144] A study of 1981 transaction costs estimated the total spent industry-wide by the railroads and by injured workers for counsel, investigation and defense, and for other administrative expenses to be over forty percent of the sum employees ultimately received to compensate them for their injuries.[145]

Employees who recover the largest FELA judgments may end up receiving less than their counterparts under state workers' compensation systems, once expenses and attorneys' fees are deducted. The employers pay substantial additional transaction costs beyond the FELA payments. Workers' compensation systems reduce transaction costs by eliminating complex issues of fault, by using administrative procedures, and by re-

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[141] *Senate Hearing*, *supra* note 2, at 18–19 (statement of Neal P. Curtin).

[142] Schwartz & Mahshigian, *supra* note 24, at 9–10. One railroad executive commented:

> [W]e have one employee who truly is permanently and totally disabled. He will be for the rest of his life. He sued us and we spent $75,000 for attorneys' fees on that case. He lost it and we saved a lot of money because that case probably would have cost us $400,000—a young man under [workers' compensation] probably would have cost us $400,000 and it's not costing us anything. And I feel bad about that.

Discussion Group, *supra* note 6, at 41 (remarks of Kenneth L. Gipson).

[143] *House Hearing*, *supra* note 3, at 75 (prepared statement of Jerry R. Davis, President, CSX Rail Transport).

[144] *House Hearing*, *supra* note 3, at 61 (prepared statement of Gerald Grinstein, President and Chief Executive Officer, Burlington Northern Railroad).

[145] Tidd & Saphire, *supra* note 13, at 15 n.48 (citing 1 ASSOCIATION OF AMERICAN RAILROADS, FEDERAL EMPLOYERS' LIABILITY ACT STUDY, REPORT OF THE STEERING COMMITTEE 9 (1983)). *See also House Hearing*, *supra* note 3, at 239 (statement of Gilbert E. Carmichael) (FRA estimates that 30 cents of every FELA dollar is skimmed off for legal and administrative expenses).

lying on compensation schedules that often set limits on attorneys' fees.[146] Repeal of the FELA would not reduce the transaction costs to zero, of course. However, as an administrator of the Federal Railroad Administration has testified before Congress: "We know of no independent analysis of the FELA system which failed to conclude that the legal expenses and court costs of the state compensation programs are significantly less than those under FELA."[147] A significant reason is that almost every state workers' compensation system places some limit on attorneys' fees.[148]

There is one other transaction cost of the FELA that is less quantifiable than caseload or litigation expenses but is no less real, and it goes beyond the courtroom. The fault basis of the FELA diminishes the intangible but important expectation for workplace harmony. The FELA inevitably creates an undesirable "divisiveness" between employees and employers that interferes with the policy goals of encouraging safety and assuring fair compensation and rehabilitation.[149]

Because establishing fault is an element in each FELA claim, accident investigations revolve around assessing blame.[150] Fellow workers frequently are called to testify in a dispute between their peers and the company. Situations quickly become adversarial. When employee and employer become "plaintiff" and "defendant," the stakes get higher and the adversarial nature of the process becomes increasingly formalized. The plaintiff-employee, who must establish fault, will go to great lengths to avoid being "zeroed." The railroad, threatened by a potentially large verdict, will defend tenaciously.[151]

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[146] *House Hearing*, *supra* note 3, at 239 (statement of Gilbert E. Carmichael).

[147] *Id.* (noting state compensation systems' economic superiority over the FELA).

[148] Tidd and Saphire note that:

> In the main, state workmen's compensation programs serve as a check on outrageous attorneys' fees. All but five states exert some control over the amount the claimant's attorney can take as a fee. In the vast majority of states, attorneys' fees are either fixed by, or subject to the approval of, the administrative agency or the court. In nineteen states a limit—either as a percent of recovery or absolute amount, or both—is placed on the claimant's attorneys' fees. As a result, a workers' compensation claimant is likely to keep a much larger percentage of his award than is a FELA claimant.

Tidd & Saphire, *supra* note 13, at 21.

[149] *Id.*

[150] Havens & Anderson, *supra* note 29, at 314.

[151] One railroad executive commented:

> We will often take a case on if we feel it has no merit. Here is kind of what our policy is[:]
>
> If we have an employee that's injured, we will voluntarily extend benefits to

The goal of assuring safety may be jeopardized by the fault standard because the incentive to cooperate and be forthright in the investigation cuts against one side or the other, and often against both sides.[152] The goal of rehabilitation for the employee is lost in this process, as has been discussed.[153] Unlike workers' compensation, FELA litigation results in a substantial number of employees, many of them severely injured and disabled, receiving nothing at trial. One railroad executive noted that this naturally can be expected to leave the employee and fellow workers with bad feelings toward the company.[154]

The President of Amtrak recently testified before Congress that efforts to "institutionaliz[e] safety awareness and injury prevention" are "continually undermined by a system that relies on the determination of fault—often in a bitterly fought courtroom battle—as the basis for employee injury compensation."[155] Encouraging safety in the workplace requires a joint effort between management and labor. Compensation for injury ought to be full, fair, and certain. The compensation system should not get in the way of rehabilitation. An accident should be followed by an open and honest investigation which, in turn, should be followed by a cooperative effort to prevent similar accidents in

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> that employee, pay his medical, pay him time lost, but the minute he brings a lawsuit against us, we cut everything off. If we have any opportunity at all to prevail in that case, we will carry it right on through to a judgment.
>
> . . . .
>
> We have won a number of those, and I have been sorry for the employee, much like [another discussant]. When I see an employee who truly had an industrial injury and ended up a permanent, total, great hardship to him and his family and a ward on the society, it is really difficult to take that.
>
> But, what are you going to do with a system like this? Are you going to reward that person for bringing a lawsuit against you when the essence of the injury was his own fault? Not with this system—we would rather pay him a benefit.

Discussion Group, *supra* note 6, at 38–39 (remarks of Kenneth L. Gipson).

[152] *See supra* notes 98–105 and accompanying text. This is one of the tort system's hidden transaction costs. The plaintiff will:

> fear getting less if he appears before a jury fully healed or rehabilitated (with, for instance, an artificial leg that he can expertly use), very often he will forego treatment or rehabilitation during the long delay between accident and trial in order to appear before a sympathetic jury as pathetically handicapped as possible. If the gamble pays off and a large award results, it may still be too small for the more expensive care required by a late start at rehabilitation.

Tidd & Saphire, *supra* note 13, at 20 (quoting ROBERT E. KEETON & JEFFREY O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE 31 (1965)).

[153] *See supra* Part III.A.2.

[154] *House Hearing*, *supra* note 3, at 73 (statement of Jerry R. Davis).

[155] *Senate Hearing*, *supra* note 2, at 37 (statement of W. Graham Claytor, Jr., President and Chairman of the Board, Amtrak).

the future. These reasonable expectations historically have led courts and policymakers to favor workers' compensation systems.[156] Such expectations are not considered idyllic but are deemed realistic in every other industry except railroading.

The experience of the Alaska Railroad demonstrates that the expectations discussed above are realistic for railroading as well.[157] The Alaska Railroad was built by the federal government in the World War I era and was transferred to state ownership in 1985. It presently provides freight and passenger service as a quasi-private/quasi-public corporation with 577 miles of track, 700 employees, and annual revenues exceeding $50 million.[158] When the Alaska Railroad was federally owned, employees fell under the no-fault Federal Employees' Compensation Act.[159] Today, employees are covered by the Alaska Workers' Compensation Act, which is a typical no-fault system.[160] The Alaska Railroad is among the top one-third of railroads in its class for safety.[161] Injured workers receive prompt and comprehensive compensation. Medical rehabilitation is immediate. Less benefits are siphoned off to pay lawyers' fees. Vocational rehabilitation is mandated for certain claims.[162] Removing the fault requirement removed barriers to achieving these policy goals. The Alaska Railroad is proof, in short, that the divisiveness and hostility engendered by the FELA are not inevitable.

Transaction costs, economic matters, and efficiency must be discounted in the operation of a compensation system to give paramount concern to matters of safety, compensation, and rehabilitation. Still, we must recognize the relevance of these

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[156] One state court described workers' compensation as:

> a great compromise between employers and employe[es]. Both had suffered under the old system; the employers by heavy judgments of which half was opposing lawyers' booty, the workmen through the old defenses or exhaustion in wasteful litigation. Both wanted peace. The master in exchange for limited liability was willing to pay on some claims in the future where in the past there had been no liability at all. The servant was willing not only to give up trial by jury but to accept far less than he had often won in court, provided he was sure to get the small sum without having to fight for it.

Stertz v. Industrial Ins. Comm'n, 158 P. 256, 258 (Wash. 1916). *See generally* Nina G. Stillman & John R. Wheeler, *The Expansion of Occupational Safety and Health Law*, 62 NOTRE DAME L. REV. 969, 971–74 (1987) (describing the evolution of health and safety policies in the workplace since the Industrial Revolution).

[157] *Senate Hearing*, *supra* note 2, at 109–12 (letter from F.G. Turpin, President and Chief Executive Officer, Alaska Railroad Corporation).

[158] *Id.* at 109.

[159] 5 U.S.C. § 8146 (1988).

[160] ALASKA STAT. §§ 23-30-005 to 23-30-270 (1990).

[161] *Senate Hearing*, *supra* note 2, at 111 (letter from F.G. Turpin).

[162] *Id.*

market factors. The unreasonable transaction costs of the fault-based FELA system should help to persuade Congress to repeal the 1908 statute.

### 4. National Transportation Policy

The proposal to repeal the FELA goes beyond the railroad industry to implicate national policies in the areas of transportation competition, international trade, deregulation, and budget.[163] Each of these considerations militates in favor of repeal and merits brief mention here.

Considerations of efficiency and fairness for the domestic transportation industry would lead one to expect equitable burdens on competing industries. Because of the FELA, however, this is decidedly not the reality.[164] The high costs of the FELA "put railroads at a distinct competitive disadvantage in relation to other transportation modes. One of the most significant changes that has occurred in the years since FELA's enactment is the increase in competition in the transportation market from trucks, bargelines, and other modes."[165] Because of the added costs of the FELA, railroads do not compete on a "level playing field" with others in the transportation industry.[166] Higher costs are passed on, as much as possible, to shippers (who pass them on to consumers) in the form of higher rates and to passengers in the form of higher fares.[167] According to one estimate, the resulting add-on is $37.50 for each freight car and $2.40 for each Amtrak ticket.[168]

Ironically, the escalating costs of the FELA system, which is supposed to compensate injured workers, "may actually be contributing to the loss of railroad jobs" in the long run.[169] For example, in 1987, "the Union Pacific Railroad, which owns a trucking subsidiary, determined that it spent nearly seven times more per railroad employee under the FELA than it did per trucking employee" under workers' compensation.[170] As FELA

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[163] *See generally* NATIONAL TRANSPORTATION POLICY, *supra* note 5, at 1–11 (providing a policy summary).

[164] *See generally* Havens & Anderson, *supra* note 29, at 312–13.

[165] *House Hearing*, *supra* note 3, at 48 (statement of William H. Dempsey).

[166] *Id.*

[167] *Id.* at 45.

[168] Press Release from Railroad Alliance for Improved Liability Systems (Oct. 17, 1990) (on file with the *Harvard Journal on Legislation*) (quoting Robert W. Blanchette).

[169] *House Hearing*, *supra* note 3, at 61 (statement of Gerald Grinstein).

[170] *Id.* at 76 (statement of Jerry R. Davis).

awards increase to higher and higher levels, this compensation system has the potential to put smaller railroads out of business and to eliminate critical service to shippers and communities on those lines.[171] New regional and local railroads, as well as smaller light-density lines trying to turn a profit on lines spun off by larger railroads, are particularly vulnerable.[172] Large and small railroads are handicapped in the transportation market competition by the FELA, and small railroads are actually threatened with extinction by the FELA.

International business competition is another consideration in favor of the FELA's repeal. The United States' participation in international markets is affected by national transportation policy.[173] World developments toward globalization of the economy and more open trading systems will mean more opportunity to sell the United States' products abroad. Developments such as the advent of the European Economic Community and competition from the Pacific Rim mean more markets with more competition for United States firms. A more competitive world market necessarily means that United States industries will face even more foreign competition in this country. Businesses in the United States deem reasonably priced transportation to be critical to their ability to compete.[174] Consider the implications of a single comparison: the FELA takes $2.50 of every $100 of gross revenue from shippers; in Canada, where compensation is on a no-fault basis, these costs account for less than $1.00 of every $100.[175]

Analysis of the public policy of deregulation provides another perspective on the FELA.[176] The FELA may be associated with

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[171] *Id.* at 87 (statement of William G. Ferguson, President, TTI Systems, also representing American Short Line Railroad Association).

[172] A railroad with a $12 million annual revenue literally could be "wiped out" by a large FELA payment. *Id.* at 85 (testimony of William G. Ferguson). Insurance is no solution. One small railroad paid $250,000 a year on a 50-mile railroad for a $500,000 deductible. *Id.* at 93–94.

[173] *See generally* U.S. DEPARTMENT OF TRANSPORTATION, NATIONAL TRANSPORTATION STRATEGIC PLANNING STUDY 6-1 to 6-15 (Mar. 1990) [hereinafter PLANNING STUDY]. One estimate—though somewhat dated and therefore likely understating today's experience—is that, in addition to the human toll, work-related injuries and deaths reduce the GNP by $8 billion. ARTHUR J. MILLUS & WILLARD J. GENTILE, WORKERS' COMPENSATION LAW AND INSURANCE 37 n.107 (2d ed. 1980).

[174] *House Hearing*, *supra* note 3, at 226 (statement of Allen Housh, Vice President—Transportation, Cargill, Inc.). General Motors, a domestic manufacturer of automobiles, which ships components and finished products by rail, has obvious foreign competition. Transportation costs and delays are significant in this global competition.

[175] *Id.* at 245 (letter from James E. Bartley, Executive Vice President, The National Industrial Transportation League).

[176] *See* PLANNING STUDY, *supra* note 173, at 2-8 to 2-9.

the turn-of-the-century beginning of the regulatory state. However, the Staggers Rail Act of 1980[177] significantly reduced governmental economic regulation of the nation's railroads. Congress' clear policy choice in the Staggers Rail Act was to reestablish the market, rather than regulation, as the rate-setting mechanism in the rail industry.[178] This deregulated environment has enabled railroads to improve their financial condition, which was quite precarious in the 1960s and 1970s.[179] The deregulated decade also marked a period during which the industry's safety record improved significantly.[180] The railroads' improved financial condition, attributed to deregulation, allowed the railroads to make investments in new track and equipment and to undertake maintenance programs. Accidents and injuries to employees have fallen as a result.[181] The federal role in safety regulation has been preserved by the FELA and would continue after the repeal of the FELA.[182] However, repealing the FELA would

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[177] Pub. L. No. 96-448, 94 Stat. 1895 (codified as amended in scattered sections of 45 & 49 U.S.C.). *See generally Rail Industry/Staggers Act Oversight: Hearing Before the Senate Subcommittee on Surface Transportation of the Committee on Commerce, Science, and Transportation*, 100th Cong., 1st Sess. (1987). *See also* PLANNING STUDY, *supra* note 173, at 7-1, 7-2.

[178] *See generally* Paul S. Dempsey, *Transportation Deregulation—On a Collision Course?*, 13 TRANSP. L.J. 329 (1984) (analyzing the impact of deregulation on the transportation industry); Frank N. Wilner, *Railroads and the Marketplace*, 16 TRANSP. L.J. 291 (1988) (discussing economic benefits of the Staggers Rail Act); G. Kent Woodman & Jane S. Starke, *The Competitive Access Debate: A "Backdoor" Approach to Rate Regulation*, 16 TRANSP. L.J. 263 (1988) (reviewing pre-Staggers regulation of the railroad industry, reforms and implementation of the Staggers Rail Act, and recent legislative efforts to reregulate the industry); Michael Billiel, Note, *Fine-tuning Deregulation: The Interstate Commerce Commission's Use of Its General Rail-Exemption Power*, 53 GEO. WASH. L. REV. 827 (1985) (examining proper scope of Interstate Commerce Commission exemptions to deregulate rail rates consistently with Congressional intent).

[179] Woodman & Starke, *supra* note 178, at 265–71.

> Taken together, the significant deregulation of rail rates, the new flexibility of carriers to escape uneconomic joint rates and routes, and the ability to negotiate and enter into contracts effectively removed the heavy cloak of Government regulation and rate equalization that had brought the industry to near financial collapse. In combination, these reforms altered the very nature of the rail industry and gave new economic life to the railroads.

*Id.* at 270. *But see* Wilner, *supra* note 178, at 311 ("In short, rail earnings have not improved since Staggers and remain well short of what the industry needs for long-term viability and what other industries are achieving.").

[180] *See supra* text accompanying notes 91–97.

[181] *Senate Hearing*, *supra* note 2, at 50, 52 (statement of William H. Dempsey).

[182] *See* Rail Safety Improvement Act of 1988, Pub. L. No. 100-342, 102 Stat. 624 (codified in scattered sections of 45 U.S.C.). Even proponents of FELA repeal recognize that a federal role in safety regulation of railroads would continue after the repeal of the FELA. *See House Hearing*, *supra* note 3, at 3 (statement of Rep. Whittaker). *See also supra* text accompanying notes 95–97 (discussing the FRA). Other national interests, in regulation of mergers for example, also would survive FELA repeal. *See* Interstate Commerce Act, 49 U.S.C. §§ 10301–10388 (1988).

carry momentum away from regulation and toward the free market because railroads would be on an even setting with other areas of the transportation industry so far as workers' compensation is concerned.

A final transportation policy concern is saving federal funds at a time when savings are sought in all quarters. Presumably, savings from repeal of the FELA could reduce subsidies for the National Railroad Passenger Corporation (Amtrak).[183] During 1988, "the total cost to Amtrak (excluding medical payments) to defend, pay and administer FELA claims amounted to *$49.5 million*," or roughly $135,000 every day.[184] There are variations in workers' compensation systems of the different states, but studies have predicted a savings of several million dollars per year in the Amtrak budget,[185] a significant reduction in Amtrak's dependence on federal financial support, and substantial progress toward the announced policy goal of complete privatization.[186]

### 5. Alternatives to the FELA

The case for repeal of the FELA has been made. The question then becomes, what should replace the FELA? The FCSC has recommended repeal of the FELA and suggested that railway employees be covered by state workers' compensation programs "or a federal system created by Congress."[187] I would

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[183] *See* 45 U.S.C. § 548(b) (1988) (requiring that Amtrak submit, "at the time of its annual report . . . such legislative recommendations as it deems desirable, including the amount of financial assistance needed for operations and for capital improvements . . .").

[184] Legislative Report, *supra* note 98, at 48. The breakdown, from the same Legislative Report, is found in Table 1. Repeal of the FELA would also allow for cost reductions in state subsidized railroads, which provide crucial rail service but are struggling financially. *See Senate Hearing*, *supra* note 2, at 99–101 (statement of New Jersey Transit) (requesting inclusion in experiment to exempt Amtrak from the FELA and estimating that New Jersey Transit "would save at least $1–2 million annually . . . by switching to New Jersey's no fault workers' compensation system").

[185] *Senate Hearing*, *supra* note 2, at 18. Under Connecticut's workers' compensation system, there would be a $3 million savings in the Amtrak budget; under Indiana's system, there would be a $17 million savings. *Id. See also Reauthorization of Amtrak: Hearing of the Senate Subcommittee on Surface Transportation of the Committee on Commerce, Science, and Transportation*, 100th Cong., 2d Sess. 3 (1988) (statement of Sen. Kasten) (noting that the repeal of the FELA "could result in significant savings, $16 million in [fiscal year 1987]").

[186] *See Reauthorization of Amtrak: Hearing of the Senate Subcommittee on Surface Transportation of the Committee on Commerce, Science, and Transportation*, 100th Cong., 2d Sess. 3 (1988) (statement of Sen. Kasten).

[187] STUDY COMMITTEE REPORT, *supra* note 35, at 63.

endorse only the first alternative—state workers' compensation systems.

All fifty state legislatures and the Congress[188] "have determined that no-fault systems are the appropriate means of providing compensation to injured workers."[189] While the state systems vary, they share the basic features of no-fault: (1) an employee who suffers a work-related injury or illness is automatically entitled to benefits; (2) benefits are based on lost wages and medical expenses; (3) an administrative agency oversees the system; and (4) rehabilitation is a specific part of the program.[190] Almost ninety percent of the workforce in this country is covered by workers' compensation.[191] I can find no rationale whatsoever to explain why 250,000 railway workers[192] should be treated differently from all the other United States workers, including the over two million employees in the trucking industry. In this regard, I simply do not see what would be gained from the proposed three-year experiment to exempt Amtrak from the FELA and to transfer Amtrak employees' injury claims to the various state workers' compensation systems.[193] The proposal seems too timid and unnecessary.[194]

Congress *could* repeal the FELA and place railway workers under the Federal Employees' Compensation Act,[195] but I do

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[188] *See* 5 U.S.C. §§ 8101–8151 (1988).

[189] Saphire, *supra* note 82, at 404.

[190] All workers' compensation systems are characterized by certain common elements:
Compulsory application of the worker's compensation principle to certain specific employments;
Liability based solely on the work connection and not on fault;
Benefits according to a prescribed schedule for injury or death;
Rate of compensation keyed to the earning power of the employee;
Provision for exclusive employer liability under the program;
Compulsory insurance for or proof of financial responsibility by the employer; and,
Administration of the program outside the court system through agency or commission proceedings.
Stillman & Wheeler, *supra* note 156, at 971.

[191] *See* Note, *Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes*, 96 HARV. L. REV. 1641, 1642 n.8 (1983) (citing U.S. CHAMBER OF COMMERCE, ANALYSIS OF WORKERS' COMPENSATION LAWS 1982 at 1 (1982)).

[192] Association of American Railroads FELA Statistics, *supra* note 107.

[193] *See generally Hearing Before the Senate Subcommittee on Surface Transportation of the Committee on Commerce, Science, and Transportation*, 101st Cong., 1st Sess. (1989); *Senate Hearing*, *supra* note 2.

[194] *Cf.* 136 CONG. REC. S15,558 (daily ed. Oct. 18, 1990) (statement of Sen. Kasten) (referring to proposed experiment he sponsored when introducing a bill for full repeal of the FELA).

[195] 5 U.S.C. § 8101 (1988). *See* DECARLO & MINKOWITZ, *supra* note 119, at 41.

not understand what would be gained by that and have heard no one suggest it.

Congress *could* amend the FELA by adding a provision indicating that the FELA applies "unless otherwise agreed to in the collective bargaining agreement" or, alternatively, the statute repealing the FELA could provide that an affected worker is to be covered by his state's workers' compensation statute "unless otherwise agreed to in the collective bargaining agreement." Such federal provisions would have the advantage of resolving the issue of what should replace the FELA through collective bargaining negotiations.[196] I do not understand, however, just what such a provision, setting as the default system either the FELA or the state workers' compensation system, would accomplish. Furthermore, I am pessimistic that collective bargaining in practice would ever achieve a compromise to replace whichever statutory presumption was enacted.[197]

Congress *could* set out to facilitate negotiations between railroad management and labor unions to develop a completely new federal no-fault system to replace the FELA, as the FCSC has suggested is possible. Such a new federal system could be expected to adhere to the Recommendations of the National Commission on State Workers' Compensation Laws, in particular the so-called "nineteen essential recommendations."[198] In testi-

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[196] *See House Hearing*, *supra* note 3, at 108 (testimony of Alan Fitzwater, Vice President, Government Affairs, Burlington Northern Railroad Co.).

[197] *See id.* at 162 (testimony of Geoffrey N. Zeh, Vice Chairman, Railway Labor Executives' Association, also representing Brotherhood of Maintenance of Way Employees) ("[T]he way we do our business as far as negotiations goes, doesn't hold out a whole lot of hope for an expeditious resolution of our current issues much less some of the more difficult issues here."). *See also id.* at 153 (statement of James N. Ellenberger, Assistant Director, Department of Occupational Safety, Health and Social Security, AFL-CIO) (expressing strong hostility toward workers' compensation).

[198] *See generally* NATIONAL COMMISSION, *supra* note 79. The 19 essential recommendations were:

> R2.1 Coverage by workmen's compensation laws be compulsory and that no waivers be permitted. R2.1(a) Coverage is compulsory for private employments generally. R2.1(b) No waivers are permitted.
>
> R2.2 Employers not be exempted from workmen's compensation coverage because of the number of their employees.
>
> R2.4 A two-stage approach to the coverage of farmworkers. First, as of July 1, 1973, each agriculture employer who has an annual payroll that in total exceeds $1,000 be required to provide workmen's compensation coverage to all of his employees. As a second stage, as of July 1, 1975, farmworkers be covered on the same basis as all other employees.

R2.5 As of July 1, 1975, household workers and all casual workers be covered under workmen's compensation at least to the extent they are covered by Social Security.

R2.6 Workmen's compensation coverage be mandatory for all government employees.

R2.7 There be no exemptions for any class of employees, such as professional athletes or employees of charitable organizations.

R2.11 An employee or his survivor be given the choice of filing a workmen's compensation claim in the State where the injury or death occurred, or where the employment was principally located, or where the employee was hired.

R2.13 All States provide full coverage for work-related diseases.

R3.7 Subject to the State's maximum weekly benefit, temporary total disability benefits be at least 66-2/3 percent of the worker's gross weekly wage.

R3.8 As of July 1, 1973, the maximum weekly benefit for temporary total disability be at least 66-2/3 percent of the State's average weekly wage, and that as of July 1, 1975, the maximum be at least 100 percent of the State's average weekly wage.

R3.11 The definition of permanent total disability used in most States be retained. However, in those few States which permit the payment of permanent total disability benefits to workers who retain substantial earning capacity, the benefit proposals be applicable only to those cases which meet the test of permanent total disability used in most States.

R3.12 Subject to the State's maximum weekly benefit, permanent total disability benefits be at least 66-2/3 percent of the worker's gross weekly wage.

R3.15 As of July 1, 1973, the maximum weekly benefit for permanent total disability be at least 66-2/3 percent of the State's average weekly wage, and that as of July 1, 1975, the maximum be at least 100 percent of the State's average weekly wage.

R3.17 Total disability benefits be paid for the duration of the worker's disability, or for life, without any limitations as to dollar amount or time.

R3.21 Subject to the State's maximum weekly benefit, death benefits be at least 66-2/3 percent of the worker's gross weekly wage.

R3.23 As of July 1, 1973, the maximum weekly death benefit be at least 66-2/3 percent of the State's average weekly wage, and that as of July 1, 1975, the maximum be at least 100 percent of the State's average weekly wage.

R3.25 (a) Death benefits be paid to a widow or widower for life or until remarriage, and (b) in the event of remarriage, two years' benefits be paid in a lump sum to the widow or widower. (c) Benefits for a dependent child be continued at least until the child reaches 18, or beyond such age if actually dependent, or (d) at least until age 25 if enrolled as a full-time student in any accredited educational institution.

R4.2 There be no statutory limits of time or dollar amount for medical care or physical rehabilitation services for any work-related impairment.

mony before Congress, representatives of the railroads[199] and at least one labor leader[200] affirmed that, if such a system were created, their constituents would acquiesce in legislation substituting the new system for the FELA.[201] Frankly, I am skeptical that the protagonists could agree on the design of a replacement system; however, Congress—particularly an interested subcommittee with relevant jurisdiction—may have the will to mediate the parties' negotiations toward such an end.[202] The FELA cannot be reformed without congressional action. Any of several congressional subcommittees might serve as a broker in forging some compromise between labor and management.

From my perspective, the policy choice to repeal the FELA is obvious. I will leave the political tactics for achieving this reform to those more conversant with the political process. However, I cannot recommend that labor and management be left to their own devices to negotiate a FELA replacement. The enmity of labor and management over the statute has been the one constant since 1908.[203]

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R4.4 The right to medical and physical rehabilitation benefits not terminate by the mere passage of time.

DECARLO & MINKOWITZ, *supra* note 119, at 18–19 (citing *Report of the National Commission on State Workmen's Compensation Laws* (Washington, D.C.: G.P.O., 1972)).

[199] *House Hearing*, *supra* note 3, at 177–79 (statement of William H. Dempsey). *See also* Herde, *supra* note 108 (the author, a general solicitor for Family Lines Rail System, advocates repeal of the FELA and substitution of a workers' compensation system).

[200] *See House Hearing*, *supra* note 3, at 181–82 (written statement of James N. Ellenberger). To the author's knowledge, no railroad union official has ever publicly indicated support for a federal no-fault system to replace the FELA, at least not during the current debate over reform.

[201] The alternative envisioned is a workers' compensation type system, *see supra* note 79, not some more radical reform. *See generally* Frederick R. Buckles, Comment, *The Federal Employers' Liability Act—A Plea for Reform*, 14 ST. LOUIS U. L.J. 112 (1969); Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555 (1985).

[202] *See House Hearing*, *supra* note 3, at 164 (remark of Rep. J. Alexander McMillan III, R-N.C.). On a related point, Congress necessarily must hold hearings on any legislation proposal to repeal the FELA. Data will be collected, reports will be made, and debate will be extended. After more than 80 years, it is unlikely that Congress will act precipitously. Reinhold Niebuhr once described democracy as the "method of finding proximate solutions for insoluble problems." REINHOLD NIEBUHR, THE CHILDREN OF LIGHT AND THE CHILDREN OF DARKNESS: A VINDICATION OF DEMOCRACY AND A CRITIQUE OF ITS TRADITIONAL DEFENCE 188 (1944).

[203] One commentator noted:

> [T]he two have been at odds over this issue since before the FELA was enacted. Initially, railroads supported a fault-based statute, and labor pressed for a no-fault plan. Railroad unions were disappointed in 1906 when Congress enacted the FELA rather than the no-fault system that labor had been advocating. Over the years, however, these positions apparently have changed. Management now espouses a no-fault system while labor defends the existing

Finally, I am not so naive as to ignore the protests and hostility that labor unions aim at the state workers' compensation systems. I simply observe, first, that the case has been made for repeal of the FELA, and second, that I do not claim the expertise to critique or reform workers' compensation—that would be a task fit for another article. I am persuaded, however, by the uniform judgment of fifty state legislatures and the Congress that state workers' compensation should be the presumed or preferred policy choice for compensating injured workers. Therefore, I deem this the favored replacement for the FELA.

## III. CONCLUSION

> FELA is . . . a manifestation of that now discredited penchant for anomalous, unique-to-railroad laws that have proven economically disastrous and self-defeating—not just for management, but also from the standpoint of employee welfare.[204]

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fault-based scheme. Labor is no doubt hesitant to reform a system that appears to offer the best of both worlds—unlimited recovery upon a minimal showing of negligence. A fault-based system also continues the incentive for railroads to reduce work place hazards in an increasingly unregulated industry.

From the railroads' perspective, the number of "at risk" employees, those most likely to bring a FELA action, has decreased as railroads have modernized, tightened belts, and reduced overall numbers of employees. Further, as railroad safety records continue to improve, the potential for fault-based liability declines. A comparative negligence standard also encourages employees to use reasonable care in performing job functions or risk a reduction in recovery. . . .

. . . .

While reasons for retaining the Act might be valid, albeit self-serving, they are themselves the product of a flawed system, and they do not overcome the stronger policy and practical reasons in support of a no-fault compensation plan. Under the current scheme, railroad employees are subject to dissimilar awards for identical injuries, high transaction costs, management-labor divisiveness, and lengthy delays. While a fault-based system may have been justified at one time, it is no longer appropriate or fair for use in the modern railroad industry, especially in light of the universal adoption by the states of no-fault workers' compensation plans. The time has come for Congress to reexamine the Act, its premises, and its consequences and to eliminate by legislative reform the disparate treatment afforded railroad employees under the FELA.

Karen D. Sitzman, *A Look at the Federal Employers' Liability Act in the Eighth Circuit*, 21 CREIGHTON L. REV. 1073, 1076–77 (1988) (footnotes omitted). *See also* Taylor, *supra* note 6 (discussing industry and labor unions' lobbying efforts and divergent positions on the FELA); John E. Morris, *Lawyers Clamor to Climb Aboard Railroad Cases*, LEGAL TIMES, Nov. 18, 1991, at 9.

[204] H.R. 5853, 101st Cong., 1st Sess., 136 CONG. REC. E3301 (1990) (statement of Rep. Whittaker upon introducing the Railroad Workers' Injury Compensation Act of 1990). *See also* S. 3214, 101st Cong., 1st Sess., 136 CONG. REC. S15,558 (1990) (statement of Sen. Kasten).

By all measures of sound public policy, the FELA is found wanting: the statute fails when measured against the contemporary public policy criteria of encouraging safety, assuring just compensation and rehabilitation, providing administrative efficiency, and pursuing sound transportation policy. The FELA does not maintain the dignity of the injured worker and does not serve the railroad industry. This 1908 statute "creates a lawsuit, not a remedy."[205] In current public policy debates, one of the most popular, almost hackneyed, expressions used to resist reform is the bromide "if it ain't broke, don't fix it." Indeed, this bit of folk wisdom has been invoked—rather unpersuasively, to my mind—in the most recent FELA debate.[206] After this Article, I am here to say, "The FELA *is* broke, and Congress *should* fix it."

The FELA is an inadequate and flawed relic of nineteenth-century conditions, a steam-powered public policy that became an anachronism soon after its enactment at the beginning of this century. The United States can ill-afford the FELA's survival into the twenty-first century. This issue of transportation policy is crucial to the future of the country, and the Congress must respond—the FELA must be repealed.

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[205] Sitzman, *supra* note 203, at 1082. There is a profound historical discontinuity between this steam-powered policy and the needs of today.

[206] *See Senate Hearing*, *supra* note 2, at 4–5 (statement of Sen. Howard M. Metzenbaum, D-Ohio, regarding the FELA). *See also* Trevor Armbrister, *Is This Any Way to Run a Railroad?*, READER'S DIGEST, Feb. 1990, at 11 (discussing current FELA debate and favoring repeal); Jeffrey H. Birmbaum, *Political Contributions of Narrow-Focus Groups Seen by Some as Growing Campaign Issues*, WALL ST. J., Dec. 22, 1989, at 1 (discussing contributions from the FELA bar).

**Table 1:** *AMTRAK'S FELA PAYMENTS AND EXPENSES*
*(Calendar Year)*

| | *Claims And Lawsuits Closed* | *Average Claim Payment* | *Average Lawsuit Payment* | *Total Payout To Plaintiffs And Their Attorneys (millions)* | *Legal Defense Expenses (millions)* | *Medical Payments (millions)* | *Admin. Expense (millions)* | *Total FELA Costs (millions)* |
|---|---|---|---|---|---|---|---|---|
| 1982 | 1,771 | $3,321 | $29,451 | $12.9 | $1.3 | $1.7 | $1.5 | $17.4 |
| 1983 | 1,473 | 3,717 | 40,183 | 16.2 | 1.9 | 2.5 | 1.5 | 22.1 |
| 1984 | 1,393 | 5,320 | 58,079 | 24.5 | 1.9 | 2.7 | 1.6 | 30.7 |
| 1985 | 1,483 | 6,088 | 69,458 | 25.2 | 1.6 | 3.3 | 1.8 | 31.9 |
| 1986 | 1,674 | 7,826 | 57,472 | 29.6 | 2.2 | 3.5 | 2.1 | 37.4 |
| 1987 | 1,615 | 6,366 | 54,285 | 25.6 | 3.1 | 3.1 | 2.2 | 34.8 |
| 1988 | 1,645 | 8,711 | 78,493 | 42.8 | 4.5 | 4.3 | 2.2 | 53.8 |

# ARTICLE

# REDUCING THE COSTS OF STATUTORY AMBIGUITY: ALTERNATIVE APPROACHES AND THE FEDERAL COURTS STUDY COMMITTEE

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*In April 1990, the Federal Courts Study Committee proposed several methods for correcting the problem of statutory ambiguity. In this Article, Professor Maggs identifies the costs of statutory ambiguity and evaluates the efficacy of the Study Committee's proposals. Professor Maggs analyzes the primary types of statutory ambiguity and their associated costs based on his study of the relevant Supreme Court cases from the past five years. In addition to evaluating the proposals of the Study Committee, Professor Maggs compares the proposals to previous efforts aimed at reducing the costs of statutory ambiguity, and suggests avenues for further study.*

Ambiguous statutes hinder planning, promote litigation, confound judicial decision-making, and impose a variety of other costs on society. Legal scholarship traditionally has strived to reduce these costs by attempting to improve methods of drafting statutes and interpreting unclear enactments. Its recommendations in these areas have influenced greatly both the legislative and judicial branches of the government. The texts of many federal and state statutes bear the imprint of scholarly drafting advice and courts often employ academically conceived principles of statutory interpretation. Nevertheless, by all accounts, unclear legislation remains a significant problem.

Efforts to improve drafting and statutory interpretation undoubtedly should continue, but their limited effectiveness to date suggests that the time has come to develop alternative ways to reduce the costs of statutory ambiguity. On April 2, 1990, the Federal Courts Study Committee, a body charged by Congress

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to evaluate the federal court system,[1] took a substantial step in this direction. In a report recommending sweeping reforms of the federal judicial system, the Committee proposed several innovative methods for avoiding ambiguity and addressing the problems that ambiguity creates. The Committee's proposals, if adopted, would give Congress guidelines for avoiding frequent ambiguities, establish fallback rules for certain recurring issues, involve the judiciary in the legislative process, and provide a new method for resolving inter-circuit conflicts.[2]

This Article provides a basis for developing and evaluating alternative approaches to reducing the costs of statutory ambiguity such as those proposed by the Federal Courts Study Committee. Part I defines statutory ambiguity and identifies its costs. Part II briefly discusses current efforts to improve drafting and statutory interpretation and explains the limitations of these efforts. Part III documents the kinds of statutory issues that actually exist, using empirical data from a survey conducted by the author of the Supreme Court's statutory cases over a five-year period. Part IV describes the Committee's proposals and assesses them in light of the costs, previous interpretive and drafting efforts, and ambiguities discussed in Parts I–III. Building on this evaluation, which includes a discussion of the proposals' implementation, Part IV then proposes additional ways to reduce the costs of statutory ambiguity and indicates directions for further research.

In the past, legal scholarship may have overlooked alternative approaches such as those recommended in the Committee's report and in this Article because they may have seemed too simplistic or too practical to warrant academic attention. The

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[1] *See* Judicial Improvements and Access to Justice Act § 102, 28 U.S.C. § 331 (Supp. III 1991). The Committee, appointed by Chief Justice William H. Rehnquist, included Judge Joseph F. Weis, Jr. (Chairman); J. Vincent Aprile II, Esq.; Judge Jose A. Cabranes; Chief Justice Keith M. Callow; Judge Levin H. Campbell; Edward S.G. Dennis, Jr., Esq.; Sen. Charles E. Grassley (R-Iowa); Morris Harrell, Esq.; Sen. Howell Heflin (D-Ala.); Rep. Robert W. Kastenmeier (D-Wis.); Judge Judith N. Keep; President Rex E. Lee, Jr., Brigham Young University; Rep. Carlos J. Moorhead (R-Cal.); Diana Gribbon Motz, Esq.; and Judge Richard A. Posner. Numerous legislators, judges, law professors, and other prominent persons also contributed to the work of the Committee. *See* FEDERAL COURTS STUDY COMMITTEE, JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 193–203 (1990) [*hereinafter* COMMITTEE REPORT].

[2] On December 1, 1990, President Bush signed into law the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990). This act implemented a number of the Committee's proposals, including a fallback statute of limitations for certain civil actions, and called for further study of issues such as the elimination of inter-circuit conflicts. *See infra* Part IV.

various proposals discussed here, admittedly, raise few of the difficult theoretical problems encountered in areas such as statutory interpretation. Rigorous analysis of these proposals, however, demonstrates that they have greater usefulness than their simplicity might suggest. Congress and the courts should strive to implement them and continue inquiry into alternative approaches.

## I. STATUTORY AMBIGUITY AND ITS COSTS

### A. *Defining Statutory Ambiguity*

The term "statutory ambiguity" itself could have several meanings. A very strict definition might include only those portions of statutes that no court could interpret. So defined, the term would encompass very little because, outside of the criminal law, courts seldom find legislation too vague to apply. A very loose definition, by contrast, might label ambiguous any statutory provision subject to more than one reading, even if no reasonable person would disagree about what it actually means. A five-year statute of limitations, for example, might qualify simply because it leaves unclear whether courts should measure the five-year period according to a solar or lunar calendar. So loose a definition surely would include almost all statutes.

This Article uses the term statutory ambiguity as though it had a meaning somewhere in between these two extremes. Specifically, it considers a statute ambiguous with respect to an issue if a lawyer would litigate the issue in court. As the following discussion will show, this definition, although arbitrary, seems to encompass the statutory provisions that burden society the most.[3] Pinning the term to the conduct of lawyers, moreover, should make the problem of statutory ambiguity easier to study. It facilitates collecting empirical data, as Part III indicates, because any reported case involving statutory interpretation, by definition, must address a statutory ambiguity.

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[3] What lawyers will argue about in court depends on a variety of factors from ethics to common sense. Legislative bodies, however, may alter the scope of argument by reducing or increasing penalties for frivolous filings such as those in FED. R. CIV. P. 11. This Article will not argue for a change in the governing standard, but will examine statutory ambiguity as it presently exists. Further work profitably could address what lawyers should be arguing about in court.

The definition of ambiguity does not attempt to distinguish statutes that employ so-called "bright-line rules" from those which rely on "open-ended" standards. Both rules and standards may contain ambiguities.[4] For example, suppose that a commercial statute in one jurisdiction requires a buyer to reject defective goods within thirty days and another statute in another jurisdiction requires the buyer to reject the goods within a "commercially reasonable" period. The former statute is ambiguous because it fails to indicate when the clock should start and stop; the latter standard is ambiguous because parties may disagree about reasonableness in unusual cases. Legal scholars, as noted further below,[5] long have debated whether standards or rules produce more ambiguities. The data examined in this Article unfortunately do not resolve this issue and it remains an important topic for future work.[6]

### B. *The Costs of Statutory Ambiguity*

With the proliferation of state and federal enactments in the modern era, not a few judges, lawyers, and law professors make their living off of statutory ambiguity. Put simply, without statutory issues, the legal profession would have much less to argue about. Yet, apart from insuring full employment for law school graduates, statutory ambiguity imposes the following nine distinct costs on society and its individual members:[7]

1. *Increased Legal Research Costs.* Statutes sometimes speak so clearly that a layman may understand their meaning simply by reading them. Most legislation, however, contains some provisions sufficiently unclear that lawyers might argue about them in court. These provisions augment the cost of legal research by increasing the number of cases and amount of other material that an attorney must consider to understand the law.[8]

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[4] *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 44 (1990).

[5] *See infra* note 30 and accompanying text.

[6] For further discussion of the interpretation of data regarding rules and standards, see Part III.D.

[7] Other, less easily identifiable costs may exist as well, but these nine stand out as particularly prominent. Identifying these costs will facilitate discussion of the current efforts to improve drafting and statutory interpretation in Part II, the empirical data in Part III, and the alternative proposals in Part IV.

[8] Proponents of the civil law, which strives to clarify legislation and in which court decisions do not control the interpretation of codes, long have considered the reduction of legal research costs an advantage over common law legal systems. *See, e.g.*, ROBERT WISEMAN, THE LAW OF LAWS: OR, THE EXCELLENCY OF THE CIVIL LAW, ABOVE ALL OTHER HUMANE LAWS WHATSOEVER. SHEWING OF HOW GREATE USE AND NECESSITY

2. *Litigation Costs.* Parties to a legal controversy may refuse to settle their disputes when they do not know the governing legal rules. Statutory ambiguity, therefore, promotes litigation. This litigation consumes attorney's fees and the time of all the parties involved. Moreover, because cases involving statutory ambiguity often require appellate court resolution, their litigation costs may exceed those involving purely factual disputes.

3. *Judicial System Costs.* Statutory ambiguity, by promoting litigation, also takes up judicial resources. Although the judicial system exists to resolve society's legal controversies, taxpayers would need to pay for fewer courts, judges, and court personnel if society had fewer statutory issues to settle. Reducing statutory ambiguity would decrease the number of statutory cases in the courts and, as a result, would decrease the funds that the public must commit to dispute resolution.

4. *Increased Unlawful Activity.* Statutory ambiguity may deprive a person of advance warning or notice of what the law requires and what it prohibits. This deprivation has two negative consequences. First, society suffers because the person unwittingly may fail to abide by the law when its boundaries remain unmarked. Second, individuals may suffer unexpected consequences for not realizing the price of their actions. As the Supreme Court has explained: "[B]ecause we assume that man is free to steer between lawful and unlawful conduct, . . . laws [should] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning."[9] Indeed, the Court uses the void for vagueness doctrine as a tool to eliminate this cost in the criminal context.[10]

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THE CIVIL LAW IS TO THIS NATION 69–71 (1686). The drafters of certain statutes in this country, such as the Uniform Commercial Code, have urged courts and lawyers to rely more on the statutory language and less on precedent for this reason. *See* Mitchell Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROBS. 330, 333 (1951); William D. Hawkland, *Uniform Commercial "Code" Methodology*, 1962 U. ILL. L. F. 291, 313–20.

[9] Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

[10] *See, e.g.*, Lanzetta v. New Jersey, 306 U.S. 451, 458 (1939) (invalidating law making it a crime to be a "gangster" due to statute's vagueness and uncertainty); *see generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-8, at 684 (2d ed. 1988) (citing *Lanzetta* for the proposition that life, liberty and property cannot be taken by statutes "so vague, indefinite and uncertain that one cannot determine their meaning"). The problem, of course, continues to exist to the extent that the criminal law incorporates social concepts that evade easy definition, such as "reasonableness." As Justice Holmes put it:

> [T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree.

It remains a greater problem in the civil context because the Court has shown more reluctance to invalidate non-penal statutes for vagueness.[11]

5. *Decreased Lawful Activity.* While some, when confronted with ambiguous legislation, may take unlawful actions thinking them lawful, others may hesitate to take any action at all. A builder probably will not construct a high rise, an airline will not fly a plane, and an investor will not enter a deal without knowing the precise operation of the pertinent law. To the extent that statutory ambiguity disguises or conceals this information, it needlessly chills lawful and productive activity.[12]

6. *Discrimination.* Ambiguities also may create possibilities for discrimination. As the Supreme Court has said, "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."[13]

7. *Separation of Powers Problems.* The task of legislating belongs to the legislature, not to the courts. Statutory ambiguity blurs the functions of these two institutions. Whenever a court must interpret an unclear statute, it risks substituting its own judgment for that of the legislators who enacted it. The more ambiguous the statute under consideration, the greater the like-

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> If his judgment is wrong, not only may he incur a fine or a short imprisonment . . . ; he may incur the penalty of death.

Nash v. United States, 229 U.S. 373, 377 (1913).

[11] *See, e.g.*, Village of Hoffman Estates v. Flipside, 455 U.S. 489, 498 (1982) (upholding ordinance banning sale of drug paraphenalia); Kolender v. Lawson, 461 U.S. 352, 358 n.8 (1972) (invalidating statute requiring persons to account for their presence to the police); Winters v. New York, 333 U.S. 507, 515 (1948) (invalidating obscenity statute). If a single statutory standard governs both civil and criminal matters, then the certainty required in criminal cases also applies in civil cases. *See* FCC v. American Broadcasting Co., 347 U.S. 284, 296 (1954).

[12] The Supreme Court regularly invalidates statutes in the free speech context because of their chilling effects. *See, e.g.*, Board of Airport Comm'rs v. Jews for Jesus, Inc., 482 U.S. 569, 575 (1987) (invalidating ban on speech in airport locations); Baggett v. Bullitt, 377 U.S. 360, 372 (1964) (invalidating statute conditioning tax benefits on loyalty oath); Speiser v. Randall, 357 U.S. 513, 526 (1958) (invalidating statute prohibiting misuse of the flag). The Court pays especially close attention to criminal laws that concern First Amendment freedoms. *See, e.g.*, Smith v. Goguen, 415 U.S. 566, 573 (1974); *see also* TRIBE, *supra* note 10, § 12-31, at 1034.

[13] *Grayned*, 408 U.S. at 108–09 (footnote omitted). The Supreme Court has suspected the officials of using loitering and similar laws to discriminate against various groups in several famous cases, including Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1971) (black youths); Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90–91 (1965) (civil rights demonstrators); Thornhill v. Alabama, 310 U.S. 88, 97–98 (1940) (labor picketeers).

lihood that a court will reach a result that its proponents never intended.

The legal community's assessment of this cost depends largely on two factors. First, whether for good reason or not, allowing courts to create legal rules does not produce much concern when Congress or some other legislative body specifically delegates them that authority. The Sherman Act provides a good example. Although the open-endedness of the statutory proscriptions has given the Supreme Court considerable leeway in fashioning antitrust policy, it has created little controversy because Congress appears to have intended such wide discretion.[14] By contrast, when courts make rules in the absence—or perceived absence—of delegated authority, they may find themselves in the midst of controversy for "legislating from the bench."[15]

Second, courts have become especially leery of crossing institutional boundaries in the area of criminal law. This hesitancy stems in part from a concern that, as discussed above, ambiguous criminal statutes will deny fair notice, increase prosecutorial discretion, and lead to the chilling of lawful conduct. It also stems from a desire to allow the legislature to make the value judgments about what constitutes a crime.[16]

8. *Replacement Costs.* Hasty draftsmanship may cost a legislature more time and effort in the long run than its speed saves the legislature in the short run. Ambiguity leaves unclear the intent of the legislature. Accordingly, whenever a court has to interpret an ambiguous statute, it may reach a result that the legislature never intended or, at least, that it does not like. While often unfair to call the court's decision erroneous in light of the statutory ambiguity, the legislature, viewing it as incorrect, may

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[14] *See* Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911) (concluding from the language and legislative history of the Sherman Act that Congress intended for the federal courts to determine the reasonableness of certain business practices).

[15] Opinions, of course, differ over exactly how much policy-making judges should do both in the statutory and constitutional contexts. *Compare, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA *passim* (1990) (objecting to almost all judicial legislation) *with* RONALD H. DWORKIN, TAKING RIGHTS SERIOUSLY 82–83 (1977) (yielding to judges the domain of "principle," but not mere "policy") *and with* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 10–20 (1959) (requiring judges at least to make decisions according to reasons that, in their generality and neutrality, transcend the immediate results).

[16] *See, e.g.*, United States v. Kozminski, 487 U.S. 931, 952 (1988) (rule of lenity, applied to ambiguous criminal statutes, serves "to maintain the proper balance between Congress, prosecutors, and the courts").

expend its energy to change the result through further legislation.[17]

9. *Diminished Utility and Justice.* Although legislatures at times may engage in less noble pursuits, in theory they should investigate the problems facing society (or at least the important special interest groups) and, through legislation, should formulate appropriate responses to them. To the extent that a legislature fails to make its chosen solution to a problem clear in a statute, the utility of its work diminishes. When confronted with an ambiguity, a court may choose a less useful or just rule than one discovered by the legislature simply because it cannot discern the legislative intent.

### C. *Characteristics of the Costs*

Three characteristics of these nine categories of costs deserve comment. First, they have an important temporal quality because an ambiguous statute may not remain ambiguous forever. Many statutory issues eventually come before a court of last resort. Once a decision by such a court fixes the meaning of a statute, it becomes unambiguous in the sense that lawyers no longer litigate it in court.[18] The timing of court decisions, accordingly, can affect the costs imposed by ambiguous statutes.

The precise effect depends on the nature of the particular cost. For the most part, the nine costs listed above fall into two groups. This Article, for lack of better terms, will call the first six of them "front-end" costs and the remaining three "back-end" costs. The front-end costs associated with a particular ambiguity generally diminish after the ambiguity comes before a court. Back-end costs, by contrast, generally arise or become more serious after a court fixes the ambiguity's meaning.

To illustrate with a somewhat exaggerated example, suppose that a statute governing licenses for operating a commercial

[17] The costs of replacing legislation may arise in several other ways. Legislatures, for example, may want to rewrite a statute even in the absence of a court's interpretation of an ambiguity simply because they have changed their views on what the statute should say.

[18] Not even the Supreme Court or the state supreme courts have the power to fix completely the meaning of federal and state statutes. Any decision remains subject to reconsideration. As a practical matter, however, courts of last resort rarely change their opinions about statutory issues. *See* Frank Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 426–27 (1988) (noting but criticizing this practice).

airline leaves unclear some aspect of the license duration. Before a court interprets the statute, the ambiguity may cause easily identifiable legal research costs, litigation costs, judicial system costs, increased unlawful activity, decreased lawful activity, and discrimination. Airlines will have to conduct research to determine the duration of their licenses and may dispute their validity with the authorities. Some airlines, which do not know that their licenses have expired, will continue to operate while others, whose licenses have not expired, will stop flying or pay to renew their licenses earlier than necessary. The authorities, in addition, may apply one period to certain favored airlines, and another to the remaining airlines. Yet, once a court resolves the ambiguity in the statute—for instance, by defining the relevant period as four years—these costs for the most part will cease. Companies will not need to litigate the issue and all will know how to conform their conduct to the law.[19]

The court's decision, however, may bring out some or all of the back-end costs identified above. The ruling, for example, will mark the start of separation of powers problems to the extent that the court, rather than the legislature, selected the four-year period. It will invite replacement costs to the extent that the legislature thinks that the court misconstrued the law and wants to change the result. It will indicate a diminishment in the potential utility and justice of the statute to the extent that the legislature intended what it considers a more useful or fair period—such as three years or five years—but failed to make its selection of the particular period sufficiently clear. The court's decision, in all fairness, actually does not produce these back-end costs; the ambiguity produces them. Identifying these costs, therefore, should not suggest that the court has done something wrong. It indicates only that society would have preferred to have the legislature avoid the ambiguity in the first place than to have the court resolve it later.

Second, the relative size and importance of the various costs remain unclear. The most explicit comparison of front-end to back-end costs, to date, has occurred in debates about the kind of action the Supreme Court should take regarding conflicting

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[19] The amount of legal research costs, litigation costs, judicial system costs, decreased lawful activity, and increased unlawful activity often depends on the money at stake and the legal sophistication of the parties. For example, while businesses like airlines will hire lawyers and alter their behavior because of statutory ambiguities, many individuals never know or research the legal rule that theoretically governs their conduct.

judicial interpretations of federal statutes. One side argues that the Court should allow many statutory issues to "percolate" in the lower courts to enable it to make a more informed judgment.[20] The other side argues that the Court should settle all statutory conflicts promptly to avoid allowing uncertainties to stand over a long period of time.[21]

The debate, properly viewed, turns largely upon whether a decision aided by lower court interpretations will produce sufficiently fewer back-end costs to justify the front-end costs associated with continued statutory ambiguity.[22] This Article will not attempt to settle the longstanding disagreement among academics on this issue, but will note it later in evaluating various divergent alternative proposals for reducing the costs of statutory ambiguity. Further work, however, should go into quantifying or comparing the costs of statutory ambiguity.

Third, although legislatures do not intend or desire most of the ambiguities found in statutes, they choose to create some of them. To avoid controversy, for instance, lawmakers may choose to leave key issues unresolved in hopes that the judiciary will supply an answer and absorb the political consequences.[23] Legislatures, similarly, but acting more openly, may use ambiguity as a device for giving courts jurisdiction to develop rules

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[20] Professors Samuel Estreicher and John Sexton have developed a "managerial theory" for the Supreme Court in which they advocate this approach. *See* SAMUEL ESTREICHER & JOHN SEXTON, REDEFINING THE SUPREME COURT'S ROLE: A THEORY OF MANAGING THE FEDERAL JUDICIAL PROCESS 41–70 (1986). They believe that, although the Supreme Court should act rapidly to resolve certain intolerable conflicts, it should allow others to percolate. *See id.* at 48, 50–52, 73–74. The Supreme Court does not have a consistent policy with respect to percolation, but has followed this approach on occasion. *See, e.g.*, United States v. Mendoza, 464 U.S. 154, 160 (1984) ("Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question.").

[21] *See* Daniel Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603, 633–34 (1989); *see also* Burnet v. Colorado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) ("[I]n most matters it is more important that the applicable rule of law be settled than that it be settled right.").

[22] *See* Meador, *supra* note 21, at 633–34 (expressly comparing the costs of having "Congress sit . . . to set the matter straight" to the individual costs of uncertainties, i.e., litigation and individual injustice costs, and the costs to those who must plan and conduct activities). The debate over the Supreme Court's certiorari policy involves other considerations not entirely related to these costs, such as the need for uniformity among the circuits on particular kinds of issues. *See also* Michael Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Inter-Circuit Conflict Cases*, 67 TEX. L. REV. 1251, 1270–71 (1989).

[23] The Committee recognized this fact in discussing one of its proposals to reduce ambiguities in legislation. *See* COMMITTEE REPORT, *supra* note 1, at 90 ("Some statutory ambiguities are, of course, intentional, required by the realities of the legislative process. But many are not.").

in complex areas of the law on a case-by-case basis.[24] At other times, they actually may view the effects of ambiguity as beneficial. For example, because of the chilling effects described above, ambiguous criminal statutes may provide greater deterrence.

This Article will express no general theory about the propriety of intentionally creating ambiguities other than to suggest that legislatures first should consider all of their costs and benefits. Identifying and discussing the costs of statutory ambiguity may educate Congress and other legislative bodies about the effects of their actions and discourage them from unnecessarily enacting unclear legislation.

## II. CURRENT EFFORTS TO REDUCE THE COSTS

Legal scholarship has addressed drafting and statutory interpretation quite extensively. Much of the writing on these topics has sought to develop methods of reducing the prevalence of ambiguity in statutes or its resulting burdens. Understanding the achievements and limitations of this work will facilitate discovering alternative ways to reduce the costs of statutory ambiguity identified above.

### A. *Legislative Drafting*

Attempts to improve legislative drafting strive to prevent potential ambiguities from making their way into enacted statutes. If successful, these attempts can avoid the front-end and back-end costs that statutory ambiguities otherwise would impose on society. Most of the writing on drafting to date has focused on three objectives: developing legislative drafting checklists or

[24] Professors William N. Eskridge, Jr. and Philip P. Frickey have distinguished this kind of intentional ambiguity, which they call "vagueness," from ordinary ambiguity:

> Vagueness is a very different problem from ambiguity. Ambiguity creates an "either/or" situation, while vagueness creates a variety of possible meanings. For example, the Sherman Act's prohibition of "contracts in restraint of trade" is vague: Its meaning cannot be narrowed to a choice between two propositions and is, instead, a range of possible meanings—from a prohibition of all contractual limitations on business freedom to a prohibition of only the most egregious or largescale restraints. The Sherman Act is a case where vagueness may be desirable (in contrast to ambiguity, which should almost always be avoided).

WILLIAM P. ESKRIDGE, JR. & PHILLIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 839 (1988).

guidelines, normalizing the structure and phrasing of statutes, and perfecting the balance of rules and standards in legislation.

Checklists and guidelines list ambiguities and other potential stumbling blocks that lawyers, from experience, believe may cause confusion in the courts. They generally contain rather straightforward but important technical advice for formulating clear legal documents. A checklist, for example, may contain suggestions about how to use words like "may" and "shall" and how to specify the first and last days of time periods. Efforts to improve legislative checklists flourished during the first half of this century[25] and have since continued at a diminished rate.[26] At various times, the federal government has sought to follow the advice of these checklists in drafting its laws and regulations.[27]

Efforts to "normalize" legislation strive to clarify the meaning of statutory language by patterning it after symbolic expressions used by mathematicians and philosophers. Normalized legislation, for example, would express legal relations with logical operators, such as "and," "or," and "not," and would express legal conditions and consequences in regular patterns, such as "if A then B else C." Normalization has much in common with checklists; legislators use both drafting tools primarily to eliminate potential ambiguities before they arise. Work on normalized drafting has gained the attention of both academics and legislators since the 1950s[28] and theoreticians more recently have speculated about using normalization to automate the legislative and interpretive processes with computers.[29]

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[25] For a remarkably thorough bibliography of drafting guidelines and other scholarship on legal drafting prior to 1950, see REED DICKERSON, LEGISLATIVE DRAFTING 125–29 (1954).

[26] *See, e.g.*, DICKERSON, *supra* note 25, §§ 6–8, at 61–106; ESKRIDGE & FRICKEY, *supra* note 24, at 830–41 (1988); JAMES C. PEACOCK, NOTES ON LEGISLATIVE DRAFTING 9–44 (1961); HORACE E. READ ET AL., MATERIALS ON LEGISLATION 232–34 (4th ed. 1982); G.C. THORNTON, LEGISLATIVE DRAFTING 76–94 (2d ed. 1987).

[27] *See* AMERICAN BAR ASSOCIATION, PROFESSIONALIZING LEGISLATIVE DRAFTING: THE FEDERAL EXPERIENCE 58–60 (Reed Dickerson ed., 1972) [*hereinafter* ABA DRAFTING STUDY]; Reed Dickerson, *Federal Drafting in the Executive Branch*, 21 CATH. U.L. REV. 703, 713–15 (1972) [*hereinafter* CATHOLIC UNIVERSITY DRAFTING STUDY].

[28] *See generally* Layman E. Allen, *Symbolic Logic: A Razor-Edged Tool for Drafting and Interpreting Legal Documents*, 66 YALE L.J. 833 (1957); Layman E. Allen & Gabriel Orechkoff, *Toward a More Systematic Drafting and Interpreting of the Internal Revenue Code: Expenses, Losses, and Bad Debts*, 25 U. CHI. L. REV. 1 (1957); Rudy Engholm, *Logic and Laws: Relief from Statutory Obfuscation*, 9 J.L. REFORM 322 (1976); Grayfred E. Gray, *Reducing Unintended Ambiguity in Statutory Drafting: An Introduction to Normalization of Statutory Drafting*, 54 TENN. L. REV. 433 (1987).

