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The Stetson University College of Law and the Local Government Law Section of the Florida Bar acknowledge and thank The Florida League of Cities, Inc. for a grant which made possible the complimentary distribution of copies of this issue to each municipality within the State of Florida.

INTRODUCTION

With this, the Sixth Edition of "The Local Government Law Symposium," we begin another five years of commitment to exchanging current information and findings in the area of local government law practice. The collaboration between the Local Government Law Section of The Florida Bar and the Stetson University College of Law has allowed the Symposium to produce articles relating to local government law practice on topics covering national as well as state issues.

This issue's lead articles focus on three major issues in local government law — procurement, home rule, and "takings." The six lead articles were chosen to look at each of these issues from differing perspectives and vantage points. The subject of home rule for local governments is the topic of two of our articles. First, Mark J. Wolff focuses on the implementation of local home rule in the State of Florida and gives us a critical assessment of home rule along with some suggestions for appropriate roles of government into the next century. George D. Vaubel's article dealing with home rule develops two considerations upon which home rule rests. These considerations are that an independent role for municipal government promotes individual liberties through responsive and responsible governmental decisions and, secondly, the independence of municipal government is compatible with the basic values of each individual.

Our first article in the area of procurement by Lynn C. Washington looks at the controversial Supreme Court case of *City of Richmond v. J.A. Croson Company*, decided last year, and discusses its effects on minority business enterprise programs. The next article in the area of procurement, by John H. Rains, Jr., revisits the area and updates an earlier work on public sector competitive bidding in Florida. The subject of "takings" serves as the topic for two articles. Peter W. Salsich examines the concept of property rights in land subject to the takings clause and concludes that the court is applying a priority system, "a hierarchy of values," in determining how to balance competing interests of land owners and local governments. Lastly, Thomas Logue, in an interesting analysis of historic preservation case law, discusses avoiding takings challenges in regulating historic properties.

With each issue, we find an increasing interest in writing for the Symposium by leading practitioners and commenta-

tors. This support is important, and as we look to planning the Seventh Edition of the Symposium, we intend to focus upon local government finance issues. To this end, we would welcome your articles and ideas in this area.

JOHN J. COPELAN, JR.
Local Government Law Section
Symposium Editor

STETSON LAW REVIEW

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NUMBER 1

ARTICLES

AN OVERVIEW OF THE HISTORICAL DEVELOPMENT OF THE JUDICIAL ARTICLE OF THE FLORIDA CONSTITUTION

Joseph W. Little*

INTRODUCTION

This is an overview of the historical development of the judicial articles of the Florida constitution. It traces the constitutional origin and development of the various Florida courts, the structural relationships among the courts, and the forms and functions of various nonjudicial offices closely affiliated with the courts. Emphasis is upon the words of the constitutions themselves. The narrative refers to illuminating statutes, court decisions and precipitating social events only to the extent they happened to be both particularly relevant to the main point and known by the author or discovered by him during the course of the study. A second focus is upon the constitutional allocation of political and governmental power among the three branches of government and how the allocation has changed with time. By contrast, relatively little attention is given to how adjudicatory jurisdiction is diffused among the courts themselves.

The structural, nonjurisdictional focus of the article reflects several factors. One is that structure is of more general political importance than jurisdiction. A second is that each of the two is rich

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enough in historical background to justify separate treatment. And, the third, which relates to the first, is that various proposals to do away with the elections of all Florida judges floated within the Florida Bar¹ and by the judiciary² in 1989 encouraged the author to examine how Florida judges have been selected through history. This led the author to delve into the study of structure and selection as a means of bringing the perspective of history to the evaluation of proposals for change.

By its nature the Article is primarily a narrative description of a historical record embodied in a succession of constitutional documents. The reader may refer to it merely to obtain information about the history of the judicial article. The only intentional slant is a gentle highlighting of transfers of political power among departments of government and between the government and the people.

HISTORICAL DEVELOPMENT

The American judicial history of Florida began with the 1819 cession by Spain to the United States of all lands in modern Florida.³ With that cession, the United States Congress obtained legislative dominion over what was to become the state, and executive authority soon thereafter was acquired by Andrew Jackson, who was named territorial commissioner and governor by President James Monroe.⁴ In 1822 Congress provided for "judges of the superior courts" to be appointed by the President with the advice and consent of the Senate and to "hold their offices for the term of four years, and no longer."⁵ This structure of government and allocation of power among departments pertained until Florida was admitted to the

1. See, e.g., Bizzaro, *Merit Section Bills are Shelved*, Fla. B. News, May 15, 1989, at 1, col. 1.

2. See, e.g., Bizzaro, *Electing Judges is Poor Policy, Overton Tells Panel*, Fla. B. News, May 1, 1989, at 4, col. 1.

3. Treaty of Amity, Settlement and Limits, Feb. 27, 1819, United States — Spain, § 8 Stat. 252, T.S. No. 327.

4. Jackson's appointment and acceptance of the job was a political compromise of sorts. At the time he was the less senior of only two major generals in the United States Army and had both gained fame and created some political heat in his raids into Spanish Florida against smugglers and renegade Indians. Congress adopted an arms-cut measure that seemed destined to force Secretary of War John C. Calhoun to retire the popular Jackson. The politically unpopular move was avoided when Jackson accepted President Monroe's request to assume the role of commissioner and governor of the Floridas after Spain ceded them to the United States. J. NIVEN, JOHN C. CALHOUN AND THE PRICE OF THE UNION 92 (1988).

5. Act of March 30, 1822, § 8, 3 Stat. 653, 654.

Union in 1845.

1838 CONSTITUTION

Although Florida was not to become a state until 1845, the initial Constitution of the State of Florida was adopted by convention in Saint Joseph on December 3, 1838. That document vested all judicial power in "a Supreme Court, Courts of Chancery, Circuit Courts and Justices of the Peace,"⁶ except that the legislature might vest non-capital criminal jurisdiction in "Corporation courts."⁷ The document also vested the powers of the supreme court in the judges of the circuit courts "until the General Assembly shall otherwise provide."⁸ Similarly, the circuit courts were the sole courts of original jurisdiction unless and until the legislature provided otherwise.⁹

Initially, the constitution required the legislature to divide the state into at least "four convenient districts" (western, middle, eastern, and northern) with one circuit judge per circuit.¹⁰ Thus, the original supreme court was a collegial gathering of the four circuit judges with no justice sitting or taking part in the appeal "of any case which shall have been decided by him in the court below."¹¹ The constitution required sittings of the supreme court to be "holden at such times and places as may be provided by law."¹²

Under the 1838 document all judges, except justices of the peace, were elected by "the concurrent vote of a majority of both Houses of the General Assembly"¹³ for initial terms of five years and, if re-elected thereafter, "for the term of and during their good behavior."¹⁴ The judges were removable by impeachment and by act of the governor upon an address of two-thirds of each house of the general assembly stating "wilful neglect of duty or other reasonable cause, which shall not be sufficient ground for impeachment."¹⁵ By contrast, the 1838 constitution left it to the legislature to specify whether justices of the peace were to be appointed or elected and for what

6. FLA. CONST. of 1838, art. V, § 1.

7. *Id.* This is the apparent beginning of what became known as municipal courts.

8. *Id.* § 3.

9. *Id.* § 8.

10. *Id.* § 5.

11. *Id.* § 18.

12. *Id.* § 4.

13. *Id.* § 11.

14. *Id.* § 12.

15. *Id.*

terms,¹⁶ except that all supreme court justices, circuit court judges, and chancellors were, by virtue of office, "justices of the peace in their respective counties"¹⁷ and also "conservators of the peace throughout the State."¹⁸ The constitution permitted the general assembly to fix the jurisdiction of justices of the peace and mandated it to provide by law for a right of appeal from the jurisdiction.¹⁹ Without using the term "probate judge," the 1838 constitution mandated the general assembly to provide by law for the appointment of a probate "officer" in each county.²⁰

From this earliest date, the Florida constitution has mandated that the "Justices of the Supreme Court, Chancellors, or the Judges of the Circuit Courts" shall have "no duty not Judicial" imposed by law upon them.²¹ This was in keeping with the general separation of powers established in the constitution.²² This earliest constitution also concerned itself with the proprieties of office. The judges were constitutionally guaranteed a salary of "not less than two thousand dollars per annum" but were absolutely denied "fees or perquisites of office" and proscribed to "hold any other office of profit under the State, the United States, or any other power."²³

From the 1838 inception, the judicial articles of the Florida constitution have provided for certain nonjudicial but court-related offices and functions. The 1838 document provided for a clerk of the supreme court and clerks of chancery (if any) who were to be "elected by the General Assembly,"²⁴ presumably for terms prescribed by law, and for clerks of the circuit courts who were to be "elected by the qualified electors, in such mode as may be prescribed by law."²⁵ The 1838 judicial article also included a provision whereby the general assembly might "establish a board of Commissioners for

16. *Id.* § 10.

17. *Id.* § 14.

18. *Id.* Florida case law gives little clue as to what powers were bestowed upon a "conservator of the peace" that were not bestowed upon a "justice of the peace." According to *Black's Law Dictionary*, the earliest functions were to prevent breaches of the peace and arrest offenders. Later, the powers included the power to arraign and try accused people. BLACK'S LAW DICTIONARY 378 (5th ed. 1979).

19. FLA. CONST. of 1838, art. V, § 10.

20. *Id.* § 9.

21. *Id.* § 20.

22. *Id.* § 2.

23. *Id.* § 5.

24. *Id.* § 13.

25. *Id.*

the regulation of the county business therein.”²⁶ Later revisions suggest that the elected clerk had an early role in the administration of the county commissioners, perhaps being the only elected nonjudicial county official until 1885.²⁷ The 1838 constitution made no mention of the office of sheriff.

As to nonjudge lawyer-officials, the 1838 constitution provided for the election “by joint vote of the two Houses of the General Assembly” of an “Attorney-General for the State, who shall reside at the seat of Government.”²⁸ The term of office was four years, but the attorney general was also removable by the governor without any specification of cause “on the address of two-thirds of the two Houses of the General Assembly”²⁹ (note the difference from the “two-thirds of each House” that applied to judges).³⁰ The constitution directed the attorney-general “to attend all sessions of the General Assembly, and upon the passage of any act, to draft, and submit to the General Assembly at the same session, all necessary forms of proceedings under such laws” and to perform “such other duties as may be provided by law.”³¹ It thus appears that the earliest Florida attorneys-general were the handmaidens of the legislature, perhaps without any litigating functions.

The only other nonjudge lawyer-official specified in the 1838 constitution was “one Solicitor for each circuit . . . to be elected by the joint vote of the General Assembly” to a term of four years.³² The constitution mandated no functions, thus leaving the general assembly complete freedom to prescribe the solicitor’s duties, which presumably included prosecuting crimes.

Although not in the judicial article, the 1838 constitution guaranteed certain rights pertaining to the judicial process that have been preserved to the present through each succeeding constitution and revision. They are:

26. *Id.* § 19.

27. The office of sheriff became elective rather than appointive in the 1885 constitution. FLA. CONST. of 1885, art. V, § 15. County commissioners were appointed by the governor until they were made elective by amendments to the 1885 constitution. S.J.R. Res. 3, 1899 Fla. Laws 358. Under the superseded 1885 constitution “the Governor, by and with the consent of the Senate, was appointed in and for each county,” for terms of two years. FLA. CONST. of 1885, art. XIII, § 5.

28. FLA. CONST. of 1838, art. V, § 16.

29. *Id.*

30. *See supra* text accompanying note 15.

31. FLA. CONST. of 1838, art. V, § 16.

32. *Id.* § 17.

That the right of trial by jury shall forever remain inviolate, [and] . . . [t]hat all courts shall be open, and every person, for an injury done him, in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered, without sale, denial, or delay.³³

When adopted by election in 1845, the 1838 constitution became the first Florida constitution.

AMENDMENTS TO 1838 CONSTITUTION

The system whereby circuit court judges sat collegially as the supreme court (except no judge sat in review of his own judgments) was maintained until 1851. In that year the legislature created an independent supreme court composed of a chief and two associate justices,³⁴ each of whom was elected by the legislature for eight-year terms.³⁵ Thus began the hierarchy of superior appellate and inferior trial judges that is common in modern judicial systems.

In harmony with similar movements in other states, the general assembly proposed amendments to the constitution in 1850³⁶ and again in 1852³⁷ with the purpose "to give the election of judges to the people." The voters adopted the 1852 measure, thereby providing for the election of circuit judges by the qualified electors of the respective circuits for terms of six years.³⁸ This apparently did not disturb the 1851 statute under which the general assembly selected supreme court justices.

33. *Id.* art. I, §§ 6, 9. Regarding the right to trial by jury, the 1968 constitution provides: "The right of trial by jury shall be secure to all and remain inviolate." FLA. CONST. art. I, § 22. The supreme court has said of this provision: "Our first constitution of 1838 . . . and all subsequent constitutions have contained similar provisions. This provision guarantees the right to trial by jury in those cases in which the right was enjoyed at the time this state's first constitution became effective in 1845." *In re Forfeiture of 1978 Chevrolet Van*, 493 So. 2d 433, 434 (Fla. 1986). See *In re Estate of Howard*, 542 So. 2d 395, 397 (Fla. 1st DCA 1989) (examining which causes of action were not triable by jury at common law).

Regarding access to courts, the 1968 constitution provides: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay." FLA. CONST. art. I, § 21.

34. Act of 1850, § 1, 1850 Fla. Laws 371.

35. *Id.*

36. FLA. CONST. of 1838, amend. I, § 1 (1850).

37. *Id.* (1852).

38. *Id.*

1861 CONSTITUTION

The 1861 Florida constitution embodied the 1838 document virtually verbatim except for the small changes needed to accommodate Florida's secession from the United States of America to join the Confederate States of America. This did not disturb the underlying judicial system of elected circuit judges (by virtue of the 1852 amendment) and appointed supreme court justices (by virtue of the 1851 legislative enabling act). A curiosity of Florida's adventure into the Confederacy was that for the duration the state operated a Court of Admiralty situated in Key West. The judge was appointed by the governor with the advice and consent of the senate.³⁹

1865 CONSTITUTION

The initial postwar constitution of 1865 also continued the existing judicial system except that the constitution now explicitly incorporated an independent supreme court composed of a chief and two associate justices, each appointed by the governor with the advice and consent of the senate.⁴⁰ This plan permitted the governor to make a new selection as to each justice after six years.⁴¹ This constitutional separation of the supreme court justices from the circuit court judges irretrievably supplanted Florida's initial collegial appellate review of the work of peers with the hierarchial superior-subordinate structure that now pertains. Nevertheless, the 1865 constitution continued peer participation at the appellate level to the limited extent of authorizing the legislature to add two circuit judges to the supreme court when in session.⁴²

Circuit judges continued to be elected by the electors for six-year terms,⁴³ and for the first time the legislature was explicitly authorized to create a chancery court elected in the same manner.⁴⁴ The number of judicial circuits was changed from four to whatever number the legislature thought fit, established by dividing the state into "convenient circuits," each with a judge.⁴⁵ The constitution mandated the di-

39. Key West, Fla., Ordinance 17 (Jan. 19, 1861).

40. FLA. CONST. of 1865, art. V, § 10.

41. *Id.* § 12.

42. *Id.* § 3.

43. *Id.* § 11.

44. *Id.* § 13.

45. *Id.*

vision into circuits but specified no criteria of division.⁴⁶ Building on the probate "officer" of the 1838 constitution, the 1865 document provided for a judge of probate in each county to be elected by "the qualified voters" for a term not specified in the constitution.⁴⁷ These judges were "subject to the direction and supervision of the Circuit Courts, as may be provided by law."⁴⁸

Both justices and circuit judges remained subject to removal either by impeachment in the legislature, or by the act of the governor upon address of two-thirds of the general assembly.⁴⁹ The 1865 document provided that the governor would institute the filling of vacancies in chancery and circuit judicial offices by writ of election (except for filling short vacancies by appointment).⁵⁰ It also mandated the legislature to provide for the selection of a "competent number" of justices of the peace,⁵¹ to prescribe their jurisdiction, and to secure by law a right of appeal from their decisions.⁵² The constitution also permitted the legislature to provide a means of removal from office of these and other nonimpeachable officers.⁵³

Under the 1865 constitution the chief justice appointed the clerk of the supreme court,⁵⁴ and each chancery judge appointed the clerk of chancery.⁵⁵ By contrast, the circuit court clerks were elected by the qualified electors for terms not specified in the constitution.⁵⁶ The justices, chancellors, and circuit judges retained their powers as conservators of the peace throughout the state but lost their status as justices of the peace.⁵⁷

The functions of the attorney-general changed drastically under the 1865 constitution. The office was no longer filled by the vote of the legislature, but by the election of "the qualified voters of the state, at the same time and in the same manner that the Comptroller,

46. *Id.* § 4.

47. *Id.* § 8.

48. *Id.*

49. *Id.* §§ 10, 11. As before, the address must result from willful neglect for duty or some other cause not justifying impeachment. *Id.*

50. *Id.* § 14. The governor would, of course, fill supreme court vacancies by appointment with the advice and consent of the senate. *Id.* § 10.

51. *Id.* § 9.

52. *Id.*

53. *Id.* art. IV, § 22.

54. *Id.* art. V, § 15.

55. *Id.*

56. *Id.*

57. *Id.* § 16. The conservator status remained up through 1970, but the justice of the peace status has never been restored.

Secretary of State, and Treasurer [were] elected."⁵⁸ Each of these offices had a term of four years. Theretofore all had been filled by the legislature.⁵⁹ Hence, the 1865 document substantially loosened the legislature's hold on the executive offices of the state and originated the elected multiheaded executive branch that became the modern day cabinet. The 1865 constitution no longer mandated the attorney-general to attend sessions of the general assembly and to be its scrivener, but required only that "he shall perform such duties as may be prescribed by law."⁶⁰ He remained removable by the governor upon address of the legislature.⁶¹

By contrast to the changes made in the office of attorney-general, the 1865 constitution did not modify the office of elected solicitor of each circuit.⁶²

Although not in the judicial article, the 1865 constitution made the first mention of jurors in the history of Florida constitutions by requiring that, "the Jurors of this State shall be white men, possessed of such qualifications as may be prescribed by law."⁶³

1868 CONSTITUTION

The 1868 constitution made numerous important changes in the structure of the judicial and quasi-judicial offices. First, although the chief justice and two associate justices were still appointed by the governor and "confirmed by the senate,"⁶⁴ they no longer served for a fixed term but "for life or during good behavior."⁶⁵ The enumerated constitutional powers of the chief justice were limited to one: to "order a temporary exchange of circuits by the respective judges, or any judge to hold one or more terms in any other circuit than that to

58. *Id.* § 18.

59. FLA. CONST. of 1838, art. V, § 16 (attorney-general); *id.* at § 14 (secretary of state); *id.* § 23 (state treasurer and comptroller of public accounts).

60. FLA. CONST. of 1865, art. V, § 18.

61. *Id.* See *supra* text accompanying note 15.

62. *Id.* § 19.

63. *Id.* art. XVI, § 3. In what seems to be a contradiction, the same article included the statement: "[A]ll inhabitants of the State, without distinction of color, are free and shall enjoy the rights of person and property, without distinction of color." *Id.* § 1.

64. The significance of the change in terminology from with "advice and consent of the senate" is unknown.

65. FLA. CONST. of 1868, art. VI, § 3. Various sources number the articles of the 1868 constitution differently, depending upon whether the Declarations of Rights is denominated as Article I, as in 1 B. P. POORE, *FEDERAL AND STATE CONSTITUTIONS OF THE UNITED STATES* 347 (2d ed. 1972), or is not designated as an article as in *Florida Statutes Annotated* (1970). This text uses the latter designation.

which he is assigned.”⁶⁶ The supreme court was explicitly charged to hold three terms a year “in the supreme court room at the seat of government.”⁶⁷ The election of circuit court judges was ended and they too were now appointed by the governor and confirmed by the senate for fixed terms of eight years.⁶⁸ The removal of judges and justices by address of the legislature was also omitted from the 1868 constitution and has not reappeared. The 1868 document assigned circuit courts “original jurisdiction in all cases of equity” as well as jurisdiction at law,⁶⁹ thus ending any development of separate courts of law and equity. The revised constitution once again mandated the number of circuits, setting the figure of seven,⁷⁰ and implicitly eliminating legislative control over the number of judges.

The 1868 constitution was the first to authorize the governor to seek advisory opinions from the justices of the supreme court. Under the new provision, the governor could at “any time require the opinion of the justices of the supreme court as to the interpretation of any portion of this Constitution, or upon any point of law, and the Supreme Court shall render such opinion in writing.”⁷¹ As shall be seen, the modern version both narrows the scope of the questions the governor may pose and the compulsion upon the court to respond.

The 1868 constitution also originated the county courts and assigned them a lesser jurisdiction than circuit courts. A county judge was appointed by the governor and confirmed by the senate for terms of four years or “until his successor is appointed and qualified.”⁷² The county court was specifically designated as “a court of Oyer and Terminer.”⁷³ No mention was made of separate judges of probate,

66. FLA. CONST. of 1868, art. VI, § 7.

67. *Id.* § 4.

68. *Id.* § 7.

69. *Id.* § 8.

70. *Id.* § 7.

71. *Id.* art. V, § 16.

72. *Id.* art. VI, § 9.

73. *Id.* § 10. The meaning of “Oyer and Terminer” was explained by *Sloan v. Sloan*, 25 Fla. 53, 63, 5 So. 603, 608 (1889), wherein the supreme court said, “Courts of Oyer and Terminer, or acting under Commissioners of Oyer and Terminer, were at common law courts having power to hear and determine criminal causes.” The importance was made distinctive by the court’s further observation that the jurisdiction of “justices of the peace shall not extend to the trial of any persons for misdemeanor or crime; it being only that of an examination and commitment for trial by the county or circuit courts.” *Id.*

but instead the constitution allocated "full surrogate or probate powers" to county courts.⁷⁴ In addition, the constitution authorized the governor to appoint as many justices of the peace as he "deemed necessary" to perform duties fixed by law.⁷⁵ The justices of the peace served during good behavior or until removed by the governor "at his own discretion."⁷⁶

The 1868 constitution retained the power of the legislature to impeach supreme court judges and circuit court judges for "misdemeanor in office" but abandoned the legislative address and gubernatorial removal process that had pertained beginning with the 1838 constitution.⁷⁷ The "misdemeanor in office" standard has thereafter been retained as the constitutional criterion of impeachment⁷⁸ and has been given a meaning that holds judges to a higher standard of rectitude than merely avoiding the commission of petty crimes.⁷⁹ Under the 1868 constitution, any officer impeached by the assembly was "deemed to be under arrest, and . . . disqualified from performing any duties until acquitted by the Senate."⁸⁰ An impeached officer was also entitled to "demand his trial by the Senate within one year from the date of his impeachment."⁸¹

74. FLA. CONST. of 1868, art. VI, § 77. But see *Sloan v. Sloan*, 25 Fla. at 63, 5 So. at 608, wherein the supreme court said, "[W]e fail to perceive that any greater, (if really as extensive) jurisdiction was given . . . to the county court, in matters pertaining to the administration of estates of deceased persons, as was given to judges of probate by the organic law of 1865."

75. FLA. CONST. of 1868, art. VI, § 15. This jurisdiction did not permit the trial of any person "for misdemeanor or crime." *Id.*

76. *Id.*

77. *Id.* art. V, § 28. A judgment of impeachment extended "only to removal from office and disqualification to hold any office of honor, trust, or profit under the state," but nevertheless remaining "liable to indictment, trial and punishment according to law" whether convicted or acquitted. *Id.*

78. See, e.g., FLA. CONST. art. III, § 17.

79. Article XVI, section 9 of the 1869 constitution supplied its own broader meaning as follows: "In addition to other crimes and misdemeanors for which an officer may be impeached and tried, shall be included drunkenness and other dissipations; incompetency, malfeasance in office, gambling, or any conduct detrimental to good morals shall be considered sufficient cause for impeachment and conviction." FLA. CONST. of 1868, art. XVII, § 9. Later versions of the constitution omitted this provision. A broad meaning was judicially retained as illustrated by *In re Investigation of Circuit Judge*, 93 So. 2d 601, 606 (Fla. 1957) ("As applied to impeachment, 'misdemeanor in office' may include any act involving moral turpitude which is contrary to justice, honesty, principles, or good morals, if performed by virtue or authority of office. [It] . . . is synonymous with misconduct in office and is broad enough to embrace any wilful malfeasance, misfeasance, or non-feasance in office. It may not necessarily imply corruption or criminal intent.").

80. FLA. CONST. of 1868, art. XVI, § 9.

81. *Id.*

In contrast to removal by impeachment, all other officers appointed by the governor and "by and with the consent of the Senate" were removable from office "upon the recommendation of the Governor and consent of the Senate" and also remained liable to indictment, trial, and punishment in the courts "for any misdemeanor in office."⁸² This would have applied to the newly created county judges. All other civil officers, including justices of the peace, were triable in the courts for misdemeanor in office as prescribed by the legislature.⁸³

Two novel features appeared in the 1868 constitution. First, the legislature was permitted to establish "courts for municipal purposes only in incorporated towns and cities,"⁸⁴ and, second, circuit judges were permitted, "upon application of the parties," to appoint a "practicing attorney as referee" to try "any civil cause."⁸⁵ Appeals were permitted from the referees' decisions "in the manner prescribed by law."⁸⁶ In sum, the 1868 constitution diffused judicial power through an array of offices, not all of which were filled by professional judges.

The 1868 constitution mandated the supreme court to appoint a clerk who would serve as clerk and librarian "until his successor is appointed and qualified."⁸⁷ Each clerk of the circuit court (who also served as clerk of the county court and board of county commissioners, recorder, and ex officio auditor of the county) was appointed by the governor with the advice and consent of the senate.⁸⁸ Thus began a short period of time in which the clerk, who was the only purely local official who was a constitutionally mandated local officer, became an appointed official. The same provision gave constitutional status to the office of sheriff for the first time, requiring the governor to appoint one in each county with the advice and consent of the senate.⁸⁹ Both the clerk and sheriff served four-year terms and performed duties "prescribed by law."⁹⁰ In addition, the 1868 constitu-

82. *Id.* art. IV, § 29.

83. *Id.*

84. *Id.* art. VI, § 16. The 1838 constitution had permitted the legislature to vest *criminal* jurisdiction in "corporation courts," but the general nature of the courts was not defined, and no general municipal jurisdiction acknowledged. FLA. CONST. of 1838, art. V, § 1.

85. FLA. CONST. of 1868, art. VI, § 7.

86. *Id.*

87. *Id.* § 16.

88. *Id.* § 19.

89. *Id.*

90. *Id.*

tion created the office of elected constable.⁹¹ Each county was to have at least two constables elected by the "registered voters," but no county was to have more than twelve.⁹² The constables "performed such duties and under such instructions as [were] prescribed by law."⁹³ Presumably, the main duty of the constables was keeping the peace as police officers.

The status of nonjudge lawyer officers changed again under the 1868 constitution. The attorney-general was designated as one member of "a cabinet of administrative officers, consisting of a Secretary of State, Attorney-General, Comptroller, Adjutant-General, and Commissioner of Immigrants, who shall assist the governor in the performance of his duties."⁹⁴ All of these officers were "appointed by the Governor, and confirmed by the Senate," and held office "the same time as the Governor, or until their successors shall be qualified,"⁹⁵ ending the short-lived elective status of the attorney-general first attained in 1865. Moreover, the role of the office was modified so that the attorney general became the "legal advisor to the Governor and each of the cabinet offices."⁹⁶ He was also required to "perform such other legal duties as the Governor may direct, or as may be provided by law," and "to be reporter for the Supreme Court."⁹⁷ Thus, in a short period of time the office of attorney-general metamorphosed from handmaiden of the legislature to handmaiden of the governor.

The 1868 constitution created the office of state attorney and eliminated the office of solicitor. The governor with the advice and consent of the senate appointed a state attorney in each circuit to perform duties "prescribed by law"⁹⁸ for a term of four years.⁹⁹

The 1868 constitution was the first to mention juries in the judicial article, mandating that "[g]rand and petit jurors shall be taken from the registered voters of the respective counties."¹⁰⁰ The 1865

91. *Id.* § 20. The general rule was one constable for "every two hundred registered voters." *Id.*

92. *Id.*

93. *Id.*

94. *Id.* art. VII, § 1.

95. *Id.* art. V, § 17.

96. *Id.* art. VII, § 3.

97. *Id.*

98. *Id.* art. VI, § 19.

99. *Id.*

100. *Id.* § 12.

requirement that jurors be white males was omitted,¹⁰¹ never to reappear, and provision for the inviolable right of trial by jury was amended to give the legislature power to prescribe a statutory means for the parties to waive jury trials in civil cases.¹⁰² The 1868 constitution required court clerks to reduce "to writing" evidence taken in all civil and criminal trials in circuit and county courts and permitted witnesses to "correct the evidence" afterwards.¹⁰³ It also required all pleas to be sworn to by the parties or their attorneys¹⁰⁴ and mandated that "all decisions of the Supreme Court, and all laws and judicial decisions, shall be for free publication by any person."¹⁰⁵

Finally, the 1868 constitution imposed upon holders of judicial office the qualification that "no person shall ever be appointed a judge of the Supreme Court or circuit court who is not twenty-five years of age and practicing attorney."¹⁰⁶ Thus began the gradual exclusion of lay citizens (i.e., nonlawyers) from judicial office that is all but complete in 1990.

Although the 1868 changes seem to repudiate the election of judges and acknowledge the desire for an insulated judiciary, the history of the times suggests that some of the new measures were impressed upon it by foreign forces rather than the will of the electorate of the state. The 1868 revision was produced in a convention mandated by the United States Congress¹⁰⁷ after Congress had found that "no legal" state government "or adequate protection for life or property now exists" in former rebellious states including Florida.¹⁰⁸ Indeed, the convention was bitterly contentious to the point that a federal military officer ultimately took charge as presiding officer.¹⁰⁹ Hence, the final product may well have incorporated measures that reflected not the unfettered sentiments of Floridians but the views of outsiders as to what was needed to restore civil government.

101. A new provision eliminating "civil or political" distinctions "on account of race, color, or previous condition of servitude" and outlawing the power of the legislature to prohibit the right to vote or hold office on account of these factors was added, but no explicit mention was made of jury service. *Id.* art. XVI, § 28.

102. *Id.* Declaration of Rights, § 3.

103. *Id.* art. VI, § 13.

104. *Id.* § 14.

105. *Id.* art. XVI, § 13.

106. *Id.* § 30.

107. Act of 1868, 14 Stat. 428 (1867).

108. J. WHITFIELD, WHITFIELD'S NOTES: LEGAL HISTORICAL BACKGROUND OF THE STATE OF FLORIDA, III FLA. STAT. 83,175 (1941).

109. *Id.* at 178.

AMENDMENTS TO 1868 CONSTITUTION

An 1870 amendment mandated the election by the people of the "several members of the cabinet of administrative officers."¹¹⁰ Thus, the tradition of an independent attorney general gained a new start, as did the more general proposition of diffusing the state executive power among several independently elected officers. At the same time, the number of judicial circuits was reduced from seven to five, the limits of which the legislature could fix by law,¹¹¹ the legislature was empowered to fix the number of terms of the supreme court and times of holding them,¹¹² and the legislature was also empowered to prescribe regulations for calling a circuit judge into the supreme court to decide a matter from which a justice was "disqualified or disabled . . . from interest or other cause."¹¹³ The 1870 amendments also abrogated the 1868 provision requiring clerks to reduce evidence to writing and permitting witnesses to correct it¹¹⁴ and also abrogated the provision deeming impeached officers to be "under arrest" and granting them the right to demand a speedy trial by the senate.¹¹⁵

Additional 1875 amendments¹¹⁶ modified the jurisdiction of the supreme court¹¹⁷ and circuit courts,¹¹⁸ and abrogated the "court of Oyer and Terminer"¹¹⁹ status of county courts, while augmenting the power of county judges to "exercise the civil and criminal jurisdiction of justices of the peace."¹²⁰ The supreme court explained these measures as taking "from the county courts their criminal jurisdiction, and civil jurisdiction except in probate matters."¹²¹ The same opinion noted that "county judges were retained and given a limited civil and

110. FLA. CONST. of 1868, art. II (1870), *quoted in* B.P. POORE, *supra* note 65, at 365 ("The several members of the Cabinet of administrative officers shall be elected by the people.").

111. *Id.* art. III.

112. *Id.* art. VII.

113. *Id.* art. VIII.

114. *Id.* art. V.

115. *Id.* art. IX.

116. According to Swindler, "widespread violence and election frauds clouded the state elections in 1870," resulting in the 1870 amendments. The "more comprehensive" amendments of 1875 led to the "overhauling" of the amended 1868 constitution to produce the 1885 constitution. 2 WM. SWINDLER, *SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS* 372 (1973).

117. FLA. CONST. of 1868, art. VI, § 5 (1875) (supreme court obtained jurisdiction in all cases of law from the circuit courts).

118. *Id.* § 8.

119. *Id.* § 10.

120. *Id.* § 11.

121. *Stockton v. Powell*, 29 Fla. 1, 76, 10 So. 688, 701 (1892).

criminal jurisdiction.”¹²² Thus, began a detachment of the powers of the “county court” from those of “county judges.” The 1875 amendments also increased the civil jurisdiction of justices of the peace from fifty to one hundred dollars, changed the duration of appointment from “during good behavior” to a term of four years, and modified the governor’s removal power from “his own discretion” to “for reasons satisfactory to him.”¹²³

A new measure authorized the legislature to fix “the number of jurors for the trial of causes in any court,”¹²⁴ thus permitting a modification of the common law rule of twelve. In addition, the 1875 amendments also narrowed the scope of the governor’s authority to seek advisory opinions from the broad reach of the 1868 constitution to the more modest power to request an “interpretation of any portion of this Constitution upon any question affecting his Executive powers and duties.”¹²⁵ The constitution now required the “Justices” rather than the “supreme court,” as before, to render “such opinion in writing.” Presumably, the change in who rendered the opinion was intended to reduce the precedential value of the written advice given on such an occasion.

1885 CONSTITUTION

The 1885 constitution marked the beginnings of the constitutional restoration of the electorate’s control over the selection of judges that had been eliminated in the 1868 revisions. Most significant was restoration of the election of supreme court justices. Under the 1885 plan the people elected three supreme court justices for terms of six years,¹²⁶ and the justices by lot selected a chief to serve as such “during his term of office.”¹²⁷ Thus began the collegial selection of a chief. Similarly, the 1885 constitution instituted election of county judges by the electors but retained four-year terms.¹²⁸ By contrast, the 1885 constitution modified the 1868 gubernatorial appointment and senate confirmation plan for selecting circuit judges only to

122. *Id.*

123. FLA. CONST. of 1868, art. VI, § 15 (1875).

124. *Id.* § 12 (“the number of jurors for trials of causes in any court may be fixed by law”).

125. *Id.* art. V, § 16: “The governor may at any time require the opinion of the justices of the supreme court as to the interpretation of any portion of this constitution upon any question affecting his executive powers and duties, and the justices shall render such opinion in writing.”

126. FLA. CONST. of 1885, art. V, § 2.

127. *Id.*

128. *Id.* § 16.

the extent of reducing terms from eight to six years.¹²⁹ Not until fifty-seven more years passed was the selection of circuit judges returned to the electorate.

The 1885 constitution retained the 1875 measure empowering the legislature "to prescribe regulations for calling into the Supreme Court a Judge of the Circuit Court, to hear and determine any matters pending before the Court" in the place of any disqualified or disabled justice.¹³⁰ By contrast, it assigned the governor the power to "order a temporary exchange of Circuits by the respective [circuit] judges, or order any judge to hold one or more terms or parts of terms in any other Circuit than that to which he is assigned."¹³¹ Hence, the constitution divided the power to assign judges between the legislature and the governor.

The 1885 constitution also required circuit court judges to reside in their respective districts¹³² and imposed upon them a duty to report to the attorney-general "such defects in the laws as may have been brought to their attention, and to suggest such amendments or additional legislation as may be deemed necessary."¹³³ These reports were to be made at least thirty days before each legislative session. The attorney general was required to report to the legislature proposals for legislation as "he deemed necessary."¹³⁴ Hence, the attorney-general apparently had the discretion, upon review of the circuit judges' submissions, to accept only those measures he agreed with and add others of his own before reporting to the legislature.

The 1885 constitution retained "impeachment for misdemeanor in office" as the means of removal of supreme court justices and circuit court judges,¹³⁵ but granted the governor the power to suspend all "officers that shall have been appointed or elected, and that are not liable to impeachment . . . for malfeasance, misfeasance, or neglect of duty in office, for the commission of any felony, or for drunkenness or incompetence," and, ultimately, the power to remove the official from office "with the consent of the Senate."¹³⁶

The 1885 constitution continued the practice begun in the 1875

129. *Id.* § 8.

130. *Id.* § 6. The disability was on the basis of "interest or other cause."

131. *Id.* § 8.

132. *Id.*

133. *Id.* § 13.

134. *Id.*

135. *Id.* art. III, § 29.

136. *Id.* art. IV, § 15.

amendments of distinguishing between "county courts" and "county judges," which had to do with jurisdiction and not personnel.¹³⁷ Under the 1885 version every county had a "county judge" but only counties designated by the legislature had "county courts," which added to the jurisdiction of the presiding county judge. Moreover, the legislature was empowered to abolish county courts (not county judges) at its "pleasure."¹³⁸

The 1885 constitution instituted a number of novel measures. These included granting authority to county commissions to designate the number of justice of the peace districts (not less than two), whose incumbents were elected, rather than appointed as under the 1868 constitution,¹³⁹ for terms of four years;¹⁴⁰ substantially modifying the jurisdiction of the justices of the peace; and providing for trial de novo in the circuit courts of criminal appeals from the justices of the peace "under such regulations as the Legislature may prescribe."¹⁴¹ The 1885 constitution acknowledged the separate existence of "criminal courts" with jurisdiction of all noncapital crimes,¹⁴² created one in Escambia County,¹⁴³ and provided for others to be established "upon application of a majority of the registered voters in such other counties as the legislature may deem expedient."¹⁴⁴ In counties where criminal courts were created, county courts (and presumably county judges if there were no county court) were deprived of criminal jurisdiction.¹⁴⁵ Judges of the criminal court were appointed by the governor and confirmed by the senate for terms of four years.¹⁴⁶

The 1885 constitution did not modify the appointment, term, and duties of the clerk of the supreme court, but it did restore the elective status of the clerk of the circuit courts,¹⁴⁷ and created a clerk of the criminal court in counties where they were created.¹⁴⁸ Each criminal court clerk was elected by the electors for a four year term

137. *Id.* art. V, § 18.

138. *Id.*

139. FLA. CONST. of 1868, art. VII, § 15.

140. FLA. CONST. of 1885, art. V, § 21.

141. *Id.* § 22.

142. *Id.* § 9.

143. *Id.* § 10.

144. *Id.* The constitution also permitted the legislature to abolish criminal courts. *Id.* § 32.

145. *Id.* § 29.

146. *Id.*

147. *Id.* § 15. This undid the 1868 abrogation of the elective status of the office. *See supra* note 88 and accompanying text.

148. *Id.* § 30.

and also served as clerk of the county court.¹⁴⁹ Elsewhere, the elected clerk of the circuit court served as clerk of the county court.¹⁵⁰ The 1885 revision also retained the constitutional status of sheriff, but made the office elective rather than appointive by the governor.¹⁵¹ It modified the office of constable only by prescribing that one should be elected by the registered voters in each justice of the peace district.¹⁵²

The 1885 constitution created the office of prosecuting attorney in each county in which either a county court or a criminal court was created. County court prosecutors were elected by the qualified electors for a term of four years,¹⁵³ whereas criminal court prosecutors were appointed by the governor and confirmed by the senate for a like term.¹⁵⁴ The function of these officials was to prosecute criminal actions within the jurisdiction of the respective courts.¹⁵⁵

Except for the creation of the office of prosecuting attorney for county courts and criminal courts, the 1885 constitution made only minor changes in the role of nonjudge lawyer officials. It broadened the responsibility of the attorney-general as legal adviser to the governor and members of the cabinet to include advising "each of the officers of the Executive Department"¹⁵⁶ and made the "State Attorney residing in the county where such Court is held [to be] eligible for appointment as County Solicitor for said county."¹⁵⁷ This is the only reference to the office of "County Solicitor" in the 1885 constitution.

The 1885 constitution also retained the power of the legislature to establish municipal courts "for the punishment of offenses against municipal ordinances" in incorporated towns and cities¹⁵⁸ and infer-

149. *Id.*

150. *Id.* § 15.

151. *Id.* The 1885 constitution was the first to recognize counties "as the legal political subdivisions of the State." *Id.* art. VII, § 2. In that vein it provided: "The Legislature shall provide for the election by the qualified electors in each county of the following county officers: A Clerk of the Circuit Court, a Sheriff, Constables, a County Assessor of Taxes, a Tax Collector, a County Treasurer, a Superintendent of Public Instruction." *Id.* § 5.

152. *Id.* art. V, § 23.

153. *Id.* § 18.

154. *Id.* § 27.

155. *Id.* § 28 (prosecutions in criminal courts). County court prosecuting attorneys were to perform duties as prescribed by law, which presumably were prosecutorial. *Id.* § 18.

156. *Id.* art. IV, § 22. The role as reporter for the supreme court was retained.

157. *Id.* art. V, § 31.

158. *Id.* § 34.

entially referred to them as "Mayor's Courts."¹⁵⁹ It retained the power of circuit judges to appoint practicing lawyers as referees to try civil cases,¹⁶⁰ and expanded the use of nonjudge lawyers by permitting the parties to agree to the sitting of an attorney at law as judge ad litem in the trial of any civil case at law when the regular circuit or county court judge was disqualified.¹⁶¹ The judge ad litem was empowered to "make orders in said cause as if he were Judge of the Court"¹⁶² and presumably sat with a jury rather than as a fact-finding referee. In the same vein, circuit judges were empowered to appoint one or more attorneys at law in each county to be court commissioners, who were authorized in the absence of the circuit judge "to allow writs of injunction and to issue writs of habeas corpus" subject to review by the circuit judge.¹⁶³ All of these measures were instituted at a time when each circuit had only one circuit judge, each county only one county judge, and means of communication and transportation among them were poor and slow. Hence, the purpose must have been to permit alternative modes of civil adjudication to avoid blockages in regular court processes.

The 1885 constitution extended the requirement that justices of the supreme court and judges of circuit courts be "twenty five years of age and an attorney at law" to criminal court judges¹⁶⁴ and empowered "all judicial officers in this State" to be "conservators of the peace."¹⁶⁵ It also prescribed that in the event of a vacancy in the "office of any judge" the successor "shall be appointed or elected only for the unexpired term" of the vacated office.¹⁶⁶

Finally, the 1885 constitution limited the power given the legislature in 1875 to fix the number of jurors by adding the final clause to this statement: "[T]he number of jurors for the trial of causes in any court may be fixed by law but shall not be less than six."¹⁶⁷ The revised version also omitted the 1868 provision requiring petit and grand jurors to be taken from the registered voters.

159. *Id.* § 11.

160. *Id.* § 20 (upon application of the parties).

161. *Id.* § 19.

162. *Id.*

163. *Id.* § 14.

164. *Id.* § 3.

165. *Id.* § 36.

166. *Id.* § 33.

167. *Id.* § 38. This mandate was retained in the 1956 revision and in the 1968 constitution. FLA. CONST. art. I, § 22.

AMENDMENTS TO 1885 CONSTITUTION

The judicial article of the 1885 constitution was adjusted numerous times before being supplanted in 1972 by amendments to the 1968 constitution. An early amendment retreated from the "no other courts" limitation by permitting the legislature to "clothe any railroad commission with judicial powers."¹⁶⁸ A 1902 amendment enlarged the supreme court from three to six members and permitted the legislature thereafter to adjust the number between three and six.¹⁶⁹ The 1902 measure also permitted the court to sit in two divisions when "there shall be six members," with the decision of a division becoming the decision of the court in the absence of a dissent in the division.¹⁷⁰ If there was a dissent, the disputed question was "submitted to the Court sitting in a body."¹⁷¹ The 1902 amendment also increased the number of judicial circuits from seven to eight.¹⁷²

A 1910 amendment restated the limitation that "no court other than herein specified shall be established," but permitted the legislature to create "such additional Judicial Circuits as may from time to time become necessary."¹⁷³ Thus, the constitution denied the legislature the power to create new kinds of courts but permitted it to enlarge the number of circuit judges by increasing the number of circuits. Even this apparently did not prove to be an entirely satisfactory means of providing additional judges, because a 1912 amendment added "another Judge of the Circuit Court of Duval County" to be selected by the same means as the other circuit judges for a six-year term.¹⁷⁴

A 1914 amendment again partially overruled the 1910 "no other courts" measure by empowering the legislature "to ordain and establish" other "Courts or Commissions," from "time to time."¹⁷⁵ A 1925 amendment required the supreme court justices to select a chief for two-year terms,¹⁷⁶ thereby instituting a plan designed to assure regu-

168. FLA. CONST. of 1885, art. V, § 35 (1909) (J. Res. 3, 1909 Fla. Laws 683) (amending article V, § 35 of 1885 constitution to add the referenced language to the general statement that "no courts other than those herein specified shall be established in this state.").