[29] *See generally* Cray G. deBessonet, *An Automated Approach to Scientific Codification*, 9 RUTGERS COMPUTER & TECH. L.J. 27 (1982); Peter B. Maggs & Cray G.

A somewhat different approach to improving drafting concentrates on the use of open-ended standards and formal rules to state statutory requirements. Questions about the appropriate balance between these two alternatives arise frequently in creating legislation. For example, suppose a legislature wants to require a person to take some sort of action within a reasonable period. The legislature might embody this requirement in a statute simply by using the words "reasonable period." Alternatively, it might select a fixed period of time that it considers reasonable in most instances, such as ten days, and use this period to create a formal rule. In choosing between these two options, drafters need to know whether a formal rule in fact would reduce uncertainty and whether, in any event, the benefits of certainty outweigh the benefits of flexibility. Writers have debated these issues extensively, in part with the aim of reducing the costs of statutory ambiguity.[30]

These diverse efforts to improve drafting have not succeeded in eliminating the ambiguity in legislation. Although they may have done much to ameliorate the situation, statutory cases continue to inundate the courts. The lack of complete success appears to have three causes.

First, theory largely has outstripped practice. Suggestions for improving drafting do no good unless legislators follow them. Although bodies such as Congress have drafting form books, in times of haste such guidelines may fall by the wayside.[31] Because normalized legislation resembles computer programs and mathematical proofs, it seems to have intimidated or failed to impress legislators familiar with more traditional styles of drafting and thus gained only limited usage.[32] Most legislators, in addition, probably put little thought into the consequences of using formal or informal language in statutes despite the tremendous body of literature on the subject.

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deBessonet, *Automated Logic and Analysis of Systems of Legal Rules*, 12 JURIMETRICS J. 158 (1972).

[30] For recent discussions of a variety of contrasting views on these questions, see POSNER, *supra* note 4, at 44–49; Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985).

[31] *See* ABA DRAFTING STUDY, *supra* note 27, at 10; CATHOLIC UNIVERSITY DRAFTING STUDY, *supra* note 27, at 714.

[32] *See* William E. Boyd, *Law in Computers and Computers in Law: A Lawyer's View of the State of the Art*, 14 ARIZ. L. REV. 267, 278–79 (1972) (seeing slim prospects for persuading lawyers to learn the new language of legislative drafting).

Second, none of the recommendations for improving drafting discussed above purports to provide a single solution for all ambiguities. Even if the methods work well with respect to certain problems, they may not address the kinds of ambiguities that cause the most difficulties. For example, leading drafting guidelines appear to cover only those issues that their authors intuitively suspect will cause confusion.[33] Similarly, normalized drafting methods, may improve the parts of statutes that refer to legal relations and conditions, but have no effect on other potential sources of ambiguity. Likewise, by substituting formal rules for standards or vice versa, drafters may improve some aspects of statutes but not others.

Third, the various recommendations now advanced may rest on questionable foundations. The checklists currently used in drafting not only may fail to address many important issues, they may fail to address any real problems at all. Little empirical data, for example, has demonstrated that courts find particular methods of expressing dates easier to understand than others. Normalized drafting prescriptions suffer from a similar lack of proof that they do anything to further the clarity of legislation.[34] Likewise, as the extensiveness of the debate indicates, scholars themselves cannot agree on the proper balance of formality and informality in legislation.

They do suggest a need to consider additional methods for reducing the ambiguities in statutes that could complement the current efforts.

### B. *Statutory Interpretation*

Modern legal scholarship perhaps has dealt with no single subject more thoroughly than statutory interpretation.[35] Although writing in this area serves a variety of other purposes as

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[33] *See, e.g.*, DICKERSON, *supra* note 25, at 61–106; PEACOCK, *supra* note 26, at 9–44.

[34] *See generally* Peter Ziegler, *The Status of Normalized Drafting: The Need for Theory Building and Empirical Verification*, 27 OSGOODE HALL L.J. 337, 338 (1989) ("[L]ack of empirical verification . . . [leaves] the usefulness of a normalized drafting approach . . . open to doubt.")

[35] For an update on some of the leading trends and most current ideas about statutory interpretation, see William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation and Practical Reasoning*, 42 STAN. L. REV. 321 (1990); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277 (1990); Richard A. Posner, *Legislation and Its Interpretation: A Primer*, 68 NEB. L. REV. 431 (1989); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 407 (1989).

well, efforts to find better methods of statutory interpretation may reduce the costs of statutory ambiguity. As with the attempts to improve drafting, however, these effects have definite limitations.

Improvements in statutory interpretation seldom will affect the front-end costs of particular ambiguities. These costs, as defined in Part I, arise from the uncertainty about the meaning of a statute and they diminish or cease once a court settles the question. Although better methods of statutory interpretation may produce better judicial decisions, they probably will not make uninterpreted statutes more certain unless all lawyers agree on them.

Improving statutory interpretation, nevertheless, may reduce the back-end costs of statutory ambiguities. Among the various ideas about interpretation that have emerged, many hold—in some form or another—that judges should attempt to implement the will of the legislature.[36] If a court succeeds in this endeavor, it very well may eliminate or reduce many back-end costs. By discerning legislative intent, a court will not substitute its own intentions; it thus will avoid any possible separation of powers problems. In addition, if the legislature still believes what it did when it enacted the statute, the decision will save replacement costs because the legislature will not desire to change the result. Finally, provided that the legislature has intended to create a useful and just statute, following the legislature's intent will ensure that society and litigants receive the full benefit of the ambiguously expressed legislation.

Statutory interpretation, however, only can do so much. Once an ambiguity enters a statute, a court may never resolve it perfectly. Lawyers argue about many issues not because they disagree about how to interpret statutes in general, but because, at bottom, the issues have no clear answer under any method of interpretation. History, indeed, has shown that no theory of statutory interpretation allows lawyers and judges to read any statute with ease and confidence.[37] As a result, although im-

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[36] Not everyone agrees with this proposition. One view, for instance, says that judges should interpret statutes solely on the basis of their text. Although the language used may not convey the legislature's true intent, whatever exactly this may mean, the method arguably makes it more difficult for judges to inject their own views into statutes and teaches the legislature to speak its mind more clearly in the future. *See generally* Sunstein, *supra* note 35, at 411–13 (discussing various aspects of textualism).

[37] As statutes proliferated in the 19th century, some authors attempted to simplify statutory interpretation by developing canons of construction. *See, e.g.*, THEODORE

proving statutory interpretation may reduce the back-end costs associated with ambiguity in some cases, it will not reduce them in all.

## III. A Survey of Ambiguous Statutes

The foregoing discussion has shown that statutory ambiguity imposes a variety of costs on society and that, although efforts to improve drafting and statutory interpretation may have lessened these costs, they have not eliminated them. This conclusion demonstrates a need for alternative approaches to reducing the costs of statutory ambiguity. Undertaking that endeavor requires a better understanding of the ambiguities that actually appear in statutes. To remedy the present lack of information relevant to this understanding, the author has undertaken a survey of the statutory cases decided by the Supreme Court during its 1985 to 1989 Terms. The empirical data provided by the survey, although not perfect, shows the kinds of issues that alternative approaches must address.

### A. *Incompleteness of the Data*

The survey, although it looked at some of the most important statutory cases recently decided in the United States, could not provide a complete picture of statutory ambiguity for at least four reasons worth noting before proceeding. First, because the Supreme Court generally does not interpret state statutes, the survey examined data only on the kinds of ambiguities that arise

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Sedgwick, A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law (1857). Although courts still employ these canons, the Realists long ago pointed out the near impossibility of creating any simple system of rules for interpreting statutes. *See, e.g.*, Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules of Canons About Statutes Are To Be Construed*, 3 Vand. L. Rev. 395 (1950). In place of canons, they argued that courts should interpret statutes according to their purpose. *See* 2 Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law 1413–17 (tent. ed. 1958). Criticism of canons has become generally accepted. *But cf.* Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 805–17 (1983). The idea of basing interpretation on the statute's purpose soon runs into the problem that statutes often do not make their purpose clear. Courts, perhaps as a result, seem to rely more and more heavily on legislative history to determine the intent of the legislature. Yet, although less simplistic than canons of construction, using legislative history has problems of its own and many jurists, such as Justice Scalia, have refused to look at it. *See, e.g.*, Begier v. IRS, 110 S. Ct. 2258, 2268 (1990) (Scalia, J., concurring in the judgment).

in federal legislation. Federal statutes may differ from state statutes because Congress has greater resources and different politics from the states. Even if intuition suggests that the differences ultimately would prove fairly insignificant, further research should go into state legislation.

Second, the survey documented only a five-year period. The brevity of this period has a potentially negative effect. On one hand, if the kind of ambiguities that arise in federal statutes remain constant over time, but the statutes themselves change, then the survey may have produced an accurate image of the problem. On the other hand, if yesterday's issues differ from today's, then a survey covering only a five-year period may suffer from greater chronological isolation. This problem can be simply resolved by expanding the survey over a longer period of time.[38]

Third, the survey considered only statutory issues that have made it to the Supreme Court. It therefore may have picked a very narrow class of the ambiguities found in federal enactments. The Supreme Court, as a general rule, will grant certiorari in a statutory case only when other courts have rendered conflicting interpretations.[39] The extent to which this policy harmed the survey remains unclear. The issues that the Supreme Court chooses may differ from the bulk of statutory questions facing lower courts, but they may prove the most important to study. Not only do lawyers argue about the issues that create conflicts, but judges, by definition, most frequently disagree over them.

The Supreme Court's certiorari policy, however, excludes one important class of cases. The Court rarely grants certiorari to resolve "fact bound" issues—issues for which the uniqueness of the facts would make any decision important only to the parties involved.[40] These cases may involve conflicts, but the

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[38] For a thorough, but somewhat different, description of earlier statutory cases, see Arthur D. Hellman, *The Supreme Court and Statutory Law: The Plenary Docket of in the 1970's*, 40 U. PITT. L. REV. 1 (1978) (categorizing statutory cases by subject matter).

[39] The Supreme Court has identified in Supreme Court Rule 10 some of the considerations that govern its decision to grant certiorari. Factors include the existence of a conflict between federal courts, *see* SUP. CT. R. 10.1(A) (as amended July 1, 1991), or the existence of a conflict between a state court of last resort and a federal circuit court, *see* SUP. CT. R. 10.1 (B). *See also* PAUL M. BATOR ET AL., THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1873–74 (3d ed. 1988); ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 196–97 (6th ed. 1986).

[40] *See* STERN, *supra* note 39, at 213; Stewart A. Baker, *A Practical Guide to Certiorari*, 33 CATH. U. L. REV. 611, 620–21 (1984).

Supreme Court does not have time to resolve ambiguities lacking national importance. Examining cases from courts other than the Supreme Court, although an arduous task, would minimize this shortcoming of the survey.

Fourth, the survey considered only ambiguities that resulted in litigation. According to the definition of ambiguity stated in Part I, every case that raises a statutory issue involves statutory ambiguity. Yet, many potential ambiguities never prompt a lawsuit, let alone one of sufficient magnitude to reach the Supreme Court. The survey, therefore, may have failed to consider many ambiguities that impose costs on society. This deficiency, unlike the preceding ones, presents a methodological problem. While merely looking at a broader array of statutory cases would lessen the three foregoing deficiencies, no survey of cases can guarantee an accurate picture of the ambiguities that do not produce—or, at least, have not yet produced—any litigation.

### B. *Recurring and Idiosyncratic Ambiguities*

The survey, despite its weaknesses, found that statutory ambiguities fall into two largely distinct categories. The first category consists of issues that, at some level of generality, appear in more than one statute. The second consists of issues that arise under one statute and no others. This Article shall refer to the former category as "recurring ambiguities" and the latter category as "idiosyncratic ambiguities." Before discussing the two categories in depth, two examples will illustrate the dichotomy.

The issue of whether federal courts have exclusive jurisdiction over a congressionally-created cause of action has arisen under many federal acts and therefore qualifies as a recurring statutory ambiguity. Pertinent provisions of the Clayton Act,[41] the Racketeer Influenced and Corrupt Organizations Act (RICO),[42] and Title VII of the Civil Rights Act of 1964,[43] for example, all create federal actions but fail to make clear which courts have jurisdiction to hear them. This issue, like many recurring issues, has produced notable litigation. In the well-known case of *General*

[41] 15 U.S.C. § 15(a) (1988).
[42] 18 U.S.C. § 1964(c) (1988).
[43] 42 U.S.C. § 2000e-5(f)(3) (1988).

*Investment Co. v. Lake Shore & M.S.R. Co.*,[44] the Supreme Court held that, despite silence by Congress, state courts could not entertain certain antitrust actions. More recently, in *Yellow Freight Systems v. Donnelly*[45] and *Tafflin v. Levitt*,[46] the Court drew the opposite conclusion from congressional silence and held that the state courts could entertain RICO and Title VII actions.

The recent case of *Mallard v. United States*[47] concerned a straightforward idiosyncratic statutory ambiguity. The ambiguity arose under a law providing that a federal court "may request an attorney to represent" any person claiming *in forma pauperis* status and presenting a nonfrivolous claim.[48] The District Court for the Southern District of Iowa, under this statute, "requested" that attorney Mallard represent an indigent inmate. Mallard attempted to decline, but the District Court ruled that the statute authorized compulsory appointments. The case eventually reached the Supreme Court, presenting the issue whether the word "request" could mean "require." The Court held, over a dissent, that it could not.[49] The survey classified this issue as idiosyncratic because few, if any, other federal statutes raise the issue whether "request" means "require."

Admittedly, a good deal of arbitrariness factors into the process of classifying an ambiguity as recurring or idiosyncratic. The arbitrariness stems mostly from a problem of generality. At some level of abstraction, any issue may resemble another. *Mallard* illustrates this point. The preceding paragraph takes a very narrow view of the question in the case by asserting that the ambiguity concerned the definition of the word "request." It might have said, in a more general sense, that Congress created the ambiguity in *Mallard* by failing to define a key word in a statute. While the former difficulty (failing to define the word "request") rarely occurs, the latter (failing to define a key word) happens frequently.

The author, in conducting the survey, did not attempt to deal with the generality problem in any rigorous way. The survey employed narrow classifications subjectively thought to make

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[44] 260 U.S. 261, 286–88 (1922).
[45] 494 U.S. 820 (1990).
[46] 493 U.S. 455, 458–60 (1990).
[47] 490 U.S. 296 (1989).
[48] 28 U.S.C. § 1915(d) (1988).
[49] *Mallard*, 490 U.S. at 301.

its findings clearer. This lack of rigor remains somewhat problematic but, as with some of the other shortcomings in the survey identified above, it has no simple solution. Future surveys at best could attempt to classify issues at several levels of generality to reveal the dimensions of the classification problem, if not to solve it.

### C. *The Recurring Ambiguities*

The survey found twenty easily identifiable recurring ambiguities that lawyers argued about in the Supreme Court during its last five Terms. Because of the generality problem noted above, some of these ambiguities require more explanation than others and some may seem too narrowly or broadly defined. Still, although not the final word on the subject, the following list illustrates the kinds of issues that a more extensive and rigorous study would identify. It documents the occurrence of these issues with citations to illustrative cases identified in the survey.[50]

1. *Applicable Statute of Limitations.* Congress often neglects to specify the statute of limitations that will govern a statutory cause of action. This failure leads to litigation over the applicable limitations period and the various rules governing the beginning and ending of that period.[51]

2. *Scope of Pre-emption.* The Supremacy Clause provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . ."[52] Accordingly, when state and federal laws conflict, the latter must govern. Whether state law interferes with federal law generally depends on the intent of Congress. At times, however, Congress does not specify its views

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[50] Each of the following compilations of cases represents all of the opinions within the last five years that address the issue discussed in the relevant text. Some of the cases cited to illustrate the recurring ambiguities, however, involve federal regulations or court rules. Although not statutes, they may impose similar costs and have similar origins and therefore deserve consideration.

[51] *See* Lorance v. AT & T Technologies, 490 U.S. 900 (1989); Hardin v. Straub, 490 U.S. 536 (1989); Reed v. United Transp. Union, 488 U.S. 319 (1989); Owens v. Okure, 488 U.S. 235 (1989); Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143 (1987); Goodman v. Lukens Steel Co., 482 U.S. 656 (1987); West v. Conrail, 481 U.S. 35 (1987); United States v. Mottaz, 476 U.S. 834 (1986).

[52] U.S. CONST. art. VI, cl. 2.

with sufficient clarity to eliminate litigation over the scope of pre-emption.[53]

3. *Severability.* Whenever a court invalidates a portion of an act as unconstitutional, it must decide whether Congress intended to keep the constitutional portions of the act in force. Congress, however, frequently fails to address this possibility, and questions about severability have therefore arisen under many federal statutes.[54]

4. *Effect of New Acts on Prior Legislation.* Congress legislates so extensively that many of its statutes overlap to some degree. Any new law that Congress passes may repeal, limit, extend, or otherwise qualify some prior legislation. Again, however, Congress often leaves ambiguous the effect of new laws on prior acts.[55]

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[53] *See* Adams Fruit Co. v. Barrett, 494 U.S. 638 (1990); United Steelworkers v. Rawson, 110 S. Ct. 1904 (1990); California v. Federal Energy Regulatory Comm'n, 110 S. Ct. 2024 (1990); English v. General Electric Co., 110 S. Ct. 2270 (1990); California v. ARC America Corp., 490 U.S. 93 (1989); Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468 (1989); Bonito Boats v. Thunder Craft Boats, 489 U.S. 141 (1989); Shell Oil Co. v. Iowa Dep't of Revenue, 488 U.S. 19 (1988); Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988); Bennett v. Arkansas, 485 U.S. 395 (1988); Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495 (1988); Lingle v. Norge Div. of Magic Chef, 486 U.S. 399 (1988); Mackey v. Lanier Collection Agency & Serv., 486 U.S. 825 (1988); Felder v. Casey, 487 U.S. 131 (1988); Mississippi Power & Light Co. v. Mississippi *ex rel.* Moore, 487 U.S. 354 (1988); Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987); Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987); Perry v. Thomas, 482 U.S. 483 (1987); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987); Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987); CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1987); International Bhd. of Elec. Workers v. Hechler, 481 U.S. 851 (1987); California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987); California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987); California Fed. Savings & Loan Ass'n v. Guerra, 479 U.S. 272 (1987); 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987); International Paper Co. v. Ouellette, 479 U.S. 481 (1987); Rose v. Arkansas State Police, 479 U.S. 1 (1986); Baker v. General Motors Corp., 478 U.S. 621 (1986); Wardair Canada, Inc. v. Florida Dep't of Revenue, 477 U.S. 1 (1986); Offshore Logistics v. Tallentire, 477 U.S. 207 (1986); International Longshoremen's Ass'n v. Davis, 476 U.S. 380 (1986); Three Affiliated Tribes v. Wold Engineering, 476 U.S. 877 (1986); Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986); Wisconsin Dep't of Indus., Labor & Human Relations v. Gould Inc., 475 U.S. 282 (1986); Exxon Corp. v. Hunt, 475 U.S. 355 (1986); Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608 (1986); Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd., 474 U.S. 409 (1986); Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494 (1986).

[54] *See* Sable Communications v. FCC, 492 U.S. 115, 124 n.6 (1989); Bowen v. Kendrick, 487 U.S. 589 (1988); K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 294 (1988); Alaska Airlines v. Brock, 480 U.S. 678 (1987); Bowsher v. Synar, 478 U.S. 714, 734 (1986).

[55] *See* Eli Lilly & Co. v. Medtronic, Inc., 110 S. Ct. 2683, 2690 (1990); Kaiser Aluminum & Chem. Corp. v. Bonjorno, 110 S. Ct. 1570, 1580 (1990); Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 746 n.4 (1989); Patterson v. McLean Credit Union, 491 U.S. 164, 180–81 (1989); Traynor v. Turnage, 485 U.S. 535, 548 (1988); United States v. Fausto, 484 U.S. 439, 453 (1988); Randall v. Loftsgaarden, 478 U.S. 647, 661 (1986).

5. *Requisite Mental State.* The legal consequences of an act frequently depend on the mental state of a person when he or she performs that act. Federal statutes, unfortunately, often neglect to specify with sufficient clarity the *mens rea* or degree of intentionality required for their application.[56]

6. *Kinds of Relief Available.* Many federal statutes create private causes of action. These statutes, however, frequently do not state the kinds of relief available to successful plaintiffs. For example, they may leave ambiguous the scope of equitable relief or the kinds of damages that a plaintiff may receive.[57]

7. *Meaning of References to Other Law or Rights.* By cross-referencing its laws to other laws, Congress creates overlapping state, federal, and foreign regulatory schemes. Federal statutes, for example, commonly speak of activities "permitted by law," refer to "rights, privileges, and immunities" guaranteed by law, or incorporate another body of law in some other manner. Yet, in many instances, Congress simply fails to make the references sufficiently specific. For example, in referring to "other law," it often neglects to specify whether the term "law" includes state and foreign laws or administrative regulations.[58]

8. *Meaning of "Person" and "Citizen."* As noted in the discussion of *Mallard* above, many statutes do not define their key terms. Congress rarely uses any one term, such as the word "request," in an ambiguous manner in several statutes, but the words "person" and "citizen" have that dubious distinction. Most legislation refers to a "person" or "citizen" at least once, but Congress has repeatedly failed to specify the meaning of these terms.[59]

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[56] *See* United States Dep't of Justice v. Tax Analysts, 492 U.S. 136, 147 (1989); United States v. Kozminski, 487 U.S. 931, 949 (1988); United States v. Lane, 474 U.S. 438, 453 n.17 (1986).

[57] *See* United States v. Montalvo-Murillo, 110 S. Ct. 2072 (1990); Pennsylvania Dep't of Pub. Welfare v. Davenport, 110 S. Ct. 2126 (1990); California v. American Stores, 495 U.S. 271 (1990); Martin v. Wilks, 490 U.S. 755 (1989); United States v. Ron Pair Enters., 489 U.S. 235 (1989); Florida v. Long, 487 U.S. 223 (1988); International Paper Co. v. Ouellette, 479 U.S. 481 (1987); Kelly v. Robinson, 479 U.S. 36 (1986); Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421 (1986); Lyng v. Payne, 476 U.S. 926 (1986); United States v. Mottaz, 476 U.S. 834 (1986); Heckler v. Redbud Hosp. Dist., 473 U.S. 1308 (1985).

[58] *See* Eli Lilly & Co. v. Medtronic, Inc., 110 S. Ct. 2683 (1990); California v. FERC, 110 S. Ct. 2024 (1990); Department of Treasury v. FLRA, 494 U.S. 922 (1990); Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989); United States v. Good Year Tire & Rubber Co., 493 U.S. 132 (1989); United States v. Wells Fargo Bank, 485 U.S. 351 (1988); West v. Atkins, 487 U.S. 42 (1988); Western Air Lines v. Board of Equalization, 480 U.S. 123 (1987).

[59] *See* Ngiraingas v. Sanchez, 495 U.S. 182 (1990); Carden v. Arkoma Assocs., 494

9. *Availability and Calculation of Interest.* Money plays a substantial role in federal litigation. For instance, the delay associated with litigation often raises questions about the right to interest on disputed money. Congress, unfortunately, does not always reveal its intentions with respect to the various issues related to interest in all instances.[60]

10. *Waivability of Prerequisites to Suit.* Many federal statutes require plaintiffs to satisfy certain prerequisites before initiating a federal action in court. Regulatory statutes, for example, often require private parties to give the government notice or to take certain other actions prior to filing a complaint. Congress, however, frequently fails to state the consequences of a private litigant's failure to comply with the statutory prerequisites before suing. The Supreme Court has therefore had to decide under a number of statutes whether Congress intended to make prerequisites "jurisdictional" and thus not subject to waiver by a court, or "procedural" and thus waivable in certain situations.[61]

11. *Remedies for Government Violations of the Law.* Congress assumes, as it should, that the federal government and its agents will abide by the law. Nevertheless, mistakes and misdeeds both happen. For example, even though a statute specifies a deadline for a certain government action, federal officials may fail to act in time. When violations of this sort occur, the affected party often seeks a remedy. Many statutes do not indicate what kind of relief such a party may receive.[62]

12. *Appealability of Rulings.* As litigation becomes more complicated, it consumes more time at all levels. Rulings made early in the course of a trial or other proceeding may have lasting effects and, if reversed on appeal, may ultimately necessitate

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U.S. 185 (1990); Pavelic & LeFlore v. Marvel Entertainment Group, 493 U.S. 120 (1989); Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989).

[60] *See* Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827 (1990); United States v. Ron Pair Enters., 489 U.S. 235 (1989); Monessen Southwestern Ry. v. Morgan, 486 U.S. 330 (1988); Loeffler v. Frank, 486 U.S. 549 (1988); Library of Congress v. Shaw, 478 U.S. 310 (1986).

[61] *See* United States v. Montalvo-Murillo, 110 S. Ct., 2072, 2082 n.9 (1990) (Stevens, J., dissenting); Hallstrom v. Tillamook County, 493 U.S. 20 (1989); Torres v. Oakland Scavenger Co., 487 U.S. 312, 316–17 (1988); EEOC v. Commercial Office Products Co., 486 U.S. 107 (1988); Granberry v. Greer, 481 U.S. 129 (1987); Brock v. Pierce County, 476 U.S. 253, 258 (1986).

[62] *See* United States v. Montalvo-Murrillo, 110 S. Ct. 2072 (1990); Wilder v. Virginia Hosp. Ass'n, 110 S. Ct. 2510 (1990); Karahalios v. National Fed'n of Fed. Employees, Local 1263, 489 U.S. 527 (1989); United States v. Taylor, 487 U.S. 326 (1988); Brock v. Pierce County, 476 U.S. 253 (1986).

starting over. Litigants therefore generally desire appellate review as early as possible. A much controverted federal statute, 28 U.S.C. § 1291 (1988), authorizes parties to appeal "final decisions" as of right. Section 1291 and the statutes to which it applies, however, do not make very clear what courts should consider final and what they should not.[63]

13. *Exclusivity of Federal Jurisdiction.* When Congress creates a cause of action, it has power to allow or restrict its adjudication in state courts and other forums. Congress prefers exclusive federal jurisdiction for certain technical matters with which few lawyers and judges have experience, such as patent law; it favors concurrent jurisdiction for more general topics. Although the Supreme Court has adopted a presumption in favor of concurrent jurisdiction,[64] lawyers continue to argue about the ability of parties to bring particular federal statutory claims in state court and other non-federal tribunals.[65]

14. *Applicable Standard of Review.* The degree of deference that a court of appeals must give to a district court depends on the issue that it is reviewing. The federal courts of appeals cannot overrule factual findings unless clearly erroneous.[66] With respect to non-factual matters, however, they use either a de novo or an abuse of discretion standard of review, depending on the nature of the issue or the command of Congress. Many laws, regrettably, leave the proper standard subject to doubt.[67]

15. *Existence of Private Causes of Action.* Legislatures often enact prohibitions without thinking much about their enforce-

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[63] *See* Sullivan v. Finkelstein, 110 S. Ct. 2658 (1990); Lauro Lines S.R.L. v. Chasser, 490 U.S. 495 (1989); Midland Asphalt Corp. v. United States, 489 U.S. 794 (1989); Osterneck v. Ernst & Whinney, 489 U.S. 169 (1989); Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988); Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988); Van Cauwenberghe v. Biard, 486 U.S. 517 (1988); Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370 (1987); NLRB v. United Food & Commercial Workers Union, Local 23, 484 U.S. 112 (1987).

[64] *See* Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478 (1981).

[65] *See* Tafflin v. Levitt, 493 U.S. 455 (1990); Yellow Freight Sys. v. Donnelly, 494 U.S. 820; Shearson/Am. Express v. McMahon, 482 U.S. 220 (1987).

[66] *See* FED. R. CIV. P. 52 ("Findings of fact . . . shall not be set aside unless clearly erroneous . . . ."); U.S. CONST. amend. VII ("[N]o fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.")

[67] *See* Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447 (1990); Firestone Tire & Rubber Co. v. Bruch, 489 U.S 101 (1989); Massachusetts v. Morash, 490 U.S. 107 (1989); Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989); Pierce v. Underwood, 487 U.S. 552 (1988); Commissioner of INS v. Abudu, 485 U.S. 94 (1988).

ment. For hundreds of years, courts have attempted to remedy this problem by inferring the existence of private causes of action under both criminal and regulatory statutes.[68] Lawyers aware of this practice argue in numerous cases about whether federal statutes create private causes of action.[69]

16. *Scope of Official Immunity*. When Congress enacts a statute creating liability for certain wrongs, it often immunizes government officials from suit. In more than a few statutes, however, Congress does not specify who has immunity and who does not.[70]

17. *Reviewability of Agency Actions*. As the government increasingly operates through administrative agencies, the demand for judicial review of agency actions also intensifies. The avenue and availability of review depend on the governing substantive statutes and the general review provisions of the Administrative Procedure Act.[71] Because of the ambiguity of many statutory provisions, lawyers often argue about the reviewability of particular agency orders.[72]

18. *Retroactivity*. Congress usually creates new rules whenever it enacts a new law. A question frequently arises about whether these new rules should apply to old cases. Although the Supreme Court has long said that it will not construe federal statutes or regulations to apply retroactively unless they indicate

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[68] *See* Mannocke's Case, 3 Dyer 294b (1571) (inferring a private cause of action for violation of the Statute of Elizabeth's prohibition on fraudulent conveyances).

[69] *See* Wilder v. Virginia Hosp. Ass'n, 110 S. Ct. 2510 (1990); Atlantic Richfield Co. v. USA Petroleum Co., 110 S. Ct. 1884 (1990); Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 741 (1989) (Brennan, J., dissenting); Karahalios v. National Fed'n of Fed. Employees, Local 1263, 489 U.S. 527 (1989); Thompson v. Thompson, 484 U.S. 174 (1988); Wright v. City of Roanoke Redev. & Hous. Auth., 479 U.S. 418 (1987); Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221 (1986).

[70] *See* Boyle v. United Technologies Corp., 487 U.S. 500 (1988); Westfall v. Erwin, 484 U.S. 292 (1988); Forrester v. White, 484 U.S. 219 (1988); United States v. Stanley, 483 U.S. 669 (1987); Malley v. Briggs, 475 U.S. 335 (1986); Cleavinger v. Saxner, 474 U.S. 193 (1985).

[71] *See* 5 U.S.C. § 702 (1988) ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

[72] *See* Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177 (1990); Bowen v. Massachusetts, 487 U.S. 879 (1988); Webster v. Doe, 486 U.S. 592 (1988); ICC v. Brotherhood of Locomotive Eng'rs, 482 U.S. 270 (1987); Clarke v. Securities Indus. Ass'n, 479 U.S. 388 (1987); Japan Whaling Ass'n v. American Cetacean Soc'y, 478 U.S. 221 (1986); Lyng v. Payne, 476 U.S. 926 (1986); EEOC v. FLRA, 476 U.S. 19 (1986); Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986); Heckler v. Chaney, 470 U.S. 821 (1985); Cuyahoga Valley Ry. v. United Transp. Union, 474 U.S. 3 (1985).

otherwise,[73] the issue of retroactivity continues to arise in federal statutes.[74]

19. *Abrogation of Eleventh Amendment Immunity.* The Eleventh Amendment immunizes states from suit in certain instances, but Congress may abrogate this immunity by statute. The Supreme Court, however, presumes no such abrogation of immunity unless Congress makes a contrary intention "unmistakably clear in the language of the statute."[75] Congress, however, rarely achieves such clarity or certainty.[76]

20. *Availability of Jury Trials.* When Congress creates a novel statutory action, it always has the option of providing for jury trials in its statutes. Yet, in many instances, it remains silent on the subject of juries.[77] This omission has onerous consequences because the Supreme Court has held that the Seventh Amendment[78] affords a litigant a right to a jury trial in any statutory action that "is more similar to cases that were tried in courts of law than to suits tried in courts of equity" at the time of the Seventh Amendment's ratification.[79] Whenever Congress fails to state that it wants a jury trial, the Court must employ this difficult test to determine whether the Constitution requires one.

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[73] *See* Green v. United States, 376 U.S. 149, 160 (1964); Claridge Apartments Co. v. Commissioner, 323 U.S. 141, 164 (1944); Miller v. United States, 294 U.S. 435, 439 (1935); United States v. Magnolia Petroleum Co., 276 U.S. 160, 162–63 (1928); Brimstone R.R. & Canal Co. v. United States, 276 U.S. 104, 122 (1928).

[74] *See* Stewart v. Abend, 110 S. Ct. 1750, 1769 n.1 (1990) (Stevens, J., dissenting); Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827 (1990); United States v. Sperry Corp., 493 U.S. 52, 64 (1989); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 207 (1988); United States v. Hemme, 476 U.S. 558 (1986).

[75] Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985).

[76] *See* Port Auth. Trans-Hudson Corp. v. Feeney, 495 U.S. 229 (1990); Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96 (1989); Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989); Dellmuth v. Muth, 491 U.S. 223 (1989); Missouri v. Jenkins, 491 U.S. 274 (1989); Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468 (1987); Green v. Mansour, 474 U.S. 64 (1985).

[77] *See* Chauffeurs, Local 391 v. Terry, 494 U.S. 558 (1990); Tull v. United States, 481 U.S. 412, 417 (1987); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989).

[78] The Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. CONST. amend. VII.

[79] Tull v. United States, 481 U.S. 412, 417 (1987). The large number of cases decided under this standard shows the difficulty of its application. *See, e.g.*, Beacon Theatres v. Westover, 359 U.S. 500 (1959); Dairy Queen v. Wood, 369 U.S. 469 (1962); Ross v. Bernhard, 396 U.S. 531 (1970); Curtis v. Loether, 415 U.S. 189, 193 (1974); Lehman v. Nakshian, 453 U.S. 156, 162 n.9 (1981); Katchen v. Landy, 382 U.S. 323, 337–40 (1966); Luria v. United States, 231 U.S. 9, 27–28 (1913).

### D. *Some Observations about Recurring Ambiguities*

Five observations about the recurring ambiguities identified in the survey deserve attention. First, the cases considered in the survey show that the Supreme Court does not treat recurring ambiguities consistently. For example, in the recent case of *Hallstrom v. Tillamook Co.*,[80] the Court confronted a provision of the Resource Conservation and Recovery Act (RCRA) mandating sixty days notice to state and federal officials named as defendants.[81] When the Hallstroms sued Tillamook County for polluting their farm water, they neglected to provide prior notice. The Supreme Court had to decide whether RCRA made the prior notice provision a jurisdictional requirement, not subject to waiver, or a procedural requirement, subject to waiver. It eventually opted for the former characterization and threw the Hallstroms out of court.[82]

A nearly identical question about the waivability of a prerequisite to suit arose in the earlier case of *Oscar Mayer & Co. v. Evans*.[83] The defendant there failed to provide notice to the government before bringing a claim under the Age Discrimination in Employment Act of 1967.[84] The statutory provisions at issue in *Hallstrom* and *Oscar Mayer* contained almost identical language, but the Court in *Oscar Mayer* found the prior notice requirement procedural rather than jurisdictional. Rather than reconcile the opposite results, the Court merely noted in its *Oscar Meyer* opinion, "*But cf. Hallstrom* . . . ."[85] Such inconsistent treatment of recurring ambiguities increases their front-end costs by making future judicial interpretations more difficult to predict.

Second, most of the recurring issues listed above seem to involve rather apolitical procedural matters. Although Congress may leave difficult substantive issues ambiguous to avoid political controversy—and, perhaps, to punt the controversy to the courts—it has little conceivable reason for intentionally failing to clarify matters relating to statutes of limitations and interest

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[80] 493 U.S. 20 (1989).
[81] 42 U.S.C. § 6972(b) (1988).
[82] *Hallstrom*, 493 U.S. at 31.
[83] 441 U.S. 750, 764–65 & n.13 (1979).
[84] 29 U.S.C. § 633b (1982).
[85] *Oscar Mayer*, 493 U.S. at 31.

on disputed money.[86] Recurring ambiguities, in consequence, would appear to result primarily from Congress' inattention rather than from deliberate action. New approaches suggested for reducing the costs of statutory ambiguity, accordingly, should attempt to prompt Congress at a minimum simply to address these issues.

Third, questions about the scope of pre-emption deserve serious attention because, as the above list shows,[87] they arise more frequently than any other recurring statutory issue. The occurrence of at least a few pre-emption problems seems largely inevitable since every federal statute pre-empts some state laws. Moreover, to eliminate all potential pre-emption problems, Congress would have to understand thoroughly all of the state laws with which its acts might conflict.

Pre-emption issues, however, should not arise as frequently as they currently do. The survey indicates that some acts produce a vastly disproportionate and unjustifiable number of pre-emption issues. Among these acts, the Employee Retirement Income Security Act (ERISA)[88] far exceeds the others. Prior to ERISA's enactment, state law long had governed pension plans and other employment benefits. The states, as a result, had developed laws addressing most of the issues in this area. In ERISA, Congress attempted to work around state law in some places,[89] to replace it in others,[90] and to incorporate its principles elsewhere.[91]

Despite a minimal effort by Congress to state the scope of pre-emption,[92] the contours of ERISA have never become very clear. The Supreme Court, in consequence, has struggled to

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[86] Some issues, such as the waivability of prerequisites to suit, may divide courts along political lines. The *Hallstrom* case itself may provide an example. However, these issues do not seem to be ones which Congress could not bring itself to decide one way or the other before they arise.

[87] *See* cases cited *supra* note 53.

[88] 29 U.S.C. §§ 1001–1461 (1988).

[89] For example, ERISA does not pre-empt state laws establishing mandatory minimum health care benefits provided by insurance policies. *See* Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985).

[90] ERISA, rather than state law, governs the subrogation rights of a health care plan when it pays a participant's medical expenses following an accident. *See* FMC Corp. v. Holliday, 111 S. Ct. 403 (1990).

[91] For instance, ERISA generally incorporates common-law principles of trust law. *See* Sommers Drug Stores v. Corrigan Enters., Inc., 793 F.2d 1456, 1463 (5th Cir. 1986).

[92] *See* 29 U.S.C. § 1144(a) (providing that ERISA supersedes all state laws insofar as they "relate to any employee benefit plan"); § 1144(b)(2)(A) (exempting from the pre-emption clause any state law that "regulates insurance").

work them out in a series of cases.[93] ERISA clearly needs revision to make its pre-emptive effect clearer. By identifying other acts that also produce a disproportionate share of pre-emption problems, a more comprehensive study could aid in the reduction of the costs imposed by this recurring statutory ambiguity.

Fourth, the Supreme Court has attempted to deal with some of the recurring ambiguities by establishing presumptions. For example, as noted in Items Thirteen, Eighteen, and Nineteen above, the Court has created background rules regarding exclusivity of federal jurisdiction, retroactivity, and Eleventh Amendment immunity. Although they ultimately may decide most cases, these rules do not seem to eliminate litigation over the issues that they address; as the survey shows, these issues continue to arise. Apparently, even when the Supreme Court acts consistently, it cannot eliminate the costs of recurring statutory ambiguities by itself.

Fifth, the list of recurring ambiguities contributes little to the standing debate, discussed in Part II, about when legislatures should employ standards instead of rules. The author, as noted above, dealt with the problem of generality by choosing to classify recurring issues narrowly enough, in his opinion, to make the survey's results analytically useful. The list, for example, does not include "failing to define a key term" as a recurring ambiguity. Even if such failures account for many of the statutory issues that lawyers would argue about in court, identifying particularly troublesome undefined words like "person" seemed more useful for the purposes of proposing concrete reforms. The survey, similarly, did not compile a list of cases in which parties disputed the meaning of standards. Such a compilation undoubtedly would include numerous statutes but might have little value in the absence of data about how much better or worse the standards worked than rules would have worked. Coming to grips with the standards versus rules question, like so many other problems, unfortunately will have to await a more detailed empirical undertaking.

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[93] *See, e.g.*, Mead Corp. v. Tilley, 490 U.S. 714, 727 (1989) (Stevens, J., dissenting); Massachusetts v. Morash, 490 U.S. 107 (1989); Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989); Mackey v. Lanier Collections Agency & Serv., 486 U.S. 825 (1988); Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987); Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987).

### E. *Idiosyncratic Ambiguities*

Since idiosyncratic ambiguities, by definition, do not recur, the survey could not compile any list of them comparable to the list of recurring ambiguities. The survey, however, did reveal several important facts about idiosyncratic ambiguities.

First, even though the survey made no attempt to measure their exact frequency, idiosyncratic ambiguities appear to be more common than recurring ambiguities. To quantify their occurrence, simply counting cases would not work. Many cases involve several statutes, some raising both kinds of ambiguities. Obtaining reliable data, therefore, would require identifying and counting all of the statutory issues in all of the Supreme Court's cases. Several factors, such as the difficulty of choosing a consistent level of generality and of deciding where one issue ends and the next begins, would render this task quite arduous. Future studies, nonetheless, should consider undertaking the necessary efforts to quantify the difference in numbers between recurring and idiosyncratic ambiguities.

Second, Congress in several instances seems to have created a large number of idiosyncratic statutory ambiguities by making sweeping reforms of the law without sufficiently contemplating the consequences. Many examples may exist, but one stood out in the survey. The American legal system historically has required parties to assume their own attorney's fees. Congress substantially altered this rule in certain civil-rights and other suits by shifting the prevailing party's reasonable attorney's fees to the losing party.[94] These acts instantly introduced a series of issues about attorney's fees into a myriad of cases.[95] With more

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[94] The principal fee-shifting statute, 42 U.S.C § 1988 (1988), provides: "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The Equal Access to Justice Act, 28 U.S.C. § 2412(d) (1988) and the Clean Air Act, 42 U.S.C. § 7604(d) (1988) also provide for fee shifting.

[95] *See, e.g.*, Commissioner of INS v. Jean, 110 S. Ct. 2316 (1990); Venegas v. Mitchell, 495 U.S. 82 (1990); Lewis v. Continental Bank Corp., 494 U.S. 516 (1990); Rhodes v. Stewart, 488 U.S. 1 (1988); Independent Fed'n of Flight Attendants v. Zipes, 491 U.S. 754 (1989); Missouri v. Jenkins, 491 U.S. 274 (1989); Sullivan v. Hudson, 490 U.S. 877 (1989); Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782 (1989); Blanchard v. Bergernon, 489 U.S. 87 (1989); Pierce v. Underwood, 487 U.S. 552 (1988); Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711 (1986); Hewitt v. Helms, 482 U.S. 755 (1987); North Carolina Dep't of Transp. v. Crest St. Community Council, 479 U.S. 6 (1986); City of Riverside v. Rivera, 477 U.S. 561 (1986); Evans v. Jeff D., 475 U.S. 717 (1986).

careful drafting in the first instance, Congress might have foreseen and eliminated these problems.

Third, an empirical survey of statutory cases may mislabel some recurring ambiguities as idiosyncratic. Mislabeling may occur because of the infrequency with which some recurring issues arise. If a recurring issue appears only once in the sample of cases under consideration, a survey will record it as an idiosyncratic ambiguity. Increasing the size of the sample will ameliorate this problem. At some point, however, the benefit of considering more cases will not justify the effort. Treating issues that rarely occur differently from genuinely idiosyncratic ambiguities may have no analytical or practical advantages.

Other mislabeling may occur because of the difficulty of recognizing the kinds of issues that recur. A rigorous survey of a sample of cases would compare each statutory issue meticulously against each of the thousands of other issues in the sample. To simplify the process, however, the author considered the issues one by one, putting aside potentially recurring ambiguities and dismissing from further consideration issues that looked so tied to particular statutory language that they appeared idiosyncratic. Although this technique saved time, premature dismissals may have caused an understatement of the recurring issues.[96] Again, however, any conceivable understatement probably had little material effect on the usefulness of the survey as a tool for developing and evaluating alternative methods for reducing the costs of statutory ambiguity.

Finally, idiosyncratic ambiguities arise more often due to political concerns rather than because of recurring ambiguities. For example, although Congress has little reason to neglect to

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[96] A similar problem of mischaracterization occurs when courts interpret statutes. Consider, for example, the recent case of *Eli Lilly & Co. v. Medtronic*, 110 S. Ct. 2683 (1990), which interpreted a provision of the patent law. The statute in question stated: "It shall not be an act of infringement to make, use, or sell a patented invention . . . solely for uses reasonably related to the development and submission of information under a Federal law which regulates the manufacture, use, or sale of drugs . . . ." 35 U.S.C. § 271(e)(1) (1988). The Court had to decide whether the law permitted testing a medical device under the Federal Food, Drug, and Cosmetic Act (FDCA), which regulates both medical devices and drugs. Justice Scalia's majority opinion approached the case as though it involved an idiosyncratic ambiguity, permitting the testing on the grounds that the FDCA qualified as "a law which regulates . . . drugs" under the peculiar wording of the statute. 110 S. Ct. at 2688. Justice Kennedy, in dissent, saw the case as involving a recurring statutory phrase. He noted that numerous statutes, in fact, use the phrase "a law which regulates" and that it does not always refer to the entirety of specific acts. *See id.* at 2694 (Kennedy, J., dissenting). *See also* Moskal v. United States, 111 S. Ct. 461, 470 (1990) (Scalia, J., dissenting) (using the Kennedy approach to criticize another decision).

include the applicable statute of limitations for a particular cause of action, it may want to pass a statute prohibiting discrimination without taking sides on affirmative action. Not all idiosyncratic ambiguities concern issues too hot for Congress to handle, but some undoubtedly do.

## IV. Alternative Approaches

The preceding sections not only show the need for alternative approaches to reducing the costs of statutory ambiguity, but also provide a basis for proposing and evaluating them. Consideration of new approaches, in particular, must focus on factors such as: (1) their effects on the kinds of costs identified in Part I; (2) their differences from the current efforts described in Part II; (3) their ability to address the kinds of ambiguities described in Part III; and (4) their ease of implementation. The following discussion refers to these criteria in examining both particular alternatives and the problem of developing alternatives more generally. It concludes that many rather simple proposals could have suprisingly substantial effects.

### A. *The Federal Courts Study Committee's Proposals*

The search for new ways to reduce the costs of statutory ambiguity already has begun. The Federal Courts Study Committee, as noted above, recently sought to recommend improvements for the federal court system.[97] Due to the general aim of

[97] The Judicial Improvements and Access to Justice Act § 102(b), 28 U.S.C.A. § 331 note (West Supp. 1991) (Federal Courts Study Committee), states the purposes of the Federal Courts Study Committee as follows:

> (b) PURPOSES.—The purposes of the Committee are to—
> (1) examine the problems and issues currently facing the courts of the United States;
> (2) develop a long-range plan for the future of the Federal judiciary, including assessments involving—
> (A) alternative methods of dispute resolution;
> (B) the structure and administration of the Federal court system;
> (C) methods of resolving intra-circuit and inter-circuit conflicts in the courts of appeals; and
> (D) the types of disputes resolved by the Federal courts; and
> (3) report to the Judicial Conference of the United States, the President, the Congress, the Conference of Chief Justices, and the State Justice Institute on the revisions, if any, in the laws of the United States which the Committee, based on its study and evaluation, deems advisable.

its study, most of the proposals in the Committee's report deal with topics directly related to courts, such as the feasibility of creating additional capacity within the judicial branch[98] and the need to improve certain aspects of federal court administration.[99] Yet, whether specifically intended or not, five of its recommendations appear aimed largely at reducing the number of ambiguities in federal statutes or at lessening their costs. The analysis in Parts I, II, and III shows the value of these recommendations and suggests various ways to improve them.

### 1. Checklists for Legislative Staff

In its report, the Committee first recommends that "Congress should consider a 'checklist' for legislative staff to use in reviewing proposed legislation for technical problems."[100] This checklist, the Committee explains, could prevent the staffs of both the substantive committees of Congress and the Office of Legislative Counsel in the Senate and the House from overlooking potential issues in federal legislation.[101] It particularly admonishes them to consider whether new federal acts indicate:

- the appropriate statute of limitation;
- whether a private cause of action is contemplated;
- whether pre-emption of state law is intended;
- the definition of key terms;
- the *mens rea* requirement in criminal statutes;
- severability;
- whether a proposed bill would repeal or otherwise circumscribe, displace, impair, or change the meaning of existing federal legislation;
- whether state courts are to have jurisdiction and, if so, whether an action would be removable to federal court;
- the types of relief available;
- whether retroactive applicability is intended;
- the condition for any award of attorney's fees authorized;
- whether exhaustion of administrative remedies is a prerequisite to any civil action authorized;
- the conditions and procedures relating to personal jurisdiction over persons incurring obligations under the proposed legislation;

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[98] *See* COMMITTEE REPORT, *supra* note 1, at 69–88.
[99] *Id.* at 145–66.
[100] *Id.* at 91.
[101] *See id.*

> • the viability of private arbitration and other dispute resolution agreements under enforcement and relief provisions; and
>
> • whether any administrative proceedings provided for are to be formal or informal.[102]

The proposal to develop a checklist along these lines, like any proposal aimed at improving drafting, strives to eliminate all of the costs of statutory ambiguity identified in Part I. By making the answers to potential questions clear from the start, a checklist will reduce the litigation and other front-end costs that burden the courts and individual litigants when they do not know the meaning of a statute. In addition, by eliminating uncertainty about the issues that it covers, a checklist can reduce the number of court decisions bringing about replacement and other back-end costs.

The Committee, of course, did not invent the concept of a drafting checklist. Legal scholars, as noted in Part II, have developed comprehensive form books for use by Congress and administrative agencies.[103] The checklist that the Committee has composed, however, differs from the lists presented in the form books because it focuses largely on substantive issues specific to federal legislation. While more general works have offered advice on usage and style to all drafters of legal documents,[104] the Committee has devised a more specialized tool.

Congressman Kastenmeier, a member of the Committee, lamented the fact that the Committee's report failed to generate anything more effective than a checklist for addressing the difficulties involved in legislating. He stated: "A checklist may be of some value but really does not do justice to the complexity

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[102] *Id.* In its report, the Committee states that the checklist, in addition, could provide for consideration:

> • of whether any deadline for judicial action appearing in proposed legislation is necessary and, if so, reasonable;
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> • in the case of proposed legislation providing for judicial review by a multi-judge panel, [of] whether the same policy objectives could be achieved by providing for single-judge review; and
>
> • of whether the statute applies to the territories, the District of Columbia, and the Commonwealth of Puerto Rico.

*Id.* at 92.

[103] At least some evidence suggests that Congress and the administrative agencies have attempted to use these books in a regular manner. *See supra* notes 25–27 and accompanying text.

[104] *See, e.g.*, DICKERSON, *supra* note 25, at 3–8; ESKRIDGE & FRICKEY, *supra* note 24, at 838–41; PEACOCK, *supra* note 26, at 45–68.

of the legislative drafting questions that must be answered."[105] To the extent that Congressman Kastenmeier was referring to idiosyncratic ambiguities, the findings in Part III support his conclusions. Checklists can do little about the numerous idiosyncratic issues that arise in legislation because, by definition, they defy listing.

Checklists, however, can address recurring ambiguities quite effectively. The Committee stated that it selected the items in its checklist according to "the judgment of committee members, who have had considerable experience in dealing with statutes before and after passage."[106] The list of recurring ambiguities compiled in Part III confirms the soundness of their judgment. Although the Committee did not attempt to base its recommendations on empirical data, its checklist substantially covers the kinds of ambiguities that actually have appeared in recent Supreme Court cases.[107] To improve upon the Committee's work, anyone using the checklist should extend it to include any future, more rigorous, empirical research, including the recurring issues identified here in Part II.

Checklists have both advantages and disadvantages when it comes to implementation. On one hand, members of the government have few grounds for objecting to checklists because they can help legislators avoid many problems in federal legislation with almost no cost or political controversy. On the other hand, although they might produce substantial improvements upon implementation by legislative staffs, checklists simply may go unused.[108] The Committee's proposed checklist seems worth trying despite this likely possibility. Further work on checklists should explore ways of compelling their use without intruding on the traditional practices of Congress.

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[105] COMMITTEE REPORT, *supra* note 1, at 92 (additional view of Congressman Kastenmeier, joined by Judge Keep, President Lee, Congressman Moorhead, and Judge Posner).

[106] *Id.* at 92.

[107] The Committee's checklist specifically overlaps the list of recurring ambiguities in Part III in its inclusion of items relating to: (1) statutes of limitations; (2) private causes of action; (3) pre-emption; (4) requisite mental states; (5) severability; (6) the effect of one statute on another; (7) the types of relief available; (8) exhaustion of administrative remedies as a prerequisite to suit; (9) retroactivity; and (10) availability of forums other than federal court.

[108] *See supra* note 31, and accompanying text.

### 2. Fallback Rules for Particular Issues

In its report the Committee also recommends, as part of a comprehensive plan to revise federal statutes of limitations, that Congress "adopt fallback limitations periods for federal claims (such as those implied by the courts) not explicitly created by Congress and for any other federal claim not specifically covered by a limitations provision."[109] Congress promptly acted on this proposal, creating a four-year fallback limitations period for all new federal claims.[110]

Fallback rules, such as this one, cannot address the costs imposed by statutory ambiguity as comprehensively as drafting solutions such as checklists. Although they may eliminate the front-end costs that uncertainty over the governing rule of law otherwise would spawn, they do so in an arbitrary manner. Fallback rules apply even in situations in which they make little sense. As a result, they may produce costs similar to the back-end costs that arise after a court interprets a statutory ambiguity.

If Congress finds a particular application of a fallback rule inappropriate, it will have to enact further legislation to correct the problem. Fallback rules thus may lead to costs similar to the replacement costs that arise when Congress acts to undo a judicial interpretation of an ambiguity that it dislikes. In addition, legislation that relies on fallback rules generally will have less utility than legislation that uses more specifically considered

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[109] COMMITTEE REPORT, *supra* note 1, at 93. The Committee concisely explained the need for such fallback periods as follows:

> At present, federal courts 'borrow' the most analogous state law limitations period for federal claims lacking limitations periods. Borrowing, while defensible as a decisional approach in the absence of legislation, appears to lack persuasive support as a matter of policy. It also creates several practical problems: It obligates judges and lawyers to determine the most analogous state law claim; it imposes uncertainty on litigants; reliance on varying state laws results in undesirable variance among the federal courts and disrupts the development of federal doctrine on the suspension of limitations periods. The present approach may promote uniform limitations periods between related state and federal claims, but that is a relatively minor benefit, especially given the uncertainty surrounding which statute will govern and the possibility of filing in different states with different time periods.

*Id.* at 93.

[110] Judicial Improvements Act of 1990 § 313, 28 U.S.C. § 1658 (1991). This new section provides: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues."

provisions.[111] Fallback rules, however, do not produce separation of powers problems so long as Congress, rather than a court, creates them.

The information collected in Part III suggests that a fallback rule for otherwise unstated limitation periods could eliminate a significant number of cases because issues involving periods of limitation often arise.[112] The Committee gave no reasons for recommending a fallback rule only for this particular problem. To the extent that fallback rules successfully would reduce the costs of statutory ambiguity, Congress should enact them for the other recurring issues listed in Part III. For example, just as it recently specified a four-year limitations period for all new claims not governed by any particular statute, it could adopt rules that, unless otherwise stated, courts may not waive prerequisites to suit or apply new legislation retroactively.

Fallback rules, like checklists, have both advantages and disadvantages in implementation. On the plus side, Congress has to act only once to use them; it passes a single act, and the fallback rule applies forever. Unlike checklists, therefore, fallback rules do not require the constant attention of busy Congressmen to succeed in reducing the costs of statutory ambiguity.

On the minus side, Congress might encounter difficulty creating fallback rules for some issues because of disagreement over their substance. Even though Congress, in theory, could override at a later date any fallback rule that it might enact, fallback rules could produce inertia inhibiting formulation of more considered legislation in the future.[113] Fearing that this inertia will tip the balance on more delicate issues when they arise, Congress may hesitate to formulate some fallback rules.

Given the apolitical nature of most recurring ambiguities,[114] however, this possibility probably would not affect many issues.

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[111] The lost utility may exceed the diminished utility costs often associated with judicial decisions. When a court has to interpret an ambiguous statute in the absence of a fallback rule, it may avoid absurd or unlikely results because it may reason that Congress did not intend them. A fallback rule, by contrast, easily could produce such results.

[112] The recurring ambiguities identified above included neglecting to specify the statute of limitations. *See supra* Part III.C.1.

[113] *See generally* Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 427 (1988) (explaining the reasons why it takes less political support to block a law than to get one passed).

[114] For discussion of the apolitical nature of most recurring statutory ambiguities, see note 86 and accompanying text.

Congress seems more likely to over-use than to under-use fallback rules. For example, now that Congress has a four-year default statute of limitations, it may choose never to discuss periods of limitations again. Because of the arbitrary nature of fallback rules, Congress should avoid relying on them when more considered and specific laws would produce greater social utility.

### 3. Office of Judicial Impact Assessment

The Committee's report also strives to eliminate ambiguities and their costs by proposing that Congress create a new body in the Judicial Branch called the Office of Judicial Impact Assessment (the "Judicial Office").[115] The Committee did not describe the proposed Judicial Office in detail but suggested that it could perform two different functions. First, it could "advise Congress on . . . the effect of proposed legislation on the [judicial] branch and legislative drafting matters likely to lead to unnecessary litigation."[116] Second, "[t]he office could call Congress' attention to possible drafting problems in existing legislation that are pointed out in judicial opinions."[117]

In advising Congress of matters likely to lead to unnecessary litigation, the Judicial Office would attempt to improve the drafting of statutes. As a result, if successful, it could eliminate both the front-end and back-end costs associated with statutory ambiguities. Unlike either the checklist or fallback rule proposals, however, this recommendation does not aim at eliminating only recurring statutory problems. The Committee undoubtedly would like the Judicial Office to inform Congress about any issues in pending legislation that it thinks lawyers might litigate in court.

The proposal does not have as clear an advantage over the current approaches to reducing the costs of statutory ambiguity as do the proposals concerning checklists and fallback rules. Although the Committee wants the Judicial Office to advise Congress about potential ambiguities, it does not suggest any

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[115] COMMITTEE REPORT, *supra* note 1, at 89. Note that the Federal Courts Study did not specify the exact relationship between such an office and the Judicial Branch. Presumably, the Committee members intended the Judicial Branch to fund, control, and supervise the Judicial Office.

[116] *Id.* at 89.

[117] *Id.* at 90.

innovative technique for detecting them. Perhaps the Committee decided that, although Congress already may attempt to check its work, the Judicial Office, located in the Judiciary, might find many problems that Congress may miss. As in all writing and drafting, ambiguities usually appear clearer to an outsider than to those who formulated them. In addition, because ambiguities ultimately may burden the courts more than Congress, an office in the Judiciary might have a greater incentive to find them.

In calling the statutory ambiguities identified in judicial decisions to the attention of Congress, the Judicial Office could not eliminate fully their front-end costs. Ambiguities begin imposing front-end costs from the time of their creation and do harm before any court interprets them. Yet, the Judicial Office could reduce the front-end costs by prompting Congress to clarify the ambiguities before a court of last resort has fixed their meanings, thus shortening the period of uncertainty. If Congress cannot act before a court of last resort, the ambiguities would impose all or almost all of their front-end costs.

Alerting Congress to ambiguities identified in opinions also could reduce back-end costs more effectively. By reacting swiftly after a court interprets an ambiguity, Congress could attack the separation of powers costs and any diminished utility associated with the decision by choosing for itself a rule that it considers most useful. Merely calling a problem to the attention of Congress would not eliminate the replacement costs, however, because Congress still would have to go through the process of debating and enacting an amendment.

Current efforts to reduce the costs of statutory ambiguity have overlooked the need to inform Congress about statutory problems. More than a few judicial opinions follow a familiar but unfortunate pattern: after laborious efforts to construe an ill-drafted law, they remind skeptical readers that, while their outcomes may seem strained, Congress can change them if it desires.[118] Sometimes Congress rewrites the statutes with which the courts are struggling. All too often, however, Congress simply fails to take cognizance of what judges say in their opinions

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[118] *See, e.g.*, Hancock v. Train, 426 U.S. 167, 198 (1976) (holding that an environmental statute did not require federal installations to obtain state permits, but remarking that Congress may amend the statute). Sometimes courts complain not about an ambiguity, but about the substance of a statute. *See, e.g.*, Amella v. United States, 732 F.2d 711, 714 (9th Cir. 1984) (stating that Congress should take an onerous notification statute "off the books"). Such substantive concerns are beyond the scope of this Article.

about ambiguities. The Committee's proposal could reduce this problem.

By focusing on issues that already have arisen as opposed to those that might arise in the future, the Judicial Office could identify both recurring and idiosyncratic ambiguities. In this regard, it surpasses the other proposals discussed above. Moreover, because judicial decisions would specify the exact nature of the ambiguity, the Judicial Office and Congress would not waste time identifying and eliminating issues that never would arise.

Some practical aspects of the proposal remain unclear. The Committee has not described the membership of the Judicial Office, but it almost certainly would not contain federal judges. It probably would consist, instead, of a staff of lawyers or others that would report to the Judicial Conference or the Administrative Office of the United States Courts, which in turn would advise Congress.[119] Although added layers of bureaucracy may hinder communication, they may have some advantages. The Judicial Conference and the Administrative Office previously have submitted recommendations to Congress for new legislation[120] and thus have a certain degree of established credibility. In the past, however, they have had time to consider only matters directly affecting the budget and operations of the Judiciary.[121] Receiving recommendations from the proposed Judicial Office could enable them to expand their efforts into other areas.

The Committee also has not described how the Judicial Office would find the problems pointed out in judicial opinions. Without an extensive staff, the Judicial Office could not read all of the federal cases decided each year. It might avoid that burden by asking judges and parties to call to the Judicial Office's attention any cases involving problematic drafting. This alternative approach could save much time, but it might turn the Judicial Office into just another body in Washington to lobby when disappointed with a piece of legislation or a judicial decision. Although requiring the Committee to report to the Judicial Conference rather than directly to Congress would limit

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[119] The Committee's report states: "The office could call [various problematic] matters to the attention of the Conference, but it would not judge the policy wisdom of legislation or speak independently to Congress." COMMITTEE REPORT, *supra* note 1, at 90.

[120] *See id.* at 89.

[121] *Id.*

the efficacy of lobbying efforts, the Judiciary probably would prefer to avoid them altogether.

Despite the various benefits of the proposal, Congress may oppose creation of the Judicial Office on political grounds. Locating the Judicial Office in the Judiciary, in the eyes of many members of Congress, could amount to an admission that Congress cannot handle the task of legislating. Moreover, with the Judiciary now largely Republican and the Congress largely Democratic, Congress may worry that the Judicial Office would seek politically motivated changes in legislation in the name of technical corrections. However, Congress may opt for increased involvement by the Judiciary anyway for the political benefits; failure to detect a problem before its enactment may estop the courts from complaining about the drafting. Understandable political concerns, nonetheless, would justify Congress, if it chooses to create the Judicial Office, to take steps to constrain its role.

### 4. Resolution of Inter-Circuit Conflicts

The Supreme Court, as noted above, presently spends much of its time resolving conflicting interpretations of federal statutes.[122] In one of the more provocative proposals of its report, the Committee urges Congress to study a new method of resolving these conflicts that would lighten the burden on the Supreme Court. It proposes: "Congress should authorize a five-year, experimental pilot project to resolve some inter-circuit conflicts, during which the Supreme Court could refer selected cases to an en banc court of appeals for disposition and creation of national precedent on the conflict issue."[123]

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[122] The Supreme Court makes the existence of a conflict one of the principal bases for granting certiorari. *See supra* note 39.

[123] COMMITTEE REPORT, *supra* note 1, at 126. The report indicates that the legislation enacting the proposal should include the following provisions:

> (1) The Supreme Court may (a) refer any case to such an in [sic] banc court before or after granting or denying certiorari or before or after noting probable jurisdiction on an appeal, and (b) direct such an in [sic] banc [court] to decide any case so referred.
> (2) The referral must be to a court not involved in the conflict issue.
> (3) The referral must be on a random basis that would preclude the Supreme Court's knowing the recipient of the case before it made the referral.
> (4) Temporary amendments to the Federal Rules of Appellate Procedure should establish uniform procedures and time limitations to govern the

This proposal, at first glance, might not seem like a method of reducing the costs of statutory ambiguity. Yet, like the second of the proposed functions for the Judicial Office, it could help reduce the front-end costs of statutory issues by hastening their resolution. The proposal, however, will do little to reduce the back-end costs because it simply shifts the task of interpreting issues from the Supreme Court to different courts. The proposal, indeed, runs a risk of increasing back-end costs by limiting the time for issues to percolate in the lower courts.[124]

Apart from accelerating decision of statutory issues, the proposal does not add much to the various approaches for reducing the costs of ambiguity discussed in Part II. Whichever court settles a conflict will have to use existing principles of statutory interpretation. Unlike checklists or fallback rules, however, the new method of reducing statutory ambiguity will apply equally to recurring and idiosyncratic ambiguities; the Supreme Court may refer either kind of issue to an en banc court for resolution.

Congress could implement the proposal without much difficulty because of its limited, experimental scope. Senator Heflin has already introduced a bill that would enact the pilot study[125] and, although Congress has not passed the bill, it has commissioned further study of inter-circuit conflicts.[126]

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transmittal of each case from the Supreme Court to the courts of appeals for the in [sic] banc review.

(5) The in [sic] banc court's decision on the designated conflict issue will be final, subject only to the right of the party adversely affected by the decision to seek reconsideration or rehearing of that ruling by the Supreme Court within thirty days from the date the court of appeals renders its in [sic] banc opinion. No response to such a reconsideration motion will be permitted unless the Supreme Court requests it.

(6) Unless modified or overruled by the Supreme Court, decisions of an in [sic] banc court, when the case has been so referred by the Court, will be binding as if made by the Court.

(7) Assignments to the courts of appeal will be adjusted so that each court receives assignments in proportion to the relative size of the court.

*Id.*

[124] *See supra* notes 20 and 21 and accompanying text.

[125] S. 2620, 101st Cong., 2d Sess. (1990).

[126] Judicial Improvements Act of 1990 § 302, 28 U.S.C.A. § 620 note (West Supp. 1991) (Study of Inter-Circuit Conflicts and Structural Alternatives for Courts of Appeals by Federal Judicial Center), provides:

(a) INTER-CIRCUIT CONFLICTS.—The Board of the Federal Judicial Center is requested to conduct a study and submit to the Congress a report by January 1, 1992, on the number and frequency of conflicts among the judicial circuits in interpreting the law that remain unresolved because they are not heard by the Supreme Court.

(b) FACTORS TO CONSIDER IN STUDY.—In conducting such a study, the Center should consider, to the extent feasible, all relevant factors, such as whether the conflict—

Opposition to the proposal generally centers on questions not directly related to its ability to reduce the costs of statutory ambiguity.[127] Although these questions may halt implementation of a permanent referral mechanism, they do not seem serious enough to delay a pilot study.

### 5. Corrections for Specific Ambiguous Statutes

The Committee did not limit its proposals to general problems of statutory ambiguity but, instead, also recommended that Congress revise particular ambiguous statutes. For example, recognizing the appealability issue identified in Part III,[128] the Committee proposed:

> To deal with difficulties arising from definitions of an appealable order, Congress should consider delegating to the Supreme Court the authority under the Rules Enabling Act to define what constitutes a final decision for purpose of 28 U.S.C. § 1291, and to define circumstances in which orders and actions of district courts not otherwise subject to appeal under acts of Congress may be appealed to the courts of appeals.[129]

In addition, seeking to address one of the problems with the federal attorney's fees statutes noted above,[130] the Committee recommended in its report various reforms to the current "rea-

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(1) imposes economic costs or other harm on persons engaging in interstate commerce;
(2) encourages forum shopping among circuits;
(3) creates unfairness to litigants in different circuits, as in allowing Federal benefits in one circuit that are denied in other circuits; or
(4) encourages nonacquiescence by Federal agencies in the holdings of the courts of appeals for different circuits, but is unlikely to be resolved by the Supreme Court.

[127] The proposal might not work well for several reasons. First, as the Committee's report itself notes, scholars have long debated the extent to which the Supreme Court fails to resolve all the conflicts in the circuits, and the Court thus may have little use for the proposal. Second, the referral mechanism might not save time because, in many circuits, the en banc procedures take as long as Supreme Court review. Third, the Supreme Court might not give equal weight to the decision as precedent even if it denies review. In addition, even if the proposal does work, it might produce arbitrary or undesirable results. The report does not suggest any criteria for the Court to follow in selecting cases for referral and would thereby give large circuits, such as the Ninth, tremendous influence on the law.

[128] Federal statutes often leave unclear when parties may take interlocutory appeals. *See supra* Part III.C.12.

[129] COMMITTEE REPORT, *supra* note 1, at 95.

[130] *See supra* note 95 and accompanying text.

sonableness" standard now used for awarding fees.[131] The Committee's report, for example, suggested that Congress devise "reasonable rate schedules and uniform enhancement factors."[132]

Commenting on the substance of these two proposed reforms lies beyond the scope of this Article. However, the idea of singling out and rewriting statutes that produce substantial litigation offers much as an alternative method for reducing the costs of statutory ambiguity. As a drafting solution, it can ameliorate both front-end and back-end costs. Moreover, unlike theoretical efforts to improve drafting and statutory interpretation, it can solve tangible problems that Congress knows are troubling the courts.

The approach will not work for all statutory issues. Many statutes do not produce much litigation because they contain only one ambiguity, whether idiosyncratic or recurring. Correcting such statutes after their ambiguities have surfaced will do nothing to prevent future litigation. For example, statute A and statute B both may fail to state whether they should apply retroactively. Amending statute A will have no effect on the ambiguity in statute B. However, many statutes, like 28 U.S.C. § 1291 and the federal fee-shifting acts, either by themselves or in conjunction with other statutes, produce a large number of the total statutory issues that courts now must decide. Amending these statutes could eliminate many of the costs of recurring and idiosyncratic ambiguities actually confronting the courts.

Although the Committee focused on § 1291 of the United States Code and the federal fee-shifting statutes, it had no reason to ignore other problematic laws. To the extent that the Committee, the Judicial Office, or some other body can point directly to widespread problems caused by particular statutes, Congress should pay attention and should correct them. The survey in Part III, for example, identified ERISA as an act whose scope of pre-emption has led to numerous lawsuits.[133] Further empirical research might establish priorities for other statutory reforms. Although even less theoretical than a checklist or fallback rule, these efforts might prove equally successful in reducing the overall costs of unclear legislation.

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[131] *See* COMMITTEE REPORT, *supra* note 1, at 104, 105.
[132] *Id.* at 104.
[133] *See supra* note 93 for a list of these cases identified in the survey.

### B. *Variations on the Committee's Proposals*

The Federal Courts Study Committee had numerous problems to consider in addition to statutory ambiguity. It therefore did not attempt to propose all possible alternatives to the current approaches for reducing the costs of statutory ambiguity. It also did not consider the numerous variations to its proposals discussed above. The Committee's five proposals and the ideas in Parts I, II, and III of this Article, however, suggest further methods that deserve consideration.

#### 1. Judicially Created Fallback Rules

Just as Congress may create fallback rules, so too may the courts. For example, as noted in Part III above, the Supreme Court has established presumptions in favor of concurrent state and federal jurisdiction and against the retroactive application of new statutes and the abrogation of Eleventh Amendment immunity.[134] The Supreme Court should consider developing other presumptions or fallback rules in this common law approach when confronted with recurring issues.

Judicial fallback rules, in theory, ought to eliminate the front-end costs of ambiguities in the same manner as statutory fallback rules. In practice, however, they may not perform as well. The Supreme Court generally creates rules or presumptions that contain some possibility for alternative outcomes. For example, instead of adopting a rule that statutes never apply retroactively in the absence of an express statutory provision, the Court has held that statutes will not apply retroactively unless "the manifest intention of the legislature" indicates otherwise.[135] As a result, even though a judicially created fallback rule may cover a particular issue, parties often feel free to litigate it. To eliminate front-end costs more effectively, the Supreme Court should strive to establish firmer rules.

With respect to back-end costs, however, this same flexibility enables judicially created fallback rules to avoid some of the arbitrary results inherent in statutory fallback rules. The infirmity which maintains some front-end costs through continued

[134] For a discussion of these presumptions, see Part III.C.13 (exclusivity of federal jurisdiction), III.C.18 (retroactivity), and III.C.19 (Eleventh Amendment immunity).

[135] Greene v. United States, 376 U.S. 149, 160 (1964) (quoting Union Pac. R.R. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913)).

litigation also means courts will apply judicially created fallback rules in a way that makes sense, thereby reducing back-end costs. In any event, such rules will not worsen the current situation very much. Part III shows that the Supreme Court presently decides many recurring issues in an arbitrary manner even when it does not have a fallback rule.[136]

Judicial fallback rules, almost by definition, however, involve separation of powers problems that statutory fallback rules do not. In creating a fallback rule, a court prescribes the outcome for future cases involving different parties and different statutes in a manner very much like legislating. Of course, when the Court selects such a rule, it theoretically puts Congress on notice of what will happen in the event that an ambiguity arises. Congress can avoid the application of the rule either by eliminating the ambiguity directly, as it often ought to do, or by replacing the judicially created fallback rule with a fallback rule of its own.

### 2. Additional Duty for the Judicial Office

The Committee's report proposed assigning the Judicial Office two functions: (1) reviewing proposed legislation for potential problems and (2) informing Congress of drafting problems identified in court opinions. The Committee may not have considered the possibility of having the Judicial Office look for ambiguities in laws that the Congress already has enacted but that the courts have not yet confronted or resolved. This additional task might prove quite worthwhile.

The substantial body of existing federal legislation undoubtedly contains many statutory issues that eventually will lead to litigation. If the Judicial Office does nothing about these issues before a court identifies them in an opinion, they will impose most or all of the front-end and back-end costs. Calling these ambiguities to the attention of Congress prior to their judicial resolution can reduce these costs by shortening the period of uncertainty and giving Congress the opportunity to clarify them.

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[136] For example, as discussed in the text accompanying note 85, the court failed to state more than minimal reasons for reaching different results concerning the waivability of prerequisites to suit in Hallstrom v. Tillamook Co., 493 U.S. 20 (1989), and Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979).

The Judicial Office realistically could not and probably should not attempt to review the entire United States Code for all possible ambiguities. Such an endeavor not only would require prohibitively extensive resources but also might involve the Judicial Office in politically sensitive areas or matters beyond its level of expertise. The Judicial Office, however, could look systematically for recurring statutory ambiguities or other issues listed in a checklist. Imposing this limited duty on the Judicial Office would not make its work unmanageable, nor would it greatly involve the Judicial Office in politics.

Congress, indeed, might prefer to have the Judicial Office concentrate on enacted laws instead of pending legislation as recommended by the Committee. Congressional staffs, as noted, presently attempt to check drafting for problematic issues, but Congress does not have any specific program for reviewing legislation that it has already enacted. If the Judicial Office performs this additional function, Congress might see it as a valuable outside resource rather than one that merely assumes Congress' incompetence and duplicates its work. Congress would also have less reason to fear that the Judiciary will attempt to meddle in legislative politics if the Judicial Office concentrates on existing statutes rather than legislation still subject to political debate.

### 3. More Dramatic Variations on Stare Decisis

By requiring the federal district and appellate courts to follow decisions of other circuits in certain instances, the Committee's proposal for resolving inter-circuit conflicts would change the prevailing rules of stare decisis. In so doing, as noted above, the proposal could reduce front-end costs of ambiguities by speeding up their judicial resolution. If Congress approves of the proposal, it might consider even more dramatic variations of the rules of stare decisis.

Although mandating inter-circuit stare decisis on all statutory issues undoubtedly would strike the legal community as too extreme, Congress might consider requiring the circuits to follow each other on a selected class of issues, such as the recurring issues listed in Part III. It could mandate, for example, that the first court of appeals to decide a particular recurring issue under a statute would undertake the usual process of statutory interpretation, but that all other courts of appeals then would

defer to the first court's judgment. For instance, Congress could pass an act holding the first circuit decision on the waivability of prerequisites to suit to be binding on the other circuits, reviewable only by the Supreme Court. Accordingly, if the Ninth Circuit held that a district court may waive a prerequisite to suit under a particular statute, the Fifth Circuit would then follow the Ninth Circuit's decision.

The approach would produce results similar to those achieved by fallback rules for recurring issues. It would not reduce the front-end costs quite as effectively because at least one court would have to examine an ambiguous statute before its meaning would become fixed. However, by allowing at least one court to give some thought to the statute, fewer arbitrary rules and the back-end costs associated with them would result.

Although the proposal does not differ much from fallback rules, the prospects for persuading Congress to adopt it seem slim. Even restricting the approach to recurring issues might seem too radical and too dismissive of the benefits of percolation.[137] Congress should consider, however, that the Committee itself responded to this proposal by recommending that panels of the United States courts of appeals make their intention to create inter-circuit conflicts known to the other judges on their circuits before releasing their opinions.[138] In addition, the first circuit's decision on an issue often sets—albeit informally—the rule that other courts follow.[139]

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[137] For a brief discussion of arguments in support of percolation, see *supra* note 20.

[138] After discussing the pilot study for the elimination of inter-circuit conflicts, the Committee proposed:

> Apart from the pilot project, we believe that when a court of appeals reviews a case raising an issue already decided in another circuit, it should accord considerable respect to that earlier decision; a panel contemplating disagreement with the panel of another circuit should circulate its draft opinion among the remaining judges of the court for their comments.

COMMITTEE REPORT, *supra* note 1, at 129. Mr. Aprile filed a separate statement and dissent. He feared that the proposal would lead to *sub rosa* en banc adjudication that would skew the effectiveness of legitimate en banc procedures. *See id.* Judge Keep also filed a separate dissent in which Mr. Aprile joined. He argued against the proposal on the grounds that it would eliminate percolation and stated that the formal en banc procedures already provide a sufficient safeguard against the creation of conflicts. *See id.* at 130.

[139] Some circuit courts already defer to the judgment of other circuits to a large extent. *See, e.g.*, United States v. Chavez-Vernaza, 844 F.2d 1368, 1374 (9th Cir. 1987) ("[A]bsent a strong reason to do so, we will not create a direct conflict with other circuits."). The Supreme Court furthers this deference by not taking certiorari absent a conflict.

### C. *Areas for Further Inquiry*

The foregoing analysis shows that the alternative approaches proposed by the Federal Courts Study Committee, numerous variations of the Committee's proposals, and additional approaches have much usefulness. Although none of them alone provides a complete solution to the problem, taken together, they attack the costs of ambiguity systematically. In addition, despite their lack of jurisprudential sophistication, they have much to add to the current efforts to solve the problem of unclear legislation. Congress, accordingly, should strive to implement these ideas and to expand them as discussed above.

The inquiry into alternative approaches, moreover, should continue. The foregoing analysis shows that the proposals presently under consideration have strengths and weaknesses. The table below summarizes the preceding discussion about the proposals' effects on front-end and back-end costs and on recurring and idiosyncratic ambiguities. It also indicates the extent to which the proposals have advantages over the current drafting and interpretive methods described in Part II.

The table lists the nine proposals in their order of discussion above: checklists, statutory fallback rules, etc. The abbreviations O.J.I.A. ## 1–3 represent the following suggested purposes for an Office of Judicial Impact Assessment, respectively: (1) to review proposed legislation, (2) to inform Congress of drafting problems identified in court opinions, and (3) to review enacted legislation for ambiguities before they result in legislation.

In the first two columns, an "X" indicates whether a proposal addresses the front-end or back-end costs, or recurring and idiosyncratic ambiguities. For example, the marks next to the checklist proposal show that checklists address both the front-end and back-end costs of recurring ambiguities, but none of the costs of idiosyncratic ambiguities. An "X" in the Current Efforts column indicates whether a proposal offers a genuine alternative to the current methods of drafting statutes or interpreting unclear enactments described in Part II. For instance, as noted above, because the Federal Courts Study Committee offered no new suggestions on how the Office of Judicial Impact Assessment should review proposed legislation, the proposal as it stands (O.J.I.A. #1), has no theoretical advantage over current methods used to reduce the costs of statutory ambiguity.

**Table of Cost-Reduction Proposals**

| | *Recurring* | | *Idiosyncratic* | | *Current Efforts* |
|---|---|---|---|---|---|
| | *Front-end* | *Back-end* | *Front-end* | *Back-end* | |
| Checklist | x | x | | | x |
| Statutory Fallback | x | | | | x |
| O.J.I.A. #1 | x | x | x | x | |
| O.J.I.A. #2 | x | | x | x | x |
| Inter-Circuit | x | | x | | x |
| Specific Statutes | (some) | | (some) | | x |
| Judicial Fallback | x | | | | x |
| O.J.I.A. #3 | x | x | | | x |
| Stare Decisis | x | | | | x |

The table emphasizes the conclusion that the nine proposals operate most effectively against recurring ambiguities. Each proposal addresses the front-end costs, and three proposals reduce the back-end costs of recurring ambiguities. Because they all operate in slightly different ways, if employed together, these proposals probably would eliminate front-end costs in a thorough manner, with a somewhat lesser effect on back-end costs. This observation suggests the potential benefit of exerting efforts in the future to expand the list of known recurring ambiguities: the more recurring ambiguities identified, the more the proposals collectively can address. Further work should also go into developing more effective means of reducing back-end costs.

The table also indicates that additional work should go into developing proposals for dealing with the front-end and back-end costs of idiosyncratic ambiguities. Only four of the proposals now under consideration address these ambiguities, and even those do not have much effect on their costs. At present, further empirical study will not have the same benefits for idiosyncratic ambiguities that it will for recurring ambiguities. Studying court cases may identify specific kinds of laws fraught with idiosyncratic ambiguities, such as those governing attorney's fees, but otherwise will not help very much in reducing their costs.

Finally, the table reveals that the proposals in fact differ considerably from the current efforts to reduce the costs of statutory ambiguity. The Federal Courts Study Committee broke new ground with its proposals even though it made them only a small part of its larger work on the federal judicial system. This fact suggests the potential for improving upon the status quo and should prompt further work toward developing alternative approaches to reducing the costs of statutory ambiguities.

In addition to the information shown in the table, the foregoing analysis also shows other directions that future work should take by exposing the specific goals of the current approaches. These include: (1) avoiding enactment of ambiguities in the first place; (2) hastening the pace at which the meaning of ambiguities becomes fixed; and (3) prompting Congress to clarify ambiguities that it has put into law. Further research should focus on developing alternative ways to pursue these goals.

The task of avoiding ambiguities in the first place has one central problem: Congress simply does not seem to care enough about the clarity of its legislation. New proposals should attempt to give Congress incentives for improving its work. They might attempt, for example, to inform voters about their representatives' oversight of drafting problems. Even if the electorate ultimately did not pay much attention, ratings or evaluations might have an effect on Congress.

Prompting Congress to action has always proved difficult. Further work should consider whether more formal procedures than those currently existing would produce better results. For example, just as federal courts may certify questions to state courts, some new procedure might somehow allow them or an outside office to refer difficult statutory questions to Congress. Such a procedure, if too rigid, would encounter undeniable constitutional difficulties. Nonetheless, as the foregoing analysis has shown, prompt action by Congress has such great benefits that even a watered-down procedure might help.

The proposals above largely rely on courts and Congress to fix the meaning of ambiguous statutes. Future work should investigate whether others, such as the Attorney General, could reduce the costs of statutory ambiguity by publishing prompt, if not quite authoritative, interpretations. Even if these interpretations could not bind the courts, they would give notice to litigants of likely interpretations of statutes prior to the occasion of an actual case or controversy.

The results of future efforts to reduce the costs of statutory ambiguity, whether developed along these lines or not, will remain unclear until properly evaluated. Nevertheless, if they rigorously address the kinds of costs that actual ambiguities impose, as do the alternative approaches considered above, they deserve the attention of Congress, the courts, and future study committees.

# NOTE

# STATE NATURAL DEATH ACTS: ILLUSORY PROTECTION OF INDIVIDUALS' LIFE-SUSTAINING TREATMENT DECISIONS

MARNI J. LERNER*

*The Supreme Court's decision in* Cruzan v. Director, Mo. Dep't of Health *has increased the importance of documenting individual desires regarding life-sustaining treatment in living wills. Many states have passed natural death acts authorizing living wills under certain conditions.*

*In this Note, the author argues that although the natural death acts profess to protect individual autonomy and self-determination, the acts in fact seriously restrict an individual's right to control treatment decisions. The author discusses how the class of people protected by the statutes is narrowed through the terminal-condition requirement, as well as how the exclusion of nutrition and hydration from the types of treatments that can be withdrawn restricts the individual's right to refuse treatment. The author addresses how natural death acts protect the medical profession's control over treatment decisions at the expense of reducing the patient's control over those decisions. Finally, the author discusses practical problems that arise when implementing living wills, which further frustrate individual autonomy and self-determination.*

> She was our bright, flaming star who flew through the heavens of our lives. Though brilliant, her flight was terribly short-lived. But she left a flaming trail, a legacy that I do not think will be shortly forgotten.
>
> —statement released by Joe and Joyce Cruzan after trial court judge ruled that Nancy Cruzan's artificial feeding tube may be withdrawn[1]

On June 25, 1990, the Supreme Court determined that Missouri may require clear and convincing evidence of a patient's desires about life-sustaining treatment before such treatment may be terminated.[2] To Joe and Joyce Cruzan, the decision

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[1] Robert Steinbrook, *Missouri Court Says Family Can Let Woman Die*, L.A. TIMES, Dec. 15, 1990, § A, at 1, 29.

[2] Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990).

meant that they could not withdraw the feeding tube that had been keeping their daughter, Nancy, alive for almost eight years in a persistent vegetative state.[3] However, to the rest of the country, the decision signalled an urgent need for individuals to document their wishes regarding medical treatment at the end of life.

Nancy Cruzan was only one of approximately 10,000 people in the United States currently being kept alive by artificial means.[4] Advances in medical technology have provided new ways to prolong both life and the dying process itself. Consequently, fewer people today are dying at home and greater numbers of people are dying in institutions.[5] It is estimated that nearly 80% of deaths in the United States occur in hospitals and long term care institutions[6] and 70% of those deaths occur after a decision to withdraw life-sustaining treatment has been made.[7]

Few people, however, prepare for the fact that treatment decisions must often be made when they are no longer able to make such decisions.[8] One survey found that although 56% of adults discussed treatment preferences with family members, only 15% had filled out living wills.[9] Others estimate that this number is as low as 9%.[10] Most critics attribute these low numbers to a tendency to avoid thinking about unpleasant matters

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[3] On December 14, 1990, after additional evidence of Nancy Cruzan's wishes was presented, the Missouri Supreme Court ruled that there was clear and convincing evidence that Nancy would have wanted her feeding tube withdrawn. *See* Tamar Levin, *Nancy Cruzan Dies, Outlived by a Debate Over the Right to Die*, N.Y. TIMES, Dec. 27, 1990, at A1, 15. Nancy's physician removed the tube the same day, and she died 12 days later. *Id.*

[4] Jerome B. Apfel, *Cruzan Leads Courts, Legislators to Rethink Right-to-Die Issues*, NAT'L L.J., Nov. 19, 1990, at 22.

[5] For a discussion of the effects of medical advances on the provision of health care, see generally *Developments in the Law—Medical Technology and the Law*, 103 HARV. L. REV. 1522 (1990).

[6] PRESIDENT'S COMM'N FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE & BIOMEDICAL & BEHAVIORAL RESEARCH, DECIDING TO FOREGO LIFE-SUSTAINING TREATMENT 17–18 (1983) [hereinafter PRESIDENT'S COMM'N].

[7] Barbara Mishkin, *Advance Directives for the Critically Ill: The Federal Legislative Initiative*, 7 HEALTHSPAN 8, 8 (March 1990) (citing Brief Amicus Curiae of the American Hospital Association at 3, Cruzan v. Harmon, (U.S. 1989) (No. 88-1503)). In contrast, 37% of deaths in 1939 occurred in institutions. 136 CONG. REC. E943 (daily ed. Apr. 3, 1990) (statement of Rep. Levin (D-Mich.)).

[8] One poll found that the public enthusiastically supports the right of adults to refuse lifesaving treatment—90% of people surveyed strongly agreed that adults have this right. Ironically, few adults execute living wills to ensure that they are able to exercise this right. *See* SOCIETY FOR THE RIGHT TO DIE, HANDBOOK OF LIVING WILL LAWS 13 (1987) (citing ABC News poll).

[9] *Most MDs Favor Withdrawal of Life Support—Survey*, AM. MED. NEWS, June 3, 1988, at 9 [hereinafter *AMA Survey*].

[10] 136 CONG. REC., *supra* note 7, at E943–44.

such as death and to ignorance that such instruments exist.[11] The *Cruzan* decision has awakened the public to the reality that avoiding discussions regarding life-sustaining treatment may exact a heavy price in the future.

The Supreme Court's narrow holding in *Cruzan* did not endorse Missouri's stringent standard of clear and convincing evidence as the proper standard, nor did it suggest that less rigorous standards were inadequate. The Court left such procedural decisions to the "laboratory" of the states.[12] Moreover, the Court did not actually hold that individuals have a right to refuse lifesaving treatment. Four of the five justices who joined the majority opinion only "assumed" for the purpose of the decision that a competent person has a constitutional right to refuse lifesaving treatment, including nutrition and hydration.[13] In her concurrence, Justice O'Connor indicated that the right to refuse treatment is a protected liberty interest.[14] The dissenting justices articulated an even broader view of the right to refuse life-sustaining treatment.

The Court did not specifically address the issue of advance directives;[15] it only hinted that written documentation, such as a living will or a durable power of attorney for health care, would meet the required evidentiary standard.[16] Although the

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[11] *See, e.g.*, Barber v. Superior Court, 195 Cal. Rptr. 484, 489 (Cal. Ct. App. 1983) ("The lack of generalized public awareness of the statutory scheme and the typically human characteristics of procrastination and reluctance to contemplate the need for such arrangements however makes [sic] this a tool which will all too often go unused by those who might desire it."); Sander M. Levin, *So That There Will Be No More Nancy Cruzans*, WASH. POST, July 6, 1990, at A23 (few people have executed living wills because of "our discomfort when dealing with issues surrounding death . . . [and because] people don't know about the opportunities their states have provided them").

[12] *Cruzan*, 110 S. Ct. at 2859 (O'Connor, J., concurring).

[13] *Id.* at 2852.

[14] *Id.* at 2856 (O'Connor, J., concurring). Some commentators suggest that O'Connor's opinion is the "real" opinion of the court because O'Connor and the four dissenting justices all recognized a constitutionally protected right to die. *See Constitutional Law Conference*, 59 U.S.L.W. 2272, 2275 (Nov. 6, 1990) (statement of Professor Yale Kamisar).

[15] "Advance directive" is a broad term encompassing different forms of anticipatory decision-making. Advance directives may be "instructional directives," giving instructions about a particular type of treatment that a patient may or may not want under certain circumstances, or "proxy directives," appointing another person to make medical decisions on the declarant's behalf. Living wills are an example of the former; durable powers of attorney for health care are an example of the latter. For a discussion of advance directives, see generally ALAN MEISEL, THE RIGHT TO DIE §§ 10.1–10.27, at 312–54 (1989); PRESIDENT'S COMM'N, *supra* note 6, at 136–53.

[16] *Cruzan*, 110 S. Ct. at 2854 (comparing the procedural safeguards that should be required in decisions to terminate treatment with those required for valid contracts or wills, i.e., they must be in writing, and the admissibility of parol evidence is limited).

Court accorded primary respect to the patient's wishes,[17] it indicated that respect for the patient's wishes may include honoring the decisions made by an agent previously appointed by the patient to make life-sustaining treatment decisions.[18] Acknowledging that few individuals execute living wills, O'Connor explicitly and emphatically held that a state would be required to look to other evidence of a patient's intent: "[a state's duty to effectuate the decisions of a surrogate decisionmaker] may well be constitutionally required to protect the patient's liberty interest in refusing medical treatment."[19] However, broadening the sources of evidence to which the state must look in order to protect an individual's right to refuse treatment may have little practical effect on the actual number of patients whose rights are protected. That is, it is unlikely that individuals who have not taken the time to sign a living will have instead formally appointed a proxy. However, recognizing the validity of surrogate decision-making may lead to better protection of the rights of individuals who both sign a living will and appoint an agent, because an agent can be instrumental in interpreting an individual's living will.[20]

*Cruzan* does not specifically resolve questions concerning how the Court would handle a case in which a patient had documented her desires regarding life-sustaining treatment.[21] Nor does the holding provide guidance for interpreting advance directives in future cases.[22] The only certainty after *Cruzan* is that competent people should provide some form of "clear and convincing" evidence, preferably written, of their wishes regarding termination of life support.[23]

Many commentators have interpreted *Cruzan* as an endorsement of living wills and a signal to state legislatures to clarify

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[17] *Id.* at 2856 ("[T]he State may choose to defer only to [the patient's] wishes, rather than confide the decision to close family members.").

[18] *Id.* at 2856 n.12. However, this observation was not applicable to the present case because Nancy Cruzan did not appoint her parents to make termination-of-treatment decisions.

[19] *Id.* at 2857 (O'Connor, J., concurring). O'Connor further held that failing to consider the patient's appointment of a proxy may "fail to honor a patient's intent." *Id.*

[20] *See infra* notes 225–227 and accompanying text.

[21] *See* Giles R. Scofield, *Cruzan: Right to Die Questions Unanswered*, 7 HEALTHSPAN 16, 18 (1990).

[22] *Id.* at 19.

[23] Cruzan v. Harmon, 760 S.W.2d 408, 425 (Mo. 1988), *aff'd*, Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990).

state laws concerning the legal status of advance directives.[24] Such critics believe that "Cruzan" situations may be avoided if people simply document their wishes in living wills or durable powers of attorney.[25] Therefore, most efforts to address the issue since the Court's decision have been largely devoted to increasing public awareness about living wills. Various groups have openly committed themselves to initiating a public education campaign. For example, the American Medical Association ("AMA") recently suggested distributing information about living wills through the Social Security Administration and is currently developing brochures to be distributed to physicians and patients.[26] Illinois created a task force to study the problem of life-sustaining treatment. After finding that living wills are "grossly underutilized," the task force recommended that information about living wills be distributed in Illinois along with drivers' licenses, license plates, and tax returns.[27]

Congress has also joined in the effort to promote living wills, passing the Patient Self-Determination Act (the "Act") in October 1990.[28] Referred to as a "medical Miranda warning,"[29] the

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[24] *See, e.g.*, Wayne Karbal, *The Constitutional Dimensions of the Right to Refuse Medically Assisted Nutrition and Hydration: An Analysis of Cruzan*, 23 J. HEALTH & HOSP. L. 241, 243 (1990); Apfel, *supra* note 4, at 22.

[25] The plethora of newspaper and magazine articles advocating living wills since the *Cruzan* decision provides evidence of this view. *See, e.g.*, *A Living Will: Stressful but Necessary*, CHI. TRIB., Aug. 17, 1990, § 1, at 22; Denise Topolnicki, *Why You Should Consider Drawing Up a Living Will Now*, MONEY, Aug. 1990, at 25; Susan Garland, *Living Wills: In Defense of Your Right to Die*, BUSINESS WEEK, July 30, 1990, at 78. *See also Patient Self-Determination Act: Hearings on S.1766 Before the Subcomm. on Medical and Long Term Care of the Sen. Comm. on Finance*, 101st Cong., 2nd Sess. 2 (1990) (statement of Sen. Danforth (R-Mo.)) ("Advance directives ensure everyone that they will be able to determine the kind of care they receive at the end of life."); Statement of the American Medical Association to the Subcommittee on Medicare and Long-term Care, Senate Finance Committee, July 20, 1990, at 3 ("There are two mechanisms by which an individual can avoid the controversy and the outcome of the *Cruzan* case, namely, through written directives or the appointment of a proxy to make health care decisions in the event of incompetency.") [hereinafter AMA Statement to the Subcommittee].

For a novel perspective on the solution to the "Cruzan" problem, see Bernard D. Davis, *Right to Die: Living Wills are Inadequate*, WALL ST. J., July 31, 1990, at A12 (advocating that in extreme situations, such as a patient in a permanent coma, it should be presumed that the patient would want life support terminated unless the patient makes a specific prior request to the contrary).

[26] AMA Statement to the Subcommittee, *supra* note 25, at 5, 7.

[27] REPORT OF THE COOK COUNTY STATE'S ATTORNEY'S TASK FORCE ON THE FOREGOING OF LIFE-SUSTAINING TREATMENT at 46–47 (March 1990) [hereinafter TASK FORCE REPORT].

[28] Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, §§ 4206, 4751, 1991 U.S.C.C.A.N. (104 Stat.) 1388 [115–17], [204–06] (to be codified in various sections of 42 U.S.C.).

[29] *The Right to Say 'No'*, NEWSDAY, Dec. 1, 1990, at 18.

Act requires health care facilities receiving money from Medicare or Medicaid to provide patients upon admission to such facilities with information on state law concerning the right to die and advance directives.[30] In addition, each facility must adopt policies to ensure that advance directives are implemented.

In all likelihood, more individuals will execute living wills as a result of the Supreme Court's decision in *Cruzan*.[31] There is already some evidence that the nation has taken the Supreme Court's decision seriously—the Society for the Right to Die has reported a 500% increase in living will requests since the *Cruzan* decision.[32] Given this increasing interest in living wills, it is important to evaluate whether executing a living will guarantees people that their instructions will be carried out,[33] or whether such instruments merely provide people with a false sense of security that their documented wishes will be honored.[34]

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[30] The AMA, while supporting the goal of the Patient Self-Determination Act, has been critical of the method advocated to attain that goal. "The AMA does not believe that the hospital or nursing home is the most appropriate place, nor admission to a facility the most appropriate time, for a patient to consider initially the issues of advance directives." AMA Statement to the Subcommittee, *supra* note 25, at 5. *But see* S. Van McCrary & Jeffrey R. Botkin, *Hospital Policy on Advance Directives: Do Institutions Ask Patients about Living Wills?*, 262 JAMA 2411, 2413 (1989) (finding that although only 4% of hospitals surveyed had active policies on living wills, 89% of those hospitals routinely inquired about living wills upon admission, and arguing that hospitals should routinely inquire about living wills to enable patients to exercise fully their autonomy).

Others question Congress's motive in passing the Act, claiming that it was mainly financial in nature. That is, if more people execute living wills requesting that treatment be withdrawn, the cost-savings (especially to the Medicare program) may be enormous. *See* Eric Bower, *Beware of the Motives for Living Wills*, CHI. TRIB., Feb. 5, 1991, at 10 (letter to the editor).

[31] Joanne Lynn & Jacqueline Glover, *Cruzan and Caring for Others*, HASTINGS CENTER REP., Sept.-Oct. 1990, at 10.

[32] *See 'Living Will Fever' Remains High in Cruzan Aftermath*, SOCIETY FOR THE RIGHT TO DIE NEWSLETTER, Fall 1990, at 1.

[33] *See* Arnold Rosoff, *Living Wills and Natural Death Acts*, *in* LEGAL AND ETHICAL ASPECTS OF TREATING CRITICALLY AND TERMINALLY ILL PATIENTS 186, 191 (A. Edward Doudera & J. Douglas Peters, eds. 1982) ("[T]he directive provided for by law can give certainty, avoid delay, and assure that the patient's wishes will be observed."). *See also AMA Survey*, *supra* note 9, at 9 (finding that 85% of people who had discussed the issue with their family or executed a living will believed that their wishes would be followed).

[34] *See* Thomas Marzen, *The "Uniform Rights of the Terminally Ill Act": A Critical Analysis*, 1 ISSUES IN L. & MED. 441, 450 (1986) ("By executing a uniform 'living will,' the person steps into a sea of ambiguity . . . [and] cannot be sure whether or how his treatment wishes will be effectuated."). *See also* Margaret A. Somerville, *Examination on Discovery of "Death at a New York Hospital": Searching for the Governing Values, Policies, and Attitudes*, 13 LAW, MED. & HEALTH CARE 274, 275 (1985) (commenting on a case where the patient had taken all steps necessary to ensure that her living will would be followed, and finding that it is "frightening" to think how ineffective such steps were in achieving the patient's desires when the time came to implement the living will); Marion Danis et. al., *A Prospective Study of Advance Directives for Life-Sustain-*

Because decisions to terminate treatment are made at the state level, a discussion of the effectiveness of living wills must look to state legislative and judicial activity on the subject. While the case law involving termination-of-treatment decisions is growing, few courts have actually considered the validity of living wills.[35] The most significant response by the states to date has been the legislative enactment of natural death acts, which provide statutory authorization for living wills and set out the procedural requirements necessary to create a valid living will. These legislative enactments purport to focus on individual autonomy and self-determination. Unfortunately, the statutes do not consistently reflect legislative acceptance of the individual's right to terminate treatment. Conflicting values and concerns underlie the most significant provisions of the natural death acts. Such legislative ambivalence has produced ambiguous statutes that afford limited protection to the right to terminate treatment. This Note focuses on the extent to which legislative ambivalence underlies the operative provisions of state living-will statutes.[36]

Section I briefly discusses the legal status of living wills and the values that such documents seek to protect. It also describes natural death acts, which are the statutory authorization for living wills. Section II analyzes how two of the major provisions often found in natural death acts limit the scope of the acts and further goals other than individual autonomy. The first of these provisions is the terminal-illness requirement, which narrows the class of individuals to whom the acts apply and indicates legislative discomfort with the notion of termination of care. The second of these provisions is the exclusion of nutrition and hydration from treatments that patients may refuse, which further limits individuals' rights. Moreover, this exclusion, a product of political compromise, creates a meaningless legal distinc-

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*ing Care*, 324 NEW ENG. J. MED. 882, 884, 886 (1991) (finding that in 25% of cases, patients' living wills were not followed and concluding that the ability of advance directives to protect patient autonomy is limited). The study shows that in 18 out of 25 cases in which living wills were not followed, doctors gave *less* treatment than patients requested, rather than administering the more aggressive treatment that patients requested in their living wills. *Id.*

[35] MEISEL, *supra* note 15, § 10.7, at 323.

[36] This Note generally discusses the difficulties created by ambiguous and restrictive statutes that confront competent individuals who have already or would like to express their wishes in a living will. An entirely different set of problems arises in cases of withdrawing treatment from previously competent patients who are now incompetent and did not leave written instructions and in terminating treatment of patients who were never competent. These issues are beyond the scope of this Note.

tion between nutrition and hydration and other life-sustaining treatment. Section III discusses how the natural death acts preserve the authority of the medical profession in making treatment decisions, especially through the statutes' liability provisions. In addition, this section illustrates how ambiguous immunity provisions increase physicians' fear and uncertainty and, therefore, prevent physicians from implementing living wills. Section IV describes some practical problems in implementing living wills. First, because the statutes are so difficult to understand, physicians may be unable to implement living wills even if the statutory requirements are met. Second, the ambiguities of the statutes discussed in Section II further hinder implementation of living wills. Finally, by failing to communicate with each other about treatment preferences, physicians and patients increase the difficulty in effectuating patients' desires as outlined in advance directives.

## I. Living Wills and Natural Death Acts

The right of patients to control medical decisions concerning their own bodies is deeply rooted in American law.[37] Most state courts have based the right to refuse treatment on a combination of the right to privacy embodied in state constitutions,[38] the common law right to self-determination,[39] and the common law

[37] *See* Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others . . . ."); Scholendorff v. Society of New York Hosp., 105 N.E. 92, 93 (N.Y. 1914), *overruled on other grounds by* Bing v. Thunig, 143 N.E.2d 3 (N.Y. 1957) (arguing that every adult has a right to determine what will happen to his own body).

[38] *See, e.g.*, Rasmussen v. Fleming, 741 P.2d 674 (Ariz. 1987) (en banc) (holding that the right to refuse treatment is protected by federal and state constitutional rights to privacy, the common law right to be free from bodily invasion, and the common law concept of informed consent); Bartling v. Superior Court, 209 Cal. Rptr. 220, 225 (Cal. Ct. App. 1984) (holding that the right to refuse treatment is protected by the privacy provision in the state constitution); *In re* Quinlan, 355 A.2d 647, 663 (N.J. 1976), *cert. denied*, 429 U.S. 922 (1976) ("[The right of privacy] is broad enough to encompass a patient's decision to decline medical treatment . . . .").

[39] *See, e.g.*, *In re* Conroy, 486 A.2d 1209, 1223 (N.J. 1985) ("On balance, the right to self-determination ordinarily outweighs any countervailing state interests, and competent persons generally are permitted to refuse medical treatment."); Bouvia v. Superior Court, 225 Cal. Rptr. 297, 305 (Cal. Ct. App. 1986) ("[D]ecision to forego medical treatment . . . belongs to her. It is not a medical decision for her physicians to make. Neither is it a legal question . . . . [I]t is not a conditional right . . . . It is a moral and philosophical decision that, being a competent adult, is her's [sic] alone.").

doctrine of informed consent.[40] Individual autonomy with respect to decisions concerning bodily integrity is thus the core value protected by living wills.[41]

A living will is a document created when a patient is competent; it directs that certain treatment decisions be made when the patient is no longer able to make such decisions. Living wills embody the recognition that the right to control treatment decisions does not disappear when the patient is no longer competent. In this way, living wills provide a medium through which individuals may ensure that choices they make while competent will be honored should they later become incompetent. Consequently, implementing the wishes expressed in a living will can be seen as "satisfying the patient's previously exercised right of self-determination."[42]

Although living wills may be used as evidence of a patient's wishes without enabling legislation,[43] courts generally consider it the job of the legislature to specify the procedures for the execution and operation of living wills and to recognize their

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[40] *See, e.g.*, Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841, 2851 (1990) ("[I]nformed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment."); Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 424 (Mass. 1977) (holding that the right of an individual to be free from a nonconsensual invasion of his bodily integrity is protected through the doctrine of informed consent).

[41] A thorough discussion of the right to refuse medical treatment is beyond the scope of this Note. For a detailed discussion of this subject, see generally Chen Kornreich, *Who Will Decide Whether to Withhold or Withdraw Extraordinary Medical Treatment? The Constitutional Right to a "Living Will"*, 6 PROB. L.J. 33, 38–45 (1984); *Developments in the Law*, *supra* note 5, at 1661–65.

[42] Nancy K. Rhoden, *Litigating Life and Death*, 102 HARV. L. REV. 375, 382 (1988). However, other critics argue that past preferences embodied in living wills are an unsatisfactory basis for making treatment decisions. *See* Rebecca Dresser, *Life, Death, and Incompetent Patients: Conceptual Infirmities and Hidden Values in the Law*, 28 ARIZ. L. REV. 373 (1986). Dresser argues that we cannot assume that by identifying what the former competent patient wanted, we will know what the present incompetent patient will want. She claims that because interests change so much over time, a new person can be said to exist by the time a treatment decision must be made. Therefore, the patient's previously expressed wishes are irrelevant in making the present treatment decision. *Id.* at 379.

[43] *See, e.g.*, John F. Kennedy Memorial Hosp. v. Bludworth, 452 So. 2d 921, 926 (Fla. 1984) ("[A] 'living' or 'mercy' will . . . would be persuasive evidence of that incompetent person's intention."); *In re* Conroy, 486 A.2d at 1229 & n.5 (N.J. 1985) ("[A patient's] intent might be embodied in a written document, or 'living will.' . . . Whether or not they are legally binding, . . . such advance directives are relevant evidence of the patient's intent."); *In re* Westchester County Medical Center, 531 N.E.2d 607, 613 (N.Y. 1988) ("The ideal situation is one in which the patient's wishes were expressed in some form of writing, perhaps a 'living will.'"). Note that neither New Jersey nor New York has a statute authorizing living wills, and *Bludworth* was decided before Florida enacted its statute in 1984.

legal validity and enforceability.[44] Statutes legitimizing living wills and outlining the procedures for executing a valid living will are generically referred to as "natural death acts."[45] Currently, forty-four states and the District of Columbia have statutes authorizing living wills,[46] and similar bills are pending in

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[44] *See, e.g.*, Barber v. Superior Court, 195 Cal. Rptr. 484, 488 (Cal. Ct. App. 1983) ("[T]he only long-term solution to this problem is necessarily legislative in nature."); Saunders v. State, 492 N.Y.S.2d 510, 516 (1985) (holding that a court cannot declare a "living will" legally binding because "only the Legislature has the authority to enact a statute recognizing the validity of living wills"); Evans v. Bellevue (Wirth), No. 16536/87 (N.Y. Sup. Ct. N.Y. County July 27, 1987) (Sandifer, J.), 198 N.Y.L.J. at 11, col. 1 (July 28, 1987) (finding living will ambiguous, court stated that it "trusts that the legislature will soon struggle with this dilemma"). *But see* Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417 (Mass. 1977):

> We do not view the judicial resolution of [the question concerning withholding life-sustaining treatment] as constituting a "gratuitous encroachment" on the domain of medical expertise. Rather, such questions of life and death seem to us to require the process of detached but passionate investigation and decision that forms the ideal on which the judicial branch of government was created. Achieving this . . . is not to be entrusted to any other group . . . .

*Id.* at 435.

[45] When the California legislature passed the first living-will statute in 1976, it called the act a "natural death" act. *See* PRESIDENT'S COMM'N, *supra* note 6, at 141.

Typically, natural death acts contain a statement of legislative intent, a definition section, the requirements for creating the written declaration, such as witness requirements, and the procedures for revocation. In addition, they provide immunity to physicians who comply with the directive in good faith, procedures for transfer of the patient if the physician is unwilling to comply, and penalties for those who wilfully conceal or destroy a declaration. The statutes contain a statement that withdrawing treatment is not suicide and should not have an effect on insurance. The statutes also state that they should not be construed as condoning mercy killing.

[46] *See* ALA. CODE §§ 22-8A-1 to 22-8A-10 (1990); ALASKA STAT. §§ 18.12.010–.100 (1991); ARIZ. REV. STAT. ANN. §§ 36-3201 to 36-3210 (1986); ARK. CODE ANN. §§ 20-17-201 to 20-17-218 (Michie Supp. 1991); CAL. HEALTH & SAFETY CODE §§ 7185–7195 (West Supp. 1991); COLO. REV. STAT. §§ 15-18-101 to 15-18-113 (West 1989 & West Supp. 1990); CONN. GEN. STAT. ANN. §§ 19a-570 to 19a-575 (West Supp. 1991); DEL. CODE ANN. tit. 16, §§ 2501–2509 (1983); D.C. CODE ANN. §§ 6-2421 to 6-2430 (1981); FLA. STAT. ANN. §§ 765.01–.17 (West 1986 & West Supp. 1991); GA. CODE ANN. §§ 31-32-1 to 31-32-12 (Michie 1991); HAW. REV. STAT. §§ 327D-1 to 327D-27 (1991); IDAHO CODE §§ 39-4501 to 39-4509 (1985 and Supp. 1991); ILL. ANN. STAT. ch. 110 1/2, para. 701–710 (Smith-Hurd Supp. 1991); IND. CODE ANN. §§ 16-8-11-1 to 16-8-11-22 (Burns 1990); IOWA CODE ANN. §§ 144A.1–.11 (West 1989); KAN. STAT. ANN. §§ 65-28,101 to 65-28,120 (1985); KY. REV. STAT. ANN. §§ 311.622–.644 (Michie/Bobbs-Merrill 1990 & Supp. 1990); LA. REV. STAT. ANN. §§ 40:1299.58.1–.10 (West Supp. 1991); ME. REV. STAT. ANN. tit. 18-A, §§ 5-701 to 5-714 (West Supp. 1990); MD. HEALTH-GEN. CODE ANN. §§ 5-601 to 5-614 (1990); MINN. STAT. ANN. §§ 145B.01–.17 (West Supp. 1991); MISS. CODE ANN. §§ 41-41-101 to 41-41-121 (Supp. 1990); MO. ANN. STAT. §§ 459.010–.055 (Vernon Supp. 1991); MONT. CODE ANN. §§ 50-9-101 to 50-9-206 (1989); NEV. REV. STAT. ANN. §§ 449.540–.690 (Michie 1986 & Michie Supp. 1989); N.H. REV. STAT. ANN. §§ 137-H:1 to 137-H:16 (1990); 1991 N.J. Laws 201; N.M. STAT. ANN. §§ 24-7-1 to 24-7-11 (Michie 1991); N.C. GEN. STAT. §§ 90-320 to 90-323 (1990); N.D. CENT. CODE §§ 23-06.4-01 to 23-06.4-14 (Supp. 1989 and Interim Supp. 1991); OHIO REV. CODE ANN. §§ 2133.01–.15 (Baldwin 1991); OKLA. STAT. ANN. tit. 63, §§ 3101–3111 (West Supp. 1991); OR. REV. STAT. §§ 127.605–.650 (1990 & Supp. 1990); S.C. CODE ANN. §§ 44-77-10 to 44-77-160 (Law. Co-op. Supp. 1990); S.D. CODIFIED LAWS ANN. §§ 34-12D-1 to 34-12D-22 (1991); TENN. CODE ANN. §§ 32-11-101 to 32-11-110 (Supp. 1991);

the legislatures of five additional states.[47] Natural death acts enable individuals to create statutorily valid and enforceable living wills as long as they follow the specified procedural requirements. Furthermore, courts often look to natural death acts as statements of state policy regarding withdrawal of life-sustaining treatment.[48]

Despite courts' continued reliance upon legislatures for guidance as to when and under what circumstances life-sustaining treatment may be withheld or withdrawn,[49] the legislative response to date has been disappointing. Because state natural death acts are vague and ambiguous, they do not provide adequate guidance for individuals, doctors, or hospitals. In part, the ambiguity reflects the legislatures' hesitation to endorse an individual's right to refuse treatment. As a result, most of the burden of decision-making in the "hard" cases continues to fall on the courts.[50]

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TEX. HEALTH & SAFETY CODE ANN. §§ 672.001–.021 (West Supp. 1991); UTAH CODE ANN. §§ 75-2-1101 to 75-2-1118 (Supp. 1991); VT. STAT. ANN. tit. 18, §§ 5251–5262 (1987); VA. CODE ANN. §§ 54.1-2981 to 54.1-2992 (Michie 1991); WASH. REV. CODE ANN. §§ 70.122.010–.905 (West Supp. 1991); W. VA. CODE §§ 16-30-1 to 16-30-13 (1991 & Supp. 1991); WIS. STAT. ANN. §§ 154.01–.15 (West 1989); WYO. STAT. §§ 35-22-101 to 35-22-109 (1988 and Supp. 1991).

[47] These states are Massachusetts, Michigan, Nebraska, New York, and Rhode Island. The Pennsylvania state legislature considered a living-will bill in 1990, but the bill died in the state senate after efforts to work out a compromise with pro-life groups failed. *See* Tom Troy, *Living Wills: Dead for this Session*, UPI, Nov. 21, 1990, *available in* LEXIS, Nexis Library, Omni UPI File.

[48] For example, in Cruzan v. Harmon, 760 S.W.2d 408, 420 (Mo. 1988) (en banc), *aff'd*, Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990), the Missouri Supreme Court looked to Missouri's natural death act "as an expression of the policy of [Missouri] with regard to the sanctity of life." *See also* Couture v. Couture, 549 N.E.2d 571, 575–76 (Ohio Ct. App. 1989) (stating that durable-power-of-attorney-for-health-care statute announced public policy of state opposition to withdrawal of nutrition and hydration regardless of the patient's wishes).

[49] Some critics draw a distinction between withholding and withdrawing life-sustaining treatment. *See* MEISEL, *supra* note 15, § 4.4, at 79. This distinction is a form of the act-omission distinction; however, this distinction actually has only symbolic and psychological significance. *Id.* There is no moral difference between never beginning a treatment and stopping it once it has begun. *See* Brophy v. New England Sinai Hosp., Inc., 497 N.E.2d 626, 637–38 (Mass. 1986); *In re* Conroy, 486 A.2d 1209, 1234 (N.J. 1985). Moreover, acknowledging such a distinction may lead to perverse results. For example, physicians may decide not to begin a treatment at all if they think that "they will be locked into continuing treatments that are no longer of value to the patient." Joanne Lynn & James F. Childress, *Must Patients Always Be Given Food and Water?*, *in* BY NO EXTRAORDINARY MEANS 47, 56 (Joanne Lynn ed. 1986). Therefore, this Note uses the two terms interchangeably.

[50] *See* Sandra H. Johnson, *Sequential Domination, Autonomy and Living Wills*, 9 W. NEW ENG. L. REV. 113, 120–22 (1987) (suggesting that legislatures have been unable or unwilling to "identify the outer boundaries of individual choice" and have merely acted within the framework already established by the courts).

In theory, natural death acts validating living wills provide statutory protection for an individual's right to refuse life-sustaining treatment. However, the statutes are structured so narrowly that, in reality, they protect the rights of only a small class of individuals to refuse treatment. A number of concerns are typically voiced against structuring statutes more broadly. First, allowing doctors to remove treatment from patients may lead to arbitrary quality-of-life determinations,[51] thereby discriminating against the elderly or the handicapped.[52] Second, it is immoral to hasten death or to choose to commit suicide.[53] Third, requiring doctors to provide less-than-aggressive treatment undermines the integrity of the medical profession whose job it is to prolong life.[54] Finally, giving a patient the right to refuse life-sustaining treatment would be the first step on a "slippery slope" toward the legalization of euthanasia.[55] Most

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[51] *See Cruzan*, 760 S.W.2d at 422 ("Where the patient is not terminally ill, as here, the profoundly diminished capacity of the patient and the near certainty that that condition will not change inevitably leads to quality of life considerations."). *But see* Bouvia v. Superior Court, 225 Cal. Rptr. 297, 304 (Cal. Ct. App. 1986) (upholding right of patient to make her own determination about the quality of her life).

[52] New Hampshire's statute embodies this idea. *See* N.H. REV. STAT. ANN. § 137-H:14 (1990) ("Nothing in this chapter shall be construed to condone, authorize, or approve of the arbitrary withholding or withdrawing of life-sustaining procedures from mentally incompetent or developmentally disabled persons.").

[53] *See* Council on Scientific Affairs and Council on Ethical and Judicial Affairs, *Persistent Vegetative State and the Decision to Withdraw or Withhold Life Support*, 263 JAMA 426 (1990) (noting the concern that if patients in a persistent vegetative state are allowed to have artificial treatment withdrawn, "the category of persons whose deaths may be hastened will be expanded beyond morally tolerable limits"); George J. Alexander, *Death by Directive*, 28 SANTA CLARA L. REV. 67, 80–82 (1988) (describing how one trial court found desire to die improper, and yet held that wish to remove treatment was not decision to commit suicide and hence was morally acceptable). *See also* Bartling v. Superior Court, 209 Cal. Rptr. 220, 223, 225 (Cal. Ct. App. 1984) (stressing that patient expressed in his living will that he did not want to die and concluding that doctors would not be aiding a suicide if they discontinued treatment); *In re* Gardner, 534 A.2d 947, 955 (Me. 1987) (holding that because he did not cause his accident and has not decided to kill himself, Gardner's decision to remove treatment is not suicide).

[54] *But see* Troyen A. Brennan, *Ethics Committees and Decisions to Limit Care: The Experience at the Massachusetts General Hospital*, 260 JAMA 803, 807 (1988) (arguing that "one risks degrading physicians if they are forced to provide aggressive but useless therapy for terminally ill, incompetent patients only because a family insists on it").

[55] *See generally* Dayna B. Matthew, Note, *The "Terminal Condition" Condition in Virginia's Natural Death Act*, 73 VA. L. REV. 749, 760–62 (1987) (summarizing these arguments as they were presented to the Virginia legislature); John J. Paris & Richard A. McCormick, *Living-Will Legislation Reconsidered*, AMERICA 86, 87 (Sept. 5, 1981) (outlining the objections to living-will legislation raised by Catholic groups).

The line between doctors withdrawing care and actively giving the patient something that will cause death has been tested in two recent cases. The first involves Dr. Jack Kevorkian who helped a woman suffering from Alzheimer's disease commit suicide in June 1990 by connecting her to a homemade suicide machine. *See* Lisa Belkin, *Doctor Tells of First Death Using His Suicide Device*, N.Y. TIMES, June 6, 1990, at A1. The

living-will statutes incorporate this last concern through a provision stating that the statute does not condone or approve of euthanasia.[56]

To some extent, each of these concerns underlies the operative provisions of the natural death acts. The practical effect is that the statutes stray from the legislatures' original goal of protecting individual decision-making and, instead, protect the interests and concerns of a variety of groups. The attempt to satisfy the concerns and fears of many interest groups in turn makes the statutes ambiguous. Such vague and narrow legislation frustrates the attempts of individuals who create living wills to ensure that their wishes will be followed and to relieve their families of the burden of decision-making. Therefore, current living-will legislation may do little to protect patient decision-making.[57]

## II. NATURAL DEATH ACTS: THE OPERATIVE PROVISIONS

The two most important questions in any discussion of the rights protected by living-will statutes are (1) when may a living will be implemented? and (2) which treatments may be withdrawn? In most statutes, the "terminal-condition" requirement addresses the former concern, and the requirement that only

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second case involves a Rochester doctor who prescribed barbiturates to a patient dying of leukemia and counselled her on how much was needed to commit suicide. *See* Timothy E. Quill, *Death and Dignity—A Case of Individualized Decision Making*, 324 NEW ENG. J. MED. 691 (1991). In his account of his experience and decision-making process, Dr. Quill questions "how may families and physicians secretly help patients over the edge into death in the face of such severe suffering." *Id.* at 694.

Some states are trying to bring the issue of doctor-assisted suicide out into the open. California, Oregon, and Florida are all considering initiatives that would enable doctors to assist patient suicide in limited circumstances. Janny Scott, *Suicide Aid Focus Turns to California*, L.A. TIMES, Nov. 7, 1991, at A3. On November 5, 1991, Washington voters defeated an initiative that would allow doctors to actively kill terminally ill patients. Jane Gross, *The 1991 Election: Euthanasia; Voters Turn Down Mercy Killing Idea*, N.Y. TIMES, Nov. 7, 1991, at B16. Under the Death With Dignity Proposal, doctors would have been able to aid patients in committing suicide under certain circumstances, such as if the patient had less than six months to live and if the patient had made a written death request, for example, in a living will. Timothy Egan, *Washington Voters Weigh Aid of Doctors in Suicide*, N.Y. TIMES, Oct. 14, 1991, at A1. Although the failure of Washington voters to pass Initiative 119 may be seen as a major defeat for right-to-die advocates, it has certainly raised public concern and awareness of the issue. For a discussion of the positive and negative aspects of such legislation, see James Vorenberg, *Going Gently, With Dignity*, N.Y. TIMES, Nov. 5, 1991, at A25, and Yale Kamisar, *An Unraveling of Morality*, N.Y. TIMES, Nov. 5, 1991, at A25.