169. *Id.* § 2 (1902) (J. Res. 1, 1901 Fla. Laws 360).

170. *Id.* § 4 (1902) (J. Res. 1, 1901 Fla. Laws 360).

171. *Id.* § 4 (1902) (J. Res. 1, 1901 Fla. Laws 360).

172. *Id.* § 8 (1902) (J. Res. 2, 1901 Fla. Laws 360).

173. *Id.* § 35 (1910) (J. Res. 3, 1909 Fla. Laws 683).

174. *Id.* § 42 (1914) (S.J. Res. 1, 1913 Fla. Laws 933).

175. *Id.* § 1 (1914) (J. Res. 547, 1913 Fla. Laws 524).

176. *Id.* § 44 (1926) (S.J. Res. 322, 1925 Fla. Laws 543). This provision modified a 1910 amendment that permitted the legislature to create additional judicial circuits as may from

lar turnover in who occupied the office.

A 1933 amendment limited the number of judicial circuits to fifteen, authorized multi-judge circuits (thereby obviating the need to create specific additional circuit judges on an ad hoc basis, as had been done for Duval County), and limited the number of judges per circuit to one for each "fifty thousand inhabitants, or major fraction thereof."¹⁷⁷ All of these measures increased the flexibility of the legislature to adjust the numbers of circuit judges as required by changed demands on the courts.

A 1940 amendment increased the number of supreme court justices to seven and permitted the court either to sit en banc or in divisions of three members.¹⁷⁸ Under this plan "the judgment of a division concurred in by the Chief Justice [was] the judgment of the Court" in the absence of a stated exception in which event the matter was decided by the two divisions and the chief justice sitting collectively.¹⁷⁹ It permitted the chief justice to call circuit judges to sit as associate justices in the divisions (but no more than one per division), and acknowledged the chief justice to be "the chief administrative officer of the court," responsible for the dispatch of court business and "procuring consistent decisions."¹⁸⁰ Thus began the process, which has been continued and expanded through subsequent revisions, of endowing designated judicial offices with express supervisory powers.

It was during this time period, specifically in 1941, that the supreme court exercised its quasi-legislative powers aggressively in regulating the conduct of judges and lawyers by adopting a comprehensive set of rules, "Relating to Ethics Governing the Bench and Bar of Florida."¹⁸¹ Nevertheless, these rules were promulgated pursuant to a

time to time be needed. *Id.*

177. *Id.* § 45 (1934) (S.J. Res. 582, 1933 Fla. Laws 881).

178. *Id.* § 4(b) (1940) (H.R.J. Res. 45, 1939 Fla. Laws 1663).

179. *Id.* The exceptions requiring en banc consideration were: (1) capital punishment cases; (2) cases involving federal or state "controversies" pertaining to "a Federal or State statute, rule, regulation or municipal ordinance;" (3) decisions disagreed with by a member of a division or the chief justice; and (4) any case ordered for en banc hearing by the chief justice. *Id.*

180. *Id.* § 4 (1940) (H.R.J. Res. 54, 1939 Fla. Laws 1663). A similar measure had been proposed unsuccessfully by the 1931 legislature. *Id.* § 4 (1932) (H.R.J. Res. 52, 1931 Fla. Laws 1037).

181. Rules of the Supreme Court Relating to Ethics Governing the Bench and Bar, 145 Fla. 763 (1940).

specific delegation of authority from the legislature.¹⁸²

A 1942 amendment returned the selection of circuit judges to "the qualified electors of their respective judicial circuits" for terms of six years, commencing with the general election of 1948.¹⁸³ This status has remained unchanged through 1990. With the adoption of this measure in 1942, the election of all Florida judges was restored to the electorate.

1956 REVISION OF 1885 CONSTITUTION

The entire judicial article was revised in 1956.¹⁸⁴ The major new departure was the initial establishment of the district courts of appeal,¹⁸⁵ thereby initiating the modern two-tier system of appellate review courts in Florida. The revision also prescribed the jurisdiction¹⁸⁶ of the new courts (then divided into three districts) and the jurisdiction of the supreme court to review their decisions.¹⁸⁷

Although a major purpose of the 1956 measure was to tidy up the existing somewhat jury-rigged structure, it did make several other important changes that included eliminating divisions in the supreme court,¹⁸⁸ increasing the maximum number of individual circuits to sixteen, requiring each circuit to comprise a county or groups of contiguous counties,¹⁸⁹ restricting the number of justices of the peace to no more than five per county and prescribing a term of four years,¹⁹⁰ authorizing the legislature to establish juvenile courts, and authorizing it to prescribe the method of "election or selection and appoint-

182. *Id.*

Section 1. That the Supreme Court of the State of Florida shall have power to prescribe from time to time the rules, forms of process, writs, pleadings, motions, and the practice and procedure in actions at law and suits in equity pending in said Supreme Court. They shall take effect at such time after their promulgation as may be designated by the Supreme Court, and thereafter all laws in conflict therewith shall be of no other force or effect.

Chapter 13870, 1929 Fla. Laws 675, 675. Curious observers may speculate what would have been the fate of this statute had it been challenged on grounds of violating constitutional separations of powers.

183. FLA. CONST. of 1885, art. V, § 46 (1942) (S.J. Res. 334, 1941 Fla. Laws 2812). *See also* Advisory Opinion to Governor, 152 Fla. 674, 12 So. 2d 879 (1943).

184. FLA. CONST. of 1885, art. V (1956) (H.R.J. Res. 810, 1955 Fla. Laws 1229).

185. *Id.* § 5(a).

186. *Id.* § 5(c).

187. *Id.* § 4(b).

188. *Id.* § 4(a).

189. *Id.* § 6(a).

190. *Id.* § 11(a).

ment" of the juvenile judges and the term of office.¹⁹¹ The specific constitutional duties of the chief justice that were added in 1940 to make the now-superseded divisions work were omitted in 1956.

The 1956 revision retained the authority of circuit judges to use practicing lawyers as court commissioners¹⁹² and referees,¹⁹³ but eliminated their authority to appoint lawyers to act as judges ad litem. It also mandated that the "legislature . . . shall provide for one circuit judge in each court for each fifty thousand inhabitants or major fraction thereof."¹⁹⁴ Despite what appeared to be the discretionary wording of the provision, the supreme court held it to be self-executing with the consequence that "the incumbent governor has both the authority and duty to fill such vacancies by appointment" without additional legislative authority.¹⁹⁵ What had been a limit on the number of judges in 1933 became a floor in 1956, thereby beginning a system of regular enlargement of the judiciary that has continued to the present in a different form.¹⁹⁶ As construed, the measure plainly constituted a transfer of power from the legislature to the governor concerning when new judgeships would be created.¹⁹⁷

The 1956 revision elaborated qualifications for judicial office by requiring justices of the supreme court and judges of the district courts of appeal to be citizens of the state, current members in good standing of the Florida Bar, and members in good standing for a period of at least ten years.¹⁹⁸ It also required circuit and criminal court judges to be members of the "bar of Florida" and not less than twenty-five years of age.¹⁹⁹ It set an "automatic" retirement age of seventy for all justices and judges,²⁰⁰ required all to devote full time to judicial duties, prohibited them to engage in the practice of law or hold any other state or federal "office of profit," and prohibited them to hold office in any political party.²⁰¹ It did not change the plan for

191. *Id.* § 12.

192. *Id.* § 6(d).

193. *Id.* § 22.

194. *Id.* § 6(b).

195. *Gray v. Bryant*, 125 So. 2d 846, 861 (Fla. 1960).

196. FLA. CONST. art. V, § 9 (1988).

197. A 1961 proposed amendment attempted to change the one-judge per 50,000 mandate to a statement of legislative discretion, but it failed. S.J. Res. 344, 1961 Fla. Laws 1169 (not adopted 1962).

198. FLA. CONST. of 1885, art. V, § 13 (1956) (H.R.J. Res. 810, 1955 Fla. Laws 1229, 1239).

199. *Id.* § 13.

200. *Id.* § 17(a).

201. *Id.* § 18.

impeachment and removal of justices and judges set in the 1885 constitution, except to include the new office of judge of district court of appeal in the impeachable category.²⁰²

The 1956 revision made a major change in the division of power between the judicial and legislative branches by transferring the power to adopt rules governing "practice and procedure in all courts"²⁰³ from the legislature to the supreme court and delegating "exclusive jurisdiction over the admission to the practice of law and the discipline of persons admitted," including power to create an admitting agency, to the supreme court.²⁰⁴ These powers, coupled with the general administrative power of the chief justice²⁰⁵ and the supreme court's self-acknowledged inherent power to require practicing lawyers to belong to an integrated bar,²⁰⁶ form the core of the regulatory powers of the present day supreme court.

The 1956 revision modified the office of clerk of the supreme court by redesignating it as "clerk and marshal," which was to be appointed by the supreme court, to perform duties it prescribed, and to serve at the court's pleasure.²⁰⁷ As marshal, this official had power

202. *Id.* § 17(c).

203. *Id.* § 3. From its origin the supreme court had deemed itself to have the inherent power to adopt rules. See Rules of Practice Adopted by the Supreme Court, for the government of the Circuit Courts of the State, 1 Fla. I (1846). Nevertheless, prior to the 1956 revision the constitution did not specifically allocate the power to any governmental department, but the legislature is said to have "dominated" the field through the exercise of its general legislative power. Means, *The Power to Regulate Practice and Procedure in Florida Courts*, 32 U. FLA. L. REV. 442, 444 (1980). See also *In re Florida State Bar Ass'n*, 145 Fla. 223, 199 So. 57 (1940).

204. FLA. CONST. of 1885, art. V, § 23 (1956) (H.R.J. Res. 810, 1955 Fla. Laws 1229, 1242). The question of legislative versus judicial control of admissions and discipline was examined extensively in *In re Florida State Bar Ass'n*, 134 Fla. 851, 186 So. 280 (1938). There, the supreme court acknowledged that it had acquiesced to legislative authority for upwards of 100 years, but accepted the following principle: "If not defined by the Constitution [w]e approve the high universal doctrine that the power to regulate such matters by rule is inherent in the Courts and cannot be taken away from them by the Legislature." *Id.* at 862, 186 So. at 287.

205. FLA. CONST. of 1885, art. V, § 4(c) (1956) (H.R.J. Res. 810, 1955 Fla. Laws 1229, 1231). The initial predecessor of this measure was found in the 1940 amendments. *Id.* (H.R.J. Res. 54, § 4(c), 1939 Fla. Laws 1663).

206. *In re Florida State Bar Ass'n*, 40 So. 2d 902 (Fla. 1949). The initial supreme court of Florida had much earlier set down the following rule for admission to practice in circuit court: "Persons making applications for admission to the Bar, shall apply by petition to one of the Judges, presenting evidence of his having attained the age of twenty-one years, and of his being of good moral character; whereupon said applicant shall be examined in open court as to his capacity and fitness." Rules of Practice Adopted by the Supreme Court, for the Government of the Circuit Courts of the State, 1 Fla. at V.

207. FLA. CONST. of 1885, art. V, § 4(d) (1956) (H.R.J. Res. 810, § 4(d), 1955 Fla. Laws 1229).

to "execute the process of the court throughout the state" and to deputize sheriffs and deputy sheriffs to do so.²⁰⁸ The measure also directed each district court of appeal to appoint a clerk and marshal with similar powers, duties, and jurisdiction.²⁰⁹

The 1956 revision retained the elective status and existing functions of the clerk of the circuit court,²¹⁰ but omitted any mention of the office of sheriff except by designation as the "executive officer" of criminal courts with duties and fees "fixed by law."²¹¹ By contrast, the office of elective constable in each justice of the peace district was continued.²¹²

The final adjustment made to the judicial article of the 1885 constitution before the adoption of the 1968 constitution was a 1964 amendment that permitted the legislature to establish up to twenty judicial circuits.²¹³

1968 CONSTITUTION

The 1885 constitution, as amended, was revised²¹⁴ and readopted in toto in 1968, except that the existing judicial article was left unchanged. After three years' delay, the legislature proposed and the people adopted a substantial revision of the judicial article in 1972.²¹⁵ Its primary accomplishment was to repose all judicial power in a state court system of only four jurisdictions: the supreme court, the district courts of appeal, the circuit courts, and the county courts.²¹⁶ All other courts including former criminal courts, probate courts, juvenile courts, justices of the peace, and municipal courts "ceased to exist" under the terms of the revision, and their cases were transferred to the court that would have had jurisdiction of the subject matter had the action arisen after the abolition.²¹⁷

208. *Id.*

209. *Id.* § 5(d).

210. *Id.* § 6(g).

211. *Id.* § 9(g).

212. *Id.* § 11(c).

213. FLA. CONST. of 1885, art. V, § 6 (1964) (H.R.J. Res. 59, 1963 Fla. Laws 1519).

214. H.R.J. Res. 1-2x, 1968 Fla. Laws 536; S.J. Res. 4-2x, 1968 Fla. Laws 528; S.J. Res. 5-2x, 1968 Fla. Laws 529.

215. FLA. CONST. art. V (1968 revised 1972).

216. *Id.* § 1.

217. *Id.* § 20(c). Municipal courts continued to function "until amended or terminated in a manner prescribed by special or general law or ordinances, or until January 3, 1977, whichever occurs first." *Id.* § 20(d)(4). All other superseded courts terminated as of the effective date of the revision.

The 1972 revision eliminated the provisions permitting the exercise of judicial powers by lawyer court commissioners and referees, and explicitly deprived the legislature of power to create other courts. Nevertheless, it did permit the legislature to grant "quasi-judicial powers" to "commissions established by law, or administrative officers or bodies,"²¹⁸ and removed all restraints on the legislature's power to change the number and territory of appellate court districts (for district courts of appeal) and judicial circuits (for circuit judges) except to require that boundaries of districts and circuits follow "county lines."²¹⁹ Although the constitution is silent on the point, the Florida Supreme Court has held that local governments are also empowered to clothe administrative agencies with quasi-judicial powers including authority to award quantifiable damages in administrative enforcement actions.²²⁰ Nevertheless, the 1968 constitution plainly limited the nature of remedies available to quasi-judicial entities as follows: "No administrative agency shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law."²²¹

The 1972 revision enlarged the supreme court's power to "adopt rules for practice and procedure in all courts" to include prescribing "the time for seeking appellate review, the administrative supervision of all courts, the transfer [of proceedings from one court to another] when the jurisdiction of another court has been improvidently invoked, and a requirement that no cause shall be dismissed because an improper remedy has been sought."²²² It also slightly reduced the supreme court's power by permitting the legislature to repeal (not amend) any of the foregoing rules "by two-thirds vote of the membership of each house."²²³

The 1972 revision removed any constitutional limit on the term of the chief justice, who was "to be chosen by a majority of the members of the court,"²²⁴ and established the chief as the "chief adminis-

218. *Id.* § 1. Even under this regime, the supreme court held that the Industrial Relations Commission performed the functions of a court sufficiently to satisfy the due process provisions of the Florida Constitution. *Scholastic Sys., Inc., v. LeLoup*, 307 So. 2d 166 (Fla. 1974).

219. *Id.*

220. *See, e.g., Laborers' Int'l Union, Local 478 v. Burroughs*, 541 So. 2d 1160 (Fla. 1989). Apparently, "unquantifiable" damages, meaning those having to do with no economic losses such as pain and suffering, cannot be awarded by administrative agencies. *Id.* at 1162.

221. FLA. CONST. art. I, § 18.

222. *Id.* § 2(a).

223. *Id.*

224. *Id.* § 2(b). The practice remains for the justices to elect a chief for a two-year term.

trative officer of the judicial system"²²⁵ with the power to assign justices and judges "to temporary duty in any court for which the judge is qualified" and to delegate to chief circuit judges similar power within the circuits.²²⁶ It also mandated that a chief judge of each district court of appeal be chosen "by a majority of the judges thereof" or by the chief justice in the absence of a majority.²²⁷ Each chief judge was "responsible for the administrative supervision of the court."²²⁸ Similarly, the 1972 revision mandated that a chief judge be selected for each judicial circuit from among the circuit judges in the circuit in a manner prescribed by supreme court rule.²²⁹ Each chief was "responsible for the administrative supervision of the circuit courts and county courts" of the circuit.²³⁰

The 1972 revision plainly transferred power from the legislature to the judiciary by depriving the legislature of the power to organize and administer the courts, to prescribe rules of practice and procedure, and to prescribe rules of attorney admission and discipline.²³¹ This power transfer was further evidenced by a constitutionally prescribed procedure whereby the supreme court was authorized to determine the need for additional judges (except justices) and the need to change the appellate districts and judicial circuits, and to certify its determinations of these needs to the legislature.²³² Although the supreme court's findings were not binding on the legislature, the constitution mandated the legislature to consider them at its next regular session and limited its power to modify them.²³³ The constitution also permitted the legislature to make an initial decision as to the need for more judges if the supreme court failed to make findings "when need exists."²³⁴ In toto those provisions constitute the modern plan for regularly increasing the number of judges as demand grows. They supplanted the self-executing 1956 measure that the supreme court had interpreted to mandate one circuit judge per each 50,000 in

225. *Id.*

226. *Id.*

227. *Id.* § 2(c).

228. *Id.*

229. *Id.* § 2(d).

230. *Id.*

231. See *supra* notes 181-82 and accompanying text.

232. FLA. CONST. art. I, § 18.

233. *Id.* The legislature might reject the recommendations or adopt them in whole or in part, with some limitations imposed by a super majority requirement.

234. *Id.*

the population without any consideration of actual need.²³⁵

In what may seem a tit-for-tat, the 1972 revision also prescribed a procedure whereby the supreme court might reapportion the legislature if a malapportioned legislature failed to do so itself.²³⁶ In the same vein, the supreme court has deemed its place as the final guarantor of constitutional liberties embodied in the declaration of rights of the Florida constitution to justify invading the legislative domain at least to the extent of forcing the legislature off a do-nothing position.²³⁷ In sum, these measures plainly constituted a judicial intrusion into what had traditionally been exclusive legislative territory.

The 1972 revision mandated that all justices and judges be elected "by vote of the qualified electors within the territorial jurisdiction of their respective courts,"²³⁸ thereby continuing the all elective mode that had commenced with the 1942 amendments. From the point of view of representative government, this was consistent with the placement of more governmental power within the control of the judiciary. Nevertheless, the 1972 revisions changed the mode of filling midterm judicial vacancies that had long prevailed under the 1885 constitution.²³⁹ Under the supplanted rule, vacancies in all elective judicial offices would be filled by election,²⁴⁰ except that the governor might make ad interim appointments up to the time a successor

235. See *supra* notes 194-97 and accompanying text.

236. FLA. CONST. art. IV, § 16.

237. See, e.g., *White v. Board of County Comm'rs*, 537 So. 2d 1376 (Fla. 1989) (right to counsel in criminal defense); *Makemson v. Martin County*, 491 So. 2d 1109 (Fla. 1986) (right to counsel in criminal defense), *cert. denied*, 479 U.S. 1043 (1987); *In re D.B.*, 385 So. 2d 83 (Fla. 1980) (right to counsel if state is seeking to take away a parent's child); *Dade County Classroom Teachers Ass'n v. Legislature*, 269 So. 2d 684 (Fla. 1972) (right of public employees to bargain collectively).

238. FLA. CONST. art. V, § 10(a).

239. FLA. CONST. of 1885, art. IV, § 7: "When any office, from any course, shall become vacant no mode is provided by this constitution or by the laws of the state for filling such vacancy by granting a commission for the unexpired term." Although the supreme court has stated that this provision "was intended to operate as a catchall and where there were other pertinent provisions in the constitution and statutes it was not to be operative," history shows that ad interim appointments by the governor were the means by which vacancies were filled under the 1885 constitution. See *Gray v. Bryant*, 125 So. 2d 846, 854 (Fla. 1960).

240. FLA. CONST. of 1885, art. V, § 33, provided: "When the office of any judge shall become vacant from any cause, the successor to fill such vacancy shall be appointed or elected only for the unexpired term of the judge whose death, resignation, retirement, or other cause created such vacancy." One of the purposes of this provision was to assure that the successor judge served no longer than to the end of the unexpired term of the predecessor in office, rather than for a completely new term. See *Advisory Opinion to the Governor*, 96 So. 2d 541, 544 (Fla. 1957).

could be elected at the next general election.²⁴¹ Under this plan unexpected vacancies by death, resignation, or removal could be filled initially by appointment at the sole discretion of the governor. Although the new rule retained the governor's power to appoint judges to fill vacancies on an ad interim basis, it required that each appointee be selected from a slate of not fewer than three candidates proposed by a judicial nominating commission.²⁴² Each nominating commission was composed of nine members selected as follows: three members of the Florida Bar appointed by the Bar's governing board, three "electors" appointed by the governor, and three non-Florida Bar member electors appointed by a majority vote of the other six.²⁴³ This measure diluted the power of the governor in selecting the large number of judges that initially attained their positions as a result of deaths or midterm retirements or resignations, and enhanced the power of the legal profession and the governing board of the Florida Bar. This, to a limited extent, simultaneously diluted political accountability to the people in that the powers of the elected governor were circumscribed by choices of nonelected functionaries.

The 1972 revision slightly modified the judicial eligibility criteria and prohibitions. It required each justice and judge to be an elector of the state and of the territorial jurisdiction of the respective court, each to retire after attaining seventy years of age (except for temporary assignments or to complete terms more than half completed), and each to be a member of the "bar of Florida," except the legislature might by general law exempt county judges from the last re-

241. The limitation on the governor's appointing power, granted by article VII, section 14 of the 1885 constitution, to ad interim appointments was prescribed by article IV, section 7 of the 1885 constitution as follows: "The term of office for all appointees to fill vacancies in any of the elective offices under this Constitution, shall extend only to the election and qualification of a successor at the ensuing general election." See Advisory Opinion to the Governor, 96 So. 2d 541 (Fla. 1957).

242. FLA. CONST. art. V, § 11(a). Still unresolved is whether the language stating that the governor "shall fill each vacancy" from the slate submitted to him by a nominating commission denies him the power to reject an entire slate. Although *Orr v. Trask*, 464 So. 2d 132, 133 (Fla. 1984) suggests in a dictum that somewhat similar legislative language binds the governor as to the appointment of statutory workers' compensation judges, that ruling should not be applied to confine the governor's discretion in appointing constitutional officers. If any vestige of political accountability is to remain in selecting judges, the governor should be acknowledged as having the power to reject a slate.

243. FLA. CONST. art. V, § 20(e)(5). Each of the members must reside "within the territorial jurisdiction of the affected court, district, or circuit," and the members of the bar appointed by the board must actively practice law with offices within the jurisdiction. *Id.*

quirement.²⁴⁴ By virtue of these provisions, the Florida constitution imposed no minimum age for eligibility to assume any judicial office, but instead relied upon tenure as a member of the bar of Florida to set the maturity standard: the ten preceding years for supreme court justices and district court of appeal judges, and the preceding five years for circuit judges.²⁴⁵ All justices and judges of the judiciary were required to "devote full time to their judicial duties" and were prohibited to "engage in the practice of law or hold office in any political party."²⁴⁶ In addition, all were "to be compensated only by state salaries fixed by general law,"²⁴⁷ and the judiciary was explicitly denied "power to fix appropriations."²⁴⁸

The 1972 revision also retained the supreme court's "exclusive" jurisdiction over admissions and discipline of the lawyers who practice law in Florida,²⁴⁹ power initially allocated to it by the 1956 revisions, and retained the role of conservator of the peace for all judicial officers.²⁵⁰

Finally, the 1972 revisions introduced a novel plan for disciplining judges for Florida, the judicial qualifications commission.²⁵¹ Under this plan a commission composed of six judges (selected by judges), two members of the bar of Florida (selected by the governing board), and five nonlawyer, nonjudge electors of the state (appointed by the governor) was empowered to commence disciplinary action against any justice or judge. Upon making a finding of wrongdoing, the commission would forward its findings to the supreme court along with a recommendation to punish an offending member of the judiciary by penalty up to and including removal for office "for willful or persistent failure to perform his duties or for other conduct unbecoming a member of the judiciary."²⁵² The supreme court possessed final authority over the disciplinary matter. Consistent with the by-then general approach to all regulatory matters pertaining to the judiciary, the 1972 revision authorized the supreme court to prescribe the commission's rules of procedure and rules for filling com-

244. *Id.* § 8. The apparent purpose for this was to permit the legislature to "grandfather" in nonlawyer county judges who had never before been required to be lawyers.

245. *Id.*

246. *Id.* § 13.

247. *Id.* § 14.

248. *Id.*

249. *Id.* § 15.

250. *Id.* § 19.

251. *Id.* § 12.

252. *Id.* § 12(d).

mission vacancies.²⁵³

The power to remove conferred upon the supreme court was "both alternative and cumulative to the power of impeachment and to the power of suspension by the governor and removal by the senate."²⁵⁴ Hence, supreme court justices and judges of the district courts of appeal and circuit courts remained subject to impeachment for "misdemeanor in office,"²⁵⁵ and county judges remained subject to gubernatorial suspension for "malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform his official duties, or commission of a felony."²⁵⁶ Nevertheless, with the adoption of the regularized judicial qualifications commission process, the people reallocated primary responsibility for overseeing and disciplining judges from the legislature and the executive to the judiciary itself.

The 1972 revision retained the offices of "clerk and marshal" of the supreme court²⁵⁷ and of each district court of appeal²⁵⁸ that had been established in the 1956 revision. It also retained the basic role and elective status of clerks of the circuit courts,²⁵⁹ but authorized the adoption of alternative plans. First, the legislature was empowered to separate the clerk's court duties from the clerk's duties as "ex-officio clerk of the board of county commissioners, auditor, recorder and custodian of all county funds" and to assign them to two officers instead of one.²⁶⁰ And, second, the electorate of any county was permitted to adopt a charter that removed the elective status of the clerk of the circuit court (or any other county constitutional administrative officer, including the sheriff) or abolished the office and transferred its functions.²⁶¹ The 1972 revision also permitted the legislature to create a separate clerk of county court by special or general law.²⁶²

The 1968 constitution had earlier established the office of sheriff

253. *Id.* § 12(c).

254. *Id.* § 12(e).

255. *Id.* art. III, § 17. The term "misdemeanor in office" in this context is given a much broader meaning than mere criminal misdemeanor. *In re Investigation of Circuit Judge*, 93 So. 2d 601, 605-06 (Fla. 1957).

256. FLA. CONST. art. IV, § 7.

257. *Id.* art. V, § 3(c).

258. *Id.* § 4(c).

259. *Id.* § 16.

260. *See also id.* art. VII, § 1(d).

261. *Id.*

262. *Id.* art. V, § 16.

in the local government article,²⁶³ and this was undisturbed by the 1972 revision of the judicial article, except to add provisions permitting marshals of the supreme court and district courts of appeal to deputize sheriffs and deputies "to execute the process of court."²⁶⁴ The 1972 revision omitted the office of elected constable, thus eliminating it entirely after a 104-year period beginning with the adoption of the 1868 constitution.

The 1968 constitution and the 1972 revision of the judicial article collectively made major changes in the offices of nonjudge lawyers. The 1968 measure redesignated the attorney general as simply "the chief state legal officer,"²⁶⁵ and omitted imposing specific functions such as legal adviser to the governor and reporter of the supreme court that had been mandated by predecessor constitutions. Presumably, these changes were meant to grant political independence to the office and to sever any subordination to the governor, other members of the cabinet, and the supreme court.

The 1972 revision eliminated the office of county prosecuting attorney and redesignated the office of state attorney as "the prosecuting officer of all trial courts" in each circuit.²⁶⁶ Along with this expansion of the role of the state attorney, the measure also made the office elective, rather than appointive, for a term of four years.²⁶⁷ It also required the state attorney to be an elector of the state, a resident of the circuit, and a member of the bar of Florida for the preceding five years, and to devote full time to the duties of office to the exclusion of all private practice of law.²⁶⁸ Hence, the new constitution imposed upon state attorneys the same initial and continuing eligibility requirements that it imposed upon circuit judges.

Finally, the 1972 revision created the office of public defender. One public defender was to be elected in each judicial circuit for a four-year term and required to "perform duties prescribed by law."²⁶⁹ The revision imposed exactly the same initial and continuing eligibility requirements upon these officers as it did upon state attorneys and circuit court judges, except it neither required full time devotion to the job nor forbade the officer to engage in private practice of

263. *Id.* art. VIII, § 1(d).

264. *Id.* art. V, § 4(d).

265. *Id.* art. IV, § 4(c).

266. *Id.* art. V, § 17.

267. *Id.*

268. *Id.*

269. *Id.* § 18.

law.²⁷⁰

The concentration of all the prosecuting authority in a single office for each circuit and all public defending authority in another constituted an executive realignment parallel to the elimination of all local courts except for the county court.

AMENDMENTS TO 1972 REVISION

A 1974 amendment transferred the power to make rules of procedure and to fill vacancies on the judicial qualifications commission from the supreme court to the commission itself, subject to repeal (but not amendment or replacement) in whole or part by "general law enacted by a majority vote of the membership of each house of the legislature, or by the supreme court, five justices concurring."²⁷¹ It also extended the scope²⁷² and reach²⁷³ of the commission's enforcement powers, thereby giving it greater independence from the judicial branch of government whose ethics it was intended to oversee.

The disciplinary provision was again amended in 1976 to add to the existing standard of behavior meriting punishment — i.e., "willful or persistent failure to perform his duties or for other conduct unbecoming a member of the judiciary" — the qualification that the conduct must demonstrate "a present unfitness to hold office."²⁷⁴ It also disqualified all members of the supreme court from sitting in judgment of any supreme court justice and required the convention of an ad hoc supreme court of the seven most senior circuit court chief judges for the purpose.²⁷⁵

A 1976 measure²⁷⁶ amended the judicial article to require that "of the seven justices, each appellate district shall have at least one justice elected or appointed from the district to the supreme court who is a resident of the district at the time of his original appoint-

270. *Id.*

271. FLA. CONST. art. V, § 12(d) (1974) (H.R.J. Res. 391, 1974 Fla. Laws 1312).

272. *Id.* (extending coverage to acts done in office "on or after November 1, 1966").

273. *Id.* § 12(e) (gave the commission "access to all information from all executive, legislative and judicial agencies, subject to the rules of the commission").

274. *Id.* § 12(f). The provision also added: "Malafides, scienter or moral ineptitude . . . shall not be required for removal from office of a justice or judge demonstrating a present unfitness to hold office." *Id.*

275. *Id.* § 12(h). The measure does not prescribe how the ad hoc court is to be convened, presumably leaving it to the regular supreme court to adopt a rule. The measure also modified the confidentiality rules. *Id.* § 12(d).

276. S.J. Res. 49 & 81, 1976 Fla. Laws 931.

ment or election.”²⁷⁷ This measure assured a modicum of geographic balance within the membership of the supreme court in anticipation of the need for putting some restraints on the revised process for selecting supreme court justices, which was also instituted by the 1976 amendment.

The new selection process empowered the governor to fill any vacancy in the supreme court or the district court of appeal, subject only to the requirement that the governor must make each selection from a slate of “three persons nominated by the appropriate judicial nominating commission.”²⁷⁸ The full terms of appointment were for six years at the end of which each justice or judge of the district court of appeal “may qualify for retention by a vote of the electors.”²⁷⁹ The apparent theory was that each candidate for retention would run against the established record of performance, but would not be challengeable by a competitor for the office.

This measure transferred the initial selection of justices and judges of district courts of appeal away from the electorate to the governor and the nominating commissions. Thereafter, a justice or judge of the district court of appeal could continue to serve without the risk of challenge by a competitor until death, resignation, retirement, or impeachment. Hence, with the adoption of this measure, the elective character of the office of supreme court that had been instituted in 1852, temporarily removed in 1869, and restored in 1885, was removed for the second time.²⁸⁰ By contrast, judges of the circuit and county courts continued to be elected for terms of six and four years respectively.²⁸¹

A 1980 amendment revised the respective appellate jurisdictions of the supreme court and the district courts of appeal.²⁸² The purpose was to narrow the mandatory jurisdiction of the supreme court, to enhance its role in resolving conflicts in the law among the judicial districts, and to heighten the role of the district courts of appeal as the final court of errors in all matters except the relatively few that fell into the mandatory²⁸³ or lessened discretionary jurisdiction of the

277. FLA. CONST. art. V, § 3(a).

278. *Id.* § 11(a).

279. *Id.* § 10(a).

280. Similarly, the elective character of the office of district courts of appeal that had their inception in the 1956 revision was also removed.

281. FLA. CONST. art. V, § 10(b).

282. *Id.* §§ 3, 4.

283. Examples of mandatory jurisdiction included appeals from death sentences and “deci-

supreme court.²⁸⁴ The effect of this, as far as the structure of the judiciary was concerned, was to enhance the power of the district courts of appeal at the expense of the supreme court.²⁸⁵

A 1984 amendment imposed membership in the bar of Florida for the preceding five years as an eligibility requirement for county judges, except that the legislature was empowered to open the office to "a member in good standing of the bar of Florida" in counties of population of 40,000 or less.²⁸⁶ This was another step in removing all nonlawyers from the bench in Florida. Nevertheless, the legislature retained the power to grandfather nonlawyer county judges (or to change the eligibility criteria entirely) "by general law."²⁸⁷

A second 1984 amendment empowered each judicial nominating commission to establish uniform rules of procedure, subject to repeal by the legislature or supreme court in the same manner rules of judicial qualification commissions were repealable.²⁸⁸ The measure also opened to public inspection the records and proceedings of the commissions, except for "deliberations."²⁸⁹

A 1986 measure mandated the justices to "render an advisory opinion of the justices" as to any question propounded by the attorney-general "addressing issues as provided by general law."²⁹⁰ The same amendment authorized the attorney-general, "as directed by general law," to request an opinion as to the validity of any initiative petition being circulated for the purpose of amending the constitution by referendum.²⁹¹ These two measures enlarged the powers of both the attorney-general and the supreme court for the narrow purpose of determining the validity of an initiative petition *before* rather than after the petitioners had acquired the requisite number

sions of the district courts of appeal declaring invalid a state statute or a provision of the state constitution." FLA. CONST. art. V, § 3(a).

284. Examples of discretionary jurisdiction included petitions from "any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal." *Id.* § 4. Others exist.

285. The change has been imperceptible to the ordinary citizen on the street. Nevertheless, some lawyers thought the unfettered right of appeal to the supreme court as to all alleged errors important enough to mount a spirited, but failed, campaign against the adoption of the measure. See *Jenkins v. State*, 385 So. 2d 1356, 1360-63 (Fla. 1980).

286. FLA. CONST. art. V, § 8.

287. *Id.*

288. *Id.* § 11(d) (1984) (H.R.J. Res. 1160, 1984 Fla. Laws 2235).

289. *Id.*

290. *Id.* § 10 (1986) (H.R.J. Res. 71, 1986 Fla. Laws 2281).

291. *Id.* art IV, § 10.

of signatures required to place the proposed amendment on the ballot.²⁹² This came in the aftermath of a series of decisions in which the supreme court seemed to have changed its view on the validity of petitions without there having been any change in the constitution.²⁹³ Although by amendment to the executive article rather than to the judicial article, a 1985 amendment²⁹⁴ created the position of state-wide prosecutor "in the office of the attorney general" and empowered the attorney general to appoint the office holder.²⁹⁵

A 1988 amendment to the judicial article made county court judges impeachable as are all other justices and judges and simultaneously eliminated the governor's power to suspend them and remove them from office with the consent of the senate.²⁹⁶ Thereafter, impeachment and judicial qualification commission proceedings became the universal processes of disciplining all Florida judges and justices.

COMMENTARY

The historical evolution of the judicial article can be viewed from many perspectives. Plainly, it parallels the transformation of the state from a backwater, sparsely populated agrarian society to one of great economic and demographic diversity that is nonetheless dominated by large and dense heterogeneous populations engaged in all manner of economic activities. The history of the judicial article suggests that at least from immediate post-Civil War times onward, the judiciary has frequently been strained to cope with demands for access to the courts. Along the way various measures have been tried and ultimately dropped — i.e., judges ad litem, lawyer referees, and court commissioners — some of which seem now to be reappearing dressed in various garbs of "alternative dispute resolution schemes."

A different view might concentrate upon how judges relate to one another and the work of the law. In the beginning virtually all judicial authority was reposed in the general jurisdiction of the cir-

292. The provision also directs that "the justices . . . subject to their rules of procedure, permit interested persons to be heard on the questions presented." FLA. CONST. art. IV, § 10. See, e.g., *In re Advisory Opinion to Attorney General English — The Official Language of Florida*, 520 So. 2d 11 (Fla. 1988).

293. See, e.g., *Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984), and cases cited therein.

294. FLA. CONST. art. IV, § 4(d) (1985).

295. *Id.* The attorney general's selection is limited to a choice among "not less than three persons nominated by the judicial nominating commission of the supreme court, or as otherwise provided by general law." *Id.*

296. FLA. CONST. art. III, § 17 (1988) (S.J. Res. 459, 1987 Fla. Laws 2469, 2470).

cuit court judges, who had power to review the decisions of the few inferior judicial offices (e.g., justices of the peace) and who also sat collectively as reviewers of their own individual decisions. In this setting, the circuit judges (recall they were initially four in number) individually applied the law sitting at the trial level, and collectively reviewed trial decisions for errors and oversaw the evolution of the law itself. As time advanced, this circuit court hegemony of the law was fractionated both by extracting the review function and reposing it in independent appellate courts and by dividing original jurisdiction among a number of trial courts, each with a different jurisdiction. Thus came the hierarchical structure of appellate review, superior authority, and supervisory oversight that is such a fixture in modern litigation.

Still another perspective is from the standpoint of division of governmental powers among the branches of government. From the beginning, the Florida constitution has always acknowledged that the judiciary collectively is a branch (or department) of government, separate and independent of the executive and legislative branches. Moreover, Florida history reveals no notable contention that the actual adjudication of the broad run of disputes is not part and parcel of the domain of the judicial branch to the exclusion of the other two. (The modern resort to quasi-judicial administrative tribunals is mainly, but not wholly, carved out by constitutional exception, and always keeps ultimate access to the courts as a relief valve.)²⁹⁷ By contrast, the enacting of non-common law rules of substance, prescribing rules of practice and procedure, and regulating admissions to the bar, discipline of lawyers, jurisdiction of the courts, and the like were initially deemed to be within the ultimate, if not exclusive, domain of the legislative branch.

Over the course of time, however, particularly after the turn of the twentieth century, all of these latter functions (i.e., rules of practice and procedure, admissions, and discipline) have been wrested one-by-one away from the legislature and vested in the judiciary, specifically the supreme court. In addition, the power to prescribe jurisdiction has been embodied in the constitution itself, thereby stopping the legislature from exercising control over the judiciary by realignment of jurisdiction. In short, substantial legislative rulemaking power, defining routes to and means of obtaining relief in the courts

297. See, e.g., *Scholastic Sys., Inc. v. LeLoup*, 307 So. 2d 166 (Fla. 1974).

and specifying who might petition for relief as an advocate, has been transferred from the legislature to the supreme court.

The supreme court has also deemed itself to be the guardian of the constitution even to the extent of mandating the legislative and executive branches to provide financial support of certain of the court's decisions.²⁹⁸ This goes beyond the ordinary role of the judiciary in upholding the constitution as a shield against legislative or executive abuses to the more aggressive use of the constitution as a sword to prod the legislature or executive to allocate monies in a manner prescribed by the court. Finally, in the narrow, but perhaps symbolic field of admission and discipline of lawyers, the supreme court has imposed rules that mandate lawyers and their clients to support charitable causes endorsed by the court by requiring that certain client trust funds be placed in bank accounts that pay interest to a beneficiary designated by the supreme court.²⁹⁹ It also requires members of the bar to pay for the political lobbying efforts of the bar subject to a burdensome rebate procedure.³⁰⁰ Moreover, the administrative operation of the courts has been completely absorbed into the judicial branch of government, to the exclusion of the legislative branch, and is exercised mainly by the chief justice and the chief judges of the districts and circuits. In sum, while the principal role of the judiciary remains adjudication, its field of legislative dominance and its aggressive assertion over it have expanded remarkably, particularly after the 1956 revision of the 1885 constitution.

Still another perspective of this history is from the standpoint of accountability of the judiciary to the electorate.³⁰¹ Beginning in 1838, circuit judges (who also made up the supreme court) were appointed by the general assembly for five year terms, and, if thereafter reappointed, held office for terms of life or during good behavior. They were removable by impeachment of the legislature, or by the governor upon an address of the legislature for causes "which shall not be sufficient ground for impeachment."³⁰² Popular support for the election of judges led to the amendment of the 1838 constitution in 1852 to require election of circuit judges (but not supreme court justices

298. See, e.g., *White v. Board of County Comm'rs*, 537 So. 2d 1376 (Fla. 1989); *Makemson v. Martin County*, 491 So. 2d 1109 (Fla. 1986); *In re D.B.*, 385 So. 2d 83 (Fla. 1980).

299. *In re Interest on Trust Accounts*, 538 So. 2d 448 (Fla. 1989).

300. *In re Amendment to Rule 2-9.3*, 526 So. 2d 688 (Fla. 1988). See also *In re Thomas R. Schwarz*, No. 70, 702 (Fla. Oct. 27, 1989) (LEXIS, States library, Fla. file).

301. This summary will focus upon supreme court judges and circuit judges.

302. See *supra* text accompanying note 296.

who had been established as an independent body in 1851). Thus, judicial accountability was moved from the elective representatives of the people (i.e. the general assembly) to the people themselves.

The popular election of circuit judges was retained until abrogated by the 1868 constitution. From then until 1942, when the constitutional provision for elections was reinstated, circuit judges were appointed by the governor and confirmed by the senate for fixed terms. Removal of circuit judges by address was also ended in 1885, leaving impeachment as the legislature's only avenue of accountability. But at least whoever was appointed to a circuit judgeship served a fixed term, at the end of which he had to be reappointed by the then-sitting governor if he was to stay in office. In 1942, the election of circuit judges was restored and has been continued to the present. Nevertheless, the 1972 revisions instituted a gubernatorial-judicial nominating commission plan for filling circuit judge vacancies that occurred midterm and also allocated to the supreme court the general disciplinary power over judges, subject to the recommendations of the judicial qualification commission.

Beginning in 1851 supreme court justices were elected by the legislature for eight year terms, subject to impeachment and removal by address. The 1865 constitution transferred the selection to the governor "with the advice and consent of the senate"³⁰³ for six-year terms, and the 1868 constitution continued this selection method but extended the term "for life or during good behavior."³⁰⁴ Election of supreme court justices by the electorate was restored in 1885 (for fixed terms of six years), and removal by address was eliminated. This basic plan pertained for almost a century, when the 1976 amendments instituted the gubernatorial-judicial nominating commission plan of selection and the seven-year noncompetitive election as the check on retention.

These patterns of development have been accompanied by a steady diminution in political influence of the general population and the elective legislative and executive branches of government in judicial matters and a steady rise in the influence of the judiciary, lawyers, and more recently, the supreme court's agency, the Florida Bar. The 1838 constitution imposed no age, educational, or professional qualifications upon circuit judges (and thus upon supreme court jus-

303. FLA. CONST. of 1865, art. V, § 10.

304. FLA. CONST. of 1868, art. VI, § 3.

tices as well), and none³⁰⁵ appeared until the 1885 constitution imposed attaining age twenty-five and being "an attorney at law"³⁰⁶ as a requirement of eligibility for supreme court justices and circuit court judges. These requirements were extended in 1956 to require supreme court justices to be current members of the Florida Bar and members in good standing for the preceding ten years and to require the same of circuit court judges, except the duration of bar membership was only five years.³⁰⁷ This occurred seven years after the supreme court had ruled that all practitioners before the bar must be members of the integrated Florida Bar.³⁰⁸ The hegemony of lawyers and more specifically of the Florida Bar was further extended by the roles assigned them in selecting and disciplining judges by the 1972 revision to the judicial qualification and judicial nominating commissions respectively, each of which is dominated by judges or nonjudge members of the Florida Bar.

In sum, accountability of the judicial branch of state government has gradually been transferred away from the electorate and its elected representatives to the supreme court and the Florida Bar, while during the same period a broad range of legislative and regulatory powers has been transferred from the legislature to the supreme court or claimed by the court itself. Proposals to further estrange the judicial branch from accountability at the ballot box should be examined from this point of view.

305. The 1868 constitution required that every "officer," except the governor and lieutenant governor, have been a citizen of the state for one year and of the county from which selected for six months, and also a registered voter. *Id.* art. XVI, § 22.

306. FLA. CONST. of 1885, art. V, § 3.

307. *Id.* § 13 (1956) (H.R.J. Res. 810, 1955 Fla. Laws 1229, 1239).

308. *In re* Florida State Bar Ass'n, 40 So. 2d 902 (Fla. 1949).