[56] *See, e.g.*, MONT. CODE ANN. § 50-9-205(6) (1989); WASH. REV. CODE ANN. § 70.122.100 (West Supp. 1991); WYO. STAT. § 35-22-109 (1988).

[57] *See* MEISEL, *supra* note 15, § 10.8, at 324.

"life-sustaining treatment" be withdrawn addresses the latter concern. While preservation of patient autonomy and dignity would seem to require the statutes to take into account the futility of treatment and its burden to the individual, neither requirement focuses on these concerns of the patient. Instead, the terminal-condition and life-sustaining treatment provisions protect a variety of considerations and interests of individuals and groups other than the person executing the living will. This section discusses how these requirements limit the right to refuse treatment.

### A. *The Terminal Condition Requirement*

The stated legislative intent of natural death acts is to respect the autonomy and dignity of individuals in directing their medical care.[58] Presumably, these statements indicate that legislatures intend to protect not only the rights of individuals who will die quickly, but also the rights of those who could be kept alive indefinitely by machinery in comas or in vegetative states.[59] Most natural death acts, however, protect the treatment decisions of only a limited class of individuals by confining the availability of the directive to patients who have been diagnosed as having a terminal condition.[60]

Because of its narrowing effect on the circumstances under which treatment may be withdrawn, the terminal-condition re-

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[58] Most natural death acts begin with a policy statement explaining the purpose of the natural death acts in these individual-focused terms. The legislative findings of the Georgia legislature are typical of many state provisions:

> The General Assembly finds that modern medical technology has made possible the artificial prolongation of human life.
>
> The General Assembly further finds that, in the interest of protecting individual autonomy, such prolongation of life for persons with a terminal condition may cause loss of patient dignity and unnecessary pain and suffering, while providing nothing medically necessary or beneficial to the patient.
>
> In recognition of the dignity and privacy which patients have a right to expect, the General Assembly declares that the laws of the State of Georgia shall recognize the right of a competent adult person to make a written directive, known as a living will . . . .

GA. CODE ANN. § 31-32-1 (Michie 1991).

[59] *See* Matthew, *supra* note 55, at 756–58 (examining the legislative history of Virginia's statute and concluding that the legislature did not intend to draft the statute so restrictively as to apply only to individuals who will die quickly).

[60] Some statutes use the term "terminal illness" rather than the broader term "terminal condition" to define this requirement. Some commentators criticize the use of terminal illness as the triggering condition in natural death acts. Illness implies a disease whereas condition is a broader term, encompassing more than diseases. *See* Uniform Rights of the Terminally Ill Act § 1, 9B U.L.A. 611, 612 (comment) (West Supp. 1987).

quirement may be viewed as one of the many political compromises made during the drafting process.[61] Although the scope of the living-will statutes must necessarily be confined to some extent—at least as long as suicide and euthanasia remain against state policy—the terminal-condition requirement provides an unworkable and unsatisfactory boundary. Therefore, through their own actions, the legislatures have defeated their stated objective of protecting individual autonomy and self-determination. Almost all of the statutes define terminal condition.[62] Most of the statutes define terminal condition with respect to the provision of life-sustaining treatment.[63] That is, under some statutes, a patient is terminal only if he is going to die regardless of whether life-sustaining treatment is administered, while other statutes define terminal status based on whether the patient would die without the administration of life-sustaining procedures.[64] The remaining statutes define terminal condition by trying to describe the illness itself. Many of the definitions contain a temporal element, such as a requirement that death be "imminent" or that death occur within a "short time."[65]

Under the living-will statutes in twelve states and the District of Columbia, a terminal condition is a condition that would produce death regardless of the application of life-sustaining procedures.[66] This language is most consistent with the notion

[61] *See* Gregory Gelfand, *Living Will Statutes: The First Decade*, 1987 WIS. L. REV. 737, 746 (1987); Matthew, *supra* note 55, at 760–62. Another possible political compromise is the exclusion of nutrition and hydration from the definition of life-sustaining treatment. *See infra* Section II(B).

[62] Idaho, Kansas, and North Carolina do not explicitly define terminal condition although the statutes at least require the physician to declare the patient terminally ill before the declaration takes effect. *See* IDAHO CODE § 39-4504 (Supp. 1991); KAN. STAT. ANN. § 65-28,102(e) (West 1985); N.C. GEN. STAT. § 90-321(b)(1) (1990). On its face, this approach seems to broaden the class of individuals who are considered terminally ill and to provide more flexibility to doctors. However, this method effectively creates additional uncertainty for doctors trying to implement living wills, perhaps causing some doctors to under-treat patients and others to over-treat patients for fear of liability.

[63] Statutes defining terminal condition in terms of life-sustaining treatment have been criticized as being tautological. *See generally* Uniform Rights of the Terminally Ill Act § 1, *supra* note 60, at 612; MEISEL, *supra* note 15, § 11.12, at 367–68.

[64] *See* Gelfand, *supra* note 61, at 741.

[65] *See* discussion *infra* notes 88–101 and accompanying text.

[66] *See* CAL. HEALTH & SAFETY CODE § 7187(f) (West Supp. 1991); DEL. CODE ANN. tit. 16, § 2501(e) (1983); D.C. CODE ANN. § 6-2421(6) (1981); GA. CODE ANN. § 31-32-2(10) (Michie 1991); MD. HEALTH-GEN. CODE ANN. § 5-601(g) (1990); MO. ANN. STAT. § 459.010(6) (Vernon Supp. 1991); N.M. STAT. ANN. § 24-7-2(F) (Michie 1991); OKLA. STAT. ANN. tit. 63, § 3102(8) (West Supp. 1991); OR. REV. STAT. § 127.605(6) (1990); TENN. CODE ANN. § 32-11-103(9) (Supp. 1991); UTAH CODE ANN. § 75-2-1103(7) (Supp. 1991); VT. STAT. ANN. tit. 18, § 5252(5) (1987); WASH. REV. CODE ANN. § 70.122.020(7) (West Supp. 1991).

that legislatures, like courts[67] and doctors, do not want to be held responsible for authorizing an action that will lead to death. By confining the removal of treatment to those patients who are going to die soon, even if treatment is continued, the legislatures are able to perpetuate the "romantic but illogical" legal fiction that the patient will die due to the underlying illness rather than the act of removing the treatment itself.[68] Under this definition, all that matters is that the patient can be kept alive; the fact that the treatment is futile is irrelevant.

This restrictive provision essentially renders the acts ineffective because it limits protection to those patients to whom it matters least whether treatment is withheld or withdrawn.[69] The President's Commission concluded that the class of persons defined in these statutes, "if it indeed contains any members, at most constitutes a small percentage of those incapacitated individuals for whom decisions about life-sustaining treatment must be made."[70]

A major category of people excluded from coverage under these statutes is the group of people who, like Nancy Cruzan, are in a persistent vegetative state. Nancy Cruzan, for example, would not have been considered terminally ill under Missouri's statute because, with life support, she could have continued to live for thirty years.[71] Even if Nancy Cruzan had executed a living will, her doctors still may have refused to remove her gastrostomy tube absent a court order to do so. Therefore, living

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[67] *See In re* Gardner, 534 A.2d 947, 955 (Me. 1987) ("[W]e judges do not ourselves engage in an independent assessment of the value of life . . . . We are only recognizing and effectuating [Gardner's] right of self-determination."); *see also* Bouvia v. Superior Court, 225 Cal. Rptr. 297, 306 (Cal. Ct. App. 1986) ("[The courts] have expressed a concern for the sanctity of life and a desire to avoid any conduct that could be characterized as aiding in a suicide."); Bartling v. Superior Court, 209 Cal. Rptr. 220, 225 (Cal. Ct. App. 1984) (stating that if doctors disconnected Bartling's ventilator, they would not have caused his death; rather, they would only "have hastened his inevitable death by natural causes").

[68] Alexander, *supra* note 53, at 82–83.

[69] *See* Gelfand, *supra* note 61, at 742; Shari Lobe, Note, *The Will to Die: Survey of State Living Will Legislation and Case Law*, 9 PROB. L.J. 47, 61 (1980).

[70] PRESIDENT'S COMM'N, *supra* note 6, at 143. *See also* Barber v. Superior Court, 195 Cal. Rptr. 484, 489 (Cal Ct. App. 1983) ("[T]he procedural requirements are so cumbersome that it is unlikely that any but a small number of highly educated and motivated patients will be able to effectuate their desires."). California's Act additionally requires that the directive be executed at least fourteen days after the patient is diagnosed as having a terminal illness. CAL. HEALTH & SAFETY CODE § 7188 (West Supp. 1991). A directive executed before a patient is so diagnosed, which is not subsequently re-executed, need not be followed, but it may be used as evidence of the patient's wishes. *Id.* at § 7191(c).

[71] Cruzan v. Harmon, 760 S.W.2d 408, 411 (Mo. 1988) (en banc), *aff'd*, Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990).

wills in states with the restrictive "regardless of treatment" definition of terminal condition may not preclude the possibility of litigation.[72] Moreover, such statutes fail to protect individual autonomy because they ignore the wishes of patients. One study found that nienty-four percent of hospital patients surveyed would refuse life support if they were in a comatose state.[73] For these reasons, statutes containing this definition are impractical and ineffective. In many situations, courts may continue to decide these cases, creating the possibility of inconsistent results and increasing uncertainty for people filling out living wills.[74]

Fifteen states define terminal condition less restrictively as a condition that, without life support, will result in death in a short time.[75] This definition is an improvement over the "regardless of treatment" definition because it broadens the class of people who may be considered terminal and, therefore, who

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[72] The restrictive nature of the statute does not mean that patients who do not fall within the definition cannot have treatment withdrawn; it only means that the treatment decision must be made outside the statutory framework. Most living-will statutes declare that the statute does not provide the exclusive source of an individual's rights. *See, e.g.*, MINN. STAT. ANN. § 145B.17 (West Supp. 1991); TENN. CODE ANN. § 32-11-110(d) (Supp. 1991). Likewise, courts have held that the rights conferred by natural death acts supplement existing constitutional and common law rights. *See, e.g.*, Corbett v. D'Alessandro, 487 So. 2d 368, 372 (Fla. 1986) ("The right protected is a constitutional right which could not be limited by legislation."); *see also In re* Drabick, 245 Cal. Rptr. 840, 859 (Cal. Ct. App. 1988), *cert. denied*, 488 U.S. 958 (1988); *In re* Gardner, 534 A.2d 947, 952 n.3 (Me. 1987). Therefore, courts have consistently ordered treatment removed from individuals who have not executed living wills, pursuant to their constitutional or common law rights. *Cruzan* was eventually decided in this manner.

[73] David Frankl et al., *Attitudes of Hospitalized Patients Toward Life Support: A Survey of 200 Medical Inpatients*, 86 AM. J. MED. 645, 646 (1989).

[74] Presumably recognizing the shortfalls of the "regardless of treatment" definition, some state legislatures have broadened the scope of the definition of terminal illness. *See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. § 672.002(9) (West Supp. 1991) (amended in 1989 from the "regardless of treatment" to the "without treatment" approach, *see infra* note 75 and accompanying text).

[75] *See* ALA. CODE § 22-8A-3(6) (1990); ALASKA STAT. § 18.12.100(7) (1991); ARIZ. REV. STAT. ANN. § 36-3201(6) (1986); ARK. CODE ANN. § 20-17-201(9) (Michie Supp. 1991); HAW. REV. STAT. § 327D-2 (1991); IND. CODE ANN. § 16-8-11-9 (Burns 1990); IOWA CODE ANN. § 144A.2(8) (West 1989); ME. REV. STAT. ANN. tit. 18-A § 5-701(9) (West Supp. 1990); MISS. CODE ANN. § 41-41-113 (Supp. 1990); MONT. CODE ANN. § 50-9-102(12) (1989); N.D. CENT. CODE § 23-06.4-02(7) (Interim Supp. 1991); OHIO REV. CODE ANN. § 2133.01(AA) (Baldwin 1991); S.C. CODE ANN. § 44-77-20(d) (Law. Co-op. Supp. 1990); S.D. CODIFIED LAWS ANN. § 34-12D-1(8) (1991); TEX. HEALTH & SAFETY CODE ANN. §672.002(9) (West Supp. 1991).

These states generally adopted this language from the Uniform Rights of the Terminally Ill Act, *supra* note 60, which defines "terminal condition" as "an incurable and irreversible condition that, without the administration of life-sustaining treatment, will, in the opinion of the attending physician, result in death within a relatively short time." *Id.* at 68, § 1(9). The comment to the Act states that the Commissioners specifically attempted to expand the definition of terminal illness because the definitions of many states were too restrictive. *Id.* at 69, § 1.

may exercise their right of self-determination. However, this definition runs the risk of being interpreted too broadly because almost any condition that is not treated may lead to death.[76] That is, this definition does not take into account whether treatment would be successful in curing, or perhaps greatly improving, the patient's condition.[77] All of these statutes qualify the definition of terminal condition either by adding a temporal element, such as "death is imminent,"[78] or by describing the condition as "incurable or irreversible."[79] Although these limitations decrease the risk that the statute will be interpreted too broadly, they raise a separate range of ambiguities.[80]

The remaining statutes do not define terminal condition with respect to whether or not medical treatment is provided, but instead attempt to define the condition itself.[81] Generally, these definitions require the condition to be incurable and/or irreversible, but the meaning of these terms is unclear.[82] Irreversibility

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[76] *See* Gelfand, *supra* note 61, at 743; *Constitutional Law Conference*, *supra* note 14, at 2276 (Kamisar commenting that this definition of terminal condition goes too far in the direction of enlarging the category of people who may refuse treatment); Matthew, *supra* note 55, at 767.

[77] *See* Matthew, *supra* note 55, at 767 ("[A] person bitten by a rabid animal is likely to die from rabies without treatment. Diabetics who do not receive insulin are likely to die 'within a relatively short time.' . . . Yet none of these conditions is correctly described as 'terminal.'").

[78] *See, e.g.*, ALA. CODE § 22-8A-3(6) (1990).

[79] *See, e.g.*, IOWA CODE ANN. § 144A.2(8) (West 1989).

[80] See discussion of the temporal requirement, *infra* notes 88–101 and accompanying text, and of the incurable and irreversible qualification, *infra* notes 81–87 and accompanying text.

[81] *See* COLO. REV. STAT. § 15-18-103(10) (West 1989) (terminal condition means "incurable or irreversible condition for which the administration of life-sustaining procedures will serve only to postpone the moment of death"). The following statutes contain similar definitions: CONN. GEN. STAT. ANN. § 19a-570(3) (West Supp. 1991); FLA. STAT. ANN. § 765.03(6) (West 1986); ILL. ANN. STAT. ch. 110 1/2, para. 702(h) (Smith-Hurd Supp. 1991); KY. REV. STAT. ANN. § 311.624(8) (Michie/Bobbs-Merrill Supp. 1990); LA. REV. STAT. ANN. § 40:1299.58.2(8) (West Supp. 1991); MINN. STAT. ANN. § 145B.02 Subd. 8 (West Supp. 1991); NEV. REV. STAT. ANN. § 449.590 (Michie 1986); N.H. REV. STAT. ANN. § 137-H:2(VI) (1990); 1991 N.J. Laws 201, § 3; VA. CODE ANN. § 54.1-2982 (Michie 1991); W. VA. CODE § 16-30-2(6) (1991); WIS. STAT. ANN. § 154.01(8) (West 1989); WYO. STAT. § 35-22-101(a)(vi) (1988).

Note that New Jersey also defines terminal condition as "a prognosis of a life expectancy of six months or less, with or without the provision of life-sustaining treatment, based on a reasonable medical certainty." 1991 N.J. Laws 201, § 3.

[82] Finding a lack of statutory guidance as to what role life-sustaining treatment should play in determining whether a condition is terminal, one Florida court interpreted Florida's definition of terminal condition as one which would imminently produce death *without* statutory life-prolonging procedures. *In re* Guardianship of Browning, 543 So. 2d 258, 265 (Fla. App. 1989), *aff'd*, 568 So. 2d 4 (Fla. 1990). Florida's statute defines terminal condition as "a condition caused by injury, disease, or illness from which, to a reasonable degree of medical certainty, there can be no recovery and which makes death imminent." FLA. STAT. ANN. § 765.03(6) (West 1986). The court rejected the "regardless of treatment" approach as useless. *In re* Browning, 543 So. 2d at 265.

denotes futility of treatment and seems to capture the intent of living-will statutes to apply to those individuals for whom treatment merely prolongs dying.[83] At the same time, the requirement of irreversibility narrows the definition to include only those individuals whose conditions will not be improved by medication. Therefore, these statutes exclude patients whose conditions could be improved but not cured by life support.[84] This exclusion may reflect the idea that the concept of "improvement" entails a quality-of-life evaluation, which the legislatures wanted to preclude through the terminal-condition restriction. That is, the word improvement has a spectrum of meanings: at one extreme, improvement may mean a complete recovery and anything less than a return to the previous capacity would not warrant continued treatment. At the other extreme, any amount of recovery, no matter how small, may be considered an improvement so that continued treatment would be required in all circumstances.

Three statutes only require that the condition be incurable, which is also an unsatisfactory definition of terminal condition.[85] Many illnesses, such as multiple sclerosis, diabetes, and AIDS, are not curable but may be treated and stabilized. This wording most likely resulted from legislative oversight because legislatures probably did not intend to include patients with these diseases in the terminal category.

Many statutes in this third category further require that a treatment "serve only to prolong the dying process" in order to classify the condition as terminal.[86] Although this aspect of the definition tries to focus on the futility of the treatment, it is vague and ambiguous because most medical treatment can be seen as prolonging the dying process.[87]

Another significant ambiguity in the definitions of terminal illness is the temporal component contained in at least half of the living-will statutes. Many statutes require that death be

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[83] *See* Gelfand, *supra* note 61, at 745.

[84] An example of such a case is an HIV-positive patient afflicted by one or more AIDS-related infections. Treatment can improve the infection, but it cannot cure the underlying condition.

[85] *See* NEV. REV. STAT. ANN. § 449.590 (Michie 1986); N.H. REV. STAT. ANN. § 137-H:2(VI) (1990); WIS. STAT. ANN. § 154.01(8) (West 1989).

[86] *See, e.g.*, ILL. ANN. STAT. ch. 110 1/2, para. 702(h) (Smith-Hurd Supp. 1991).

[87] *See* Matthew, *supra* note 55, at 769; *see also* Arnold S. Relman, *Michigan's Sensible "Living Will"*, 300 NEW ENG. J. MED. 1270, 1271 (1979) ("What exactly is meant by 'incurable' and how often do we know for sure whether treatment 'would serve only to prolong dying' or whether it would be of some substantial benefit?").

"imminent,"[88] while other statutes require that death occur within a short time[89] or within a "relatively short time."[90] This requirement severely restricts the class of patients to whom the statutes apply by excluding those patients who may linger in a vegetative state for some time. The imminence requirement likewise undermines the declared legislative purpose of the statutes because it sacrifices the individual's right to choose to terminate treatment in favor of the physician's determination that the individual meets an arbitrary time component.[91] In addition, if death is imminent, the urgency of withdrawing life-sustaining treatment is less compelling.[92] Rather than focusing upon whether treatment is futile or whether it would impose a substantial burden on the patient without a concomitant benefit, this standard focuses entirely on the timing of death.[93] In addition, the temporal requirement may be criticized on its face for requiring an uncertain "medical prognostication" as to when death will occur.[94] Does imminent mean days, weeks, or months?[95] The statutes that adopt the "short time" approach did so to provide physicians with additional flexibility;[96] however, the actual effect is to substitute one vague term for another.

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[88] *See, e.g.*, ALA. CODE § 22-8A-3(6) (1990); FLA. STAT. ANN. § 765.03 (West 1986); N.H. REV. STAT. ANN. § 137-H:2(VI) (1990).

[89] *See, e.g.*, IND. CODE ANN. § 16-8-11-9 (Burns 1990); ME. REV. STAT. ANN. tit. 18-A, § 5-701(9) (West Supp. 1990). *See also* OKLA. STAT. ANN. tit. 63, § 3102(8) (West Supp. 1991) (requiring that death occur from the condition within "hours or days").

[90] *See, e.g.*, HAW. REV. STAT. § 327D-2 (1991); MONT. CODE ANN. § 50-9-102(12) (1989).

[91] *See* Bouvia v. Superior Court, 225 Cal. Rptr. 297, 304–05 (Cal. Ct. App. 1986) ("If her right to choose may not be exercised because there remains to her, in the opinion of a court, a physician, or some committee, a certain arbitrary number of years, months, or days, her right will have lost its value and meaning.").

[92] ROBERT M. VEATCH, DEATH, DYING AND THE BIOLOGICAL REVOLUTION 159–60 (rev. ed. 1989).

[93] Even the American Medical Association has rejected the imminence criterion. *See* AMERICAN MEDICAL ASS'N, CURRENT OPINIONS OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS § 2.20, at 13 (1989) ("Even if death is not imminent but the patient is beyond doubt permanently unconscious . . . it is not unethical to discontinue all means of life-prolonging medical treatment.") [hereinafter AMA CURRENT OPINIONS].

[94] PRESIDENT'S COMM'N, *supra* note 6, at 25.

[95] *See* Christopher J. Condie, Comment, *Comparison of the Living Will Statutes of the Fifty States*, 14 J. CONTEMP. L. 105, 115 (1988). *See also* TASK FORCE REPORT, *supra* note 27, at 56 & app. B at 4 (criticizing Illinois's imminence requirement as ambiguous, but recommending that the requirement be retained. The proposed model statute defines imminent to mean a "determination made by the attending physician on a case-by-case basis that death is about to take place, even if life-sustaining treatment is initiated or continued." Rather than ameliorating the problem, this approach seems to convert Illinois's definition into a "regardless of treatment" definition and to restrict further the application of the statute to people who are about to die.).

[96] *See* Uniform Rights of the Terminally Ill Act, *supra* note 60, at 69–70, § 1 ("[This alternative] reflects the balancing character of the time frame judgment . . . . [I]t focuses

Terminal condition is supposed to be a medical conclusion; the statutes evidence this intent by requiring physicians to certify the patient as terminally ill. However, by requiring a determination of imminence, the statutes incorporate a non-medical value judgment into what should be strictly a medical assessment. Different physicians are likely to interpret "imminent" and "short time" differently depending on their own subjective understandings of the terms.[97] Therefore, whether a person is considered terminally ill may depend upon who is making the diagnosis.[98] To the extent that the statutes allow or enable physicians to exercise such discretion, the statutes take control over medical treatment decisions away from individuals and place it in the hands of the medical profession, thereby undermining the stated purpose of the statutes.[99] Yet, to the extent that such ambiguity opens up the way for physicians to make arbitrary determinations as to when the statute will apply, the legislatures have also failed to achieve one of their own underlying purposes in drafting the terminal-condition requirement: limiting quality-of-life decisions.

The uncertain meaning of the temporal component may further impede the operation of the living will. If a physician is unclear as to the meaning of the time requirement, he may refuse to remove treatment without a court order to ensure that he will not face civil or criminal liability.[100] Left to the courts, however, such terms are also subject to a wide variety of interpretations. One court that interpreted the meaning of "imminent" under the state's durable-power-of-health-care statute held that death is not imminent as long as the patient can survive one to two months.[101]

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the physician's medical judgment and avoids the narrowing implications of the word 'imminent.'")

[97] A similar criticism was made by the American Medical Association with regard to the futility requirement in do-not-resuscitate orders. *See* REPORT OF THE COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, GUIDELINES FOR THE APPROPRIATE USE OF DO-NOT-RESUSCITATE ORDERS, Report C (1990). The report concluded that words such as futile identify a wide range of probabilities that may be interpreted differently by different physicians. Studies found that to some physicians, treatment is futile only if the possibility of success approaches 0%, whereas others consider treatment futile even if the chance of success is 13%. *Id.* at 6.

[98] *See* Diane L. Redleaf et al., Note, *The California Natural Death Act: An Empirical Study of Physicians' Practices*, 31 STAN. L. REV. 913, 932 (1979) (suggesting that the application of the California Natural Death Act varies according to the particular physician's definition of terminal illness).

[99] See discussion of physician control, *infra* Section III(A).

[100] See discussion of liability, *infra* Section III(B).

[101] Couture v. Couture, 549 N.E.2d 571, 575–76 (Ohio Ct. App. 1989) (interpreting

Despite the efforts of some states to broaden the terminal-condition definition, this requirement continues to be a major factor limiting the effectiveness of current living-will legislation. The primary problem with the definitions is that whether or not they have an explicit temporal requirement, the definitions focus on the timing of death rather than on the futility and the burden of treatment to the patient. The importance to the legislatures of not removing treatment unless death is imminent or will occur regardless of whether treatment is provided reflects their ambivalence toward allowing people to refuse treatment. Consequently, the statutes exclude patients, clearly within the spirit of the statutes, whose conditions have stabilized and who are in a persistent vegetative state.[102]

Most courts have stated explicitly that there is no distinction between terminal and non-terminal patients,[103] although others have upheld the distinction.[104] At least one commentator has suggested that the Supreme Court's silence on the issue in *Cruzan*[105] indicates that there is no significant difference between a patient whose condition has stabilized but is not terminal and one whose condition is terminal.[106] If this analysis is

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OHIO REV. CODE ANN. § 1337.13) (Anderson Supp. 1990). *See also In re* Browning, 543 So. 2d 258, 265 (Fla. 1989), *aff'd*, 568 So. 2d 4 (1990) (finding patient's death imminent because patient would die within a few days upon withdrawal of a feeding tube).

[102] *See* Norman L. Cantor, *The Permanently Unconscious Patient, Non-Feeding and Euthanasia*, 15 AM. J. L. & MED. 381, 407 (1989). Perhaps attempting to address this shortcoming, South Dakota has defined terminal condition to include "a coma or other condition of permanent unconsciousness that . . . will last indefinitely." S.D. CODIFIED LAWS ANN. § 34-12D-1(8) (1991). *But see* OHIO REV. CODE ANN. § 2133.02(3)(a-b) (Baldwin 1991) (distinguishing between patients in "permanently unconscious state[s]" and patients with "terminal condition[s]").

[103] *See, e.g.*, Bartling v. Superior Court, 209 Cal. Rptr. 220, 223 (Cal. Ct. App. 1984) (right to terminate treatment not limited to terminal patient); *In re* Peter, 529 A.2d 419, 423 (N.J. 1987) (stating that regardless of whether they are terminally ill, all patients have right to refuse life-sustaining treatment). *Cf.* Ezekiel J. Emanuel, *Should Physicians Withhold Life-Sustaining Care from Patients Who Are Not Terminally Ill?*, 335 LANCET 106 (1988) (criticizing *Peter* court for creating a meaningless distinction between non-terminal patients and those with advanced Alzheimer's disease or other organic brain syndrome because, in many respects, there is little medical or practical difference between the conditions).

[104] *In re* Estate of Longeway, 549 N.E.2d 292, 298 (Ill. 1989) (holding that a patient must be terminally ill before artificial sustenance may be withdrawn); Cruzan v. Harmon, 760 S.W.2d 408, 419 (Mo. 1988) (en banc), *aff'd*, 110 S. Ct. 2841 (1990) (arguing that the state's interests in prolonging Cruzan's life are especially strong because she is not terminally ill).

[105] The Court did not suggest that the case of Nancy Cruzan, who was not terminal, differs from that of terminal patients or that a different evidentiary standard would apply in the case of a terminal patient.

[106] *Constitutional Law Conference*, *supra* note 14, at 2276 (statement of Kamisar).

correct, restrictive terminal-condition provisions may be of questionable validity if challenged in future cases.

Through the terminal-condition requirement, legislatures have chosen to codify the inner boundaries of individual decision-making. That is, by codifying the most restrictive definitions of terminal condition, legislatures have put strict limits on individual autonomy. Eliminating the distinction between terminal and non-terminal patients, courts and doctors have pushed this boundary a little further. They have broadened the range of instances over which individuals may control decisions to terminate treatment, but they have still left it up to the legislatures to identify the outermost boundary. The continued omission of permanently comatose and persistently vegetative patients from those who may refuse treatment means that the statutes fall short of protecting individual autonomy, which was supposedly the legislatures' primary purpose in enacting the statutes. That is, individuals express the highest preference for removal of treatment when they are permanently unconscious.[107] Further, the ethical justification for allowing patients to remove treatment at all primarily depends on the fact that treatment is hopeless, and not that the individual is terminal.[108] Not only should legislatures eliminate the distinction between terminal and non-terminal patients, but they should also establish a framework within which individuals, physicians, and, if necessary, courts, can act. In continuing to distinguish between terminal and non-terminal patients and in failing to consider the futility of treatment, the legislators prevent, or at least retard, the progress of the law regarding refusal of treatment.

### B. *Life-Sustaining Treatment*

Some legislatures acknowledge in their policy statements that artificial treatment may give an individual "only a precarious and burdensome existence, while providing nothing medically

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[107] *See* Linda L. Emanuel et al., *Advance Directives for Medical Care—A Case for Greater Use*, 324 NEW ENG. J. MED. 889, 892 (1991) (reporting that 79% of individuals surveyed would refuse treatment if they were in a persistent vegetative state); Frankl et al., *supra* note 73, at 646 (finding only 6% of patients would want life support if they were to remain comatose); *see also* Danis et al., *supra* note 34, at 894.

[108] Ezekiel J. Emanuel, *A Review of the Ethical and Legal Aspects of Terminating Medical Care*, 84 AM. J. MED. 291, 295–96 (1988).

necessary or beneficial to the patient."[109] However, in determining which treatments may be withdrawn, the very same legislatures do not consider the benefits and burdens of the treatments. Living-will statutes restrict the treatments that may be refused to statutorily defined "life-sustaining treatment." By focusing only on which treatments may be refused, rather than on whether the treatment provides any benefit commensurate to the burden, legislatures again deviate from their stated intent to allow individuals to control their life-support decisions.

The controversy surrounding these provisions concerns the significant number of states that exclude the provision of nutrition and hydration, one of the most widely used methods of life support,[110] from the definition of life-sustaining treatment.[111] Although some state legislatures have made the exclusion explicit, almost half of the state statutes do not mention nutrition and hydration,[112] perhaps due to legislative oversight of the importance of the distinction.[113] In these states, the status of nutrition

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[109] FLA. STAT. ANN. § 765.02 (West 1986).

[110] HASTINGS CENTER, GUIDELINES ON THE TERMINATION OF LIFE-SUSTAINING TREATMENT AND THE CARE OF THE DYING 59 (1987).

[111] *See* ARIZ. REV. STAT. ANN. § 36-3201(4) (1986); CONN. GEN. STAT. ANN. § 19a-570(1) (West Supp. 1991); GA. CODE ANN. § 31-32-2(5)(a) (Michie 1991); HAW. REV. STAT. § 327D-2 (1991); IND. CODE ANN. § 16-8-11-4 (Burns 1990); IOWA CODE ANN. § 144A.2(5) (West 1989); KY. REV. STAT. ANN. § 311.625(5)(b) (Michie/Bobbs-Merrill Supp. 1990); MD. HEALTH-GEN. CODE ANN. § 5-605(1) (1990); MO. ANN. STAT. § 459.010(3) (Vernon Supp. 1991); N.H. REV. STAT. ANN. § 137-H:2(II) (1990); N.D. CENT. CODE § 23-06.4-02(4) (Supp. 1989) S.C. CODE ANN. § 44-77-20(2) (Law. Co-op. Supp. 1990); WIS. STAT. ANN. § 154.01(5)(b) (West 1989).

Note that North Dakota permits removal of nutrition if it would be physically harmful or painful to the patient. N.D. CENT. CODE § 23-06.4-07 (Supp. 1989). Whether this approach permits a balancing of benefits and burdens is unclear.

[112] *See* ALA. CODE § 22-8A-3(3) (1990); ARK. CODE ANN. § 20-17-201(4) (Michie Supp. 1991); CAL. HEALTH & SAFETY CODE § 7187(c) (West Supp. 1991); DEL. CODE ANN. tit. 16, § 2501(d) (1983); D.C. CODE ANN. § 6-2421(3) (1981); IDAHO CODE § 39-4503(4) (1985); KAN. STAT. ANN. § 65-28,102(c) (1985); LA. REV. STAT. ANN. § 40: 1299.58.2(4) (West Supp. 1990); MISS. CODE ANN. § 41-41-103(b) (Supp. 1990); MONT. CODE ANN. § 50-9-102(7) (1989); NEV. REV. STAT. ANN. § 449.570 (Michie 1986); N.M. STAT. ANN. § 24-7-2(C) (Michie 1991); N.C. GEN. STAT. § 90-321(a)(2) (1990); TEX. HEALTH & SAFETY CODE ANN. § 672.002(4) (West Supp. 1991); VT. STAT. ANN. tit. 18, § 5252(2) (1987); WASH. REV. CODE ANN. § 70.122.020(4) (West Supp. 1991); W.VA. CODE § 16-30-2(6) (1991).

Note that West Virginia's statute is not completely silent on the issue. Section 16-30-3, the West Virginia model directive, states that the declarant wishes to be "permitted to die naturally with only the administration of nutrition and [medication necessary for comfort care]." Thus, although the definition is silent as to nutrition, this statement in the model directive may indicate that people in West Virginia cannot refuse nutrition and hydration.

[113] Wendy A. Kronmiller, Note, *A Necessary Compromise: The Right to Forego Artificial Nutrition and Hydration Under Maryland's Life-Sustaining Procedures Act*, 47 MD. L. REV. 1188, 1200 (1988). However, given the fact that legislatures hear from many interest groups, it is more likely that they did not want to or could not endorse

and hydration is uncertain at best.[114] At their worst, these statutes may also preclude the withholding or withdrawing of nutrition and hydration.[115] The failure of these legislatures to mention nutrition and hydration not only raises questions concerning legislative intent, but also leaves open the question of whether people who follow their state's model directive when executing living wills intended to refuse artificial nutrition and hydration.[116]

The best approach to the issue of nutrition and hydration is that adopted by Alaska, Minnesota, and South Dakota. These states explicitly allow individuals to choose whether they would like artificial nourishment to be withheld or withdrawn.[117] Under this approach, the intent of both the legislature and the patient is clear. Furthermore, this approach fully preserves individual self-determination because individuals can choose not only whether they want to refuse sustenance, but also whether they want to receive sustenance.[118] Maine, Idaho, and Utah have adopted a similar approach. Although these states exclude hydration and nutrition from the definition of life-sustaining pro-

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the withdrawal of nutrition and hydration. *See* Cantor, *supra* note 102, at 388. *See also* discussion of legislative process, *infra* notes 141–144 and accompanying text.

[114] *See* Leslie P. Francis, *The Evanescence of Living Wills*, 14 J. CONTEMP. L. 27, 34 (1987).

[115] *See* Gelfand, *supra* note 61, at 751 & n.50.

[116] *See* Ron M. Landsman, *Terminating Food and Water: Emerging Legal Rules*, *in* BY NO EXTRAORDINARY MEANS, *supra* note 49, at 135, 140; Kronmiller, *supra* note 113, at 1214–15 (suggesting that a "gutted" living-will statute is dangerous because it will discourage people from writing about their wishes regarding sustenance and people who do express their wishes in writing will have no assurance that the wishes will be honored).

For this reason, declarants in these states should probably specify that they would like such treatments withheld or withdrawn.

[117] *See* ALASKA STAT. § 18.12.010 (1991); MINN. STAT. ANN. § 145B.04 (West Supp. 1991); S.D. CODIFIED LAWS ANN. § 34-12D-3 (1991). South Dakota draws a clear distinction between "oral administration of food and water," which is excluded from the definition of life-sustaining treatment and hence cannot be withdrawn or withheld, S.D. CODIFIED LAWS ANN. § 34-12D-1(4) (1991), and "artificial nutrition and hydration," which patients can elect to have withdrawn or withheld. *Id.* at § 34-12D-2. In addition, South Dakota does not allow patients to have comfort care withdrawn. *Id.* at § 34-12D-1.

Alaska's statute also seems to distinguish "natural" feeding from "artificial" feeding by limiting withdrawal to sustenance provided through a "gastric tube" or intravenously. *Id.* Although the language in their statutes is less clear, Oklahoma, Oregon, and Tennessee may also differentiate between "artificial" and "natural" feeding. *See infra* note 121.

[118] In this sense, these provisions represent the "ideal" construction to be consistent with individual autonomy. To the extent that they provide the opportunity for refusal of care rather than an opportunity to specify treatment choices in general, living wills on the whole fall short of this ideal. Some states, however, do allow patients to express their desires either to withdraw treatment or to receive treatment. *See* IND. CODE ANN. § 16-8-11-12 (Burns 1990); MD. HEALTH-GEN. CODE ANN.§ 5-611 (1990); N.D. CENT. CODE § 23-06.4-03 (Supp. 1989).

cedures, an individual can modify the directive to refuse such treatment.[119]

All except one[120] of the remaining states that specifically address the subject of sustenance provide only a limited right of refusal.[121] Florida's recent amendment exemplifies legislative hesitation to endorse the right to refuse nutrition and hydration. In 1990, Florida amended its definition of life-prolonging procedure to allow people to include sustenance among the life-prolonging treatments they may choose to refuse.[122] However, the conditions under which such desires may be carried out render the amendment meaningless. Not only must the patient authorize the hospital to withdraw or withhold nutrition or hydration, but the attending physician and one other physician who "is not employed by and does not have a financial interest in the health care facility" must determine that sustenance is a life-prolonging procedure for the patient whose death is imminent.[123] Finally, even if this burdensome requirement is satisfied, the patient's next of kin can prevent the withdrawal of suste-

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[119] IDAHO CODE § 39-4504 (Supp. 1991); ME. REV. STAT. ANN. tit. 18-A, § 5-701(4)(a) (West Supp. 1990); UTAH CODE ANN. §§ 75-2-1103, 75-2-1104(4) (Supp. 1991). Although Idaho's statute explicitly excludes nutrition and hydration from the definition of life-sustaining treatment, the living-will form allows the individual to exclude nutrition and hydration. Utah also allows a person to choose to refuse comfort care, which must always be provided in other states. UTAH CODE ANN. § 75-2-1104(4) (Supp. 1991).

[120] Virginia provides an unqualified right to remove nutrition and hydration if all of the other statutory conditions are met. VA. CODE ANN. § 54.1-2982 (Michie 1991). Virginia only limits the withdrawal of nutrition and hydration to the extent necessary to provide comfort care and to alleviate pain, which is the same limitation placed on the removal of all medical procedures. *Id.*

[121] *See* COLO. REV. STAT. § 15-18-104(2.5)(a) (West 1989) (patient may choose to have artificial nourishment withdrawn if it is the only procedure provided); ILL. ANN. STAT. ch. 110 1/2, para. 702(2)(d) (Smith-Hurd Supp. 1991) (nutrition and hydration cannot be withdrawn or withheld if to do so would cause "death solely from dehydration and starvation rather than from the existing terminal condition"); 1991 N.J. Laws 201, § 3 (life-sustaining treatment is defined to include only "artificially provided fluids and nutrition"); OHIO REV. CODE ANN. § 2133.01(N), (T) (Baldwin 1991) (nutrition and hydration are defined to mean sustenance and fluids "artifically or technologically administered"); OKLA. STAT. ANN. tit. 63, §§ 3102(4), 3103 (West Supp. 1991) (life-sustaining procedure does not include "normal consumption of food and water" although individuals can choose to forego artificial nutrition and hydration); OR. REV. STAT. § 127.605(3) (1990) (life-sustaining procedure does not include "usual and typical provision of nutrition"); TENN. CODE ANN. § 32-11-103(5) (Supp. 1991) ("[I]n no case shall this section be interpreted to allow the withholding of simple nourishment or fluids so as to condone death by starvation or dehydration."); WYO. STAT. § 35-22-101(a)(iii) (Supp. 1991) (life-sustaining procedure includes "nourishment by artificial means"). Note that in addition to limiting withdrawal to artificial nutrition, Wyoming does not mention hydration; therefore, it is unclear whether hydration may be withdrawn under the statute.

[122] Life-Prolonging Procedure Act, ch. 90, §§ 765.03, 765.075(1), 1990 Fla. Laws ch. 223.

[123] *Id.* at § 765.075(1)(a–b).

nance for a "reasonable amount of time."[124] This amendment effectively provides a right so cumbersome to exercise that it is devoid of any substance.

These statutes create an artificial legal distinction between medical treatment on the one hand, and nutrition and hydration[125] on the other hand, a distinction that the medical profession itself does not uphold.[126] The motivations for excluding sustenance from the definition of life support reflect values and interests other than those of the individuals that the statutes were purportedly designed to protect. As with the terminal-condition requirement, the legislatures exhibit reluctance to take responsibility for or to put their imprimatur on "causing" death.[127] Yet, if nutrition and hydration are withdrawn, death

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[124] *Id.* at § 765.075(2).

[125] The distinction between nutrition and other medical care originally grew out of the "ordinary/extraordinary" distinction, which has been relied upon to define the line between treatments which must be provided and those which may be foregone. *See* Steve Morgan, Note, *Selecting Medical Treatment: Does Arizona's Living Will Statute Help Enforce Decisions?*, 1986 ARIZ. ST. L.J. 275, 290–91 (1986). The criteria for determining whether treatment is ordinary or extraordinary include considerations of whether the treatment is: usual/unusual, customary/uncustomary, simple/complex, natural/artificial, noninvasive/invasive, and inexpensive/costly. *See* James F. Childress, *When is it Morally Justifiable to Discontinue Medical Nutrition and Hydration?*, *in* BY NO EXTRAORDINARY MEANS, *supra* note 49, at 67, 71. For a discussion of the ordinary/extraordinary distinction, see generally MEISEL, *supra* note 15, § 4.6, at 82–87.

Although this distinction has been enunciated by both courts, *see In re* Quinlan, 355 A.2d 647, 667–68 (N.J. 1976); Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 423–24 (Mass. 1977), and legislatures, *see* MISS. CODE ANN. § 41-41-103(b) (Supp. 1990); N.C. GEN. STAT. § 90-321(a)(2) (1990); VT. STAT. ANN. tit. 18, § 5252(2) (1987), the distinction has recently been rejected as confusing and unhelpful, *see, e.g.*, Brophy v. New England Sinai Hosp., Inc., 497 N.E.2d 626, 637 (Mass. 1986) (holding that although the distinction between ordinary and extraordinary care is a factor to be considered, it "tends to create a distinction without meaning"); *In re* Conroy, 486 A.2d 1209, 1234–36 (N.J. 1985) (arguing that such distinctions are "nebulous" and "of limited use in legal analysis"); PRESIDENT'S COMM'N, *supra* note 6, at 88 ("[I]ts continued use in the formulation of public policy is no longer desirable."), in part because it means different things to different people. *See* VEATCH, *supra* note 92, at 152.

The boundary between ordinary and extraordinary treatment is continuously in flux because it varies with time and circumstances. First, as new medical technology is developed, treatments that were once extraordinary become ordinary. *See In re* Conroy, 486 A.2d at 1235. Second, treatment that is ordinary to some patients in one context may be extraordinary to other patients in a different context. *See* PRESIDENT'S COMM'N, *supra* note 6, at 87–88.

[126] *See* AMA CURRENT OPINIONS, *supra* note 93, § 2.20, at 13 ("[L]ife-prolonging medical treatment includes medication and artificially or technologically supplied respiration, nutrition or hydration.").

[127] Physicians have demonstrated a similar reluctance. *See* Kenneth Micetich et al., *An Empirical Study of Physician Attitudes*, *in* BY NO EXTRAORDINARY MEANS, *supra* note 49, at 39, 42 (finding that 75% of physicians surveyed would not discontinue intravenous feeding even when the patient clearly had no hope of survival, for reasons such as not wanting to appear to abandon the patient, fear of liability and potential guilt).

will clearly result from starvation and dehydration rather than from the underlying illness.[128] Even those who support removal of sustenance seem uncomfortable with the notion of allowing people to starve to death. They emphasize the similarity between sustenance and other treatments, arguing that the patient's inability to swallow causes death and that the removal of artificial nutrition simply allows the patient to die naturally.[129] This argument, however, merely manipulates the causation issue in order to justify the unpleasant reality that patients starve to death when food is removed.[130]

A related argument for always providing sustenance is that it symbolizes care and compassion; withholding nutrition and hydration is repulsive to societal norms.[131] This objection ties nutrition and hydration to the provision of routine comfort care,

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[128] *See Brophy*, 497 N.E.2d at 640 (Nolan, J., dissenting) (maintaining that death will be direct result of cessation of feeding); Cruzan v. Harmon, 760 S.W.2d 408, 412 (Mo. 1988) (en banc), *aff'd*, Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990) ("[W]e are asked to allow the medical profession to make Nancy die by starvation and dehydration."). *See also* Lynn & Childress, *supra* note 49, at 57 (commenting that caregivers are uncomfortable removing care if removal will be the "unambiguous cause of death"); Cantor, *supra* note 102, at 397 (reporting that some critics compare removing nutrition to giving a lethal injection because of the finality of the action).

Some statutes limit the right to withdraw nutrition and hydration to situations in which death will not result from starvation and dehydration. *See, e.g.*, ILL. ANN. STAT. ch. 110 1/2, para. 702(2)(d) (Smith-Hurd Supp. 1991); TENN. CODE ANN. § 32-11-103(5) (Supp. 1991). In effect, these statutes do not allow food and water to be withdrawn in any cases because of an unnecessarily narrow view of causation. In the broad sense, removal of food and water, and not the underlying illness, will cause death in every case.

[129] *See* Cantor, *supra* note 102, at 394. Courts have also made this distinction. *See, e.g.*, McConnell v. Beverly Enterprises-Connecticut, Inc., 553 A.2d 596, 605 (Conn. 1989) ("[D]eath will be by natural causes underlying the disease."); *In re* Gardner, 534 A.2d 947, 956 (Me. 1987) ("[The] cause of . . . death will not be . . . [Gardner's] refusal of care but rather his accident and his resulting medical condition, including his inability to ingest food and water.").

[130] Note that it is a medical certainty that all people will die without nutrition and hydration, yet some patients may survive indefinitely if other medical treatment is removed. For example, although her doctors expected her to die soon after they removed her respirator, Karen Ann Quinlan survived for nine years with artificial nutrition and hydration. *See* Cantor, *supra* note 102, at 398. Because medical expectations of immediate death usually are fulfilled upon removal of life-sustaining treatments other than nutrition and hydration, the "finality" distinction between nutrition and hydration on the one hand and other forms of life support on the other hand is really insignificant. *Id.* For a general outline of arguments for and against the withdrawal of nutrition and hydration, see David W. Meyers, *Legal Aspects of Withdrawing Nourishment From an Incurably Ill Patient*, 145 ARCHIVES INTERNAL MED. 125 (1985).

[131] *See* Daniel Callahan, *Public Policy and the Cessation of Nutrition*, *in* BY NO EXTRAORDINARY MEANS, *supra* note 49, at 61, 61; Lynn & Childress, *supra* note 49, at 57–58. *See also* Brophy v. New England Sinai Hosp., Inc., 497 N.E.2d 626, 640 (Mass. 1986) (Nolan, J., dissenting) ("Food and water are basic human needs. They are not medicines and feeding them to a patient is just not medical treatment.").

which all patients must receive at a minimum.[132] Adopting this argument, some statutes prohibit the removal of nutrition and hydration on the theory that food and water constitute comfort care, which must always be provided to patients.[133] Furthermore, many religious groups that generally support living-will statutes, consider nutrition and hydration to be basic care rather than medical treatment.[134]

A final argument for refusing to treat sustenance as life-sustaining treatment is concern for the integrity of the medical profession. It is argued that patients may lose confidence in physicians if physicians are allowed to hasten death, and thus the removal of food and water may undermine the physician-patient relationship.[135] Furthermore, such action is deemed incompatible with the physician's role as "healer."[136]

These arguments, however, fail to recognize that patient confidence may also be undermined if physicians are encouraged to ignore the patient's instructions.[137] Moreover, these arguments fail to distinguish between removal of artificial nutrition and hydration and removal of other technologies that apparently neither violate the integrity of the profession nor are incompatible with the role of doctors in providing care. In fact, removal

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[132] Childress, *supra* note 125, at 72.

[133] *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-3201(4) (1986); MD. HEALTH-GEN. CODE ANN. § 5-605(1) (1990). Generally, an individual's right to remove treatment is balanced against the state's countervailing interests. These state interests are outlined in Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 425 (Mass. 1977) as "(1) the preservation of life; (2) the protection of the interests of innocent third parties; (3) the prevention of suicide; and (4) maintaining the ethical integrity of the medical profession." Comfort care is typically considered to require insignificant bodily invasion, an intrusion that is insufficient to outweigh the state's interests. By grouping sustenance with comfort care, these statutes may express the idea that artificial nutrition and hydration is less burdensome than other life support, and, therefore, the individual's interest in its removal does not outweigh the state's interests in prolonging life. *But see Brophy*, 497 N.E.2d at 637 (stating that in Brophy's situation, maintenance on a G-tube is "not only intrusive but extraordinary"); *In re* Conroy, 486 A.2d 1209, 1236 (N.J. 1985) (stating that artificial feeding itself may be invasive and risky); *see also* Lynn & Childress, *supra* note 49, at 49–50 (describing the medical procedures necessary to provide food and water artificially).

[134] *See* TASK FORCE REPORT, *supra* note 27, at 26–27 (discussing such views held by a minority of Roman Catholic and Protestant sects); Michael Nevins, *Perspectives of a Jewish Physician in* BY NO EXTRAORDINARY MEANS, *supra* note 49, at 99–106 (discussing the Jewish view on the withdrawal of sustenance); Kronmiller, *supra* note 113, at 1193–94 (summarizing historical positions of various religious groups).

[135] Cantor, *supra* note 102, at 389.

[136] *Id.*

[137] *See* M. Somerville, *supra* note 34, at 277 (arguing that the breach of trust resulting from a physician ignoring his patient's desires as expressed in her living will affects the entire medical profession and the public's attitude toward its members).

of nutrition and hydration in many cases may be consistent with the physician's duty to alleviate pain and suffering.

None of these arguments for excluding nutrition and hydration focuses on patient autonomy or on the fact that individuals typically do not differentiate between medical care and nutrition and hydration in their treatment preferences.[138] Moreover, these arguments for excluding sustenance fail to recognize that the provision of food and water may not only be painful at times, but also may not provide an overall benefit to the patient.[139] If patient self-determination is the main objective of natural death acts, the legislatures should allow the withdrawal of nutrition and hydration when the provision of such treatment is futile or when the burdens of receiving such treatment outweigh the benefits to the patient.[140]

The explicit exclusion in many statutes of nutrition and hydration from the treatments that may be withdrawn, as well as the failure of other statutes to address whether nutrition and hydration can be withdrawn, probably reflects more than mere legislative discomfort with equating nutrition and hydration with medical care. Legislation is often the outcome of compromises to appease various interest groups. Therefore, some legislatures may have been forced to choose between a statute excluding nutrition and hydration from the definition of life-sustaining treatment and no statute at all. In Maryland, for example, passage of the Life-Sustaining Procedures Act required a compromise with the Maryland Catholic Conference to prohibit withdrawal of sustenance.[141] Similarly, in Pennsylvania, a living-will bill was amended to prevent refusal of tube feeding in order to satisfy the Pennsylvania Catholic Conference.[142] Thus, while legislatures theoretically may be able to "synthesize vast quantities of data and opinions from a variety of fields and to formulate general guidelines that may be applicable to a broad range of situations,"[143] in reality, they may operate in a climate

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[138] *See* L. Emanuel et al., *supra* note 107, at 894.

[139] *See* Lynn & Childress, *supra* note 49, at 52–53; Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841, 2857 (1990) (O'Connor, J., concurring) (describing the procedures used to feed patients artifically and concluding that such procedures may burden a patient's "liberty, dignity, and freedom to determine the course of her own treatment"); *id.* at 2866 (Brennan, J., dissenting) (explaining the implantation technique and describing the possible dangerous side-effects of the treatment).

[140] *See* Lynn & Childress, *supra* note 49, at 50–51.

[141] *See* Kronmiller, *supra* note 113, at 1207.

[142] Troy, *supra* note 47.

[143] *In re* Conroy, 486 A.2d 1209, 1220–21 (N.J. 1985).

that constrains their actions and leads them to produce unacceptable and ineffective solutions.[144]

Although the exclusion of nutrition and hydration from legislation has not yet been held unconstitutional,[145] courts and other authorities interpreting natural death acts have confined the reach of legislative ambivalence or opposition to the withdrawal of these treatments.[146] In many states, patients can rely on their state constitutional and common law rights to support their request to remove nutrition and hydration. For example, Nancy Cruzan had her gastrostomy tube withdrawn by court order despite the fact that Missouri's statute does not allow nutrition or hydration to be withheld or withdrawn.[147] Likewise, in *Corbett v. D'Alessandro*,[148] a Florida appellate court circumvented the prohibition on removal of sustenance in Florida's statute[149] by noting that the statute incorporates existing law and, therefore, preserves all constitutional rights, including the right to withdraw nutrition and hydration.[150] In fact, although the court did not hold the exclusion of sustenance from the living-will statute to be unconstitutional, it suggested that the exclusion would be unconstitutional if the statute precluded the removal of sustenance entirely.[151] Although the court rendered the statute's exclusion of nutrition and hydration meaningless, it still added that in those cases in which the living-will statute applies, it excludes the right to decline sustenance.[152]

In the subsequent case of *In re Browning*,[153] the same court held that a woman who had executed a living will had no remedy under the statute because the "nasogastric tube is not a statutory

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[144] *See* Johnson, *supra* note 50, at 122 (suggesting that political compromise and majority rule may prohibit legislatures from developing effective living-will legislation).

[145] *But see infra* notes 164–166 and accompanying text.

[146] However, some courts have ruled that even if an individual specifies in an advance directive that sustenance not be provided, sustenance may not be withdrawn if the statute does not encompass such treatment. *See* Couture v. Couture, 549 N.E.2d 571, 576 (Ohio Ct. App. 1989).

[147] *See* Levin, *supra* note 3, at A1. Note, however, that the state supreme court did find Missouri's living-will statute's exclusion of nutrition and hydration from the definition of death-prolonging procedure relevant to the state's policy. Cruzan v. Harmon, 760 S.W.2d 408, 420 (Mo. 1988) (en banc), *aff'd*, Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841 (1990).

[148] 487 So. 2d 368 (Fla. Dist. Ct. App. 1986).

[149] Florida's statute was not amended to allow the removal of nutrition and hydration until 1990.

[150] *Corbett*, 487 So. 2d at 370.

[151] *Id.*

[152] *Id.*

[153] 543 So. 2d 258, (Fla. Dist. Ct. App. 1989), *aff'd*, 568 So. 2d 4 (Fla. 1990).

life-prolonging procedure."[154] As in *Corbett*, however, the court looked beyond the statute and found that Mrs. Browning's guardian had the right to make a decision to terminate sustenance,[155] rendering meaningless the exclusion of nutrition and hydration from the statute. This decision also illustrates how such narrowly constructed statutes frustrate an individual's attempt to specify her desires in advance in order to avoid an adversarial inquiry into her wishes later.

The Connecticut Supreme Court went even further in confining the legislature's limitation. In *McConnell v. Beverly Enterprises-Conn., Inc.*[156] the court took advantage of poor wording in the statute to construe the exclusion of nutrition and hydration as referring only to "normal procedures" of feeding and hydration rather than to artificial means, which the court said may be refused.[157] Acknowledging that the legislative history did not indicate that the legislature intended to draw this distinction,[158] the court explained that its interpretation provided flexible guidelines for the exercise of common law and constitutional rights.[159] In effect, the court eradicated the apparent legislative restriction on the removal of artificial sustenance.

In Maryland, the attorney general attempted to remedy an inconsistency between the constitutional and common law right to refuse treatment, including artificial nutrition and hydration, and the natural death act's exclusion of such treatment.[160] The opinion interprets the statute's preamble, recognizing a person's fundamental right to control his medical decisions, in conjunction with the statute itself, which states that the living-will law should not be construed to impair any other legal rights a person has relating to treatment.[161] The opinion concludes that the legislature intended that a person be able to reject sustenance *expressly*.[162] As a result of these manipulations, a person in

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[154] *Id.* at 265. The court also found that Mrs. Browning did not have a terminal condition as defined by the statute. *Id.*

[155] *Id.* at 270. Recognizing that patients have a fundamental right to refuse health care, including nutrition and hydration, the Florida Supreme Court on review held that the district court was correct in not applying the statute. *In re Browning*, 568 So. 2d at 10–11.

[156] 553 A.2d 596 (Conn. 1989).

[157] *Id.* at 602–03.

[158] *Id.* at 602–03 & n.11.

[159] *Id.*

[160] 73 Op. Att'y Gen. (Md.) 162 (1988). *See* MD. HEALTH-GEN. CODE ANN. § 5-605(1) (1990).

[161] MD. HEALTH-GEN. CODE ANN. § 5-610(1) (1990).

[162] Op. Att'y Gen., *supra* note 160, at 182.

Maryland must explicitly request or refuse nutrition or hydration. If the person simply uses Maryland's model living will, the directive will be interpreted as stating no opinion on the provision of sustenance; the patient's intent as to the removal of sustenance would have to be determined through other means.[163] Although this decision may expand patient rights in Maryland, it also increases uncertainty as to the effect of creating a living will in that state.

The Supreme Court's holding in *Cruzan* creates additional doubt about the validity of the statutory distinction between nutrition and hydration and other medical procedures. The majority opinion did not distinguish between artificial nutrition and hydration and other medical treatment. Moreover, the majority cited with approval decisions in which state courts allowed the termination of artificial sustenance.[164] However, O'Connor and the four dissenting justices explicitly stated that there is no distinction between artificial feeding and other medical care,[165] which one commentator has suggested means that the distinction has been "obliterated as a matter of constitutional law."[166] More specifically, merely preserving existing constitutional and common law rights of individuals to refuse artificial nutrition and hydration in a preamble may no longer sufficiently guarantee the constitutionality of the statutes.

Whether nutrition and hydration have been excluded from life-sustaining procedures because of legislative ambivalence or actual legislative opposition, the exclusion as embodied in the statutes greatly constrains the abilities of individuals to exercise their rights through living wills. Even though courts have been more willing to equate nutrition and hydration with medical care, the requirement of a court procedure unnecessarily burdens the exercise of the right. In addition, to the extent that legislative enactments influence the public policy debate, such restrictions cut back, rather than advance, notions of medical autonomy. Because the Supreme Court apparently approves of treating nutrition and hydration as medical care that may be refused, legislatures should overcome political restraints and their own fears and concerns, and they should include nutrition

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[163] *Id.* at 184. The opinion suggests that procedures for surrogate decision-making should be used.

[164] Cruzan v. Director, Mo. Dep't of Health, 110 S. Ct. 2841, 2849–50 (1990).

[165] *Id.* at 2857 (O'Connor, J., concurring); *id.* at 2866 (Brennan, J., dissenting).

[166] *Constitutional Law Conference*, *supra* note 14, at 2275 (statement of Kamisar).

and hydration among the treatments that patients may elect to refuse.

## III. Preservation of Physician Control and Protection of Physician Action

The logical corollary of increasing individual control over refusal-of-treatment decisions is decreasing physician control over these same decisions. Many physicians do not want to lose their authority in this realm. Living-will statutes, however, do not necessarily reduce physician authority. Through ambiguous terms, the statutes allow broad physician interpretation and provide only limited liability for failing to follow a patient's directive, thereby preserving the medical profession's control over treatment decisions. As a result, the natural death acts afford less protection to individual autonomy and self-determination and represent an illusion of control by patients over their decisions. At the same time, however, these interpretive problems and ambiguous liability provisions can also constrain physician action and further impede the implementation of patient wishes.

### A. *Physician Control*

The everyday reality of medical decision-making clearly requires physicians to exercise a great deal of control over which treatments will be started. Especially in emergency situations, doctors may not have time to find a living will, determine its validity, read it to discover the patient's wishes and decide whether the patient's condition fits within the statutory terms.[167] It is only once the patient is stable, the pressure of the emergency is over, and the decision must be made about beginning another treatment or stopping one that was begun that doctors should turn to living wills. When physicians refuse to honor the patient's express wishes in these non-emergency situations, they undermine individual autonomy.

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[167] *See* Anne A. Cote, *The Hospital Perspective*, 13 Law, Med. & Health Care 269, 270 (1985) (describing the difficulties facing a hospital when it is presented with the living will of an individual admitted to the emergency room).

Despite public support for individual autonomy in refusal-of-treatment decisions, many physicians continue to believe that the role for patient autonomy in treatment decisions is limited and that a medical professional should make most of these decisions.[168] One study found that one-third of the physicians surveyed believed that their training and experience gave them greater authority than the patient to make life-sustaining treatment decisions.[169] Another study found that physicians were reluctant to implement living wills with which they disagreed.[170] Some physicians feel that living wills unnecessarily interfere with their professional role and that they demonstrate a lack of confidence in physicians' judgments concerning what treatments are in their patients' best interests.[171]

A recent Minnesota termination-of-treatment case provides an extreme illustration of this belief. In what appears to be the first case of its kind,[172] doctors went to court to have treatment removed from a patient against the wishes of the patient's family and against the previously expressed oral wishes of the patient herself.[173] The doctors in the case believed that it undermines the integrity of the medical profession to be forced to provide care that they think is "inappropriate and which can't advance the patient's personal interests."[174]

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[168] *See* Susanna E. Bedell & Thomas L. DelBanco, *Choices about Cardiopulmonary Resuscitation in the Hospital: When Do Physicians Talk with Patients?*, 310 NEW ENG. J. MED. 1089, 1091 (1984); *see generally* Joel M. Zinberg, *Decisions for the Dying: An Empirical Study of Physicians' Responses to Advance Directives*, 13 VT. L. REV. 445, 481–84 (1989) (suggesting that physicians' desires to retain control over these decisions account for their reluctance to honor living wills in some cases); Danis et al., *supra* note 34, at 887 (concluding that physicians consider patient autonomy as only one of various competing principles relied on when making the best decision).

[169] *See* Kent W. Davidson et al., *Physicians' Attitudes on Advance Directives*, 262 JAMA 2415, 2419 (1989).

[170] *See* Zinberg, *supra* note 168, at 483.

[171] *See* Bedell & DelBanco, *supra* note 168, at 1091; Zinberg, *supra* note 168, at 482.

[172] *But see* Brennan, *supra* note 54, at 806–07 (finding that the Optimum Care Committee at Massachusetts General Hospital frequently recommends a do-not-resuscitate order regardless of the wishes of patients' families and concluding that this approach represents an increased willingness on the part of physicians to act in what they believe are the best interests of the patient).

[173] *See* Lisa Belkin, *As Family Protests, Hospital Seeks An End to Woman's Life Support*, N.Y. TIMES, Jan. 10, 1991, at A1. On July 1, 1991, a judge ruled in favor of the family, holding that the doctors could not remove the woman's life support. *Judge Denies Request to Cut Life Support*, CHI. TRIB., July 2, 1991, at 3. Refusing to focus on the futility and cost of the treatment, the judge determined that the woman's husband was best situated to act upon his wife's desires. *Id.* This case, therefore, can be viewed as a victory of patient automony and self-determination over physician control of medical decisions.

[174] Robert Steinbrook, *Hospital or Family: Who Decides the Right to Die?*, L.A. TIMES, Feb. 17, 1991, at A1. *See also* Barber v. Superior Court, 195 Cal. Rptr. 484, 491

Rather than diminishing the impediment that physician control poses to patient autonomy, living-will statutes may further physicians' abilities to direct patient care. Although living wills in theory provide a medium through which a patient can influence his future treatment decisions, the statutes reflect a reluctance to turn the treatment decision entirely over to the patient.[175] Under the living-will statutes, "[e]very important decision" is "delegated to the 'attending physician.'"[176] For example, the physician must declare the patient terminally ill before the patient's wishes may be implemented. The physician must determine whether death will occur imminently or in a short time. In addition, the statutes charge the physician with determining whether a particular treatment is life-sustaining.[177] The statutes thus leave a great deal of room for physician manipulation and the projection of physicians' values onto what is supposed to be the patient's decision.[178]

Generally, living-will statutes attempt to protect patient autonomy from physician control by requiring physicians to follow the patient's wishes or to transfer the patient to another institution.[179] These provisions assume, perhaps incorrectly, that transfer will be easy.[180] Furthermore, the "bite" of the transfer provisions in the form of liability for failure to transfer varies

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(Cal. Ct. App. 1983) (upholding right of physician to discontinue treatment once treatment becomes futile in the opinion of the physician).

[175] *See* Johnson, *supra* note 50, at 123, 114–15, 124–28.

[176] Marzen, *supra* note 34, at 471.

[177] That is, in many statutes, a treatment is life-sustaining only if it serves solely to prolong life. The physician must decide whether a treatment prolongs life.

[178] *See* Marzen, *supra* note 34, at 472 (arguing that the structure of the statute encourages physicians to take advantage of interpretive loopholes and to avoid implementing a living will when it is personally disadvantageous to the physician). *See also* Sidney H. Wanzer et al., *The Physician's Responsibility Toward Hopelessly Ill Patients*, 310 NEW ENG. J. MED. 955, 956 (1984) (suggesting that physicians are strongly influenced by their personal attitudes and values).

[179] *See, e.g.*, ALASKA STAT. § 18.12.050 (1991); ILL. ANN. STAT. ch. 110 1/2, para. 707 (Smith-Hurd Supp. 1991). In contrast, Colorado, Connecticut, and Delaware do not have transfer provisions in their statutes. Presumably, if the physician is unwilling to follow the directive, the only remedy in these states would be to get a court order to remove treatment.

[180] *See The Patient Self-Determination Act: Hearings on S. 1766 Before the Subcomm. on Medicare and Long Term Care Finance Comm. of the U.S. Senate*, 101st Cong., 2nd Sess. 5 (1990) (testimony of Julianne Delio, woman who fought to have her husband's treatment removed, noting that she had to go through a "heartwrenching search" before her husband could be transferred and letter from Julianne Delio to New York State Task Force on Life and the Law, reporting that transfers burden the family with paperwork, bills, and the trauma of becoming familiar with new staff and surroundings).

enormously among the states.[181] Some states do not require physicians to follow the directives at all. That is, the document is regarded merely as evidence of the patient's wishes, and the physician is given discretion over whether or not to implement it. For example, in Connecticut, the physician must decide to remove treatment based on his "best medical judgment" and should only "consider" the patient's wishes as expressed in the directive.[182] Whether this discretion is meant to cover only situations in which the patient's directive requires termination of treatment for treatable conditions or all termination decisions is unclear. Nevertheless, this discretion seems to apply not only in the emergency room situation, but also when decisions are being made about a patient whose condition has stabilized.

Other statutes contain a "disguised provision for physician control at the expense of patient autonomy."[183] These provisions provide physicians with immunity if they remove treatment "in good faith and pursuant to reasonable medical standards" in accordance with a declaration.[184] In effect, these provisions give the physician broad discretion over whether to effectuate the patient's wishes, and the physician's decision is measured by a subjective standard. As long as the physician's decision is made in good faith, it takes priority over the patient's wishes.

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[181] *Compare* ALASKA STAT. § 18.12.070 (1991) (penalty for not transferring includes civil damages and costs incurred because of the failure to transfer); TENN. CODE ANN. § 32-11-108 (Supp. 1991) (civil liability and professional discipline for failure to transfer) *and* D.C. CODE ANN. § 6-2427(b) (1981) (failure to transfer is unprofessional conduct); HAW. REV. STAT. § 327D-17(a) (1991) (failure to transfer constitutes professional misconduct) *with* IND. CODE ANN. § 16-8-11-14(e) (Burns 1990) (no penalty for failure to transfer); IOWA CODE ANN. § 144A.8 (West 1989) (no penalty for failure to transfer).

[182] CONN. GEN. STAT. ANN. § 19a-571 (West Supp. 1991). *See also* CAL. HEALTH & SAFETY CODE § 7191(c) (West Supp. 1991) (attending physician may give weight to directive executed before patient is diagnosed with terminal condition as evidence of patient's wishes, but physician is not liable for failing to effectuate directive); IND. CODE ANN. § 16-8-11-11(f) (Burns 1990) (living will does not obligate physician to withhold or withdraw life-prolonging procedures but is "presumptive evidence" of the patient's desires and shall be given great weight by the physician); NEV. REV. STAT. ANN. § 449.640 (Michie 1986) (physician must give great weight to declaration as evidence of patient's wishes, but attending physician may consider other factors in determining whether to follow directive).

[183] Gelfand, *supra* note 61, at 771.

[184] *See, e.g.*, ALA. CODE § 22-8A-7 (1990); KAN. STAT. ANN. § 65-28,106 (1985); W. VA. CODE § 16-30-7 (Supp. 1991). *Cf.* ARIZ. REV. STAT. ANN. § 36-3205(c) (1986) (no physician who relies on directive shall be liable for withholding or withdrawing treatment pursuant to declaration); IDAHO CODE § 39-4508 (Supp. 1991) (no physician acting in accordance with wishes of patient shall be liable for withholding or withdrawing treatment).

### B. *Fear of Liability*

Although immunity provisions may decrease individual autonomy by granting more physician control over decision-making, immunity provisions should improve the implementation of living wills by removing any fear of liability that a physician has about following a living will. In reality, however, immunity provisions have had little success allaying doctors' concerns about liability.[185] Despite the fact that only one physician has been prosecuted, ultimately unsuccessfully, for removing life-sustaining treatment,[186] doctors and hospitals continue to seek court approval of decisions to discontinue treatment because they fear liability for their decisions.[187] Fear of liability continues to be an overriding factor motivating treatment decisions.[188]

Although physicians' fears in part stem from uncertainty regarding the terms of the statutes, such as what specific conditions fall within the statutory definition of terminally ill,[189] the immunity provisions themselves may heighten doctors' fears. Some statutes require that physicians act in accordance with certain requirements in order to fall within the immunity provisions.[190] Therefore, physicians may be held liable for errors

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[185] *See AMA Survey*, *supra* note 9, at 9 (54% of physicians surveyed were uncertain of their legal risks and responsibilities); Zinberg, *supra* note 168, at 481 (commenting that even after physicians learned of the statutory immunity, they said they would not rely on the statute for legal protection); Redleaf et al., *supra* note 98, at 939 (27% of doctors stated that the Act has made them uncertain about their liability for discontinuing treatment).

[186] Barber v. Superior Court, 195 Cal. Rptr. 484 (Cal. Ct. App. 1983). The court in *Barber* dismissed the criminal charges against the physicians, holding that if certain conditions are met, physicians have no duty to continue treatment. *Id.* at 491–93.

[187] *See, e.g.*, Bartling v. Superior Court, 209 Cal. Rptr. 220, 223 (Cal. Ct. App. 1984) (although patient had executed living will, doctors still refused to remove support because they feared liability); Corbett v. D'Alessandro, 487 So. 2d 368, 370 (Fla. Dist. Ct. App. 1986) (physicians were "reluctant to discontinue the nasogastric sustenance without judicial intervention and approval for fear of civil and/or criminal liability."); John F. Kennedy Memorial Hosp. v. Bludworth, 452 So. 2d 921, 922 (Fla. 1984) (although patient had executed "mercy will," the hospital feared liability and, therefore, filed for declaratory relief, "asking the court to determine its rights and liabilities relating to continuation or discontinuation" of artificial life support).

[188] *See* Zinberg, *supra* note 168, at 479–81.

[189] For a discussion of the effect of ambiguous terms on physicians' perceptions of liability, see generally Linda F. Gould, *Right to Die Legislation: The Effect on Physicians' Liability*, 39 MERCER L. REV. 517, 529–33 (1988).

[190] *See, e.g.*, CAL. HEALTH & SAFETY CODE § 7190 (West Supp. 1991); IDAHO CODE § 39-4508 (Supp. 1991); IND. CODE ANN. § 16-8-11-14 (Burns 1990). *See also* CONN. GEN. STAT. ANN. § 19a-571 (West Supp. 1991) (requiring physician to act with best medical judgment, to diagnose patient with terminal condition, to obtain informed consent of patient's next of kin and to take into account patient's wishes in order to be protected from liability).

of law, such as removing treatment from a non-terminal patient or implementing a living will that, although facially valid, does not comply with their states' natural death acts.[191] Physicians in such states may think that they need a lawyer to interpret the technical requirements of the acts and to ensure that the living wills are valid.[192] Although such statutes seem to go further in protecting patient autonomy by limiting physician discretion and by forcing physicians to abide by the declaration, they may also go too far in tying the physician's hands.

Immunity provisions that protect physicians acting in accordance with "reasonable medical standards" discussed above[193] may not greatly improve the stricter provisions. Ironically, although these provisions may increase physician control by allowing the physician to trump the patients' written desires, the statutes may also afford greater protection to patient autonomy if a physician implements instructions that are outside of the statutory authorization but within the ambit of reasonable medical judgment. For example, reasonable medical standards may include withdrawing treatment from non-terminal patients or withdrawing nutrition and hydration, both of which are actions prohibited under some state statutes. At the same time, such statutes increase ambiguity, which further hampers decision-making by a fearful physician. Some physicians may question whether such statutes actually protect them from liability for actions that do not comply with the technical terms of the statutes but, nevertheless, satisfy reasonable medical standards.

The implications of physicians' fear of liability are that physicians may refuse to implement living wills even when all of the statutory prerequisites have been met. Fearful physicians may be less concerned with patient autonomy than with the family's wishes because their perception of liability will be closely tied to the need for family consensus.[194] One study found that physicians will not implement a patient's directive if the family dis-

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[191] Some statutes allow physicians to presume that the living will is valid on its face. *See, e.g.*, ALA. CODE § 22-8A-7 (1990); COLO. REV. STAT. § 15-18-110 (West 1990); ILL. ANN. STAT. ch. 110 1/2, para. 707 (Smith-Hurd Supp. 1990). *But see* Marzen, *supra* note 34, at 457 (criticizing the uniform act for relaxing safeguards that ensure that only valid living wills are followed).

[192] *See* Gould, *supra* note 189, at 528; Redleaf et al., *supra* note 98, at 931 (noting that doctors surveyed often consult a lawyer regarding their uncertainties).

[193] *See supra* notes 183–184 and accompanying text.

[194] *See* Zinberg, *supra* note 168, at 477 (arguing that the issues of liability and family consensus overlap).

agrees about what action to take.[195] Consequently, physicians may over-treat patients and, at the same time, ignore patients' previously expressed wishes.[196] Therefore, the liability provisions may be unsuccessful both in regulating physician conduct to ensure that patients' wishes are carried out and in protecting physicians from liability for implementing living wills. Although the problem can be ameliorated by clearer, more carefully worded statutes, a change in physicians' perceptions and attitudes must also occur to make physicians more comfortable implementing living wills.

## IV. PHYSICIANS, PATIENTS AND LIVING WILLS: PHYSICIAN UNDERSTANDING AND PATIENT COMMUNICATION

Because the natural death acts are ambiguous in their most important terms, they may create various practical impediments to the implementation of living wills. First, because the statutes are so difficult to decipher, physicians cannot possibly know or understand the technical requirements of natural death acts. Conversely, even if a physician does understand the statutes, he may not be able to interpret the patient's wishes from the vague language often used in the living will. The lack of adequate communication between physicians and patients further complicates this problem. These factors combined may result in the patient's wishes, even if expressed in a living will, being ignored.

A 1988 American Medical Association survey found that 78% of physicians favor withdrawing life support from hopelessly ill or irreversibly comatose patients if patients or their families request it.[197] Similarly, a study in Arkansas found that 79.2% of physicians expressed a positive attitude toward advance directives.[198] However, this enthusiasm is not borne out either in physicians' attempts to understand or in their abilities to comprehend the requirements of the state natural death acts. Evidence shows that physicians generally do not know or under-

[195] *Id. But see* Brennan, *supra* note 54, at 805 (finding that physicians are increasingly asking that treatment be removed despite the contrary wishes of the family).

[196] *See* Ronald Cranford, *A Physician's Perspective*, 13 LAW, MED. & HEALTH CARE 279 (1985).

[197] *See AMA Survey*, *supra* note 9, at 9. *See also* Janice Somerville, *Survey Finds Support Among Colorado MDs for Euthanasia*, AM. MED. NEWS, July 1, 1988, at 17 (finding that more than 35% of Colorado physicians would administer lethal drugs to terminally ill patients if it were legal).

[198] Davidson et al., *supra* note 169, at 2418.

stand the technical requirements of their states' natural death acts.[199] In Colorado, for example, 23.3% of physicians surveyed were not familiar with the Colorado living-will statute.[200] Although only 8% of doctors in California were unfamiliar with the California Natural Death Act, only 22% were aware of the act's technical requirements.[201] Finally, a study of California and Vermont physicians with experience treating patients who had executed advance directives found that few knew that their states had living-will statutes and even fewer knew the specific statutory requirements.[202] To some extent, these statistics may indicate laziness on the part of the medical profession and resentment of legal intervention in what physicians consider to be the medical realm. For the most part, however, physicians' lack of understanding of the statutes' terms should not be surprising because, as this Note demonstrates, the statutes themselves are ambiguous and difficult to understand,[203] even by individuals trained in the law. Notwithstanding the reason behind these statistics, such data indicate that, in practice, the natural death acts may have little effect on treatment decisions.

The confusing nature of the natural death acts is compounded by the fact that the acts do not seem to be written with the needs of physicians in mind. First, as discussed above, some of the most important operational terms in the statutes are "medically vague" or "linguistically vague" and, therefore, are subject to various interpretations.[204] This vagueness may allow physi-

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[199] If statutes are so unclear that physicians cannot understand them, it is even more unlikely that the people who are supposed to exercise their informed consent by filling out a living will are able to understand the meaning of the form that they sign (especially if they ask a lawyer, who has no medical knowledge, to explain the implications of the various requirements on the provision of medical care). To my knowledge, no studies have been done on *patient* understanding of the terms of living wills; however, in my experience helping AIDS patients fill out living wills, many do not sign the wills with the optimal amount of "informed consent."

[200] J. Somerville, *supra* note 197, at 17.

[201] Redleaf et al., *supra* note 98, at 930.

[202] *See* Zinberg, *supra* note 168, at 472 (8% of California and 44% of Vermont physicians did not know of the statute, and only 15% of California and 11% of Vermont physicians knew the statutory terms).

[203] *Cf.* Redleaf et al., *supra* note 98, at 930 & n.82 (finding that while 42% of doctors surveyed claimed to have read the act, only 21.8% correctly answered a question concerning when life support may be withdrawn under the act).

[204] *See* Linda L. Emanuel & Ezekiel J. Emanuel, *The Medical Directive*, 261 JAMA 3289, 3292 (1989). The authors consider absolute phrases, such as "if there is no hope of recovery," which are often used in definitions of terminal condition, to be medically vague because the phrases ignore the inherent uncertainty in applying clinical knowledge to particular patients. *Id.* Linguistic vagueness addresses the limits of language in defining a term. The authors recommend specifying the treatments encompassed by the term life-sustaining treatment and the situations included in a terminal condition. *Id.* at

cians to exercise too much discretion when withdrawing treatment in accordance with the statutes.[205] Alternatively, uncertainty may constrain treatment decisions, causing physicians to over-treat patients.[206]

By contrast, living-will statutes are too restrictive because they attempt to confine a wide range of medical circumstances within narrow definitions, and they require greater certainty than is medically possible. For example, limiting the operation of the living will to circumstances where the patient is terminally ill ignores the variety of clinical situations in which treatment decisions must be made.[207] In addition, some statutes require an unrealistic level of medical certainty concerning the patient's prognosis before doctors may implement the living will.[208] By failing to take account of the inherent uncertainty in rendering a medical prognosis, the acts may further hinder physicians' attempts to implement the patients' wishes.[209]

The problems of interpretation go beyond the terms of the statutes themselves; doctors also face difficulties in discerning patients' intent from the living wills. In some sense, the living

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3291–92. Some states have already adopted this approach. *See, e.g.*, ILL. ANN. STAT. 110 1/2, para. 702 (Smith-Hurd Supp. 1991) ("death delaying procedure" includes: "assisted ventilation, artificial kidney treatments, intravenous feeding or medication, blood transfusions, tube feeding" among other procedures); N.D. CENT. CODE § 23-06.4-02(7) (Interim Supp. 1991) ("terminal condition" does not include: "senility, Alzheimer's disease, . . . comatose conditions that will not result in imminent death"). Although this approach is appealing because it seems to provide greater clarity, it runs the danger of leading to erroneous presumptions about the patient's intent if the patient requires a treatment that is not specified. The living will cannot take into account all possible treatments and situations. *See* VEATCH, *supra* note 92, at 152 (stating that specifying treatments to be provided or removed may lead to under-treatment or over-treatment, respectively).

[205] *See* Marzen, *supra* note 34, at 472 (commenting that the vague terms and structure of the act gives physicians wide latitude in determining whether the act will apply to a particular patient). *See also* Davidson et al., *supra* note 169, at 2418–19 (finding that physicians surveyed believed that advance directives lead to less aggressive treatment for all patients).

[206] *See* Redleaf et al., *supra* note 98, at 939–40 (reporting that since the act took effect, 10% of doctors surveyed said that they administered treatment in situations where they previously would have withheld it).

[207] *See* L. Emanuel & E. Emanuel, *supra* note 204, at 3289. At least one court recognized this lack of flexibility. *See In re Browning*, 543 So. 2d 258, 268 (Fla. Dist. Ct. App. 1989), *aff'd*, 568 So. 2d 4 (Fla. 1990) ("Rather than forcing the physician to fit the patient's condition within a legal definition of a medical condition, we would allow the physician the opportunity to provide a more complete and descriptive analysis of the patient's physical condition.").

[208] *See, e.g.*, OKLA. STAT. ANN. tit. 63, § 3102(8) (West Supp. 1991) (requiring doctors to determine that death will occur within hours or days before they can certify the patient as terminal).

[209] *See* Wanzer et al., *supra* note 178, at 956 (arguing that requiring certainty beyond a reasonable point can "handicap" the physician dealing with hopeless cases).

will "conceals the real opportunities for misunderstanding and the range of discrete decisions that often must be made" and "reduces a sometimes complex judgment into a slogan: No machines!"[210] The model directives included in state statutes typically contain a vague statement of the patient's wishes.[211] This lack of specificity provides the physician with little guidance for interpreting those wishes in the actual clinical setting.[212] However, even those patients who add additional language to clarify their intent may be unable to provide guidance for unanticipated circumstances.[213] Moreover, by providing specific instructions, patients run the risk that their directives will be interpreted to exclude treatments that they did not specify.[214]

Ambiguous living-will statutes are not entirely to blame for physicians' difficulties in interpreting living wills. Lack of communication between doctor and patient is one of the primary reasons that physicians do not know their patients' intents.[215] Many patients indicate a desire to discuss their wishes concerning life-sustaining treatment with their physician; however, few take the opportunity to do so.[216] Doctors may not make any effort to discuss treatment, perhaps thinking that patients will be uncomfortable discussing death when they are healthy and that discussions will make ill patients anxious or depressed. However, the most prominent reason cited by patients for failure to discuss treatment options with their physicians is that the patients expect their physicians to introduce the discussion;

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[210] Johnson, *supra* note 50, at 116.

[211] *See, e.g.*, CAL. HEALTH & SAFETY CODE § 7188 (West Supp. 1991):

> If at any time I should have an incurable injury, disease, or illness certified to be terminal . . . and where the application of life-sustaining procedures would serve only to artificially prolong the moment of my death . . . I direct that such procedures be withheld or withdrawn, and that I be permitted to die naturally.

[212] *See* Stuart J. Eisendrath & Albert R. Jonsen, *The Living Will: Help or Hindrance?*, 249 JAMA 2054, 2055 (1983) (showing how the living will can be a hindrance when it contains ambiguous instructions, because even if a physician wants to follow the patient's wishes, he may be unable to do so). To remedy the problem of ambiguity regarding the patient's intent, two physicians developed an alternative to the living will called the medical directive, specifying four illness scenarios and twelve treatment categories and requiring the patient to provide treatment choices for each hypothetical situation. *See* L. Emanuel & E. Emanuel, *supra* note 204, at 3290.

[213] *See* David Orentlicher, *Advance Medical Directives*, 263 JAMA 2365 (1990).

[214] *See* MEISEL, *supra* note 15, §§ 10.3, 10.24, at 317, 349.

[215] *See* L. Emanuel & E. Emanuel, *supra* note 204, at 3289.

[216] *See* Bernard Lo et al., *Patient Attitudes to Discussing Life-Sustaining Treatment*, 146 ARCHIVES INTERNAL MED. 1613, 1614 (1986) (finding that although 68% of patients surveyed wanted to discuss life-sustaining treatment with their doctors, only 6% had done so). *But see* Frankl et al., *supra* note 73, at 647 (reporting that 37% of patients surveyed did not desire to discuss life support with their physicians).

discomfort with the topic itself is only a minor reason for this lack of discussion.[217] Hospitals apparently do not facilitate communication; only four percent of hospitals surveyed actively ask patients whether they have completed a living will.[218]

Instead of encouraging doctor-patient communication, living-will statutes may merely widen the communication gap.[219] Most existing statutes place the burden of notifying the doctor about the living will on the patient.[220] As a result, many doctors do not find out about the living will until after the patient has become incompetent, when it is too late to clarify the patient's intent.[221] Conversely, because they do not speak with their physician in advance, many individuals may never discover that their doctor disagrees with withdrawal of treatment and would refuse to honor their directive.

In addition, the living will is viewed as a legal document rather than a medical document. Therefore, patients may not feel the need to discuss treatment options with their physician once they have put their wishes in writing.[222] Natural death acts need to be rewritten to encourage patients to discuss their living wills with their physicians. One solution may be to require physicians to sign the living wills and to indicate that they have read the

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[217] *See* L. Emanuel et al., *supra* note 107, at 892–93 (comparing 29% of patients who would discuss upon physician initiative with only 5% who have difficulty with the subject itself).

[218] *See* Van McCrary & Botkin, *supra* note 30, at 2413. Note that this statistic is likely to change in November 1991 when the Patient Self-Determination Act, *see supra* note 28 and accompanying text, becomes effective.

[219] Some statutes expressly state that increased communication among the physician, patient and family members is one of their express purposes. *See, e.g.*, FLA. STAT. ANN. § 765.02 (West 1986); MO. ANN. STAT. § 459.055(4) (Vernon Supp. 1991). Yet these statutes suffer from the same infirmities described below and rely on the parties themselves to initiate the conversation.

[220] *See, e.g.*, ALA. CODE § 22-8A-4(b) (1990); TEX. HEALTH & SAFETY CODE § 672.003(e) (West Supp. 1991). Presumably, the burden is placed on the patient to limit the liability of doctors and hospitals in cases where they do not discover the existence of a living will and continue to provide life-sustaining treatment. *Cf.* MISS. CODE ANN. § 41-41-107(2) (Supp. 1990) (requiring all living wills to be filed in the state bureau of vital statistics and the state board of health).

[221] *See* Eisendrath & Jonsen, *supra* note 212, at 2055; Van McCrary & Botkin, *supra* note 30, at 2413. *Cf.* MONT. CODE ANN. §§ 50-9-102(8), 102(11), 204(1)(c) (1989) (allowing emergency medical personnel, upon seeing a "reliable documentation" such as a standardized notification card or bracelet indicating that the patient has filled out a living will, to withhold care from a qualified patient under state-wide standards). Although Montana's system does not resolve the interpretation problem, it at least addresses the notification issue.

[222] *See* Johnson, *supra* note 50, at 129 ("[L]iving-will statutes elevate documentation over conversation. They encourage individuals to make decisions concerning refusal of treatment in the lawyer's office rather than the doctor's office, by filling out a form rather than engaging in open discussion with persons involved in the process.").

document, discussed it with the patient, and are prepared to implement it fully if the need arises. Likewise, medical schools should teach their students that this type of discussion is part of routine patient care and that physicians may help patients fill out living wills during normal visits.[223]

## V. CONCLUSION

Legislation can be an effective way to deal with patient autonomy in medical decision-making for several reasons. It can provide a formal mechanism for individuals to ensure that their wishes will be followed. It can provide a framework within which physicians, and sometimes, courts, can make decisions. It can set the tone for public acceptance of decisions to refuse treatment. Moreover, legislation provides a "shield against the psychological nakedness" involved in judicial inquiries into patients' desires.[224] Nevertheless, the natural death acts enacted to date have only minimally fulfilled this potential. Part of the problem stems from the conflicting pressures and claims for control over treatment decisions. To the extent that legislation will always represent a compromise between different interests, the statutes may never entirely protect individual choice. Yet, another part of the problem seems to be legislative ambivalence toward removal of treatment itself and an unwillingness to take an active role in advancing public policy. This aspect of the problem can be overcome, and if it is, the statutes will be much more effective in fulfilling their stated purpose.

Ultimately, patients and physicians must make treatment decisions together. A further problem with the statutes is that they were not written to enable physicians, who are charged with implementing living wills, to understand their patients' wishes. Even if the definitions were improved from a legal standpoint so that lawyers and courts could better understand them, it may be unrealistic ever to expect physicians to understand and to memorize a statute that is several pages long. Therefore, not only should the statutes be rewritten, but they should also be simplified so that physicians can understand their obligations.

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[223] One study found that such a procedure would not be lengthy; three-quarters of the patients could understand and complete the documents in 15 minutes. L. Emanuel et al., *supra* note 107, at 895.

[224] Johnson, *supra* note 50, at 118.

Moreover, even with clearer statutes, physicians may still be unable to discern patients' intents from the vague language used in the living wills and the inability of living wills to provide guidance and to anticipate all circumstances that may arise. This problem can be ameliorated, although not entirely eliminated, by training physicians to take a more active role in determining their patients' wishes.

To some extent natural death acts and living wills will never fully protect patient autonomy. Recognizing these limitations, many commentators advocate the appointment of an agent to make health care decisions in a durable power of attorney.[225] Twelve states either authorize the appointment of a proxy or provide a priority list of people able to make withdrawal decisions on the declarant's behalf in their natural death acts.[226] Twenty states and the District of Columbia have durable-power-of-attorney statutes that permit agents to make medical decisions, including the withdrawal of treatment.[227] The durable power of attorney has some specific advantages over the living will. An agent can be instrumental in interpreting the patient's wishes and making decisions based on the circumstances as they arise. In this respect, the agent would take some of the burden of interpreting living wills off physicians. In addition, patient autonomy is better protected if an agent, who knows best what the patient would want in a particular situation, makes decisions rather than a doctor who has not discussed life-sustaining treatment with the patient or, worse yet, a judge who has never even met the patient. Moreover, an agent may be able to avoid the limitations of natural death acts, such as the terminal-condition requirement and the exclusion of sustenance from the definition of life-sustaining treatment, because durable powers of attorney can be used to make all health care decisions. For these reasons, the execution of a durable power of attorney

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[225] *See* Orentlicher, *supra* note 213, at 2366; Mark S. Fowler, Note, *Appointing an Agent to Make Medical Treatment Choices*, 84 COLUM. L. REV. 985, 1000 (1984); SENATE SPECIAL COMMITTEE ON AGING, MATTER OF CHOICE: PLANNING AHEAD FOR HEALTH CARE DECISIONS, S. DOC. NO. 99-M, 99th Cong., 2nd Sess. 33 (1987); *see also* Danis et al., *supra* note 34 at 887 (concluding that living wills do not fully protect individual autonomy and that durable powers of attorney should be considered more seriously as a mechanism to protect individual autonomy).

[226] The states are Arkansas, Delaware, Florida, Idaho, Louisiana, Minnesota, New Mexico, North Carolina, Oregon, Texas, Utah and Virginia. SOCIETY FOR THE RIGHT TO DIE, STATE LAW GOVERNING DURABLE POWER OF ATTORNEY, HEALTH CARE AGENTS, PROXY APPOINTMENTS (Aug. 3, 1990).

[227] *See id.*

may solve many of the problems that currently arise under the natural death acts.

If natural death acts afford only limited protection to patient autonomy, is it therefore useless to sign a living will in an attempt to avoid a fate similar to that of Nancy Cruzan? The answer is no. Despite their shortcomings, the living wills authorized by natural death acts do provide evidence of patients' wishes, and probably, the clear and convincing evidence necessary to satisfy a court. To further preserve their wishes, individuals should try to provide specific instructions and to discuss their wishes with their physicians. Finally, to aid in interpretation problems, individuals should execute durable powers of attorney so that someone whom they know well will be able to resolve ambiguities in their written instructions. Therefore, efforts to publicize living wills since *Cruzan* have not been made in vain, and as more people execute living wills, fewer "Cruzan" situations will arise. Because of the various shortcomings of living wills and natural death acts, however, living wills do not provide a "simple" solution to the problem.

# NOTE

# RECONSIDERING INALIENABILITY FOR COMMERCIALLY VALUABLE BIOLOGICAL MATERIALS

HANNAH HORSLEY*

*The existence of property rights in the human body has long been the subject of debate. Current law prohibits the sale of human body parts for transplantation or for medical research. In this Note, Ms. Horsley describes why the law should recognize the distinction between those human body parts that have always been recognized to have intrinsic, functional value and those which traditionally have been considered biological waste. She argues that patients ought to retain an alienable property interest in non-functional tissue that becomes commercially valuable. Ms. Horsley proposes both legislative and judicial reforms that would allow patients to profit from research conducted on their therapeutically excised tissues and cells.*

Recent developments in biotechnology have transformed the use of human biological materials[1] in medicine, scientific research, and commercial science. These developments have enabled scientists to use a wide variety of human biological materials in entirely new ways, establishing a new context in which to explore the legal status of the human body and its constituent parts.

For the purposes of this Note, biological materials will be divided into two distinct categories according to the ways in which they are used. The intrinsic value of most biological materials lies in the successful retention of their original characteristics and functions when they are removed and transferred. Organs and tissues removed for transplantation exemplify the biological materials in this first category ("type-1"). The second category consists of biological materials which have no intrinsic value in their original form, but which are essential raw material used in the development of other scientifically and commercially valuable products ("type-2"). An example of this

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[1] For the purposes of this Note, biological materials are defined as organs, tissues, and cells, or any subpart thereof. This definition is coextensive with the definition of "human organ" in the National Organ Transplant Act, 42 U.S.C. § 274 (1988). *See infra* note 112 and accompanying text.

second category is malignant tissue that is removed from the body for therapeutic purposes and then used to develop a cell line.

Because of the universally recognized value of type-1 biological materials, ethicists, policy-makers, and legal scholars have sought to determine the legal rights that should pertain to them, as well as ways to facilitate their use and transfer.[2] In contrast, because the value of type-2 materials has been discovered only recently, there has been less consideration of their use. Moreover, much of the existing analysis in this area simply has applied the arguments related to type-1 biological materials to type-2 materials without recognizing the important distinctions between the two.[3] The escalating demand for type-2 biological materials in research and commercial development signals the need for an independent analysis of the legal rights implicated by transactions involving type-2 materials.

This Note argues that individuals should have property rights in their own bodies which include the right to alienate their type-2 biological materials. Part I provides background on developments in modern biotechnology and explains the context in which such transactions occur. Part II argues for the right of market-alienability in type-2 materials. Finally, Part III surveys two different proposals for law reform that reflect the substantive differences between type-1 and type-2 materials.

## I. MODERN DEVELOPMENTS IN BIOTECHNOLOGY

The use of the human body and its constituent parts for purposes beyond their original physiological functions is not

[2] *See, e.g.*, RUSSELL SCOTT, THE BODY AS PROPERTY (1981); Lori B. Andrews, *My Body, My Property*, 16 HASTINGS CENTER REP. 28 (1986); Henry Hansmann, *The Economics and Ethics of Markets for Human Organs*, 14 J. HEALTH POL., POL'Y & L. 57 (1989); Note, *The Sale of Human Body Parts*, 72 MICH. L. REV. 1182 (1974); Richard Schwindt & Aidan R. Vining, *Proposal for a Future Delivery Market for Transplant Organs*, 11 J. HEALTH POL., POL'Y & L. 483 (1986).

[3] These articles fail to distinguish the two types of biological materials despite the differences in their intrinsic value, intended uses, and the contexts in which they are removed and transferred. *See, e.g.*, Jennifer Lavoie, Note, *Ownership of Human Tissue: Life After* Moore v. Regents of the University of California, 75 VA. L. REV. 1363, 1381 (1989) (arguing that "tissue donation is closely analogous to organ donation"); Thomas P. Dillon, Note, *Source Compensation for Tissues and Cells Used in Biotechnical Research: Why a Source Shouldn't Share in the Profits*, 64 NOTRE DAME L. REV. 628, 633 (1989) (analogizing tissue sales to surrogacy and organ transplantation, and arguing that sale of tissues and cells will result in increased health care costs, harm to donor system, and harm to individuals seeking to commercialize cells).

unprecedented.[4] Such uses have included research on cadavers and living tissues, therapeutic treatment such as organ and tissue transplantation, and commercial uses ranging from the sale of replenishable parts such as blood or sperm to the sale of sexual activity and reproductive services.[5] However, scientists have only recently been able to use diseased tissue, which traditionally was considered waste, in enterprises that are both scientifically and commercially valuable.

### A. *Scientific and Commercial Developments*

One of the most important new techniques that make use of diseased biological materials is the creation of cell lines through hybridoma technology.[6] Hybridoma technology enables scientists to isolate and mass-produce valuable proteins that affect the body's immune system. In particular, it is used to produce monoclonal antibodies and lymphokines in large quantities.[7] Unlike the original cells excised from the body, a cell line can produce large quantities of these proteins and can survive and replicate indefinitely. The use of these cell lines is ubiquitous and has revolutionized certain aspects of research, medicine, and commercial science. Cell lines are essential to a wide range of endeavors: basic research on the cell, the study of diseases,

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[4] *See generally* Roy Hardiman, *Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue*, 34 UCLA L. REV. 207 (1986).

[5] *See* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1921–30 (1987).

[6] *See generally* IVER D. COOPER, BIOTECHNOLOGY AND THE LAW 1-4 (1989); Carlo Croce, *Hybridomas in Cancer Research*, in BANBURY REPORT 10: PATENTING OF LIFE FORMS 27–35 (David W. Plant et al. eds., 1982); OFFICE OF TECHNOLOGY ASSESSMENT, NEW DEVELOPMENTS IN BIOTECHNOLOGY: OWNERSHIP OF HUMAN TISSUES AND CELLS—SPECIAL REPORT, OTA-BA-337, 31–45 (1987) [hereinafter OTA REPORT, OWNERSHIP].

[7] The immune system fights infection with antibodies that bind to foreign substances (antigens). Because each type of antibody corresponds to a particular binding site on the surface of an antigen, antibodies are invaluable in isolating antigens. However, conventional techniques for producing antibodies frustrate isolation because they result in polyclonal antibodies that contain a variety of proteins corresponding to different antigens. Hybridoma technology, in contrast, makes it possible to fuse a single, pure antibody (monoclonal antibody) with a cancer cell that divides infintely to produce a cell line. COOPER, *supra* note 6, at 1-4, 1-13 to 1-14. Monoclonal antibodies are especially useful in the study of diseases and antigens associated with human malignancies. *See* Croce, *supra* note 6, at 27. Lymphokines, proteins that regulate the immune system, are naturally occurring in human blood, but only in quantities that are too small to be practically removed for research. Hybridoma technology enables scientists to produce lymphokines in much larger quantities. *See* OTA REPORT, OWNERSHIP, *supra* note 6, at 38–40.

the testing of new drugs, and the development of scientifically and commercially valuable products and services.[8]

The field of biotechnology has become increasingly commercialized as scientists and the public seek the valuable products created through this new technology. Private companies have invested in the emerging techniques to encourage the development of profitable commercial applications.[9] The combination of this capital investment and government support for basic research likely will lead to the introduction of biotechnology products into virtually every industrial sector.[10] The Commerce Department has forecast that the market for genetically engineered products will amount to tens of billions of dollars during the 1990s,[11] and industry analysts expect that the products created in the 1980s will be part of a market serving millions of patients by the mid-1990s.[12]

### B. *Legal Developments*

Profits from this commercialization have already gone to scientists and research institutions through such means as consulting, research funding, shareholding, and patent licensing,[13] but the individuals whose cells are necessary for the manufacture of these valuable products have no legal rights to the prof-

[8] Biotechnology has produced goods such as pharmaceuticals, biochemicals, and foodstuffs, and services such as water purification and waste management systems. ALAN M. RUSSELL, THE BIOTECHNOLOGY REVOLUTION: AN INTERNATIONAL PERSPECTIVE 3 (1988). Of the goods produced for research, scientists use monoclonal antibodies to purify proteins and develop diagnostic tests for cancer, infections, genetic diseases, pregnancy, and infertility. Lymphokines are used in the research of blood diseases, cancers, and immune system deficiencies. Pharmaceuticals created through biotechnology that have already been approved for use include Alpha Interferon used to treat hairy cell leukemia, insulin, human growth hormone, and vaccines for Hepatitis-B. *See* OTA REPORT, OWNERSHIP, *supra* note 6, at 56–61; Dillon, *supra* note 3, at 628.

[9] *See generally* OFFICE OF TECHNOLOGY ASSESSMENT, NEW DEVELOPMENTS IN BIOTECHNOLOGY: U.S. INVESTMENT IN BIOTECHNOLOGY—SUMMARY, OTA-BA-401 (1988).

[10] Joseph Perpich, *The Biotechnology Industry*, *in* GENETICS AND THE LAW III 413 (Aubrey Milunsky & George J. Annas eds., 1985); *see generally* OFFICE OF TECHNOLOGY ASSESSMENT, COMMERCIAL BIOTECHNOLOGY: AN INTERNATIONAL ANALYSIS, OTA-BA-218 (1984).

[11] Edward Dolnick, *Spare Parts*, THE NEW REPUBLIC, Sept. 15, 1986, at 16, 16.

[12] *Patents Disputed in Biotechnology*, N.Y. TIMES, Mar. 9, 1987, at A1.

[13] Hardiman, *supra* note 4, at 212; Lavoie, *supra* note 3, at 1364 ("Researchers alone appear to have captured the profits from the biotechnology boom, leading to public perceptions of disparate gains for researchers and patients, and of a system beyond patients' control.").

its.[14] This disparity already has been challenged, with relatively little or no success, by patients providing the cells.[15] Future cases involving the commercialization of biotechnological research are likely to focus on whether the donor's contribution of biological materials warrants a share of the profits.[16]

The most recent challenge arguing for patient rights, heard in *Moore v. Regents of the University of California*,[17] illustrates the transactions typically involved in the use of type-2 biological materials. The plaintiff, John Moore, underwent a splenectomy in the course of treatment for hairy cell leukemia at the UCLA Medical Center. Moore's physician knew that research conducted prior to the procedure had indicated that Moore's cells overproduced lymphokines, proteins that regulate the immune system. The defendants[18] were aware of the cells' commercial and scientific value, and knew that access to a patient whose blood contained these substances would "'provide competitive, commercial, and scientific advantages.'"[19]

The physician-researcher used the spleen and blood samples from Moore to develop a cell line that was later patented as the "Mo-cell line." The physician, and the university, to whom the patent rights had been assigned, sold a pharmaceutical company exclusive access to the cells, the research performed on the cell line, and the products derived from it. In exchange, they received 75,000 shares of stock at a nominal price, $330,000 to be paid over a three-year period, a pro rata share of the physician's

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[14] Lavoie, *supra* note 3, at 1364. ("[D]uring this period of massive growth in tissue-derived products' commercial value, there has been neither a corresponding growth in legal doctrine nor increased recognition of donors' or patients' rights.").

[15] Moore v. Regents of the Univ. of Cal., 793 P.2d 479 (Cal. 1990). One other case involving a dispute over property rights in a cell line was filed but settled out of court. In that case researchers patented a hybridoma that produced an anti-tumor antibody using cancer cells of the mother of a post-doctoral student, Dr. Heideaki Hagiwara. The settlement allowed the university to retain all patent rights in the cell line, and the Hagiwara family received an exclusive license to exploit the patent in Asia in exchange for royalty payments to the university. *See* OTA REPORT, OWNERSHIP, *supra* note 6, at 26.

[16] It is impossible to determine at present how many patients may eventually seek a share. Nearly half of the research done by medical institutions involves the use of biological materials. Lavoie, *supra* note 3, at 1369. However, there is always uncertainty about whether a cell line can be started from biological materials. At the present time, few of these cell lines have been patented, and even fewer have resulted in a commercially valuable product. *See* Dillon, *supra* note 3, at 637.

[17] 793 P.2d 479 (Cal. 1990).

[18] The defendants included the Regents of the University of California, a physician, a researcher, and two pharmaceutical companies to whom exclusive rights to the biological materials were sold. *Id.* at 479.

[19] *Id.* at 481 (quoting Moore v. Regents of the Univ. of Cal., 249 Cal. Rptr. 494, 499 (Cal. Ct. App. 1988)).

salary, and fringe benefits. For an additional $110,000, another pharmaceutical corporation later joined the exclusive access agreement. Although the ultimate commercial value of the Mo-cell line is uncertain, its successful manufacture and distribution could result in a $3 billion industry.[20]

Moore sued for conversion by the physician and the researcher, claiming property rights in his tissue.[21] A divided California Supreme Court reversed the Court of Appeal decision which had held that property rights existed in the human body. Despite the fact that the Mo-cell line would not exist without Moore's contribution, the supreme court refused to expand the concept of property rights to include an interest in one's own cells. The court thus denied compensation to Moore for his contribution to the production of the cell line.[22]

In response to *Moore*, many scholars have advocated the expansion of existing common law rights in the body to ensure that patients like Moore receive remuneration,[23] while others continue to oppose the recognition of a commercial interest in the human body.[24] Subsequent sections of this Note address these arguments. The debate itself, however, must be considered in light of two recent changes relevant to transactions involving type-2 materials: (1) changes in the patient-physician relationship as a result of the commercialization of medical research, and (2) the reconception of the role and status of the human body as a source of material for increasingly valuable research.

First, the physician-researchers' ties to industry that have developed because of access to and use of patients' cells[25] have

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[20] *Id.* at 482.

[21] *See id.* at 482 n.4.

[22] The court stated that existing laws recognizing quasi-property rights are based primarily on public health concerns for the sanitary disposal of bodily tissues and corpses, and that these policy concerns are not broad enough to encompass the transaction in biological materials. *Id.* at 491.

[23] *See infra* notes 60–76 and accompanying text (surveying arguments for market-alienability of type-2 biological materials).

[24] *See, e.g.*, Randy W. Marusyk & Margaret S. Swain, *A Question of Property Rights in the Human Body*, 21 OTTAWA L. REV. 351 (1989); Lavoie, *supra* note 3, at 1364; Dillon, *supra* note 3, at 637; Radin, *supra* note 5.

[25] Physicians and researchers may serve as consultants, directors, or stockholders in the companies that are profiting from the commercialization. Hardiman, *supra* note 4, at 212.

altered the traditional relationship between doctor and patient.[26] With the increasing probability that unusual or diseased cells could be worth large sums of money, the patient's treatment may no longer be the only goal pursued by her physician. This is not to imply that physicians or researchers would intentionally take advantage of patients; it is simply to acknowledge that practices change, and therefore, our perceptions of the doctor-patient relationship must be updated to reflect these changes.

Second, traditional research norms regarding access to, and use of, the human body have changed. The use of the human body as a source of essential raw materials that are acquired, distributed, and manipulated by scientists for profit has provoked a need to determine what rights a person has in the commercial exploitation of his or her body.[27] The law has historically encouraged the use of biological materials for traditional research and teaching purposes by treating materials removed from the body for diagnostic or therapeutic purposes as part of the public domain.[28] However, should materials that were traditionally considered to be worthless, but are now commercially valuable, continue to be a free resource for researchers? An initial response to this question may simply be that notwithstanding the competence and expertise necessary to create cell lines, the source of the unusual cells is always an individual without whom the products would not exist.[29]

Transactions in type-2 biological materials occur regularly. Every participant in the chain of transactions—except the source of the raw material, the patient—can transfer these materials in the market. The question is not whether these biological materials should be commercialized; they already are. In-

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[26] For example, the *Moore* court recognized the problem of one person being both the primary physician and the researcher who is exploiting the commercial value of the patient's cells. *See* 793 P.2d at 484.

[27] Against the backdrop of heightened concern about liability in general, researchers themselves have acknowledged the need for laws that delineate what the rights of patients are to the commercial products of cell lines derived from their tissues. Ivor Royston, *Cell Lines from Human Patients: Who Owns Them?*, 33 CLINICAL RES. 442, 443 (1985).

[28] After pathology tests are completed, materials are either immediately destroyed, or retained for research or teaching purposes, provided that the privacy of the source is protected. Robert J. Levine, *Research That Could Yield Marketable Products from Human Materials: The Problem of Informed Consent*, IRB: A REVIEW OF HUMAN SUBJECTS RESEARCH, Jan.-Feb. 1986, at 6, 6.

[29] *See* Hardiman, *supra* note 4, at 222 n.77.

stead, the issue is whether the patient should share in that commercialization and how.

## II. MARKET-ALIENABILITY FOR BIOLOGICAL MATERIALS

There are two primary types of property interests related to excised body parts.[30] A few may be sold (e.g. blood, semen, hair), but the majority may only be given away (i.e., type-1 and type-2 biological materials).[31] This Part examines the class of property that may be given away but not sold (i.e. market-inalienable or modified inalienable property)[32] with particular focus on the rights related to type-2 biological materials.

### A. *Philosophical Foundations*

An analysis of the relationship between the person and the body, and the selling ("commodification") of the human body is helpful in framing the discussion of whether an individual should have the right to alienate her body. Views on these questions may affect subsequent judgments of whether property rights should apply to the human body at all, and if so, which rights should pertain.[33]

The most common argument against the alienation of the human body is that it would result in the commodification of the person and violate notions of human dignity and personhood.[34] This argument assumes that the person and the body

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[30] Thomas H. Murray, *Who Owns the Body? On the Ethics of Using Human Tissue for Commercial Purposes*, IRB: A REVIEW OF HUMAN SUBJECTS RESEARCH, Jan.-Feb. 1986, at 1, 1.

[31] *See* 42 U.S.C. § 274e (1988).

[32] Both terms have been used to describe a restriction on alienability where property may be given away but not sold. *See* Radin, *supra* note 5, at 1850 (using market-inalienability); Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 935 (1985) (using modified alienability). I will use variations of "market-inalienability" throughout this Note because it is easier to use as different parts of speech.

[33] If we are confirmed Cartesians, believing that the body is merely an incidental appurtenance to what is morally significant about persons—their rationality—then those aspects of commercialization likely to lead to differential participation in the body-market will not seem offensive, precisely *because* the body is not particularly connected to our moral worth. If, on the other hand, we believe respect for persons includes respect for the human body, then those empirical properties of the market do pose a grave threat to justice.

Thomas H. Murray, *On the Human Body as Property: The Meaning of Embodiment, Markets, and the Meaning of Strangers*, 20 J.L. REFORM 1055, 1084 (1987).

[34] *See, e.g., id.*; Radin, *supra* note 5.

are essentially one and the same.[35] There is a counter-argument, however, that relies on a different conception of the ontological status of the human body.

These two arguments are based respectively on two philosophical positions: monism and dualism.[36] Each has been widely discussed and accepted, but philosophers continue to debate them and have not reached a consensus. Monists maintain that the body is essentially indivisible from the person so that it is nonsensical to formulate a property relationship in which the person is the owner and the body is the object owned.[37] Any action taken toward the body would necessarily be action taken toward the person, and so selling the body would be commensurate to selling the self.

In contrast, dualism holds that the body is only incidental to the person and that treatment of the body is distinct from treatment of the person.[38] According to this view, the body is not essential to being a person with human dignity, and therefore is not inherently morally significant. Instead, the body has only extrinsic value because it is instrumental in allowing a person to act. Most dualists do concede, however, that one's body is morally protected against unwanted external interference because the body is important to one's ability to interact with others.[39] This view more stringently restricts what a person can do to another person's body than what an individual can do to his own body.

Resolution of the monism/dualism debate is far beyond the scope or ambition of this Note, but the immediate argument must be grounded in only one of these traditions. The choice between them is not entirely arbitrary; recent developments in the law have embraced a dualist metaphysics,[40] and this Note will do the same. Having assumed that the person and the body are distinct entities, the remaining task is to determine what effects the alienation of a body part can have on the person,

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[35] Murray, *supra* note 33, at 1074.

[36] *See generally id.*

[37] *See, e.g.*, PAUL RAMSEY, THE PATIENT AS PERSON (1970); Leon R. Kass, *Thinking About the Body*, 15 HASTINGS CENTER REP. 23 (1985).

[38] *See, e.g.*, H. TRISTAM ENGELHARDT, JR., THE FOUNDATIONS OF BIOETHICS (1986); JOSEPH FLETCHER, MORALS AND MEDICINE (1954).

[39] *See* Engelhardt, *supra* note 38, at 128.

[40] *See, e.g.*, UNIF. DETERMINATION OF DEATH ACT, 12 U.L.A. 338 (Supp. 1991) (statutes, adopted by the majority of states, defining death in relation to brain functioning identified with person, rather than vegetative functioning identified with body).

and whether the alienation of type-2 biological materials constitutes the alienation of the person.

Professor Margaret Jane Radin has made a dualist argument that all rights in the body should be market-inalienable because such sales would commodify "things important to personhood"[41] such as personal attributes, relationships, and philosophical and moral commitments.[42] In making this argument, she rejects using the person/body distinction as a bright line that divides the inalienable from the alienable, arguing that it will inevitably lead to universal alienability. Her argument, however, relies on a conception of the person/body dichotomy in which things important to personhood are "separate from the person and possessed by the person."[43] She finds this problematic because once these things are separated from the person they can be treated as alienable, and ultimately commodifiable, objects.[44]

I agree with Radin that we have certain attributes that are important to our personhood and that should not be objectified or monetized,[45] but I disagree with her characterizations of the dualist relationship between the person and the body. Under my conception, characteristics important to personhood would be identified with the person, rather than with the body, and would therefore be inalienable. Excised body parts, particularly malignant tissue, however, would not fall within the category of things important to personhood. Only market-alienability of the whole body could implicate one's personhood—for example, prostitution, slavery, and surrogacy. In contrast, the sale of tissue that has already been excised from the body would have no effect on the person under this dualist metaphysics.

### B. *Elements of the Property Relationship*

Any property relationship has three primary components: the owner, the object owned, and the rights of the owner in relation

[41] According to Professor Radin, we may justifiably identify ourselves with such things because they are linked with our conception of human growth and change. Radin, *supra* note 5, at 1908.

[42] *Id.* at 1905–06.

[43] *Id.* at 1897.

[44] *Id.*

[45] Radin uses the examples of prostitution and surrogacy where she claims "commodification will harm personhood by powerfully symbolizing, legitimating, and enforcing class division and gender oppression." *Id.* at 1916.

to what is owned.[46] Treating the human body as an object owned raises inevitable questions about who the owner(s) should be and what rights an owner should have in relation to the body and its constituent parts.

The law restricts the disposition of property in two basic ways: (1) by controlling who may hold property (i.e., ownership), and (2) by restricting what actions an owner may take with respect to such property (i.e., use and transfer).[47] The legal status quo is ambiguous as to which of these two types of restrictions apply to the human body and to what degree. For example, the restrictions have been interpreted to apply to ownership in the sense that no one can hold a property entitlement in a human body,[48] but also to mean that property rights in the body do exist but are limited as to use and transferability. The latter interpretation appears to be the majority view among legal scholars, with disagreement focusing on the nature and extent of rights to use and transfer the body or its parts, rather than on whether property rights exist at all.[49] This Note accepts the second interpretation and proceeds from the supposition that property rights do exist in the body.

Currently, the transfer of property rights in type-2 materials is restricted under the National Organ Transplant Act which makes them market-inalienable.[50] These rights should be reformulated so that the restrictions relate to who may own them rather than how they may be used and transferred. Professor Susan Rose-Ackerman enumerates four different categories of ownership that identify options for such a reformulation. Under her scheme, title to property may be held by: (1) anyone; (2) only some specified groups or individuals; (3) everyone simultaneously; or (4) no one.[51] This analysis of property rights in the body will focus on the first and second categories only because, as will be argued, it is not sensible for a person's type-2 materials to be owned by either no one or everyone at once.

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[46] JAMES O. GRUNEBAUM, PRIVATE OWNERSHIP 4 (1987).

[47] For an analysis of the various permutations of the legal restrictions on the disposition of property, see generally Rose-Ackerman, *supra* note 32 (describing a "taxonomy of entitlements").

[48] *See, e.g.*, Moore v. Regents of the Univ. of Cal., 793 P.2d 479 (Cal. 1990).

[49] *See, e.g.*, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Radin, *supra* note 5; Rose-Ackerman, *supra* note 32.

[50] 42 U.S.C. § 274e (1988).

[51] Rose-Ackerman, *supra* note 32, at 933.

The law should recognize two forms of property rights in the body corresponding to two different objects of ownership. First, title in a whole, intact human body should be granted only to the person who inhabits the body under the second category above. The transfer of the body under such title would be limited to transfers upon death, so that an individual could donate or sell her body for cadaveric research, but not transfer it while alive. This would prevent the transfer of title in a living body and the commercialization of the person who inhabits the body.[52]

Second, title in parts of the body that can be excised should initially be granted in the person who inhabits the body under Rose-Ackerman's second category, but no restrictions on use and transferability should apply. Thus, for example, if an individual chooses to sell her type-2 biological materials, she should be able to do so and pass title to the buyer. According to this formulation, then, title would originally be granted to the person who inhabits the body from which the materials were excised, but may then be transferred to anyone, allowing a property right that falls within the first category.

### C. *Reconsidering Restrictions on Alienability*

Once the entitlement has been established and vested, it should be protected and maintained by a system of legal rules. Another important consideration, then, is whether property rules, liability rules, or strict inalienability should apply.[53] The critical question is whether existing restraints on the alienability of type-2 biological materials are justifiable or simply "have their roots in paternalistic attempts to impose moral values on others"[54] and therefore should be replaced by property or liability rules.

Three basic arguments support the inalienability of property. They are introduced briefly below and then applied in arguments regarding the alienability of the human body and its constituent parts. The first holds that restrictions are warranted when alien-

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[52] *See supra* notes 41–44 and accompanying text (discussing effects of market-alienation on personhood).

[53] Calabresi & Melamed, *supra* note 49, at 1105. Liability rules would allow the doctor who wants to use a patient's type-2 materials to determine whether or not their commercial worth would be sufficiently great to justify taking them, rather than bargaining with the patient, and then paying damages if the patient sues. *See id.* at 1092.

[54] Rose-Ackerman, *supra* note 32, at 938.

ation would be inefficient or when inalienability is required to correct for some other market failure.[55] Central to this claim is the assumption that commodifying goods and transferring them on the market is not inherently problematic, but that commodification should be restricted when the resulting costs outweigh the benefits of such transfers. For example, transaction costs associated with the commercial transfer of biological materials may be too high for efficient transactions to occur. The second argument favors inalienability when the negative effects of the transfer on wealth distribution outweigh the benefits of the transfer and the inequity cannot be corrected through another means such as taxation.[56] Finally, inalienability may be preferable when the externalities of a transfer are too difficult to account for because they cannot be measured in objective, or monetizable, terms.[57] Such intangible externalities would include the moral outrage felt by a third party when someone is sold into slavery.

These three arguments often collapse into a broader efficiency analysis.[58] Such an approach has been criticized for reducing all values to monetizable terms,[59] but economic analysis is useful in a context such as this where commercialization has already occurred. I will presume that unrestrained alienability of type-2 biological materials, and a market for their transfer, is favorable unless the following arguments do not adequately support the removal of restrictions.

### 1. Arguments for Market-Alienability

The arguments favoring market-alienability emphasize the need to change current legal rules which allow physicians, but not patients, to benefit from the commercial value of the patient's type-2 biological materials. Recognition of a patient's right to alienate such materials would ensure a fairer distribution of wealth between doctors and patients, comport with the legal protection of a patient's autonomy, and preserve the trust in the doctor-patient relationship that is threatened by the disparity in their rights to the profits of commercialization.

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[55] *See, e.g.*, Calabresi & Melamed, *supra* note 49, at 1111; Rose-Ackerman, *supra* note 32, at 938.

[56] Calabresi & Melamed, *supra* note 49, at 1098; Rose-Ackerman, *supra* note 32, at 940.

[57] *See* Calabresi & Melamed, *supra* note 49, at 1111–14; Radin, *supra* note 5, at 1870.

[58] *See, e.g.*, Calabresi & Melamed, *supra* note 49, at 1094 n.11.

[59] *See, e.g.*, Murray, *supra* note 33, at 1085; Radin, *supra* note 5, at 1870.

a. *Distributive justice considerations.* Under the legal status quo, asymmetrical information ensures that the physician is uniquely situated to benefit from his knowledge that a patient has commercially valuable type-2 materials.[60] Unless the patient has property rights in his biological materials, which would require the physician to divulge such information, he might never discover their commercial value.[61] Allowing researchers, but not the patient, to benefit from the commercial value of unusual or diseased cells seems unfair, especially since "the uniqueness of the product that gives rise to its patentability stems from the uniqueness of the original cell."[62] The California Court of Appeal in *Moore* recognized this inequity when it stated that "[i]f this science has become science for profit, then we fail to see any justification for excluding the patient from participation in those profits."[63]

This assertion is rooted in traditional notions regarding the exploitation of personal property. The first is that people commonly profit from the use of their bodies; the second is that owners may profit from the use of their property. People reap profits by using their bodies, primarily to perform labor, but also in other forms of commercialization such as modeling, marketing one's likeness as a public figure, or selling hair, blood, semen, and other body parts.[64] Consistency with this tradition demands that an individual be allowed to profit from the commercial use of her unique type-2 biological materials unless there are compelling reasons to distinguish it from these other accepted uses of the body.[65]

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[60] This is precisely what happened in *Moore* where the physician-researcher continued to withdraw biological materials from the patient for seven years after the splenectomy without ever informing the patient that the materials had any commercial value. The doctor also told Moore that the samples could not be taken at any other medical center despite the fact that Moore lived out of state. *See* Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 480 (Cal. 1990).

[61] *See* Hardiman, *supra* note 4, at 232. Only property rules would ensure that this information is conveyed prior to commercial exploitation. Liability rules, on the other hand, are used to enforce a right after it has been violated. *See infra* notes 103–105 and accompanying text.

[62] Mary Taylor Danforth, *Cells, Sales, and Royalties: The Patient's Right to a Portion of the Profits*, 6 YALE L. & POL'Y REV. 179, 197 (1988); *see also* Patricia M. Parker, *Recognizing Property Interests in Bodily Tissues*, 10 J. LEGAL MED. 357, 371–72 (1989) (arguing that such cells have independent value because they are so rare).

[63] Moore v. Regents of the Univ. of Cal., 249 Cal. Rptr. 494, 509 (Cal. Ct. App. 1988). *See also* Hardiman, *supra* note 4, at 213 (asserting that fairness requires that the patient who contributes commercially valuable cells share in the resulting profits).

[64] Hardiman, *supra* note 4, at 229.