LEGAL ADVERTISING — OPENING PANDORA'S BOX?

Robert D. Peltz*

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Few topics have generated as much controversy in legal circles during the past decade as the issue of attorney advertising. Has advertising resulted in a wholesale degradation of the judicial system as its critics argue? Or has advertising instead helped bring about a greater availability of affordable legal services to the middle class as its proponents suggest? Perhaps even more importantly, even if advertising has had an adverse effect upon public perception of the legal system, are state bar associations nevertheless constitutionally powerless to restrict it? This Article will attempt to answer these

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questions as well as to trace the legal parameters of those restrictions which may constitutionally be placed upon attorneys advertising under both state and federal law.

I. SUPREME COURT CHRONOLOGY

A. The Overview

Any discussion of attorney advertising must necessarily focus on the United States Supreme Court's landmark decision in *Bates v. State Bar Association*¹ and its five progeny: *Ohralik v. Ohio State Bar Association*,² *In re Primus*,³ *In re R.M.J.*,⁴ *Zauderer v. Office of Disciplinary Council of the Supreme Court*,⁵ and most recently *Shapiro v. Kentucky Bar Association*.⁶ In their narrowest sense, these six decisions set forth the following express parameters for state regulation of attorney advertising by providing:

1. States may not blanketly prevent attorneys from
 - (1) advertising the costs of certain routine legal services in the print media,⁷
 - (2) advertising an accurate listing of the attorney's areas of practice, either through general mailings, announcements to specific targeted groups, newspaper ads, or telephone listings,⁸
 - (3) advising target portions of the public of their rights to pursue particular types of cases (*e.g.*, Dalkon Shield users) and the attorney's willingness to handle such litigation,⁹
 - (4) directly soliciting through the mail clients with a particular legal problem (*e.g.*, impending foreclosures),¹⁰ or
 - (5) directly soliciting prospective clients *in person*, where the attorney is motivated by the desire to promote political and ideological goals, rather than for purely pecuniary gain.¹¹
2. States may, however, permissibly
 - (1) ban *in-person* solicitation when the attorney is motivated

1. 433 U.S. 350 (1977).

2. 436 U.S. 447 (1978).

3. 436 U.S. 412 (1978).

4. 455 U.S. 191 (1982).

5. 471 U.S. 626 (1985).

6. 108 S. Ct. 1916 (1988).

7. *Bates*.

8. *R.M.J.*.

9. *Zauderer*.

10. *Shapiro*.

11. *Primus*.

purely for pecuniary gain,¹²

(2) impose certain restrictions on advertising, such as requiring the attorney to

(a) make disclosures concerning his fee arrangements¹³ or

(b) set forth a disclaimer explaining that the listing of areas of practice does not constitute a certification of expertise,¹⁴ or

(3) place reasonable restrictions on advertising which are necessary to prevent untruthful, false, deceptive, or misleading statements.¹⁵

It is initially apparent from the Supreme Court's choice of cases as well as the chronology of its decisions that the issue of permissible restrictions on legal advertising is still in an evolving state. The Court's initial holding in *Bates* was clearly and simply limited to the newspaper advertising of the prices of routine legal services. Its next foray into the area in *Ohralik* and *In re Primus* involved the *in-person solicitation* of specific prospective clients for litigation. *In re R.M.J.* subsequently considered the permissibility of advertising an attorney's areas of practice in newspapers and telephone directories. The next and most recent steps came in *Zauderer*, where the Court permitted general newspaper advertising directed to particular targeted prospective clients, and *Shapero*, which carried this principle to direct mail solicitation.

It is also obvious from these opinions that they are meant to merely set forth a very rough outline or framework, since many of these cases are limited by their particular facts as well as the record before the Court. Although the Court has generally continued to expand the protections afforded to advertising in general in these opinions, the future direction of the Court in specific cases is not totally clear, since these decisions contain an ongoing debate between competing philosophical groups of Supreme Court Justices. Filling in the full picture, therefore, requires an analysis and understanding of not only the various constitutional arguments accepted and rejected by the Court in each of these cases, but those rationales set forth by the dissenters as well.

12. *Ohralik*.

13. *Zauderer*.

14. *R.M.J.*.

15. *R.M.J.*.

B. Pre-Bates Restrictions on Advertising

Although prohibitions against legal advertising trace their roots back to the English legal system, modern day restrictions are largely the product of Canon 27 of the American Bar Association Canons of Professional Ethics, which was adopted in 1908 in order to offer guidance to state and local bar associations. Under this Canon, the "solicitation of business by circulars or advertisements, or by personal communications, or interviews, not warranted by personal relations [was considered] unprofessional."¹⁶

In 1937, Canon 27 was amended to permit attorneys to place their names in so-called reputable law lists and legal directories that were available for the use of the legal community. The ABA Committee on Professional Ethics and Grievances, which was empowered to issue opinions interpreting the Canons, ruled in 1941, however, that attorneys could not use distinctive listings in telephone directories to draw the public's attention, on the basis that such listings would constitute unethical "implied solicitation of professional employment."¹⁷

One year later, the Committee on Professional Ethics and Grievances partially reversed itself, by ruling that distinctive listings would be permitted in the white page section of the telephone directory, under the rationale that people had already selected the lawyer before using that portion of the telephone directory.¹⁸ The Committee changed direction once again on this issue in 1951 and imposed a complete ban on all distinctive listings in telephone directories.¹⁹

The ABA overhauled its entire Canons of Professional Ethics in 1969, reducing the forty seven Canons of the previous code to nine new ones, each followed by ethical considerations and disciplinary rules. Under this new format, the ethical considerations were designed to "represent the objectives toward which every member of the profession should strive,"²⁰ while the disciplinary rules articulated "the minimum level of conduct below which no lawyer [could] fall without being subject to disciplinary action."²¹ The section of the new code dealing with lawyer advertising was set forth in Disciplinary

16. CANONS OF PROFESSIONAL ETHICS Canon 27 (1908).

17. OPINIONS ON PROFESSIONAL ETHICS Formal Op. 223 (1941).

18. *Id.* Formal Op. 241 (1942).

19. *Id.* Formal Op. 284 (1951).

20. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble and Preliminary Statement (1969).

21. *Id.*

nary Rule 2-101, which merely recodified the law as it had been carried forward since 1908. The District of Columbia and every state in the country, with the exception of California, adopted this new model code, either in whole or in substantial part, setting the stage for its consideration in *Bates* several years later.

C. The Threshold Question: What Protection Is Afforded to Purely Commercial Speech?

Although any analysis of the constitutional limitations on attorney advertising must necessarily center on the Supreme Court's landmark decision in *Bates*, the real genesis of the constitutional inquiry goes back to the Court's opinion in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,²² rendered one year earlier. In this case, a group of consumers challenged on first amendment grounds a Virginia statute that prohibited pharmacists from advertising the prices of prescription drugs. The majority opinion, written by Justice Blackmun, first considered the threshold question of whether *purely* commercial speech was entitled to first amendment protection.

Noting that prior cases had touched upon this issue in various contexts, but never squarely confronted it,²³ Justice Blackmun observed:

Here, in contrast, the question whether there is a First Amendment exception for "commercial speech" is squarely before us. Our pharmacist does not wish to editorialize on any subject, cultural, philosophical, or political. He does not wish to report any particularly newsworthy fact, or to make generalized observations even about commercial matters. The "idea" he wishes to communicate is simply this: "I will sell you the X prescription drug at the Y price." Our question, then, is whether this communication is wholly outside the protection of the First Amendment.²⁴

22. 425 U.S. 748 (1976).

23. See, e.g., *Bigelow v. Virginia*, 421 U.S. 809 (1975) (reversing a conviction for violation of a Virginia statute making the circulation of any publication encouraging or promoting the procuring of an abortion a misdemeanor); *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376 (1973) (upholding an ordinance prohibiting newspapers from listing employment advertisements and columns according to sex); *Beard v. Alexandria*, 341 U.S. 622 (1951) (upholding an ordinance prohibiting door-to-door solicitation of magazine subscriptions); *Valentine v. Christensen*, 316 U.S. 52 (1942) (upholding a New York statute prohibiting the distribution of handbills and other advertising material upon any street).

24. 425 U.S. at 760-61.

In concluding that purely commercial speech was in fact entitled to First Amendment protection, the majority went on to further hold:

[T]he particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate

Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely "commercial," may be of general public interest

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price.²⁵

The Court limited its opinion, however, by holding that commercial speech is subject to some restriction, such as by its time, place, and manner or where it is untruthful, false, deceptive, or misleading.

Ironically, *Virginia State Board of Pharmacy* became the foundation for the *Bates* decision the following year, despite the fact that the majority opinion concluded by emphasizing the distinction between the nature of advertising standardized products as opposed to professional services:

We stress that we have considered in this case the regulation of commercial advertising by pharmacists. Although we express no opinion as to other professions, the distinctions historical and functional, between professions, may require consideration of quite different factors. *Physicians and lawyers, for example, do not dispense standardized products; they render professional services of almost infinite variety in nature, with the consequent enhanced possibility for confusion and deception if they were to undertake certain kinds of advertising.*²⁶

D. *Bates*

In *Bates*, the Court was faced with the question of whether two attorneys, who had opened a legal clinic seeking to provide legal services at modest fees to middle income persons, could be constitutionally prohibited from placing a newspaper ad setting forth their fees for certain routine services. The Arizona Supreme Court found the

25. *Id.* at 763-65.

26. *Id.* at 773 n.25 (emphasis added).

attorneys guilty of violating its disciplinary rules, which were based upon the existing ABA Model Rules and provided:

A lawyer shall not publicize himself, or his partner or associate, or any other lawyer affiliated with him or his firm, as a lawyer through newspaper or magazine advertisements, radio or television announcements, display advertisements in the city or telephone directories or other means of commercial publicity, nor shall he authorize or permit others to do so in his behalf.²⁷

In so holding, the Arizona Court rejected the attorneys' arguments that the disciplinary rule was unconstitutionally vague and violated the Sherman Antitrust Act,²⁸ the first amendment, the equal protection clause, and the due process clause.

Before the United States Supreme Court, the attorneys abandoned all of their challenges except for those based upon violation of the Sherman Antitrust Act and the first amendment. The Court quickly rejected the antitrust argument under the so-called "*Parker* exemption,"²⁹ which provides that certain state action is exempted from the operation of the Sherman Antitrust Act, since the state as sovereign may impose various restraints as acts of government, which the Act did not undertake to prohibit.

In upholding the application of the *Parker* exemption to state restrictions on attorneys' advertising, the Court distinguished its earlier decision in *Goldfarb v. Virginia State Bar*,³⁰ which held that the Sherman Antitrust Act was applicable to prohibit the operation of a minimum fee schedule passed by a county bar association. The majority opinion distinguished *Goldfarb* on the basis that the fee schedule in that case was not the action of the State of Virginia through its supreme court, but was instead promulgated by a county bar association in the first instance.³¹

Although the Court was able to unanimously dispose of the anti-

27. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B), incorporated into Ariz. Code of Professional Responsibility Ariz. Sup. Ct. R. 29(a), 17A ARIZ. REV. STAT. ANN. 26 (Supp. 1976) (renamed and renumbered Feb. 1, 1985 as Ariz. Rules of Professional Conduct Ariz. Sup. Ct. R. 42, 17A ARIZ. REV. STAT. 323 (1988)).

28. 15 U.S.C. § 1 (1982).

29. See *Parker v. Brown*, 317 U.S. 341 (1943).

30. 421 U.S. 773 (1975).

31. This interpretation of *Goldfarb* leaves open the question of whether such a minimum fee schedule would be proper if promulgated by the state supreme court, rather than merely by a local bar association. Florida has recently adopted a maximum fee schedule by court rule in personal injury cases, involving contingency fees. See RULES REGULATING THE FLA. BAR Rule 4-1.5 (1986).

trust issue, it was deeply divided over the more important first amendment question. The majority opinion, once again written by Justice Blackmun, viewed the issues involved as merely an extension of the "commercial speech" doctrine previously enunciated in *Virginia State Board of Pharmacy*. In reviewing the history of those decisions upholding first amendment protections for commercial speech, the majority noted:

Even though the speaker's interest is largely economic, the Court has protected such speech in certain contexts. The listeners' interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech. Advertising, though entirely commercial, may often carry information of import to significant issues of the day. And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decision making.³²

The Court was careful to limit its precise holding to the issue of "whether lawyers . . . may constitutionally advertise the *prices* at which certain *routine* services will be performed."³³ In so doing, it specifically refused to "address the peculiar problems associated with advertising claims relating to the *quality* of legal services . . . [because] such claims probably are not [conducive to] . . . precise measurement or verification and, under some circumstances, might well be deceptive or misleading to the public, or even false."³⁴

While recognizing a constitutional protection for legal advertising, the Court held it was nevertheless subject to some regulation:

As with other varieties of speech, it follows as well that there may be reasonable restrictions on the *time, place, and manner* of advertising. Advertising concerning transactions that are themselves illegal obviously may be suppressed. And *the special problems of advertising on the electronic broadcast media will warrant special consideration*.³⁵

Regulation was also recognized as permissible to prevent advertising

32. 433 U.S. at 364 (citations omitted).

33. *Id.* at 367-68 (emphasis added).

34. *Id.* at 366 (emphasis in original).

35. *Id.* at 384 (citations omitted) (emphasis added).

that is false, deceptive, or misleading.³⁶

Although the majority was careful to limit the precise extent of the holding, it did not demonstrate the same degree of care or foresight in its legal analysis of the competing issues involved. As a result, much of its legal analysis was extremely superficial and often misperceived the basic nature of the arguments raised against legal advertising. Therefore, many of the majority's broad statements of policy, which were totally unnecessary to support its narrow holding, set into motion and foreordained the subsequent expansion of permissible attorney advertising in its following cases, well beyond the intended limits set in *Bates*. Justice O'Connor, looking back to the origins of attorney advertising in the Court's earlier opinions, in her dissent in *Shapero* observed:

I agree with the Court that the reasoning in *Zauderer* supports the conclusion reached today. That decision, however, was itself the culmination of a line of cases built on defective premises and flawed reasoning. As today's decision illustrates, the Court has been unable or unwilling to restrain the logic of the underlying analysis within reasonable bounds.³⁷

The majority's analysis of the issues involved in attorney advertising suffered from a number of basic flaws. First, and perhaps foremost, was its failure to duly consider the function of the attorney as an officer of the court and his critical role in the functioning of the judicial system. Rather than analyzing the issue from the perspective of whether public confidence in the legal system as a whole would be adversely affected by allowing officers of the court to hawk their wares in the same manner as sellers of soap powders and used cars, the majority instead erroneously viewed the issue in terms of whether advertising would undermine the attorney's sense of dignity and self-worth. Thus, rather than giving this issue the serious analysis it deserved, the Court instead dismissed it with the offhand comment, "At its core, the argument presumes that attorneys must conceal from themselves and from their clients the real-life fact that lawyers earn their livelihood at the bar."³⁸ In so doing, the Court seemed to forget its admonition just the year before in *Goldfarb*, when it stated, "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of ad-

36. *Id.*

37. 108 S. Ct. at 1925 (O'Connor, J., dissenting).

38. 433 U.S. at 368.

ministering justice, and have historically been 'officers of the Court.' ”³⁹

This failure was also pointed out by Justice O'Connor in her *Shapero* dissent:

One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one's selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market This view of the legal profession need not be rooted in romanticism or self-serving sanctimony, though of course it can be. *Rather, special ethical standards for lawyers are properly understood as an appropriate means of restraining lawyers in the exercise of the unique power that they inevitably wield in a political system like ours.*

It is worth recalling why lawyers are regulated at all, or to a greater degree than most other occupations, and why history is littered with failed attempts to extinguish lawyers as a special class. *Operating a legal system that is both reasonably efficient and tolerably fair cannot be accomplished, at least under modern social conditions, without a trained and specialized body of experts* Like physicians, lawyers are subjected to heightened ethical demands on their conduct towards those they serve. These demands are needed because market forces, and the ordinary legal prohibitions against force and fraud, are simply insufficient to protect the consumers of their necessary services from the peculiar power of the specialized knowledge that these professionals possess.⁴⁰

A second fundamental flaw in the majority's reasoning was its failure to properly recognize the “uniqueness” of legal services rendered by the attorney, resulting in a “defective analogy between professional services and standardized consumer products.”⁴¹ The majority dismissed this argument by naively asserting:

Although many services performed by attorneys are indeed unique, it is doubtful that any attorney would or could advertise fixed prices for services of that type. The only services that lend themselves to advertising are the routine ones: the uncontested divorce, the simple

39. 421 U.S. at 792. Also see *Cohen v. Hurley*, 366 U.S. 117, 124 (1961), where the Court noted “lawyers must operate in a three-fold capacity, as self-employed businessmen as it were, as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes.”

40. 108 S. Ct. at 1929-30 (O'Connor, J., dissenting) (citations omitted) (emphasis added).

41. *Id.* at 1928.

adoption, the uncontested personal bankruptcy, the change of name, and the like — the very services advertised by appellants.

. . . .

A moment's reflection reveals that the same argument can be made for barbers; rarely are two haircuts identical, but that does not mean that barbers cannot quote a standard price.⁴²

The services performed by attorneys are not, however, like the services performed by barbers. All too often, a client's fate or fortune relies upon the legal expertise of his attorney.

The shortsightedness of the majority's failure to give proper consideration to the unique nature of legal services was aptly pointed out by the dissenting members of the Court, who argued:

Even the briefest reflection on the tasks for which lawyers are trained and the variation among the services they perform should caution against facile assumptions that legal services can be classified into the routine and the unique. In most situations it is impossible — both for the client and the lawyer — to identify with reasonable accuracy in advance the nature and scope of problems that may be encountered even when handling a matter that at the outset seems routine⁴³ This definitional problem is well illustrated by appellants' advertised willingness to obtain uncontested divorces for \$195 each. A potential client can be grievously misled if he read the advertised service as embracing all of his possible needs. A host of problems are implicated by divorce. They include alimony; support and maintenance for children; child custody; visitation rights; interests in life insurance, community property, tax refunds, and tax liabilities; and the disposition of other property rights More important from the viewpoint of the client is the diagnostic and advisory function: the pursuit of relevant inquiries of which the client would otherwise be unaware, and advice with respect to alternative arrangements that might prevent irreparable dissolution of the marriage or otherwise resolve the client's problem⁴⁴

. . . .

. . . In short, until the lawyer has performed his first duties of diagnosis and advice as to rights, it is usually impossible to know whether there can or will be an uncontested divorce "[T]he inherent vice [is] that you can't know in advance, what special problems the client who sees the advertisement will present, and if you are bound to a predetermined price . . . sooner or later you are

42. 433 U.S. at 372, 373 n.27.

43. *Id.* at 392 (dissenting opinion).

44. *Id.* at 392-93 (dissenting opinion).

going to have to inevitably sacrifice the quality of service you are able to render.”⁴⁵

Another failing of the majority was in its misplaced and blind faith in the integrity of all attorneys to avoid taking advantage of the public through advertising as evidenced by its opinion:

We suspect that, with advertising, most lawyers will behave as they always have: They will abide by their solemn oaths to uphold the integrity and honor of their profession and of the legal system. For every attorney who overreaches through advertising, there will be thousands of others who will be candid and honest and straightforward. And, of course, it will be in the latter’s interest, as in other cases of misconduct at the bar, to assist in weeding out those few who abuse their trust.⁴⁶

As the public has unfortunately witnessed by the barrage of often tasteless and offensive advertising over the twelve years since *Bates*, the dissenters had a much clearer view of the future, when they predicted:

[We are] apprehensive, despite the Court’s expressed intent to proceed cautiously, that today’s holding will be viewed by tens of thousands of lawyers as an invitation — by the public-spirited and the selfish lawyers alike — to engage in competitive advertising on an escalating basis Some members of the public may benefit marginally, but the risk is that many others will be victimized by simplistic price advertising of professional services “almost infinite [in] variety and nature”⁴⁷

Although recognizing the public’s general lack of sophistication concerning legal services, the majority also surprisingly failed to appreciate the many different ways in which such advertising could be inherently misleading to the public. While acknowledging that advertising relating to the “quality” of legal services was fraught with the potential for abuse because of its inherently subjective nature, the majority nevertheless failed to recognize that because of the nature of legal services, even the advertising of prices for supposedly routine services such as those in *Bates* necessarily involves subjective representations of opinions. For example, as pointed out by the dissenters:

45. *Id.* at 393 n.5 (dissenting opinion) (quoting Mark Harrison of the State Bar of Arizona).

46. *Id.* at 379 (majority opinion).

47. *Id.* at 403-04 (dissenting opinion).

Whether a fee is "very reasonable" is a matter of opinion, and not a matter of verifiable fact as the Court suggests. One unfortunate result of today's decision is that lawyers may feel free to use a wide variety of adjectives — such as "fair," "moderate," "low-cost," or "lowest in town" — to describe the bargain they offer the public.

. . . .
 . . . The very reasons that tend to make price advertising of services inherently deceptive make its policing wholly impractical. With respect to commercial advertising, Mr. Justice STEWART, concurring in *Virginia Pharmacy*, noted that since "the factual claims contained in commercial price or product advertisements relate to tangible goods or services, they may be tested empirically and corrected to reflect the truth." But there simply is no way to test "empirically" the claims made in appellants' advertisement of legal services These are not factual questions for which there are "truthful" answers; in many instances, the answers would turn on relatively subjective judgments as to which there could be wide differences of opinion.⁴⁸

Unfortunately, this particular problem would become even more apparent in the Court's subsequent decisions involving the advertising of attorneys' areas of specialization.

E. Solicitation Cases

The tide in the Court's internal philosophic struggle over legal advertising turned momentarily the following year, as the Court considered in-person solicitation, the issue in *Ohralik v. Ohio State Bar Association*.⁴⁹ Many of the policy arguments against attorney advertising that were rejected by the *Bates* majority opinion authored by Justice Blackmun were adopted in the *Ohralik* majority opinion, written by Justice Powell, one of the vociferous *Bates* dissenters. Although only for a brief moment, *Ohralik* went a long way in closing the door to the constitutional protection of attorney advertising, which had been thrown wide open by *Bates*.

In order to fully appreciate the context of *Ohralik*, it is first necessary to go back to the Court's earlier solicitation cases, which dealt with political and trade organizations attempting to utilize the legal system to achieve their aims. The first such case was *NAACP v. But-*

48. *Id.* at 395, 397 (dissenting opinion) (quoting *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 780 (1976) (Stewart, J., concurring)).

49. 436 U.S. 447 (1978).

ton,⁵⁰ which involved an attempt by Virginia to interfere with the NAACP's underwriting of litigation designed to promote desegregation. For many years, the NAACP had both solicited litigants and provided staff attorneys in connection with litigation raising the issue of segregation. The NAACP defrayed all expenses of such litigation as well as the complete salary of the staff attorney.

Although the in-person solicitation of clients had been prohibited by statute in Virginia since 1849, no attempt was made to place the activities of the NAACP under such regulations until 1956. At that time, the state legislature amended its antisolicitation statute to include solicitation by persons or organizations that were not real parties in interest to the litigation and that had no pecuniary right or liability in the pending case. As pointed out by Justice Douglas in his concurring opinion in *Button*, the legislation was directed squarely at the NAACP as retaliation for the Supreme Court's landmark decision in *Brown v. Board of Education*,⁵¹ which outlawed segregated public schools.

The Court in *Button* rejected the state's contention that this form of solicitation was wholly outside the area of freedoms protected by the first amendment, since the NAACP was using litigation not as a technique of resolving private differences, but instead as a means for achieving its lawful objectives of promoting desegregation. Noting that "[g]roups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts,"⁵² the Court determined that the NAACP sponsored litigation was a form of political expression. Since the activity was therefore entitled to first amendment protection, the Court concluded: "[A] State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights."⁵³

In the following year, the Court expanded upon this holding in *Brotherhood of Railroad Trainmen v. Virginia*,⁵⁴ which challenged a union practice of recommending injured members to particular lawyers whom the union considered to be competent in litigation under the Federal Employers Liability Act (FELA). Under this plan, whenever a worker was injured or killed, a union official would visit the

50. 371 U.S. 415 (1963).

51. 347 U.S. 43 (1954).

52. 371 U.S. at 429.

53. *Id.* at 439.

54. 377 U.S. 1 (1964).

worker or his family and recommend that the claim not be settled without first consulting specifically recommended lawyers. As a result of this program, the union channeled substantially all FELA claims to lawyers chosen by its legal counsel.

Virginia challenged this practice based upon its Canons of Ethics, which prohibited the incitement of litigation, or the control of litigation by one other than the client and solicitation. In rejecting these arguments, the Supreme Court held that *Button* was not limited to groups utilizing litigation as a form of political expression, but also included groups such as unions, which sought to accomplish other lawful objectives, primarily the financial protection of their injured members.

Another variation on this theme was presented in the subsequent case of *United Mine Workers v. Illinois State Bar Association*,⁵⁵ where the union, instead of merely recommending approved attorneys, took the next step of employing licensed attorneys on a salary basis to represent its members in the prosecution of injury claims. The Court once again rejected attempts to restrict its prior holdings to situations where the litigation could be characterized as a form of political expression by noting: "[T]he First Amendment does not protect speech and assembly only to the extent it can be characterized as political. 'Great secular causes, with small ones, are guarded [T]he rights of free speech and a free press are not confined to any field of human interest.'"⁵⁶

The final case to consider this issue was *United Transportation Union v. State Bar*,⁵⁷ which extended this protection still one step further. In this case, not only did the union recommend selected attorneys to its members for the prosecution of personal injury actions, but it also secured from these attorneys a commitment that the maximum contingency fee which they would charge would not exceed twenty five percent of the recovery. In extending its prior decisions to protect this practice, the Court observed:

The common thread running through our decisions in *NAACP v. Button*, *Trainmen* and *United Mine Workers* is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment. However, that right would be a hollow promise if courts could deny

55. 389 U.S. 217 (1967).

56. *Id.* at 223.

57. 401 U.S. 576 (1971).

associations of workers or others the means of enabling their members to meet the costs of legal representation.⁵⁸

While each of these cases involved solicitation by an organization seeking to promote its own policies and interests, *Ohralik* on the other hand involved the action of an attorney seeking to solicit clients for his own pecuniary benefit. The attorney, who had learned about an automobile accident involving a woman with whom he was casually acquainted, visited the young woman in the hospital at which time he solicited her retention of his services. He returned several days later, while she was still hospitalized, to have her sign a written contract. In the meantime, despite the potential conflict of interest, he had also visited the passenger in her car and obtained an oral agreement to represent her as well, which he surreptitiously tape-recorded without her knowledge.

Both clients eventually discharged the attorney, who then sued them for breach of contract, receiving a portion of their settlement proceeds as a fee for his services. Subsequently, both women filed grievances against him for violation of Ohio's prohibition against solicitation by attorneys, which was patterned after the 1969 ABA Model Canons. The Ohio antisolicitation regulations provided in pertinent part: "A lawyer shall not recommend employment, as a private practitioner, of himself, his partner or associate to a nonlawyer who has not sought his advice regarding employment of a lawyer."⁵⁹ A lawyer who has given unsolicited advice to a layman that they should obtain counsel or take legal action shall not accept employment resulting from that advice, except that: "(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client."⁶⁰

The Court's decision in this case operated on two different levels. On one hand, the Court paid deference to *Bates* by distinguishing in-person solicitation from the print advertising allowed in *Bates*, comparing the degree of "sales pressure" which each produced upon the consumer:

Unlike a public advertisement, which simply provides information and leaves the recipient free to act upon it or not, in-person

58. *Id.* at 585-86.

59. OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) (1979).

60. *Id.* DR 2-104(A) (1979).

solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. The aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking; there is no opportunity for intervention or counter-education by agencies of the Bar, supervisory authorities, or persons close to the solicited individual In-person solicitation is as likely as not to discourage persons needing counsel from engaging in a critical comparison of the "availability, nature, and prices" of legal services, it actually may disserve the individual and societal interest, identified in *Bates*, in facilitating "informed and reliable decisionmaking."⁶¹

In this regard, the Court drew attention to the fact that even in the case of ordinary consumer products, the Federal Trade Commission had recognized a distinction between in-person solicitation and other forms of advertising. This potential for overreaching

is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person. Such an individual may place his trust in a lawyer, regardless of the latter's qualifications or the individual's actual need for legal representation, simply in response to persuasion under circumstances conducive to uninformed acquiescence. Although it is argued that personal solicitation is valuable because it may apprise a victim of misfortune of his legal rights, the very plight of that person not only makes him more vulnerable to influence but also may make advice all the more intrusive. Thus, under these adverse conditions the overtures of an uninvited lawyer may distress the solicited individual simply because of their obtrusiveness and the invasion of the individual's privacy, even where no other harm materializes.⁶²

The majority, however, went beyond just distinguishing in-person solicitation from newspaper advertising, revisiting many of the basic policies underlying attorney advertising which were initially debated in *Bates*. The Court started by reexamining the very foundation of *Bates*: the protection due commercial speech. While the majority in *Bates* took great pains to expand the constitutional protection given to commercial speech as a means for supporting its decision to permit legal advertising, the majority in *Ohralik* took

61. 436 U.S. at 457-58 (quoting 433 U.S. at 364) (citations omitted).

62. *Id.* at 465-66.

equally great effort to limit the protection in order to support its restriction of *Bates*. In holding that commercial speech was not entitled to the same protection as noncommercial speech, the *Ohralik* majority observed:

In rejecting the notion that [commercial] speech "is wholly outside the protection of the First Amendment," we were careful not to hold that "it is wholly undifferentiable from other forms" of speech. We have not discarded the "common-sense" distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a *limited measure* of protection, commensurate with its *subordinate* position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression.⁶³

This philosophy paved the way for the further conclusion by the Court that "A lawyer's procurement of remunerative employment is a subject only *marginally* affected with First Amendment concerns. It falls within the State's proper sphere of economic and professional regulation. While entitled to *some* constitutional protection, appellant's conduct is subject to regulation in furtherance of important state interests."⁶⁴

After establishing this foundation, the majority then proceeded to recognize many of the same policies rejected in *Bates*, especially that of the lawyer's role as an officer of the court:

The state interests implicated in this case are particularly strong. In addition to its general interest in protecting consumers and regulating commercial transactions, the State bears a special responsibility for maintaining standards among members of the licensed professions. "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'"⁶⁵ While lawyers act in part as "self-employed business-

63. *Id.* at 455-56 (citations omitted) (emphasis added). See also *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).

64. 436 U.S. at 459 (citations omitted) (emphasis added).

65. *Id.* at 460 (quoting 421 U.S. 773, 792 (1975)) (citations omitted).

men," they also act as "trusted agents of their clients, and as assistants to the court in search of a just solution to disputes."⁶⁶

. . . .

"Lawyers have for centuries emphasized that the promotion of justice, rather than the earning of fees, is the goal of the profession."⁶⁷

The majority also accepted historical justifications for prohibitions against in-person solicitation, despite the previous rejection of such rationales in *Bates*. After noting that such bans originated as rules of etiquette to prevent "barratry, champerty and maintenance," the Court observed:

The solicitation of business by a lawyer through direct, in-person communication with the prospective client has long been viewed as inconsistent with the profession's ideal of the attorney-client relationship and as posing a significant potential for harm to the prospective client. It has been proscribed by the organized Bar for many years.⁶⁸

Although there is an obvious difference between in-person solicitation and mass media advertising, the difference is one of degree. Many of the same policy arguments which militate against in-person solicitation apply equally as well to other forms of advertising, especially mass media television advertising. In considering the effect upon the public's perception of attorneys and their role in the administration of justice, the effects of mass media advertising are often more insidious than those of in-person solicitation in the sense that advertising reaches a wider audience.

Nevertheless, there are a number of factors in *Ohralik* that make this case "distinguishable" from cases involving other forms of advertising. First and perhaps most obvious is the difference in degree of "sales pressure" relied upon by the majority. Secondly, the other forms of advertising considered by the Court have generally been deemed acts that would primarily benefit prospective clients by lowering fees or providing additional information to prospective clients, while the solicitation in *Ohralik* was instead viewed as benefiting the attorney solely.

Thirdly, there were also a number of elements of unethical and

66. *Id.* (quoting 366 U.S. 117, 124 (1961)).

67. *Id.* (quoting Comment, *A Critical Analysis of Rules Against Solicitation by Lawyers*, 25 U. CHI. L. REV. 674, 674 (1958)) (citations omitted).

68. *Id.* at 454.

overreaching conduct by the attorney in *Ohralik* in addition to the solicitation. The mere fact that he sought to represent both the passenger and driver in this accident amounted to a direct conflict of interest, since the passenger might ultimately be called upon to sue the driver. Moreover, as further pointed out by Justice Marshall in his concurring opinion, *Ohralik*

not only foisted himself upon these clients; he acted in gross disregard for their privacy by covertly recording, without their consent or knowledge, his conversations with [the passenger] and [driver's family]. This conduct, which appellant has never disputed, is itself completely inconsistent with an attorney's fiduciary obligation fairly and fully to disclose to clients his activities affecting their interests. [Ohralik's] unethical conduct was further compounded by his pursuing [the passenger], when her interests were clearly in potential conflict with those of his prior-retained client, [the driver].⁶⁹

Justice Marshall relied upon this unethical conduct in an attempt to restrict the majority decision to ban in-person solicitation only where it was accompanied by such similar conduct. He argued that the majority opinion therefore did not prohibit in-person solicitation where it merely amounted to what he called "benign solicitation": truthful, noncoercive advice in a dignified manner to a potential client who is emotionally and physically capable of making a rational decision to either accept or reject the representation with respect to a legal claim.⁷⁰

On the same day as *Ohralik*, the Court also rendered its opinion in *In re Primus*.⁷¹ Because of its unusual facts, however, this decision has a very limited application in the overall issue of attorney advertising; *Primus* is really just an extension of the *Button*⁷² line of cases. *Primus* was a member of the South Carolina bar as well as a member of the American Civil Liberties Union. In this capacity, she advised a mother who had been sterilized as a condition of her continued receipt of welfare assistance from the state that the ACLU would represent her without charge in a suit against the doctor who had sterilized her.

The central thrust of the Court's opinion was that these actions did not constitute an in-person solicitation for pecuniary gain, but

69. *Id.* at 469-70 (Marshall, J., concurring) (citations omitted).

70. *Id.* (Marshall, J., concurring).

71. 436 U.S. 412 (1978).

72. 371 U.S. 415 (1963). See *supra* text accompanying notes 50-57.

instead the attorney was motivated purely by her personal political beliefs and the desire to advance the civil liberty objectives of the ACLU. Accordingly, the Court viewed the case as being governed by the *Button* line of cases permitting such solicitation on behalf of various political and union organizations to accomplish their organizational objectives. The Court refused to distinguish these cases on the basis that the ACLU routinely asked for an award of attorney's fees, so that there would be a possible benefit to it by this case. In so doing, the Court noted that any potential benefit would go to the organization and not the attorney in question.

F. What Constitutes Misleading Advertising?

After establishing the basic constitutional ground rules in *Bates* and *Ohralik*, the Court returned to consider the question of what constitutes "misleading" advertising in *In re R.M.J.*⁷³ Ironically, in so doing, the Court's opinion produced two diametrically opposed results. On one hand, the Court expanded the constitutional protection afforded to attorney advertising by reaching beyond the mere publication of routine legal services permitted in *Bates*, as well as setting the stage for the even further extensions of permissible legal advertising subsequently sanctioned in *Zauderer* and *Shapero*. On the other hand, however, the Court also gave states the tool to significantly restrict legal advertising, by virtue of its recognition of the many diverse and often subtle ways that such legal advertising could be considered misleading and hence permissibly regulated.

In re R.M.J. involved an attorney's violation of Missouri's post-*Bates* bar regulations, which allowed an attorney to mail professional announcement cards to "lawyers, clients, former clients, personal friends, and relatives,"⁷⁴ identifying the attorneys' areas of practice from a specified list. The rule further required the advertisement to contain a disclaimer advising that the listing of such areas of practice did not constitute any certification of experience.⁷⁵

The attorney violated this disciplinary rule by (1) using language other than that approved in the rule to identify his areas of practice, (2) failing to include the required disclaimer, (3) mailing his announcements to persons other than those authorized, and (4) placing his announcement in the local newspapers and yellow pages. Al-

73. 455 U.S. 191 (1982).

74. *Id.* at 196 (quoting Mo. SUP. CT. R. 4, DR 2-102(A)(2)).

75. See Mo. SUP. CT. R. 4, DR 2-101(B) & Addendum III.

though conceding the constitutionality of the disclaimer requirement, the attorney attacked the other violations as being unconstitutional restraints on his first amendment right to freedom of speech.

In upholding the attorney's right to advertise his areas of practice by using unsanctioned nonmisleading language to persons other than those permitted by the disciplinary rule, the majority first reiterated the principle that commercial speech is protected by the first amendment, in response to the partial apparent retreat from this doctrine signaled in *Ohralik*. After paying lip service to the constitutional underpinnings supporting legal advertising, the Court then took great pains to repeatedly point out that a state could regulate advertising that was misleading or deceptive, setting forth an expansive definition of such prohibited advertising.

In so doing, the Court began with the recognition of the basic principle that "advertising by the professions poses special risks of deception — 'because the public lacks sophistication concerning legal services, [and accordingly] misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising.'"⁷⁶ The Court also recognized that "special risks" of deception are inherent in "[t]he public's comparative lack of knowledge, the limited ability of the professions to police themselves, and the absence of any standardization in the 'product.'"⁷⁷

With this foundation, the Court then went on to identify particular types of advertising that posed special risks of misleading the public, thereby permitting its regulation. In addition to advertising that contained outright false or deceptive statements, it also recognized the potential for abuse in advertising based upon the quality of legal services, as well as the many different ways that such claims could implicitly arise. In this regard, the majority pointed to the ABA's Model Rules of Professional Conduct, which defined misleading advertising as including communications that

- (1) omit a fact necessary to make the statement considered as a whole not materially misleading,
- (2) are likely to create an unjustified expectation about the results a lawyer can achieve,
- (3) compare the lawyer's services with other lawyers' services,
- (4) advertise the results obtained on behalf of a client or the

76. 455 U.S. at 200 (quoting 433 U.S. at 383).

77. *Id.* at 202.

attorney's record in obtaining favorable verdicts, or
(5) contain client endorsements.⁷⁸

In order to prevent potential deception from communications that were not overtly false, but nevertheless were potentially misleading, such as where they contained implications that an attorney had greater expertise than in fact existed or raised unjustified expectations of success, the Court held that states were permitted to require various disclaimers or disclosures of additional information. This portion of the Court's opinion provided states with perhaps their most potent weapon for regulating the abuses often found in attorney advertising.

For example, one of the most frequent criticisms by organized trial bars of the ever proliferating personal injury advertising is that too many of the advertisers are not in fact experienced or skilled trial attorneys. Instead, it is argued that many of these attorneys are merely business brokers, who take in cases and then refer them out to experienced trial attorneys if they cannot settle them quickly, earning a hefty fee for the mere act of referring the client to a competent trial attorney.⁷⁹

Under the best of circumstances, the client caught in this predicament ends up paying a higher fee, because of the need to compensate the referral attorney. Under the worst of circumstances, the client is not competently represented, resulting in a settlement for less than the value of his case by an attorney who was never prepared to take the case to trial, no matter how insufficient the settlement offer.

Under the ABA definition of misleading advertising referred to by the Court, states can therefore better protect the prospective client either by prohibiting such attorneys from advertising their willingness to handle any type case in the first instance, where they reasonably only expect to refer it to a specialist for a fee, or by requiring an outright disclosure warning the client that if his case could not be

78. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 (1984).

79. Although an attorney's receipt of a fee for the mere act of referring a case to another attorney has long been considered unethical, *see* FLA. CODE OF PROFESSIONAL RESPONSIBILITY DR 2-107(2) (1970) (superceded by RULES REGULATING THE FLA. BAR), many devices have arisen in actual practice to circumvent this rule. In tacit recognition of these devices, the Florida Supreme Court has recently amended Rule 4-1.5 of the Rules Regulating the Florida Bar to limit such "referral fees." Under the newly adopted rule, any attorney assuming "secondary responsibility" for the legal services rendered on behalf of a client may only receive a maximum of 25% of the total contingency fee charged to the client. *See* RULES REGULATING THE FLA. BAR Rule 4-1.5(f)(4)(d)(2). Various exceptions to this rule also exist, however.

settled, it would likely be referred to trial counsel at a higher fee. In fact, Florida has already moved in this direction by virtue of its recently adopted Rule 4-7.3(g) of its Rules Regulating the Florida Bar, which provides:

A statement and any information furnished to a prospective client, as authorized by paragraph (a) of this rule, that a lawyer or law firm will represent a client in a particular type of matter, *without appropriate qualification*, shall be presumed to be misleading if the lawyer reasonably believes that another lawyer or law firm will be associated or act as primary counsel in representing the client. *In determining whether the statement is misleading, the history of prior conduct by the lawyer in similar matters may be considered.*⁸⁰

The majority offered another hope to those in favor of regulating attorney advertising by clearly leaving open the door for a reevaluation of all forms of advertising, repeatedly observing that its prior decisions were based upon the record before it. Therefore, it observed that "[t]he Court might reach a different decision . . . on a different record . . . [or] [i]f experience proves that certain forms of advertising are *in fact misleading*, although they did not appear at first to be 'inherently' misleading, the Court *must* take such experience into account."⁸¹

Thus, the Court was serving a warning to bar associations to be better prepared in future cases by developing the necessary *record evidence* to support their arguments in favor of the need for particular regulations, something that had been sorely lacking in prior cases. As discussed subsequently, this warning was heeded by Iowa, in its efforts to restrict attorney advertising on television,⁸² as well as by Texas in its regulation of optometrist's advertising,⁸³ resulting in much more successful conclusions in both cases.

G. Target Group Advertising

Following its extension of the constitutional umbrella to protect the advertising of areas of specialty, the Court has most recently

80. RULES REGULATING THE FLA. BAR Rule 4-7.3(g) (emphasis added).

81. 455 U.S. at 200 n.11 (emphasis added).

82. See Committee on Professional Ethics & Conduct of the Iowa State Bar Ass'n v. Humphrey, 355 N.W.2d 565 (Iowa 1984), *judgment on appeal vacated, remanded*, 472 U.S. 1004 (1985), *writ issued*, 377 N.W.2d 643 (Iowa 1985), *appeal dismissed*, 475 U.S. 1114 (1986) (for want of federal question).

83. See Friedman v. Rogers, 440 U.S. 1 (1979).

turned to the issues of advertising directed to particular target groups. As with its preceding opinion in *In re R.M.J.*, the Court's decisions in these subsequent cases have had the effect of expanding the permissible areas and types of legal advertising, while at the same time providing a constitutional means to regulate certain detrimental byproducts. Although generally upholding the right to advertise to specific target groups with particular legal problems, the Court has also approved restrictions on advertising in general, designed to prevent the public from being misled by advertisers' claims.

The first of these cases, *Zauderer v. Office of Disciplinary Council of the Supreme Court*,⁸⁴ involved an attorney who had been disciplined for (1) advertising that he would represent defendants in drunk driving cases and provide a full refund to any client convicted of "drunk driving," and (2) publicizing his willingness to represent women who had suffered injuries from the use of Dalkon Shields.

The drunk driving ad was held by the Ohio Supreme Court to be potentially deceptive to clients, who might be unaware that they could be found guilty of a lesser offense and still be liable for attorney's fees. The attorney did not contest the misleading nature of this ad, but instead raised a procedural due process argument based upon the fact that the initial complaint filed against him by the state alleged a different charge — that the ad violated Ohio's prohibition against representing criminal defendants on a contingency fee basis. The Court, by a 6-2 majority, quickly disposed of this argument and affirmed the action of the Ohio Supreme Court in disciplining the attorney by issuing a public reprimand because of the potentially misleading nature of this ad.⁸⁵

The Court was much more divided, however, over the issue of whether the state could constitutionally prohibit the attorney from advertising in newspapers his willingness to represent particular target groups. The advertisement advised readers that Dalkon Shields allegedly caused women a variety of injuries and that it might not be too late to take legal action against the manufacturer. It further stated that the attorney's firm was presently handling a number of such cases on a contingency fee basis and also contained an illustration of a Dalkon Shield. The ad was extremely successful, resulting in several hundred inquiries and 106 new clients.

The Ohio Supreme Court ruled that the attorney had violated a

84. 471 U.S. 626 (1985).

85. *Id.* at 655-56.

variety of disciplinary rules, which (1) prohibited soliciting or accepting legal employment through advertisements containing information or advice regarding a specific legal problem,⁸⁶ (2) prohibited the use of illustrations in advertisements, (3) required ads to be dignified, and (4) limited the information that could be included in such ads to a list of twenty items.⁸⁷

In considering the state court action, the United States Supreme Court once again initiated its inquiry by addressing the degree of protection afforded to "commercial speech" in general. In so doing, it both reiterated the *Bates* recognition that "commercial speech" was entitled to first amendment protection as well as *Ohralik*'s admonition that such protection is less extensive than that afforded to non-commercial speech. The Court then attempted to coalesce its prior pronouncements into the following workable test:

The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive or misleading or that proposes an illegal transaction . . . Commercial speech that is not false or deceptive and [that] does not concern unlawful activities, however, may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest.⁸⁸

The first inquiry under this test is whether the advertisements in question were in any manner false or deceptive. Since the advertisements did not promise readers that lawsuits would be successful or that the attorney had any special expertise in such litigation other than his employment in similar suits, the majority concluded that the ad was neither misleading or deceptive.