[65] For example, prostitution is distinguishable because of its implications for personhood and broader social values. *See supra* note 45.

People have argued that the sale of biological materials should be distinguished from other methods of commercialization because no volitional act by the patient can increase their value.[66] Moreover, because biological materials cannot be cultivated, there is no reason to create market incentives to encourage their development.[67] Despite the accuracy of these arguments, neither sufficiently distinguishes type-2 biological materials from blood, semen, or hair which are market-alienable.

A more persuasive distinction is that type-2 biological materials are usually malignant tissues which are not only waste, but harmful materials that the patient pays to have removed.[68] However, the fact that the patient pays to have them removed actually further provokes the question of equitable distribution. Two separate transactions occur; in the first the patient pays a fee in exchange for the surgical removal of the malignant tissue, and in the second the patient transfers the tissue to the physician but receives no consideration. This lack of parallel consideration illustrates the distributive inequity in failing to recognize the patient's rights in his type-2 materials. When the body is commercially exploited for type-2 biological materials, its owner should be able to profit from that exploitation.[69]

b. *Autonomy and self-determination.* The right of market-alienability in biological materials is also rooted in the traditional recognition and protection of patient autonomy and self-determination.[70] Judicial decisions and legislation have reinforced the right of individuals to make decisions regarding their own bodies, including the rights of informed consent,[71] privacy,[72] and the protection of research subjects.[73] The right to alienate type-2 biological materials would broaden these existing rights and ensure that individuals have greater control over their own bodies within the context of their relationship with their physicians.

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[66] *See* Dillon, *supra* note 3, at 641.

[67] *See* Rose-Ackerman, *supra* note 32, at 949 n.49.

[68] *See* Dillon, *supra* note 3, at 641.

[69] *See supra* notes 47–52 and accompanying text; Hardiman, *supra* note 4, at 229.

[70] Lavoie, *supra* note 3, at 1385; *see also* Note, *supra* note 2, at 1264.

[71] *See* Moore v. Regents of Univ. of Cal., 793 P.2d 479, 482 (Cal. 1990).

[72] *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 380 U.S. 939 (1965).

[73] *See* 45 C.F.R. §§ 46.101–.409 (1988) (guidelines for protection of human subjects in government funded research).

c. *Preserving trust in the doctor-patient relationship.* In addition to protecting the patient's autonomy, the right to alienate type-2 biological materials would also re-establish the trust necessary to the interaction between physician and patient. The commercialization of modern medical science, and the resulting asymmetrical information and bargaining power of physicians and patients, threaten the fiduciary relationship between doctor and patient. These problems are especially relevant to the scientifically and commercially motivated use of type-2 biological materials, in contrast to the use of type-1 materials which is primarily medical and therapeutic.[74]

Under the current system, where physicians but not patients benefit from the commercialization of type-2 materials, a patient may doubt whether procedures are therapeutically indicated or are simply a means to provide the physician with necessary research materials. In this context, patients may fail to seek necessary medical advice or may feel compelled to find a physician who practices on a non-profit basis.[75] The property right to market-alienability would alleviate these problems by requiring physicians to inform patients if their type-2 biological materials are or could be valuable, thereby placing the patient in a better position to negotiate with the physician.[76]

### 2. Arguments Against Market-Alienability

Most of the arguments against alienability of type-2 materials have arisen previously in the debate surrounding type-1 biological materials. As the discussion below points out, however, arguments involving the commodification of the human body, the creation of destructive incentives, and a resulting decrease in altruism are inapplicable in this context because of the differences between the two types of materials and their corresponding uses. The potential for substantial transaction costs is less easily reconciled, however, and presents a difficult set of problems.

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[74] Patricia A. Martin & Martin L. Lagod, *Biotechnology and the Commercial Use of Human Cells: Toward an Organic View of Life and Technology*, 5 SANTA CLARA COMPUTER & HIGH TECH. L.J. 211, 249 (1989).

[75] Marusyk & Swain, *supra* note 24, at 373.

[76] *See* Hardiman, *supra* note 4, at 231.

a. *Commodification of the human body.* The prospect of market-alienability has raised concerns about treating the body as a commodity and objectifying persons as material objects by pricing their body parts.[77] This argument is unfounded in a dualist metaphysics.[78] In the context of transactions in type-2 biological materials, where the body is already being commercialized, it only serves to exclude patients from the benefits of that commercialization.[79]

b. *Creation of destructive incentives.* There is further concern that if a market in biological materials were created, the incentives to sell would result in two externalities. First, while an individual should be allowed to commodify her own body as an exercise of autonomy,[80] some argue that a market would result in the commodification of one person's body by others and lead to coercion of the economically disadvantaged by individuals seeking access to biological materials.[81] Second, it has been argued that the quality of available materials would decrease because people would misrepresent the value of their biological materials in order to sell them.[82]

These externalities may result from a market in type-1 biological materials, but do not apply to the sale of type-2 materials. First, unlike the typical type-1 material, a healthy kidney for example, type-2 biological materials are relatively rare. Moreover, an individual either produces them or not. Therefore, even if the prospect of profit creates an incentive to sell, most people do not have them to sell and cannot cultivate them.[83] Second, the transfer of type-2 materials, and the discovery of any value they may have, occur in the reverse order of type-1 materials. Type-2 materials are typically removed for therapeutic purposes, and only later after research has been conducted is the

[77] *See supra* note 34.

[78] *See supra* notes 34–45 and accompanying text (discussing the ontological relationship between the person and the body).

[79] Hardiman, *supra* note 4, at 240.

[80] *See supra* notes 70–73 and accompanying text (outlining autonomy arguments for alienability of the body).

[81] Note, *supra* note 2, at 1217. Others have acknowledged the conceivable risk that as long as individuals had capital in their own bodies, they would be ineligible for social services. Thus, not only would the poor be coerced into surrendering their body parts, they could lose access to other means of subsistence unless they did so. *See* Andrews, *supra* note 2, at 32; Marusyk & Swain, *supra* note 24, at 372.

[82] *See, e.g.*, Hardiman, *supra* note 4, at 237; Marusyk & Swain, *supra* note 24, at 373; Rose-Ackerman, *supra* note 32, at 946.

[83] *See* Parker, *supra* note 62, at 370.

value of the material determined.[84] Moreover, the ultimate commercial value of type-2 materials is impossible to gauge at the time of transfer because it is dependent on the products derived from the materials, not the materials themselves. In contrast, the value of type-1 materials, which is intrinsic, is known prior to transfer.

c. *Decrease in altruism.* Our society's tradition of donating transplantable organs to other people, often strangers, whose lives depend on them is celebrated as a vestige of altruism in our market-dominated society.[85] Professor Murray argues that this is more than a nice tradition; transfers which occur by gift rather than sale are critical to affirm the sense of solidarity and community in a mass society.[86]

This argument applies to type-1 biological materials, but is wrought with irony and obscures the real interests at stake when applied to type-2 materials.[87] In the context of type-2 materials, no recipient is reliant on a donor to provide material for a therapeutic, and often lifesaving, transplant. Moreover, commercialization of type-2 materials has already occurred, and restraints on alienability would only serve to "defeat the individual's right to profit from the commercial value of his or her own tissue, but not to defeat the commercial interest of the involved physician, investigator, university, or biotechnology companies."[88]

d. *Transaction costs.* Market-inalienability of type-2 biological materials may be justified if transaction costs would make their sale inefficient. It is very difficult to value type-2 biological materials, especially at the outset of an exchange.[89] Once the materials are determined to be valuable, it is equally difficult to apportion the value of a derived product such as a cell line between the source of the biological materials and the researchers who establish the cell line.[90] The indeterminacy of the value

[84] Martin & Lagod, *supra* note 74, at 249; Stephen A. Mortinger, Comment, *Spleen for Sale:* Moore v. Regents of the University of California *and the Right to Sell Parts of Your Body*, 51 OHIO ST. L.J. 499, 513 (1990).

[85] Murray, *supra* note 33, at 1085.

[86] *Id.*

[87] Martin & Lagod, *supra* note 74, at 247, 249.

[88] *Id.* at 247–48.

[89] *See supra* notes 83–84 and accompanying text (acknowledging difficulty in valuation prior to research and product development).

[90] Lavoie, *supra* note 3, at 1379.

of the materials would lead to inherently more costly price negotiations. Furthermore, there would be additional costs associated with negotiation that could include acquiring legal counsel (especially because of the unequal bargaining power of the parties), competitive bidding, insuring the title to acquired materials, and the maintenance of extensive records.[91] Finally, because type-2 materials are rare and often unique, patients with them would be in a position of monopoly power; because there are no substitutes, researchers would not be able to turn to alternative sources.[92] Monopoly power in the hands of one of the parties to these transactions would heighten transaction costs and perhaps create other inefficiencies. Arguably, these additional burdens could impede the progress of scientific research and development by reducing the availability of biological materials for research.[93]

## III. Proposals for Law Reform

In this Part, the debate over market-alienability is used to evaluate two alternatives for law reform. The first, which would require modification of the common law of contracts and torts, discusses the comparative efficiency of protecting the entitlement with property rules in a market or with liability rules. The second is a more comprehensive proposal for law reform that suggests a legislative and regulatory revision of the current federal restrictions on alienability of human tissue.

### A. *Common Law Solutions*

There have been a number of proposals for a market in type-1 biological materials, which consider the variety of different types of market transfers.[94] The most common type of proposal advocates some form of a "futures" market in which a seller

[91] *See* Danforth, *supra* note 62, at 199; Dillon, *supra* note 3, at 634–36.

[92] *See* Marusyk & Swain, *supra* note 24, at 373; Parker, *supra* note 62, at 371.

[93] *See* Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 495 (Cal. 1990); Christopher Heyer, Comment, Moore v. Regents of University of California*: The Right of Property in Human Tissue and Its Effect on Medical Research*, 16 Rutgers Computer & Tech. L.J. 629, 655 (1990).

[94] *See* Note, *supra* note 2, at 1218; *infra* note 95.

would contract for the sale of his organs and receive remuneration currently, but not transfer the organs until death.[95]

There are two critical distinctions between type-1 and type-2 biological materials that make such a market infeasible for type-2 materials. First, as explained above, unlike type-1 materials which have intrinsic value, the value of type-2 materials cannot be determined prior to transfer. Thus, agreements prior to transfer would not be possible since the value is unknown until after the transfer has occurred.[96] Second, the purposes of the markets would be different in the two cases. The primary purpose of a market in type-1 materials would be to increase the supply of organs available for transplantation. The prospect of profit would create incentives for people to sell their organs, thereby increasing the supply.[97] In contrast, the purpose of a market in type-2 materials would be to correct for the inequity of the status quo by allowing a patient to enter the market that already exists in her commercially valuable materials. Incentives to patients created by this type of market would be irrelevant because supply is not an issue.[98]

The most plausible market option would be to allow remuneration upon transfer of type-2 materials.[99] Such a market would have all of the advantages of allowing alienability of type-2 biological materials,[100] but also the transaction costs associated with such transfers.[101] Measured against the inequities of the current situation, such a market would be preferable despite the inefficiencies that might result.

However, a more efficient common law alternative may be to protect the entitlement with liability rules rather than through a

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[95] The proposals differ as to determination of price, duration of contract, forms of remuneration, and buying agent among other things. *See, e.g.*, Lloyd R. Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 GEO. WASH. L. REV. 1 (1989); Hansmann, *supra* note 2; Schwindt & Vining, *supra* note 2.

[96] *See* notes 83–84 and accompanying text.

[97] *See, e.g.*, Note, *supra* note 2, at 1216.

[98] *See supra* notes 80–83 and accompanying text (noting that even if incentives were relevant, they would be ineffective).

[99] To postpone payment until the patient dies would be unfair and would serve no purpose in the case of type-2 materials. Unlike transfers in type-1 materials, these transfers would not endanger the health of the patient or be economically coercive so there is no risk that present remuneration would create destructive incentives. *See id.*

[100] *See supra* notes 60–76 and accompanying text. An example would be the full disclosure to patients of the potential commercial value of their type-2 biological materials.

[101] As discussed above, such transaction costs could include price negotiation expenses and legal fees and could be heightened by the existence of monopoly power. *See supra* notes 92–93 and accompanying text.

system of property rules operating in a market. In a market, the patient's monopoly power could make it impossible for the parties to enter a mutually satisfactory bargain,[102] whereas liability rules would make it possible for a physician to acquire the materials and pay damages if it is efficient for her to do so. Moreover, the inability to predetermine the value of the materials makes it difficult to bargain in a market.[103] Although a determination of value using liability rules may only approximate the actual value, it would at least be possible to assign some monetary worth to the patient's commodity.[104] Third, although administrative procedures could be streamlined to facilitate these transactions,[105] it may be more efficient to protect the relatively few patients who have these valuable materials with liability rules instead of formulating new administrative procedures for all patients.

### B. *A Regulatory Approach to Transferring Type-2 Biological Materials*

As an alternative to expanding the common law and requiring parties to incur the costs of routinely entering the market or litigating, the following proposal advocates a legislative and regulatory solution that would be consistent with the existing governmental oversight of biotechnology. In order to define and protect the rights of patients in these transactions, Congress should create a statutory right to compensation that would be analogous to a common law property right in one's own body. Such a right would recognize the value of a patient's contribution of biological materials to research in addition to the recognition of the researchers' contributions of labor and skill.

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[102] *See supra* note 92 and accompanying text.

[103] Calabresi & Melamed, *supra* note 49, at 1110 ("[A] very common reason, perhaps the most common one, for employing a liability rule rather than a property rule to protect an entitlement is that market valuation of the entitlement is deemed inefficient, that is, it is either unavailable or too expensive compared to a collective valuation.").

[104] *See id.* at 1125. Damages could be calculated by valuing the property at the time of conversion and adding interest or by measuring the amount the injured party has lost as a result of the harmful act. Parker, *supra* note 62, at 371.

[105] For example, an agreement form could be incorporated into the standard paperwork a patient signs prior to surgery. However, such a form would not obviate the need to maintain records, locate the patient, and enter negotiations in those cases where a patient's materials prove to be valuable. *See infra* notes 121–128 and accompanying text.

Governmental oversight of biotechnology entails a cooperative venture in which Congress and executive agencies exercise their respective authority and expertise. Generally, once Congress defines a regulatory approach, it delegates the authority to develop specific regulations to an agency because "Congress has neither the desire nor the technical expertise to become enmeshed in the scientific minutiae that characterize the field of biotechnology."[106] Calls for legislation in this area have already been made,[107] but the proposals either fail to secure compensation for the patient,[108] or fail to utilize the regulatory structure already in place to handle biotechnology.[109]

### 1. Statutory Amendment

In order to create a more equitable system, Congress should amend the National Organ Transplant Act ("NOTA")[110] to provide explicitly that all patients have a right to compensation when their type-2 biological materials are used by physicians and researchers in commercially valuable research. The amendment would vest authority in the Secretary of the Department of Health and Human Services to regulate patients' compensation.

NOTA provides that "[i]t shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human

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[106] Albert Gore, Jr. & Steve Owens, *The Challenge of Biotechnology*, 3 YALE L. & POL'Y REV. 336, 350 (1985).

[107] The *Moore* court advocated legislative action stating that "problems in this area are better suited to legislative resolution" because of the complex policy choices involved. Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 493 (1990).

[108] *See* Tanya Wells, Note, *The Implications of a Property Right in One's Body*, 30 JURIMETRICS J. 371 (1990) (advocating legislation to forbid sale of "body parts that undergo biotechnological intervention and are patented," and amendment to patent statute to require that substantial percentage of royalties from these patents be returned to government-funded research projects).

[109] *See generally* Danforth, *supra* note 62 (advocating common law recognition of monopolistic ownership over one's own body, and licensing agreements between parties to grant use of patient's monopolistic interest to researchers in exchange for royalty share in any future profits); William D. Noonan, *Ownership of Biological Tissue*, 72 J. PAT. TRADEMARK OFF. SOC'Y 109, 111 (1990) (advocating amendment to patent law to define patient's rights in any patentable invention developed from her biological materials, and legislation requiring that a compulsory license be granted to any inventor who uses patient's cells in patented invention in exchange for small royalty to the patient); Parker, *supra* note 62 (advocating legislation that explicitly recognizes property rights in bodily tissues so that patients whose tissues are commercially exploited without their consent have a remedy under the law; if the patient does consent, compensation would be based on a percentage of the royalties from sale of the product, but no regulation is advocated.).

[110] Codified at 42 U.S.C. § 274 (1988).

organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce."[111] It defines "human organ" as "human (including fetal) kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin or any subpart thereof and any other human organ (or any subpart thereof, including that derived from a fetus) specified by the Secretary of Health and Human Services by regulation."[112] As defined, "'[v]aluable consideration' does not include the reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the organ."[113] Congress should amend NOTA by establishing a right to compensation for type-2 biological materials and by altering the definition of "valuable consideration" to include compensation for these materials.

The first amendment should consist of a new subsection immediately following the proscription of organ purchase. It would state:

> The Secretary of Health and Human Services shall establish guidelines for the payment of compensation to patients whose organs, tissues, cells, or any other bodily substance, or any subpart thereof, are excised by physicians, researchers, research institutions, or any other person or institution which uses those organs, tissues, cells, or other bodily substances to produce research products that have commercial value.

This amendment would be codified as 42 U.S.C. § 274e(a)(2).

The second amendment should add one clause to the "valuable consideration" definition to provide for payments in exchange for biological materials later used for research. The amended definition would state:

> The term "valuable consideration" does not include the reasonable payments associated with the removal, transportation, implantation, processing, preservation, quality control, and storage of a human organ or the expenses of travel, housing, and lost wages incurred by the donor of a human organ in connection with the donation of the organ, *or reasonable payment for a human organ excised for therapeutic*

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[111] *Id.* § 274e(a).
[112] 42 U.S.C. § 274e(c)(1) (1988).
[113] 42 U.S.C. § 274e(c)(2) (1988).

> *purposes and used for research, including commercial research.*

This amendment would not provide for payments for type-1 biological materials.

### 2. The Regulations

Despite the government's well-established right to regulate the practice of medicine and the existence of extensive regulations over biotechnology generally, relatively few governmental regulations intervene in the doctor-patient relationship.[114] Two arguments, however, justify the regulation of transactions between patients and physicians relating to type-2 biological materials.

First, as doctors become increasingly engaged in commercial enterprises that alter their relationships with patients, there is justification for at least limited government intervention.[115] Second, unlike other scientific fields that have developed commercial enterprises in the private sector—such as computer science—biomedical research has received substantial government funding and is closely associated with public health. For this reason, academic entrepreneurs in biomedical science should be accountable for their commercial activities.[116]

With these propositions in mind, and in response to the proposed amendments to NOTA, the Secretary of Health and Hu-

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[114] *See* OFFICE OF TECHNOLOGY ASSESSMENT, BIOLOGY, MEDICINE, AND THE BILL OF RIGHTS—SPECIAL REPORT, OTA-CIT-371 (1988).

[115] *See supra* notes 18–29 and accompanying text (noting that traditional notions of the doctor-patient dynamic should be changed to account for the increasingly commercialized field of biotechnology).

[116] *See* Sheldon Krimsky, *The Corporate Capture of Academic Science and Its Social Costs*, in GENETICS AND THE LAW III 45, 45–46 (Aubrey Milunsky & George J. Annas, eds. 1985), *supra* note 10. *See also* Stephen L. Carter, *The Bellman, the Snark, and the Biohazard Debate*, 3 YALE L. & POL'Y REV. 358, 359 (1985) ("The Modern American state intervenes in nearly every aspect of the lives of its constituents . . . . Under an interventionist ideological regime, there may no longer be persuasive reasons for scientists to consider themselves possessed of a special immunity.").

An alternative reform measure could be to resolve the current inequity by restricting the physician's rights to profits derived from research using his patient's type-2 biological materials. Two types of regulatory reform would make this option possible. First, the profession could be regulated so that type-2 biological materials could still be used in research for private financial gain, but physician-researchers would no longer be allowed to wear both professional hats. In other words, the physician who removes the material could not use it for profit in a private research interest, but could transfer it to a commercial researcher who could. Second, regulations could require that profits derived from research revert back into government funding for biomedical research. *See* Wells, *supra* note 108, at 380.

man Services should establish guidelines for patient compensation. The guidelines would require that a patient be offered a percentage of any profits received by the physician-researchers as a result of the commercialization of any products derived from her biological materials.

a. *The regulated parties.* Compensation would be limited to patients whose type-2 biological materials are removed for therapeutic purposes and then found to be commercially valuable after research conducted on them results in the development of a commercially valuable product. Because type-2 biological materials are diseased, it is realistic to presume that individuals with valuable materials are under the care of a physician who has excised the materials for therapeutic purposes before using them in research.

By limiting the scope of the regulations to existing doctor-patient relationships, the regulations could be implemented efficiently. The compensation agreement could simply be incorporated into the existing framework of exchanges between the doctor and patient, such as obtaining informed consent.[117]

b. *The rate of compensation.* The rate of compensation would be based on a set percentage share of the physician-researchers' profits that are related to the commercialization of the derived product, including patent royalties, stocks, and any direct payments such as the $440,000 given to the researchers in *Moore*.[118] Researchers would not be required to share profits directly compensating them for the research itself such as salary.

Granting compensation on the basis of a percentage share of these profits would be similar to instituting a licensing agreement wherein the patient would grant the researchers a license to use

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[117] *See infra* 121–128 and accompanying text. The regulations would not provide for retroactive compensation to prior donors who never received compensation, despite the fact that they deserve to be compensated on the basis of fairness and equity. Unlike compensation in prospective cases, however, retroactive compensation would be unfair to the researchers who did not anticipate such an obligation.

[118] Each of these is a viable option, but making the patient a shareholder in the company with rights to the product would not be commensurate with his contribution. As a shareholder, he would incur benefits and liabilities related to all of the company's holdings, not just the product derived from his biological material. Moreover, the transaction costs would increase because of the greater number of parties involved.

the biological materials in exchange for a royalty.[119] In setting the percentage, the Secretary should consider the parties' relative contributions to the derived product, including the investment of capital and expertise by the researchers and the fortuitous fact that the patient's biological materials are valuable. The percentage should be high enough to provide fair compensation to the patient, but not so high that physicians will try to circumvent the regulations by not informing the patient of her right to compensation.[120]

### 3. Implementation

Hospitals and other medical facilities would be required to institute internal procedures to implement the regulations. In addition to existing requirements for informed consent, these procedures would inform each patient undergoing a surgical procedure of his right to compensation if research on excised materials results in a commercially valuable product. On the basis of this information, the patient can choose whether or not to sign an agreement and exercise the right to compensation before the surgery takes place. Since the terms would be set by regulations, the agreement would be non-negotiable, and consequently, legal counsel generally would be unnecessary.

Currently, physicians must obtain a patient's consent to all medical treatment.[121] Physicians have, however, no legal obligation to obtain consent to perform research on materials excised in the course of medical treatment,[122] although experts have advocated such an obligation.[123] Nonetheless, consent forms routinely recognize a patient's "right of notice" by explaining that excised tissue will be sent to the surgical pathologist for a diagnostic examination and may be retained for research or teaching purposes.[124] Physicians could add the compensation agreement to these existing forms to follow the

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[119] *See* Danforth, *supra* note 62, at 199 n.88 ("[T]he patient retains a property interest in the body part that he or she licenses to the scientist on the condition that he or she receive some percentage of the profits derived from the product."); Noonan, *supra* note 109, at 111 ("[L]egislation could . . . grant a compulsory license to any inventor who uses the cells in a patented invention, and require payment of a small royalty (such as 1% of net income) to the patient.").

[120] *See* Danforth, *supra* note 62, at 200.

[121] *See* Levine, *supra* note 28, at 6.

[122] *See id.*

[123] *See* Andrews, *supra* note 2, at 31.

[124] Levine, *supra* note 28, at 6.

notice and consent sections. The new section would simply inform the patient that if research conducted on the excised materials results in the development of any marketable product, the patient has the right to the designated percentage of the researchers' profits directly generated from the product's commercialization.[125]

Entering the agreement at the outset of treatment would prevent the following moral hazard problems and transaction costs.[126] First, waiting to negotiate until after the products are proven valuable creates the risk that researchers will never contact the patient or his heirs to notify them of the right to compensation, knowing that the patient would not have access to information about the progress of research and the prospects for commercialization. Mandatory patient notification at the outset of treatment would obviate this problem. Second, required prior notification would also prevent the transaction costs that would be incurred by physicians in locating a patient or her heirs, and by patients in the detection and prevention of violations by the researchers.[127] Finally, patients would not put themselves at any financial risk because they would not be giving up anything but their diseased tissue in exchange for the potential to reap a profit. Indeed, they would simply be choosing whether or not to exercise the statutory right to seek compensation for the use of tissue excised from their bodies.

Although the routine use of the forms by medical facilities would be a more efficient means of compensating patients than a market, substantial costs would still be incurred. The initial implementation would entail one-time administrative costs of drafting the new agreement and training personnel, but the costs would not increase significantly once the procedures are integrated into the informed consent procedures.[128] More significant costs would result, however, from the requirement of presenting the agreement to every patient that undergoes surgery, not just the relatively few with valuable biological materials. In addition,

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[125] The actual percentage set by the Secretary in the regulations would be specified in the forms and would be the same in every case regardless of the amount of profits.

[126] *But see* Danforth, *supra* note 62, at 199; Levine, *supra* note 28, at 7 (both proposing that market value be disclosed only at the "stage of inevitability, the stage in applied research at which the development of a product that could have market value becomes inevitable").

[127] *See* John W. Schlicher, *Some Thoughts on the Law and Economics of Licensing Biotechnology Patent and Related Property Rights in the United States*, 69 J. PAT. TRADEMARK OFF. SOC'Y 263, 267 (1987).

[128] *But see* Heyer, *supra* note 93, at 660.

substantial cost could be incurred in reviewing the agreements to identify those patients whose materials have been used in a profitable enterprise, and then contacting and compensating them.

Nevertheless this proposal would streamline the agreement procedures by incorporating them into existing informed consent forms. Potential transaction costs emphasize the importance of integrating the agreement procedures within the present informed consent process, but inefficiency alone is not sufficient to support denial of a patient's right to compensation.

The statutory right to compensation would be enforceable under two sets of circumstances. If the physician never informed the patient of the right to compensation, the patient could bring a claim for breach of a physician's fiduciary duty to disclose facts material to the patient's consent. If the physician or researchers breached an existing agreement, the patient could enforce the agreement as a contract.

## IV. Conclusion

Scientific and commercial advances in biotechnology have rapidly developed amidst a groundswell of support from within and without the scientific community. Subsequent legal action in the area has encouraged scientific and commercial developments, but has often failed to protect the rights of patients who contribute commercially valuable biological materials. This inequity is especially evident in transactions involving type-2 biological materials.

As biotechnology becomes more sophisticated and continues to present novel dilemmas, the law must respond to new issues with a corresponding level of sophistication. The proposed reform accounts for the complexities that have emerged with biotechnological advances regarding the commercial use of type-2 biological materials, and provides guidance for managing the legal questions that surely will continue to arise in the future.

# RECENT DEVELOPMENTS

## FEDERAL REGULATION OF SOLID WASTE REDUCTION AND RECYCLING

Reauthorization of the Resource Conservation and Recovery Act ("RCRA"),[1] which expired in 1988, is one of the top priorities of the 102nd Congress.[2] Although RCRA is the nation's primary statute governing both solid and hazardous waste management practices, the major focus of regulations issued to implement RCRA since the early 1980s has been on hazardous waste. Solid waste regulation, by contrast, has been left almost exclusively to municipalities and states.[3]

The Senate began hearings on a reauthorization bill, the Resource Conservation and Recovery Act Amendments of 1991 ("Baucus bill"), in May 1991.[4] The bill contains comprehensive initiatives on waste reduction and recycling, and addresses solid as well as hazardous waste. In September 1991, the Bush administration surprised Congress by opposing Senate reauthorization plans.[5] The Bush administration characterizes the Baucus bill as unnecessarily expanding the federal government's role in solid waste management, and as potentially "technically infeasible, inefficient or administratively unworkable."[6]

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[1] Pub. L. No. 94-580, 90 Stat. 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901–6991i (1988)). RCRA was enacted in 1976 as an amendment to the Resource Recovery Act, which was a 1970 amendment to the Solid Waste Disposal Act of 1965. RCRA was most recently amended by the Hazardous and Solid Waste Amendments of 1984. At present, RCRA is divided into four regulatory programs: hazardous waste (Subtitle C), solid waste (Subtitle D), underground storage tanks (Subtitle I), and medical waste (Subtitle J). *See generally* U.S. EPA, PUB. NO. 530-SW-90-036, RCRA ORIENTATION MANUAL I-3 to I-7 (1990) [hereinafter RCRA ORIENTATION MANUAL]. Note also that, although funding authority for RCRA expired in 1988, statutory requirements still apply, and funding has been appropriated in the intervening years.

[2] Phillip A. Davis, *Reauthorization Is New Front for the Garbage Wars*, 47 CONG. Q. 979 (1991).

[3] *See generally* RCRA ORIENTATION MANUAL, *supra* note 1. *See also* Cynthia Folkerts & Elaine Eby, *A Federal Perspective on Waste Minimization*, 13 COLUM. J. ENVTL. L. 293–97 (1988); William L. Kovacs, *The Coming Era of Conservation and Industrial Utilization of Recyclable Materials*, 15 ECOLOGY L.Q. 546–90 (1988); Peter S. Menell, *Beyond the Throwaway Society: An Incentive Approach to Regulating Municipal Solid Waste*, 17 ECOLOGY L.Q. 671–79 (1990).

[4] S. 976, 102nd Cong., 1st Sess. §§ 101–503 (1991) [hereinafter Baucus bill].

[5] Phillip A. Davis, *Administration Backing Away from RCRA Reauthorization*, 47 CONG. Q. 2685 (1991).

[6] *Senate Comm. on Environment and Public Works Subcomm. on Environmental Protection: Legislative Hearing on S. 976, the Resource Conservation and Recovery Act Amendments of 1991*, 102nd Cong., 1st Sess. (Sept. 17, 1991) (statement of William K. Reilly, Administrator, Environmental Protection Agency) [hereinafter *EPA Statement*].

This Recent Development examines the current controversy over RCRA legislation, specifically focusing on the utility of increasing federal control of solid waste reduction and recycling. Part I briefly outlines the scope of the solid waste crisis. Part II discusses the legislative and administrative context in which debate over the Baucus bill is taking place. Part III focuses on responses to the Baucus bill from various interest groups and the Bush administration. (It is noteworthy that, in contrast to the Bush administration's position, environmentalists, state and local governments, and most industry representatives agree that RCRA should be reauthorized, although they differ on particular strategies and goals.)[7] Subpart A of Part III discusses the Baucus bill's provisions for solid waste reduction, which encompass both toxics-use reduction and source reduction.[8] Subpart B addresses the Baucus bill's recycling provisions. Subpart C discusses the Baucus bill's packaging and labeling policies, which are meant to further the objectives of both solid waste reduction and recycling.

Part IV discusses whether it is appropriate to reauthorize RCRA at this time. Subpart A of Part IV considers the problems of comparative risk assessment and allocation of funds for environmental protection. Subpart B addresses whether technical or financial incentives and/or disincentives should play a larger role in the amendment of RCRA. Subpart C analyzes what the respective roles of federal and state government should be in the oversight of solid waste reduction and recycling. Subpart D discusses whether solid waste reduction, recycling, and packaging and labeling standards should be mandatory, voluntary, or a combination of both. Finally, Part V offers a brief summary, concluding that the reauthorization of RCRA is not only environmentally necessary, but administratively feasible and economically sound.

## I. The Nation's Solid Waste Crisis

Increasing quantities of industrial, municipal, and toxic wastes contribute to the nation's present solid waste crisis.

[7] Davis, *supra* note 5, at 2685.

[8] Toxics-use reduction decreases the use of toxic chemicals in industrial production processes. Source reduction decreases the total quantity of waste generated, without particular emphasis on toxics.

Despite state and local efforts to manage solid waste, most experts agree that the United States is currently facing a municipal solid waste ("MSW") disposal crisis of unprecedented proportions.[9] Americans now generate an estimated 180 million tons of MSW[10] annually, of which 73% is landfilled, 14% incinerated, and 13% recycled.[11] MSW generation is projected to reach 200 million tons in 1995, and 216 million tons by the year 2000.[12]

Industrial wastes and toxic releases worsen the solid waste crisis. The Environmental Protection Agency ("EPA") estimates that over 7.6 billion tons of non-hazardous industrial waste are generated in the United States each year.[13] In the 1989 Toxics Release Inventory, the EPA concluded that about 5.7 billion pounds of toxic chemicals are released into the environment annually.[14] This figure is conservative, however, since national data on the use of toxic chemicals is limited.[15]

The environmental and economic consequences associated with these increasing quantities of waste are severe. Exposure to toxic chemicals, in particular, has serious health and environmental consequences.[16] Furthermore, pollution control investments are expensive. In its 1990 annual report, the Council on Environmental Quality indicated that controls to contain or

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[9] For general background and an assessment of the severity of the MSW crisis, see OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, FACING AMERICA'S TRASH: WHAT NEXT FOR MUNICIPAL SOLID WASTE? 3–5, 49–73 (1989) [hereinafter OTA REPORT].

[10] The Environmental Protection Agency defines MSW as including "durable goods, nondurable goods, containers and packaging, food wastes, yard wastes, and miscellaneous inorganic wastes from residential, commercial, institutional, and industrial sources." U.S. EPA, PUB. NO. 530-SW-90-042A, CHARACTERIZATION OF MUNICIPAL SOLID WASTE IN THE UNITED STATES: 1990 UPDATE: EXECUTIVE SUMMARY ES-2 (1990).

[11] *Id.* at ES-4.

[12] *Id.* at ES-3.

[13] *EPA Statement*, supra note 6, at 18.

[14] U.S. EPA, 1989 TOXICS RELEASE INVENTORY (1991).

[15] *See, e.g.*, NATIONAL ENVIRONMENTAL LAW CENTER & U.S. PUBLIC INTEREST RESEARCH GROUP, TOXIC TRUTH AND CONSEQUENCES 1 (1991) (indicating that *reported* toxic chemical releases in 1988 amounted to over 6.2 billion pounds).

[16] *Id.*

> [T]he nation's toxic chemical release problem pales in both size and severity in comparison to the spectrum of problems associated with the production and use of toxic chemicals. Hazardous substances are transported daily over our roads, rails and waterways, stored in our communities, handled by workers in our factories, and incorporated into the products we buy and dispose. At each step in the process, from production to consumer disposal, different hazards are posed.

*Id.*

clean up industrial waste and pollutants amounted to $115 billion in 1990, or 2.1% of the Gross National Product.[17]

As the production of MSW increases, the nation's capacity to manage it by traditional methods—landfilling and incineration—is being challenged by a combination of economic, health, safety, and environmental concerns. Landfills have traditionally been the least expensive means of MSW disposal, but diminishing capacity has increased landfilling costs.[18] In addition, ground water and surface water contamination, and the risk of explosions and fires from methane gas generation, have made communities reluctant to site new facilities. Incinerators, which have been a principal alternative to landfills, burn MSW to produce energy that can be sold. However, incinerators raise significant health concerns because of their emission of toxic air pollutants, including dioxins and furans. Furthermore, ash from the combustion of MSW contains high concentrations of heavy metals, and environmentalists believe that it should be classified and disposed of as hazardous waste.[19]

In response to the solid waste crisis, the Congressional Office of Technology Assessment ("OTA") has concluded that "[s]pecific actions regarding MSW are likely to be more effective if they are delineated in the context of a coherent, comprehensive approach for the Nation, and *this can only be done if a national policy for MSW is established.*"[20] The OTA recommends a strategy favoring MSW prevention, and advises that the next priority be given to the recycling of existing MSW, followed by incineration and landfilling.[21] This strategy has also been recommended by the EPA.[22] The EPA and OTA proposals have significantly shaped the RCRA reauthorization debate.

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[17] EXECUTIVE OFFICE OF THE PRESIDENT, COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY: THE 1990 ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY (1990).

[18] Diminishing landfill capacity has also led to controversy over the interstate transport and disposal of MSW, a topic beyond the scope of this Recent Development.

[19] *See generally* OTA REPORT, *supra* note 9, at 217–98.

[20] *Id.* at 12. The OTA is a nonpartisan agency that provides Congress with analyses of public-policy issues related to scientific and technological change.

[21] *Id.* at 9.

[22] *See* U.S. EPA, THE SOLID WASTE DILEMMA: AN AGENDA FOR ACTION 17–19 (1989).

## II. The Legislative Context of the Senate Consensus Bill

Three comprehensive RCRA bills were introduced into the 101st Congress. Each bill called for a national solid waste management policy that would favor source reduction and recycling of waste.[23] More than one hundred other RCRA-related bills were introduced into the 101st Congress, and several laws affecting solid waste were enacted.[24]

Participants in the current RCRA reauthorization process hope to develop legislation from single consensus bills in both the Senate and the House.[25] Senator Max Baucus (D-Mont.), chairman of the Senate Committee on Environment and Public Works Subcommittee on Environmental Protection, which has jurisdiction over RCRA, introduced a comprehensive reauthorization bill on April 25, 1991.[26] The Baucus bill was co-sponsored by Senators Quentin Burdick (D-N.D.), chairman of the Committee on Environment and Public Works, and John Chafee (R-R.I.), ranking Republican of that committee.[27] In the House, Representative Al Swift (D-Wash.), chairman of the Committee on Energy and Commerce Subcommittee on Transportation and Hazardous Materials, began a series of hearings on RCRA in the spring of 1991.[28] His panel is presently working on a House consensus bill.[29]

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[23] H.R. 3734, 101st Cong., 1st Sess. (1989); S. 1112, 101st Cong., 1st Sess. (1989); S. 1113, 101st Cong., 1st Sess. (1989).

[24] Mark Reisch & James E. McCarthy, Cong. Research Svc., Issue Brief No. IB91069, Solid Waste Management: RCRA Reauthorization Issues CRS-1 (1991) [hereinafter CRS Issue Brief]. Most notably, the Pollution Prevention Act of 1990, 42 U.S.C. § 13101 (Supp. 1991), makes pollution prevention a national policy, provides funding for technical assistance to businesses, and requires firms that must file toxic-chemical release information also to file annual reports on source reduction and recycling. The major substantive provisions of the Pollution Prevention Act have been incorporated into the Baucus bill, *supra* note 4.

[25] Davis, *supra* note 2, at 980. Under the "consensus" bill approach, which Congress also followed in enacting the Clean Air Act Amendments of 1990, a single bill from each house will be introduced by the subcommittee with relevant jurisdiction, with the understanding that only these bills will reach the floor of their respective chambers.

[26] Baucus Bill, *supra* note 4.

[27] 137 Cong. Rec. S5261 (1991).

[28] Davis, *supra* note 2, at 979.

[29] *Id.* In addition to the Baucus bill and the forthcoming bill from Rep. Swift, more than 70 bills promoting recycling have been introduced into the 102nd Congress. CRS Issue Brief, *supra* note 24, at CRS-9. [On November 22, 1991, as this issue went to press, Rep. Swift introduced a House consensus bill, H.R. 3865 ("The National Waste Reduction, Recycling, and Management Act"). The Baucus bill emphasizes federal standards in order to promote recycling markets, but H.R. 3865 relies more strongly on individualized state planning requirements. H.R. 3865 also incorporates a multiple-

When he introduced the Senate consensus bill, Senator Baucus noted that the proposed legislation "establishes a new environmental hierarchy in solid waste."[30] Consistent with the EPA and OTA recommendations,[31] it gives priority first to toxics-use and source reduction, and then to recycling, followed by waste treatment, landfilling, and incineration.[32]

In September 1991, the Bush administration "shocked"[33] Congress by claiming that the Baucus bill is "not the most efficient" means of achieving solid waste management goals.[34] According to Congressional testimony by EPA Administrator William K. Reilly, the Bush administration believes that provisions of the Baucus bill "do not provide for targeting significant risks, and establish 'command and control' approaches that are in some cases technically infeasible, inefficient, or administratively unworkable."[35] Senators on the Subcommittee on Environmental Protection, disagreeing, expressed their intention of reauthorizing RCRA even without administration support.[36]

The Baucus bill is organized under five titles. This article will focus on Title II, which governs toxics-use and source reduction, and Title III, which governs recycling.[37]

## III. The Debate Over the Senate Consensus Bill

This section will outline relevant provisions of the Baucus bill pertaining to solid waste reduction, recycling, and packaging and labeling requirements. It will identify areas of controversy and briefly present the viewpoints of environmental groups, industry, states, and the Bush administration, as set forth by

option packaging reduction strategy, requires toxic metals reduction in packaging, and includes an envrionmental marketing claims program. Rep. Swift announced his intention to address "waste reduction" in a second consensus bill to be introduced early next year. 137 Cong. Rec. H10990, H10990–93 (daily ed. Nov. 22, 1991) (statement of Rep. Swift)].

[30] 137 Cong. Rec. S5261 (1991).

[31] OTA Report, *supra* note 9, at 9.

[32] Baucus bill, *supra* note 4, § 102.

[33] Davis, *supra* note 5, at 2685.

[34] *EPA Statement*, *supra* note 6, at 9.

[35] *Id.*

[36] Davis, *supra* note 5, at 2685. For example, challenging the Bush administration's conclusions, Senator Chafee argued that the bill "'isn't a major imposition of costs on this country, it's a saving.'" *Id.*

[37] Title I provides general amendments (Congressional findings, objectives and national policy, budgetary authorization, and definitions). Title IV governs waste and secondary materials management. Title V amends provisions for underground storage tanks.

representative individuals and organizations at the recent Senate hearings.

### A. *Solid Waste Reduction*

Federal regulation of solid waste has emphasized pollution control and cleanup. It has not focused on preventing pollution from the outset by mandating reductions in the use of toxic materials and decreased generation of waste at the source. Several states, by contrast, have recently adopted programs emphasizing pollution prevention instead of post-pollution control.[38]

Title II of the Baucus bill offers several strategies to promote toxics-use and source reduction. Among these, both the EPA and states would be required to make toxics-use and source reduction an integral part of state solid waste management planning. The EPA would also be required to collect and disseminate pertinent information, and to provide technical assistance for this purpose.[39] Other requirements include a mandate that the EPA establish accounting procedures and reduction goals for industries presently required to file reports under the Emergency Planning and Community Right-to-Know Acts, and a stipulation that industries prepare performance reports.[40] The public would be entitled to request disclosure of these reports if industries do not meet their toxics-use and source reduction goals.[41] The Baucus bill also requires the EPA to prepare a list of products containing hazardous ingredients, and makes it responsible for regulating the disposal of those products whenever necessary.[42] The EPA would be further required to conduct research and develop methods to support toxics-use and source reduction,[43] and, within one year of RCRA's reauthorization, to report to Congress on criteria for regulatory incentives to promote toxics-use and source reduction.[44]

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[38] CONG. RESEARCH SVC., BRIEFING BOOK ON THE RESOURCE CONSERVATION AND RECOVERY ACT (1991).
[39] Baucus bill, *supra* note 4, § 201.
[40] *Id.* § 202.
[41] *Id.*
[42] *Id.* § 204.
[43] *Id.* § 205.
[44] *Id.* § 206.

Two key questions have arisen from these provisions. The first is whether RCRA should focus on *both* toxics-use and source reduction. The second is whether the so-called "community right-to-know" provisions, mandating disclosure of an industry's plans if it fails to meet reduction goals, should be eliminated or expanded. These questions are discussed below.

### 1. Toxics-Use Reduction or Source Reduction?

There is a crucial difference between toxics-use reduction and source reduction. Toxics-use reduction decreases the use of toxic chemicals in industrial processes and products. Source reduction, on the other hand, reduces the total quantity of waste generated. The distinction is important because, under a source-reduction strategy, a facility could achieve technical compliance by producing a smaller volume of waste that is more toxic. It could, for example, substitute a highly corrosive acid needed in small quantities for one less harmful that, in order to achieve the same production process results, must be used in large volumes. The less toxic chemical may be easier to treat or dispose of, and may present fewer risks to workers, but under a source reduction strategy a company would have less incentive to take these factors into account.

Spokespersons for industry generally acknowledge the validity of the Baucus bill's pollution prevention goals, but believe that the goals should focus solely on source reduction.[45] Also, while acknowledging that "[f]ocused attention on specific chemicals in specific uses to reduce specific, unacceptable risks does make good sense,"[46] Monsanto Company ("Monsanto"), a major chemicals manufacturer, urges that the Baucus bill be revised to incorporate a type of cost-benefit analysis that would require "probable unreasonable risk as a basis for further scrutiny or regulation."[47]

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[45] For example, asserting that toxics-use reduction is "too simplistic" an approach, the American Petroleum Institute emphasized at a recent Senate hearing that it is "only one of a number of valuable tools for use in preventing pollution," and that it "fails to recognize the use of appropriate and environmentally sound handling methods to reduce releases." *Senate Comm. on Environment and Public Works Subcomm. on Environmental Protection, Legislative Hearing on the Toxics Use and Source Reduction Provisions of S. 976, The Resource Conservation and Recovery Act Amendments of 1991*, 102nd Cong., 1st Sess. (1991) [hereinafter *Toxics Hearing*] (statement of American Petroleum Institute).

[46] *Id.* (written testimony of Monsanto Company).

[47] *Id.*

Another argument against toxics-use reduction, set forth by the National Association of Metal Finishers, is that "[i]f an industrial process can no longer be efficiently operated in the United States due to the elimination of a 'toxic' material . . . that process and the related jobs will be performed overseas under potentially fewer environmental controls . . . ."[48]

Environmentalists, on the other hand, support both toxics-use and source reduction. They rely on evidence from a recent attempt by the EPA to encourage over 600 large companies to voluntarily reduce pollution caused by seventeen specific toxic chemicals.[49] Some of these enterprises have not only made major progress, but have also discovered that toxics-use and source reduction can be economically profitable when compared to the cost of managing existing waste.[50] Environmentalists also believe that source reduction and, especially, toxics-use reduction will stimulate industry to consider changes in production processes, product design, and materials that will increase economic efficiency and global competitiveness.[51]

Furthermore, the environmental group, INFORM, does not consider a "probable unreasonable risk" standard to be an adequate solution, noting that under the similar standard established by the fifteen-year-old federal Toxics Substances Control Act ("TSCA"), very few chemicals have been restricted.[52] TSCA does not force innovation since, if no chemical substitute is available, the Act makes it "very hard to conclude that anything less than a rare emergency constitutes an unreasonable risk."[53] If Congress incorporates a TSCA-type standard into the Baucus bill instead of pursuing technology-forcing strategies such as the

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[48] *Id.* (written testimony of the National Association of Metal Finishers).

[49] *See* U.S. EPA, POLLUTION PREVENTION STRATEGY (1991).

[50] *Id. See also, e.g.*, Elizabeth Dougherty, *Waste Minimization: Reduce Wastes and Reap the Benefits*, RES. & DEV. MAG., Apr. 1990 at 62–68; Scott McMurray, *Chemical Firms Find That It Pays to Reduce Pollution at Source*, WALL ST. J., June 11, 1991, at A1. The environmental group INFORM also observes that "[f]or most of industry, source reduction and toxics use reduction are virtually identical," and that for such businesses, toxics-use reduction should have similar economic benefits to those of source reduction. INFORM does acknowledge that, especially for industries that define themselves as suppliers of toxic chemicals to other businesses, toxics-use reduction may have adverse economic impact. *Toxics Hearing*, *supra* note 45 (testimony of Warren R. Muir, Senior Fellow, INFORM).

[51] *Toxics Hearing*, *supra* note 45 (testimony of William Ryan and Hillel Gray, National Environmental Law Center). The National Environmental Law Center suggests that "there is a confluence between competitiveness recommendations offered by business theorists and the reduction strategies envisioned in bills such as [the Baucus bill]." *Id.*

[52] *Id.* (testimony of Warren R. Muir).

[53] *Id.*

phasing out of toxic chemicals, INFORM believes that toxic chemicals will be regulated "only under the most extreme circumstances."[54]

The Bush administration, by contrast, points to the EPA's recent success in gaining voluntary industrial compliance for toxics-use and source reduction as a reason to avoid prescriptive regulation through the Baucus bill. EPA Administrator Reilly states that the bill's standards "could seriously inhibit industrial innovation, and may not be cost effective."[55] He believes that the technical requirements imposed on the EPA, industry, and states by the Baucus bill are both infeasible and unnecessary, and argues that voluntary compliance should be sufficient to achieve waste reduction goals.[56]

### 2. Community Right-to-Know

Industry is generally concerned that the Baucus bill's reporting and disclosure requirements may jeopardize trade secret confidentiality.[57] In addition, companies such as Monsanto believe that requiring public disclosure only for noncomplying facilities "indicates an intent to cause the plan to become an enforcement tool, a means of penalizing any site who sets goals and does not achieve them."[58] Monsanto warns that this requirement will work as a disincentive for industry to set its own ambitious and innovative goals.[59]

Despite these concerns, the environmental community believes that reporting requirements can be designed to safeguard trade secrets. The National Environmental Law Center suggests that industry can disguise the actual amounts of chemicals used in making any particular product by reporting chemical use per

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[54] *Id.* The banning of chlorofluorocarbons, for example, which harm the stratospheric ozone layer, came about not through TSCA but through the Montreal Protocol, an international agreement to phase out all uses of these chemicals. Although substitutes are now being developed, INFORM notes that the EPA, in implementing TSCA, was unwilling to find chlorofluorocarbons an "unreasonable risk" because such substitutes did not yet exist.

[55] *EPA Statement*, *supra* note 6, at 17. It would seem that improperly designed standards do carry this risk, but that standards could also be set to encourage innovation, particularly in conjunction with technical and financial incentives.

[56] *Id.* at 16–17.

[57] *Toxics Hearing*, *supra* note 45 (written testimony of Monsanto Company).

[58] *Id.*

[59] *Id.*

unit of production.[60] They also support expanding the Baucus bill's public reporting requirements to mandate disclosure in *all* instances, whether or not reduction goals are met.[61] Such a requirement would not be punitive, but rather would "serve as an engine to drive toxics use reduction."[62] Not only are community right-to-know provisions allowing the release of process-specific information "crucial for developing reliable measures of progress," contends the National Environmental Law Center, but "[d]enial of public access should not be a reward for obeying the nation's laws."[63]

### B. *Recycling: The Problem of Market Development*

A major obstacle to increasing MSW recycling rates has been hesitation both on the part of states and municipalities to support recycling programs without a guarantee of a market for recovered materials, and on the part of industry to invest in recycling without a guaranteed supply of usable materials or a secure market for recycled products.

The Baucus bill includes several provisions to increase recycling rates and to guarantee that materials, once separated for recycling, are collected and incorporated into the manufacture of new products. Among these are national goals for a 10% decrease in MSW generation by the year 2000, and a 25% rate of MSW recycling by 1995, increasing to 50% by the year 2000.[64] To achieve these goals, the EPA is required to establish industry-wide minimum recovery and utilization rates for recyclable materials as well as minimum recycled-content standards, when necessary, for the manufacture of products.[65] The Baucus bill also requires that certain percentages of all paper, glass, metals, and plastic be recycled, and provide industry-wide goals for

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[60] *Id.* (testimony of William Ryan and Hillel Gray, National Environmental Law Center).

[61] *Id.*

[62] *Id. See also* John Holusha, *The Nation's Polluters—Who Emits What, and Where*, N.Y. TIMES, Oct. 13, 1991, at F10 (noting that public disclosure provides an incentive for companies to reduce toxic emissions).

[63] *Toxics Hearing*, *supra* note 45 (testimony of William Ryan and Hillel Gray, National Environmental Law Center).

[64] Baucus bill, *supra* note 4, § 301.

[65] *Id.* "Recovery rates" refers to the *collection* of goods containing recyclable materials, and "utilization rates" refers to the actual *incorporation* of recycled materials into new products. "Minimum content standards" refers to a percentage of recycled materials that *must* be incorporated into new products.

minimum recovery and utilization rates of those materials.[66] The bill specifies minimum content standards for each industry in the event that these rates are not met.[67] In addition, the bill establishes model recycling collection programs for rural and urban areas, which the states must either adopt or replace with a satisfactory alternative.[68]

Moreover, federal agencies must procure items containing the maximum practicable recycled content,[69] and federal contracts exceeding one million dollars must require the use of at least fifty percent recycled materials, whenever possible.[70] Under the bill, individuals will be authorized to petition a federal agency either to increase its use of a recycled item, or to decrease the volume of toxic elements in a waste product generated by the agency, by at least five percent. Petitions may also request smaller-percentage improvements that will result in a neutral or net cost savings to the government.[71] Finally, the Commerce Department and the EPA will be required to cooperate in the identification and development of new worldwide markets for recyclable materials and recycled products.[72]

Controversy has arisen over the Baucus bill's national recycling goals and minimum content standards. Industry, environmental organizations, and states disagree over the levels at which such requirements should be set, and whether they should exist at all.

### 1. National Recycling Goals

Industry is generally less than enthusiastic about national recycling goals. Companies that use recycled materials in the goods they produce are cautiously supportive.[73] Producers of commodities that would be directly subject to recycling goals

[66] *Id.* § 302.
[67] *Id.*
[68] *Id.* § 303.
[69] *Id.* § 304.
[70] *Id.* § 306.
[71] *Id.* § 307.
[72] *Id.* § 305.
[73] Procter & Gamble, for example, finds that the goals of the Baucus bill are "very aggressive but probably appropriate." *Hearing on Municipal Waste Recycling Before the Subcomm. on Environmental Protection of the Senate Comm. on Environment and Public Works*, 102nd Cong., 1st Sess. (June 6, 1991) [hereinafter *Recycling Hearing II*] (written statement of Robert L. Wehling, Vice President, Public Affairs, Procter & Gamble Company).

are more critical. For example, the Council for Solid Waste Solutions, a group of major plastics manufacturers, supports voluntary industry goals and public reporting requirements to measure progress, but argues against mandatory goals.[74] In addition, the Glass Packaging Institute claims that an expanding population and expected economic growth render the goal of a ten percent MSW reduction by the year 2000 overly optimistic.[75]

States and municipalities are also in conflict over national recycling goals. Spokespersons from both rural and urban areas have urged Congress to provide flexibility.[76] In response to these concerns, Barry A. Mannis, a research analyst for the investment banking firm, Morgan Stanley, has advised Congress that national goals should "serve primarily as milestones,"[77] not as mandates. As the latter, he fears, they might "destabilize the economics of recycling."[78] Instead, Mannis thinks, each state should be required to "mandate an aggressive diversion rate which is appropriate for it," and should justify its ceilings to the EPA.[79] He expects this approach would lead some states to set higher targets than the national goals provide, while it would accommodate the particular problems facing other states.[80]

The environmental community has also shown a lukewarm response to the Baucus bill's national recycling goals. The Natural Resources Defense Council ("NRDC"), for example,

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[74] *Id.* (written statement of Bruce Kuiken, Vice President, Resource Recovery, Quantum Chemical Corp., on behalf of the Council for Solid Waste Solutions).

[75] *Id.* (comments by the Glass Packaging Institute).

[76] *Id.* For example, the Commissioner of Missoula County, Montana, states that national goals are appropriate but should not be mandated, so that states can "develop recycling rates based on local community conditions, even if that means a much lower rate for some areas." *Hearing on Municipal Waste Recycling Before the Subcomm. on Environmental Protection of the Senate Comm. on Environment and Public Works*, 102nd Cong., 1st Sess. (June 5, 1991) [hereinafter *Recycling Hearing I*] (statement of Hon. Janet L. Stevens on behalf of the National Association of Counties). The Commissioner of New York City's Department of Sanitation argues that recycling goals "are neither necessary nor appropriate," since they "may ultimately impose new burdens on localities with little, if any, consideration of costs or markets." *Id.* (testimony of Steven M. Polan, Commissioner, New York City Dept. of Sanitation). Other states and municipalities, however, are optimistic about the effectiveness of national recycling goals. The Rhode Island Department of Environmental Management finds the Baucus bill's minimum recovery rates "achievable." *Id.* (testimony of Louise Durfee, Director, Rhode Island Department of Environmental Management). The Seattle Solid Waste Utility believes that they "are not excessive and may be low." *Id.* (testimony of Diana Gale, Director, Seattle Solid Waste Utility).

[77] *Recycling Hearing II*, *supra* note 73 (testimony of Barry A. Mannis, Vice President, Environmental Services Research, Morgan Stanley & Co.).

[78] *Id.*

[79] *Id.*

[80] *Id.*

stresses that the numbers are uniformly too low. Emphasizing the need for a national waste reduction and recycling "mandate," NRDC urges a 40% reduction of MSW within ten years, and a diversion requirement from landfilling and incineration of "upwards of 60% by commodity."[81] NRDC contends that "*[t]he absence of a diversion mandate in these Amendments are their most substantial defect. By not requiring diversion these Amendments preclude a shift from a waste-treatment system to a recycling system.*"[82] They would prohibit new incinerator or landfill permits until localities achieve these diversion rates and demonstrate that new waste management facilities will not interfere with maintaining such rates.[83] To support its proposed levels of diversion, NRDC also promotes a national beverage container deposit system.[84]

### 2. Minimum Content Standards

States and municipalities strongly support minimum content standards for products made with recycled goods.[85] For example, Rhode Island's Department of Environmental Management observes the following: "It is vital that the Federal government take the lead in market development, since markets are national and international. Market development is an area where the actions of individual states have little impact."[86] Seattle's Solid Waste Utility believes that the Baucus bill's present provision to make minimum content standards take effect only as a "hammer,"[87] when recovery and utilization rates are not met, may be insufficient. It suggests that Congress should instead "consider moving *directly* to minimum contents as part of a market development strategy."[88]

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[81] *Recycling Hearing I*, *supra* note 76 (testimony of NRDC on behalf of the National Audubon Society, Sierra Club, U.S. Public Interest Research Group, and NRDC). NRDC recommends the following diversion rates: 65% for glass, 65% for paper, 80% for metals, 50% for plastics, 90% for yard wastes, and 10% for food wastes.

[82] *Id.*

[83] *Id.*

[84] *Id.*

[85] *See, e.g.*, *id.* (testimony of Hon. Janet L. Stevens, Louise Durfee, Diana Gale, and Steven M. Polan).

[86] *Id.* (testimony of Louise Durfee).

[87] A "hammer" is a statutory provision that becomes effective on a specific date if legislative goals are not met. *See* RCRA ORIENTATION MANUAL, *supra* note 1, at I-4. (Such provisions are a legislative means of curtailing the EPA's discretionary authority.)

[88] *Recycling Hearing I*, *supra* note 76 (testimony of Diana Gale) (emphasis in original).

NRDC would also like to see a mandate for minimum content standards, and urges raising the proposed levels.[89] They note that "[t]he higher the content standards that are required the more likely that industry will step in and assist with diversion/collection and in this way alleviate some of the financial burden municipalities must bear."[90]

Producers of commodities that would be governed by such standards voice major objections to minimum content requirements. Spokespersons for the paper and plastics industries characterize the hammer provisions as a substantial "burden"[91] or as "unduly insert[ing] government into the market system."[92] The Glass Packaging Institute acknowledges that minimum content standards may strengthen recycling markets, but stresses that "they must be based on technological and supply realities."[93] The aluminum industry, attempting to exclude itself from the proposed regulations, suggests that content standards should be mandated only for recyclable commodities in need of market development.[94]

### C. *Product Packaging and Labeling Standards*

The Baucus bill provides for the establishment of a products and packaging advisory board composed of representatives from industry, state and local government, and environmental and consumer groups.[95] The board will be charged with making recommendations to the EPA for (1) voluntary minimization of packaging and recycling of packaging materials; (2) labeling of plastic resins used in products; and (3) standards for the design, composition, and reuse of packaging.[96] The EPA will be free to adopt any of the board's recommendations through administrative rulemaking.[97] Controversy exists, however, as to whether

[89] *Id.* (testimony of NRDC).
[90] *Id.*
[91] *Recycling Hearing II*, *supra* note 73 (statement of Red Cavaney, American Paper Institute).
[92] *Id.* (statement of Bruce Kuiken).
[93] *Id.* (comments by the Glass Packaging Institute).
[94] *Id.* (testimony of Charles W. Rayfield). The Aluminum Association, emphasizing its successful recycling record, also believes that it should be exempted from national recycling goals.
[95] Baucus bill, *supra* note 4, at § 203.
[96] *Id.*
[97] *Id.*

packaging and labeling standards should be mandatory or voluntary.

### 1. Product Packaging

Since product packaging constitutes about one-third of all MSW,[98] volume reduction and recycling in this area have major potential to alleviate the solid waste crisis. Industry representatives claim that they have, and will continue, voluntarily to reduce packaging and to "design for recyclability." They argue that progress in these areas should be a matter of voluntary, market-driven decision-making. For example, the Foodservice and Packaging Institute, pointing out that many recycling processes are still under development, suggests that industrial innovation might be stifled by mandatory regulation.[99]

Environmental groups and some states endorse a stronger approach. The National Environmental Law Center addresses industry's fear of regulation by suggesting that compliance costs will be low.[100] It also notes that "regulations most likely to elicit an innovative response are those that set stringent standards while providing industry with maximum flexibility in meeting those standards, and that target industries with the capacity to innovate."[101]

Northeastern state officials, observing that significant market barriers hinder waste reduction and recycling, request "preferably, regional and federal action, but action that goes beyond what is contemplated in [the Baucus bill]."[102] The Coalition of

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[98] OTA REPORT, *supra* note 9, at 5.

[99] *Legislative Hearing on the Packaging and Labeling Provisions of S. 976, The Resource Conservation and Recovery Act Amendments of 1991, Before the Subcomm. on Environmental Protection of the Senate Comm. on Environment and Public Works*, 102nd Cong., 1st Sess. (1991) [hereinafter *Packaging Hearing*] (written statement by Pamela J. Driver, Director of Government Relations, Foodservice & Packaging Institute, Inc.). *See also id.* (testimony of Deborah A. Becker, Vice President, Environmental Affairs, Kraft General Foods, Inc., on behalf of National Food Processors; testimony of Unilever United States, Inc).

[100] *Id.* (testimony of Geoffrey Lomax on behalf of the National Environmental Law Center). The Center contends that costs will be low for the following reasons: competition in the packaging industry will reduce costs; some packaging already meets the anticipated standards; businesses already redesign packaging, on average, every two or three years; and packaging regulation is likely to stimulate cost-effective innovation.

[101] *Id.*

[102] *Id.* (testimony of Dr. William M. Ferretti, Director, Office of Recycling Market Development, New York State Dep't of Economic Development, on behalf of the Coalition of Northeast Governors). The Coalition of Northeast Governors promotes the following "Preferred Packaging Guidelines": (1) whenever possible, eliminate packaging; (2) if packaging is necessary, minimize the amount of material used; (3) design consum-

Northeast Governors, for instance, supports mandatory packaging requirements to correct a market distortion that undervalues the costs of waste disposal. They also warn that the Baucus bill's emphasis on research, advisory boards, and voluntary standards "will fall short of yielding the fundamental marketplace developments that need to occur"[103] to effectively promote source reduction and recycling.

### 2. Labeling Standards

A national Gallup survey has indicated that over ninety percent of consumers would be willing to pay more for "environmentally safe" products.[104] In response to this perceived consumer preference, corporations have made an increasing number of "environmentally safe" claims in product labeling. However, the lack of uniform standards has led to a proliferation of unclear and misleading labels.[105] Industry, environmental groups, and states universally acknowledge a need to bring order to this chaos. Some members of industry, for example, want labeling guidelines to prevent the risk of regulatory or legal penalties in response to their claims.[106]

Controversy exists, however, about whether to establish actual standards, even the non-binding advisory standards contemplated by the Baucus bill. The National Food Processors Association argues that standards "will slow progress by allowing companies to stop when they have reached government standards. Market driven solutions will spawn greater creativity and better results."[107]

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able, returnable or reusable packaging; (4) produce packages that are recyclable, and that contain recycled materials. This group has also drafted model legislation to reduce toxicity in packaging by requiring the elimination of lead, cadmium, mercury and hexavalent chromium. (For a further discussion of market barriers, see *infra* notes 132–149 and accompanying text.)

[103] *Id.*

[104] Frank Lautenberg, *Pulling the 'Green' Over Our Eyes*, N.Y. TIMES, Apr. 22, 1991, at A17. *But see* Rose Gutfeld, *Eight of 10 Americans Are Environmentalists, At Least So They Say*, WALL ST. J., Aug. 21, 1991, at A1 (arguing that environmental sensitivity does not necessarily translate into consumer purchasing patterns).

[105] *See id.*; *see also* John Holusha, *Coming Clean on Products: Ecological Claims Faulted*, N.Y. TIMES, Mar. 12, 1991, at D1; Mark Green, *Recyclable . . . or Just Fraudulent?*, N.Y. TIMES, Apr. 21, 1991, at § 3, 11.

[106] *See, e.g.*, *Packaging Hearing*, *supra* note 99 (testimony of Deborah A. Becker on behalf of the National Food Processors Association).

[107] *Id.*

The environmental community disagrees. The Environmental Defense Fund contends that "[g]overnment intervention is *essential* to ensure the accuracy and reliability of environmental claims."[108] They believe that standards must "require that claims be specific, substantive, and substantiated . . . be materials-neutral and readily measurable . . . [and] provide manufacturers with strong incentives to improve their products."[109]

## IV. Policy Options and Analysis

Congress must reconcile competing interests and policy options in order to achieve effective, economical gains in solid waste reduction and recycling. Several major themes recur as interest groups and the Bush administration debate the Baucus bill's waste reduction and recycling provisions. First, should RCRA be reauthorized at all? If so, should the federal government provide increased technical and financial incentives in order to promote compliance with RCRA's goals? What should the respective roles of federal and state government be in the "new" RCRA? Should RCRA's standards be mandatory, voluntary, or some combination of the two?

### A. *Comparative Risk Assessment*

Given the limited federal budget that is allocated for environmental protection, the EPA has considered it necessary to set priorities among competing goals. EPA Administrator Reilly has championed the use of comparative risk assessment as a scientific yardstick for singling out those problems that the government should most urgently address.[110] As defined by the EPA's Science Advisory Board, comparative risk assessment is "the process by which the form, dimension, and characteristics of [an environmental] risk are estimated."[111] Acknowledging the complexity of environmental issues and the resulting uncertainty associated with *any* measurement technique, Administrator

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[108] *Id.* (testimony of the Environmental Defense Fund).

[109] *Id.*

[110] *See* William K. Reilly, *Why I Propose a National Debate on Risk*, EPA J., Mar.-Apr. 1991, at 2–5.

[111] Science Advisory Board, U.S. EPA, Pub. No. SAB-EC-90-021, Reducing Risk: Setting Priorities and Strategies for Environmental Protection 2 (1990) [hereinafter Reducing Risk].

Reilly nevertheless believes that comparative risk assessment "serves as an excellent guidepost . . . for targeting our limited resources."[112]

In testimony before the Senate, Administrator Reilly drew upon comparative risk assessment to challenge the utility of the Baucus bill. He asserted that, "[i]n the broad context of all environmental hazards and problems, those addressed in RCRA generally pose low risk to human health today, and pose variable ecological risks."[113] Given this evaluation, he found that the proposals of the Baucus bill were "overly prescriptive" and too expensive to implement, and suggested that necessary levels of improvement in solid waste management could be achieved through the use of market-based incentives, the existing regulatory framework, and voluntary initiatives on the part of the EPA and industry.[114]

Since comparative risk assessment is central to the Bush administration's rationale for its position on the Baucus bill, current debate surrounding the technique merits a brief discussion here. Proponents of comparative risk analysis, such as Administrator Reilly, point to the need for an objective means to allocate available environmental protection resources for maximum effectiveness. As the EPA's Science Advisory Board has observed, comparative risk assessment "allows many environmental problems to be measured and compared in common terms, and it allows different risk reduction options to be evaluated from a common basis. Thus the concept of environmental risk can help the nation develop environmental policies in a consistent and systematic way."[115]

Critics of comparative risk assessment question whether the data and methodologies employed by the technique are sufficiently accurate to yield reliable, unbiased assessments.[116] They also note that technical formulas do not address public perceptions of risk or the ethical values that may underlie environ-

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[112] *Id.* at 3–4.

[113] *EPA Statement*, *supra* note 6, at 2.

[114] *Id.* at 11. (Note, however, that even a high-priority problem could in theory be addressed by non-prescriptive means.)

[115] REDUCING RISK, *supra* note 111, at 2.

[116] *See, e.g.*, Graeme Browning, *Taking Some Risks*, NAT'L J., June 1, 1991, at 1279 ("Skeptics argue . . . that risk assessment is just another tool for rationalizing policy after it is made."). The EPA's Science Advisory Board also grants that comparative risk assessment's results are necessarily uncertain, due to missing or questionable data, methodological inadequacies, and "the inevitable value judgments that must be made." REDUCING RISK, *supra* note 111, at 8.

mental concerns. Senator David Durenberger (R-Minn.), for example, has charged the following: "To date the comparative risk endeavors of the [EPA] have been virtually blind to the environmental ethic . . . the concern for the future . . . which motivates most Americans."[117]

One problem with comparative risk analysis is, indeed, its uncertainty. However, there is no evidence that alternative means of prioritizing environmental needs are more reliable. If comparative risk analysis is employed in conjunction with, and not to the exclusion of, public opinion and "soft" value judgments, this would seem to offer the greatest likelihood for accurate decision-making. Administrator Reilly does, in fact, endorse a strategy that addresses non-quantifiable concerns in calculating risk. He says that "risk is not the only criterion that we need to consider. Costs, technology, the speed with which measures can take effect, public concerns, legislative mandates, and other factors must all be taken into account."[118]

A greater problem than uncertainties of measurement is comparative risk assessment's underlying premise that resources for environmental protection are scant and fixed. As Senator Durenberger has noted, "There is an explicit assumption in the comparative risk assessments that our resources to address environmental problems are limited and that it is a question of properly dividing the pie. I don't buy that assumption . . . . The appropriations pie is a lot bigger than the $6 billion that currently goes to EPA."[119]

Choosing the size of the entire pie necessarily involves subjective value judgments, which comparative risk assessment tends to obscure. By exclusively focusing attention on how to allocate limited resources, the potential benefits of environmental protection are not weighed against those of unrelated, but competing, categories of government spending. Thus, even if the Bush administration's characterization of the Baucus bill's priority among environmental concerns is accurate—and that is

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[117] *Hearing on the Recent Environmental Protection Agency Science Advisory Board Report, "Reducing Risk: Setting Priorities and Strategies for Environmental Protection" Before the Senate Comm. on Environment and Public Works*, 102nd Cong., 1st Sess. (1991) [hereinafter *Risk Hearing*] (statement by Senator David Durenberger).

[118] *Id.* (testimony of William K. Reilly, Administrator, U.S. Environmental Protection Agency).

[119] *Id.* This figure does not reflect the much larger expenses of environmental protection that are borne by industry. Administrator Reilly has observed that the total "cost of environmental protection [is] now over $100 billion a year." *Id.*

a matter of obvious controversy—this does not automatically imply that RCRA should not be reauthorized.

### B. *The Role of Technical and Financial Incentives*

The Baucus bill makes some provision for technical assistance, particularly in the areas of toxics-use and source reduction. In its present form, the bill pays minimal attention to financial (or market) incentives for waste reduction and recycling. Questions have arisen over whether federal technical and/or financial incentives should be expanded and, especially as to financial incentives, what form they should take. The Bush administration has raised the stakes in this area by strongly favoring market incentives in its testimony before the Senate in September 1991.

#### 1. Current Incentive Provisions in the Baucus Bill

The Baucus bill requires the EPA to collect and disseminate information and to provide technical assistance to industry for toxics-use and source reduction.[120] The EPA must also conduct research and develop methods in order to further these goals.[121] In addition to these requirements, the Baucus bill's establishment of model urban and rural recycling programs is, in a sense, a provision of technical assistance to the states.[122]

The Baucus bill does not mandate any initial financial incentives for toxics-use and source reduction and, except for federal procurement preferences for recycled materials, none are provided to further the bill's recycling goals.[123] However, the EPA must report to Congress within one year of the bill's enactment on standards that might be used in developing a program of regulatory incentives for toxics-use and source reduction, and must evaluate tradable credit options for manufacturers of recycled products.[124] In particular, the EPA must examine the

[120] Baucus bill, *supra* note 4, § 201.
[121] *Id.* § 205.
[122] *Id.* § 303.
[123] Any provision that raises the cost of waste disposal is, of course, an indirect incentive for toxics-use and source reduction.
[124] *Id.* §§ 206, 302.

potential benefits to health and the environment from the use of permit modifications.[125]

### 2. The Case for Technical Assistance

The lack of technical information is a major reason why businesses, especially small businesses, do not practice source reduction, toxics-use reduction, or recycling. As one commentator has observed, "[t]he most significant barrier to the use of source reduction could be lack of knowledge."[126]

Representatives of industry, in accord with this viewpoint, have asked that the Baucus bill's technical assistance provisions be strengthened. The National Association of Metal Finishers, for example, has pointed out that toxics-use and source reduction requirements will have a disproportionate effect on small business.[127] Claiming that the Baucus bill in its present form "will provide only a portion of the guidance and technical assistance required by small business affected by RCRA,"[128] the National Association of Metal Finishers champions both increased and mandatory technical and financial assistance.[129] Larger businesses, such as Monsanto, also support increased technical assistance.[130]

There is reason to believe that the benefits of collecting, evaluating, and disseminating technical information and assistance for solid waste management will outweigh the costs. However, any institution serving as a technical-assistance "clearinghouse" must not only supply information, but, in order to acquire information in the first place, must convince businesses that it will protect their trade secrets and maintain confidential-

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[125] *Id.* The basic premise of permit modifications, or marketable permits, is that the most efficient means to reach specific regulatory standards is to allow companies that can meet their goals at lowest cost to voluntarily exceed these goals and sell their excess credits to companies with higher costs of compliance. *See generally* PROJECT 88: HARNESSING MARKET FORCES TO PROTECT OUR ENVIRONMENT—INITIATIVES FOR THE NEW PRESIDENT (Robert Stavins ed., 1988); PROJECT 88—ROUND II: INCENTIVES FOR ACTION: DESIGNING MARKET-BASED ENVIRONMENTAL STRATEGIES (Robert Stavins ed., 1991).

[126] Roberta G. Gordon, *Legal Incentives For Reduction, Reuse, And Recycling: A New Approach to Hazardous Waste Management*, 95 YALE L.J. 810, 820 (1986).

[127] *Toxics Hearing*, *supra* note 45 (written statement of the National Association of Metal Finishers).

[128] *Id.*

[129] *Id.*

[130] *Id.* (written testimony of Monsanto Company).

ity.[131] Given this latter concern, if government does not accept the role of "clearinghouse," industrial organizations are unlikely to do so on their own in any effective way.

### 3. The Case for Financial Incentives

It has been suggested that, while disseminating technical information may be helpful in alleviating the solid waste crisis, "as technological limits are approached, there is a greater need for incentive approaches that encourage innovation."[132] Technical assistance and financial incentives, in this view, would seem to work in conjunction with each other. The former is more important when a given enterprise first attempts to comply with RCRA standards, and the latter when it can choose whether or not to attempt more ambitious goals.

A considerable range of financial incentives is available. In the area of toxics-use and source reduction, some players in industry have argued that Congress should provide tax credits, variances, extended implementation schedules, and other market incentives to encourage voluntary participation.[133] Among the states, the New York State Department of Economic Development suggests furthering the goal of source reduction by imposing a tax on packaging reflecting the "full cost of disposal," and providing credits for product waste reduction or for investments by the manufacturer to promote recycling of the used product.[134] This agency also proposes "the creation of a market for waste reduction through the trading of permits."[135]

Various groups have also suggested that financial incentives and disincentives should play a larger role in implementing the Baucus bill's recycling goals. Among the states and municipalities, Seattle's Solid Waste Utility advises that value-added taxes, tradable allowances, materials fees, or secondary-material rebate programs would significantly improve recycling programs, and that tax incentives could be used to encourage businesses to build processing facilities.[136] The Seattle utility notes that the Baucus bill does not currently include "language that

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[131] Gordon, *supra* note 126, at 820.

[132] Robert W. Hahn, *An Evaluation of Options for Reducing Hazardous Waste*, 12 HARV. ENVTL. L. REV. 201, 223 (1988).

[133] *Toxics Hearing*, *supra* note 45 (written testimony of Monsanto Company).

[134] *Packaging Hearing*, *supra* note 99 (testimony of Dr. William M. Ferretti).

[135] *Id.*

[136] *Recycling Hearing I*, *supra* note 76 (testimony of Diana Gale).

would encourage communities to calculate the full cost of disposal . . . ."[137] In effect, this results in a comparative disincentive for recycling. (Costs of disposal are generally not reflected in increased product prices for goods made of nonrecycled materials, or, in most municipalities, in incrementally increasing costs for trash removal based on volume per household.) Indeed, Rhode Island's Department of Environmental Management has suggested explicit *dis*incentives to correct this problem. They argue that "[f]or some materials . . . imposing a virgin materials tax is needed to promote recycling. For others reducing incentives that give virgin materials an advantage over recycled materials is necessary."[138]

NRDC, representing the environmental community, has also advanced several proposals to increase the role of financial incentives and disincentives,[139] including use of the tax code to promote recycling. Like Rhode Island, it stresses the importance of "*assess[ing] fees on the use of virgin materials to correct environmental imbalances . . . which now subsidize against recycling.*"[140] Barry A. Mannis of Morgan Stanley also believes that positive incentives should be provided, saying "[t]he most immediately apparent way to do this would be through the tax code. Perhaps investment tax credits . . . [or] [a]ccelerated depreciation schedules . . . ."[141]

The National Environmental Law Center, however, favors an alternative to financial incentives. In the area of toxics-use and source reduction, they note two potential drawbacks to the latter. First, it would be problematic to "avoid providing credits for any change in a product or production process that incidentally reduces toxics use."[142] Second, the Center fears that a "subsidy" for waste reduction goals may interfere with simultaneously furthering both "environmentally-sound technologies" and competitive efficiency.[143] They believe that expanded public disclosure requirements would be the strongest possible incentive for industry to comply with the Baucus bill.[144]

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[137] *Id.*
[138] *Id.* (testimony of Louise Durfee).
[139] *Id.* (testimony of NRDC on behalf of National Audubon Society, Sierra Club, U.S. Public Interest Research Group, and NRDC).
[140] *Id.* (emphasis in original).
[141] *Recycling Hearing II, supra* note 73 (testimony of Barry A. Mannis).
[142] *Toxics Hearing, supra* note 45 (testimony of William Ryan and Hillel Gray).
[143] *Id.*
[144] *Id.*

Is there a way to differentiate among these competing proposals? Robert W. Hahn, Professor at the School of Urban and Policy Affairs at Carnegie-Mellon University, has suggested that financial incentives can be grouped into basic categories, including taxes, permits, and subsidies of various types. He also notes that in choosing incentives, "tradeoffs need to be made among several dimensions, including ease of administration, complexity of the system, effects on waste generation, and expected damages."[145]

Imposing taxes on virgin (nonrecycled) materials is a simple and potentially effective strategy, but—because of public opposition to increased taxes in general—it is probably politically infeasible. Nevertheless, increasing the cost of a product to reflect the actual cost of its disposal would create a more level playing field than presently exists among recycling and more traditional methods of disposal.

Professor Hahn has observed that taxes and marketable permits probably have similar incentive effects.[146] Certainly, the Bush administration might be more likely to support marketable permits, which were a major innovation in the Clean Air Act Amendments of 1990, than it would be to embrace new taxes. And, under a marketable permit system, commodity-specific recycling rates and minimum content standards could offer flexibility to industry: businesses that exceed mandated rates could sell credits to those that do not. If markets operate as expected, RCRA standards would be met at the lowest aggregate cost to industry as a whole.[147]

Concerns about the effectiveness of marketable permits have focused chiefly on their enforceability. Professor Hahn notes that "when information on sources is not readily available and effective monitoring is expensive, tools such as taxes and marketable permits are likely to be limited in their usefulness."[148] In addition, marketable permits may diminish the technology-driving effects of mandatory regulation, although correctly de-

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[145] Hahn, *supra* note 132, at 221.

[146] *Id.* at 215–16, *see also supra* note 125 and accompanying text. *But see* Hahn, *supra* note 132, at 216 n.54 (citing Robert W. Hahn, *Marketable Permits: What's All the Fuss About?* 2 J. PUB. POL'Y 395 (1982) and questioning whether, given uncertainties in measurement, this assumption is correct).

[147] *See generally* Stavins, *supra* note 125, at 6–7.

[148] *Id.* at 213. *See also* Stavins, *supra* note 125, at 7 (noting "if the number of regulated sources . . . is great, the administrative (transaction) costs of these systems can be very high . . .").

signed incentives have at least the potential to encourage companies to go far beyond government-mandated standards, causing a few to develop particularly advanced technology.

Variable fees for waste disposal are another market incentive approach particularly favored by the Bush administration. Under a variable-rate pricing structure, consumers pay fees proportional to the amount of waste that they dispose of, instead of a flat rate which ignores differences in waste volume generated among households. Noting that this strategy has met with considerable success in the city of Seattle, Administrator Reilly has emphasized that, since under variable-rate pricing, fees for waste disposal increase with the volume of waste produced, a market signal is sent that educates consumers. This helps to level the playing field for recycling, and influences, but does not dictate, consumer behavior. Furthermore, variable-rate pricing can be adapted to suit local conditions.[149]

Political considerations will inevitably influence the choice among financial incentives for solid waste reduction and recycling. The challenge, in this context, is to design effective strategies that steer clear of inadvertent disincentives for exceeding waste management goals. Particularly as standards become more, rather than less, voluntary, incentives become correspondingly more critical in order to achieve widespread implementation. Even with mandatory standards, however, technical assistance and financial incentives should facilitate industry and consumer compliance.

### C. *The Roles of Federal and State Government*

The states have a considerable lead over the federal government in solid waste management. Furthermore, state government appears better adapted to handle the many aspects of waste reduction and recycling that are particularized and local in scope. As one commentator has observed, in consequence, "the federal government is ill-suited to micromanage municipal solid waste regulation."[150] Such "micromanagement" (even on the part of states) would be unwieldy, expensive, and of doubtful effectiveness.

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[149] *EPA Statement*, *supra* note 6, at 13–14.
[150] Menell, *supra* note 3, at 718.

Traditional federalist concerns also lead to arguments against expansion of the federal government's role in managing solid waste. To the extent that the federal government regulates, it diminishes local autonomy. Furthermore, there is value in allowing the states to attempt "individualized" experiments. Their results may not only be economically well-suited to local conditions, but may also provide other states with a wealth of information unavailable under conditions of lesser flexibility.

That the solid waste crisis has developed at all, however, is evidence that states cannot cope with solid waste management problems entirely without assistance. In addition, as testimony at the RCRA hearings has indicated, the states themselves have asked for federal management of problems that are "national" in scope.

The optimal solution seems to call for a balance to be struck, in which the federal government's role is expanded in implementing particular, appropriate aspects of the Baucus bill's agenda. Defining minimum content standards for recycled products is a matter of "national" concern; establishing uniform packaging and labeling guidelines is another. In the absence of standardization, manufacturers risk producing goods that cannot be sold in every state. In this era of nationwide markets, such a result is economically infeasible. Furthermore, federal support for recycling markets seems to be the only practical way to ensure an adequate level of recycling at an acceptable cost. Federal standards and incentives can ensure that it remains economically feasible for both industry and local government to invest in recycling.

It seems logical to think of state and federal control of waste reduction and recycling not as an either/or matter, but as a continuum. Each entity will most effectively implement RCRA if it is given authority in its particular areas of strength. The states should retain primary oversight of solid waste management, but the federal government should provide national coordination, policy leadership, and when necessary, enforcement and incentives.

### D. *Mandatory or Voluntary Standards*

Environmentalists, industry, and states are sharply divided over the relative merits of mandates and purely voluntary guide-

lines. Industry warns that mandatory standards may be economically inefficient and discourage voluntary cooperation and innovation. It implies that the latter offers greater hope for resolution of the MSW crisis. If its arguments are taken at face value, industry's main difficulty with the Baucus bill seems less to revolve around mandatory *standards* than around mandatory means of achieving those standards. This seems to be an unnecessary concern, for the Baucus bill does not generally contemplate such hands-on regulation of private business.

It seems more likely that the Baucus bill may lead to mandatory goals set by government, with which industry will comply as it sees fit. Under these circumstances, the argument that mandatory goals will drive technological innovation appears plausible. Furthermore, the contention of environmentalists that waste reduction is economically profitable is borne out by industry's experience with the EPA's recent voluntary initiatives,[151] and also suggests that in arguing against mandatory standards, industry may be focusing only on the possibility of short-term, limited burdens. In the long range both industry and environmentalists are likely to find their interests met by mandatory goals. Certain instances of toxics-use reduction may be the exception to this rule of economic benefit from waste reduction, but those are instances where danger to public safety and health is greatest, and the argument for mandatory regulation is correspondingly strong.

There is another, perhaps too obvious, argument in favor of mandatory goals. As Robert F. Blomquist observes, "While a limited number of far-sighted and innovative companies will respond to voluntary technical assistance programs,"[152] explicit requirements are more likely to have broad effectiveness. In companies that are not "far-sighted," day-to-day pressures on managers to achieve short-term profit goals may make it difficult or impossible for them to factor into their decision-making the longer-term potential profits of complying with "optional" RCRA guidelines.

## V. Conclusion

The environmental problems addressed by the Baucus bill are worsening, and will grow increasingly expensive to remedy over

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[151] *See supra* notes 49–50 and accompanying text.

[152] Robert F. Blomquist, *Developing a Long-Term Waste Management Strategy*, 18 Envtl. L. 817, 875.

time. However, the policy choices that Congress makes in reauthorizing RCRA must be politically feasible in order for the legislation to be passed and to win industry's support for implementation. A solution must be found that optimizes the well-being of our nation's environment, economy, and quality of life.

If waste reduction and recycling standards are lax and voluntary, and the federal government takes a largely hands-off role, new RCRA legislation will be little more than symbolic words. In view of this alternative, the Bush administration's position has the virtue of forthrightness. However, the administration's failure to support the reauthorization of RCRA, given the current state of waste disposal problems in this country, the uncertainities of comparative risk assessment, and industry's partial support for the changes, is difficult to comprehend.

How might a realistic yet effective RCRA bill address the policy concerns that have arisen in the interest groups' debate? First, despite a continuing primary role for the states in the management of waste reduction and recycling, the federal government must become an active player in *significant* areas if the solid waste crisis is to be alleviated. Such areas include the development of markets and the promulgation of consistent standards for the manufacture of products. Technical assistance, especially for small businesses, should be expanded, and traditional financial incentives and disincentives should play a greater role than they presently do in the Baucus bill. Finally, mandatory goals that provide industry with maximum freedom to choose the means to meet them seem most likely to promote environmental and economic gains.

—*Alice D. Keane**

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## INCLUDING LEGAL SERVICES IN STATE SALES TAXES

Following in Florida's footsteps, Massachusetts recently passed and quickly repealed legislation expanding its sales tax base to include many services.[1] Had the expansion not been repealed, Massachusetts would have joined the few states that currently tax legal services.[2] The legal establishment in Massachusetts, however, strongly opposed the legal services tax.[3] In fact, the bar associations of Boston and Massachusetts even filed suit to challenge the statute.[4] Massachusetts soon gave in to such pressures and repealed the sales tax expansion.

Although the effort to tax legal services failed in Massachusetts, other states will continue to consider taxing legal services. California, for example, has recently been considering expanding its sales tax to include legal and other services.[5] The Pennsylvania Legislature also considered such a tax recently, but rejected the proposal.[6] Lawyers have successfully opposed such legislation in many other states as well.[7] This Recent Develop-

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[1] MASS. GEN. L. ch. 64H, §§ 1–33 (Supp. 1991), *amended and partially repealed by* Act of March 8, 1991, 1991 Mass. Acts 4. The legislature had previously delayed the effective date of the tax from November 30, 1990, until March 6, 1991. Act of Nov. 30, 1990, 1990 Mass. Acts 265. On March 8, 1991, two days after the new effective date, the Massachusetts legislature repealed the expansion of the sales tax and applied the repeal retroactively to March 6, 1991. 1991 Mass. Acts 4.

Florida's broad sales tax on services took effect July 1, 1987, and was repealed in December, 1987, after months of national attention and organized opposition. *See* Walter Hellerstein, *Florida's Sales Tax on Services*, 41 NAT'L TAX J. 1, 1–3 (1988).

[2] Hawaii and South Dakota tax legal services as part of general sales tax schemes. *See* HAW. REV. STAT. §§ 237-7 to -13 (1988); S.D. CODIFIED LAWS ANN. §§ 10-45-1 to -5.2 (1989). In addition, New Mexico's "gross receipts tax" includes legal services in its five-percent excise tax. *See* N.M. STAT. ANN. §§ 7-9-1 to -4 (Michie 1978).

Although Delaware has no general sales tax, it does tax gross receipts from legal services through its licensing statute. The statute requires lawyers to pay an annual license fee of $75 and 0.4% of aggregate gross receipts exceeding $15,000 each month. DEL. CODE ANN. tit. 30, § 2301 (Supp. 1990). Since Delaware's statute is a tax on the privilege of doing business rather than an excise tax on consumption, it does not include many of the provisions characteristic of sales taxes, nor does it raise many of the concerns associated with sales taxes.

[3] *See* Neil T. Shayne, *Sales Tax—Another Burden*, 14 TRIAL DIPL. J. 4 (1991); Edward F. Hines, Jr., *The President's Page*, BOSTON B.J., Jan.-Feb. 1989, at 2.

[4] *See* Andrew Blum, *Bay State Professionals Sue Over Service Tax*, NAT'L L.J., Sept. 24, 1990, at 15.

[5] *See* Richard C. Reuben, *Legal Services Levy Begins Hot Debate*, L.A. DAILY J., Apr. 15, 1991, at 7.

[6] *See Noted*, NAT'L L.J., Aug. 19, 1991, at 6 (reporting the Pennsylvania Legislature's rejection of the proposed sales tax on legal services); *Pennsylvania Looks at Legal Services Tax*, NAT'L L.J., Aug. 5, 1991, at 6.

[7] *See, e.g.*, Gail Appleson, *Lawyers Fight Tax on Services*, NAT'L L.J., May 9, 1983, at 1 (reporting lawyers' opposition to service taxes on legal fees in Chicago, New York, Connecticut, and Nebraska); *Legal Services Tax, UMPA Are Hot Issues on Heavy Agenda*, 30 RES GESTAE 304 (1987) (noting the Indiana State Bar Association vote to

ment examines whether states can and should tax legal services in spite of such opposition. Part I of this Recent Development describes the provisions of the repealed amendments to Massachusetts' sales tax as an example of a tax on legal services. Part II identifies the major advantages of taxing legal services, while Part III points out the problems such a tax may create for the legal profession. Finally, Part IV analyzes the various objections to taxing legal services that were raised in Massachusetts, concluding that while social interests in the legal profession's work might justify exempting legal services, no constitutional provisions or other important social policies require such an exemption.

## I. THE MASSACHUSETTS TAX ON LEGAL SERVICES

Unlike other states that tax legal services, Massachusetts would have taxed only legal services performed for businesses.[8] Under the amending statute, these services would have been subject to the regular five-percent sales tax rate when sold "at retail in the commonwealth."[9] A sale of legal or other services would occur "in the commonwealth" if "a greater proportion of the service [was] performed within the commonwealth than in any other state, based on costs of performance."[10] In this respect, Massachusetts' tax was similar to Florida's, in which a service was performed in the state and taxable if "the greater

oppose tax on legal services); Gary Taylor, *No Respite in Legal Services Tax Storm*, NAT'L L.J., Sept. 7, 1987, at 3 (discussing lingering issues in Texas after state bar's successful opposition to a tax on legal services); Susan Trebach, *Sales Tax on Professional Services: Property Tax or Sales Tax?*, WIS. B. BULL., Sept. 1987, at 8, 9 (describing Wisconsin bar officials' lead in the opposition to expansion of sales tax to include legal and other services); *see also* Jerome R. Hellerstein, *Significant Sales and Use Tax Developments During the Past Half Century*, 39 VAND. L. REV. 961, 966 (1986) (suggesting that efforts to tax professional services have consistently failed because of resistance by professional organizations and domination of state legislatures by lawyers who consistently oppose taxation of legal services).

[8] MASS. GEN. L. ch. 64H, § 1 (Supp. 1991), *amended by* Act of March 8, 1991, 1991 Mass. Acts 4. South Dakota specifically lists legal services among those to be taxed, while Hawaii and New Mexico declare all services taxable, then exempt certain services. *See* HAW. REV. STAT. § 237-7 (1988) (including any activity that involves rendering a service for consideration as a "service business or calling"); N.M. STAT. ANN. § 7-9-3 (Michie 1990) (defining services as "all activities engaged in for other persons for consideration"); S.D. CODIFIED LAWS ANN. § 10-45-5.2 (Supp. 1991) (providing a partial list of taxable services).

[9] MASS. GEN. L. ch. 64H, § 2 (Supp. 1991).

[10] *Id.* § 1, *amended by* Act of March 8, 1991, 1991 Mass. Acts 4.

proportion of the service [was] performed within [the] state, based on costs of performance."[11]

Massachusetts would have exempted any sales of legal services that were used outside the commonwealth.[12] Under the Massachusetts statute, if a legal service was directly related to tangible personal property, such as a will or other document, and if the vendor or its licensed carrier delivered the property to the client within Massachusetts, the services were presumed to be used within the commonwealth.[13] If the service was directly related to real property, and the property was within the commonwealth, the service was also presumed to be used within the commonwealth.[14] Other services would be presumed to be used within the commonwealth if the client was engaged in business "primarily within the commonwealth" or had its "principal place of business . . . within the commonwealth."[15] If the service were used both within and outside of Massachusetts, only those portions of the service used within the state were taxable.[16] Finally, if the services could not be assigned to a distinct part of the purchaser's use within the commonwealth, he could apportion them by any reasonable method.[17]

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[11] FLA. STAT. § 212.059(1)(b) (1987), *repealed by* 1987 Fla. Laws ch. 87-548, §§ 13, 37. The Massachusetts statute defined costs of performance in part as "direct costs determined in a manner consistent with generally accepted accounting principles . . . ." MASS. GEN. L. ch. 64H, § 1 (Supp. 1991), *amended and partially repealed by* Act of March 8, 1991, 1991 Mass. Acts 4; *see also* FLA. STAT. § 212.02(6), *deleted by* 1987 Fla. Laws ch. 87-548, § 1 (using identical definition). This definition is included in § 17 of the Uniform Division of Income for Tax Purposes Act, thus making it easier for corporations to comply with the tax, since they will already be keeping such records for state corporate income tax. *See* Walter Hellerstein, *Extending the Sales Tax to Services: Notes From Florida*, 34 TAX NOTES 823, 829 (1987).

[12] MASS. GEN. L. ch. 64H, § 6(mm) (Supp. 1991), *repealed by* Act of March 8, 1991, 1991 Mass. Acts 4. South Dakota also exempts services used out-of-state, but only "if the use of the service occurs entirely outside the state." S.D. CODIFIED LAWS ANN. § 10-45-12.3 (Supp. 1991). Florida also exempted out-of-state sales of services, but applied a detailed list of rules to determine what sales were used outside of Florida. The rules for sales to businesses looked first to the situs of any property to which the service was directly related, then to whether the service related to sales in a purchaser's local market. If none of the other rules applied, the service was deemed to be used within Florida to the extent the purchaser was doing business in the state. FLA. STAT. § 212.0591(9) (1987), *repealed by* 1987 Fla. Laws ch. 87-548, § 14; *see also* Hellerstein, *supra* note 1, at 4–5. New Mexico, on the other hand, does apply a "compensating tax" for the privilege of using services rendered in New Mexico, if the transaction would not have initially been subject to its gross receipts tax. N.M. STAT. ANN. § 7-9-7(B) (Michie 1990).

[13] MASS. GEN. L. ch. 64H, § 6(mm)(1) (Supp. 1991), *repealed by* Act of March 8, 1991, 1991 Mass. Acts 4.

[14] *Id.* § 6(mm)(2).

[15] *Id.* § 6(mm)(3).

[16] *Id.*

[17] *Id.*

The Massachusetts statute also would have exempted services which were "an integral, inseparable component part" of taxable services.[18] This "sale-for-resale" exemption is typical of other states' services taxes.[19] Under this exemption, any sale of legal services to a purchaser who included the charge for those services in a subsequent sale to an ultimate consumer would not have been taxed. The statute would require the intermediate purchaser to "separately state the service and the cost thereof to the purchaser on the bill or invoice to the ultimate consumer."[20] The exemption, therefore, would not be available where the cost of the legal service was simply absorbed into the price of a final product or service. It would apply only where the intermediate purchaser was acting as a broker or otherwise acquiring legal services that were clearly billed and passed onto a final purchaser. For example, a law firm could separately bill the ultimate client for the otherwise taxable services of local counsel without paying sales tax on the intermediate transaction between local counsel and general counsel.[21]

Unlike any other state that taxes legal services, Massachusetts would have also exempted a business purchaser's first $20,000 in aggregate legal fees per year.[22] Since the administrative details of this provision were left to subsequent regulation,

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[18] *Id.* § 6(nn). The commissioner was given responsibility for promulgating regulations to define what services would qualify for this exemption. *See id.*

[19] *See, e.g.*, N.M. STAT. ANN. § 7-9-48 (Michie 1978); S.D. CODIFIED LAWS ANN. § 10-45-1(7) (1989). Florida exempted sales of services for resale only if five conditions were met: (1) the purchaser acted only as a broker and did not consume the service himself; (2) the purchaser bought the service pursuant to a written contract specifying the client for whom he was acting as broker; (3) the purchaser separately stated the value of the service in his resale bill; (4) the resale was taxable or used outside the state; and (5) the service was purchased pursuant to a resale permit by a dealer primarily selling services. FLA. STAT. § 212.02(19)(a) (1987), *amended by* 1987 Fla. Laws ch. 87-548. Hawaii, however, exacts a 0.5% tax on gross receipts from sales to intermediaries, in addition to the full 4% on final sales. HAW. REV. STAT. § 237-13(6) (1988). Since professions are listed in a separate section from "service business," however, this sale-for-resale provision may not apply to legal services. *Id.* § 237-13(8).

[20] MASS. GEN. L. ch. 64H, § 6(nn) (Supp. 1991), *repealed by* Act of March 8, 1991, 1991 Mass. Acts 4. Sales are presumed retail sales unless the seller proves otherwise or receives from the purchaser a proper resale certificate. *See id.* § 8.

[21] Such separate billing would most likely not violate rules of professional conduct. These rules most often prohibit the division of fees among attorneys in situations where the client is aware of only a single, aggregate fee, and is without knowledge that a division of the fee will be made. A client presented with a separate bill for additional counsel certainly is aware of that counsel's receipt of payment, and indeed it is questionable whether in this circumstance there exists a division of fees. S.J.C. Rule 3:07, Canon 2, DR 2-107(A); ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(e) (1991).

[22] *Id.* § 6(oo).

it is uncertain whether law firms would have been required to collect information on clients' cumulative legal expenses, or whether clients would have paid tax throughout the year, then applied for a refund.

Besides these exemptions included in the amending statute, several other general sales tax exemptions would have applied to some legal services. For example, "casual and isolated sales" by one not regularly engaged in the business of making "sales at retail" were exempt from the tax.[23] Moreover, legal services sold to any agency of the United States, Massachusetts, or a political subdivision of Massachusetts would not have been taxed.[24] Nor would legal services sold to tax-exempt organizations have been taxed, if they first acquired an exemption certification from the commissioner and purchased the legal services to further their charitable, religious, educational, or scientific purposes.[25]

If legal services had remained in the tax base, Massachusetts would also have subjected them to its use tax. The Massachusetts use tax is a five-percent tax imposed on all "storage, use, or consumption" of property or services in the commonwealth.[26] The tax thus would have applied to legal services performed outside of Massachusetts, but used within the commonwealth.[27]

The use tax is intended to remove the incentive for in-state purchasers to avoid the sales tax by purchasing from out-of-state sellers.[28] The tax's details are essentially identical to those of the corresponding sales tax. All of the relevant exemptions to the sales tax apply equally to the use tax.[29] In addition, any

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[23] *Id.* § 6(c).

[24] *Id.* § 6(d).

[25] *Id.* § 6(e).

[26] *Id.* ch. 64I, § 2 (1991). The use tax incorporates the definitions given for the sales tax. *See id.* § 1.

[27] *Id.* ch. 64I, §§ 1–34 (Supp. 1991), *amended and partially repealed by* Act of March 8, 1991, 1991 Mass. Acts 4; *see also* FLA. STAT. § 212.059 (1987), *repealed by* 1987 Fla. Laws ch. 87-548, §§ 13, 37; S.D. CODIFIED LAWS ANN. § 10-46-2.1 (1989). New Mexico repealed its exemption for services performed outside the state but used inside the state. The repeal takes effect on July 1, 1993. N.M. STAT. ANN. § 7-9-13.1 (Michie 1990).

[28] *See* Hellerstein, *supra* note 1, at 8–9 (suggesting that the Florida use tax was designed to avoid loss of business and revenue from purchasers going out of the state); Timothy E. Marx, *Sales Taxation in the Service and Information Sector*, 7 HAMLINE L. REV. 19, 46–47 (1984); Robert A. Pierce & Carol D. Peacock, *Broadening the Sales Tax Base: Answering One Question Leads to Others*, 14 FLA. ST. U. L. REV. 463, 479 (1986) (arguing that tax avoidance would increase without a use tax).

[29] MASS. GEN. L. ch. 64I, § 7(b) (1991).

sale upon which sales tax is collected is exempt.[30] Furthermore, to avoid double taxation of out-of-state purchases, Massachusetts holds purchasers liable only for the amount of use tax due in excess of sales tax properly paid in another state.[31]

Collecting the sales tax is the seller's responsibility.[32] Collecting the use tax, however, is more complicated. The purchaser, rather than the seller, is given general responsibility for remitting the tax.[33] However, the purchaser is freed from this responsibility if he receives a receipt showing that the tax was collected by a seller doing business within Massachusetts and authorized to collect the tax.[34]

Oddly, the amending statute did not alter the statutory provision requiring only sellers of tangible personal property to register as vendors to collect sales and use taxes.[35] Therefore, even out-of-state law firms that regularly practice in Massachusetts might not have been required to register as vendors to collect the use tax, although they would have met the statutory definition of "engaged in business in the commonwealth."[36]

## II. THE ADVANTAGES OF TAXING SERVICES IN GENERAL

There are several reasons Massachusetts and other states have considered taxing legal and other services. The primary reason, of course, is to raise revenues.[37] By taxing services, a state can greatly increase tax collections without increasing property or sales tax rates.[38]

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[30] *Id.* § 7(a).
[31] *Id.* § 7(c).
[32] *Id.* ch. 64H, §§ 3(a), 5.
[33] *Id.* ch. 64I, §§ 2, 3.
[34] *Id.* § 3.
[35] *Id.* § 9.
[36] *See id.* ch. 64H, § 1 (defining "engaged in business in the commonwealth").
[37] In 1990, Massachusetts would have received an additional $1.24 billion in sales tax revenues by extending the sales tax to include business, personal, automobile, professional, entertainment, and sports services. Sandra C. Quinn, *The Taxation of Legal Services—A Good Idea*, BOSTON B.J., Mar.-Apr. 1990, at 10. A study based on 1982 figures concluded that Massachusetts would have received over $45 million by taxing legal services, and more than $712 million by taxing all services. *See* William F. Fox & Matthew Murray, *Economic Aspects of Taxing Services*, 41 NAT'L TAX J. 19, 25 (1988). States could increase their total tax revenues anywhere from 14% to 103% by extending the sales tax to include services. *See id.*
[38] *See* Karen J. Boucher, *Sales Tax on Services: The New Source of State Revenue*, 7 J. OF STATE TAX'N 273 (1988) (describing political and economic reasons that states often favor taxing new sources over increasing existing tax rates); John J. Siegfried & Paul A. Smith, *The Distributional Effects of a Sales Tax on Services*, 44 NAT'L TAX J.

In addition, taxing services may reduce economic distortions caused by taxing goods but not services. If goods are taxed but services are not, the economy will theoretically produce too many services.[39] By changing the relative price of goods compared to services, taxing only goods also subsidizes services.[40] Expanding the tax base to include services should therefore improve economic efficiency.[41]

Including services in the sales tax may also help reduce the regressivity of the sales tax. It is commonly assumed that higher-income people spend a higher percentage of their income on services than do lower-income people.[42] If so, including services may have a progressive effect on the sales tax distribution.[43]

Including services in the sales tax base also has the practical advantage of making the tax more responsive to changes in consumer spending patterns.[44] This is particularly attractive to states today, given the steady increase in the proportion of spending on services.[45]

## III. The Implications for the Legal Profession

Whatever the advantages of taxing services in general, the legal profession has several reasons to worry about a tax that

41 (1991) (states often prefer expanding the tax base to increasing the tax rate); Quinn, *supra* note 37, at 10 (arguing that expanding the tax base is preferable to increasing the sales tax rate to six percent).

[39] *See* Fox & Murray, *supra* note 37, at 29; Marx, *supra* note 28 at 32–35.

[40] *See* Marx, *supra* note 28, at 32–35.

[41] *See* Fox & Murray, *supra* note 37, at 29.

[42] *See* Marx, *supra* note 28, at 40–41.

[43] *See* John F. Due & John L. Mikesell, Sales Taxation: State and Local Structure and Administration 89 (1983). Empirical studies of the distributional effect of including services in the sales tax, however, have not shown any substantial reduction in regressivity. *See id.*; David G. Davies, *The Significance of Taxation of Services for the Pattern of Distribution of Tax Burden by Income Class*, 1969 Proceedings of the Sixty-Second Ann. Conf. on Tax'n 138, 146 (including services in those states that tax food would insignificantly improve sales tax equity and would insignificantly decrease equity in those states that exempt food); Siegfried & Smith, *supra* note 38, at 48–52. Although taxing professional services would be regressive in the lowest-income groups, it would be proportional among higher-income groups. *See* Fox & Murray, *supra* note 37, at 30–31.

[44] *See* William H. Forst, *Limited Coverage of Services—The Iowa Experience*, 1969 Proceedings of the Sixty-Second Ann. Conf. on Tax'n 161, 163 (finding sales tax more elastic when services are included in the tax base); Fox & Murray, *supra* note 37, at 22–24 (describing studies showing that including services in tax base would increase "elasticity," or responsiveness to economic changes).

[45] *See* Marx, *supra* note 28, at 20–21 & n.9 (showing a steady increase in the percentage of GNP attributable to services); John L. Mikesell, *Sales Tax Coverage for Services—Policy for a Changing Economy*, 9 J. of State Tax'n 31, 31 (1991) (explaining that from 1965 to 1989, services increased from 42.1% to 54% of personal consumption expenditures).

includes legal services. Most lawyers' basic fear is that they will lose profits. For example, if law firms pass on the cost of the tax to their clients, the increased cost might drive away customers.[46] Large national clients may be especially willing to take their business out of the state to avoid the tax.[47] While there is little empirical evidence to support this fear, there is some evidence that excise taxes in general may cause intensive buyers of taxed goods or services to either buy those products out-of-state or relocate outside the state.[48]

On the other hand, law firms that reduce their fees to keep the client's cost the same would still lose profits. Firms with national or regional practices might be especially pressured to reduce their fees, since they face substantial competition from out-of-state law firms that are not subject to the tax.[49] Of course, many clients probably would continue to patronize in-state firms even if the entire cost of the tax was passed on to them, whether because of loyalty, convenience, or other reasons. To some extent, however, law firms may be forced to either reduce their fees or lose clients, both of which decrease profits.

Law firms may also lose business to in-house counsel.[50] Like other states that tax services, Massachusetts would not have

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[46] While passing on the total costs of an excise tax relieves business of the tax burden, it also raises the problem of "pyramiding": the final price to consumers is distorted because it has absorbed multiple taxation. *See* Fred W. Bennion, *Broad Coverage of Services—Hawaii's Experience Under the General Excise Tax Law* 1969 PROCEEDINGS OF THE SIXTY-SECOND ANN. CONF. ON TAX'N 147, 158 (giving an example of pyramiding under Hawaii's General Excise Tax); Fox & Murray, *supra* note 37, at 29; Pierce & Peacock, *supra* note 28, at 477. Since exempting sales of services to businesses would create serious administrative difficulties and greatly reduce the revenue potential of a tax on services, however, states are very unlikely to exempt such sales. *See* DUE & MIKESELL, *supra* note 43, at 91; Siegfried & Smith, *supra* note 38, at 44–46 (calculating that 78% of total consumption of "miscellaneous professional services" in the United States is intermediate consumption by business).

[47] *See* Hellerstein, *supra* note 1, at 8; Edward F. Hines, Jr., *The Taxation of Legal Services—A Bad Idea*, BOSTON B.J., Mar.-Apr. 1990, at 11.

[48] *See* Fox & Murray, *supra* note 37, at 24–28.

[49] *See* Bennion, *supra* note 46, at 157 (describing Hawaiian companies' inability to effectively pass on the state's excise tax, thus reducing output and profits). This would be especially true where out-of-state clients had cases in jurisdictions outside of Massachusetts or matters not related to property or operations within the commonwealth. In those cases, an out-of-state law firm would obviously not perform its services in Massachusetts, nor would the benefit of the services be enjoyed in Massachusetts. But if a Massachusetts firm did the work, the fees would be taxed whenever more of the work was performed at the firm's in-state offices than in any other state. *See* MASS. GEN. L. ch. 64H, § 1 (Supp. 1991), *amended by* Act of March 8, 1991, 1991 Mass. Acts 4.

[50] *See* DUE & MIKESELL, *supra* note 43, at 91; Hellerstein, *supra* note 1, at 8; Appleson, *supra* note 7, at 11; Michael Franck, *Lansing Letter*, MICH. B.J., Jan. 1987, at 12; Hines, *supra* note 47, at 11.

taxed services performed by employees for their employers.[51] Therefore, if law firms attempted to pass on the tax to their clients, clients might find an in-house legal department cost-effective.[52] Such "vertical integration" would not only harm private law firms, but would also create economic distortion by promoting inefficient behavior to avoid taxes.[53] Furthermore, since large companies that spend more on legal services would be more likely to find vertical integration efficient, the result would be to provide another competitive advantage to larger corporations.[54]

Finally, small law firms and individual practitioners might be seriously burdened by the need to keep the necessary records and collect the tax.[55] Under the Massachusetts statute, attorneys might have been faced with the difficult administrative task of determining how much their clients had spent on legal services elsewhere, in order to determine whether the client had reached the statutory $20,000 threshold.[56]

## IV. Reasons for Exempting Legal Services

Because the dangers of losing business and profits are not unique to the legal profession, competitive difficulties alone cannot justify exempting legal services. Furthermore, the legal profession's political pressures, to which many have ascribed the exemption of legal services in other states, clearly do not

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[51] Mass. Gen. L. ch. 64H, § 1 (Supp. 1991), *amended by* Act of March 8, 1991, 1991 Mass. Acts 4; *see also* Fla. Stat. § 212.0592(2) (1987), *repealed by* 1987 Fla. Laws ch. 87-548, § 15; Haw. Rev. Stat. § 237-7 (1988) (not including "services rendered by an employee to the employee's employer" as taxed services); N.M. Stat. Ann. § 7-9-17 (Michie 1978); S.D. Codified Laws Ann. § 10-45-4.1 (1989).

[52] Of course, many companies would still find it cheaper to pay the extra five percent than to hire an in-house staff. *See* Carol Douglas, *State Lawmakers Consider Florida Sales Tax on Services*, 36 Tax Notes 460, 461 (1987); *see also* Mikesell, *supra* note 45, at 37 (arguing that efficiency and/or quality might outweigh an increase of two or three percent, but at six to eight percent the advantage of taking work in-house becomes considerable).

[53] *See* Fox & Murray, *supra* note 37, at 28–29; Hellerstein, *supra* note 1, at 8. Exempting sales of services to businesses would avoid this economic distortion, but states taxing services have not exempted such sales because administration and enforcement would be difficult and substantial revenue would be lost. *See* Due & Mikesell, *supra* note 43, at 91 (describing the difficulty of enforcing an exemption for sales of services to business); Douglas, *supra* note 52, at 461 (under Florida services tax, businesses' percentage of total sales tax revenue would increase from 25 to 65%).

[54] *See* Marx, *supra* note 28, at 36; Mikesell, *supra* note 45, at 37.

[55] *See* Appleson, *supra* note 7, at 10; Hines, *supra* note 47, at 11.

[56] *See* Mass. Gen. L. ch. 64H, § 6(oo) (Supp. 1991), *repealed by* Act of March 8, 1991, 1991 Mass. Acts 4; Shayne, *supra* note 3, at 4.

justify exemption. Since an exemption is essentially a tax expenditure by the government, a state should exempt a given service only if necessary to satisfy constitutional requirements or to further a clear and significant social policy.[57] Opponents of taxing legal services have advanced several such reasons for exempting legal services, including the constitutional rights to counsel, access to the courts, equal protection, and due process, as well as state constitutional requirements, attorney-client privilege, and the social interest in legal services. None of these arguments, however, requires exempting legal services.

### A. *The Constitutional Right to Counsel*

Lawyers in both Massachusetts and Florida argued that their states' taxes impermissibly burdened the constitutional right to counsel.[58] Although courts in the states that tax legal services apparently have not directly decided this issue, a tax on legal services would probably survive such a challenge.

The right to counsel is guaranteed by the Sixth Amendment, and applied to the states through the Fourteenth Amendment.[59] Among other things, the right requires the state to provide counsel to an indigent criminal defendant who cannot afford an attorney.[60] There is no such affirmative right in civil or other cases where a person's liberty is not at stake, but due process still requires the state to permit a party to be heard by counsel.[61]

The Supreme Court explained how a tax or fee may impermissibly burden a constitutional right in *Murdock v. Pennsylvania*. The Court held unconstitutional a license tax on door-to-

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[57] *See* Marx, *supra* note 28, at 37–38 (arguing that states should exempt services from sales tax "only if they further some clearly articulated social goal").

[58] *See* Opinions of the Justices to the Governor, 556 N.E.2d 1002, 1004 & n.4 (Mass. 1990) (declining to consider charges raised in amicus briefs that taxing legal services violates due process and right to counsel); *In re* Advisory Opinion to the Governor, 509 So. 2d 292, 298–99 (Fla. 1987) (listing challenges to taxing legal services on due process, access to courts, separation of powers, supremacy clause, and right to counsel grounds).

[59] *See, e.g.*, Ridgway v. Baker, 720 F.2d 1409, 1413 (5th Cir. 1983).

[60] *See* Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963).

[61] *See* Goldberg v. Kelly, 397 U.S. 254, 270–71 (1970) (stating that due process requires that the state permit counsel to represent a person facing loss of welfare benefits); Powell v. Alabama, 287 U.S. 45, 68–69 (1932) (arguing that an arbitrary refusal by a state or federal court to hear a party through counsel in a civil or criminal case would deny that party due process). A party must also have the "opportunity to employ and consult with counsel," or else the right "would be of little worth." Chandler v. Fretag, 348 U.S. 3, 10 (1954).

door solicitation as applied to religious solicitation.[62] The Court made this distinction:

> We do not mean to say that religious groups and the press are free from all financial burdens of government . . . . It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon . . . . The power to tax the exercise of a privilege is the power to control or suppress its enjoyment . . . . A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution.[63]

While *Murdock* seems to give some authority for a constitutional challenge against a tax on legal services, the Court's reasoning relied heavily on the unique character of license taxes. The Court observed that a license tax has a "destructive influence" because it is "fixed in amount and unrelated to the scope of the activities of petitioners or to their realized revenues."[64] Furthermore, the license tax at issue was not "a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question," nor was it apportioned in any way.[65] "Accordingly," the Court concluded, "it restrains in advance those constitutional liberties of press and religion and *inevitably* tends to suppress their exercise."[66] The Court thus implied that if a tax did not actually suppress protected activity, and was not unrelated to the scope of the activities or realized revenues, the tax would be constitutionally acceptable.

The Court has since held that general sales taxes do not impermissibly burden constitutional rights. In *Minneapolis Star v. Minnesota Commissioner of Revenue*,[67] for example, the Court struck down a special sales and use tax that applied only to large newspapers in Minnesota. The Court explained that generally-applicable taxes, such as Minnesota's general sales

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[62] 319 U.S. 105 (1943).

[63] *Id.* at 112–13. One commentator has found this decision persuasive evidence that a sales tax on legal services would impermissibly burden the right to counsel. Philip P. Houle, *Maine's Proposed Sales Tax on Attorneys' Services: The Tax Man Meets the Constitution*, 10 U. BRIDGEPORT L. REV. 83, 92–94 (1989). In fact, Houle argues that "a sales tax which claims ever-increasing amounts by way of a 'percentage' on an attorney's services or fees would be even more repugnant than Pennsylvania's 'flat' tax on religious solicitations." *Id.* at 93. However, this reasoning overlooks the Supreme Court's evident concern with the character of the tax, not just the amount.

[64] *See Murdock*, 319 U.S. at 113.

[65] *Id.* at 113–14.

[66] *Id.* at 114 (emphasis added).

[67] 460 U.S. 575 (1983).

tax, prevent unconstitutional targeting of the press and therefore do not violate the First Amendment.[68] Recently, *Jimmy Swaggart Ministries v. Board of Equalization* held that California's general sales and use tax, as applied to religious activities, did not impermissibly burden First Amendment rights.[69] Finally, in *Leathers v. Medlock*, the Court upheld the imposition of Arkansas' general sales tax on cable services while exempting satellite services and print media.[70] A sales tax which does not single out protected activity does not threaten to destroy it, and therefore does not impermissibly burden the right at issue.[71]

Including legal services in a general sales and use tax, as Massachusetts did, would almost certainly be constitutional for these same reasons. First, the Massachusetts statute did not target legal services for a separate tax, but simply included them in a general sales tax that taxed a wide range of goods and services.[72] Second, the Massachusetts tax was directly related to the realized revenues from the activity, since the tax was to be a percentage of the actual fee paid to an attorney.[73] Finally, payment of the sales tax was not a precondition imposed prior to receiving an attorney's services, thereby restraining in advance the purchaser's right to counsel. It merely would have increased the charge the purchaser paid the attorney.[74] As Justice O'Connor observed in *Jimmy Swaggart Ministries*, sales taxes are actually imposed on "the privilege of making retail sales" rather than on any constitutionally-protected activity.[75]

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[68] *Id.* at 583–85. The Court noted that although a sales tax does impose some burden, such burdens have long been upheld as acceptable economic regulation of the press. *Id.* at 583, 586 & n.9.

[69] 493 U.S. 378 (1990).

[70] 111 S. Ct. 1438 (1991).

[71] *Id.* at 1444.

[72] The tax applies, of course, to the vast majority of sales of tangible personal property. *See* MASS. GEN. L. ch. 64H, § 1 (Supp. 1991), *amended by* Act of March 8, 1991, 1991 Mass. Acts 4. Under the 1990 amendments, many services also would have been taxed, including telecommunication services; credit reporting and collection services; commercial art and graphic design services; and accounting, engineering, architectural, photographic, computer, and automotive repair services provided to businesses. *See id.*

[73] *Id.* § 2, *repealed by* Act of March 8, 1991, 1991 Mass. Acts 4 (calculating tax from "gross receipts").

[74] *See* Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 390 (1990) (observing that sales taxes do not raise the prior restraint concerns that flat license taxes do, because sales taxes are not imposed as a precondition for engaging in the protected activity).

[75] *Id.* at 389–90 (finding that California's sales tax "applies neutrally to all retail sales" and thus "is not a tax on the right to disseminate religious information, ideas, or beliefs *per se*; rather, it is a tax on the privilege of making retail sales"). This distinction is not just academic, since the services of pro bono or otherwise unpaid attorneys would not incur any tax. Court-appointed, pro bono, and in-house attorney services also would

In other words, the sales tax would have been imposed on the act of selling and buying, not on the act of receiving an attorney's services.

### B. *The Constitutional Right of Access to the Courts*

A related issue is whether taxing legal services unconstitutionally hinders access to the courts. A constitutional right of access to the courts has been recognized to some extent in the Privileges and Immunities Clause,[76] the Right to Petition Clause,[77] and the Due Process Clause.[78] A tax or fee may unacceptably burden or restrict the exercise of this constitutional right.[79] Applying a general sales and use tax to legal services, however, most likely does not violate this right.

In evaluating the right to access, courts have distinguished between "actual access to the court" and "procedures essential to the trial process."[80] Fees that prevent or unacceptably burden actual access to court violate the right, while those procedures which merely increase the burden of pursuing one's case do not. Unlike fees for filing papers in court, taxing attorney fees would not actually prevent entry into court. Rather, like fees for witnesses, the tax would simply increase the cost of effectively pursuing one's case.

Even if one views the hiring of an attorney as part of the initial cost of entry into court, a general sales tax on legal services would not impermissibly burden the right of access. Since an individual would pay the tax only if he paid a fee, the

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not be taxed. The tax is thus clearly directed at consumption, not attorney services *per se*.

[76] *See* Chambers v. Baltimore & Ohio R.R., 207 U.S. 142, 148 (1907).

[77] *See* California Motor Transp. Co. v. Trucking Unltd., 404 U.S. 508, 510 (1972).

[78] *See* Johnson v. Avery, 393 U.S. 483, 485–86 (1969); *see also* Simmons v. Dickhaut, 804 F.2d 182, 183 (1st Cir. 1986); Ryland v. Shapiro, 708 F.2d 967, 971–72 (5th Cir. 1983).

[79] *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371, 380 (1971) (indicating that if a filing fee totally denies indigent's access to obtain a divorce in court, state must waive fee); Silver v. Cormier, 529 F.2d 161, 161–62 (10th Cir. 1976) (finding that a public official's threat to withhold money due impermissibly burdened constitutional right of access in action under 42 U.S.C. § 1983). *But see* United States v. Kras, 409 U.S. 434 (1973) (not requiring a state to waive fee that denies indigent access to bankruptcy); Mid-State Homes, Inc. v. Portis, 652 F. Supp. 640 (W.D. La. 1987) (holding that a $10 recording fee to help pay costs of notice did not burden right of access to courts).