86. The disciplinary rules in question, OHIO CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103(A) -104(A) (1979), prohibited an attorney from "recommend[ing] employment, as a private practitioner, of himself, his partner or associate to a nonlawyer who has not sought his advice regarding employment of a lawyer," or from accepting employment resulting from the giving of "unsolicited advice to a layman that he should obtain counsel or take legal action." Although virtually all advertising could be construed to run afoul of these rules, in order to fit within *Bates*, the Ohio Supreme Court construed these provisions to provide a much more restricted application, so as to prohibit only those ads directed to a particular targeted audience. *Office of Disciplinary Counsel of the Supreme Court v. Zauderer*, 10 Ohio St. 3d 44, 461 N.E.2d 883 (1984).

87. The 20 permissible areas included basic background information, areas of practice, scholastic record, fee information, and the attorney's membership and offices held in various bar associations and professional societies. OHIO CODE OF PROFESSIONAL RESPONSIBILITY Rule 2-101(B) (1979).

88. 471 U.S. at 638 (citation omitted). See also *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

Having resolved the first prong of this test, the majority next turned its attention to the question of whether the state had carried the burden of establishing that the subject restrictions on advertising directly advanced a substantial government interest. The state argued that the restrictions on advertising to target groups were based upon the same substantial interests that justified the ban on in-person solicitation approved in *Ohralik*. The majority rejected this argument by reiterating the unique features of in-person solicitation and its tremendous risk of overreaching and undue influence, due to the pressure that could be asserted upon the potential client by the personal presence of a trained advocate.

The Court also concluded that while the state had a substantial interest in insuring that its attorneys act with dignity and decorum in the courtroom, it did not find that

the State's desire that attorneys maintain their dignity in their communications with the public is an interest substantial enough to justify the abridgement of their First Amendment rights [T]he mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity.⁸⁹

Finally the Court rejected the remaining contention that such restrictions were justified by the fear that such advertising would allow lawyers to "stir up litigation," on the grounds that:

We cannot endorse the proposition that a lawsuit, as such, is an evil. Over the course of centuries, our society has settled upon civil litigation as a means for addressing grievances, resolving disputes, and vindicating rights when other means fail That our citizens have access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride. The State is not entitled to interfere with that access by denying its citizens accurate information about their legal rights.⁹⁰

Although the Court was divided on all other aspects of its opinion, it unanimously concluded that commercial illustrations in the print media are entitled to the same first amendment protections afforded verbal commercial speech, thereby invalidating the prohibition against using such illustrations in connection with legal advertis-

89. 471 U.S. at 648.

90. *Id.* at 643.

ing. The Court concluded that the use of illustrations in print advertising serves important communicative functions, which not only attract the attention of the audience to the advertiser's message, but may also serve to impart information directly.

While generally expanding the scope of permissible advertising, the Court also reiterated the message in *In re R.M.J.* that states could permissibly require that certain types of ads contain additional disclosures of information or disclaimers in order to prevent them from misleading the public. In so doing, the Court rejected the contention that the validity of requiring such disclaimers or disclosures in a particular case must be measured by the same constitutional test used to determine whether the advertisement could be regulated in the first instance. Instead, the Court concluded:

Appellant, however, overlooks material differences between disclosure requirements and outright prohibitions on speech. In requiring attorneys who advertise their willingness to represent clients on a contingent-fee basis to state that the client may have to bear certain expenses even if he loses, Ohio has not attempted to prevent attorneys from conveying information to the public; it has only required them to provide somewhat more information than they might otherwise be inclined to present . . . [B]ecause disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech, "warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of *consumer confusion or deception*."⁹¹

In recognition that unjustified or unduly burdensome disclosure requirements might result in a chilling of protected commercial speech, the Court concluded that the advertiser's rights are adequately protected as long as the disclosure requirements are "reasonably related" to the state's interest in preventing deception of consumers. Ohio's requirement that an attorney advertising his availability on a contingency fee basis must disclose that clients will have to pay costs even if their lawsuits are unsuccessful was found to pass this standard.⁹²

Two separate groups of justices dissented from various portions of the majority opinion. Justice O'Connor, joined by Chief Justice Burger and Justice Rehnquist, dissented from that portion of the majority opinion rejecting the state's right to prohibit advertising di-

91. *Id.* at 650-51 (emphasis added).

92. *Id.* at 653 n.15.

rected to target groups. In so doing, Justice O'Connor pointed out that the advertising in question went well beyond just publicizing the attorney's willingness to handle Dalkon Shield litigation, but also contained *legal advice* for prospect clients. Thus, for the first time, the Court was authorizing the advertising of legal advice, rather than just information concerning an attorney's fees or areas of specialization.⁹³

These dissenters likened this free unsolicited legal advice used to entice clients to merchants offering free samples of their wares. They found this practice particularly rife with danger because of the qualitative difference between standardized products, such as soap powders, and professional services, which by their very nature are complex and diverse. Even more important, however, was their concern over the substantial risk that the attorney's personal interest in obtaining business might color the advice offered in soliciting a client, with the result that the client's decision to employ the attorney might therefore be based on advice that was neither complete nor disinterested.⁹⁴

This group of dissenters also concluded that the present case was not so far removed from the in-person solicitation prohibited in *Ohralik*, since once the legal advice was employed within the advertisement, a lay person might very well conclude there was no means to judge its applicability, short of consulting with the lawyer who placed the advertisement in the first place. They concluded that at the time of such consultation, the same risk of undue influence, fraud, and overreaching found in *Ohralik* might also be present.⁹⁵

A separate dissenting opinion was filed by Justices Brennan and Marshall, which took the opposite tack — contending that the regulation permitted by the majority through the use of disclaimers and required disclosures of information in certain circumstances was too severe. Instead, they argued that the permissibility of such disclaimers and disclosures should be judged by the same constitutional test as used to determine whether a regulation or prohibition of speech was proper in the first instance.⁹⁶ In support of this position, they argued that an affirmative publication requirement operates as a command in the same sense as a statute forbidding the publication of

93. *Id.* at 678.

94. *Id.*

95. *Id.*

96. *Id.* at 657 n.1.

specified matter, citing the Court's prior decision in *Miami Herald Publishing Co. v. Tornillo*,⁹⁷ which struck down a Florida libel law containing a right to reply provision.

The second case to consider targeted advertising was the Court's most recent decision, *Shapero v. Kentucky Bar Association*.⁹⁸ Here, the attorney proposed to send a letter to persons who had foreclosure suits filed against them, which read in part:

It has come to my attention that your home is being foreclosed on. If this is true, you may be about to lose your home. Federal law may allow you to keep your home by ORDERING your creditor [sic] to STOP and give you more time to pay them. You may call my office anytime from 8:30 a.m. to 5:00 p.m. for FREE information on how you can keep your home. Call NOW, don't wait. It may surprise you what I may be able to do for you. Just call and tell me that you got this letter. Remember it is FREE, there is NO charge for calling.⁹⁹

Although not finding the letter to be false and misleading, the Attorney's Advertising Commission of the Kentucky Bar, which was charged with the responsibility for previewing all such solicitations, refused to approve its use. The Commission concluded that the letter violated Kentucky Supreme Court Rule 3.135(5)(b)(i), which barred the use of written advertisements prompted or "precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public."¹⁰⁰ The Commission did, however, register its view that the rule was violative of the principles enunciated in *Zauderer* and recommended that the Kentucky Supreme Court therefore amend its rules in conformance with this decision.

Pursuant to the Commission's suggestion, the attorney petitioned the bar's Committee on Legal Ethics for an advisory opinion as to the rule's validity. The Ethics Committee also found that the letter was neither misleading nor false, but nevertheless upheld the rule on the basis that it was consistent with the ABA's Model Rules of Professional Conduct.¹⁰¹

In reviewing the Ethics Committee advisory opinion, the Ken-

97. 418 U.S. 241 (1974).

98. 108 S. Ct. 1916 (1988).

99. *Id.* at 1919.

100. *Id.*

101. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1984).

tucky Supreme Court determined that the rule was in fact in violation of *Zauderer* and accordingly replaced it with the ABA Model Rule itself. This rule, which was adopted by at least twenty four other states, provided:

A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in-person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term 'solicit' includes contact inperson, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful.¹⁰²

Under this Model Rule as well as the Kentucky Court Rule, targeted direct mail solicitation for pecuniary gain was prohibited, regardless of whether the correspondence was false or misleading.

In considering the validity of this regulation, the United States Supreme Court concluded that its *Bates* line of cases "never distinguished among various modes of written advertising to the general public."¹⁰³ Thus, the Court found no constitutional difference between the targeted general media print advertising permitted in *Zauderer* and the direct mail solicitation in the subject case. The Court concluded that the only distinction between the two was one of efficiency, in that the proposed letter in *Shapero* was targeted only to persons who were known to need the legal services offered in the letter, while in *Zauderer* the advertising was directed to persons "so situated that they might in general find such services useful."¹⁰⁴

Although the result in *Shapero* was clearly not unanticipated in light of the Court's prior decision in *Zauderer*, the majority opinion written by Justice Brennan was devoid of much of the concern over the potential for the misleading of consumers contained in the Court's prior opinions. For example, although the Court recognized many of the ways in which such letters can be misleading to the lay public — such as by leading the recipient to overestimate the law-

102. *Id.*

103. 108 S. Ct. at 1921.

104. *Id.* at 1920 (quoting *Zauderer*, 726 S.W.2d 299, 301 (quoting MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.3 (1984))).

yer's familiarity with the case or by implicitly suggesting that the recipient's legal problem is more dire than it really is — it offhandedly dismissed these concerns with the curt statement that it was up to the states to find ways to prevent these abuses and bear whatever financial and practical burdens were imposed by such regulations.

In a particularly scathing dissent, Justice O'Connor, joined by Chief Justice Rehnquist and Justice Scalia, attacked the analytical framework underlying the entire *Bates* line of cases. The central thrust of this attack was that advertising has promoted distrust of lawyers as well as disrespect for the entire judicial system, both of which are areas of legitimate substantial interest by the states. Applying the *Central Hudson Gas* test,¹⁰⁵ used to determine when commercial speech may be regulated, which was adopted to legal advertising in *Zauderer*, the dissenters concluded that "the states should have considerable latitude to ban advertising that is '*potentially* or demonstrably misleading,' . . . *as well as* truthful advertising that undermines the substantial governmental interest in promoting the high ethical standards that are necessary in the legal profession."¹⁰⁶

The dissenters further criticized the *Bates* line of cases for relying upon

a defective analogy between professional services and standardized consumer products and a correspondingly inappropriate skepticism about the States' justifications for their regulations Although the [*Bates*] opinion contained extensive discussion of the proffered justifications for restrictions on price advertising, the result was a little more than a bare conclusion that "We are not persuaded that price advertising will harm consumers." Dismissing Justice Powell's careful critique of the implicit legislative fact-finding that underlay its analysis, the *Bates* majority simply insisted on concluding that the benefits of advertising outweigh its dangers [T]hat policy decision was not derived from the First Amendment, and it should not have been used to displace a different and no less reasonable policy decision of the State whose regulation was at issue.¹⁰⁷

After discussing the legal and historical basis requiring special ethical standards for lawyers, the dissent further warned that

[i]mbuing the legal profession with the necessary ethical standards

105. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

106. 108 S. Ct. at 1928 (O'Connor, J., dissenting) (quoting 455 U.S. at 202) (emphasis added).

107. *Id.* at 1928-29 (quoting 433 U.S. at 365, 368-79).

is a task that involves a constant struggle with the relentless natural force of economic self-interest. It cannot be accomplished directly by legal rules, and it certainly will not succeed if sermonizing is the strongest tool that may be employed. Tradition and experiment have suggested a number of formal and informal mechanisms, none of which is adequate by itself and many of which may serve to reduce competition (in the narrow economic sense) among members of the profession.

. . . Restrictions on advertising and solicitation by lawyers properly and significantly serve the same goal. Such restrictions act as a concrete, day-to-day reminder to the practicing attorney of why it is improper for any member of this profession to regard it as a trade or occupation like any other.

. . . [T]his Court's recent decisions reflect a myopic belief that "consumers," and thus our nation, will benefit from a constitutional theory that refuses to recognize either the essence of professionalism or its fragile and necessary foundations.¹⁰⁸

H. Around the Corner — Television?

Considering that television advertising by lawyers has increased from a mere \$900,000 in 1978 to a \$59 million industry in 1987,¹⁰⁹ the Court's consideration of such advertising can only be around the corner. Although the Court's opinions, with the exception of *Ohralik*, have generally resulted in progressive expansion of the right to advertise by attorneys, there are a number of signs to indicate that its treatment of television advertising may be different.

First it is important to keep in mind that each of the Court's prior decisions, with the exception of its in-person solicitation cases, have dealt with advertising in the print media. The distinctions between print advertising and television broadcasts have been repeatedly noted by the Court. In *Bates*, the majority warned that "the special problems of advertising on the electronic broadcast media will warrant special consideration,"¹¹⁰ an admonition that was repeated again in *In re R.M.J.*¹¹¹ Similarly, in *Shapero*, the majority also observed: "In assessing the potential for overreaching and undue influence, the mode of communication makes all the difference."¹¹²

108. *Id.* at 1930.

109. Labaton, *Propriety on Trial in Lawyers Ads*, N.Y. Times, Mar. 21, 1988, at 21, col. 2.

110. 433 U.S. at 384.

111. 455 U.S. at 201 n.13.

112. 108 S. Ct. at 1922.

Other Supreme Court cases in different contexts also support imposing different regulations on television from those placed upon print advertising. For example, in discussing the various modes of communicating purely commercial speech in *Metromedia, Inc. v. City of San Diego*,¹¹³ the Court observed: "Each method of communicating ideas is 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method."

Similarly, in *FCC v. Pacifica Foundation*,¹¹⁴ which considered the FCC's ban of comedian George Carlin's infamous broadcast entitled "Filthy Words," the Court made it very clear that different modes of communication were entitled to different degrees of protection. In this regard, the majority stated:

We have long recognized that each medium of expression presents special First Amendment problems. And of all forms of communication, *it is broadcasting that has received the most limited First Amendment protection*. Thus, although other speakers cannot be licensed except under laws that carefully define and narrow official discretion, a broadcaster may be deprived of his license and his forum if the [Federal Communication] Commission decides that such an action would serve "the public interest, convenience, and necessity." Similarly, although the First Amendment protects newspaper publishers from being required to print the replies of those whom they criticize, it affords no such protection to broadcasters; on the contrary, they must give free time to the victims of their criticism.¹¹⁵ The reasons for these distinctions are complex First, *the broadcast media have established a uniquely pervasive presence in the lives of all Americans* Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offense by turning off the radio . . . is like saying that the remedy for an assault is to run away after the first blow.¹¹⁶

In upholding the FCC's ban on the subject monologue, the Court went on to point out numerous examples of communications which would be protected if found in print, but properly prohibited on television because of the unique nature of the electronic broadcast

113. 453 U.S. 490, 501 (1981) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J.)).

114. 438 U.S. 726 (1978).

115. *Id.* at 748 (citations omitted) (emphasis added).

116. *Id.* at 748-49 (emphasis added).

medium.

Another reason for distinguishing between the first amendment protection afforded to communications on the broadcast media as opposed to print was expressed by the Court in *CBS v. Democratic National Committee*.¹¹⁷ In upholding CBS' right to refuse certain political advertising, the Court concluded that "the broadcast media impose unique and special problems not present in the traditional free speech case."¹¹⁸ The Court extensively relied upon one special problem:

[t]he reality that in a very real sense *listeners and viewers constitute a "captive audience."* The "captive" nature of the broadcast audience was recognized as early as 1924, when Commerce Secretary Hoover remarked at the Fourth National Radio Conference that "the radio listener does not have the same option that the reader of publications has — to ignore advertising in which he is not interested — and he may resent its invasion of his set." As the broadcast media became more pervasive in our society, the problem has become more acute "Similarly, an ordinary habitual television watcher can *avoid* these commercials only by frequently leaving the room, changing the channel, or doing some other such affirmative act. It is difficult to calculate the subliminal impact of this pervasive propaganda, which may be heard even if not listened to, but it may reasonably be thought greater than the impact of the written word."¹¹⁹

The Court has also already given a preview of its feelings — and perhaps more — in a series of cases involving Iowa's regulations on television advertising, which were promulgated in response to *Bates*. The Iowa advertising rules sought to draw a line of demarcation between advertising that informs the public and that which merely promotes the lawyer, prohibiting the latter as being outside the scope of the protections afforded to commercial speech. To this end, Iowa Code of Professional Responsibility DR 2-101(B) set forth nineteen items of information which were "presumed to be informational and not solely promotional."¹²⁰ These items included the attorney's name, field of practice, office hours, fees, date and place of bar admission, licenses and memberships in professional organizations, and similar

117. 412 U.S. 94 (1973).

118. *Id.* at 101.

119. *Id.* at 127-28 (quoting *Banzhaf v. FCC*, 405 F.2d 1082, 1100-01 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969)) (citation omitted) (emphasis added).

120. IOWA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1988).

information.

Although all attorney advertising was limited by the Iowa rules to the permissible areas of information, the regulations place the following additional restrictions on television advertising:

The same information, in words and numbers only, articulated by a single non-dramatic voice, not that of the lawyer, and with no other background sound, may be communicated on television. In the case of television, no visual display shall be allowed except that allowed in print as articulated by the announcer. All such communications on radio and television, to the extent possible, shall be made only to the geographical area in which the lawyer maintains offices or in which a significant part of the lawyer's clientele resides. Any such information shall be presented in a dignified manner.¹²¹

In violation of these rules, an Iowa attorney placed television ads featuring an actor and actress portraying a physician and nurse in an examining room.¹²² While the nurse examined an x ray, the physician actor stated, "We see first-hand injuries caused by the neglect of others. If you're seriously injured through the negligence of others, you should be talking to a lawyer. The choice of lawyer could be important. That's something to think about."¹²³ Following this dramatization, the picture switched to another actor portraying a receptionist in a law office. The attorney's name, address, phone number, and areas of practice were then superimposed over the picture, with the voice-over adding, "If you're injured through the negligence of others, call the law firm of Humphrey, Hass and Gritzner. Cases involving auto accidents, work comp, serious personal injury and wrongful death handled on a percentage basis. No charge for initial consultation. Call now at 288-0102."¹²⁴ The attorney also utilized several other similar ads involving an injured workman and a group of bowlers.

The Iowa Supreme Court concluded that these ads were misleading in two different ways. First, it found that the statement that personal injury cases were handled on a percentage basis with no charge for initial consultation misled prospective clients into believing that

121. IOWA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1988).

122. Committee on Professional Ethics & Conduct of the Iowa State Bar Ass'n v. Humphrey, 355 N.W.2d 565, 566 (Iowa 1984), *judgment on appeal vacated, remanded*, 472 U.S. 1004 (1985), *writ issued*, 377 N.W.2d 643 (Iowa 1985), *appeal dismissed*, 475 U.S. 1114 (1986) (for want of a federal question).

123. 355 N.W.2d at 566.

124. *Id.*

pursuing such cases was a cost-free venture. Secondly, and much more importantly, the court also found the ads to be misleading on the basis that they "implied" that the advertisers were experts in personal injury practice. Instead, the court found the opposite:

Defendants had little in the way of experience when the commercials were broadcast. After graduation from law school, Mr. Humphrey had tried six cases, the nature of which are unknown, all while under the supervision of another Des Moines law firm. Mr. Haas had virtually no trial experience. Together, defendants Humphrey and Haas had only tried one case.¹²⁵

After finding that the defendant had violated the state's rules on television advertising, the court next analyzed the constitutionality of the rules in light of *Bates*. In so doing, it concluded that *Bates* only condemned those regulations

which amounted to restrictions on the flow of "*relevant information needed to reach an informed decision.*" The committee's position is that the *Bates* rationale does not apply to irrelevant information. *Information is not relevant if it makes no contribution to informed decision making.* In other words, prohibition of such information does not impede, and in fact advances, the fostering of rational decision making and maintaining of the bar's professionalism.¹²⁶

Thus, the court concluded that advertising that informs the public was permissible, while advertising that merely promotes the lawyer may be regulated, since it is outside the scope of the protections afforded to commercial speech.

The Iowa opinion was vacated by the United States Supreme Court the following year, with instructions to reconsider the case in light of its intervening decision in *Zauderer*.¹²⁷ In its subsequent reconsideration, however, the Iowa Supreme Court reached the same conclusion and reaffirmed its prior decision. After first noting that *Zauderer* was expressly limited to print advertisements, the Iowa Supreme Court concluded that electronic advertising lies closer to in-person solicitation.

Electronic media advertising, when contrasted with printed advertising, tolerates much less deliberation by those at whom it is aimed. Both sight and sound are immediate and can be illusive because, for

125. *Id.* at 570.

126. *Id.* (citation omitted) (emphasis added).

127. 472 U.S. 1004 (1985).

the listener or viewer at least, in a flash they are gone without a trace. Lost is the opportunity accorded to the reader of printed advertisements to pause, to restudy, and to thoughtfully consider. The purpose of defendant's television advertisements was much more immediate.¹²⁸

The Iowa court further concluded that the purpose of the subject advertising was far removed from that found to be protected in *Zauderer* and *Bates*. Unlike these earlier cases, which involved information concerning the availability and cost of legal services, the subject television advertising was nothing more than "electronically conveyed image building."¹²⁹

This decision was once again appealed to the United States Supreme Court, which this time dismissed the appeal for want of a substantial federal question.¹³⁰ Under the doctrine enunciated in *Hicks v. Miranda*,¹³¹ such an action is considered to be a holding on the merits as to those questions properly before the Court, thereby at least implicitly, and perhaps expressly, upholding the Iowa regulations.

The approach taken by the Iowa court in allowing television advertising that informs the public, but prohibiting that which merely promotes the attorney, also appears to be consistent with the Supreme Court's decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,¹³² which was extensively relied upon in *Zauderer*. In recognizing that commercial speech is afforded less protection than other constitutionally guaranteed expression, the Court in *Central Hudson Gas* made the following observation:

The First Amendment's concern for commercial speech is based on the *informational function* of advertising. Consequently, *there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity*. The government may ban forms of communication more likely to deceive the public than to inform it.¹³³

128. 377 N.W.2d 643, 646 (Iowa 1985), *appeal dismissed*, 475 U.S. 1114 (1986) (for want of a federal question).

129. *Id.* at 647.

130. 475 U.S. 1114 (1986).

131. 422 U.S. 332 (1975). *Cf. Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 499 (1981) (quoting *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) ("although summary dispositions are decisions on the merits, the decisions extend only to 'the precise issues presented and necessarily decided by those actions'")).

132. 447 U.S. 557 (1980).

133. 447 U.S. at 563 (citations omitted) (emphasis added). A similar conclusion was also

Another important aspect of the *Humphrey* cases, which is not readily apparent from the opinions themselves, was Iowa's creation of an evidentiary record to support its contentions that such restrictions were necessary, something that was lacking in most of the other lawyer advertising cases to reach the Supreme Court. The contents of the record were discussed in more detail by Iowa Supreme Court Chief Justice W. Ward Reynoldson in a subsequent article entitled "The Case Against Lawyer Advertising."¹³⁴ Chief Justice Reynoldson noted that before the case even reached the Iowa Supreme Court:

A complete evidentiary record was obtained, including a public survey on attitudes and opinions regarding advertising for law firms. The survey questioned a group of representative persons on their attitudes about lawyers both before and after viewing television commercials.

Following viewing the opinions dropped significantly with respect to those characteristics of a lawyer; trustworthy, from 71% to 14%; professional, from 71% to 21%; honest, from 65% to 14%; and dignified, from 45% to 14%.¹³⁵

A second public opinion survey was commissioned by the Iowa Bar Association prior to the state court's consideration of the case on remand. This survey reinforced the prior survey's conclusion that advertising lowered the public's perception of lawyers and contained the additional, highly troubling finding that a significant number of those surveyed admitted that if serving as jurors they would be prejudiced against a party who retained an advertising lawyer.¹³⁶ Thus, there is ample support both factually and legally for the separate treatment that has traditionally been given to the electronic media in considering permissible regulations under the first amendment.

II. THE FLORIDA EXPERIENCE

A. Pre-Bates Advertising Prohibitions

In the year 1941, the Florida Supreme Court adopted Rule B of the ABA's Ethics Governing Attorneys, which included Canon 27

reached by the Court in *Friedman v. Rogers*, 440 U.S. 1 (1979), which upheld a Texas ban on the use of trade names by optometrists. For a further discussion of this case, see *supra* note 83 and accompanying text.

134. Reynoldson, *The Case Against Lawyer Advertising*, A.B.A. J., Jan. 1989, at 60.

135. *Id.*

136. *Id.* at 61.

prohibiting advertising by lawyers.¹³⁷ Under this Canon, attorneys were prohibited from both direct advertisements through mass media and personal solicitation as well as indirect advertisements, such as furnishing or inspiring newspaper comments and other forms of so-called "self-laudation."¹³⁸ The only approved form of advertisement was the publication by the attorney of his name with various specified biographical data in reputable law lists.

The rationale behind Florida's adoption of these prohibitions was expressed by the Florida Supreme Court.

[A]dvertisements, unless kept within narrow limits like any other form of solicitation, tend to stir up litigation, and such tendency is against the public interest.

. . . [I]f there were no restrictions on advertisements, the least capable and least honorable lawyers would be apt to publish the most extravagant and alluring material about themselves, and . . . the harm which would result would, in large measure, fall on the ignorant and on those least able to afford it.

. . . [T]he temptation would be strong to hold out as inducements for employment, assurances of success or of satisfaction to the client, which assurances could not be realized, and . . . the giving of such assurances would materially increase the temptation to use ill means to secure the end desired by the client.¹³⁹

The issue of what constituted prohibited "self-laudation" was first considered in *State v. Nichols*,¹⁴⁰ where an attorney was charged with violating Canon 27 after an article appeared in the *Miami News* concerning his law practice and recently constructed office building. The article talked in detail about the attorney's great successes and many of the results he had obtained for his clients. Although the lawyer provided biographical information to the writers of the article,

137. CANONS OF PROFESSIONAL ETHICS Canon 27 (1980). This rule, which was also subsequently incorporated into Article X of the Integration Rule of the Florida Bar in 1955, provided in pertinent part:

It is unprofessional to solicit professional employment by circulars, advertisements, through touters or by personal communications or interviews not warranted by personal relations. Indirect advertisements for professional employment such as furnishing or inspiring newspaper comments, or procuring his photograph to be published in connection with causes in which the lawyer has been or is engaged or concerning the manner of their conduct, the magnitude of the interest involved, the importance of the lawyer's position and all other like self-laudation, offend the traditions and lower the tone of our profession and are reprehensible.

138. *State v. Nicols*, 151 So. 2d 257 (Fla. 1963).

139. *Jacksonville Terminal Co. v. Misak*, 102 So. 2d 292, 295 (Fla. 1958).

140. 151 So. 2d 257 (Fla. 1963).

the reporters initiated all contact with the attorney.

In discussing the parameters of Canon 27, the Florida Supreme Court concluded:

"Self-laudation" is a very flexible concept; Canon 27 does not define it, so what course of conduct would be said to constitute it under a given state of facts would no doubt vary as the opinions of men vary. As a famous English judge said, it would vary as the length of the chancellor's foot.¹⁴¹

Although the court's discussion provided very little help or guidance in defining prohibited conduct under Canon 27, it concluded that the attorney was not guilty of unethical conduct largely due to the fact that he had not solicited the reporters, but had merely responded to their questions.

Another interesting case arising under this Canon was *Jacksonville Bar Association v. Wilson*,¹⁴² in which it was held that advertising by a county-bar-association-sponsored referral service was not prohibited, where the service was open to all members of the Florida Bar practicing law in that county. The gist of the court's opinion was that advertising by private attorneys involved competition between lawyers, which was likely to produce abuses, while the bar-sponsored project represented a cooperative effort by all attorneys in a geographic area designed to apprise prospective clients of the availability of specialized legal services.

Inherent in the court's reasoning was the recognition of the need for the public to have sufficient information in order to make an informed choice as to the availability of the particular specialized legal services that their individual problems required. Therefore, the court concluded that the referral service would be "in a far better position to make arrangements for proper disposition of the prospective client's legal affairs than the client would be when confronted with the monolithic listing of attorneys in the telephone directory."¹⁴³

In October 1970, Article X of the Integration Rule of the Florida Bar was amended to conform to the Code of Professional Responsibility, which also carried forward the same prohibition against adver-

141. *Id.* at 259. A very good argument can be made that such a definition would be vague, since there is no way that any reasonable man could determine in advance whether he was violating such a standard. See, e.g., *Gooding v. Wilson*, 405 U.S. 518 (1972).

142. 102 So. 2d 292 (Fla. 1958).

143. *Id.* at 294.

tising, except in the so-called reputable law lists.¹⁴⁴ The prohibitions against the legal advertising contained in the Code of Professional Responsibility were subsequently amended in 1975 to permit listings in telephone directories as well as designations under the newly adopted Florida Designation Plan.¹⁴⁵ The purpose behind this plan was to provide a means to inform the public about an attorney's experience in a particular area of practice.¹⁴⁶

Under this plan, an attorney would be able to designate in up to three of twenty permitted areas of practice if the attorney had "substantial experience" for at least three years in the area of designation. In order to maintain the designation, the attorney was only required to obtain a total of thirty hours of approved continuing legal education credits in each of the areas over the ensuing three years.

The Designation Plan clearly provided that it was not intended to constitute a certification by the Florida Bar that the attorney was an "expert" in the area of designation. Accordingly, while allowing the attorney to list his areas of designation in telephone directories, on business cards, and on his letterhead, descriptive phrases such as "areas of practice," "practice limited to," or "specializing in" were expressly prohibited, except in approved law lists.

The problem with these restrictions, however, is that they did far too little to prevent the public from being misled as to the meaning of the attorney's designation. In the absence of a specifically worded disclaimer, there is no way in which the lay public can appreciate the true meaning of an attorney's designation or recognize that the phrase "Florida Bar designated attorney" does not constitute a certification of experience, but only requires the barest minimum of experience in the field. Thus, instead of helping prospective clients choose an experienced attorney, the Designation Plan provided more opportunities for misleading the public.

This problem was partially rectified in 1982, when Florida adopted its Board Certification Plan.¹⁴⁷ In order to receive board certification in one of several designated areas, the attorney must have practiced at least five years, demonstrated a "substantial involvement" in the particular area during that time, met various continuing

144. *In re* Integration Rule of the Fla. Bar, 235 So. 2d 723 (Fla. 1970).

145. *In re* Florida Bar, 319 So. 2d 1 (Fla. 1975).

146. FLA. BAR INTEGRATION RULE Article XXII, § 3 (1975).

147. FLA. BAR INTEGRATION RULE Article XIX (1982); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-105(1) (1970).

legal education requirements, satisfied certain experience criteria (i.e. tried fifteen circuit court cases), and passed a board examination similar to that required of the medical profession. The purpose of this program, unlike the Designation Plan, was to identify particular lawyers as "having met rigorous requirements of experience and education" by the Bar in the area of certification. Board certification, involving similar requirements, has also been available on a national level from the National Board of Trial Advocacy since 1980.

Despite the adoption of this Board Certification Plan, the Florida Bar has continued to maintain its Designation Plan as well. Both of these programs have been carried forward following the consolidation of the various different rules of ethics governing the practice of law under Chapter 6 of the newly adopted Rules Regulating The Florida Bar. The Bar has recently taken a step toward dismantling the Designation Program, however, by deleting those specific areas for which certification exists.

B. Pre-*Bates* Solicitation Prohibitions

Rule B of the ABA's Ethics Governing Attorneys adopted by the Florida Supreme Court in 1941, also contained Canon 28, which prohibited solicitation both in person and by mail. This Canon, which was titled "Stirring Up Litigation, Directly or Through Agents," provided in part:

It is unprofessional for a lawyer to volunteer advice to bring a lawsuit, except in rare cases where ties of blood, relationship or trust make it his duty to do so. Stirring up strife in litigation is not only unprofessional, but it is indictable at common law. It is disreputable to . . . breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients or to employ agents or runners for like purposes.¹⁴⁸

Under these early rules, a variety of different penalties were handed out by the Florida Supreme Court, running the gamut from a mild public "admonishment" to varying suspensions to disbarment. For example, in *State v. Rubin*,¹⁴⁹ an attorney was found guilty of unauthorized solicitation under Rule 19, where a nonlawyer member of his firm had called the father of a serviceman charged with first-

148. ETHICS GOVERNING ATTORNEYS Canon 28 (1980).

149. 142 So. 2d 65 (Fla. 1962).

degree murder and convinced him to retain the attorney. Noting that the attorney had a history of defending various indigent persons on a pro bono basis and other public service, the court rendered only a mild "admonishment" to the attorney.

A somewhat stiffer penalty was handed out in *State ex rel. Florida Bar v. Swidler*,¹⁵⁰ in which an attorney was publicly reprimanded and placed on three years' probation for allowing his brother, who was an employee of his firm, to have solicited an automobile accident victim at Jackson Memorial Hospital. Six-month suspensions were meted out in *State ex rel. Florida Bar v. Bieley*¹⁵¹ and *Florida Bar v. Scott*,¹⁵² where the attorneys were found to have solicited personal injury plaintiffs, either directly or through employees. An even more severe two-year suspension was handed down in *Florida Bar v. Meserve*,¹⁵³ for an attorney who had hired an inmate at Raiford State Prison to solicit clients for him. Actual disbarment occurred in *Florida Bar v. Dodd*,¹⁵⁴ in which the attorney solicited employment from a number of individuals, coupled with other unethical conduct such as representing both a husband and wife in a divorce action.

It is interesting to note in these cases that although the Florida Supreme Court frequently took pains to "condemn the practice of ambulance chasing through the media of runners and touters,"¹⁵⁵ its decisions nevertheless appeared to be tempered by the following philosophy:

To cite a lawyer to be reprimanded for violating the Canons of Ethics creates a stain on his escutcheon that, like the emblem of ownership impressed on a range cow with branding iron, never wears away. True, there are extreme cases that merit it, but it should not be imposed except in those cases where showing of violation of the canon is deliberate and conclusive A lawyer's integrity and his good name are his most precious assets and they should not be smutted . . . absent a clear showing of lack of good faith and good taste.¹⁵⁶

Canon 27's prohibition against solicitation was carried forward in

150. 159 So. 2d 865 (Fla. 1964).

151. 120 So. 2d 587 (Fla. 1960).

152. 197 So. 2d 518 (Fla. 1967).

153. 372 So. 2d 1373 (Fla. 1979).

154. 195 So. 2d 204 (Fla. 1967).

155. *Scott*, 197 So. 2d at 510 (citing *Florida Bar v. Dawson*, 111 So. 2d 427, 431 (Fla. 1959)).

156. *Florida Bar v. Nichols*, 151 So. 2d 257, 261 (Fla. 1963).

the subsequently enacted Code of Professional Responsibility, providing in pertinent part:

(A) A lawyer shall not recommend employment . . . to a non-lawyer who had not sought his advice regarding employment of a lawyer.

(B) Except as permitted under DR 2-103(C) [relating to approved referral services], a lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client.¹⁵⁷

A simultaneously enacted rule went on to further provide:

(A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.¹⁵⁸

These provisions, just as Canon 27,¹⁵⁹ were held to prohibit not only in-person solicitation, but direct mail solicitation as well.

In the pre-*Zauderer* case of *Florida Bar v. Schreiber*,¹⁶⁰ the Florida Supreme Court held that an attorney's letter to a particular target client seeking his employment for immigration and naturalization matters constituted prohibited solicitation under these rules. The court first rejected the attorney's contention that his letter was protected under *Bates*, instead concluding that targeted direct mail solicitation was more akin to the high pressure in-person solicitation prohibited in *Ohralik*, by observing:

We do not perceive that a citizen receiving a letter written on stationary carrying an attorney's letterhead would be bold enough to discard it after only a casual perusal. Read it he must, for letters from attorneys carry a special aura of respect because of the state's power that attorneys can invoke, and the attorney's words carry a corresponding sense of authority.¹⁶¹

The court thereafter concluded that since the primary function

157. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103 (1970).

158. *Id.* DR 2-104.

159. *See* *Florida Bar v. Curry*, 211 So. 2d 169 (Fla. 1968).

160. 407 So. 2d 595 (Fla. 1982).

161. *Id.* at 598.

of the lawyer is that of an officer of the court for the administration of justice, there was a sufficiently strong interest in regulating this type of conduct. It would seem fairly clear, however, that this decision cannot stand in light of the United States Supreme Court's subsequent decisions in *Zauderer* and *Shapero*.

C. Post-Bates Advertising Regulations

In 1980, Florida finally modified its bar rules concerning advertising in an effort to conform with the mandate set forth three years earlier in *Bates*. In so doing, the Florida Supreme Court in *In re Amendment to the Florida Bar Code of Professional Responsibility (Advertising)*,¹⁶² construed *Bates* to allow regulation, which (1) required a warning or disclaimer to insure that consumers were not misled, or (2) only constituted a reasonable restriction on the time, place or manner of advertising, on advertising which (a) was false, deceptive, or misleading, or (b) contained claims as to the quality of services. The court further concluded that *Bates* was expressly limited to the print media and did not apply to the issue of electronic broadcasting, which would warrant special consideration.

The Florida Supreme Court also considered amendments proposed by the Florida Bar, that were based upon Proposal B of the ABA Model Code¹⁶³ and further invited comments from interested individuals and organizations. Despite the criticism of some individuals and organizations that the proposed amendments unreasonably restricted the advertising rights recognized in *Bates*, the court adopted the ABA Model provision with only several minor modifications.¹⁶⁴

The adopted provisions were set forth in Disciplinary Rules 2-101, 2-102, and Ethical Considerations 2-9 through 2-13. DR 2-101, captioned "Publicity and Advertising" provided:

(A) A lawyer shall not . . . use or participate in the use of any form of public communication containing a false, fraudulent, misleading or deceptive statement or claim.

(B) *Without limitation*, a false, fraudulent, misleading, deceptive statement or claim *includes* a statement or claim which:

(1) Contains a material misrepresentation of fact;

(2) *Omits to state any material fact necessary to make the*

162. 380 So. 2d 435 (Fla. 1980).

163. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Proposal B (1970).

164. 380 So. 2d at 439-42.

statement, in the light of all circumstances, not misleading;

(3) *Is intended or is likely to create an unjustified expectation;*

(4) States or implies that a lawyer is a certified or recognized specialist other than is permitted by DR 2-105;

. . . .

(7) Contains a representation or implication that is likely to cause an ordinary prudent person to misunderstand or be deceived or fails to *contain reasonable warnings or disclaimers necessary to make a representation or implication not deceptive.*

(C) A lawyer shall not . . . use or participate in the use of any form of public communication which:

. . . .

(2) Contains statistical data or other information based on past performance or prediction of future success;

(3) Contains a testimonial about or endorsement of a lawyer;

(4) Contains a statement of opinion as to the quality of the services or contains a representation or implication regarding the quality of legal services which is not susceptible of reasonable verification by the public . . . ;

. . . .

(6) Is intended or is likely to attract clients by use of showmanship, puffery, self-laudation or hucksterism, including the use of slogans, jingles or garnish or sensational language or format.¹⁶⁵

This rule further contained various restrictions relating to fee information that could be provided by way of advertising as well as a prohibition against the compensation of members of the media for professional publicity in a news item.

Although adopted prior to the United States Supreme Court's decision in *In re R.M.J.*, DR 2-101 largely fit within the restrictions provided in that case. As previously discussed,¹⁶⁶ the majority in *R.M.J.* recognized a very expansive definition of what constitutes misleading advertising and in so doing, referred to the same ABA model provision utilized by Florida in preparing its standard. This definition includes not only advertising that is outright false and misleading, but also communications that are deceptive to the unsophisticated lay public. Such communications fail to contain all the facts necessary to make them complete, or require reasonable warnings or disclaimers in order to prevent any misleading implications to those unfamiliar with the delivery of legal services.

165. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (1970) (emphasis added).

166. See *supra* text accompanying notes 73-83.

Through its adoption of DR 2-101, the Florida Supreme Court attempted to strike a balance between the competing philosophies espoused in *Bates*. These philosophies are clearly seen in the Ethical Considerations that accompany Canon 2.¹⁶⁷ For example, EC 2-10 recognizes that the primary justification for advertising is the need to encourage the flow of information to the public regarding the availability of legal services. On the other hand, it also warns against the potential for misleading a lay public unsophisticated in dealing with lawyers. Accordingly, it further provides that all publicity must be directed with concern for its effect on laymen. EC 2-9 further emphasizes the attorney's responsibility to preserve public confidence in the judicial system and to protect the public from abuses that might arise out of advertising.

There have been surprisingly few cases to arise under this Disciplinary Rule. In *Florida Bar v. Budish*,¹⁶⁸ an attorney was publicly reprimanded for outright false and misleading advertisements, which indicated that his firm would charge one fee for a particular service, where it in fact charged another. Although recognizing the "great potential" for harm in false and deceptive advertising in which an attorney publicly misleads or deceives the public, the court was satisfied with merely giving the attorney a public reprimand, rejecting the referee's recommendations for probation and additional disciplinary action.

A somewhat more subtle form of deceptive advertising was considered in the case of *Florida Bar v. Kaiser*,¹⁶⁹ which involved a New York attorney who maintained an interstate law firm with an office in Miami. The attorney, who was not licensed in Florida, limited his practice to immigration and naturalization matters in the federal courts and accordingly was not required to be a member of the Florida Bar to practice these specialties. The attorney advertised in various telephone books as well as on television and newspapers of his availability as an attorney, without any disclaimer that he was not licensed to practice in the Florida state courts or that his area of practice was limited. These ads gave rise to the implication, through such omission, that he was authorized to practice law in the Florida state courts.¹⁷⁰

167. See 380 So. 2d 435, 441 (Fla. 1980).

168. 421 So. 2d 501 (Fla. 1982).

169. 397 So. 2d 1132 (Fla. 1981).

170. *Id.* at 1133.

Although the court limited its punishment to an injunction against the attorney to refrain from this type of advertising, the importance of the opinion lies in its recognition that "misleading advertising" subject to regulation is not limited to those ads which contain outright misrepresentations of fact, but also extends to communications that are implicitly deceptive to the average lay person because of omissions of relevant information or the failure to contain reasonable warnings or disclaimers.

In 1980, the Florida Supreme Court also adopted Disciplinary Rule 2-102,¹⁷¹ which referred to the permissible use of professional cards, announcements, signs, letterheads, telephone directory listings, and the like. The main limitations contained in this rule were that the attorney's use of such forms of advertising were permissible as long as they did not contain false, fraudulent, misleading, or deceptive statements within the meaning of DR 2-101(B).¹⁷²

This rule further provided, however, that a lawyer would not be permitted to practice under a "trade name" or other name that was misleading as to the identity, responsibility, or status of the attorneys practicing under it. EC 2-12 further expounded upon the use of trade names by observing:

The name under which a lawyer conducts his practice may be a factor in the selection process. The use of a trade name or an assumed name could mislead laymen concerning the identity, responsibility or status of those practicing thereunder. Accordingly, a lawyer in private practice should practice only under his own name, the name of a lawyer employing him, a partnership name composed of the name of one or more of the lawyers practicing in a partnership, or, if permitted by law, the name of a professional legal corporation, which should be clearly designated as such.¹⁷³

This use of trade names by various law firms to catch the attention of the reader or to obtain a highly visible location in telephone directory listings is an interesting sidelight to the advertising controversy. A review of the 1988 Yellow Pages for Dade, Broward, and Palm Beach counties shows names such as "A AAR Law Office of . . .," "A Advocacy Office of . . .," "A Aardvark Accidents Advo-

171. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-102 (1970), *adopted by* 380 So. 2d 435, 439 (Fla. 1980).

172. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101(B) (1970), *adopted by* 380 So. 2d at 438-39.

173. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-12 (1970).

cacy Office of . . . ,” “A Aaron ABA Academy of Law,” “A Aaron ABA Advocate Attorneys,” “A Aaron Accident Law Offices . . . ,” “A ABA Attorneys,” “A Ability Abogados Advocacy Office of . . . ,” “AAA Advocates . . . ,” “The Ticket Clinic,” “DUI Law Center,” ad nauseum.

Two cases have arisen under DR-102 considering the propriety of such names. In *Florida Bar v. Shapiro*,¹⁷⁴ an attorney practicing law under the trade name of “People’s Legal Clinic, Inc.” was found guilty of violating this rule without extended discussion.

In the subsequent case of *Florida Bar v. Fetterman*,¹⁷⁵ an attorney by the name of Fetterman practiced under the name of “The Law Team, Fetterman and Associates.” In considering the complaint against the attorney, the Florida Supreme Court held that DR-102(B) “does not strictly prohibit practice under a trade name, but rather prohibits use of *any* name ‘that is misleading as to the identity, responsibility or status of those practicing thereunder’ ”¹⁷⁶ Accordingly, the court held that even though the attorney was practicing under a trade name, it was not inherently misleading, since it also included his actual name after it, so that the public would not be unaware of who was to be held accountable for the firm’s actions. In so holding, the court warned, however, that this particular name had reached the outer limits of what it would permit, by observing:

Our approval of the use of the words “law team” and “associates” together with the legal profession’s acceptance of the term “law clinic” should not, however, be taken as an invitation to lawyers to experiment with other terminology to attract the public’s attention. This appears to be the outer limit allowable.¹⁷⁷

In 1986, Florida followed the lead of the ABA once again, by re-drafting the various regulations applying to advertising as part of its overall effort to coalesce all of the various canons, ethical standards, and disciplinary rules into a single document, known as the Rules Regulating the Florida Bar.¹⁷⁸ The provisions of DR 2-101 prohibiting and defining false and misleading communications were trans-

174. 413 So. 2d 1184 (Fla. 1982).

175. 439 So. 2d 835 (Fla. 1983).

176. *Id.* at 838 (quoting MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-102(B) (1970)) (emphasis added).

177. *Id.* at 840.

178. *In re* Rules Regulating the Fla. Bar, 494 So. 2d 977 (Fla. 1986).

ferred over to newly enacted Rules 4-7.1, 4-7.2, and 4-7.4.¹⁷⁹ The central *general* definition of false and misleading advertising contained in subsection (B) of DR 2-101 was largely carried forward in Rule 4-7.1 and 4-7.4, albeit in a slightly different format.¹⁸⁰ The prohibitions against specific types of advertising deemed to be expressly misleading contained in subsection (C) of DR 2-101 were transferred to the comment sections of Rule 4-7.1 and 4-7.2, rather than to the Rules themselves, thereby treating these specific prohibitions as particular applications of the general definition of misleading advertising, rather than as separate rules.¹⁸¹

There were also, however, several major changes in the new rules. The first, was the rules' express recognition of the propriety of television advertising, which had not received specific mention in either the Disciplinary Rules or Canons of Ethics under the prior Code of Professional Responsibility. Rule 4-7.2 specifically includes television among the list of media permitted for legal advertising, while the comment to this section observes:

Television is now one of the most powerful media for getting information to the public, particularly persons of low and moderate income; *prohibiting television advertising, therefore, would impede the flow of information about legal services to many sectors of the public. Limiting the information that may be advertised has a similar effect and assumes that the bar can accurately forecast the kind of information that the public would regard as relevant.*¹⁸²

Although it is not unreasonable to believe that the United States Supreme Court will eventually extend the *Bates* line of cases to expressly allow *some form* of television advertising in the not too distant future, Rule 4-7.2 goes well beyond the line drawn by existing cases as discussed earlier in this article¹⁸³ and instead equates television advertising to all other forms of print advertisements. In so doing, Florida has unwisely chosen to ignore the *Bates* warning that "the special problems of advertising on the electronic broadcast media . . . warrant special consideration."¹⁸⁴

A second major change was the addition of Rule 4-7.3,¹⁸⁵ in re-

179. RULES REGULATING THE FLA. BAR Rules 4-7.1, .2, .4.

180. *Id.* Rules 4-7.1, .4.

181. *Id.* Rules 4-7.1, .2 comment.

182. *Id.* Rule 4-7.2 comment (emphasis added).

183. See *supra* text accompanying notes 109-36.

184. 433 U.S. at 384.

185. This particular change was effective January 1, 1988. See *In re Amendments to the*

sponse to the proliferation of personal injury advertising in recent years. This rule — which is based upon the recognition in *Zauderer* that states may require advertisers to include additional disclosures of information or disclaimers in order to prevent ads from being misleading to the public — requires each attorney to have available for prospective clients upon request a written factual statement detailing his background, training, and experience. Where the attorney claims a special expertise in the handling of certain types of cases, the written information must further set forth the factual details of the lawyer's particular experience, expertise, background, and training in such areas. All advertising on either television or radio must contain a prominent display or announcement that advises the public that such information concerning the attorney's qualifications and experience are available on request. Similarly, all telephone or other commercial direct displays as well as any other print advertising must prominently contain the same statement.¹⁸⁶

One of the most interesting aspects of this rule is contained in subsection (g), which is apparently directed toward those attorneys who have utilized advertising to solicit prospective clients in order to broker or refer them to other trial attorneys in exchange for a referral fee, rather than representing the clients on their own. This subsection provides that the required statement under the rule shall be deemed to be misleading, if it indicates without qualification that the lawyer will handle a particular type of case, where the attorney reasonably expects to call in other trial counsel. In making such a determination, the attorney's prior history in handling such cases may be considered.¹⁸⁷

It would therefore appear that an attorney would violate this provision, where he utilized advertising merely for the purposes of soliciting clients to broker to another attorney in exchange for a referral fee, unless his ads contained the disclaimer that he did not reasonably anticipate handling the case himself. To date, there have been no reported appellate decisions under this section.

The express limitation on the use of trade names contained in Florida's Code of Professional Responsibility was also modified by the supreme court's recent adoption of the Rules Regulating the

Rules Regulating the Fla. Bar, 519 So. 2d 971 (Fla. 1987) (adding Rule 4-7.3 and renumbering the prior Rule 4-7.3 as Rule 4-7.4).

186. RULES REGULATING THE FLA. BAR Rule 4-7.3. See *supra* text accompanying note 80.

187. *Id.* Rule 4-7.3(g). See *supra* text accompanying note 80.

Florida Bar. Rule 4-7.5, which replaced DR 2-102, now provides:

A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 4-7.1 [defining misleading advertising]. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 4-7.1.¹⁸⁸

Once again, Florida has chosen to allow much more leeway in such advertising than required by the United States Supreme Court. In *Friedman v. Rogers*,¹⁸⁹ the Supreme Court upheld Texas prohibitions against the use of trade names by optometrists on the grounds that they posed a "significant possibility" of misleading the public. Although holding that trade names constituted a form of commercial speech, the Court concluded that the use of such assumed names was a significantly different form of commercial speech than that considered in *Virginia Pharmacy*¹⁹⁰ and *Bates*. While these cases involved advertising that conveyed meaningful information relating to the prices of various products or services, trade names on the other hand do not convey such information. Moreover, by allowing the use of such names,

[t]he possibilities for deception are numerous. The trade name of an optometrical practice can remain unchanged despite changes in the staff of optometrists upon whose skill and care the public depends when it patronizes the practice. Thus, the public may be attracted by a trade name that reflects the reputation of an optometrist no longer associated with the practice. A trade name frees an optometrist from dependence on his personal reputation to attract clients, and even allows him to assume a new trade name if negligence or misconduct casts a shadow over the old one. By using different trade names, for its shops under its ownership, an optometrist can give the public the false impression of competition among shops.¹⁹¹

In concluding that the state had a substantial interest in protecting the public from the deceptive and misleading use of trade names, the Court relied upon the fact that the state had carried its burden of creating a record to support such prior misuse. The failure to carry the burden of establishing such a record has marked virtually all of

188. *Id.* Rule 4-7.5.

189. 440 U.S. 1 (1979).

190. 425 U.S. 748 (1976).

191. 440 U.S. at 13.

the Court's cases that have resulted in expansions of permissible legal advertising.¹⁹²

Although the variety of trade names inundating Florida's phone directories probably do not violate the express wording of Rule 4-7.5 itself, they may, however, violate Rule 4-7.2, since the comment to this provision adds the further requirement that "[t]he content and format of a legal advertisement should comport with the dignity of the profession and promote public confidence in our legal system. Advertisements utilizing *slogans, gimmicks or other garish techniques* . . . fail to meet these standards and diminish public confidence in the legal system."¹⁹³ To date, there have been no cases arising under the present amended rule on trade names; however, from these comments and the change in wording of the rule itself, it would appear that a much greater latitude in the use of such assumed names would be permitted than under the prior rule.

D. Post-Zauderer Solicitation Regulations

The decision in *Bates* did not materially affect Florida's ethical prohibitions against either in-person or direct mail solicitation of prospective clients, due to the fact that prior to the subsequent decision in *Zauderer*, Florida considered both forms of solicitation improper under *Ohralik*. Following *Zauderer*, however, the Florida Supreme Court revamped its prohibitions against solicitation with its adoption in 1986 of Rule 4-7.4 of the Rules Regulating the Florida Bar, under which

A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person or otherwise, when a significant motive for the lawyers doing so is the lawyer's pecuniary gain. The term "solicited" includes contact in person, by telephone or telegraph, or by other communication directed to a specific recipient and includes any written form of communication directed to a specific recipient and not meeting the requirements of paragraph (b) of this rule.¹⁹⁴

Although subsection (a) of this rule appears to prohibit both in-person as well as direct mail solicitation, subsection (b) goes on to

192. *Id.* at 12-16.

193. RULES REGULATING THE FLA. BAR Rule 4-7.2 comment (emphasis added).

194. Although initially designed as Rule 4-7.3, this rule was subsequently renumbered by the Florida Supreme Court in *In re Amendments to the Rules Regulating the Fla. Bar*, 519 So. 2d 971 (Fla. 1987).

qualify the general rule by only prohibiting written communications where

(a) The written communication concerns a specific matter and the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter;

(b) It has been made known to the lawyer that the person does not want to receive such communications from the lawyer;

(c) The communication involves coercion, duress, fraud, overreaching, harassment, intimidation or undue influence;

(d) The communication contains a false, fraudulent, misleading, or deceptive statement or claim or is improper under Rule 4-7.1 [defining misleading advertising]; or

(e) The lawyer knows or reasonably should know that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer.¹⁹⁵

Thus, this rule bars in-person solicitation designed primarily for the attorney's pecuniary gain, such as found in *Ohralik*, while at the same time allowing such solicitation where it is motivated by nonpecuniary reasons under the *Primus* and *Button*¹⁹⁶ line of cases. At the same time, this rule permits those types of direct mail solicitation allowed under *Zauderer* and *Shapero*, but also attempts to prohibit extreme and misleading forms of such solicitation, which the Court indicated could be regulated in these cases. To date there have been no appellate decisions reported under this section.

E. The Legislature Gets Involved

In addition to regulations promulgated by the Florida Supreme Court, the Florida Legislature has also attempted to prohibit certain types of in-person solicitation by its passage of Florida Statutes section 877.02, which provides in pertinent part:

(1) It shall be unlawful for *any person or his agent, employee or any person acting on his behalf*, to solicit or procure through solicitation either directly or indirectly legal business, or to solicit or procure through solicitation a retainer, written or oral, or any agreement authorizing an attorney to perform or render legal service, or to make it a business or solicit or procure such business, retainers or

195. RULES REGULATING THE FLA. BAR Rule 4-7.4(b)(2).

196. See *supra* text accompanying notes 51-57.

agreements.

(2) It shall be unlawful for any person in the employ of or in any capacity attached to any *hospital*, sanitarium, *police department*, *wrecker service* or garage, prison or court, or for a person authorized to furnish *bail bonds*, *investigators*, photographers, insurance or public adjustors, to communicate directly or indirectly with any attorney or person acting on said attorney's behalf for the purpose of aiding, assisting or abetting such attorney in the solicitation of legal business or the procurement through solicitation of a retainer, written or oral, or any agreement authorizing the attorney to perform or render legal services.¹⁹⁷

The first subsection of this statute applies to attorneys and their "employees," while the second relates to "third persons" in various capacities where they are likely to have contact with persons needing the services of an attorney.

Although this statute was initially passed in 1959 along with similar statutes in Virginia, Arkansas, Georgia, Mississippi, South Carolina, and Tennessee as a response to the Supreme Court's landmark desegregation decision in *Brown v. Board of Education*,¹⁹⁸ it was never given the same discriminatory construction that resulted in the invalidation of the Virginia statute in *NAACP v. Button*.¹⁹⁹

The constitutionality of this statute was first challenged in *State ex rel. Farber v. Williams*,²⁰⁰ eleven years prior to *Bates*. The attorney, who had been found guilty of soliciting the parents of a minor injured in an accident, argued that the statute violated the first, fifth, and fourteenth amendments to the United States Constitution and section 12 of the declaration of rights of the Florida constitution. The basis of his argument was that the statute (1) was too vague, indefinite, and ambiguous to sufficiently define the acts that would constitute a criminal offense, (2) unduly inhibited the attorney's right of freedom of speech and association, and (3) deprived the attorney of equal protection by the laws.

In rejecting these arguments, the Florida Supreme Court limited the operation of the statute to persons who either received some type of economic benefit from the attorney for recommending the client or had an ongoing agency relationship, by observing that the statute

197. FLA. STAT. § 877.02 (1987) (emphasis added).

198. 347 U.S. 483 (1954).

199. For a further discussion on this point, see Agudo, Pineiro & Kates, *P.A. v. Harper Constr. Co.*, 476 So. 2d 1311, 1315 n.4 (Fla. 3d DCA 1985).

200. 183 So. 2d 537 (Fla. 1966).

does not prohibit the recommendation of an attorney by anyone to another where the one recommending has no relationship or privity with the attorney as the latter's agent or his employee or other similar relationship with the attorney for the purpose of soliciting legal business for him. Thus, the statute does not prohibit the recommendation of an attorney by a mere volunteer or acquaintance who has no prior and continuing relationship as agent or employee or similar status with the attorney recommended which contemplates solicitation of legal business for the attorney.²⁰¹

In upholding the statute, the court relied upon Canon 28 of the Canons of Professional Ethics in effect at the time, which provided that it is unprofessional for a lawyer to suggest litigation.²⁰² The court also drew upon other authorities of the day, which stood for the proposition that since the practice of law is affected with the public interest, the state has the right to regulate and control in order to serve and promote the public welfare.²⁰³

Thirteen years later, in the case of *Pace v. State*,²⁰⁴ the Florida Supreme Court was presented with another opportunity to review the constitutionality of this statute following the rendition of *Bates*, *Primus*, and *Ohralik*. The attorney, who was found guilty of instigating a meeting with a promising high school athlete for the purposes of representing him in obtaining a college football scholarship, raised essentially the same arguments that had been rejected in *Williams*.

The court concluded that neither *In re Primus* nor *Button* were applicable, but that instead the case was clearly governed by *Ohralik*, since the attorney was motivated by financial considerations in his solicitation. Therefore, once again the court upheld the constitutionality of the statute.²⁰⁵

The attorney raised one additional argument, however, not pre-

201. *Id.* at 539.

202. CANONS OF PROFESSIONAL ETHICS Canon 28 (1980), quoted in 183 So. 2d at 539.

203. *State ex rel. Farber v. Williams*, 183 So. 2d 537 (Fla. 1966) (citing *State ex rel. Florida Bar v. Murrell*, 74 So. 2d 221 (Fla. 1954)); *Lambdin v. State*, 150 Fla. 814, 9 So. 2d 192 (1942); 5 AM. JUR. 2d *Attorneys at Law* § 274; Annotation, *Power of Court to Enjoin Attorney from Prosecuting Actions Secured Through Chasers or Runners*, 14 A.L.R.2d 740 (1950) (superceded by Annotation, *Modern Status of Law Regarding Solicitation of Business By or For Attorney*, 5 A.L.R.4th 866 (1981)).

204. 368 So. 2d 340 (Fla. 1979).

205. The constitutionality of this statute was upheld a third time in *Carricarte v. State*, 384 So. 2d 1261 (Fla. 1980), when the Florida Supreme Court affirmed the convictions of an attorney for both extortion and solicitation, where the attorney had threatened a prospective client if the client did not hire him. The court once again relied upon *Ohralik*, as well as the prohibition against solicitation found in the Florida Code of Professional Responsibility.

viously considered in *Williams*. Since article V, section 15 of the Florida constitution invests exclusive jurisdiction over the discipline of attorneys with the supreme court, it was argued that the application of the antisolicitation statute to attorneys violated Florida's constitutional separation of power principles. The court rejected this argument as well, however, by observing:

To adopt this view would be to say that the Legislature may not punish conduct deemed harmful to the public welfare if the conduct also fails within the purview of this court's authority to discipline lawyers for violating the code of professional responsibility in the course of their practice of law. Simply because certain conduct is subject to professional discipline is no reason why the Legislature may not proscribe the conduct.²⁰⁶

It would therefore appear that as long as the antisolicitation statute only applies to conduct prohibited by the Rules Regulating the Florida Bar, there would not be a separation of powers problem under Florida's constitution. On the other hand, if the legislative enactment sought to impose additional restrictions upon attorneys in the practice of law beyond what was proscribed by the Rules Regulating the Florida Bar, a violation of article V, section 15 of the Florida constitution would appear to exist, since the attorney would therefore be subject to punishment for professional conduct in the practice of law otherwise permitted by the Florida Supreme Court.

In recent years, however, the Florida Supreme Court has chosen on a number of occasions to adopt various restrictions imposed on the practice of law by the Legislature under its rule-making power, rather than to declare the statute unconstitutional on this basis. Recent examples where the court has followed this path include its adoption of the legislatively enacted Florida Evidence Code²⁰⁷ and the prohibition against the mention of insurance in medical malpractice cases.²⁰⁸

The most recent constitutional attack on the antisolicitation statute came in the case of *Agudo, Pinerio & Cates, P.A. v. Harbert Construction Co.*,²⁰⁹ in which the statute had been raised by a personal injury defendant in defense of a subsequent suit brought by the plaintiff's attorneys for intentional interference of contract. The case

206. 368 So. 2d at 345.

207. *In re Florida Evidence Code*, 372 So. 2d 1369 (Fla. 1979).

208. *Carter v. Sparkman*, 335 So. 2d 802 (Fla. 1976).

209. 476 So. 2d 1311 (Fla. 3d DCA 1985).

arose as a result of an underlying personal injury action by an employee of the defendant, who had been injured on the job. While the employee was recuperating from his injuries in a convalescent home, one of the staff members suggested to the employee that his employer was not treating him properly and that she had an attorney friend who could help him. The employee eventually retained the law firm to represent him in an action against his employer.²¹⁰

Subsequently, the employer discontinued payment of the employee's medical expenses, which it had been voluntarily paying up until that time. Shortly thereafter, one of the officers of the employer's corporation met with the employee outside the presence of his counsel, and the employee executed an affidavit discharging his attorney.²¹¹ Following that meeting, the medical payments and other benefits were resumed by the employer.

The discharged law firm brought suit against the employer for tortious interference with a contractual relationship. The firm further alleged that the employer had utilized threats and economic coercion to induce the client to abandon his contractual relationship with the law firm and to release all claims against the employer for a sum far below the amount that reasonably could have been expected to have been recovered. The trial court granted the employer's motion for summary judgment.²¹²

During the oral argument on the ensuing appeal, the Third District Court of Appeal raised on its own, the question of whether the attorney's contract was void ab initio by virtue of Florida Statutes section 877.02. Although ultimately remanding the case back to the trial court for a further determination, the court held that for the solicitation statute to pass constitutional muster, it must be construed to require more than a mere referral or recommendation to an attorney. Instead, the statute must be read to require "some form of relationship or agency linking the person covered under the statute and the attorneys."²¹³ Thus, the statute would not apply to situations involving an officious intermeddler, whose communication was not instigated by an attorney, but instead only where the third person acted as an agent for the attorney for the purpose of aiding in the solicitation of his legal business.

210. *Id.* at 1312-13.

211. *Id.* at 1313.

212. *Id.*

213. *Id.* at 1314.

In addition to providing a basis for criminal penalties²¹⁴ and bar disciplinary sanctions,²¹⁵ the antisolicitation statute has also been used by several enterprising attorneys in fee dispute controversies with attorneys previously discharged by their clients, in order to render the former attorneys' contracts void and thus to defeat their claimed fees. In the first such case, *Thomas v. Ratiner*,²¹⁶ a doctor who was also a lawyer entered into a contingency fee contract with a personal injury plaintiff, while the latter was a patient at a hospital where the doctor-attorney worked. Subsequently, the doctor-attorney was discharged, and the case settled by newly retained counsel. The Third District Court of Appeal concluded that the discharged doctor-attorney was not entitled to any fee for his services, since he had entered into his contract in violation of subsection (2) of Florida Statutes section 877.02.

Although the second case to consider this statute, *Spence Payne, Masington & Grossman, P.A. v. Philip M. Gerson, P.A.*²¹⁷ also involved a fee dispute over a personal injury settlement, the application of the statute was much less obvious and appeared to be in conflict with prior cases construing the statute. Following the death of the plaintiff's husband, an attorney's secretary received a telephone call from a friend of the plaintiff, who was also a client of the attorney, notifying the secretary of the death and stating without basis in fact that the decedent's widow was expecting his call. The secretary then called the attorney, who was out of state at the time, and he advised her to hire an investigator to "find out what is going on." The investigator contacted the plaintiff and obtained her signature on a contingency fee contract. Shortly thereafter, the plaintiff met with the attorney, and she signed the retainer agreement.²¹⁸

Subsequently, the attorney was discharged by the client shortly before trial, and the successor law firm retained in his place settled the case for \$1.4 million dollars. In the ensuing fee dispute, it was held that the initial attorney's contract was invalid under the statute, despite the fact that he had acted under the good faith belief that the plaintiff's friend, who had contacted his office, was authorized to do so on her behalf. In light of the attorney's apparent good faith belief

214. See *Carricarte v. State*, 384 So. 2d 1261 (Fla. 1980).

215. See *Florida Bar v. Gaer*, 380 So. 2d 429 (Fla. 1980).

216. 462 So. 2d 1157 (Fla. 3d DCA 1984).

217. 483 So. 2d 775 (Fla. 3d DCA 1986).

218. *Id.* at 776.

and the lack of evidence of any relationship with the friend by the attorney, the result not only seems quite severe, but it is hard to understand how it fits in with *Pace* and *Harbert Construction Co.*

Interestingly, although the antisolicitation statute has been used in a variety of different contexts, ranging from the invalidation of retainer contracts to the assessment of criminal or bar penalties, each of the appellate decisions that have arisen under the statute have involved attorneys, despite the fact that the express wording of the statute applies equally to agents and employees of attorneys as well as various other third persons. Since the prohibition of in-person solicitation has been determined to be a constitutionally permissible state objective in *Ohralik*, there appears to be no constitutional reason to limit the application of this statute to attorneys. In cases involving nonlawyers, however, the statute would have to be given the same restricted reading as in *Pace* and *Harbert Construction Co.*, where it was limited to situations in which there was some form of legal relationship, privity, or agency between the third party and the attorney.

F. Pending Florida Bar Proposals

In July 1989, the Florida Bar Board of Governors passed a comprehensive set of proposed amendments to the existing rules regulating advertising, which are to a large extent patterned after the Iowa guidelines.²¹⁹ These amendments were filed for consideration with the Florida Supreme Court in October, which invited briefs and other comments by December 1 as part of the consideration process, which is expected to take a number of months at the very least. The end result of the process may result in actual rules that are substantially similar or totally different from the proposals.

The proposed amendments contain a number of very substantial changes from the existing rules and are designed to significantly restrict attorney advertising in order to prevent specific abuses that have arisen. The two most significant changes involve the recognition that electronic media advertising may be more tightly controlled than print advertising, because of its unique nature, and an attempt to encourage "informational" communications, while at the same time discouraging advertising that is purely promotional in nature.

The proposed amendment to Rule 4-7.2(b) paraphrases the Iowa

219. See *supra* text accompanying notes 119-36.

restrictions on television and radio advertising by providing:

...

(b) Advertisements on the electronic media such as television and radio, may contain the same factual information and illustrations as permitted in advertisements in the print media, but the information shall be articulated by a single voice, with no background sound other than instrumental music. The voice may be that of the lawyer whose services are advertised; it shall not be that of a celebrity whose voice is recognizable to the public. In the case of electronic media, the lawyer whose services are being advertised may appear on screen or radio. If a law firm advertises a particular legal service on television, and a lawyer in the firm appears on screen to present the advertising message, the lawyer appearing on screen must be the lawyer who will actually perform the service advertised unless the advertisement discloses that the service may be performed by others in the firm. Further, the lawyer who personally appears on television must be a member of the Florida Bar. Under no circumstances shall any person other than a lawyer in the advertising firm appear in any advertisement.²²⁰

Under this rule, dramatizations would also be prohibited as well as the use of celebrities or actors.

The second major change contained in the amendments is the attempt to encourage "informational" advertising, while simultaneously discouraging advertising that is purely promotional. To this effect, the amendment to Rule 4-7.2(n) contains a listing of various categories of information that are presumptively permissible subjects for advertising. This list also mirrors the previously discussed Iowa regulation.²²¹

In addition to being presumptively permissible, such approved "informational" advertising is further encouraged by being exempted from various disclosure requirements contained elsewhere in the amendments. Although encouraging informational advertising, the

220. Proposed Amendments to Rule 4-7.2(d) of RULES REGULATING THE FLA. BAR comment (1929), *reprinted in* FLA. B. NEWS, July 15, 1989, at 3, col. 3-4 [hereinafter Proposed Amendments].

221. The areas of permissible advertising under this rule include the attorney's name, firm members, address, phone numbers, date and place of bar admissions, technical and professional licenses, foreign language ability, fields of practice, various specified fee information, and sponsorship of charitable, civic, and community services. Proposed Amendments Rule 4-7.2(d). Unlike the Iowa rule, *see supra* text accompanying notes 119-36, this amendment does not expressly include membership and offices in professional organizations.

proposed amendments do not go quite as far as the Iowa rules in attempting to prohibit all forms of "promotional" advertising and instead attempt to strike a balance. This attitude is seen in the comment to the proposed Rule 4-7.2, which states in part: "The purpose of advertising should be not *merely* promotion of a particular lawyer or law firm, but *also* the provision to the public of useful information about legal rights and needs and the availability and terms of legal services."²²²

Another important change in the proposed amendments is an attempt to further broaden the concept of misleading and deceptive advertising to include statements, which although technically correct, take advantage of the public's lack of sophistication concerning the delivery of legal services so as to imply a greater expertise on the part of the lawyer than in fact exists. This change, which is seen in the comment to proposed Rule 4-7.1, includes references to specific abuses occurring in Florida, such as law firms advertising that their lawyers are all "juris doctors" or members of the Florida Bar.²²³ While technically correct, the purpose of these statements is obviously to imply a greater expertise on the part of the firm than in fact exists, thereby constituting a misleading or deceptive statement. This proposed amendment also requires attorneys who advertise the handling of personal injury cases on a contingency fee basis to disclose whether the client will be liable for costs in the event of no recovery.²²⁴

Other specific abuses that have occurred in Florida advertising are also addressed in the proposed amendment to Rule 4-7.2. This rule prohibits dramatizations in all advertisements in any medium, self-laudatory statements, and the payment of the cost of advertising by an attorney not in the same firm as the advertiser. This proposal also requires all advertisements that contain statements other than the approved "informational" items to include the following disclaimer: "The hiring of a lawyer is an important decision that should not be based solely on advertisements. Before you decide, we will send you free written information about our qualifications and experience upon request."²²⁵

One of the more controversial changes contained in the proposed

222. Proposed Amendments Rule 4-7.2 comment (emphasis added).

223. *Id.* Rule 4-7.1 comment.

224. *Id.*

225. *Id.* Rule 4-7.2(d).

amendments is the flat out prohibition under Rule 4-7.4 of direct mail solicitation of clients in all personal injury or wrongful death cases.²²⁶ This change was obviously prompted in response to the public outcry and media criticism over such advertising. This proposed amendment also contains various technical restrictions on solicitation letters in other fields, which affect the letter's content, the need for disclosures, and so on.²²⁷

Another area affected by the proposed amendments relates to the use of trade names by law firms. Although proposed Rule 4-7.7 permits an attorney to "practice" under a trade name, it prohibits him from "advertising" under a trade name unless he actually practices under the same name. In order to practice under the trade name, the lawyer must use it in his letterhead, business cards, office sign, fee contracts, pleadings, and other legal documents.²²⁸ The intent of this new rule is to prohibit advertising under nonsensical names utilized merely to allow the attorney to obtain an advantageous alphabetic position in directories.²²⁹

In order to insure compliance with the proposed amendments as well as to assist attorneys in their interpretation, the new rules also create a standing committee on advertising, which is empowered to render advisory opinions. In the event that an advance advisory opinion is not obtained, proposed Rule 4-7.4 requires all advertisements, other than those expressly exempted, to be subsequently filed with the committee for its review. The rule contains various procedures for the filing of such advertisements as well as their review.²³⁰ Finally, in order to assist the bar in the enforcement of the new rules, the proposed amendments to Rules 3-5.1(h) and 4-1.5(A) and (D) provide a mechanism for forcing attorneys to forfeit any fees earned in representing clients who were retained through advertising or solicitation in violation of the amendments.

226. *Id.* Rule 4-7.4.

227. *Id.*

228. *Id.*

229. *Id.* See *supra* text accompanying notes 173-74.

230. Proposed Amendments Rule 4-7.4.

III. IN THE FINAL ANALYSIS

A. The Practical Effect of Advertising

What has been the practical effect of legal advertising? Has it benefited the consumer by either lowering the prices of legal services or improving the flow of information, so as to allow a more informed selection of attorneys? Or has advertising merely benefited certain attorneys at the expense of the legal profession and the public?

The debate over the answers to these questions has raged on in the dozen years since *Bates*. If anything, time has only intensified the arguments on each side as more and more attorneys have chosen to advertise in recent years. Of the attorneys responding to annual surveys conducted by the *ABA Journal*, the percentage who advertise has risen steadily from only thirteen percent in 1984 to thirty two percent in 1987.²³¹

The easiest of these questions to answer is probably the first — whether advertising has lowered the prices of legal services? However, even here there is a sharp difference of opinion.

In attempting to answer this question, the analysis should first focus on the modes of advertising and the types of legal services generally promoted by attorneys today to determine whether fees in these areas have decreased since *Bates*. Contrary to the prediction in *Bates*, the substantial majority of legal advertising has not involved the publication of routine legal services in the print media, but rather television advertising. According to the Television Bureau of Advertising, nearly fifty nine million dollars was spent on television attorney advertising in the year 1987, which represented a twelve million dollar increase over the preceding year.²³² Such advertising has increased annually from a mere \$900,000 in 1978. The greatest strides have been since 1983, growing by at least ten million dollars each year thereafter.²³³

As is readily apparent to anyone who watches television, the overwhelming majority of such advertising is geared to the personal injury practice. Such cases are almost always handled by attorneys on a contingency fee basis. Prior to *Bates*, the customary fee charged for

231. See ABA Comm. on Advertising, Report to the House of Delegates (1988). A 1988 Florida Bar Membership Attitude Survey reached a similar result with nearly 35% of the respondents indicating they intended to advertise in some fashion. Florida Bar, Membership Attitude Survey (1988).

232. Labaton, *supra* note 109, at 21.

233. *Id.*

handling such cases in South Florida was in the range of forty percent of the total recovery. Despite the tremendous onslaught of personal injury advertising subsequent to *Bates*, the amount of such fees has not changed at all in practice.²³⁴

In fact, the Florida Supreme Court has recently determined the need to place a limitation upon such fees by its adoption of Rule 4-1.5 of the Rules Regulating the Florida Bar. Under this rule, contingency fees are now mandatorily limited to thirty three and one third percent of any settlement prior to the filing of an answer and forty percent of any recovery up to the first one million dollars obtained thereafter. Recoveries beyond one million dollars are subject to a sliding scale of fees.²³⁵ The need for such a limitation imposed by the Florida Supreme Court rule is further evidence of the failure of advertising to lower the rates customarily charged in this area.

Hourly and fixed fees have also been largely unaffected by post-*Bates* advertising in South Florida. A review of the 1988 South Florida Yellow Page advertisements clearly shows that price advertising for so-called "routine legal services" is virtually nonexistent. Instead, the typical ads stress the lawyers' *availability* to handle personal injury actions or DUI defenses. A recent article by former Florida Bar President, Russell Troutman stated, "The First Amendment idealists predicted that lawyer advertising would make legal services more available, more competitive, and at lower prices. None of that occurred. Attorney fees have gone up since the advent of lawyer advertising and availability of legal services is the same now as before."²³⁶

Yet some contend that such advertising has resulted in savings to the consumer. For example, in a 1984 survey of legal fees charged for five specific types of defined services in seventeen different cities, the Federal Trade Commission concluded that there was a correlation between higher fees and restrictions on legal advertising.²³⁷ The legal services compared by the FTC study involved the preparation of simple wills and the handling of uncontested personal bankrupt-

234. Compare *Phillips v. Nationwide Mut. Ins. Co.*, 347 So. 2d 465 (Fla. 2d DCA 1977) and *610 Lincoln Rd., Inc. v. Kelner*, 289 So. 2d 12 (Fla. 3d DCA 1974) with *Stabinski, Funt & de Oliveira, P.A. v. Alvarez*, 490 So. 2d 159 (Fla. 3d DCA 1986); *Sanchez v. Friesner*, 477 So. 2d 66 (Fla. 3d DCA 1985); *Kopplov & Flynn, P.A. v. Trudell*, 445 So. 2d 1065 (Fla. 3d DCA 1984); and *King v. Nelson*, 362 So. 2d 727 (Fla. 2d DCA 1978).

235. RULES REGULATING THE FLA. BAR Rule 4-1.5.

236. Troutman, *Why Advertise?*, 302 J. ACAD. FLA. TRIAL LAW. 6 (Nov. 1987).

237. FED. TRADE COMM., IMPROVING CONSUMER ACCESS TO LEGAL SERVICES: THE CASE FOR REMOVING RESTRICTIONS ON TRUTHFUL ADVERTISING (Nov. 1985).

cies, uncontested divorces, and automobile accidents where the defendant admitted liability and the plaintiff suffered no permanent injury.

The methodology utilized by the Federal Trade Commission, however, makes the survey's conclusion highly suspect. First, the choice of legal services, especially in the personal injury area, is hardly representative of the type of services typically advertised by attorneys. Secondly, rather than compare the fees for the chosen legal services in each geographic area both before and after *Bates*, with appropriate modifications for inflation, the FTC instead took on the virtually impossible task of trying to first categorize the degree of restrictiveness of the advertising regulations governing each city and then attempting to make a correlation with the cost for each of the legal services. The initial problem with this approach was recognized by the survey itself:

[There] are enormous conceptual difficulties in translating the bewildering variety of state restrictions into a scale. For example, it is unclear that restrictiveness is a scale. Which is more restrictive, and how much more restrictive: a jurisdiction that prohibits trade names but allows direct mail, or a jurisdiction that prohibits direct mail but allows trade names?²³⁸

Another major problem created by the methodology of the survey was the fact that differences in prices for legal services in various cities scattered throughout the country were the function of many diverse factors besides advertising. For example, such discrepancies in prices were no doubt affected by different costs of living in each of the cities, as well as by significant differences in the nature of the services performed in each jurisdiction due to differences in state law. The comparison was further hindered by the fact that various portions of the survey were prepared in different years.

In an attempt to compensate for these diverse factors and problems, the FTC made significant adjustments in its raw data, which substantially affected the conclusions of the survey. The assumptions chosen to support these adjustments also greatly influenced the final outcome of the survey and are open to great criticism. As a result of these and numerous other problems with the methodology utilized by the FTC, the survey itself was forced to include the disclaimer that "undue weight should not be attached to the actual

238. *Id.* at 88.

percentage point or dollar differences reported in these tables, however, since statistical analysis always carry a degree of imprecision."²³⁹ Thus, the survey was unable to offer any significant quantitative support for its ultimate conclusion.

The question of whether advertising has resulted in improving the flow of information to prospective clients is somewhat harder to answer, since there is less empirical evidence on this issue. One cannot seriously question that the allowance of attorneys to advertise their areas of specialty or interest, whether it be in a telephone directory or on television, has increased the flow of some information to consumers. Nevertheless, since advertising directed toward the "quality" of legal services is one of the few areas which can be permissibly prohibited, there is an inherent limitation on the type or value of information that can be conveyed to the consumer about the attorney's practice, other than to publicize his "interest" in handling a particular variety of cases. In fact, the real irony of allowing attorneys to publicize their areas of "interest," while prohibiting advertising based upon "quality," is the creation of an even greater risk of misleading the public. There may be little correlation between the attorney's desire or interest to handle a particular type of case and his ability to do so competently.

Many critics of legal advertising also point to the fact that present-day television advertising is far different from that contemplated by the Supreme Court in *Bates*, where the attorneys had merely communicated a straightforward listing of their fees for various services. By contrast, television advertising of the 1980's is not only virtually devoid of any discussion of the costs of the attorneys' services, but is also totally lacking in any type of useful information to benefit the consumer in choosing between attorneys to represent his particular interests. Instead, this advertising is designed solely to induce people to retain the advertiser and not in any way to educate or inform the prospective client as originally envisioned by the Supreme Court. The lure of potentially large fees and instant wealth has also led to more and more aggressive advertising by marginally competent or inexperienced attorneys.

These criticisms are borne out by a 1988 statewide scientific polling survey conducted by the Academy of Florida Trial Lawyers, which provides empirical evidence of advertising's failure to substan-

239. *Id.*

tially improve the flow of information to the public. Only twenty seven percent of the respondents to this survey, which was designed to test the public's perception of lawyers who advertise on television, felt that such advertising "either helps people understand their rights [or] informs people of the help available to them."²⁴⁰

Because of these problems, many individuals and organizations have expressed the belief that advertising, especially by television, has merely created a new class of business brokers who do little more than to sign up the cases which they receive through advertising and then refer them out to attorneys specializing in trial practice. For example, the Dade County Trial Lawyers Association, which is a voluntary organization of over 400 trial attorneys specializing in personal injury and commercial litigation, recently determined the need to prepare a public service pamphlet entitled "How to Pick Your Attorney." In this pamphlet, the Dade County Trial Lawyers Association expressed the concern "that mass media advertising merely promotes a particular lawyer without conveying the meaningful information to the public concerning the attorney's experience or qualifications."²⁴¹

Accordingly, the Association set forth a brief listing of sample questions for consumers to ask their perspective attorneys in order to assist them in making an informed choice. The questions, which seek to elicit information typically excluded from such advertising, generally include:

1. Will your firm personally handle my case or will you refer my case to another law firm?
 - (a) If you intend on referring my case to another law firm, why will you do so?
 - (b) If you refer my case to another law firm, what will be your role in handling my case?
2. Which specific attorney(s) will prepare my case for trial?
3. In the event that a trial of my case is necessary, which specific attorney(s) will personally try my case?
4. With regard to the attorney(s) who will prepare and try my case, I would like to know:

240. ACADEMY OF FLA. TRIAL LAWYERS, *ISSUE ANALYSIS OF LAWYER ADVERTISING* (1988) (prepared by Kitchens & Associates) [hereinafter AFTL]. Although the Federal Trade Commission reached different conclusions in its previously discussed report, *see supra* text accompanying note 237, its conclusions were based largely upon a 1979 survey by the Kansas Bar Association. Not only did this survey predate the onslaught of television advertising, but it only measured response to "public service announcements" concerning available legal services prepared by the Kansas Bar Association and not advertising by private attorneys. *Id.*

241. DADE COUNTY TRIAL LAWYERS, *HOW TO PICK YOUR ATTORNEY 1* (1988).

- a) How long have they been licensed to practice law in Florida?
 - b) Are they board certified?
 - c) What experience do they have in preparing cases similar to mine?
 - d) How many cases have they actually tried which are similar to mine?
 - e) What legal and professional organizations are they members of?
 - f) What is the extent of the continuing legal education courses they have taken in the past five years?
 - g) Have they ever been reprimanded or suspended by any state from the practice of law?
5. How will you keep me advised as to the progress of my case?²⁴²

If advertising has not had any significant effect in either lowering attorneys' fees or improving the flow of meaningful information to consumers, what effect has it had? Rutledge Liles, the 1988 President of the Florida Bar, observed the effect in a recent article:

As I travel the state meeting with fellow lawyers, I am constantly reminded of a growing problem that affects us all — erosion of confidence in the law and lawyers. Often the lack of appreciation and esteem is cast simply as an image problem.

. . . Problems with law and the image of lawyers have existed throughout history.

. . . .
 . . . Notwithstanding recognized historical prejudices, few, if any, lawyers would disagree with the statement that at this particular point in history, law, lawyers individually, the legal profession generally, and our system of justice suffer from an unprecedented lack of respect.

. . . .
 . . . One need only review the daily newspaper to see that our profession is a favorite target for journalistic vilification. In fact, as I write this article, I have before me a column which suggests that the legal profession in Florida is in a "state of sleaze." The problem has far-reaching implications, with the cry growing louder each year for lawyer regulation by the Department of Professional Regulation rather than by the Florida Supreme Court. *Our image is tarnished and it affects our ability to function effectively.* We find ourselves increasingly in a defensive posture.²⁴³

242. *Id.*

243. Liles, *The Lawyer in Society - A Role With Responsibility*, FLA. B.J., July-Aug. 1988,

There is no doubt that there are many different causes for this public erosion of confidence in the legal system and lawyers. Some of these causes were outlined by Robert Habush, a former president of the American Trial Lawyers Association, in another recent article:

[I]n the 1970s, Watergate dealt the profession a staggering blow. The culprits were mostly lawyers, including a lawyer-President and the United States Attorney General. As lawyers became more successful in the courtrooms, media coverage fed the misconception in the public mind that most personal injury awards were of the mega variety. When the media reported an unusual, perhaps bizarre, suit or result, again the public generalized and overassumed the frequency of such occurrences; and, of course, as more and more tortfeasors found themselves with judgments against them, they became vocal in their attacks on lawyers who had successfully represented the claimants.

. . . [I]n the 1980s, media coverage of Bhopal and the widely publicized allegations of international ambulance-chasing exacerbated our image problem many times. Naturally, reports of countless civic deeds by trial lawyers everywhere, as well as their pro bono work, were largely unreported. The societal gains from litigation were for the most part ignored: removal of cancer-causing asbestos from schools and homes, of flammable cotton flannel pajamas from the marketplace, of exploding Pinto-type gas tanks from passenger vehicles. Tort law became viewed only as a compensation device — without regard to how it has made life safer for Americans and has worked to control corporate and individual negligence.

The right to trial by jury, a precious gift from our founders, was viewed as an inalienable right only of the criminally accused; the civilly aggrieved were hardly ever considered; and writers, jurists, and columnists often proposed abolition of the civil jury.²⁴⁴

Nowhere can this attitude be better seen than in the recent campaign in support of Amendment 10 to the Florida constitution during the fall of 1988, which was designed to limit noneconomic damages in personal injury actions. Virtually the entire focus of the campaign in support of Amendment 10 was unmitigated lawyer bashing, rather than a discussion of the issues involving the amendment. Typical of the numerous ads critical of the legal profession, was one nicknamed "The \$400 Lunch," which depicted a table full of overweight, sleazy-

at 5 (emphasis added).

244. Habush, *President's Page - The Image of Trial Lawyers*, TRIAL, Dec. 1986, at 6.

looking personal injury attorneys eating lobster, caviar, and other delicacies for lunch, leaving four \$100 bills for the waiter. Although Amendment 10 was defeated soundly by the citizens of this state, obviously this image of attorneys existed in at least some of the public perception.

Florida was not alone in this regard. In California, a measure was also on the ballot in November, 1988 to limit lawyers' contingency fees in all tort cases to twenty five percent of the first \$50,000 recovery, fifteen percent of the next \$50,000 and ten percent of the remainder.²⁴⁵ One of the popular radio spots for this measure featured a voice imitating the legendary Professor Charles Kingsfield of "Paper Chase" fame asking students how much attorneys could charge on a contingency fee case. One student responded, "Whatever you can get away with," while another added, "We can really get away with anything, since the people who control our fees are other lawyers at the state bar."

Although there are many reasons for these public image problems, advertising has no doubt played a great role. It does not take any great leap of faith to understand how television ads adversely affect the image of the profession and the ability of attorneys to act as officers of the court, especially the one for a divorce attorney that showed a chain saw slicing the family couch in half and then turning ominously toward the family dog,²⁴⁶ or another Wisconsin ad where a lawyer draped in jewels and gold chains, rising from a pool, proclaimed that his low cost bankruptcy service will keep customers' heads above the water.²⁴⁷

The previously discussed statewide survey, conducted by the Academy of Florida Trial Lawyers in 1988, of the public's perception of the lawyers who advertise on television provides clear empirical evidence of the harm that such advertising has caused the profession. According to the survey, sixty three percent of the public have a favorable impression of attorneys in general compared to twenty seven percent with an unfavorable view and ten percent who are undecided. On the other hand, sixty nine percent of the general public have an unfavorable opinion of lawyers who advertise compared to

245. Jost, *California Lawyer-Bashing*, A.B.A. J., Nov. 1, 1988, at 51.

246. Labaton, *supra* note 109, at 30.

247. *Opinion Column*, USA TODAY, July 1, 1987, at 2, col. 2. Another noteworthy ad discussed in that article involved an attorney who offered clients a free ten-speed bicycle if he failed to obtain a DUI acquittal for them. *Id.*

twenty three percent favorable and eight percent undecided.²⁴⁸ Thus, while lawyers in general have a five-to-two positive rating, television advertisers have a three-to-one negative rating.