[80] Johnson v. Hubbard, 698 F.2d 286, 288 (6th Cir.), *cert. denied*, 464 U.S. 917 (1983) (no constitutional requirement to waive costs of transcripts, witness fees, and fees to secure depositions); *see also* McNeil v. Lowney, 831 F.2d 1368, 1373 (7th Cir. 1987), *cert. denied*, 485 U.S. 965 (1988).

tax would affect only those who actually pay attorneys.[81] While there would be a slightly increased financial burden on those paying an attorney, such a burden created by a general sales tax would not seem to violate the right to access anymore than it would violate the right to counsel.[82] As Justice O'Connor observed in *Jimmy Swaggart Ministries*, it is possible to imagine that a "more onerous tax rate, even if generally applicable, might effectively choke off" the exercise of a constitutional right; that mere possibility, however, is not enough to invalidate an otherwise permissible general sales tax.[83]

### C. *Equal Protection*

Lawyers have also complained that exempting certain consumers of legal services violates the Equal Protection Clause.[84] Massachusetts, for example, would not have taxed legal services provided by employees to their employers or those services provided to individuals, governments, or non-profit organizations.[85] Such exemptions, however, almost certainly would have satisfied Equal Protection requirements.

States have considerable freedom to make statutory classifications to balance competing goals and interests, particularly in taxation.[86] A court generally will apply strict scrutiny to a state

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[81] Since the sales tax is based on gross receipts, free services would not have been taxed in Massachusetts. MASS. GEN. L. ch. 64H, §§ 1, 2 (Supp. 1991), *amended by* Act of March 8, 1991, 1991 Mass. Acts 4. Massachusetts also exempted government and non-profit purchasers. *Id.* § 6(d), (e). As with the right to counsel objection, the Supreme Court of Florida reasoned that since no taxes were charged if no fee was paid, only those who could afford to pay attorney fees would be taxed. *See In re* Advisory Opinion, 509 So. 2d 292, 302–03 (Fla. 1987) (interpreting Article I, Section 21 of the Florida state constitution, which guarantees that "courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay").

[82] *See supra* text accompanying notes 64–75.

[83] 493 U.S. 378, 392 (1990).

[84] *See* Opinions of the Justices to the Governor, 556 N.E.2d 1002, 1004 n.4 (Mass. 1990); *see also Advisory Opinion*, 509 So. 2d at 303; Hellerstein, *supra* note 1, at 12. Taxing legal services while exempting other types of services does not violate the Equal Protection Clause, since legal services "are not targeted for a separate discriminatory tax." *Advisory Opinion*, 509 So. 2d at 303.

[85] MASS. GEN. L. ch. 64H, § 1, 6(e) (Supp. 1991), *amended by* Act of March 8, 1991, 1991 Mass. Acts 4.

[86] *See, e.g.*, Regan v. Taxation with Representation, 461 U.S. 540, 547 (1983) (stating that legislatures have "especially broad latitude in creating classifications and distinctions in tax statutes"); Madden v. Kentucky, 309 U.S. 83, 87–88 (1940) (finding that the presumption of a tax classification's constitutionality can be overcome "only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes").

statute only if it disadvantages a constitutionally suspect class. Since courts have limited constitutionally suspect classification to "instances of prejudice operating to the detriment of racial and ancestral groups,"[87] non-exempt consumers of legal services almost certainly are not a suspect class.

Classifications based on certain fundamental rights have also invited closer scrutiny.[88] Even if representation by counsel were such a fundamental right, however, the classification challenged in Massachusetts did not draw a line between those who exercise that right and those who do not. Rather, it drew a line between businesses on one hand and individuals, governments, and charities on the other.

Exemptions which do not merit heightened scrutiny "will be sustained if the legislature could have reasonably concluded that the challenged classification would promote a legitimate state purpose."[89] The Supreme Court thus recently upheld a general sales tax that exempted all media except cable television, reasoning that such classifications are constitutional so long as they do not reveal an intent to target the constitutionally-protected activity being taxed.[90] It would be difficult to find such an unconstitutional intention in exemptions like the ones adopted in Massachusetts. The classifications in the Massachusetts statute were meant to further several legitimate state interests: avoiding increased burdens on individual consumers of already costly legal services, promoting charitable work, preserving the tax's character as an excise tax on consumption, and avoiding the waste of taxing the very money government units might spend on legal services.[91] Since employers, charities, and governments

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[87] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-13, at 1465 (2d ed. 1988).

[88] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, (1969) (applying strict scrutiny to classifications based on interstate migration); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (applying strict scrutiny to law requiring voters to pay poll tax).

[89] Williams v. Vermont, 472 U.S. 14, 22–23 (1985) (quoting Exxon Corp. v. Eagerton, 462 U.S. 176, 196 (1983)); *see also* Clements v. Fashing, 457 U.S. 957, 962–63 (1982) (classifications will be upheld if they "bear some rational relationship to a legitimate state end," and will be "set aside only if they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them"); Dunn v. Blumstein, 405 U.S. 330, 337 (1972).

[90] *See* Leathers v. Medlock, 111 S. Ct. 1438, 1446–47 (1991).

[91] The Florida Supreme Court approved of Florida's $500 annual exemption for legal services guaranteed by the Sixth Amendment and the state constitution, and services related to child support, child custody, adoption, divorce, guardianship, juvenile cases, landlord/tenant relations, mobile home rentals, enforcement of civil rights or recovery of past or future medical expenses. FLA. STAT. § 212.0592(27) (1987), *repealed by* 1987 Fla. Laws ch. 87-548. The court concluded that these exemptions were "necessary in

receiving legal services are not similarly situated to private purchasers of such services, a state may choose to treat them differently to further such legitimate state interests.[92]

### D. *Due Process and Interstate Commerce*

Imposing a use tax on sales of services may also raise several concerns under the Due Process and Commerce Clauses of the Constitution.[93] Although occasional problems might have arisen in the application of the tax, the Massachusetts tax as applied to legal services generally would have satisfied these constitutional requirements.

The Due Process and Commerce Clauses limit a state's power to compel out-of-state sellers to collect use taxes.[94] The Massachusetts statute may not have required any out-of-state law firms to collect use tax, thus avoiding constitutional challenge on these grounds.[95] However, even if it had required all firms "engaged in business in the commonwealth" to collect and remit the use tax, the statute probably would have survived a constitutional challenge. In order to satisfy constitutional requirements, there must be some minimum connection between the state and the seller by which the seller enjoys the services of the state.[96] Under the Massachusetts statute, a law firm or other seller of legal services would have been "engaged in business in the commonwealth" only if it (1) maintained a "business location" in Massachusetts; (2) regularly solicited clients for services to be performed in the commonwealth; (3) "exploit[ed] the retail sales market" through various types of advertising and solicitation; or (4) regularly performed services in the commonwealth.[97] An out-of-state law firm would have enjoyed the protections and benefits of the commonwealth's legal and economic

order to satisfy either constitutional requirements or social policy considerations." *In re* Advisory Opinion, 509 So. 2d 292, 303 (Fla. 1987).

[92] *See Williams*, 472 U.S. at 23 (classifications should provide equal treatment for those similarly situated).

[93] U.S. CONST. amend. XIV, § 1; art. I, § 8.

[94] *See* National Geographic Soc'y v. California Bd. of Equalization, 430 U.S. 551, 555 (1977).

[95] *See supra* note 701 and accompanying text.

[96] *See National Geographic Soc'y*, 430 U.S. at 558–61.

[97] *See* MASS. GEN. L. ch. 64H, § 1 (1991), *amended by* Act of March 8, 1991, 1991 Mass. Acts 4.

order if it met any one of these criteria.[98] Since each of these criteria therefore describes some constitutionally sufficient connection to Massachusetts, out-of-state law firms meeting any of the criteria could have been compelled to collect taxes for Massachusetts without violating the Constitution.

Regardless of whether the buyer or seller remits the tax, an excise tax may impermissibly burden interstate commerce if it taxes activities of interstate commerce which do not have a "substantial nexus" with the state or are not fairly related to services provided by the state.[99] Use taxes have been held constitutional because they only tax transactions which have a clear nexus to the state: those transactions in which the purchaser intends to store, use, or consume the product in the taxing state.[100] In addition, use taxes are fairly related to the state's services, since a seller to an in-state user benefits from the state's market, economic order, and legal order.[101]

Besides meeting the nexus and fair-relation requirements, a tax must be apportioned to the state-related activities and must not subject an interstate buyer or seller to multiple taxation.[102] The Massachusetts use tax, and taxes similar to it, satisfy these requirements because the tax applies only to those transactions directed at the taxing state and avoids multiple taxation by providing a credit for any taxes paid to another state.[103]

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[98] *See National Geographic Soc'y*, 430 U.S. at 558–61 (upholding the duty to collect use tax where out-of-state society had two in-state offices soliciting magazine subscriptions, unrelated to the taxed activities); Scripto, Inc. v. Carson, 362 U.S. 207 (1960) (upholding the duty of a Georgia corporation to collect Florida use tax where corporation had no office or employees in Florida, but accepted orders solicited by Florida wholesalers); *In re* State Sales or Use Tax Liability of Webber Furniture, 290 N.W.2d 865 (Neb. 1980) (upholding the duty of a Nebraska corporation to collect South Dakota use tax where only connections were two truckers who delivered furniture into state but did not solicit sales).

[99] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977); Northwestern Cement Co. v. Minnesota, 358 U.S. 450, 464 (1959).

[100] *See, e.g., National Geographic Soc'y*, 430 U.S. at 555; Henneford v. Silas Mason Co., 300 U.S. 577, 581 (1937).

[101] *See* Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940) (state may tax in relation to opportunities it gives, protection it offers, and benefits it confers as an orderly society).

[102] *See* Memphis Gas Co. v. Stone, 335 U.S. 80, 87–88 (1948) (upholding a tax on the value of capital used or invested in pipeline running through Mississippi because it did not risk multiple taxation and was properly apportioned to in-state investment); Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938) (upholding a New Mexico tax on the sale of advertising space in magazine distributed out of state, because taxed activities all occurred in New Mexico and could therefore not be taxed by any other state).

[103] MASS. GEN. L. ch. 64I, § 7(c) (1991); *see also* Hellerstein, *supra* note 1, at 9–11; *cf.* Williams v. Vermont, 472 U.S. 14, 22 (1985) (holding Vermont use tax in violation

A final requirement is that state taxes must not discriminate against interstate commerce. A state's tax scheme as a whole must treat similarly situated in-state and out-of-state taxpayers equally.[104] A tax scheme like Massachusetts' would most likely be constitutional, since both the sales and use taxes impose a five-percent tax on the total amount paid by the purchaser as consideration.[105] Both in-state and out-of-state purchasers are therefore treated equally.

As with any such use tax, occasional difficulties may have arisen in applying the Massachusetts use tax to legal services. There would have been disputes over what law firms "regularly" served Massachusetts clients. Moreover, there probably would have been questions about whether certain legal services were used or consumed within Massachusetts.

The statute says a service is used in the commonwealth if the "benefit of a service" is enjoyed therein.[106] If the services were performed for a Massachusetts client, they could almost certainly have been taxed, subject to the credit for taxes paid in another state. Regardless of where the services were performed, the seller would enjoy the benefits of the commonwealth's opportunities and legal protections by dealing with an in-state client.

Many legal services partially performed within the commonwealth could also have been taxed, either under the sales tax (if the greatest proportion of the costs of performance were within the commonwealth),[107] or perhaps even under the use tax if the services performed in the state established a sufficient nexus.

On the other hand, if Massachusetts had attempted to tax sales of legal services between out-of-state parties where little or none of the services were physically provided within Mas-

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of the Equal Protection Clause when credit is applied discriminatorily); International Harvester Co. v. Dept. of Treasury, 322 U.S. 340, 349–62 (1944) (Rutledge, J., concurring) (finding the Indiana gross income tax not prohibited by the Commerce Clause or the Fourteenth Amendment).

[104] Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64, 69–70 (1963).

[105] The use tax imposes the tax on "the sales price of the property or services." MASS. GEN. L. ch. 64I, § 2 (1991). The sales tax requires "five percent of the gross receipts of the vendor." *Id.* ch. 64H, § 2. "Gross receipts" is defined as the total sales price received as consideration; the two taxes share the definition of "sales price," a definition that does not treat in-state or out-of-state sellers differently. *See id.* § 1, *amended by* Act of March 8, 1991, 1991 Mass Acts 4; ch. 64I, § 1.

[106] *Id.* ch. 64I, § 1.

[107] *Id.* ch. 64H, § 1.

sachusetts, there might have been frequent constitutional and statutory disputes. For example, legal services provided largely outside of Massachusetts regarding an out-of-state client's failed merger with a Massachusetts corporation would probably not have been taxable, since no benefit would actually have been enjoyed in Massachusetts. However, given the obvious administrative difficulties of monitoring and collecting on sales of legal services between out-of-state firms and clients, Massachusetts would probably not have attempted to impose the use tax beyond those cases in which the client was in the commonwealth or in which the services were substantially performed in the commonwealth. Successful constitutional challenges to these applications of the use tax would have been unlikely.

### E. *State Constitutional Objections*

Even though these challenges might be rejected under the United States Constitution, some state courts might interpret similar state constitutional provisions in a more restrictive fashion.[108] Furthermore, states may have other constitutional provisions that could invalidate a tax on legal services.[109]

For example, the Massachusetts tax was challenged under a state constitutional provision that gives the legislature power to "impose and levy, reasonable duties and excises, upon any produce, goods, wares, merchandise, and commodities, whatsoever, brought into, produced, manufactured, or being within the [commonwealth]."[110] The challengers maintained that services were not taxable in Massachusetts because they were not commodities. The Massachusetts Supreme Judicial Court, however, concluded that the services to be included in the sales tax qualified as "commodities" under the court's past decisions.[111] The court relied primarily on its decision in *Minot v. Winthrop*,[112] in

[108] *See, e.g.*, Cooper v. California, 386 U.S. 58, 62 (1967) (state may impose greater search and seizure restrictions under state constitution); Houle, *supra* note 63, at 88–92; *Developments in the Law—Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1463–78 (1982).

[109] *See* Houle, *supra* note 63, at 85–88 (arguing that taxing attorney services would violate constitutional guarantee that "justice shall be administered freely and without sale," a provision contained in the constitutions of Maine, Massachusetts and at least 22 other states).

[110] MASS. CONST. part II, ch. 1, § 1, art. IV.

[111] Opinions of the Justices to the Governor, 556 N.E.2d 1002, 1005–07 (Mass. 1990).

[112] 38 N.E. 512 (Mass. 1894).

which it was held that "commodities" included "all such gainful employments and privileges as are created or may be regulated by law."[113] Since the activities that would have been taxed under the amended statute are subject to regulation—attorneys, for example, are regulated by the judiciary—the majority concluded that the activities were taxable commodities.[114]

### F. *Attorney-Client Privilege*

Some have also suggested that taxing legal services might violate the attorney-client privilege by revealing clients' identities and fees to state auditors, a concern especially relevant to tax clients.[115] In most cases, however, client identities and fees are not considered privileged.[116] There are, however, exceptions to this general rule, such as where disclosure "would implicate the client in the very matter for which he sought legal advice" or would "connect the client to an already disclosed and independently privileged exchange."[117]

While circumstances may occasionally require consideration of such a privilege, it is certainly not a major defect in the tax. Most consumers will be unable to claim legitimate privilege. If cases of legitimate privilege do arise, it would simply mean that auditors might not be able to verify certain gross receipts and the tax paid thereon. Even this occasional problem might be avoided by developing auditing or reporting procedures, such as a coding system for clients, that would examine gross receipts without requiring disclosure of clients' identities. In any event, the attorney-client privilege would at most cause occasional enforcement and administrative problems, but certainly not enough to require abandoning the tax entirely.

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[113] *Id.* at 515.

[114] *Opinions of the Justices*, 556 N.E. 2d at 1006–07.

[115] *See* Blum, *supra* note 4, at 15; Hines, *supra* note 47, at 11. Hines likens this situation to "district attorneys having the right to discover from defense attorneys not only the names of their clients, but also the amount of fees collected therefrom." *Id.*

[116] *See In re* Shargel, 742 F.2d 61, 62 (2d Cir. 1984) (finding fee arrangements not privileged); *In re* Grand Jury Investigation No. 83-2-35 (Durant), 723 F.2d 447, 451 (6th Cir. 1983), *cert. denied*, 467 U.S. 1246 (1984) (finding client identity not privileged).

[117] *Developments in the Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1519–20 (1985); *see also* Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960) (upholding privilege for client's identity where revealing identity to IRS would expose the client to the charges he had sought to avoid).

### G. *The Social Interest in Legal Services*

Even though including legal services in a general sales tax would probably be legally permissible, a state might still consider exempting legal services for their social significance, just as Massachusetts exempted health services, for example.[118] After all, lawyers are essential to the state's obligation to administer justice;[119] in fact, "attorneys are officers of the court."[120] Even if a sales tax does not unconstitutionally burden the right to counsel, it may still be an unwise social policy to increase the cost of legal assistance when such an important value as justice is at stake.

Opponents also argue that taxing legal services often unjustly taxes those undergoing personal hardship and tragedy.[121] If a broad-based services tax can succeed without taxing legal services, perhaps such social concerns might justify exempting legal services.[122] On the other hand, a state might answer these concerns by simply exempting legal services to individuals, as was done in Massachusetts,[123] or by exempting certain categories of services which merit particular concern, as was done in Florida.[124]

## V. CONCLUSION

Although a state's lawyers may suffer financially because of a tax on legal services, competitive difficulty alone is no reason

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[118] MASS. GEN. L. ch. 64H, § 1 (Supp. 1991), *amended by* Act of March 8, 1991, 1991 Mass. Acts 4; *see also* S.D. CODIFIED LAWS ANN. § 10-45-12.1 (Supp. 1991) (exempting health services along with agricultural, educational, forestry, social, construction, and other services).

[119] *See* Goldfarb v. State Bar, 421 U.S. 773, 792 (1975) (claiming "lawyers are essential to the primary governmental function of administering justice"); *see also* Brewer v. Williams, 430 U.S. 387, 415 (1977) (maintaining that the lawyer is the "essential medium" between the court and citizens).

[120] *See, e.g.*, Powell v. Alabama, 287 U.S. 45, 73 (1932).

[121] *See* Hines, *supra* note 47, at 11; Robert N. Schoeplein, *Some Perspectives in the Sales Taxation of Services*, 1969 PROCEEDINGS OF THE SIXTY-SECOND ANN. CONF. ON TAX'N 167, 170.

[122] Massachusetts could have raised $1.24 billion by taxing services in 1990. *See* Quinn, *supra* note 37, at 10. However, legal services would account for only six percent of total potential sales tax service receipts. *See* Fox & Murray, *supra* note 37, at 25.

[123] *See* MASS. GEN. L. ch. 64H, § 1 (Supp. 1991), *amended by* Act of March 8, 1991, 1991 Mass. Acts 4.

[124] The Florida statute exempted legal services guaranteed by the Sixth Amendment and the state constitution, and services related to "child support, child custody, adoption, divorce, guardianship, juvenile cases, landlord/tenant relations, mobile home rentals, enforcement of civil rights or recovery of past or future medical expenses." FLA. STAT. § 212.0592(27) (1987), *repealed by* 1987 Fla. Laws ch. 87-548.

to single out legal services for exemption. Nor do constitutional objections appear to require exempting legal services. General sales taxes simply do not impermissibly burden the exercise of constitutional rights, as the Supreme Court has made clear in the First Amendment context. Furthermore, states are free to include and exempt various services from sales taxes, so long as constitutionally-protected activity is not targeted for discriminatory treatment. Of course, there will be problems to resolve in collecting and administering such taxes. But unless state constitutional provisions bar the way, courts cannot be expected to prevent the inclusion of legal services in states' general sales taxes. The legislatures must therefore be left to decide whether the state's social or economic interests justify exempting legal services.

—*Alan R. Romero*

# BOOK REVIEWS

REFLECTIONS OF AN AFFIRMATIVE ACTION BABY. By *Stephen L. Carter*. Basic Books, 1991. Pp. 286, notes, index. $23.00, cloth.

In a lecture at Harvard Law School in the fall of 1991, Professor Stephen Carter[1] described himself as a critic of affirmative action rather than one of its opponents.[2] The distinction is important to the reader of *Reflections of an Affirmative Action Baby* because it suggests Carter's often ambiguous position within the debate over the path that the black community should take into the twenty-first century. The ambiguity arises from the complex set of social and cultural factors that have shaped and continue to shape the intellectual and political forces within the black community. Full of anecdotes and personal history, the book reveals the struggle of an individual to come to terms with his identity as a beneficiary of racial preferences.

*Reflections of an Affirmative Action Baby* is not, however, straightforward autobiography. Professor Carter makes clear from the first pages that his task is twofold; as he recounts his own story, he simultaneously examines the conflict within the black community over the advantages and disadvantages of affirmative action programs. This conflict has emerged and grown in the decades following the initiation of such programs in the 1960s and now, according to Carter, threatens the black community with potentially irremediable harm. The danger, Carter argues, is that certain members of the community will silence debate, thereby sacrificing further advancement for the appearance of unanimity of opinion (p. 4).

Carter's fundamental premise is that he and other black Americans should not be ambivalent about having benefited from racial preferences (p. 5). They should openly acknowledge to themselves and to the rest of the world that they were the beneficiaries of affirmative action programs. Thus, his own response to the often unvoiced question about his qualifications as a law professor is: "I got into law school because I am black" (p. 11). A simple, unequivocal answer to the question works to the benefit of the individual as well as black society as a whole,

[1] Stephen L. Carter is William Nelson Cromwell Professor of Law at Yale University.

[2] Stephen L. Carter, Speech at the Special Session of Saturday School, Harvard Law School, Sept. 25, 1991.

says Carter. By advocating open acknowledgement of the role of racial preferences, Carter's goal is to "bring some honesty as well as rigor to the debate, and begin at the beginning" (p. 15). Such honesty on the part of black Americans will help to ease the cognitive dissonance they often feel when discussing the merits of affirmative action programs (p. 14).

To be forthright in this way, however, is to invite disagreement and at times hostility on the part of other participants in the debate. When he published an editorial in the *Wall Street Journal*[3] advocating such candor on the part of affirmative action beneficiaries, Professor Carter received letters from other black Americans calling him a traitor and decrying his "'cynicism and insecurity'" (p. 116). Notwithstanding the disapproval of other members of the black community, including some of his students, Carter reiterates the importance of honest self-perception throughout the book.

According to Professor Carter, much of the negative response to his and other non-traditional positions on racial preferences arises from the belief, strongly held by many black Americans, that "there is a *black way to be*" (p. 34). This belief and its adherents equate skin color with a set of values thought to be universal to a person's identifiable group. The conflict among black educators and leaders over the validity of this assumption manifests itself very clearly in the area of university faculty appointments. Thus, when a university wants to hire a person of color, it often seeks someone whose views are considered truly representative of the interests of her community (p. 31). The fact that certain leaders of the black community advocate such goals troubles Carter because he wonders whether the community should continue to perceive itself as a monolithic entity with only one true approach to issues of civil rights and affirmative action.

Carter's general concern is valid; it is true that the call for racial and ethnic diversity on college campuses has at times resulted in the rejection of candidates of color whose academic and political views do not conform to the current agenda. And, the imposition of standards of behavior and expression on black educators does imply blindness to the deep contradiction Carter identifies. He could have gone further, however, by addressing

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[3] Stephen L. Carter, *Racial Preferences? So What?*, WALL ST. J., Sept. 13, 1989, p. A20.

another related issue. When a law firm or a business wants to have minority representation, it most likely seeks individuals who fit the mold of the firm and not necessarily the mold of the black community. Indeed, such institutions intentionally may choose not to hire black applicants whose political and cultural attitudes do not adequately mirror those of their white counterparts. Carter mentions later that law firms are, on the whole, far less diverse than colleges and law schools (p. 135), but he does not address the implications of the troubling fact that the professional world may be unwilling to adjust its standards of cultural expression in order to accommodate such diversity.

When institutions do hire a person of color, that person is often considered the best black for the job, rather than the best candidate among many applicants of diverse racial backgrounds (p. 49). According to Professor Carter, black Americans are "measured by a different yardstick: *first black, only black, best black*" (p. 49). In other words, those who measure the accomplishments of a successful black lawyer or professor compare him to his black colleagues and not to the larger pool of all such professionals. Carter emphasizes that proponents of traditional affirmative action programs are as responsible for the double standard as opponents to such programs (p. 50).

Carter himself received significant attention when he became the first black tenured professor at Yale Law School. Although the award of tenure to professors is not entirely uncommon, Carter became a campus celebrity. He attributes the special treatment to the fact that black individuals' achievements are "either ignored or applauded, but never accepted as a matter of course" (p. 62). The accomplishments of black Americans will no longer be considered extraordinary, he says, when people of color prove that they are as competent as their white counterparts (p. 67). This is a recurrent theme. Throughout the book, Professor Carter emphasizes the importance of strong achievement among black Americans. His message is clear; by proving to themselves and others that they are fully capable of excellence in many different fields, those who succeed will eliminate the need for preferences altogether.

At the beginning of *Reflections of an Affirmative Action Baby*, Carter seems more an opponent of affirmative action than a critic. But, he is ultimately unwilling to forego completely the gains that affirmative action programs have earned for people of color. For example, he believes that universities and busi-

nesses searching for candidates should seek names of people of color for consideration. Despite the high costs of such searches, he argues, the resulting diversity of vision and opinion would produce a net benefit (p. 66), both private and public. Rather than let racial preferences figure in the process, however, the goal of the search should be "to find the blacks among the best, not the best among the blacks" (p. 66). The goal of affirmative inclusion of names of black Americans should be to find the best person for the job regardless of color (p. 67).

Moreover, Carter does not oppose all racial preferences in admission to college and professional schools. He notes that preferences of many kinds operate to fill schools with students of various levels of competency and intelligence. And, expectations about their potential for success depend upon the type of preference applied whether it be preference for racial background, superior musical or athletic ability or for the children of alumni (p. 86). As Carter explains, however, the particular problem with racial preferences is that black students are expected to fail and if they do so, whether at the same rate as white students or not, their failure reinforces pernicious racial stereotypes. To counter such stereotypes, students of color should push themselves to excellence. By the time they enter the professional job market, they should expect to compete equally with their white peers (p. 88), making affirmative action hiring policies unnecessary.

The ambiguity of Carter's position on racial preferences surfaces in his emphasis on accomplishment as the key to eliminating them. He articulates a formula that resembles the traditional goal of affirmative action programs—to ensure a "level playing field" (p. 67). But, he goes on to argue that "[r]acial preferences . . . are not the most constructive method for overcoming the barriers that keep people of color out of high-prestige positions" (p. 67). He also notes that arguments in favor of preferences often assume that these barriers will come down only after more time (p. 69). As a critic and not an outright opponent of affirmative action, Carter believes that the level playing field should be created in the present rather than in an unknown moment in the future.

In Part II of *Reflections of an Affirmative Action Baby*, Professor Carter takes on a different and perhaps more difficult challenge. His foes in this stage of the battle are the leaders of

the black community against whom he claims to bear the standard of free expression and free thought. According to Carter, the black community as a whole has made concerted efforts to stifle any opposition to its mainstream, traditional approach to affirmative action and other civil rights issues. Carter analogizes the treatment of the small group of black dissenters by the larger community to a purge: "It punishes those who disagree with the established view or with a newly minted view being made into the established one" (p. 102). This modern American purge has not resulted in the death or physical persecution of those who dare to question, but rather in their ostracism and expulsion (p. 103). Such individuals as Shelby Steele, Thomas Sowell, and Glenn Loury are no longer welcome in the circle of prominent black intellectuals (pp. 104–05).

The dissenting black has become, according to Carter, a celebrity whose "conservative" views are the focus of media and public attention (p. 104). But, he argues, the dissenting black voices may actually represent a more radical expression of black perspective than that of the mainstream civil rights agenda (p. 106). Because these black men do not share the same position on racial preferences, their legitimate efforts to resolve the complex problems facing black America have been rejected by mainstream black leaders and commentators. Engaging in name calling and ad hominem attacks, the vocal members of both groups have engendered bitter division and hindered further progress toward equality and civil rights (pp. 107–09).

The example of Carter's own experience is telling. By writing his opinion piece for a nationally read newspaper like the *Wall Street Journal*,[4] he had hoped to expand the debate over racial preferences, but instead he became the object of derision (p. 116). His efforts and those of others to encourage discussion and debate within the black community, he argues, have resulted in exaggerated and harmful insularity. Professor Carter attributes the strong reaction to his column to "the seductive call of group identity" (p. 117). As members of any group recognize, the loyalty demanded by one's colleagues and compatriots may be excessive. To challenge or to question is to undermine the power created by unity. The seduction may be difficult to resist; Carter himself values his group identity and refuses to forget

[4] *See supra* note 3.

the history of oppression of black America (p. 129). But, he also condemns the censure of certain views to protect the appearance of unity within the black community because such superficial unity brings the community no real power. Dissent, he argues, should be accepted as part of the ongoing struggle to better the lives of black Americans, not branded as disloyalty and silenced (p. 133).

Carter attempts to fashion a dispassionate response to the criticism that he has betrayed the trust of his fellow black Americans in advocating open debate about the merits of racial preferences. He asserts that polls show that "a plurality, and perhaps a majority, of black Americans oppose racial preferences" (p. 118). The empirical evidence for his assertion is noteworthy and contradicts the conventional wisdom that all of members of the black community support affirmative action policies. However, the force of such data is mitigated by Carter's statement that "the entire point of the argument is that the majority view is irrelevant to the intellectual, whose authority must be the authority of reason" and that "the task of the intellectual, finally, is to answer not the cautions of friends but the call of the mind" (p. 118). He apparently wants to depoliticize this argument, but does so in the course of what is undeniably an extremely political narrative. As an intellectual, he has given himself the task of analysis and rational resolution of problems, or in this context, reflection. Yet, as the author of a book about affirmative action, Carter has stepped outside the boundaries of his accustomed role and into the political arena.

Carter returns to an explicitly political analysis in a later section of the book wherein he reveals his own general political beliefs. He finds it ironic that although he has fairly moderate views on education, taxes, and government spending, as a critic of affirmative action, he has been labelled a black conservative. The imposition of this label, which he claims to be pejorative, has brought many requests for the presentation of views contrary to mainstream black scholars and leaders in the debate over other aspects of the civil rights agenda. He generally refuses to comment on or generalize about such topics as the various Civil Rights Acts because, as he explains, his area of expertise is not civil rights (p. 149).

In *Reflections of an Affirmative Action Baby*, however, Professor Carter cites the Republican Party's strategic opposition

to quotas and therefore to the proposed Civil Rights and Racial Justice Acts of 1990 as justification for the distrust among black Americans of conservative politics. In a chapter entitled "Why Black Conservative is Pejorative," Carter proposes strategies through which the conservative movement could change the way black Americans perceive the Republican Party and garner the support of more black voters (p. 157). He suggests that the Republican Party of George Bush, unlike that of Ronald Reagan, is worthy of black support (pp. 156–57). The Republicans of the 1990s could appeal to black interests, he argues, by making genuine, substantive overtures to the black community. Rather than propose black candidates for seats that they have little chance of winning, the Republican Party should "get some of [the] fiscal and social black conservatives into positions of national prominence" (p. 158). Choosing strong black candidates would allow the conservatives to assert their concern and support for black America in a way that would be more readily believed.

With the nomination of Clarence Thomas to the Supreme Court, the Republican party appears to have taken the first step toward including blacks within the conservative movement in legitimate and powerful ways. This victory is only the beginning, however, as Carter indicates when he calls for reform of the Administration's general approach to the civil rights agenda (pp. 162–64). Moreover, the Republican Party may not be perceived as welcoming to black voters in the face of the politics of some of its more extreme members such as David Duke, formerly a Grand Wizard in the Ku Klux Klan, and recently defeated candidate for governor in Louisiana. If the Republican Party does not abandon its rhetoric of racial difference and hatred, "conservative" may continue to be a "dirty word" in the minds of many black Americans.

Although Carter suggests methods of bringing blacks into the conservative fold, he does not accept the argument that black Americans should be given special treatment because of their shared tragic history. His vision of society rejects the essentialist[5] position that the history of oppression of black

[5] Essentialist theory holds that there are differences between people of color and whites or between women and men that are so fundamental as to be irreconciliable. Critics of this position assert that emphasizing difference is itself harmful because it reinforces antiquated racist and sexist notions.

Americans should support the notion that their singular position is of greater value than that of other Americans. Just as he challenges the assumption that there are universal values held by blacks, he also questions the idea that blacks are any different than other racially and ethnically oppressed groups (p. 198). He fears that essentialism will broaden the gap between black and white Americans, and will promote, rather than eliminate the need for racial preferences (p. 210). He explains that there is something fundamentally "unsettling about the advocacy of a continuation of racial consciousness in the name of eradicating it." Racial consciousness, according to Carter, is always dangerous (p. 210).

Professor Carter indicates, however, that his ideal world in which black Americans are expected to compete on equal footing with white Americans "should not be confused with the vision of a color-blind society that enjoys such political currency" (p. 227). He clearly does not have faith in white America's capacity to solve the complex problem of institutional racism (p. 235). His faith lies with the black community and the last part of the book articulates the need for solidarity within. Carter envisions a world in which the existing rift has been repaired through continued debate and discussion among "black people in all of [their] diversity: rich, poor, gay, straight, religious, secular, left, right" (p. 204).

Despite the seriousness and difficulty of Professor Carter's subject, *Reflections of an Affirmative Action Baby* is extremely readable and enlightening. He provides an engaging mix of personal experience, sociological fact, and political analysis that enhances the current debate over affirmative action. The book resonates with a well-meaning and passionate plea to his fellow black leaders to simultaneously embrace diversity and foster unity. In this way, Carter's book succeeds for the most part in adhering to one of its own tenets; it encourages discourse and gives voice to many competing theories and ideas. Professor Carter does not, however, address the question of affirmative action outside of the professions and inside the factories and police stations. The problems of non-professional blacks affect a larger portion of the black community and arguably impede progress in equality as much as obstacles to success in academia and in elite corporate environments. Professor Carter explicitly foregoes this route because he chooses to speak to that which

he knows, and he does so very skillfully. *Reflections of an Affirmative Action Baby* has already been the subject of considerable media attention, and it promises to continue to provoke strong reactions.

—*Julie T. Barton*

PERSPECTIVES ON THE ROLE OF A CENTRAL BANK. By *Paul A. Volcker, Miguel Mancera, Jean Godeaux, et al.* Washington D.C.: International Monetary Fund, 1991. Pp. xii, 85, list of participants. $12.50 cloth.

For a brief period in 1989, the People's Republic of China experienced incredible internal chaos and as a result faced serious international condemnation. On May 13, 1989, 1000 students began a hunger strike in Tiananmen Square in an attempt to force the government to enact democratic reforms.[1] According to official Chinese accounts, within a few days one million protesters jammed the streets of Beijing in support of these students.[2] Hundreds of millions of people throughout the world watched the drama unfold on television and in the press. On June 4, 1989, the "revolution" ended. The army attacked the demonstrators, killing between 500 and 1000 of them and crushing the incipient democratic movement.[3]

The world community reacted quickly against China's crackdown. President Bush warned that the United States' "constructive relationship" with China would not be resumed until it returned "to the path of political and economic reform" that it had been on prior to the massacre.[4] Japan delayed review of over $5 billion worth of loans.[5] The European Community decided at their June, 1989 Madrid summit to ban arms sales to and new agreements with China until it ended its "brutal repression" of democracy.[6] The United States Congress contemplated the rescission of China's most favored nation trading status, a move that could have cost China billions of dollars.[7]

In the aftermath of Tiananmen Square and its domestic and international repercussions, China held an international convention in January, 1990 (p. 1). The topic of the convention was the role of China's central bank in the formulation and implementation of its monetary policy and economic reform. Sponsored by the People's Bank of China ("PBC"), the International Monetary Fund ("IMF"), and the United Nations Development

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[1] Russell Watson et al., *Upheaval in China*, NEWSWEEK, May 29, 1989, at 18.
[2] *Id.* at 20.
[3] Russell Watson et al., *Beijing Bloodbath*, NEWSWEEK, June 12, 1989, at 24.
[4] *Id.* at 29.
[5] Dori Jones Yang et al., *The Outside World Puts China on Hold*, BUSINESS WEEK, July 10, 1989, at 40.
[6] *Id.*
[7] *Id.* at 41.

Programme ("UNDP"), the conference invited Paul Volcker, former Chair of the U.S. Federal Reserve System, Miguel Mancera, Governor of the Bank of Mexico, and Jean Godeaux, former Governor of the National Bank of Belgium, to meet with over forty senior Chinese officials (p. v). *Perspectives on the Role of a Central Bank* is a compilation of the speeches made by the three guest lecturers and various Chinese and international officials during this convention.

One of the assumptions of the conference was that price stability is key to economic success. In 1988, China's Gross National Product grew at an annual rate of 11.4%, and its industrial production increased by 20.7%.[8] This remarkable growth, however, was accompanied by inflation rates of 18% to 20%.[9] At an October, 1988 central work conference, Chinese political and economic leaders declared the main goal for the next two years to be to lower inflation in order to "bring the economic environment under control, and reestablish economic order."[10] It is therefore not surprising that the three guest speakers at the conference have strongly anti-inflationary track records. As Richard Erb, Deputy Managing Director of the IMF, explained, "these are men who have demonstrated an ability to bring inflation down. You will be hearing from men who have fought the war and have succeeded in achieving their objectives" (p. 5). *Perspectives on the Role of a Central Bank* must be understood within this anti-inflationary bias.

There are two ways to read and think about this book. The first is as an analysis of how a developing nation with a planned economy attempts to reform its economic system based on the advice of Western economists. The second is as a political inquiry into why an isolated Communist country would invite leading Western officials to discuss and criticize its economic system when only six months earlier it seemed indifferent to world censure of its political agenda.

On the one hand, the participating Chinese officials make references throughout the book to the potential for true economic reform in China resulting from these discussions. According to Li Guixian, the Governor of the PBC,

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[8] Lester Thurow, *China's Economic Moves Make Sense*, FORTUNE, June 5, 1989, at 323.

[9] *Id.*

[10] Barry Naughton, *Inflation and Economic Reform in China*, CURRENT HISTORY, Sept. 1989, at 272, 289.

> the 1990s will be a key decade for China to fulfill its economic development strategy; it will also be a decade full of hope and challenge . . . . [And] we wish to learn from and refer to experiences of various nations . . . . It is my belief that the conference will play a positive role in strengthening the functions of the People's Bank of China . . . [and] macroeconomic regulation (p. 6).

Governor Li's words were supported by other Chinese conference participants who gave excellent summaries of the country's economic predicament. For example, Deputy Governor Tong Zengyin explained, "[t]he imperfection of the existing financial framework . . . has severely limited the central bank's ability" to carry out its supervisory and regulatory activities (p. 46). Moreover, Deputy Governor of the PBC Chen Yuan readily admitted that China's "research department still lags behind its counterparts in Western central banks with regard to the scope and speed of information, ability of comprehensive analysis, and the quality of the research team" (p. 64).

On the other hand, Chinese officials also presented this conference as a symbol of China's interest in better foreign relations. Governor Li went on to posit that the conference "will contribute toward enhancing friendly cooperation between the People's Bank of China and the International Monetary Fund, the United Nations Development Program, as well as the central banks of various nations" (pp. 6–7). The foreign participants in the conference also recognized their role in helping China to regain some of the respect and esteem it had lost as a result of the Tiananmen Square disaster. Roy Morey of the UNDP maintained, "to my mind, this international conference is an example of the Chinese Government's commitment to maintain its open-door policy" (p. 7). Paul Volcker agreed: "it is a fact of life that an influential central bank, a prestigious central bank, can be a great asset internationally" (p. 33). When dealing "with the rest of the world, . . . there is a certain inherited confidence and trust in dealing with the central bank" (p. 33). This conference appears to have been an opportunity to enhance the reputation of the People's Bank of China, and hence the severely damaged international reputation of the People's Republic of China. The book highlights the often complex relationship between economic reform and international political approval.

Each of the guest speakers attempted to develop his own themes throughout the three day conference with varied degrees

of effectiveness. Paul Volcker, of the U.S. Federal Reserve System, was the most successful in developing coherent themes, directly answering questions, and giving specific advice. His main contention was that central banks have a monetary stability mission that extends beyond political concerns and economic philosophy. He argued that "if we are going to have well-functioning markets," there must be a "sense of monetary stability" (p. 13). For Volcker, this argument "is not a matter of economic ideology" (p. 14). He noted that both Germany's central bank, the Deutsche Bundesbank, and Vladamir Lenin, which Volcker considered the extremes of capitalism and communism respectively, have warned of the potential dangers of inflation (p. 14).

Within this monetary-stability mandate, the central bank has a unique role. It is the behind-the-scenes player that must regulate the other political economic actors. Indeed, "[m]ost people will not know what the central bank is when things are going smoothly. It is only when things go poorly that the central bank becomes prominent" (p. 64). Volcker believes that there is a natural tendency towards inflation, and that the central bank must fight this. Volcker argues that this will be unpopular in the short run, but is necessary to long-term economic stability.

Volcker's comments were also the most useful of the three guest speakers because only he was willing to criticize the policies and structure of his own country. When asked a question about how the banking system should be supervised and regulated, Volcker suggested that America has "a very complicated, overlapping, confusing situation" (p. 49). He blamed "sensitive political and bureaucratic rivalries" for this problem (p. 49). Volcker further criticized the American system when asked how to establish federal control of the regional central banks. He responded, "if we were starting today, would we have this, administratively, very cumbersome system of twelve different Federal Reserve banks. The answer to that is almost certainly no" (p. 69). He suggested that China establish four or five regional offices responsible for collecting information, but maintain only one centralized bank (pp. 69–70).

The major criticism of Volcker's contribution to the conference stems not from misdirected economic theories, but rather from his apparent willingness to cater to the political strategy of the conference as characterized in Governor Li's earlier statement concerning the potential for stronger ties between China and the international community (pp. 6–7). When asked about

the role of monetary policy, Volcker volunteered to discuss the United States air traffic controllers strike of 1981. He argued that the controllers falsely felt they were "absolutely essential" to the nation and praised the government for firing the workers because their strike was illegal: "the attitude of the Government toward the strike changed in a very important way the attitude of labor unions all over the United States" (p. 16).

Volcker's comments should be evaluated in light of the fact that six months before this conference, the Chinese government killed over 500 hunger-striking students who believed they could force the nation to become more democratic. The possibility that the Chinese officials might analogize between the air traffic controllers' strike and the Tiananmen Square massacre, thereby concluding that Volcker tacitly approved the June crackdown, makes his statement irresponsible. On the whole, however, Paul Volcker's willingness to draw both the good and bad from the American experience allowed him to give constructive advice on how China should reorganize its banking system.

Miguel Mancera, of the Central Bank of Mexico, presented two related themes: first, "the evils of inflation are countless" and second, that the central bank's primary job is to fight inflation (p. 19). But, rather than develop these themes and apply them to China's current economic situation as Volcker did, Mancera simply warned China about economic ruin resulting from inflation and advocated the abolishment of any Chinese policy that could lead to an inflationary economy.

In his model, Mancera maintained that high inflation makes savers unwilling to buy financial instruments because they fear higher inflation will decrease their future yields. At the same time, however, investors are unwilling to take out loans because they are afraid inflation will drop. Mancera did not explain adequately why savers and borrowers, when presented with the same economic scenario, anticipate opposing results. He also did not explain why he believes high inflation necessarily implies galloping inflation.

Mancera's second theme was that the central bank is most suited to fight inflation because it is closest to the market and furthest from politics. Mancera supported this argument well. Central banks are largely made up of economists appointed for lengthy periods of office which "gives central bankers a longer-term responsibility and concern for the consequences of monetary mismanagement" (p. 72). Most are chosen for their non-

partisan academic integrity. This makes them theoretically less susceptible to political pressure for expansionary monetary policies. Lastly, since they are more closely associated with the market, they are more attuned to the dangers of uncontrolled inflation.

The main drawback to Mancera's sections, besides his clear disapproval of any level of inflation, was his failure to explore the problems of a central bank within the context of China's political and economic systems. He suggested that "when a country is closely linked to the international economy and there is a major foreign currency that is very stable, a policy of pegging the rate of exchange of the national currency to that foreign currency may be a very effective way to promote price stability" (p. 21). He did not, however, explore whether China is linked sufficiently to the world economy or if it deals with a stable foreign currency enough to make this worthwhile.

Jean Godeaux of the National Bank of Belgium also neglected to address China's unique conditions in his speeches. He discussed Belgium and the European Community ("EC") without explaining how the functioning of the Community relates to China.[11] When questioned about the proper supervisory and regulatory role of the central bank, Godeaux went into the history of the Group of Ten countries ("G-10") and the EC.[12] He explained why "mutual recognition" and "minimum harmonization" are better than "complete harmonization"[13] in coordinating banking regulations. The importance of such goals to an isolated nation like China is not immediately apparent.

There are several drawbacks to *Perspectives on the Role of a Central Bank.* As explained earlier, the three guest lecturers are prominent public officials, not academics. Accordingly, they failed to respond fully to some of China's more difficult problems—such as how to deal with regional bank corruption or how to convert the credit allocation management of a central bank into one based on open market operations. The speakers tended to rely more on stories and anecdotal examples than on solid

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[11] The European Community consists of Belgium, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Turkey, and the United Kingdom.

[12] The G-10 nations are Belgium, Canada, France, Germany, Italy, Japan, the Netherlands, Sweden, the United Kingdom and the United States.

[13] The standard for banking unification has developed into mutual recognition and minimum harmonization, replacing complete harmonization in the EC. Rather than have a uniform system of banks, each member of the Community ultimately will allow the licensed financial institutions of the other countries to operate within its borders (p. 58).

economic analysis and provided almost no statistical information, a gap that makes the economic discussions difficult to follow.

Despite this problem, the book still provides three different international approaches and perceptions of the monetary policy problems of a closed, developing Communist economy. On the political side, the book documents the use of shared economic problems among nations to pave over political differences. *Perspectives on the Role of a Central Bank* is recommended to enhance the reader's understanding of China's economic situation as well as modern international political and economic realities.

*—Robert G. Marks*

LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION. By *Daniel A. Farber and Philip P. Frickey*. Chicago: The University of Chicago Press, 1991. Pp. 153, index. $13.95 paper.

Public choice is defined "as the economic study of non-market decision making, or simply the application of economics to political science" (p. 7). Thus, public choice theory combines economic methodology and analysis of complex political interactions. Its primary function is to provide a rational scheme by which to understand a seemingly irrational and incoherent topic: lawmaking by the national legislature. The authors of *Law and Public Choice: A Critical Introduction* shy away from rigid mathematical applications of the public choice doctrine and instead analyze various political and social influences on the creation of public law. The focus of public law,[1] and consequently of this book, is legislation, and the question which surfaces repeatedly throughout the work is the extent to which the work of Congress reflects the public interest.[2]

According to the authors, the economists, political scientists, and legal scholars who support an empirical, social scientific, and analytical approach to public choice clearly do not think that Congressional enactments represent the public interest (pp. 1–11). Too often, they assert, the legislative product of Congress reflects particular private concerns at the expense of public policy and social welfare (pp. 14–15). Elected representatives are described as "motivated solely by self-interest," and unduly influenced by special interest groups (p. 22). Statutes, as the by-product of competing private interests, rarely if ever represent any coherent public policy (pp. 40–42). The result is public law which serves the few politically organized special interest groups with sufficient resources to sway the "seekers of re-election" (p. 20). The authors' expressed intent is to illustrate the contributions public choice has to offer the legislative process (p. 1).

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[1] Public law may be defined as those bodies of rules that are created, regulated, or endorsed by governmental individuals or agencies acting in a legislative capacity. This general classification of law usually consists of constitutional, administrative, criminal, and international law (as opposed to the various realms of private law).

[2] Public interest in this context connotes the public policy and social welfare concerns of the general citzenry, as opposed to the interests of individuals or special interest groups.

The questionable role of special interest groups in the course of Congressional decision-making permits the strongest attack by proponents of public choice theory. Undoubtedly, the school of public choice is not alone in criticizing the disproportionate influence of a select number of private interest groups upon the formation of public policy. By employing arguments of economic efficiency, however, the authors of this book incorporate a strong cost-benefit analysis into their critique of the current system.[3] The authors make a distinction between social and private benefits. Good public law will presumably resolve any conflicts between the two in favor of society at large. The authors suggest that all too often legislation permits activities that create a social loss while enforcing private gain (a common argument of tort law).

Public choice adds a different twist to the villainous characterizations of special interest groups. One of the most serious problems facing government today is increased deficit spending. While it would be in the great interest of society to reduce the enormous national budget deficit, the unwillingness of any individual interest group to accept a reduction in benefits to its particular members thwarts any progressive action in this area (p. 36). The logic is simple. Special interest groups lobby for a greater piece of the federal pie; thus, the greatest fear among these groups is to be left hungry. In other words, if one interest group willingly accepts a reduction in benefits, without a corresponding decrease across the board, then it would face the worst of all possible worlds: no benefits and a budget deficit that is essentially unchanged.[4] Without a comprehensive agree-

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[3] The authors admit that any discussion of cost-benefit analysis necessarily implies that entitlements have already been determined. In other words, the legal right and the corresponding legal duty have been allocated (pp. 34–37).

An example may be found in the topical issue of industrial pollution. A large manufacturing corporation argues that it has a legal right to produce its product, with the accompanying pollutive effects, if it can show a positive cost-benefit analysis based upon private calculations of profit and liability. At the same time, environmentalists believe they are entitled to enjoy nature in a pristine state, and industry may continue to function only if the cost-benefit analysis incorporates not only the private costs, but also the much greater social costs and the result is a net benefit to society.

[4] The authors use the example of catalytic converters. Each converter would cost the individual $100, while the resulting reduction in air pollution may be valued at $200. While the cost of the converter is suffered by the individual, the benefits are enjoyed by the community at large. Thus, an individual cost-benefit analysis would not favor the installation of catalytic converters because private costs would outweigh private benefits. It is in this capacity, when social benefits are greater than social costs but private costs are greater than private benefits, that public law should protect the interests of society.

ment reached by all special interest groups to accept lower federal funding, a premise reasonably assumed to be impossible, it would be irrational for an individual interest group to act in a socially responsible way. This leads to the authors' label of the influence of interest groups on the legislation of public policy as "collectively irrational but individually rational" (p. 36).

Public choice also identifies illogical functions inherent to the legislative process. Through the technical devices of "cycling" and "strategic behavior,"[5] legislators often create public policy that is against the will of the majority of Congress and the nation as a whole (pp. 39–40). Such outcomes lead to incoherent public law. A general, schematic approach to the determination of public policy is infeasible if the individual pieces of legislation which constitute public policy are derived through irrational and unpredictable means. Interestingly, the authors note that unpredictability works in no one's favor. Even self-interested politicians and single-minded interest groups would prefer a stable environment in which to conduct business. Yet, any small checks politicians may place on the chaotic and arbitrary nature of the legislative process are "of little comfort if they are also unconnected with anything that can plausibly be called the popular will or the public interest" (p. 55).

With such a dismal outlook on the legislative process and public law in general, it is little wonder that public choice advocates take a somewhat radical view of the proper role of judicial interpretation of public policy legislation. Traditionally, the judiciary has addressed the problem of statutory interpretation through a search for legislative intent, believed to be found in the various documents recounting legislative history. The creation of legislative history, though, is deemed to represent the greatest vice of the legislators: "promoting private interest deals, or strategically posturing to mislead judges, or abdicating all responsibility to their unelected staffs" (p. 95). It is asserted by Judge Alex Kozinski, and adopted by other advocates of the public choice doctrine, that "legislative history can be cited to support almost any proposition" (p. 97).

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[5] "Cycling" is the label applied to the repetitive voting process within Congress that results when a clear majority does not favor one solution on a particular issue. The legislators are forced to choose between their second and third choices. By a careful decision of which options to vote on first, almost any solution can be reached by a systematic elimination of all other alternatives. This "chaos theorem" leads to "strategic behavoir" by legislators who vote against their interests in the early rounds of voting in order to secure a more favorable compromise (pp. 39–40).

This view of the legislative product leads to a drastic revision of the role of the judiciary in statutory interpretation, and in the formulation of public policy. The public choice doctrine, drawn to its logical conclusion, would favor the elimination of legislative intent as a tool in statutory interpretation. The authors claim that this is the exact position taken by leading public choice advocates such as Justice Antonin Scalia and Judge Frank Easterbrook. The supporters of the public choice doctrine ask hard questions: Is legislative intent an objective reality? If so, is it possible to discern? Even if possible to calculate, should legislative history carry any interpretive weight? The theories behind the doctrine, as described by Scalia and Easterbrook, answer a resounding "no" to each of these inquiries. The conclusion reached is that unambiguous statutory language should not be impeached by legislative history.

This book, however, is not an unabashed endorsement of the view of public choice advocates. Indeed the authors of this work confront the difficult task of introducing a doctrine which they seem reluctant fully to embrace themselves. They do a credible job of presenting the material in a readable, straight-forward manner. The book is comprehensively outlined, both in the Introduction and at the start of each chapter allowing the reader to appreciate the general theme of public choice while digesting its particular applications. The authors also show a commendable ability to touch a number of bases upon which to interpret and employ the doctrine of public choice. The economic, cost-benefit approach has already been mentioned. The authors also highlight the political philosophical distinction between "liberalism" and "republicanism" to provide yet another outlook on the legislative process.[6] Political models abound throughout the book. It is the authors' finest accomplishment that they provide several contexts in which to analyze the theory of public choice.

Unfortunately, this attribute is not enough to spare the authors and the work from criticism. Although the authors enjoy the liberal use of footnotes, there is little by way of explanatory text or substance in these notes. Also, the book contains only a brief index and no bibliography. In short, it serves to merely introduce the reader to its topic. Yet, the authors often make

[6] In broad terms, "liberals" are said to argue for the inherent rights of the individual, irrespective of any particular political system. In this context, "republicans" espouse a more communitarian approach to public law, emphasizing the need for civic virtue and willingness to sacrifice private interests for the common good (pp. 42–47).

broad conclusions as to the state of judicial and legislative affairs which call for evidence of more thorough research and substantive documentation than is given. For example, in a discussion of the power of Congress to delegate authority, they assert that members of Congress "prefer broad delegations so they can 'pass the buck' and avoid taking responsibility for the consequences of legislation" (p. 81).

The authors seem to have little empirical evidence to support their claims. The vast majority of citations refer to journal articles or similar secondary sources. Discussion of independent studies or research is conspicuously absent, particularly in a defense of public choice doctrine, the very definition of which implies objective, social scientific standards of analysis. The authors at times seem willing to accept this deficiency in their work: "Without some independent measure, not only for the cost of each activity, but of its 'self-expression value,' we can account for *any* pattern of activities within the public choice framework" (p. 27).

It is somewhat disconcerting that the authors proceed with such strong criticisms of the legislative process and the judicial interpretation of public law despite the lack of evidentiary support for their allegations. The disproportionate influence of special interest groups on public law is the cornerstone of the authors' arguments regarding the fallibility of the legislative process. Yet, the authors undermine their position from the beginning by noting that a systematic study of the effects of interest groups found that:

> Depending on the configuration of a large number of factors—among them the nature of the issue, the nature of the demand, the structure of political competition, and the distribution of resources—the effect of organized pressure on Congress can range from insignificant to determinative (p. 19).[7]

This logical disparity between the authors' introductory comments and conclusions raises questions about the credibility of their arguments.

Furthermore, the authors' conclusions are at times disappointingly weak. They are either self-evident or a compromise between public choice doctrine and the more favorable, tradi-

[7] Quoting K. SCHOLZMAN & J. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 317, (1986).

tional view of legislative process. An example of the former would include: "Our best picture of the political process, then, is a mixed model in which constituent interest, special interest groups, and ideology all help determine legislative conduct" (p. 33). Yet another extremely general conclusion further jeopardizes their arguments: "One way of reducing the power of special interest groups is to limit their role in the political process" (p. 132).

Perhaps the finest illustrations of fence-riding are the conclusions derived from the discussion on the suggested role of legislative history in judicial interpretation of statutory law. As previously stated, Justice Scalia and Judge Easterbrook, defenders of the public choice doctrine, have expressed the opinion that legislative history is nearly worthless as a guiding light for judicial review. The authors disagree and contend that "Justice Scalia and his followers have indulged in some doubtful factual assumptions" (p. 98). Amazingly, the authors issue a call for evidence, appealing to public choice advocates for proof of a "demonstrated pervasive abuse of legislative history by legislators or congressional staff" (p. 99). Moreover, the authors support the integrity of legislative history, and their criticism of Scalia's opinions, by boldly asserting that "competition between interest groups helps keep the system honest" (p. 98). In so doing, they depart significantly from the apparent direction of the book. At one point Justice Scalia was praised as a leader in the creation of public choice, a doctrine which criticized the legislative process as being overly responsive to special interest groups. Here, the role of special interest groups is used by the authors to defend public law from the logical conclusions of the public choice doctrine, as espoused by Justice Scalia.

The authors' response to the doubts cast on the legitimacy of legislative history in judicial statutory interpretation lacks true resolution. They set forth a difficult standard: "when a fundamental aspect of legislative history, like a committee report, is unimpeached by other sources and is consistent with the apparent political equilibrium, it should be an important interpretive source" (p. 101). At first glance it is obvious that such a test raises more questions than it answers.[8] How can one determine

[8] Ironically, it is the authors who criticize the Supreme Court for imposing "wrong-headed opinion-drafting techniques" that are prone to "mislead lower court judges or perhaps even the Justices themselves" (p. 102). Also, Justice Scalia's suggestion is discredited as a "wooden rule." *Id.*

a "fundamental aspect" of legislative history? What "other sources" might impeach a "fundamental aspect?" Is there such a thing as political equilibrium? If so, to whom is it apparent? Most importantly, what weight does an "important interpretive source" carry? Not surprisingly, the authors' conclusion broadly generalizes: "The appropriate reform is to draft opinions that candidly reflect the complexities of statutory interpretation" (p. 102). Despite its breadth, this conclusion is valid; yet, this book draws us no closer to accomplishing this admirable goal.

Upon reviewing this work, one is reminded of the acrobat who walked a tightrope over a river. Too much fancy footwork applied in racing back and forth between the opposing banks led to the acrobat becoming all wet.

Perhaps the authors were overly worried about creating waves within the legal community. When they were not advancing the public choice doctrine, they were apologizing for it. By trying to smooth the rough edges, such as Justice Scalia's repudiation of legislative history, the authors succeeded in removing much of the bite from the approach. The application of social-scientific methods of analysis to this nation's legislative and judicial processes offers intriguing possibilities. Criticism of the formulation of public law and judicial interpretation of legislative history may be highly controversial, but the direction and goals of public choice are certainly noteworthy and deserving of more thorough and profound analysis.

*—William H. O'Dowd*

# INTRODUCTION

With Volume 29, Number 2, the *Harvard Journal on Legislation* renews its tradition of periodically devoting an entire issue to the United States Congress. In general, the *Journal* seeks to promote analysis and reform of both substantive legislation and legislative process at the state and federal level. While state legislatures and courts play significant roles in developing statutory law, the Congress' role is central, unique, and powerful, rendering scrutiny of the instutition critical. How does Congress relate to the Executive Branch and to the Supreme Court? Is the Congress' delegation of powers to executive and congressional agencies appropriate and constitutional? How can the legislative process be improved, and how can substantive law impact future decision-making processes? In this Congress Issue, authors with a range of perspectives grapple with these issues in the hope of improving our understanding of contemporary problems in our nation's legislature and promoting useful reform.

The Congress Issue opens with an essay by Congressman Henry B. Gonzalez (D-Tex.) reflecting on his thirty years in the House of Representatives. Congressman Gonzalez asserts that the Congress has abdicated its constitutional responsibilities and relinquished too much power to the Executive Branch. To support his argument, he discusses issues surrounding war powers, the budget process, and presidential succession.

Complementing Congressman Gonzalez' essay, Charles Tiefer, Deputy Legal Counsel for the House of Representatives, argues that Congress rather than the Supreme Court ought to play the central role in constitutional debates. Using the flag-burning controversy to illustrate, he argues that Congress is better able to raise and respond to our society's constitutional concerns.

Alex D. Tomaszczuk and John E. Jensen probe another issue of congressional power, one that implicates all three branches of government. As an arm of Congress, the General Accounting Office ("GAO") has played an increasingly adjudicatory function with regard to the award of government contracts. As the Congress has increased the GAO's adjudicatory powers, the Executive Branch has grown increasingly resistant to them. The authors examine the constitutional issues as well as the political dimensions of this inter-branch disagreement.

Shifting to legislative process in Congress and relations with the Executive Branch, Dr. Robert Reischauer, Director of the Congressional Budget Office, and Phillip G. Joyce, a staff member at the Office, examine the recent budget process reforms as well as potential future reforms. Given the large-scale, systemic budget deficits and the continuing difficulty in reaching agreement on annual budgets, budget process reform remains an area of significant importance and political activity.

Congressional power in the area of international trade policy is the topic addressed by Jessica Korn, special guest scholar at The Brookings Institution. She examines the impact of the Supreme Court's invalidation of the legislative veto on the balance of power in trade policy between the Congress and the Executive Branch. She concludes that Congress has retained power over trade policy, despite the Court's ruling, and suggests why other statutes might be similarly unaffected.

The final Congress Issue piece, like the first, concerns the delegation of congressional authority. Here, Harvard Law School student Erik H. Corwin examines the different problems and tensions involved in broader-versus-narrower congressional delegation of authority to governmental agencies, particularly in an ideologically divided government. He utilizes the Hazardous and Solid Waste Amendments of 1984 to illustrate his analysis.

The Congress faces many challenges as it tries to govern an increasingly complex society and internationalized economy. Divisions of power between the branches of government are in flux, and internal legislative processes are straining to handle the budget problems. The views and analyses herein should contribute to a better understanding of these problems and potential solutions.

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