The survey also reveals, however, that this high negative rating for television advertisers affects the remainder of the profession as well. For example, only twenty seven percent of the public consider legal advertising on television a "good public service," while fifty nine percent feel that it is "bad for the public [because] it makes *all* lawyers appear to be unethical and encourages unnecessary lawsuits."²⁴⁹ A majority of respondents, fifty five percent to thirty six percent, similarly felt that such advertising gives "*all* lawyers a bad image," while seventy percent stated that lawyers who advertise on television remind them of "used car salesmen."²⁵⁰

Thus, the unfortunate conclusion of the survey is that television advertising by attorneys not only lowers the credibility of the advertisers in the eyes of a substantial majority of the public, but also significantly impairs the public perception of *all* attorneys. The results of this polling are very similar to other surveys, relied upon by state supreme courts to restrict television advertising.²⁵¹

Television advertising has not been the only culprit in this process, as many offensive, tasteless, and misleading ads can also be found in the local phone book. Some of the ads recently contained in Yellow Page Directories throughout this state make claims such as:

All our lawyers are juris doctors.

Is Your Baby O.K.?

For That Bust You Never Thought Would Happen To You. (an ad from a criminal lawyer)

Can't Afford That Bill? Don't Borrow on Your Home Equity.
Get Rid of Debts and Save Your Home with a Chapter 7
Bankruptcy.

248. AFTL, *supra* note 240.

249. *Id.* (emphasis added).

250. *Id.* (emphasis added).

251. Similar findings were reached in a recent Nevada study of the effects of television advertising on former jurors. Myers, Attorney Advertising: The Effect on Juror Perceptions on Verdicts (1988). In this survey, 63% of the respondents expressed negative opinions toward television advertising by attorneys, while only 39% felt that such advertising helped to inform people of their legal rights or in choosing an attorney. An even more remarkable finding of the study, however, was that 83% of the jurors rendered defense verdicts in cases where the plaintiff was represented by an advertiser, compared to only 40% of the jurors in cases where the plaintiff was represented by a nonadvertising lawyer. None of the potential explanations for this tremendous discrepancy does much to advance the cause of those favoring advertising.

...
INJURED? You May Have a \$\$\$\$ Claim.
We Meet All Advertised Prices.
We Make Hospital Visits.²⁵²

Perhaps the most outrageous one of all is an ad contained in the Santa Monica, California phone directory showing a picture of the attorney's "luxury yacht, the Wild Goose formerly owned by John Wayne."

The damage caused by telephone directory advertising pales in comparison, however, to the havoc wreaked by direct mail solicitation following *Zauderer* and *Shapero*.²⁵³ Such solicitation, especially in wrongful death and personal injury cases, has unleashed an avalanche of highly critical editorials and news articles across this state. Authors of these criticisms complain that accident victims, hereaved spouses and parents, and other victims of misfortune are being inundated with letters from Florida attorneys, while local police departments are being paralyzed by lawyers' demands for copies of accident reports. Some recent statewide newspaper headlines include:

"Scavenger Lawyers" (*Miami Herald*, September 29, 1987).
"Law Firm Sends Wreath After Baby's Death" (*Pensacola News-Journal*, July 17, 1987).
"Take Action on Ghoulisb Attorneys" (*Fort Lauderdale Sun Sentinel*, September 16, 1987).
"Ambulance Chasing Lawyers Have No Place in Profession" (*The Florida Times — Union*, September 28, 1987).
"Soliciting by Lawyers Drawing Criticism" (*St. Petersburg Times*, September 26, 1987).
"Chasing Ambulances — Solicitations Give Lawyers a Black Eye" (*Bradenton Herald*, July 15, 1987).
"Bus Crash Survivors Hounded by Lawyers" (*Fort Lauderdale Sun Sentinel*, September 16, 1987).

Each of these articles and columns recount numerous horror stories of direct mail solicitation following tragedies, resulting in vulture-like images affecting the entire legal profession.

These headlines unfortunately reflect the attitudes and opinions

252. Bianchi, *All our Lawyers are Juris Doctors*, FLA. B.J., Jan. 1989, at 63 (emphasis deleted).

253. According to the Florida Bar, over 250,000 letters of solicitation had been mailed out by the 177 attorneys who had filed with the Bar last year. FLORIDA BAR, SELECTED STATISTICS ON DIRECT MAIL (Oct. 26, 1987).

of Floridians as discovered by the Florida Bar in a 1987 survey designed to measure public attitudes toward direct mail solicitation.²⁵⁴ Of those respondents who had received such advertisements, eighty percent did not believe that the advertisement was totally truthful. Likewise, seventy one percent believed that direct mail advertising was designed to appeal to gullible or unstable people and that such advertising violated the privacy of those who receive such advertising. A majority also believed that direct mail advertising promoted unwarranted and frivolous lawsuits and higher legal costs, while belittling the legal profession.²⁵⁵

Perhaps even more importantly, twenty seven percent responded that their regard for the legal profession and the judicial process had been adversely affected as a result of such solicitations, while eleven percent admitted that direct mail advertising produced such concerns about competency and honesty in the legal profession that it could influence the way they would feel about lawyers or litigants if they were to serve as jurors in a civil trial.²⁵⁶ This latter figure is perhaps the most ominous of all, since, regardless of their feelings, most persons are unwilling "to express the highly unpopular and undesirable opinion that they could ever be biased jurors."²⁵⁷ Therefore, the number of people in fact holding this attitude is undoubtedly much higher.

These findings were also similar to those from a 1988 Florida Bar Survey of Florida Circuit Judges.²⁵⁸ In this survey, twenty three percent of the trial court judges responding stated that potential jurors, witnesses, or parties before them had expressed negative opinions concerning lawyer advertising during trial proceedings. Over two-thirds (67.4%) of the judges reported that they had observed changes in the public's perception of the judicial system directly attributable to attorney advertising, of which 78.6% felt that the impact had been negative.

Even lawyers as a group are negatively affected by attorney advertising. In the 1988 Florida Bar Membership Survey, only five percent of the lawyers responding believed that television advertising was "good," compared to seventy four percent who felt it was poor.

254. FLORIDA BAR, *supra* note 253.

255. *Id.*

256. *Id.*

257. FLORIDA BAR, ATTITUDES AND OPINIONS OF FLORIDA ADULTS TOWARD DIRECT MAIL ADVERTISING BY ATTORNEYS 1 (Dec. 1987) (prepared by Frank & Magid Associates).

258. FLORIDA BAR, SURVEY OF FLORIDA CIRCUIT JUDGES (1988).

An even smaller three percent had positive opinions of direct mail solicitation.²⁵⁹

The result of those negative attitudes was discussed by another Florida Bar President, Ray Ferraro, Jr.:

Reality works against idealism. And the reality is that the *few* lawyers who use mass media techniques and overly aggressive solicitation techniques have a backlash that affects the entire legal profession and the judicial system in its ability to serve the public interest. Quite simply for this reason, if mass media techniques, albeit legal, in effect erode the confidence and trust people place in the judicial system, then the very basis of professionalism has been undermined. Citizens must rightfully be able to trust lawyers and their counsel. If commercials are done in bad taste, if accident victims are plagued by scores of solicitation letters, then such practices (as was the case in the recent Bronson tragedy) belie the trust "substance" of professionalism. As a result, we all are the losers — the profession, the legal system and most importantly, the public.²⁶⁰

Another Article, in tracing a number of these various root problems, has also recently observed:

Disquiet about the size and profitability of today's megafirms is far exceeded, however, by the outrage over what is widely regarded as a litigation explosion and a runaway jury system. Fee-happy lawyers are blamed for everything from high insurance rates to a breakdown in personal morality, while jurors take the rap for financial windfalls paid to undeserving plaintiffs out of the public's pocket.²⁶¹

Inasmuch as this is the underlying attitude of a growing segment of the public, each personal injury ad merely serves to place even further kindling on the fire of public resentment of the profession as a whole.

B. Some Attempted Solutions

A variety of different solutions have been proposed from various quarters. One proposal advanced by the ABA's Commission on Advertising in June 1988 was the adoption of "Aspirational Goals for Lawyer Advertising." These so-called goals, which are expressly nonregulatory and nonbinding, provide in pertinent part:

259. *Id.*

260. Ferraro, *President's Page — Professionalism: A State of Mind as Well as Behavior*, FLA. B.J., Dec. 1987, at 4, 5 (emphasis added).

261. Jost, *What Image Do We Deserve?*, A.B.A. J., Nov. 1, 1988, at 47, 50.

1. Lawyer advertising should encourage and support the public's confidence in the individual lawyer's competence and integrity as well as the commitment of the legal profession to serve the public's legal needs in the tradition of the law as a learned profession.

2. Since advertising may be the only contact many people have with lawyers, advertising by lawyers should help the public understand its legal rights and the judicial process and should uphold the dignity of the legal profession.

3. While "dignity" and "good taste" are terms open to subjective interpretation, lawyers should consider that advertising which reflects the ideals stated in these Aspirational Goals is likely to be dignified and suitable to the profession.

4. Since advertising must be truthful and accurate, and not false or misleading, lawyers should realize that ambiguous or confusing advertising can be misleading.

. . . .

6. Lawyers should consider that the use of inappropriately dramatic music, unseemly slogans, hawkish spokespersons, premium offers, slapstick routines or outlandish settings in advertising does not instill confidence in the lawyer or the legal profession and undermines the serious appeal of legal services and the judicial system.

. . . .

9. Lawyers should design their advertisements to attract legal matters which they are competent to handle.²⁶²

Even these nonbinding proposals, as watered down and un-specific as they are, provoked the opposition of the Federal Trade Commission. In a letter to the chairman of the ABA Commission on Advertising, the Federal Trade Commission's Bureau of Competition urged the ABA not to pass even these minimal aspirational goals:

No matter how guidelines are phrased, they may harm consumers by reducing the availability of truthful, nondeceptive information without providing any countervailing benefit. Furthermore, such guidelines appear to be unnecessary as individual consumers may decide for themselves which advertisements they consider to be undignified and may, if they choose, refuse to patronize lawyers whose advertising they find offensive.

. . . .

. . . The Federal Trade Commission has examined various justifications offered for restrictions on advertising and has concluded that these arguments do not justify restrictions on truthful advertis-

262. *ABA Comm. on Aspirational Goals for Legal Advertising* (1988).

ing. For this reason, the Commission staff believes that only advertising that is false or deceptive should be prohibited.

. . . .
. . . Publication of guidelines on dignity and advertising may harm consumers by depriving them of information that would be useful in selecting a lawyer. Similarly, billboards may be an effective medium for a lawyer to communicate his or her name, phone number and areas of practice.²⁶³

The Bureau's letter to the ABA further referred to the Second Circuit Court of Appeals' decision in *American Medical Association v. FTC*.²⁶⁴ Although the AMA's activities in this case went beyond restrictions on advertising and included prohibitions against certain forms of business organizations and other trade practices, the circuit court's opinion can be read as limiting the AMA to restraining only advertising of its members, that is false or misleading, as defined by the Federal Trade Commission Act²⁶⁵ and activities amounting to in-person solicitation. In light of *Zauderer's* reference to the Act in defining deceptive advertising that can be permissibly regulated, this opinion therefore assumes some precedential value on the issue of regulating attorney advertising.

A much more radical approach was recently taken by the Executive Board of the Georgia Trial Lawyers Association, which is a voluntary statewide organization of trial attorneys, by its proposal of a Code of Ethics, providing in part:

1. We will not, without invitation, communicate directly or indirectly with an injured victim or his or her family in person, by telephone, *by mailing specifically directed to such individuals*, or through paid surrogates or "runners," for the purpose of offering our services with the expectation of earning a fee.

2. We will not seek to exploit the occurrence of a disaster by going to the scene of the locale of a calamity to set up temporary quarters for the purpose of soliciting claims, *nor will we advertise* for prospective clients among those who are injured or the family of those who are killed in such occurrence.

3. We will not advertise for cases which we have no initial intention of handling ourselves, for the purpose of brokering such cases to

263. Letter from Jeffrey I. Zuckerman, Director of the Fed. Trade Comm. Bureau of Competition to Thomas S. Johnson, Chairman of the ABA Comm. on Advertising (Dec. 8, 1986).

264. 638 F.2d 443 (2d Cir. 1980), *aff'd mem. by an equally divided Court*, 455 U.S. 676 (1982).

265. 15 U.S.C. § 45 (1982).

other attorneys.

4. *We will not advertise for cases in the electronic media.*²⁶⁶

At the time of this Article, this proposal had not yet been voted on by the entire organization, however, in the event that it is eventually adopted, it is hard to understand how it can pass constitutional muster, since it prohibits conduct expressly permitted in *Zauderer* and *Shapero*, and would also appear to run afoul of *Goldfarb's*²⁶⁷ anti-trust prohibitions as well.

C. A Proposed Solution

Between these extremes — the useless and the unconstitutional — lie a number of permissible approaches that can balance the public's desire for information with the legal profession's need to maintain the confidence of the public and the high ethical standards of its members. The following proposals attempt to strike this balance within the framework created by the United States Supreme Court in the *Bates* line of cases.

Canon I Misleading Advertising Defined

(A) A lawyer shall not use or participate in the use of any form of public communication or advertisement containing a false, fraudulent, misleading, or deceptive statement or claim.

(B) A false, fraudulent, misleading, or deceptive statement or claim, includes, but is not limited to, a statement or claim which:

- (1) Contains a material misrepresentation of fact,
- (2) Omits any fact necessary to make the statement, considered in light of all the circumstances, including time, place, medium, evidence, and entire message conveyed, not materially misleading,
- (3) Is likely to create an unjustified expectation about the results a lawyer can achieve,
- (4) States or implies that the lawyer is a certified or recognized specialist, other than is permitted under the state's board certification plan,
- (5) Contains a representation or implication that is likely to cause an ordinary, prudent person to misunderstand or be deceived or fails to contain reasonable warnings or disclaimers necessary to make a representation or implication not deceptive, or

266. GEORGIA TRIAL LAWYERS ASS'N, CODE OF ETHICS (1989) (proposed) (emphasis added).

267. 421 U.S. 773 (1975).

(6) Advertises the attorney's willingness, desire, or availability to represent a client in a particular type of matter, where the lawyer reasonably believes that another lawyer or law firm will be associated or act as primary counsel in representing the client. In determining whether such an advertisement is misleading, the history of prior conduct by the lawyer in similar matters may also be considered.

(C) Without limitation, the following types of statements or advertisements shall be considered to be inherently misleading or deceptive per se and prohibited:

(1) Any use of the words "specialist," "specializing in," "expert," "expertise," or any similar words or phrases, implying special skill or expertise in an area of the law, unless the attorney is certified under the state board certification plan, in which case the attorney may use the language permitted thereunder,

(2) A statement which compares the lawyer's services with other lawyers' services,

(3) A statement which advertises the results obtained on behalf of a client or the attorney's record in obtaining a favorable verdict,

(4) Endorsements by clients or well-known "personalities,"

(5) Advertisements containing statistical data or other information based on past performance or predictions of future success,

(6) Advertisements containing a statement of opinion as to the quality of the services of a lawyer, either by the lawyer or any other person,

(7) Communications or advertisements intended or likely to attract clients by the use of showmanship, puffery, self-laudation, or hucksterism, including the use of slogans, jingles, or garish or sensational language or format, or

(8) Use of descriptive words, which subjectively characterize fees or rates, such as "cut-rate," "lowest," "give-away," "below-cost," and "special."

COMMENT

The foregoing definition of misleading and deceptive advertising is patterned after Rule 7.1 of the ABA's Model Rules of Professional Conduct,²⁶⁸ which was expressly referred to in *In re R.M.J.*, as well as a modified version of Florida's recently adopted Rule 4-7.3(g) of its

268. MODEL RULES OF PROFESSIONAL CONDUCT Rule 7.1 (1986).

Rules Regulating the Florida Bar.²⁶⁹ This canon recognizes the many different direct and indirect ways in which advertising statements may be misleading to members of the public, which generally lack sophistication concerning legal services. Accordingly, this canon is meant to be construed with a recognition of the public's comparative lack of knowledge concerning both the law and the delivery of legal services.

Under this canon, not only are statements containing material misrepresentations of fact prohibited, but also those advertisements that would likely mislead the lay public by either creating an unjustified expectation about the results a lawyer could achieve or his level of expertise in a particular area, omitting relevant facts, or containing implications that are not accurate. In considering whether omissions of fact make a statement misleading, this canon adopts the Utah rule, which looks to all the circumstances surrounding it, including the time, place, medium, audience, and entire message conveyed.

Any advertisements by an attorney of his willingness or availability to handle a particular type of matter is *per se* misleading, where the lawyer reasonably believes that he will refer primary responsibility on such a case to other counsel. This canon also abolishes designation plans similar to Florida's because of its misleading nature to the lay public.

Canon II Disclaimers and Required Disclosures

(A) Any advertisement which states that certain cases are handled on a percentage or contingency fee basis, and implies that there is no other charge for attorney's fees or states that there is no charge for an initial consultation, must also contain the following additional disclaimer: "This fee arrangement, however, will not relieve you of your responsibility to pay for litigation costs, which include expenses such as filing fees, expert witness charges, investigation costs, court reporting bills, etc." Where the law governing the particular type of case advertised provides for the award of attorney's fees to prevailing parties, the disclaimer shall contain the further additional language: "You are further warned that under the applicable law if you lose your case, you may be liable to the other party for their attorney's fees as well."

(B) A lawyer may communicate the fact that the attorney does

269. RULES REGULATING THE FLA. BAR Rule 4-7.3(g).

or does not practice in particular field(s) of law, but may do so only in the following manners:

(1) If the lawyer is certified under the state board certification program, the attorney may state as follows:

(a) "Board Certified by the State Bar as having special knowledge, skills, and proficiency in the area of (Area)," or

(b) "Board Certified (Area) Lawyer," or

(c) "State Bar Board Certified (Area) Lawyer,"

(2) If the lawyer is not board certified and accepts only legal matters in that attorney's listed fields of law practice, such listing of fields of law practice shall be preceded by the words "Practice Limited to . . . ," or

(3) If the lawyer is practicing primarily in that lawyer's listed fields of law practice, but also accepts other types of legal matters, such listing of fields of law practice shall be preceded by the words "Practicing primarily in"

(C) Any attorney identifying his areas of practice or limitation in any advertisement must set forth the following additional disclaimer, unless the attorney is board certified by the appropriate state program:

Your decision as to your need for legal services and the choice of a particular lawyer are extremely important decisions and should not be based solely upon advertisements or self-proclaimed expertise. I am NOT board certified by the State Bar in these areas of practice. A statement of my training and experience must be provided to you by my office before you may retain my services. This disclosure is required by rule of the supreme court of the state.

(D) Any attorney identifying his areas of practice or interest in any advertisement must prepare a Statement of Experience, which will be provided to ALL clients prior to the lawyer's retention. This Statement of Experience, which must be signed by the client to acknowledge his or her receipt, will set forth the following information in written form:

(1) The attorney's educational background,

(2) The names and dates of all firms the attorney has practiced with in the state,

(3) The length of time licensed to practice in the state,

(4) All other states licensed to practice in,

(5) Whether the attorney has ever been the subject of any bar grievance or disciplinary action in which some form of sanction or penalty has been entered,

(6) The legal and professional organizations which the attorney is a member of as well as any offices held in each, and

(7) Whether the attorney is board certified. If not, a description of the number of cases actually tried to conclusion by the attorney in the areas of advertisement shall be set forth.

COMMENT

The foregoing disclaimers and required disclosures of information fall within the permissible guidelines established in *In re R.M.J.* and *Zauderer*. The disclaimers contained in section (A) of this canon are necessary to advise prospective clients that even where a case is being handled on a contingency fee basis, they will still be liable for litigation costs.

The disclaimer required in section (B) and the disclosures set forth in (C) are necessary to prevent prospective clients from being misled into believing that an attorney's advertisement of his areas of interest constitutes some type of expertise in those areas. These regulations are patterned after those in effect in Iowa at the time of the *Humphrey*²⁷⁰ line of cases. An attorney who is board certified is not required to set forth the disclaimer contained in section (B).

The disclosure form required under section (D) must be provided to all clients of attorneys who advertise that they handle particular types of cases, prior to their retention by the attorney in the same manner as Florida's Statement of Client's Rights.²⁷¹ This form contains basic information that will allow the client to make an informed decision as to the attorney's level of experience in the area advertised in order to prevent the client from being misled as to the attorney's expertise in the area by virtue of his advertisement.

The required disclaimers and disclosures are specifically directed to correct those potential problems of misleading the public that are most likely to be produced by such advertising. Since they provide additional information to the consumer and are not overly burdensome, these disclaimers and disclosures are of the type contemplated in *In re R.M.J.* and *Zauderer*.

270. 355 N.W.2d 565 (Iowa 1984), *judgment on appeal vacated, remanded*, 472 U.S. 1004 (1985), *writ issued*, 377 N.W.2d 643 (Iowa 1985), *appeal dismissed*, 475 U.S. 1114 (1986) (for want of federal question). See *supra* text accompanying notes 122-35.

271. Client Statement of Rights, 61 FLA. B.J. 69 (Sept. 1987).

Canon III Advertising in the Print Media

(A) Subject to the requirements of these canons, a lawyer may advertise services through public print media, such as a telephone directory, legal directory, newspaper, periodical, or similar advertising media, not involving direct mail solicitation as defined in Canon V, which is published and disseminated in the geographic area in which the lawyer maintains offices or in which a significant part of the attorney's clientele resides. Such advertising shall be limited to informational communications and may not include communications that are solely promotional. The following types of information shall be presumed to be informational and not solely promotional:

(1) Name, including name of law firm, names of professional associates, addresses, and telephone numbers,

(2) Fields of practice, limitation of practice or specialization, but only to the extent permitted by Canon II,

(3) Date and place of birth,

(4) Date and place of admission to the bar of state and federal courts,

(5) Schools attended with dates of graduation, degrees, and other scholastic distinction,

(6) Public or quasi-public offices,

(7) Military service,

(8) Legal authorships,

(9) Legal teaching positions,

(10) Memberships, offices, and committee assignments in bar associations,

(11) Memberships and offices in legal fraternities and legal societies,

(12) Technical and professional licenses,

(13) Memberships in scientific, technical, and professional associations and societies,

(14) Foreign language ability,

(15) With their written consent, names of clients regularly represented,

(16) Subject to applicable disciplinary rules, prepaid or group legal service programs in which the lawyer participates,

(17) Whether credit card or other credit arrangements are accepted,

(18) Office and telephone answering service hours,

(19) Fees for an initial consultation, subject to the provisions of Canon II,

(20) Availability upon request of either a written schedule of fees, or an estimate of the fee to be charged for specific services, or both,

(21) Contingency fee rates, provided that the statement discloses whether percentages are computed before or after deduction of costs and further complies with the provisions of Canon II, and

(22) Fixed fees or ranges of fees for specific legal services or hourly fee rates, provided that in print size at least equivalent to the largest print used in setting forth the fee information, the statement also discloses:

(a) That the stated fixed fees or range of fees will be available only to clients whose matters are encompassed within the described services, and

(b) If the client's matters are not encompassed within the described services, or if an hourly fee rate is stated, the client is entitled, without obligation, to a specific written estimate of the fees likely to be charged.

The description of specific legal services contained in said advertisement must be written in terms so as not to be misunderstood by the average lay person or to be misleading or deceptive. Nothing contained herein shall prohibit a lawyer from permitting the inclusion in reputable law lists and law directories intended primarily for the use of the legal profession of such information as traditionally has been included in these publications.

(B) A copy of each such advertisement or written communication shall be kept by the attorney for three (3) years after its last dissemination, along with a record of when and where it was used.

(C) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of advertising or written communication permitted by these rules and may pay the usual charges of a lawyer referral service or other legal service organization.

COMMENT

This canon is patterned in part after Iowa Disciplinary Rule 2-101²⁷² and Rule 4-7.2 of the Rules Regulating the Florida Bar.²⁷³ This Canon permits advertising of information which would be useful to a

272. IOWA DISCIPLINARY RULES Rule 2-101.

273. RULES REGULATING THE FLA. BAR Rule 4-7.2.

prospective client in reaching an informed decision concerning the selection of an attorney, while prohibiting those communications which act merely to promote the lawyer. This distinction is consistent with the *Humphrey*²⁷⁴ line of cases as well as the opinions in *Central Hudson Gas*²⁷⁵ and *Friedman*.²⁷⁶ This rule defines communications that will be presumed to be informational in nature.

Section (B) of this Canon requires that a record of the content and use of the advertising be kept in order to facilitate enforcement of its provisions. It does not require that the advertising be subject to review prior to dissemination.

Canon IV Electronic Media Advertising

(A) A lawyer may advertise services through electronic media, such as radio or television, but in doing so shall be limited to providing the same information permitted under Canon III. In using electronic media advertising, this information may only be articulated by a single nondramatic voice, with no other background sound. Although a paid announcer may be used for this purpose, an attorney may not use "personalities" known to the general public in order to capitalize or make use of another's name or image. In the case of television, no visual display shall be allowed, except that allowed in print as articulated by the announcer.

(B) All such communications on radio and television, to the extent possible, shall be made only in the geographic area in which a lawyer maintains offices or in which a significant part of the lawyer's clientele resides.

(C) Such advertising shall also be subject to the restrictions and limitations contained in Canons I and V and shall contain all disclaimers and disclosures required under Canon II. In the case of television advertising, such disclaimers and disclosures shall be communicated both visually and auditorally.

COMMENT

This regulation is patterned after Iowa Disciplinary Rule 2-

274. 355 N.W.2d 565 (Iowa 1984), *judgment on appeal vacated, remanded*, 472 U.S. 1004 (1985), *writ issued*, 377 N.W.2d 643 (Iowa 1985), *appeal dismissed*, 475 U.S. 1114 (1986) (for want of federal question). See *supra* text accompanying notes 122-35.

275. 447 U.S. 557 (1980). See *supra* text accompanying notes 131-32.

276. 440 U.S. 1 (1979). See *supra* text accompanying note 83.

101,²⁷⁷ approved in the *Humphrey*²⁷⁸ line of cases. As with Canon III, this provision draws the line between advertising that is of an informational nature and that which is merely promotional, seeking to regulate only the latter in accordance with the dictates of *Humphrey*, as well as *Central Hudson Gas*²⁷⁹ and *Friedman*.²⁸⁰ As noted by the Iowa Supreme Court in *Humphrey* in rejecting the contention that the prohibitions against background sound, visual displays, dramatic voices, and self-laudatory statements are more extensive than necessary to serve the state interests, "All that is prohibited are the tools which would manipulate the viewer's mind and will."²⁸¹

Canon V Trade Names

(A) The use of a trade name or an assumed name by an attorney can mislead lay people concerning the identity, responsibility, or status of those practicing under it, while the use of such a name conveys no meaningful information to the general public. Accordingly, except as otherwise provided in this Canon, a lawyer may only practice under his own name, the name of a lawyer employing him, a partnership name composed of the name of one or more of the lawyers practicing in a partnership, or, if permitted by law, the name of a professional legal corporation, which should be clearly designated as such.

(B) A lawyer or law firm may use the term "clinic" or similar term in a communication with the public only if the practice of the lawyer or firm is limited to routine matters for which the cost of rendering the service can be substantially reduced because of the repetitive nature of the services performed and the use of standardized forms and office procedures. In such cases, the name must also include the name of one or more of the lawyers actually practicing in such firm.

(C) A lawyer practicing as part of a nonprofit organization, whose practice is limited to advancing the non-pecuniary goals of said organization, may practice under the name of said organization.

277. IOWA DISCIPLINARY RULES Rule 2-101.

278. 355 N.W.2d 565 (Iowa 1984), *judgment on appeal vacated, remanded*, 472 U.S. 1004 (1985), *writ issued*, 377 N.W.2d 643 (Iowa 1985), *appeal dismissed*, 475 U.S. 1114 (1926) (for want of federal question). See *supra* text accompanying notes 122-35.

279. 447 U.S. 557 (1980).

280. 440 U.S. 1 (1979).

281. 355 N.W.2d at 571.

COMMENT

This provision is patterned after Ethical Consideration 2-12 of the prior Florida Code of Professional Responsibility.²⁸² Such regulations are clearly permitted by the Supreme Court's decision in *Friedman*,²⁸³ as well as under the test for commercial speech generally enunciated in *Central Hudson Gas*.²⁸⁴ This regulation does not restrict the flow of information to consumers, but merely seeks to suppress assumed names that clearly have a very strong potential to mislead and confuse the public.

Exceptions to this general rule exist in those specified situations where a trade name would supply meaningful information to prospective clients. Low cost legal service clinics or where the firm practice is designed to accomplish nonpecuniary political or organizational goals, such as those of the ACLU or NAACP are examples of such exceptions.

Canon VI Direct Mail Solicitation

(A) A lawyer shall not advertise or solicit business by mail or brochure through the use of any correspondence, communication, letter, brochure, or pamphlet, which

(1) Contains any false, fraudulent, misleading, or deceptive statement or claim as defined under Canon I,

(2) Fails to contain any disclaimer or disclosure of information required by Canon II,

(3) Is sent to a prospective client who the lawyer knows or should reasonably know is represented by an attorney in said manner,

(4) Is sent to any person who has made it known either to the lawyer directly or to the state bar association that the person does not wish to receive such communications from the lawyer,

(5) Involves coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence,

(6) Is sent by a lawyer who knows or should reasonably know that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in em-

282. FLORIDA CODE OF PROFESSIONAL RESPONSIBILITY EC 2-12 (1970) (superceded by RULES REGULATING THE FLA. BAR (1986)).

283. 440 U.S. 1 (1979).

284. 447 U.S. 557 (1980).

ploying the lawyer; any communication under this canon, that is sent to the survivors of a decedent, seeking to represent either the survivors or the decedent's estate in any type of matter arising from said death, shall be presumed to violate this section, if mailed within thirty (30) days of the decedent's death,

(7) Is sent to a person who the lawyer knows or should know is without legal capacity to retain an attorney, including minors and incompetents, or

(8) Is sent to a person indicating that the addressee has a particular legal problem, when such addressee does not in fact have such a legal problem.

(B) Any lawyer advertising or soliciting business by mail or brochure under this canon must follow the following requirements in said communications:

(1) The word "ADVERTISEMENT" shall be marked on both the envelope and on the top of the communication itself in red ink and be at least ½ inch in size; the word "ADVERTISEMENT" shall not be obscured by either letterhead or logo or in any other manner, and any print in the immediate area must be of a different color than red,

(2) Direct mail solicitations may be sent only by regular mail and not by registered mail, courier, or other forms of restricted delivery, which would imply a legal need to respond to said correspondence,

(3) The first paragraph of the communication must state in capital letters: "IF YOU HAVE ALREADY RETAINED A LAWYER FOR THIS MATTER OR DO NOT WISH TO RETAIN A LAWYER FOR THIS MATTER, PLEASE DISREGARD THIS LETTER" and "THIS LETTER IS MERELY AN ADVERTISEMENT AND YOU SHOULD NOT INFER FROM IT THAT YOU HAVE A LEGAL PROBLEM FOR WHICH YOU REQUIRE THE SERVICES OF AN ATTORNEY,"

(4) Lawyers may not state in direct mail communications that the communications have been approved by the state bar or are permitted by the state bar,

(5) The Statement of Experience required under Canon II(C) must be enclosed with all such written communications as well as a copy of the Statement of Client's Rights set forth in Rule 4-1.5 of the Rules Regulating the Florida Bar; an explanation of both of these enclosures must be included in the advertisement, and both must be of the same type size as the advertisement letters,

(6) No contracts for representation may be mailed with the ad-

vertisement letter, and

(7) The advertisement must include a statement advising the client as to the name of the attorney who will actually handle the case and/or trial of the matter.

(C) A lawyer shall not advertise or solicit clients in a particular type of matter under this canon where the attorney reasonably believes that the primary responsibility for handling the case or matter will be referred to another lawyer or firm.

(D) A copy of each such written communication shall be sent to staff counsel at the state bar headquarters and another copy shall be retained by the lawyer for three (3) years. If more than one identical communication is sent to prospective clients, the lawyer may comply with this requirement by sending a single copy together with a list of the names and addresses of persons to whom the written communication was sent, as well as retaining a copy of the same information. Where the communication states, indicates, or implies that the addressee has a particular type of legal problem, the attorney must also supply to the state bar headquarters copies of all court documents or other materials that lead the lawyer to this conclusion along with a written explanation as to how the lawyer discovered such facts and verified their accuracy as to each individual person to which the letter is addressed.

COMMENT

The foregoing restrictions on direct mail solicitation fall within the permissible guidelines allowed under the *Zauderer* and *Shapero* cases. These restrictions include the prohibition of false and misleading statements as previously defined under Canon I as well as required disclaimers and disclosures authorized under Canon II. Section (A) of this canon also seeks to restrict those types of direct mail solicitation that produce specific abuses by utilizing the least restrictive manner, without prohibiting such mailings altogether.

In this regard, subsection (A)(4) provides a mechanism whereby members of the public can inform the state bar association that they do not wish to receive such communications from lawyers. The bar association will maintain such names, and it will therefore be the obligation of the attorney to obtain copies of such lists and to refrain from sending advertisements to persons so listed. An attorney is also charged with the obligation not to send target mail, which implies that a person has a particular problem, to someone who does not in fact have such a problem, which is one of the potential abuses noted

in *Zauderer*.

Subsection (A)(6) of the canon also seeks to protect individuals, who because of their emotional or mental state, are unlikely to be able to exercise reasonable judgment in employing the attorney. In this regard, an attorney may not solicit services in connection with the death of a family member for thirty days following the death in order to allow the survivors to pass through an initial grieving period.

Section (B) of this canon sets forth various requirements that must be complied with by those attorneys utilizing this form of advertising. These requirements are designed to cure specific abuses and problems noted by both the Florida Bar's Special Committee on Solicitation and the Supreme Court's decision in *Zauderer*. Because these requirements seek to prevent such abuses in the least restrictive manner through regulation, rather than prohibition, they comply with the mandate of *Zauderer* and *Shapero*.

Subsection (C) reiterates the rule contained in Canon I. Any attorney advertising which advertises willingness or ability to represent clients in a particular type of matter, where the attorney reasonably believes that the case will be referred to another law firm for handling, is per se misleading advertising.

The remaining provision of this canon allows the state bar association to enforce its rules regulating direct mail solicitation. These provisions are patterned after those found in Rule 4-7.4 of the Rules Regulating the Florida Bar²⁸⁵ as well as containing additional regulations specifically discussed by the Supreme Court in *Zauderer*. One of the specific abuses that this section is designed to combat is that an inadequately targeted letter could lead the recipient to incorrectly believe that he has a legal problem. This section therefore not only requires the attorney to make a reasonable investigation before sending such a letter, but combines with the provisions of section (A) to hold the attorney responsible where this type of problem arises.

Canon VII In-Person Solicitation

(A) A lawyer, either directly or indirectly, may not solicit in-person professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

285. RULES REGULATING THE FLORIDA BAR Rule 4-7.4.

(B) Prohibited in-person solicitation under this canon includes contact in person, by telephone or telegraph, either by the lawyer himself or by any agent, employee, or other individual acting on the lawyer's behalf, where such person receives some economic or other benefit or consideration from the lawyer, either direct or indirect, is in privity with the lawyer, is an agent or employee of the lawyer, or has some ongoing relationship with the attorney contemplating or involving solicitation of legal business for that attorney.

(C) Also prohibited under this Canon is an attorney's knowing retention of a client referred to the attorney by any person in the employ of or in any capacity attached to any hospital, police department, wrecker service, garage, prison, court, bail bonding agency, or insurance or adjusting company, where said person comes into contact with the prospective client in said employment capacity and is in privity with the lawyer, acts as an agent or employee of the lawyer, has some ongoing relationship with the attorney, or receives some economic or other benefit, either directly or indirectly, from the attorney.

COMMENT

The first section of this canon is patterned after the ABA Model Canon that was upheld in *Ohralik* and modified by the Supreme Court's subsequent decision in *Primus*. The section excludes in-person solicitation not motivated primarily by the attorney's economic benefit.

Section (B) of this canon is based upon Florida's antisolicitation statute, in order to prevent such prohibited solicitation through indirect means by using agents, employees, or other persons with whom the attorney has some ongoing relationship. This section is phrased to follow the construction given to the antisolicitation statute by Florida courts in upholding the statute's constitutionality, so as to limit its operation to individuals with an ongoing relationship with the attorney or who receive some type of benefit or consideration as a result of the solicitation and referral.

Section (C), which is also based upon Florida's antisolicitation statute, prohibits referrals by specifically designated individuals who by virtue of their particular employment are likely to come into contact with prospective personal injury and criminal clients. This section only prohibits such referrals where the person comes into contact with the prospective client in the course of employment and further receives some benefit, either direct or indirect, as a result of referral.

D. The Lessons Learned

There is no doubt that attorney advertising is here to stay. It is equally as apparent, however, that regulations — even significant ones — on such advertising are permissible, but only if they bear some relationship to those state interests recognized as being substantial enough to justify interference with the first amendment. The various cases considered by the Supreme Court have taught a number of lessons in this regard.

First, regulations that relate in some manner to correcting misleading advertising have generally been found to pass muster, even when the regulations restrict statements that are only implicitly or potentially misleading. But restrictions based upon a self-proclaimed need to combat perceived damage to the public's confidence in the legal system caused by such advertising have generally failed.

Part of the reason for the lack of success of these latter restrictions has been the failure of the states to prepare the appropriate evidentiary record linking advertising to these type problems. In those cases where such regulations have been stricken, the states have largely relied on sanctimonious platitudes, rather than empirical evidence. On the other hand, when the appropriate evidentiary record has been created, these restrictions have generally been upheld, such as in *Humphrey* and *Friedman*. Thus, the second lesson these cases have taught is that the evidence exists, but the states, like any good trial attorney, must do the work necessary to create a sufficient record to prove their case.

A third lesson from these cases is that outright *prohibitions* on particular forms of advertising will only be upheld in very rare cases, such as with in-person solicitation. On the other hand, less restrictive *regulations* on such communication, such as requiring disclaimers or disclosures of information, have a much better chance of success.

There seems to be still another lesson emerging from these cases as well, although the jury is still out at this time. Several cases, including some considering nonattorney advertising, have upheld regulations making a distinction between advertising that is essentially informational in nature and advertising that is promotional, allowing extensive restriction and even prohibition of the latter. This approach offers a great deal of promise, since it provides a method for satisfying the two often competing policies of encouraging the flow of

information to the public, while at the same time preserving the public's confidence in the legal system.

ARBITRATION AGREEMENTS IN BANKRUPTCY: A MUTANT IS LOOSE (AGAIN!), SYMPTOMS ARE SHOWING, A PALLIATIVE IS SUGGESTED

Mark D. Yochum*

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I. INTRODUCTION

Law reviewing often reflects grand designs of the philosophical perfectibility of man or elevates the conduct and effect of this human activity of lawmaking to scientific certainties or elegant economic responses. Each tack taken is to display law as it is (given the view from the speaker's particular bailiwick) and then to tell what it should be (given the speaker's belief in the good or, at least, better). In law, the scientific or economic approach cannot illustrate with repeatable experiments or illuminate with calculated prediction. These disciplines supply a respected methodology and, perhaps more importantly, metaphor for analysis of the effect of legal principle. Philosophers, not scientists, similarly provided the skills of their classical pursuits to categorize, justify, and explain the law. Most (by volume)

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legal analysis itself, however, is conducted on the lower plane, the simpler discovery of what the law is. While the grand theories concocted in the gray matter may persuade the body of law to alter itself in appearance and function, it is the mundane process of digestion in the legal processes, tearing at, and reconstructing statutes and cases, which chiefly affects the environment of the law.

II. *THE "BODY" OF LAW*

The capacity of the legal system for the breakdown, assimilation, and recombination of the grist of law, chewed by lawyers for driven litigants, seems as great as any omnivorous animal's capacity. Functioning like a biological system, the law is subject to the infirmities that confront the living in a world of change. This animated simile reveals some cautionary tales, which perhaps may be concealed from the ordinary lawyer by an economic model too mathematically inaccessible or philosophical digression too immutably arcane. This Article illustrates a different portrait of the law, as a patient who reacts as bodies do to infection or to internal deterioration or change, or in a broader sense as an environment which, like any living system, may develop unpleasant reactions in those surviving in that system to creations or pollutions let loose. Further, the ordinary processes of the law often compound infection, spreading mutations with ill-regard to overall systemic impact.

A word before examination of the patient, the law of the administration of bankrupts' estates, is in order concerning the nature of a healthy legal system. The analysis of metaphorical health is not an examination of whether the system is designed to achieve a good end, a conclusion that is subject to those philosophical disputes. Rather, the issue of the simple health of the legal system should be measured by whether, because of the system's internal processes for decision-making, the system has become enfevered with a problem that might be easily excised without violence to the great objects of the law. If the law is about to be tested and confused by the mindless, the unknowable, the unpredictable, the unquantifiable, only to have the matter to be resolved at the end of sweat and misery in a way which

is equally guess-filled, why not note the coming ailment and with more immediacy diagnose the cure?¹

Elevated temperatures (manifested here by heated disputes) do have the effect in bodies of destroying the invaders but at some risk. In law, a heightened measure of disputations concerning points may have the effect, in time, of settling those points. Moreover, courts often explicitly recognize that issues raised might be the subject of further furor but refuse to determine those matters finally, in order that the courts might generally see the play-out of the cases as guidance to fashion what is to be the final rule.² Illness in the law often gives rise to evolution and mutation, killing forever the immutably bad, amending for the good the salvageable or profitable.

Nonetheless, if the system has the common cold, the sniffles are not likely to play out examples which will provide special guidance for a universal cure or to provide basic analysis for some fundamental change. The wise would simply try to clear the cold and move on. To this end, the doctrinal style of reviewing the state of the law is counterproductive. Such discussions often lead to an increase in symptoms. At root, what follows is a bloody tale that lawyers often grow to know intuitively. In the body of the legal system, most issues are not great ones and often the answer to the legal issue is not as significant as whether the issue is finally decided.

III. THE POTENTIAL ILL HEALTH OF THE BANKRUPTCY CODE

The subject for examination is the Bankruptcy Code, which now strides onto the scene with a false tone of good health. The Code is a clone, with important and cosmetic genetic reengineering, of the old

1. While abjuring economical modeling because of its inaccessibility to the commonwealth, one must note that biological functions often mirror economic systems' activities. See Wm. H. McNEILL, *PLAGUES AND PEOPLES* 181 (1976) [hereinafter McNEILL]. The notion of economic health of the judicial system has been explained in a similar sense in POSNER, *FEDERAL COURTS: CRISIS AND REFORM* (1985) [hereinafter POSNER]. Uncertainty in the law breeds more cases which, in turn, breed more uncertainty and less uniformity. The system spends too much costly time trying to settle the increasingly unseizable. *Id.* at 119.

2. See *In re B.D. Int'l Discount Corp.*, 701 F.2d 1071, 1077 (2d Cir.), *cert. denied*, 464 U.S. 830 (1983). Judge Friendly, responding to the litigants' request to issue a prospective guideline opinion on whether a putative debtor was "generally not paying" his debts under 11 U.S.C. § 303(h) (1982), suggests such opinions "'are apt in their application to carry unintended consequences which once accomplished are not always easy to repair.' We prefer to see some more cases before we decide." *Id.* (quoting *Sanders v. United States*, 373 U.S. 1, 32 (1963) (Harlan, J., dissenting)).

Bankruptcy Act. Too often we are seduced by the outward body and persuaded that the old are enfeebled and confused. The old Act did not have the sheen or order of its more modern competitors, the Internal Revenue Code or the Uniform Commercial Code. Its sections were scattered, modified by seventy-five years of accretion. Its language was often a peculiar dialect. Often the Act alone did not supply a question's answer but resort was required to odd judicial gloss to come to a conclusion.³ In several concrete areas, jurisdiction and preferences, for example, the answer that the Act gave was often, in this new age of efficiency and certainty, undesirable.⁴

The clean surface, an eager fresh Code, belied an underdeveloped defense system. The Act had the prominent weaknesses of age, the unattractive wrinkles, the stooped gait, the quaint speech, but that elder body, nonetheless, had the strong physical virtue of a developed immunity.⁵ Buffeted by invaders throughout its lifetime and having survived, the old is strong in its environment. The new may be attacked promptly by diseases that the tested thick skin of the old shrugs off.⁶ Immediately, of course, the Code, like H.G. Wells' Mar-

3. The search for historical patina put upon the Act by old courts often ends in the sections of the new Code. *Moore v. Bay*, 284 U.S. 4 (1931), allowing trustee's complete avoidance powers in spite of the amount of the creditor's claim which he assumed, is now in §§ 544(b) and 556(a). The odd gloss continues to be made, of course, and the oddest are those court-made rules which substantially modify the operation of a statute which, by its terms, suggests a contrary result. In *Midatlantic National Bank v. New Jersey*, 474 U.S. 494 (1986), the Supreme Court concluded that § 554, which says the trustee may abandon property, does not mean what it says. See Klee & Menola, *Ignoring Congressional Intent: Eight Years of Judicial Legislation*, 62 AM. BANKR. L.J. 1 (1988).

4. See S. REP. NO. 989, 95th Cong., 2d Sess. 1 (1978) ("The Purpose . . . remains to modernize the bankruptcy law."); H.R. REP. NO. 595, 95th Cong., 2d Sess. 5 (1978).

5. Age in the law may be a quantifiable virtue by those reviewing laws from the economic perspective. In broad stroke, the determinability of legal issues reduces litigation. A full stock of cases, legal capital accumulated over time's test, increases that determinability; conversely, insufficient decisions encourage litigation. See Posner & Landes, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J. LAW & ECON. 249, 270 (1976). Concomitant with age is depreciation which, in law, is manifested by the increasing worthlessness of opinions created by the leisurely flow of the law and the more punctuated mutations which destroy large chunks of precedential value. These severe adjustments may be caused by an insensitive legislature or unprincipled betrayal of stare decisis. Massive changes are justified by values external to systemic wholeness. That is, some good will be achieved such that disruption of the in-place system of law becomes a minor price.

6. McNEILL, *supra* note 1, at 52. ("The entire process of adjustment between host and parasite may be conceived as a series of wavelike disturbances to pre-existing biological equilibria A fluctuating balance then asserts itself These fluctuations tend to stabilize themselves into [an] . . . emerging equilibrium."). The economic metaphor, with more mathematics and less poetry, would agree with this simple structure of growth and change in the law, with new cases unbalancing for a time.

tians, was severely laid down by a constitutional infirmity, a problem to which the old Act had long become immune.

IV. CONSTITUTIONAL INFIRMITIES

With jurisdiction part of our ultimate diagnosis, the all-too-common reference to *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*⁷ is distressingly appropriate. Prior to the Bankruptcy Reform Act of 1978, when the trustee wished to recover a debt owing to the debtor, the action had to be commenced in state court, absent an independent basis for federal jurisdiction.⁸ The issue was further complicated by the irregularly applied notion that a third party might constructively consent to the jurisdiction of the bankruptcy court or that such jurisdiction might obtain because the property in dispute was in the constructive hands of the debtor and his court.⁹ The Bankruptcy Reform Act of 1978 gave us 28 U.S.C. § 1471 which, very theoretically, eliminated the confusion by giving the bankruptcy court jurisdiction over the whole lot.¹⁰ That expanded jurisdiction was declared unconstitutional in *Marathon*. The surgical solution of Congress to the fatal infirmity was to move certain matters to be decided in the district court, by judges of the required eternal tenure.¹¹ Further, bankruptcy court and district court jurisdiction was limited by 28 U.S.C. § 1334(c)(2), which requires abstention from those actions commenced in state courts that could only have been brought there, absent bankruptcy, so long as the matter may be timely adjudicated.¹² (The omnipotent district court is permitted to abstain discretionarily, a matter for more worry later).¹³

The pre-*Marathon* Code contained a grand malady that the unvenerated Act never entertained, a product of the risky mutation Congress attempted.¹⁴ Thus forewarned about the delicacy of a deceptively robust Code, we may tiptoe into its sickroom and examine

7. 458 U.S. 50 (1982).

8. See Triester, *Bankruptcy Jurisdiction: Is It Too Summary?*, 39 S. CAL. L. REV. 78 (1966).

9. *Id.*

10. 28 U.S.C. § 1471 (1982).

11. See 28 U.S.C. § 157 (Supp. V 1984) (as amended, principally by the Bankruptcy and Federal Judgeship Act of 1984, Priv. L. No. 98-353, 98 Stat. 333 (1984)).

12. 28 U.S.C. § 1334(c)(2) (1982).

13. See 28 U.S.C. § 1334(c)(1) (1982).

14. Congress's first attempt at expanding the jurisdiction of the bankruptcy courts included the contemplation that the lack of lifetime appointments for its judges might constitutionally limit that court's jurisdiction. See H.R. REP. NO. 595, 95th Cong., 2d Sess. 1, 48 (1978).

the symptoms of a newer nagging ailment.

V. UNHEALTHY DECISIONS REGARDING ARBITRATION PROVISIONS

A. The Beginning Symptoms

The body part which is in the processes of being most firmly infected is the law of the effect of arbitration provisions in prepetition arrangements with putative bankrupts. The agent of infection is a decision in the law of arbitration of issues which are the product of federal legislation, specifically securities' laws claims. The mutation and migration of the bad agent may be traced with some precision as well as those indicia of the decision which allow us to anticipate its unhealthy effects. The decision is *Shearson/American Express, Inc. v. McMahon*.¹⁵

In *McMahon*, customers of the brokerage sued, using the common language of the disgruntled investor, that fraudulent excessive trades were made, lies were weaved, and material information withheld. This old saw makes an arguable case under section 10(b) of the Securities Exchange Act of 1934¹⁶ and rule 10b-5.¹⁷ Further, the customers' complaint is enough for a claim under the Racketeering Influence and Corruption Act (RICO).¹⁸ The customers, however, as is virtually the universal case in the securities industry, had entered into a standard agreement which called for the arbitration of any controversy arising out of the relationship.¹⁹ Clearly the disputes were covered by the agreement to arbitrate.

Meet the carrier of the coming germ, the Federal Arbitration Act (the "FAA").²⁰ This mosquito of a law, brief but durable, has lasted with little change for a long while. Sections 3 and 4 require courts of the United States to stay all litigation and compel arbitration of issues referable under written agreements. The imperative of the FAA is unavoidable; by its terms it excepts no statutory cause of action. The vitality of its policies can be seen in the limited review available

15. 482 U.S. 220 (1987) (opinion by O'Connor, J., for the five-person majority).

16. 15 U.S.C. § 78(b) (198_).

17. 482 U.S. at 223.

18. 18 U.S.C. § 1962(c) (198_). See 482 U.S. at 223.

19. In pertinent part, the customer agreement provided that "any controversy arising out of or relating . . . to this agreement on breach thereof, shall be settled by arbitration." 482 U.S. at 223.

20. 9 U.S.C. §§ 2-203 (1982).

to courts importuned by parties seeking to avoid arbitration.

Throughout the following pre-mortem, the universal assumption will be made that the dispute between the debtor and another is covered by the arbitration clause; the contracts will contain the language such as "any controversy" and, by other terms or contract implication, is not limited. This assumption is no leap and is justified by the broad scope given traditionally to such provisions. The federal courts' approach under the FAA, absent the problem of implied statutory exception, is limited to the analysis delineated in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*²¹ To avoid arbitration of a dispute, two arguments are possible: that the dispute is not within the scope of the arbitration agreement or that the agreement is void for any reason in "law or equity."²² While fraud, for example, constitutes a reason in law or equity for the invalidity of an agreement to arbitrate, broad arbitration clauses include the issue of fraud in the inducement of the other provisions of the contract within their scope.

In *Prima Paint*, the Supreme Court held that, in actions under the FAA, the issue of whether there was fraud in the inducement of the entire contract was for the arbitrators if the contract contained a clause providing for the arbitration of any controversy. *Prima Paint* sought to avoid arbitration, filing suit for rescission of a contract which it claimed was fraudulently induced by Flood & Conklin's protestations of solvency. The Court held that "where no claim is made that fraud was directed to the arbitration clause itself, a broad arbitration clause will be held to encompass the arbitration of the claim that the contract itself was induced by fraud."²³ Further, a federal court must consider the arbitration clause as severable from the agreement even if under state law, it would not be.²⁴

Back to the future in *McMahon*, the hopeful brokerage moved to compel arbitration pursuant to section 3 and section 4 of the FAA.²⁵

21. 388 U.S. 395 (1967).

22. 9 U.S.C. § 2 (1982) provides these exceptions.

23. 388 U.S. at 402.

24. *Id.*

25. 9 U.S.C. § 3 (1982):

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Both the district court and the Second Circuit agreed that the RICO claim presented too important federal policies to be left to arbitration.²⁶ The district court had concluded, however, that the securities law claim was arbitrable because of national policies favoring arbitration.²⁷ The law of the circuit, however, had been that such claims were excepted from the mandate of the FAA.²⁸ Relying on *Wilko v. Swan*,²⁹ the Second Circuit reversed. In turn, the Supreme Court reversed and held that the FAA required arbitration, and only an irreconcilable conflict between a federal policy and arbitration will permit an implied exemption.³⁰

What follows is not a peroration on the Supreme Court's conclusion; the criticism of the four dissenters is primly surgical.³¹ What is significant is how the conclusion has created a change in the way in which federal statutory policies are measured against the strictures of the FAA, leaving *Wilko* for dead. The Court commits to life a new strain with apparently off-handed consideration of the consequence of that creation beyond the instant case. The immediate perceived consequence (particularly in the narrow view of stare decisis that the majority reveals) must have only been that arbitration will ensue in the securities law context where, in the innocent past, it would have been stopped. The Court, however, at once enlivened the FAA and limited the range of other federal acts, our fresh fragile Code included. Worse, in making this mutation, which will migrate with little need of any unusually swift imagination by the advocate, on the wings of the FAA, little care is given to whether any of the assumptions made concerning the efficacy of this evolution were true.³²

Section 4 of the FAA also authorizes the federal district court to compel arbitration when there has been a failure to comply with the agreement.

26. 482 U.S. at 224 (1987).

27. *Id.*

28. *Id.* As part of the circuit's history of expansion of precluding arbitration of rule 10b-5 claims, the Second Circuit fondly remembered *Allegaert v. Perot*, 548 F.2d 432 (2d Cir. 1977), a case interacting with bankruptcy discussed herein. See *infra* text accompanying note 67.

29. 346 U.S. 427 (1953).

30. 482 U.S. at 239.

31. *Id.* at 242 (Blackmun, J., joined by Brennan, J. and Marshall, J., concurring in part and dissenting in part); *Id.* at 268 (Stevens, J., concurring in part and dissenting in part).

32. The Brief of the American Arbitration Association ("AAA") as amicus curiae in *McMahon* offered statistical support for the notion that arbitration should have been favored over court proceedings. AAA's primary argument was that the burden of securities litigation, as exhibited over 3000 actions filed in district courts in the year before March 1986, represented a continuing flood which only overruling *Wilko* would stem. AAA pointed out there was no empirical data which would have suggested there was illegality practiced in the halls of arbitra-

In *Wilko*, a customer brought an action against a broker for violations of the Securities Exchange Act of 1933 based on transactions under a margin agreement containing an arbitration clause. The Court held that section 14 of the 1933 Act voided the arbitration clause.³³ Section 14 provided that a stipulation to waive compliance with the 1933 Act was void. The Court found that a litigant's choice of forum was a substantial right under the 1933 Act and an in futuro waiver of such right would not be in compliance.³⁴

One of the lawyer-like ways Justice O'Connor consigns *Wilko* to a spectral future (soon to be exorcised completely) is by chaining the decision precisely to its facts, precluding its extension to Exchange Act claims.³⁵ The Exchange Act has no provision sufficiently similar to section 14 of the 1933 Act. Of course, few sue under the 1933 Act. Such subtlety only briefly crossed the minds of lawyers and courts when first tasting *Wilko* years before. *Wilko* was reborn, as lower courts read its praise for general confidence in the integrity of the markets which could only be maintained by judicial supervision of the actions the statutes had created. The preclusion of arbitration was extended to claims under the Exchange Act, the profitable grail of the rule 10b-5 action, because the enforcement of the policies of that statute was perceived as too important to be left to arbitral enforcement.³⁶

Justice O'Connor's notion that stare decisis concerns are somehow mollified by not directly overruling *Wilko* is disturbing. If stare decisis simply means a coequal court's respect for a coequal court's

tion. AAA noted the massive growth of its own organization, a Mom and Pop arbitration store at the time of *Wilko*, swollen to a supermarket of over 45,000 expertly conducted, rapidly resolved disputes annually. Of course, no statistical evidence could be produced that the decisions were correct. As support for the fairness of the process, AAA offered statistics that customers won about 60% of the time. Brief of Amicus Curiae, American Arbitration Association, Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) (No. 86-44).

33. 15 U.S.C. § 14 (1933); see 346 U.S. at 434.

34. 346 U.S. at 435.

35. 482 U.S. at 234 ("While stare decisis concerns may counsel against upsetting *Wilko*'s contrary conclusion under the Securities Act, we refuse to extend *Wilko*'s reasoning to the Exchange Act.") In retrospect, AAA may be quite satisfied with *McMahon*, yet clearly, from the tenor of its brief, the lawyer for the organization must have thought *Wilko* needed to be overruled. See *supra* note 32.

36. *Stockwell v. Reynolds*, 252 F. Supp. 215 (S.D.N.Y. 1965); *Reader v. Hirsh & Co.*, 197 F. Supp. 111 (S.D.N.Y. 1962). *Wilko* was viewed by superior courts as well as providing a philosophy for dealing with theoretical conflicts between the FAA and other federal statutes; *Wilko* was not limited because of its reliance on a provision of the 1933 Act. See *United States Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 360 (1970) (Harlan, J., concurring).

opinion, the doctrine would be insufficient to promote certainty and regularity in the legal process. Simply, as with *Wilko*, a significant, longstanding body of rules had developed in the lower courts from the prior opinion, albeit created from a philosophy evinced in the opinion rather than from strict legal precedential mandates. The limitation of the case to its facts, speciously not overruling it, nonetheless destroys the law created under that decision. Arguments over judicial philosophy, restraint or activism, must begin in part with the nature of respect jurists should have for prior pronouncements.³⁷ Although eschewing oughts as we are, we may note for the metaphorical value of health that assaults on prior decisions, overruling them outright or petrifying them into fossils, does disrupt the legal environment which those decisions had created. While certainly the process of overruling does not always have pernicious effect in sum, the process does engender a loss of equilibrium and certainty and breeds, concomitantly, litigation.

In the Balkans of securities law, the now bloodless *Wilko* was finally staked and put to final rest in *Rodriguez de Quijas v. Shearson/American Express, Inc.*³⁸ In *Rodriguez de Quijas*, the clever claimants against the brokerage included a 1933 Act count in their complaint, which was otherwise filled with the usual Exchange Act and other claims of evil deeds. The district court bound by *Wilko* ordered arbitration of all but that 1933 Act claim; the Fifth Circuit, disregarding Justice O'Connor's speech in *McMahon* concerning stare decisis concerns, said *Wilko* was dead and reversed.³⁹ The Supreme Court, although both in the majority and in dissent chastising the Fifth Circuit for its unwarranted activism, nonetheless agreed.⁴⁰ (Perhaps the ephemeral nature of the concern of the most current holders

37. See POSNER, *supra* note 1, at 217-18.

38. 57 U.S.L.W. 4539 (May 15, 1989) (No. 88-385).

39. See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 845 F.2d 1296, 1299 (5th Cir. 1988).

40. Justice Stevens in dissent makes the following comment:

In the final analysis, a Justice's vote in a case like this depends more on his or her views about the respective lawmaking responsibilities of Congress and this Court rather than conflicting policy interests There are valid policy and textual arguments on both sides None of these arguments carries sufficient weight to tip the balance between judicial and legislative authority.

57 U.S.L.W. at 4542 (Stevens, J., dissenting). Clearly, however, it was *McMahon* which did tip the balance in this area, emboldening inferior courts to play fast and loose with *Wilko*. See footnote 1 of Justice Stevens' dissent for a list of courts which, after *McMahon*, simply disregarded *Wilko*. *Id.* at 4541 n.1.

of seats on courts supreme for the musings of past colleagues is best evidenced by Justice O'Connor's vote with the five-person majority here, with nary a shadow of the stare decisis worry she voiced for *Wilko* in *McMahon*.) The Court concluded that *Wilko* was incorrectly decided because, as we have discovered over the experience of the ages, the right to judicial resolution of 1933 Act claims is not protected by section 14's prohibition against waiver. After all, arbitration is quite fine and will not result in iniquity or inequity.

Wilko's last rites are almost a simple sad tangent in this analysis. As we approach life in bankruptcy, our concern will be implied exceptions from the FAA, an issue not presented by the overruling of the emasculated *Wilko*. Fully buried *Wilko* will provide, however, no vitality to the argument it once championed, that judicial resolution is the product of some more justice than the arbitrator's call.

Beyond its holding which was tenuously justified by its statutory analysis, *Wilko* created or enunciated a philosophy for dealing with competition between statutory rights and the strict FAA. The FAA requires the enforcement of arbitration clauses, save upon such grounds as exist in law or equity for the revocation of the contract. Federal statutory causes of action, arbitrable under the terms of agreements, are nonetheless subject to judicial resolution if the effectiveness of the competing statute would be "lessened."⁴¹ The Court's concern in *Wilko* was that arbitrators could interpret the law in an erroneous or inconsistent manner with decisions that were not reviewable in courts.⁴² Arbitrators lacked judicial instruction and were permitted to award without explanation or reason. With this view of arbitration, the Court inevitably concluded that the right to have judicial resolution of claims invented to effectuate a special federal policy (the confidence of all in the securities market) was mandated in spite of the advantages of arbitration for resolving conventional commercial difficulties (promptness and economy).⁴³

Bankruptcy has thus interacted with issues presented by arbitra-

41. 376 U.S. at 435.

42. *Id.* at 436-37. The FAA does provide a procedure for vacating awards. Section 10 of the FAA permits a court to vacate for corruption, fraud, misconduct, or if the arbitrators "exceeded their powers." The sense of *Wilko* was that this review process was ineffective to preclude extra-legal awards. The grounds for vacation have been characterized as proof that the arbitrators "manifestly disregarded" the law, not merely misinterpreted it. The arbitrator, in the former case, must be shown to have known the law, then disregarded it. *Reynolds Sec., Inc. v. Macquown*, 459 F. Supp. 943 (W.D. Pa. 1978).

43. 346 U.S. at 438.

tion agreements under the color of *Wilko*. As the *McMahon* Court concludes, the origin of the rules of *Wilko* are grounded in the traditional judicial distrust of arbitration which absolutely lacks empirical support.⁴⁴ *McMahon* cheerfully notes how the Court has more recently concluded that arbitrators are quite capable of deciding complex issues, such as antitrust claims or international disputes or securities law claims between brokers and dealers.⁴⁵ Of course, the Court's new conclusion that arbitration does not "entail any consequential restriction on substantive rights"⁴⁶ also lacks empirical support. The Court holds that arbitration is adequate to enforce Exchange Act rights and, while explicitly recognizing the concerns of *stare decisis*, consequently destroys a body of law created over the last thirty years.

B. The Disease

Here is the genesis of our biological problem, a disruption in the state of law. Clearly, no statutory language or rule of construction or anything else mandates the preservation or destruction of *Wilko*. *McMahon* does not preclude judicial interpretations which might determine that arbitration of issues under different federal statutes should be enjoined. Given the choice of preserving the environment versus the introduction of new bacteria, should not the presumption be in favor of preservation, absent the presence of a condition of illness, manifested in the law by confusion or injustice, or by a clear indication that by some notion of progress the world will be a better place?

The root determination to both decisions, *Wilko* and *McMahon*, is a guess about the unknowable (with the required incantation of doctrinal mumbo-jumbo), whether the decisions of arbitrators will be different from the decisions of judges and juries. By definition, one can never know if the arbitrated case would have fared differently in court. While the speed and economy of the typical arbitration would exceed the speed and economy of typical judicial resolution, a conclusion not subject to real debate, particular cases will deviate from that norm. In the environments that arbitration has touched, litigants seem to believe that there is a difference in result, if such belief can be considered manifested by the number of actions of those seeking to avoid arbitration in spite of having entered into such contracts. If

44. 482 U.S. at 233.

45. *Id.* at 232.

46. *Id.* at 232-33.

persuaded that the results do differ, we might charitably ascribe the variance to the special expertise arbitrators should have and the brand of equity that they are rumored to practice rather than the admission of evidence a judge would not hear, the disregard of statutes or their spirit, or an institutional bias to one side of the action.

Arbitration has its virtue in the rapidity with which disputes are brought to a head and concluded. This virtue, in turn, lightens the load of the public courts which view any expanse of jurisdiction with horror and any litigation as vice. If justice were done with regular equality in both fora, the economy in process would be sufficient justification for the conclusion in *McMahon*. But, as lawyers know, we argue with rules, doctrines, and philosophies to courts about such matters because sociological data, ever suspect, is rarely brought to the fore as even modest support for the ultimate assumptions the courts must make when they change the law. Often, the magi make the correct choice (within their view of progress) because their intuition is correct or inspiration divine. In this mundane area of arbitration, however, how could one possibly know the appropriate course such that judicial resolution is appropriate? Let Congress make the grand errors in euthenics.

Men come from the Moon, a lifeless place for all we know, under wraps and under care for an incubation period to insure, commensurate with our simple abilities, that no radical germ of the cosmos can escape and murder us all. The risk seems rare but the gravity of harm great. While the carping here has been that we should be as timid in the law as we are with our space in the introduction of mutations, nonetheless a mutation we have, an unexpected invader into the Code's processed hide which has begun to raise rashes.

McMahon handily provided an immediate example of the application of the post-*Wilko* examination that courts might engage in examining claims or rights created by federal statutes but clearly arbitrable under outstanding agreements. Neither the RICO statute or its legislative history mentions the applicability of the FAA. The Court posits that the appropriate test to determine whether arbitration should be ordered is whether there "is an irreconcilable conflict between arbitration and RICO's underlying purposes."⁴⁷ The litigants

47. *Id.* at 239. Of course, the Court took no time in reviewing whether the Exchange Act policies precluded arbitration, because it had amply decided in other contexts that such policies did not conflict, and because the historical preclusion was a product of an aberrant reading of old *Wilko*.

offered only three policy grounds for suggesting the nonarbitrability of RICO claims: complexity, overlap with criminal sanctions, and the ever-vague public interest.⁴⁸

That the conflict must be "irreconcilable" to preclude arbitration must decide more than most cases because more than most lawyers can fashion arguments that will suggest that there is no reason why arbitration does not effectively act as courts do, only quicker. In fact, the key reasoning in the Court's limitation of *Wilko* to its facts is that the traditional handicaps of arbitration, enumerated in *Wilko*, were the delusions of suspicious jurists, hogtied and blinded by a history of unthought-out aspersions on nonjudicial processes. In dealing with the notion that RICO claims are too complex for arbitrators, the Court deftly notes the longstanding belief in the expertise of arbitrators.⁴⁹ To counter the claim that interaction with a criminal statute should preclude arbitration, the Court notes simply that arbitrators have handled antitrust claims adequately, in spite of those claims' criminal relatives.⁵⁰

Finally, we have turned full circle, to a litigant claiming that the public interest requires a public forum for his claim. RICO provides for treble damages and the customers argued that arbitration of such claims would inhibit the private attorney's general role, contemplated by the statute. Happily the Court intones that "there is even more reason to suppose that arbitration will adequately serve the purposes of RICO," more than it serves antitrust enforcement.⁵¹ At best, the Court's rationale for this conclusion is that few real criminals seem to be involved in RICO civil actions.⁵² Consequently, little need for a populace of private attorneys general prosecuting in public courts exists.

Importantly, the Court's analysis does not provide an immunity to the FAA from assault based upon an implied exception. An enthusiasm for the immediate calcification of the law produced by a plain language interpretation of the FAA might have precluded later pene-

48. *Id.* at 239-40.

49. *Id.* at 239 (relying on *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) which held that federal antitrust policies were insufficient to preclude international arbitration).

50. *Id.*

51. *Id.* at 241.

52. *Id.* (relying on *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 506 (1985) (Marshall, J., dissenting), for the proposition that fewer than 10% of RICO civil cases involve professional criminal activity).

tration by marauding litigants with another federal statute in hand. The FAA by its terms has no exception. Clearly, however, arbitration is to be the favored manner of disposition and, given the laudatory description of the arbitration processes, it seems unlikely that a court should conclude that a federal statute impliedly precludes arbitration. With this long slice of gene, the mutant agent, *McMahon*, lurks along the border of the ecosystems of bankruptcy and arbitration. Take caution. Now, here is the Code view of arbitration, to the extent settled and slightly unsettled, of the effect of pre-dispute arbitration agreements in bankruptcy, law made through *Wilko*, colored by the special arrogance of power that the equitable courts of bankruptcy often take. Applying *McMahon* to these newly old rules will create confusion and uncertainty. In large measure the fever will not be manifested by the dizziness and disorientation of a lack of decisions but rather by a fungal overgrowth of decisions in which delirious litigants will fumble for exits and jurists will hallucinate mirage policies, fabricating false oases of reason. The objective, however, is not, at any point, to suggest which course judicial resolution of these issues should take but to illustrate that the speculative nature of *McMahon* may create contradictory conclusions with respect to particular issues and throughout the Code generally. The courts of bankruptcy are about to become enfevered with *McMahon*, producing no more reasoned decision making and no new principle to advance the state of Western law.⁵³

Debtors often are parties to contracts calling for arbitration of any controversy arising out of the contractual relationship; these contracts are collectively bargained labor agreements, customer-broker arrangements, construction contracts, and the full panoply of commercial deals and leases. The arbitration clauses at issue are those entered into by the debtor prior to bankruptcy.⁵⁴

53. In the process of becoming extinct bit by bit, *Wilko* has been observed as influencing fewer bankruptcy resolutions of arbitration issues and consequently destabilizing the fragile state of the law. See Deitrick, *The Conflicting Policies Between Arbitration and Bankruptcy*, 40 BUS. LAW. 33, 45 (1984) ("The best solution would seem to be to compel arbitration of factual disputes . . . and to retain those disputes that the bankruptcy court decides, in its discretion, are permeated with purely bankruptcy issues."). See also Comment, *Balancing Section 3 of the United States Arbitration Act and Section 1471 of the Bankruptcy Reform Act of 1978: A Bankruptcy Judge's Exercise of "Sound Discretion,"* 53 U. CIN. L. REV. 231 (1984). No one suggests, however, that the cases in this area will deeply influence the development of law. Nonetheless, this review of *Wilko*'s erosion has inspired this Article's title that the mutant has been loosed again.

54. Pre-dispute arbitration agreements entered into by the debtor pre-bankruptcy are at

No provision of the Bankruptcy Code explicitly deals with the efficacy of these clauses. If parties to these arrangements, either the debtor or a party in interest, seek to avoid arbitration, presumably irreconcilable conflicts between arbitration and the purposes of the Code must now be demonstrated.

The exposed flesh in bankruptcy upon which the FAA will alight is the common organ of insolvency activity. The holder of a claim seeks arbitration of that claim or the trustee seeks arbitration of an action the estate has against a third party (or, perhaps, a claimant) to recover an asset. Of course, the parties may be reversed in their enthusiasm for arbitration, the claimant may seek to avoid arbitration of his claim or the trustee may be reluctant to arbitrate the recovery of the estate's property. What must be a disturbing burr irritating the observer of the logic of litigants here is that, if the results of arbitration are substantially similar to court processes as the Court suggests in *McMahon*, why have there been tooth and nail fights to obtain or avoid extrajudicial process? In part, the ability to force arbitration is an economically useful chip which parties use in bargaining because they believe that, in some significant way, the results will differ or the cost of litigation in the alternative forum creates for them some competitive advantage. Naturally, arguments have been cast in the form of evaluating competing policies of statutes, rather than a search for justice. Further, the test of policies, this weighing of processes, is often decided by the peculiar context of the Code provision at issue and which party was seeking arbitration. Nonetheless, while certainly a singularly mixed body of law, the principal theme of the interaction of arbitration and bankruptcy has been that the FAA does not compel arbitration in bankruptcy but that the court may allow arbitration to ensue, in its discretion.

issue here. Initially, the bankruptcy rules have historically permitted the court under the bankruptcy rule, 11 U.S.C. Rule 9019(c) (1982 Supp. V 1987), and its predecessors, to authorize arbitration of matters affecting the estate upon the stipulation of the parties. In other words, this provision authorized arbitration where no contract to arbitrate existed. *See* *Tobin v. Plein*, 301 F.2d 378 (2d Cir. 1962). Additionally, in rehabilitative bankruptcy, where the debtor-in-possession or trustee enters into a contract containing an arbitration provision, no tension is readily apparent between bankruptcy policies and the FAA. A tension may arise when rehabilitation is no longer possible. Congress has recently considered, in a variety of proposed acts, embodying this loose rule in statute. For example, the proposed Judicial Improvements and Access to Justice Act would "allow the referral to arbitration of any civil action (including any adversary proceeding in bankruptcy) pending before it, if the parties consent to arbitration." H.R. Rep. 149, 100th Cong., 2d Sess., 134 CONG. REC. 10430 (daily ed. Oct. 19, 1988).

C. Preventative Medicine: *Zimmerman v. Continental Airlines*

The last great pre-*McMahon* case sets forth the culmination of wisdom on the interaction of the Code and the FAA, *Zimmerman v. Continental Airlines*.⁵⁵ Pursuant to a liquidated damages clause, Continental withheld \$200,000 of a payment due to Ludwig Honold Manufacturing Company, the debtor, when delivery of certain vehicles was delayed. The trustee initiated an action in the bankruptcy court, alleging the claim to liquidated damages was improper. The contract contained the nearly ubiquitous agreement to arbitrate any controversy. Continental sought a stay pending arbitration.

The Third Circuit held that the Code impliedly modified the FAA such that arbitration, even in the face of an agreement, is left to the sound discretion of the bankruptcy judge.⁵⁶ In this case and historically, bankruptcy courts have routinely concluded that ordering or allowing arbitration is a matter of their discretion.⁵⁷ Often, lower courts concluded that the disposition of claims and actions was so within their plenary power that reference to the FAA was regularly not even made.⁵⁸

The Third Circuit recognized that the FAA requires any federal court, by its terms, to stay court action and refer the controversy to arbitration. Using *Wilko* for form, the court weighed the competing policies of the two statutes. The policy of the FAA is that it promotes speedy resolution, not subject to the annoying interferences of courts, and has the virtue of being the method agreed to by the parties. The Code, however, has the policy of the reduction of delays, expenses,

55. 712 F.2d 55 (3d Cir. 1983).

56. *Id.* at 59-60.

57. *Zimmerman* relied on no pre-Bankruptcy Reform Act bankruptcy case for the conclusion that the Code impliedly modifies the FAA and, implicitly, leaves contracted for arbitration to the court's discretion. The Third Circuit did note the decision of *Cross Electric Co. v. John Driggs Co.*, 9 Bankr. 408 (Bankr. W.D. Va. 1981). In that case, the debtor sought recovery on a contract against a nonclaimant. After concluding that it had jurisdiction over the matter, the court easily concluded that arbitration called for by the contract need not be ordered because of concern over "protracted arbitration" and the need for "prompt disposition" in view of the debtor's ongoing rehabilitation. *Id.* at 412. Further, *Cross* and, slightly more obliquely, *Zimmerman* reject *Schilling v. Canadian Foreign Steamship Co.*, 190 F. Supp. 462 (S.D.N.Y. 1961), see *supra* note 118 and accompanying text, which had suggested that, in instances where trustees sought recovery against a nonclaimant, arbitration must be ordered.

58. A typical case is *In re Good Hope Industries, Inc.*, 16 Bankr. 719 (Bankr. D. Mass. 1982), where the debtor sought arbitration of a counterclaim it had against a claimant. It appears that no parties raised the FAA and certainly the court made no mention of that statute's imperatives. The court believed that there was no disputing its discretion. *Id.* at 722. See also *F & T Contractors, Inc. v. Muzar*, 649 F.2d 1229 (6th Cir. 1981).

and duplication evinced by the so-called expanded jurisdiction. The court points to the fragility of the estate and the demands of rehabilitation as arguing for expeditious resolution.⁵⁹ Simply, the court concluded that allowing free application of the FAA and, concomitantly, arbitration would reanimate the evils that the great new expanded jurisdiction sought to cure. Consequently, easily in the *Wilko* world, the Third Circuit holds that, while certainly the court could stay itself and allow arbitration, such stay is left to its sound discretion.⁶⁰ The test for abuse of that discretion is whether its exercise was "arbitrary, fanciful, or unreasonable."⁶¹

Does the *Zimmerman* holding survive *McMahon*; are there irreconcilable conflicts between the Code and the FAA? The manifestations of the coming infirmities have surfaced. *In re Monge Oil Corp.*,⁶² involved a trustee's attempt to reject a contract with Merrill Lynch as executory. The trustee contemplated an action against the broker for improper investment and churning. The trustee feared the "any controversy" arbitration clause and sought initially to avoid the provision through the expediency of rejection. The court cautioned the trustee that his conclusion that rejection could eliminate the requirement of arbitration is very uncertain. Equally uncertain is the converse, that acceptance of an executory contract means that arbitration cannot be avoided.⁶³ The court gleefully noted that the mere presence of the arbitration clause does not make the contract an executory one and that the continuing validity of *Zimmerman* in the face of *McMahon* was not at issue.⁶⁴ The court mused that, in the *McMahon* world, absent Code policies, the arbitration agreement would be enforceable.

In order to preserve *Zimmerman*, that is discretionary control over the order to arbitrate, one must justify its conclusion with respect to the policies of the Code which are in theoretical conflict with the FAA. The source of the Third Circuit's conclusion that the Code

59. 712 F.2d at 58-59.

60. *Id.* at 59-60.

61. *Id.* at 60.

62. Bankr. L. Rep. (CCH) ¶ 72,237 (Bankr. E.D. Pa. 1988).

63. *Id.* at 92,751.

64. *Id.* at 92,752. The conclusion that an arbitration provision alone is insufficient to render a contract executory is unassailable. If all that is left to a contract would be to arbitrate claims, a trustee could not through rejection avoid those claims. The great Countryman definition requires that a failure of performance on either side would result in a material breach. Countryman, *Executory Contracts in Bankruptcy*, Part 1, 57 MINN. L. REV. 439, 460 (1973). The obligation to arbitrate is not in that mix.

favors centralized, rapid resolution of actions by trustees was based largely upon the expanded jurisdiction in our new Code. The grant of jurisdiction has been modified, due to *Marathon*, to require abstention from those actions which have started and could not have been commenced in a federal court without the expanded jurisdiction provided for bankruptcy-related disputes.⁶⁵ The restriction on this exception is that the matter must be capable of timely adjudication in the state court. Because the FAA requires state courts to enforce arbitration agreements also, once reaching state court, such matters might necessarily be referred to the arbitrators.⁶⁶ Of course, one may argue that the jurisdictional amendments were occasioned by the constitutional infirmity of the less than life-long tenure of the bankruptcy judges and, as such, do not affect *Zimmerman's* overall conclusion with respect to the policies of the Code toward centralized resolution of disputes.

Assuming the recitation of the competing policies is accurate, it is difficult to see logically and impossible to demonstrate empirically that the policies conflict in any way. Both statutes have as their aim the rapid resolution of disputes. Given court congestion, even in bankruptcy, for the resolution of disputed matters, the conclusion that court proceedings will move more rapidly than arbitration must

65. In *Ram Construction Co. v. Port Authority*, 49 Bankr. 363, 367 (Bankr. W.D. Pa. 1985), the court held that the mere existence of an arbitration clause in a disputed contract did not mean the debtor's action could not have commenced in federal court, a prerequisite to abstention. *Id.*

66. Some small niceties exist with respect to state courts' responsibility under the FAA which in § 3 requires a stay pending arbitration and in § 4 requires a court to order arbitration. While § 3 has been held to apply to states, some doubt existed over whether state courts must order arbitration. See *Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983). State courts, however, have generally held that their courts must order arbitration. See *GAF Corp. v. Werner*, 66 N.Y.2d 97, 485 N.E.2d 977, 495 N.Y.S.2d 312 (1985), *cert. denied*, 475 U.S. 1083 (1986). California courts had recalcitrantly concluded a related issue: whether state-created rights to judicial resolution precluded enforcement of arbitration agreements in the face of the FAA. In *Perry v. Thomas*, 482 U.S. 483 (1987), the Court concluded that the FAA preempted a California labor statute which precluded arbitration of wage claims, relying on *McMahon*. Justice O'Connor dissented, arguing the paean to arbitration and the superiority of the FAA was not meant to decide preemption of state statutes. 482 U.S. 483, 493 (1987) (O'Connor, J., dissenting). How state statutes can prevail in policy where the strong federal statutes, both of securities and antitrust, could not, is difficult to fathom. Worse, Justice Stevens, in dissent, made a hair split which, if reduced to common practice, might render the value of any opinion minimal. Agreeing with Justice O'Connor that state preemption should be decided by Congress, Justice Stevens admitted: "The dicta in some of these recent cases are admittedly broad enough to cover this case . . . , but since none of our prior holdings is on point, the doctrine of stare decisis is not controlling." *Id.* at 493 (Stevens, J., dissenting). Once again, a narrow, unhealthy view of stare decisis is displayed.

be, at best, only occasionally true. Costs may increase with arbitration as the debtor will be forced to other fora, but that additional cost may be evanescent. The conflict of policies does not seem at all irreconcilable.

The action in *Zimmerman* essentially was one by the trustee to recover an asset of the estate, enforcing a cause of action which is property of the debtor. Prior to the adoption of the Code, in the days of the Act sans inflated jurisdiction, trustees were still successful in avoiding arbitration. In *Allegaert v. Perot*,⁶⁷ the Second Circuit reversed district court orders, staying a trustee's action against a number of brokerage firms and related entities based upon a complex scheme which had defrauded the debtor. The debtor, a broker as well, and the defendants would have been required to arbitrate any controversy by reason of agreements between them and because of the constitution of their exchange.⁶⁸ The court analyzed the claims of the trustee in two aspects, those claims which were the debtor's actions and those actions available to the trustee simply because of the interposition of the bankruptcy proceedings.

A short dive into a related lymphatic pool at this interlude is appropriate to present a common limitation on the arbitrability of controversies in order to explore *Allegaert's* distinction between claims of the debtor and claims of the trustee. A common way to avoid arbitration is to convince the reviewing court that the controversy is not within the scope of the agreement. An agreement for the arbitration of any controversy, the common locution, is enormously broad but contractually could not contemplate those actions which could not arise but for bankruptcy, those actions a trustee gets that the debtor does not have. In other words, the trustee was not a party to the arbitration agreement. In *Allegaert*, several of the trustee's counts dealt with preferential or fraudulent transfers which he sought to recover. The debtor could not have brought an action for recovery; the trustee's action is either specifically granted him under the statute or is the product of the trustee standing in the shoes of

67. 548 F.2d 432 (2d Cir. 1977).

68. Outside bankruptcy, these "intramural situations," exchange member against exchange member, were excepted from the *Wilko* rule precluding arbitration. *Id.* at 437. See also *Coenen v. R.W. Presspich & Co.*, 453 F.2d 1209 (2d Cir. 1972). This exception was premised on the notion that regulation of the industry had been left to the exchanges and that the collective wisdom of the brokers and dealers on the method of their dispute resolution should be respected. *Id.*

another creditor of the debtor.⁶⁹ The creditor, seeking satisfaction out of a fraudulent transfer, would not have to arbitrate that action based upon an agreement to arbitrate any controversy between the transferor and transferee.⁷⁰

The nature of the claim may still be used as a device for avoiding arbitration after *McMahon* because that rationale eliminates an analysis of irreconcilable differences between the Code and the FAA. Otherwise *Allegaert's* analysis of the rest of the trustee's claims offers little which would argue for the continued avoidance of the agreements and for the placement of the decision to allow arbitration in the hands of the bankruptcy court. The significance of *Allegaert* is that the Second Circuit has long since adopted a philosophy which permitted the implied exception of bankruptcy-related matters from the strictures of the FAA.⁷¹ Further, in *Allegaert*, this implied exception from the FAA was recognized in an area in which, outside bankruptcy, *Wilko* had already been eviscerated. Pointing to the public interest in the fairness of the securities markets and in the administration of bankrupts' estates against the perceived limited procedural safeguards available in an arbitration proceeding, the Second Circuit concluded that this claim of bankrupt broker versus broker was not arbitrable.⁷²

The foregoing discussion involved the trustee seeking property rather than the more common case of a claimant seeking a portion of the estate. In the former case, at least the equitable feeling may be

69. See, e.g., 11 U.S.C. §§ 544, 547-49 (1982 Supp. V 1984). The foregoing statutes are the great sources of power afforded to the collector of the assets of the debtor, not in existence for the common creditor and not available outside the protective close of federal bankruptcy. Similarly, certain creditors obtain rights in bankruptcy that would not otherwise be available. Disputes with brokers in bankruptcy, which would be arbitrated outside of bankruptcy, may be obscured by the filmy cover of the Securities Investor Protection Act, 15 U.S.C.S. § 78aaa (Law. Co-op. 1983) ("SIPA"). No reference to arbitration is made in SIPA. SIPA, which provides for an ordinary liquidation of the bankrupt broker-dealer, nonetheless allows recompense to customers out of a protective fund. *Id.* § 78fff-1(b). Theoretically, then, the right to payment from the fund could not be said to be the subject of the arbitration arrangement between the debtor and the customer. Otherwise, the SIPA trustee is a chapter XI trustee. See, e.g., *Securities Investor Protection Corp. v. Poirier*, 653 F. Supp. 63 (D. Or. 1986). SIPA perhaps adds to the balance of competing policies by allowing its trustee, in seeking to avoid arbitration, to not only argue Code purposes but also the hefty value of the preservation of the SIPA fund.

70. See also *Coar v. Brown*, 29 Bankr. 806 (N.D. Ill. 1983) (subordination issues not subject to arbitration because trustee is a separate entity not party to the contract).

71. See also *American Safety Equip. Corp. v. J.P. Maguire Co.*, 391 F.2d 821 (2d Cir. 1968) (discretionary power in district court for arbitration of antitrust disputes).

72. 548 F.2d at 438 (trustee cannot be compelled to arbitrate his claims under securities laws; each case depends on its own facts).

present that a third party, whose only contact with the bankruptcy is that the debtor holds a claim against him, should be entitled to the contracted-for dispute resolution device, arbitration. Individual case equities, however, are not part of the *McMahon* analysis, whereas, under the *Wilko*-developed rules, such equities did impact on the exercise of judicial discretion. Without question, whether the trustee is successful in an action arising out of the debtor's rights is significant to all participating in distribution from the estate. The unsecured creditor is eager for an enhancement of the estate and, if such creditor had the wherewithal, he doubtlessly would like to monitor the trustee's activities in prosecution of that claim. To this extent, there is a policy interest in the centralization of dispute resolution in allowing trustees to avoid pre-existing arbitration agreements.⁷³ Nonetheless, this speculative interest of competing creditors hardly seems sufficient to create the irreconcilable conflict now required for avoidance. Mathematically identical is the effect in the bankruptcy administration of a claimant who seeks arbitration of his claim because a successful action will reduce the amount distributable to competing claimants. As expected, this notion of protection of the estate and, in rehabilitation, protection of that process permeates cases in which claimants seeking arbitration of a liability of the estate were told that they must litigate the issue in the bankruptcy court.⁷⁴

The disruptive powers of *McMahon* are further illustrated by the range of influence produced by *Wilko* at its logical extreme. In *Fallick v. Kehr*,⁷⁵ a discharged bankrupt sought a stay of an arbitration proceeding which had been revived by a claimant after the termination of the bankruptcy case. The claimant argued that his claim was not discharged; the bankrupt argued that the policies of the bankruptcy discharge provisions would be impeded if an arbitrator made the decision. The Second Circuit upheld the trial court's denial of the bankrupt's stay request. First holding that the matter was within the trial court's discretion, the court then noted that arbitration was not a worse way to resolve discharge issues than state court action.⁷⁶ Judge Friendly, in dissent, took the principles of *Wilko* as far as they might go to suggest that the policies of the social legisla-

73. See *In re Brookhaven Textiles, Inc.*, 21 Bankr. 204, 207 (Bankr. S.D.N.Y. 1982) (one factor in exercise of discretion to order arbitration of security interest issue is effect on other unsecured creditors).

74. See, e.g., *In re Miller & Neill Co.*, 41 Bankr. 589, 593 (Bankr. N.D. Ohio 1984).

75. 369 F.2d 899 (2d Cir. 1966).

76. *Id.* at 901-02.

tion, the good Act, were so significant that the trial court had no discretion.⁷⁷ As Judge Friendly's opinion displays, complete devotion to *Wilko* principles produces a prohibition on arbitration; devotion to *McMahon* will impel arbitration.

Courts of bankruptcy prior to *McMahon* have favored in certain contexts arbitral resolution of issues with bankrupts. Such statements of support for nonjudicial resolution are, nonetheless, accompanied with the regular assertion that the court has discretion with respect to that order. *McMahon* would suggest that if there is an arbitration clause, arbitration must follow, because the FAA would have it so, unless a competing bankruptcy policy strongly intervened. The appellate review of a court's order, if the matter is within the trial court's discretion, is limited to those matters of capricious abuse, cases which are regularly won above by those who prevailed below. If the test, however, is whether the trial court properly weighed the competing policies, the losing litigant's appellate chances even up, as the standard of review is the search for simple legal error. Any increase in likelihood that the determination of the trial court may be modified encourages the losing litigant to appeal and injects the system with more litigation.⁷⁸

Compounding the infirmity, now we, the doctrinally enslaved, will once again be forced to review in this new harsh environment for bankruptcy policies the cases which have ordered or upheld a lower court order granting arbitration under pre-existing agreements to arbitrate. The significant decisions, closely read, all display the conclusion that the order is not compelled but is discretionary. Many of the cases contain an approbation of arbitration's virtues to support the order. These old cases will be revived now to display judicial opinion that the policy of bankruptcy might be well served by the arbitral process.⁷⁹

77. *Id.* at 906 (Friendly, J., dissenting).

78. In economic terms, an increase in the likelihood of success on appeal causes a rise in the value of the appeals process to the litigant. This better chance increases demand for appeals and crowds dockets. See POSNER, *supra* note 1, at 77. In organic systems problems are often dealt with simultaneously by several systems. But, in metaphor, if a legal matter might be viewed as some parasitic invasion ingested as part of ordinary life, the less disruptive remedy is digestion rather than a more fiercesome fight at the cellular level later on. See MCNEILL, *supra* note 1, at 7.

79. Note that this problem of dicta's use in supporting subsequent related cases has already surfaced in the area. See *Perry v. Thomas*, 482 U.S. 483 (1987) (Stevens, J., dissenting). *McMahon* itself, in the natural lawyer-like fashion, used laudatory descriptions of arbitration from prior decisions which had diminished *Wilko*. In *Perry*, the enthusiasm engendered for

D. Arbitration in Collective Bargaining Agreements and International Contracts

Two general areas of arbitration in bankruptcy have produced the decisions in which arbitration has been regularly ordered: collective bargaining agreements and international contracts. In both of these areas, the courts' approach has been to favor arbitration as a method for resolving claims but, concomitantly, to withhold to itself the discretion to order arbitration or not.

Cases involving claims arising out of collectively bargained contracts (whether or not assumed by the debtor) regularly result in a judicial order toward arbitration. The chestnut, *L.O. Koven & Brother, Inc. v. Local Union No. 5767*,⁸⁰ illustrates the pre-*McMahon* struggle between bankruptcy and federal labor policies and the practical sense of the bankruptcy court in accommodating each. The employer, a chapter XI debtor, had been discharged, but the union sought to arbitrate a vacation wage claim. The district court denied the union's request to arbitrate, as the collective bargaining agreement required, and concluded the claim was discharged. The Second Circuit reversed and remanded the matter, requesting the district court, if possible, to separate bankruptcy and contractual matters with judicial resolution of one coordinated with arbitral resolution of the other.⁸¹ The Second Circuit recounted the usual nutrients contained in arbitration, virtues with a strong aroma in the labor setting, where there are special sources of law, special expertise, and a competency with these issues which, because of the commonality of labor arbitration, are outside of courts' ken.⁸² Further, arbitration is desirable when the entity is operating and at labor peace, a goal of the Labor Management Relations Act⁸³ which is promoted by arbitration.⁸⁴ In sum, the Second Circuit concluded that the existence and amount of the claim was for the arbitrators, but whether the claim was discharged or entitled to priority (bankruptcy issues) was for the judge.⁸⁵ Nonetheless, the organization of such matters, dividing the

arbitration, coupled with the freshly empowered FAA served up by *McMahon*, allowed the majority to sweep past earlier decisions which argued for some measure of state control over the federal FAA mandates.

80. 381 F.2d 196 (2d Cir. 1967).

81. *Id.* at 202.

82. *Id.*

83. 29 U.S.C. §§ 160-200 (1982 Supp. V 1984).

84. 381 F.2d at 203.

85. *Id.* at 209.

arbitrable from the nonarbitrable, and consequently, whether to permit arbitration at all, is "best left with the discretion of the trial court."⁸⁶

In no sense, however, did the courts feel compelled to order arbitration, especially when strong intervening policies presented countervailing needs. For example, in *In re Muskegon Motor Specialties Co.*,⁸⁷ the Sixth Circuit affirmed a district court's refusal to order arbitration of vacation pay claims. In this chapter XI proceeding, the union argued that clear federal policy required the surrender of jurisdiction to the arbiters. The court noted that the forum for resolution of claims was subject to the sound judicial discretion of the lower court.⁸⁸ Because the debtor was out of business and labor peace was not at issue and because the determination of entitlement to vacation pay was simply a legal issue not requiring the expertise of arbitrators, the district court did not abuse its discretion in refusing arbitration.⁸⁹

Note that in judging the exercise of trial courts' discretion, appellate courts have conducted a situational policy balancing. Simply, general bankruptcy policies, preservation of the estate, centralized resolution of disputes, equality among creditors, and if appropriate, rehabilitation, have been insufficiently dominant to preclude any argument that the order for arbitration is within the complete discretion of the courts. Rather, in a fashion akin to the weighing process called for by *McMahon*, courts reviewed competing policies, but as presented by the particular merits or equities of the instant litigation.

For example, if a chapter XI debtor is operating and rehabilitation is possible, the assumption of an executory labor contract subject to an arbitration provision should require the debtor to arbitrate

86. *Id.* at 205.

87. 313 F.2d 841 (6th Cir. 1963).

88. *Id.* at 842.

89. *Id.* at 843. *Koven* distinguishes the exercise of discretion in *Muskegon* on grounds of labor peace and because the former case involved discharge. In *Muskegon*, claimants sought a piece of a fund, and arbitration would have affected the amount of distribution. When discharge is the issue, only the debtor's assets, post-bankruptcy, are at risk. See *Koven*, 381 F.2d at 203. Implicitly, the Second Circuit in *Koven* must have concluded that the judicial resolution of discharge is not impelled by the policies of the fresh start, at least from the 1967 view. Of course (as is our theme in this sonata), policies change or perceptions of their vigor alter. See, e.g., 11 U.S.C. § 523(c) (1982) (precluding all but bankruptcy court resolution of certain discharge issues); *id.* § 525 (protection against discrimination against bankrupts based on discharge). See also *Perez v. Campbell*, 402 U.S. 637 (1971).

new claims. *In re Smith Jones, Inc.*⁹⁰ permitted arbitration of pre-petition labor grievances against the debtor under the view that collectively bargained agreements surviving bankruptcy remain unaffected in the rehabilitation setting.⁹¹ The court reserved for itself, however, the enforcement of any award. Again, in ordering arbitration, even while holding it is practically required, a court slyly retains its control and discretion.

Here is where the institutional malaise we are to suffer under *McMahon* will be exacerbated. Lightly balancing the policies of arbitration against weightier bankruptcy concerns, courts might have easily found an implied exception from the strictures of the FAA for the Act or Code. Perhaps some courts may be persuaded that the balancing tests conducted in cases like *Koven* gave appropriate weight to arbitration. Some litigants will not be so persuaded. After all, a simple tipping of the scales of justice toward the Code will not stop those pressing with the FAA. Consequently, in addition to a spasmodic reweighing of the massless, a search will be conducted through the Code to find whether it grants in one of its pristine well-ordered sections the discretion to the bankruptcy courts which they have arrogated rather loosely. More recent decisions have cogitated upon Code provisions (in addition to great jurisdiction) which might authorize their control in spite of the pesky FAA. In *Smith Jones*, the court off-handedly noted that which logically may be seductively true: the existence of the automatic stay and the bankruptcy court's power over it subsumes a power to deny a claimant an arbitral forum in spite of the provision in his contract with the debtor.⁹²

*In re Allen & Hein, Inc.*⁹³ examines more closely the suggestion that the provisions of section 362(a)(1) of the Code provides the power of the bankruptcy court to avoid collectively bargained arbitration clauses.⁹⁴ A union sought relief from the automatic stay to continue an arbitration proceeding which had been commenced prior to the petition. The statutory ground for relief from the stay is the amorphous "cause," and the burden of proof is on the opponent of relief.⁹⁵ There has never been a suggestion that, in the first instance,

90. 17 Bankr. 126 (Bankr. D. Minn. 1981).

91. See also *Teamsters, Local 897 v. Bohack Corp.*, 541 F.2d 312 (2d Cir. 1976).

92. 17 Bankr. at 128.

93. 59 Bankr. 733 (Bankr. S.D. Cal. 1986).

94. 11 U.S.C. § 362(a)(1) (1982 Supp. V 1986).

95. Section 362(d) puts the "burden of proof on all other issues" on the opponent of relief from the stay. 11 U.S.C. § 362(d) (1982 Supp. V 1986).

on-going arbitrations are not stayed by the filing of a petition pursuant to section 362(a).⁹⁶ No case suggests, however, that the determination of whether the stay should be lifted under the general "cause" provision is anything but a decision left to the sound discretion of the court, judged under the totality of the circumstances.⁹⁷ Consequently, tested by section 362(d), the court's decision to order arbitration is not impelled by the FAA. With *McMahon*, anomalous results may develop which might proceed from a tortured analysis of the bankruptcy courts' power over the lifting of the stay to allow the discretionary preclusion of arbitration because it began before bankruptcy, in distinction to cases which might decide that arbitration is an imperative under the FAA for the liquidation of a claim.

The *Allen & Hein* court reviewed the so-called disputed authorities, those cases which have ordered arbitration as not conflicting with bankruptcy policies and those that have held the opposite. That review does not produce any legal synthesis; rather, the court simply held that this case presented no good reason why the stay should not be lifted. Because the debtor could not demonstrate any harm from allowing arbitration to proceed, the stay should be lifted.⁹⁸ Lastly, the court noted that this extra-bankruptcy court determination of the claim does not preclude some measure of later judicial review because, the court asserted, it is always within its power to determine whether a claim was allowable.⁹⁹

The struggle to ensue for a source for the authority of the bankruptcy court to keep discretionary control over arbitration can ooze in many directions, beyond the environs of the simple stay. The automatic stay, in part, is just an element of the bankruptcy court's power and mandate to resolve claims expeditiously and without regard to success in court house races. Section 502 of the Code does provide some authority to the court with respect to the allowance and liquidation of claims. Section 502(g) provides that if an "objection to a claim is made, the court, after notice and a hearing, shall determine the amount of the claim."¹⁰⁰ Section 502(c) provides that "[t]here shall be estimated for the purpose of allowance . . . any contingent or unliquidated claim, the fixing or liquidation of which . . . would

96. H.R. REP. NO. 595, 95th Cong., 1st Sess. 340 (1977).

97. See *In re Opelika Mfg. Corp.*, 66 Bankr. 444 (Bankr. N.D. Ill. 1986).

98. 59 Bankr. at 735 (expenses of arbitration were deemed insufficient reason because of a lack of proof that the litigation would be less expensive in bankruptcy court).

99. *Id.* (reservation over award enforcement).

100. 12 U.S.C. § 502(g) (1982 Supp. V 1986).

unduly delay the administration."¹⁰¹ Those who have considered the matter are uniform in concluding this duty is mandatory.¹⁰² The determination of whether estimation is mandated is another test of judicial discretion, whether there would be undue delay in administration. Further, an estimation by the court under these provisions has not been held to be unfettered completely but rather must be interpreted consistently with other provisions of the Code.¹⁰³

Nonetheless, all courts' grants of jurisdiction (here in the case of allowance of claims or in the instance of our fabled expanded grant) are cast broadly and yet are limited by the provisions of FAA. To avoid the FAA under *McMahon*, the policies reflected by these statutes must be irreconcilable with arbitration such that the courts of bankruptcy would be impliedly exempted. In any case, settling on section 502 as the source of this power produces the additional doctrinal anomaly that arbitration may be avoided for claims against the estate but perhaps not claims of the estate. Madness lies when considering the estimation power in these days of *Marathon's* ghostly presence, haunting the issue of jurisdiction when a trustee counterclaims in response to a claimant.¹⁰⁴

In the Western District of Virginia, the bankruptcy court has an unbridled enthusiasm for arbitration coupled with a healthy sense of the court's own power. The court, flushed with the expanded jurisdiction of the new Code, held that its plenary power extended to matters otherwise arbitrable. In *In re Sterling Mining Co.*,¹⁰⁵ a worker sought to arbitrate a claim with a chapter XI debtor. The court concluded that justice required abstention, pursuant to 28 U.S.C. § 1471(d).¹⁰⁶ Wryly, the court noted that it intended to abstain from all labor issues in the case and informed the debtor that the determination of abstention is unappealable. The abstention power does not

101. *Id.* § 502(c) (1982 Supp. V 1986).

102. See COLLIER, THE BANKRUPTCY CODE § 502.03 (1974); H.R. REP. NO. 595, 95th Cong., 1st Sess. 354 (1977).

103. See *In re Pacific Express, Inc.*, 69 Bankr. 112 (Bankr. 9th Cir. 1986) (general equitable powers to fix claims is limited by § 510 provisions when determination of claim has the effect of a subordination).

104. See, e.g., *In re Bar M Petroleum*, 63 Bankr. 343 (Bankr. W.D. Tex. 1986); *Bokum Resources Corp. v. Long Island Lighting*, 49 Bankr. 854 (Bankr. D.N.M. 1985).

105. 21 Bankr. 66 (Bankr. W.D. Va. 1982).

106. 28 U.S.C. § 1471(d) (1982) provides that, "in the interest of justice," the district court or bankruptcy court may abstain "from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise."

necessarily imply a policy which suggests judicial control over the arbitration of bankruptcy-related issues. Rather, litigants arguing that the court is constrained to follow the FAA may argue that the existence of the abstention statute suggests a congressional feeling that all matters need not be sanctimoniously adjudicated by the temporal bankruptcy judge or the everlasting district court.

The labor cases have not provided a consistent rationale because the equities color the policies reviewed, equities which shift from case to case. While displaying a receptivity to arbitral resolution, the courts have struggled to articulate a statutory justification for the retention of their discretion over the order to arbitrate or not to arbitrate. Further, decisions authorizing arbitration are filled with language singing its virtues which may inhibit fresh reasoning when these issues are confronted again under the color of *McMahon*.

Affection for ordering arbitration under pre-dispute agreements with bankrupts has been displayed in cases dealing with international contracts. Arbitration of international disputes is a commercially significant term, providing for an increased measure of certainty in selection of fora and concomitant rapidity in the resolution of claims. In these cases, the coming pathology of *McMahon* has been played out in miniature. For in this area, the Supreme Court earlier began to carve away at *Wilko* in cases such as *Scherk v. Alberto Culver Co.*,¹⁰⁷ excepting international arbitration agreements from the policy balancing tests of *Wilko* (or, more properly perhaps, determining that the policies presented by such arrangements were of too stupendous weight) and affirmatively requiring enforcement of such agreements. While typically reluctant to state that the FAA and such Supreme Court analysis dictates arbitration, nonetheless, the bankruptcy decisions effectively embrace the arbitration solution. The early lack of vitality in this area of *Wilko* presages the emaciation of court discretion in the new age to come.

In re Hart Ski Manufacturing Co.,¹⁰⁸ involved a claimant who sought arbitration of its claim and the counterclaim of the bankrupt under International Chamber of Commerce rules called for by their contract. The district court concluded that the bankruptcy court's order to arbitrate was not clearly erroneous (a standard of review which yet implies that the district court believed it was reviewing a matter of the bankruptcy court's discretion). The court specifically held that

107. 417 U.S. 506 (1974).

108. 22 Bankr. 763 (Bankr. D. Minn. 1982).

the filing of the proof of claim does not constitute a waiver of the right to seek arbitration. Further, the court held that financial disadvantage or inconvenience to the debtor is insufficient reason of itself to deny arbitration.¹⁰⁹ Earlier decisions might have balked at the latter conclusion, as the protection of the estate through providing fora of lesser expense and greater convenience (meaning the bankruptcy court) for the resolution of claims would have been considered sufficient justification for denying the contracted-for right.¹¹⁰

Societe Nationale Algerienne v. Distrigas Corp.,¹¹¹ contains a full-blown debate over the issue in the international context, reviewing a bankruptcy court's order denying the claimant's motion to permit modification of the automatic stay to permit international arbitration. The claimant sought arbitration of liabilities arising out of the debtor's rejection of an executory contract. The court first reviewed whether the arbitration clause survived the rejection by the debtor. Under ordinary rules, arbitration provisions survive the termination of the agreement such as pre-existing issues related to that termination, although unasserted disputes are arbitrable as well.¹¹² Section 365(g) of the Code provides that rejection constitutes a "breach" and as simply a breach, damages so produced are clearly arbitrable. Under either of these approaches, the arbitration clause survives. Concluding that the clause survived, of course, has not been dispositive that the clause will be enforced. The *Societe Nationale* court concludes that enforcement depends on the winner in the conflict of federal policies, a survival of the fittest which can only be determined on the always unhelpful case by case basis.¹¹³ This conclusion is the worst that law should offer if, at least, order and economy are in view; indicating at once that while the matter is of judicial discretion, it is also incapable of prediction.¹¹⁴ Nonetheless, seeing

109. *Id.* at 765.

110. In *In re Braniff Airways, Inc.*, Bankr. L. Rep. (CCH) ¶ 69,377 (Bankr. N.D. Tex. 1983), the court declined a claimant's motion to compel arbitration of certain claims, priorities, and set-offs pursuant to the FAA covered by an international arbitration agreement. While concluding that certain rights, such a set-off and priority are born of the Code and thus not covered by the agreement to arbitrate, the court alternately concluded the arbitral delays would hamper reorganization. This court found its discretionary power in the broad jurisdictional grant. *Id.*

111. 80 Bankr. 606 (Bankr. D. Mass. 1987).

112. *Id.* at 609.

113. *Id.* at 611.

114. There is a school of thought which would suggest by degrees that all is within judges' discretion and that the belief that legal results are any way predictable is the delusion of faith

the federal policy in favor of international arbitration as manifested in cases like *Alberto Culver*, the court concluded that arbitration should ensue. The court noted that no special issues of bankruptcy expertise, such as preferences or offsets, were to be litigated. Further, this case involved another failed chapter XI candidate so that supervision and protection of a rehabilitation plan was not militating in favor of judicial resolution. Noting the growing conflict, the court argued that "it would be unrealistic indeed to argue that bankruptcy principles are qualitatively more fundamental to our capitalistic democratic system than either the securities laws or anti-trust policy."¹¹⁵

While no court has yet to say the perhaps ultimately unsayable, that arbitration of claims must be ordered under the FAA, a few pre-*McMahon* cases, tugged along by the erosion of *Wilko*, unduly influenced by cases in the labor and international fields, have reflected a constraint on their unbridled discretion and have displayed the product of the confusion engendered by the various contexts in which the license to arbitrate is sought. In a Frankenstein-like decision (legal parts from various bodies sewn together into a quasi-logical form), the Ninth Circuit's Bankruptcy Appellate Panel in *In re Morgan*¹¹⁶ reversed a bankruptcy judge's order inhibiting arbitration. The not-yet-bankrupt Morgan was being hounded by Bender who sought an order under the FAA in the Southern District of Alabama to compel arbitration of their dispute. Bender was to build a vessel for Morgan under a contract containing our ever-present clause. Apparently, Morgan thought he had overpaid and threatened action to get his money back. While Bender's writ was pending, Morgan sued him in Humboldt County, California, seeking a trial of the matter. The Alabama federal court ordered arbitration, and Morgan immediately turned to chapter XI. He then obtained a specific stay from the bankruptcy court, enjoining Bender's irritating attempts to have the dispute before arbitrators.

Relying on the unreliable *Hart Ski* (for *Hart Ski* reviewed a

in the arguments and explanations jurists give. While this view is occasionally called real or perhaps critical, one cannot ignore that some judges really do mean what they say and are concerned with broader concerns of stare decisis. What is critical about the doctrinal or stolidly textual approach is that, although bemoaned, it is used. Consequently, the mere existence of these legal arguments of doctrinal bent creates institutional problems, like overcrowded dockets, inconsistent decisionmaking, and the unadmitted but often present confusion.

115. 80 Bankr. at 613.

116. 28 Bankr. 3 (Bankr. 9th Cir. 1983).

matter of discretion), the panel concluded that no competing bankruptcy policy exists to preclude favoring arbitration when the trustee or debtor in possession sues a third party or a claimant. Again, this assertion of no policy shows a lack of imagination in creating bankruptcy policies, an art which was certainly not lacking in the earlier cases. Further, this art of fabrication will certainly not be lost in later cases. Simply, even in instances in which the trustee is seeking an asset of the estate, his success in that endeavor necessarily will affect the value of the estate or rehabilitation process. The court also notes that there is no suggestion that this ordinary contract claim presents any issue which is in the special competence of the tribunals.

Plummeting the value of this panel's opinion is its alternative ground for reversing the bankruptcy court's refusal to lift the stay to allow arbitration, that the decision of the Alabama District Court is *res judicata*.¹¹⁷ As the concurring panelist notes, had this action been one of a claim against the estate, bankruptcy policies may well have intervened to preclude arbitration. The conclusion that the posture of the parties in the subsequent action would color the *res judicata* effect of the prior order is anomalous. Under the principal opinion of the panel, theoretically, all arbitrations commenced pre-bankruptcy under judicial order must be allowed to continue. Clearly, this approach has been taken by no other case.

Cases such as *Morgan* which order arbitration almost invariably rely on the oldest of chestnuts in the interaction of bankruptcy and arbitration, *Schilling v. Canadian Foreign Steamship*.¹¹⁸ The trustee sued for a debt owing the bankrupt under a charter agreement which contained an arbitration clause, and the defendant moved for a stay so that arbitration could proceed. The trustee replied that General Order 33 rendered compliance by trustees in bankruptcy optional. The court held that the general order merely authorized the trustee to arbitrate, upon stipulation, in the absence of an agreement to arbitrate.¹¹⁹ As is plainly true, the rule is not a license to abrogate existing agreements.¹²⁰ The court held that a trustee, attempting to receive benefits under a contract, should not be permitted to selectively avoid that important clause. Citing section 3 of the FAA, the court

117. *Id.* at 5.

118. 190 F. Supp. 462 (S.D.N.Y. 1961).

119. *Id.* at 463.

120. See *Tobin v. Plein*, 301 F.2d 378 (2d Cir. 1962).

granted the defendant's motion for a stay.¹²¹

It is anomalous to suggest that the efficacy of the arbitration agreement in bankruptcy should depend on whether the action is a claimant seeking satisfaction or the trustee recovering an asset. This doctrinal soup creates the sort of overripe environment in which litigation, like algae, blooms. The rule of *Schilling* has never been restated by any superior court with such singular clarity and arguably has been completely disregarded where the equities slightly shift. In fact, at the beginning of this exploration of bankruptcy and arbitration's shared viscera, we encountered *Zimmerman* which, in a substantially similar situation, did not augur such a restricted result. Even in cases where the trustee or debtor initiated the action, courts clearly articulated that the arbitration process, if allowed to go forward, was still subject to "judicial control" and was still subject to the gale force of countervailing bankruptcy policies.

VI. DIAGNOSIS FOR LEGAL HEALTH

Courts have been developing a set of rules which, in the first instance, considers that, regardless of contract or context, the decision to allow arbitration of issues affecting the administration of the estate is within the discretion of the bankruptcy court. While the basis for arrogation of such power by the bankruptcy courts in the face of the plain language of the FAA has been maladroitly explained, or ill fashioned to the extent clarity might exist, it is certain that *McMahon* will substantially alter consideration of the issue.

The discretionary power of the courts over otherwise arbitral issues has been found in the amorphous implications of federal bankruptcy legislation, in the negative implication from the courts' power to grant relief from the stay, from the courts' so-called expanded jurisdiction and their statutory authority to settle claims, and inferentially from their power to issue discretionary injunctions in support of their general powers.¹²² Each of these bases has the patina of persuasiveness but none are sufficiently rigorous to be dispositive. Cast as a matter of discretion, this weak body of law had the effect of certitude and finality by discouraging appeals which under the standard of review of discretionary orders had little basis for hope for

121. 190 F. Supp. at 463.

122. Section 105 of the Code permits the court to issue discretionary orders, but this power has been held to be the equivalent of the court's power under the judicial code. In other words, district courts have the same power.

success. Further, and perhaps most importantly, a discretionary rule appeals to the practical sense of the bankruptcy judge which allows him to realize that to arbitrate or not is an issue presented not always by a party to achieve justice but as a bargaining ploy in a higher game. The bankruptcy judge, without empirical data but only his instinct, might conclude that choice of fora may be significant to the outcome because of the institutional bias of the particular arbitration process or a cost disadvantage in prosecution of the action; exercise of his judicious discretion, he concludes, will be steeped in proper justice.¹²³

The first conclusion one must make in the diagnosis for legal health is whether any rule is better than another, where the legislature has not dictated the response. Thus, the real problem is not coming to a conclusion in each of the contexts in which arbitration meets the bankrupt but rather that conventional legal analysis of these issues will produce a resolution, if at all, only after lengthy litigation. The Supreme Court in *McMahon* concluded that the FAA impelled arbitration, leaving a small but potentially large opening for exceptions to be implied from other federal statutes. In reality, it seems impossible to prove that arbitration produces swifter, more ec-

123. While the issue of whether litigation ensues by arbitration or in court is in a sense a matter of forum, forum selection clauses, those designating a particular court over another, have been enforced in courts of bankruptcy with much less agony. *In re Diaz Contracting, Inc.*, 817 F.2d 1047 (3d Cir. 1987), involved the defendant in an adversary proceeding commenced by the debtor to recover damages from a contract breach. A forum selection clause required all actions be brought in the courts of New York. The district court approved the bankruptcy court's refusal to enforce the clause, holding that enforcement was a matter of discretion and that financial difficulty for this poor debtor, unable to confirm a reorganization plan, was sufficient reason. *Id.* at 1049. The Third Circuit reversed, holding that the debtor had not met its burden of proving that enforcement "in the contractual forum will be so gravely difficult that [the litigant] will . . . be deprived of [its] day in court." *Id.* at 1052 (citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)). The Third Circuit concluded, in this adversary proceeding, a debtor is not entitled to a more lenient standard than litigants outside of bankruptcy. *Id.* at 1053. The district court had relied upon *Zimmerman* to conclude that enforcement was not mandated but discretionary. Oddly, the Third Circuit holds the judge-made rule of *The Bremen* has more clout than the FAA mandate because "where both competing forums are judicial," the policy-weighting conducted under the latter to determine an implied exception is not required. Worse in terms of finality and the discouragement of appeals, the Third Circuit concludes that the decision to refuse to enforce a forum selection clause is a legal conclusion subject of plenary review. *Id.* at 1055. The court notes, however, that had this proceeding been a core proceeding, perhaps where a claimant sought the enforcement of a forum selection clause, the result might differ. *Id.* at 1051 n.9. One of the factors considered generally in the enforcement of such clauses is the "strong public policy of the forum" which may provide the first rung in an argument that Code policies similarly preclude enforcement. See *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 202 (3d Cir. 1987).

onomic, more just decisions, in tune with the overall bankruptcy policies of rehabilitation, equitable distribution of assets, and a fresh start. Equally impossible to prove is that the bankruptcy court in its litigation processes and supervision of awards from outside its forum provides swifter, cheaper, or more right results. If the argument is incapable of logical resolution from the policy perspective, the perspective taken by courts in comparing these statutes, the only justification for allowing the litigation to follow is if the litigation will produce some advancement or clarity of discussion which might in turn breed some healthier legal stock.

In the welter of confusion in the discussion of the principles of law, courts are bound to take disparate routes in future cases to decide these issues. The variety of contexts is bound to create decisions which will have dubious precedential effects for later cases, as the environment of a particular dispute weathers the play of the policies.¹²⁴ A court which engages in the *McMahon* comparison as the trustee sues and concludes that arbitration must ensue will not bind a court considering the arbitrability of claims against the estate. Through chance, future cases may amplify the extent of the bankruptcy court's jurisdiction and power as tested by the virulent invading FAA. This newly forming corpus of decisions, each spuming a distinct conclusion, all legally justifiable, textually plausible, yet all litigiously arguable, will have difficulty in evolving into some profitable legal advance.

McMahon and its malformed progeny in bankruptcy now may encourage a new set of tricksters. Those seeking to avoid the formal federal forum, which some believe is a haven for the debtor, may regularly include provisions for arbitration, perhaps only maliciously triggered by bankruptcy, especially in contracts where the financial health and bargaining power of a party is suspect. The avoidance of court procedures through contractual devices has plagued the administration of bankruptcy for a century. The common tool had been to provide that the relationship between the debtor and the nonbankrupt was terminated upon insolvency or the petition. Because of the courts' inability to create a uniform rule which gave what Congress

124. Where ordinarily a large body of judicial opinions is desirable for the legal community, too many opinions is a potential problem here. "Conceivably, an increase in stock [of opinions] beyond some level might produce conflicting precedents or so increase the difficulty of discriminating against non-conflicting ones as to reduce the amount of information about the expected outcome of legal disputes." Posner & Landes, *supra* note 5, at 263 n.20.

concluded was appropriate consideration to the policies of the fair administration of these estates, section 365(e)(1)¹²⁵ of the Code was enacted to render such provisions ineffective.

The only physician with the cure is Congress. The Supreme Court cannot effect uniformity with any alacrity because, bound by the facts before it, the Court cannot fashion an absolutely uniform rule. (The Court could not achieve this in *McMahon*.) If one truly believes that there is no good reason to decide this matter one way or the other, then there is sheepish feel in suggesting a home concocted remedy. But for even the amateur physician to stand fast ignoring litigation, seems to be equally a sin.

A range of statutory bullets are possible, which might prick the skin of bankruptcy with different effect at tender spots. These remedies might be similar to those which the institutional body will evolve after the arduous biological processes of infection and response. For example, the process of determining claims may be excepted from the FAA's bite, except for those disputes arising out of assumed contracts. Reorganizations in chapters XI and XIII may require special genes, immune from the FAA when necessary, subject to the FAA when the entity is surviving and strong enough to stand it. The arbitration commenced but not concluded before bankruptcy should not be treated more reverentially than the arbitration sought to be commenced after bankruptcy. This Code frailty requires operation on the stay provisions. Further, actions by the estate, not otherwise freed from the FAA, such as those which must be brought outside the federal forum (whatever those actions are), should be, in *Schilling* fashion, subject to arbitration. A precise disinfectant might be created for the one who has triggered arbitration only upon bankruptcy, for this is certainly the murder of jurisdiction.

This last list of prescriptions is simply one set of conclusions which will occur because the problems will arise, a pharmacopeia which will produce its own unfortunate side effects. If this is to be effected by Congress, the bankruptcy world will appropriately shudder. The Code, so untested, subject to a graft here and vaccine there, may not survive the medications. Anomalies will be produced yet again as new statutes in odd Code sections become tainted by brethren sections, when seen by courts in *pari materia* or with ears for legislative motives or with a heart for activism or restraint.¹²⁶ As

125. 1 U.S.C. § 365(e)(1) (1982).

126. See POSNER, *supra* note 1, at 276.

bandages are applied by courts of inferior jurisdictions, the achievement of consensus, uniformity, regularity, and finality becomes even more remote. Worse still is the world in which Congress chases some of the malignant parasites and courts follow some others, with the remedies and the ailments feeding off each other in a peculiar witches brew, where the dynamic of change is potently volatile, each physician adding irregularly its eye of newt or wing of bat.

Save for the existence of the strong lobby which nourishes and is nourished by the FAA, one could calmly offer the palliative that the courts cannot create and only Congress can offer. Notwithstanding the FAA, pre-bankruptcy arbitration agreements are without force and effect, save that the court may order arbitration under such arrangements in its discretion. A detail or two for form might be added: that stayed arbitrations should only ensue under this test rather than for relief from the stay generally; that actions outside the federal forum could not produce the enforcement of the agreement without bankruptcy court approval; that the bankruptcy court's decision in these cases is unappealable.

In any case, for the sound administration of the Code, the decision to order arbitration should not be made on the evanescent grounds of weighing policies of the Code against the FAA, either in the general sense or in that sense modified by the situation of the particular litigation. Rather, arbitration or court resolution, whichever is quicker, fairer, and cheaper should occur. Unless your affection for arbitration is unseemly passionate, this remedy has the virtue of being largely indisputable. As a matter of justice, this issue is a small matter, but as an issue in the administration of bankrupts' estates, it may become too large.

The foregoing offer was made with no hope for its acceptance. Wait then and watch with me as the Code becomes flush, perspires, and shakes. Be chastened about the loosing of new germs in law, as arbitration mutates bankruptcy.

COMMENTS

THE FLORIDA LIVING WILL: ALIVE AND WELL?

Nearly a decade after the enactment of the first living will statute in the United States,¹ the Florida legislature adopted the Life-Prolonging Procedure Act in 1984.² This Act provides an individual the right to make an advance "declaration"³ governing the withdrawal or withholding of life-sustaining treatment. Although originally enacted to clarify patient rights and to establish guidelines for making and upholding a living will, the Act has had a limited effect.⁴

Many provisions within the Act restrict its application. For example, ambiguous statutory terminology has raised more questions than it has answered. Undoubtedly, conflicting viewpoints concerning the scope of the patient's right to die have led to some of the Act's limitations. This Comment provides a detailed analysis of Florida's Life-Prolonging Procedure Act and its limitations. The Comment

1. California Natural Death Act, CAL. HEALTH & SAFETY CODE §§ 7185-7195 (West Supp. 1976).

2. FLA. STAT. §§ 765.01-.15 (1987). Florida was the twentieth state to adopt a living will statute. Thirty-eight states had enacted such legislation prior to 1988. Nineteen of those states adopted their statutes in 1984 and 1985. See Gelfand, *Living Will Statutes: The First Decade*, 1987 WIS. L. REV. 737, 739-40 [hereinafter Gelfand] (sets forth the statutes enacted through November 1987 in chronological order).

3. FLA. STAT. § 765.02 (1987). See *infra* note 95 for the suggested form declaration. Nowhere in the statute is the phrase "living will" mentioned. Considering its purpose, the term "living will" is actually a misnomer. See Martyn & Jacobs, *Legislating Advance Directives for the Terminally Ill: The Living Will and Durable Power of Attorney*, 63 NEB. L. REV. 779, 787 (1984) ("The term 'Living Will' was first used in 1967 by Dr. Louis Kutner to describe a document drafted by a competent adult as an advance directive . . . provid[ing] that no extraordinary artificial life-support systems may be used to prolong the drafter's life").

4. Only one court has directly construed the statute since its enactment. See *In re Guardianship of Browning*, 543 So. 2d 258, 261 (Fla. 2d DCA 1989) (although a guardian of an incompetent patient does not have the right to make a decision to remove nutrition and hydration tubes under chapter 765 of the Florida Statutes, such a right does exist under article I, section 23, of the Florida Constitution). See also *Corbett v. D'Allessandro*, 487 So. 2d 368, 370-71 (Fla. 2d DCA 1986) (court mentioned the Act, but, in ignoring a statutory prohibition regarding the removal of nutrition and hydration tubes, avoided interpreting it). See *infra* note 7 for further discussion of *D'Allessandro*.

also proposes alternative statutory language, and presents alternative methods that may be used to supplement or to substitute a living will under Florida Statutes chapter 765.⁵

FROM MERCY KILLING TO LIVING WILLS

Advocates of right-to-die legislation stress that the right to refuse medical treatment is based upon accepted common law concepts⁶ and established constitutional rights to privacy.⁷ They view living wills as facilitating a patient's right to choose a "natural death."⁸ On the other hand, critics of right-to-die legislation emphasize the illegality⁹ of euthanasia¹⁰ and equate living wills with

5. FLA. STAT. §§ 765.01-.15 (1987).

6. See Morgan & Harty-Golder, *Constitutional Development of Judicial Criteria in Right-to-Die Cases: From Brain Dead to Persistent Vegetative State*, 23 WAKE FOREST L. REV. 721, 726-29 (1988) [hereinafter Morgan & Harty-Golder] (tracing the right to refuse bodily intrusions as far back as 1891).

7. *D'Allessandro*, 487 So. 2d at 370. The court construed the Life-Prolonging Procedure Act to protect all of a patient's constitutional rights, including the right to decline the provision of life-prolonging sustenance treatment, even though the Act specifically denies a patient the right to decline medical procedures providing sustenance. *Id.*

8. See Morgan & Harty-Golder, *supra* note 6, at 764. "In right-to-die cases, no matter what life-prolonging measure is utilized, the patient will only linger and never recover. Death is the only certainty for the patient." *Id.* See also Kutner, *The Living Will: The Epitome of Human Dignity in Coping With the Historical Event of Death*, 64 U. DET. L. REV. 661 (1987) [hereinafter Kutner] (citing a Cardozo opinion in *Schloendorff v. Society of New York Hosp.*, 211 N.Y. 125, 105 N.E. 92 (1914)). Kutner recognized the importance of a patient's right to informed consent when choosing the right to die; "[Cardozo] defined informed consent as the protection of an individual's self-determination; he based this definition on the premise that every adult of sound mind has the right to determine what should be done with his own body." *Id.* at 663. Kutner further extended the right to informed consent to the patient's right to govern all medical treatment decisions, stressing that "[t]he individual has the right to forego treatment, or even a cure, no matter how distorted his values may seem to members of the medical profession, so long as the individual is competent." *Id.* See also *In re Guardianship of Barry*, 445 So. 2d 365, 371 (Fla. 2d DCA 1984) ("We can conceive of no state interest great enough to compel . . . continu[ing] . . . a life support system [that] . . . would merely prolong the death of a child terminally ill, wholly lacking in cognitive brain functioning, completely unaware of his surrounding, and with no hope of development of any awareness."); and Bryan, *How Dignified a Death? — Living Wills*, 1985 MED. TRIAL TECH. Q. 209, 209 [hereinafter Bryan] for a discussion of a living will's benefit to doctors because it allows them to carry out a patient's wishes without fear of liability. Finally, the American Medical Association has recently stated that physicians could ethically withdraw all life-support treatment from comatose or terminally ill patients who had given appropriate advance declarations. See AARP News Bull., Feb. 1989, at 8 (discussing the AMA's present position).

9. Koop & Grant, *The "Small Beginnings" of Euthanasia: Examining the Erosion In Legal Prohibitions Against Mercy-Killing*, 2 J. L. ETHICS & PUB. POL'Y 585, 593 (1986) [hereinafter Koop & Grant] (noting that although right-to-die proponents have argued that humanitarian motive and intent ought to remove all criminal aspects from "mercy killing," such acts

"mercy-killing."¹¹ Such biases have affected the official titles of each state's living will statute. For example, some states have adopted acts that provide "*Death With Dignity*,"¹² while others have limited legislative labeling to the "*Withdrawal of Life-Saving Mechanisms*."¹³ Somewhere in between these two is the Life-Prolonging Procedure Act of Florida.¹⁴

The limitations of Florida's living will statute arise from the compromises that have resulted from opposing social factions.¹⁵ Further, the courts have recognized that the right to refuse treatment is subject to compelling state interests. For example, the Act states that a patient's right to control medical decisionmaking is "subject to certain interests of society, such as the protection of human life and the

have been consistently condemned by the law and should continue to be treated just like any other type of homicide).

10. See *Brophy v. New England Sinai Hosp., Inc.*, 398 Mass. 417, 442-53, 497 N.E.2d 626, 640-46 (1986) (Nolan, J., dissenting). Regarding the majority opinion's extension of the right to decline life-prolonging food and water treatments, Justice Nolan stated, "[T]he forces of secular humanism . . . have now succeeded in imposing their anti-life principles at both ends of life's spectrum." *Id.* at 442-53, 497 N.E.2d at 640-46.

11. This group includes C. Everett Koop, the United States Surgeon General, and Edward R. Grant, the Executive Director for Americans United for Life Legal Defense Fund, who recently wrote that "changes in the obligation to provide medical treatment to seriously ill and incompetent patients have created a legal climate that is favorable to euthanasia, which is the intentional killing by omission or direct action, of those whose lives are considered of insufficient value to maintain." Koop & Grant, *supra* note 9, at 589 (emphasis in original). Koop and Grant noted the similarities between the present euthanasia movement in the United States and the pervasive disregard for life in Germany in the 1920's and 1930's. The authors pointed out that since the mid-1970's, the so-called "right to die" in America has gone from being illegal to an ever-expanding accepted principle. The right to die is being extended to include the removal of all life-prolonging medical treatments, including the administration of life-sustaining food and water. *Id.* at 586-92. Koop and Grant, noted that:

[A] denial of nutrition may in the long run become the only effective way to make certain that a large number of biologically tenacious patients actually die. Given the increasingly large pool of superannuated, chronically ill, physically marginal elderly, it could well become the non-treatment of choice . . . [B]ecause we have now become sufficiently habituated to the idea of turning off a respirator, we are psychologically prepared to go one step further.

Id. at 586 (citing Callahan, *On Feeding the Dying*, HASTINGS CENTER REP., Oct. 1983, at 22). Based on the claims of groups promoting euthanasia (such as the Hemlock Society, which has targeted several states, including Florida, to promote more progressive living will legislation), Koop and Grant stated that the right to die will soon encompass medical aid in dying, including the injection of lethal drugs. *Id.* at 586-87.

12. See Gelfand, *supra* note 2, at 739 (citing the "Connecticut Death With Dignity Act," CONN. GEN. STAT. §§ 19a-570 to -575 (1985)).

13. *Id.* (citing the "Mississippi Withdrawal of Life-Saving Mechanisms," MISS. CODE ANN. §§ 41-41-101 to -121 (1984)).

14. FLA. STAT. §§ 765.01-.15 (1987).

15. See *supra* notes 8 & 11 and accompanying text.

preservation of ethical standards in the medical profession.”¹⁶ If such compelling interests are present, courts may ignore declarations made in a living will.¹⁷

Despite compelling interest limitations on the right to die, Florida courts have consistently upheld a person's right to decline life-prolonging medical treatment.¹⁸ Florida's progressive judiciary established a Floridian's right to die before the Life-Prolonging Procedure Act was adopted;¹⁹ furthermore, courts have extended a patient's rights to areas that have otherwise been specifically prohibited by Florida Statutes chapter 765.²⁰ Thus, in spite of the Act's restrictions,²¹ courts have expanded the scope of the right to die in Florida.

The expansion of the scope of the right to die continues to be a major concern for proponents and opponents of living will legislation. Two of the most prominent factors affecting this issue are the “aging” of the American society, and the advance of medical technology. Currently, twenty-nine million Americans or twelve percent of the population are over age sixty-five. Studies indicate that the number of Americans over the age of sixty-five will nearly double within the next thirty years.²² Recent technological advances have contributed

16. FLA. STAT. § 765.02 (1987). See *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, cert. denied sub nom, 429 U.S. 922 (1976). *Quinlan* was the first judicial decision to allow the constitutional right to privacy as a basis for withholding or withdrawing life-sustaining treatment from a terminally ill patient. In the case, the court noted that such rights would be weighed against state interests. *Id.*

17. See *Eichner v. Dillon*, 73 A.D.2d 431, 455, 426 N.Y.S.2d 517, 536 (N.Y. App. Div. 1980), aff'd sub nom, 52 N.Y.2d 363, 420 N.E.2d 64, 438 N.Y.S.2d 266, cert. denied, 454 U.S. 858 (1981).

18. See *John F. Kennedy Memorial Hosp. v. Bludworth*, 452 So. 2d 921 (Fla. 1984); *Satz v. Perlmutter*, 379 So. 2d 359 (Fla. 1980); *Corbett v. D'Allessandro*, 487 So. 2d 368 (Fla. 2d DCA 1986); *In re Guardianship of Barry*, 445 So. 2d 365 (Fla. 2d DCA 1984).

19. See *John F. Kennedy Memorial Hosp. v. Bludworth*, 452 So. 2d 921, 925-26 (Fla. 1984). In *Bludworth* the Florida Supreme Court first held a living will to be a sufficient declaration for the removal of life-prolonging treatment, noting that prior court approval would not be necessary for such removal. *Id.* FLA. STAT. §§ 765.01-.15 was enacted later in 1984.

20. See *supra* note 7.

21. As one commentator observed, “[M]ost of the states that have enacted living will statutes have done so in a context where a living will statute accomplishes little more than to provide a specific procedure for channeling the rights created by the courts.” Gelfand, *supra* note 2, at 796-97.

22. See Collin, *Planning and Drafting Durable Powers of Attorney for Health Care*, 1988 INST. ON EST. PLAN. 5-1, 5-5 [hereinafter Collin]. The author also noted that today's average working couple will never have more young children than they have living parents; furthermore, couples will spend, on average, more years caring for their parents than they will raising their children. *Id.* See also Koop & Grant, *supra* note 9, at 588-89 (noting that there will be 35 million Americans over the age of 65 by the year 2000, and over 50 million by 2020).

to this aging process by expanding life expectancies.²³ As a result, many elderly people are spending their waning years in hospitals or nursing homes.²⁴ Frequently, they are incompetent or dependent on life-support systems.²⁵ Rather than turning to courts²⁶ to make the decision of whether life-sustaining medical treatment should be continued, some people are relying on living wills to provide instructions governing the administration of medical treatment should they become incompetent.

In order for the Florida Act to be effective, the Legislature needs to ensure that individual patients have control over their own medical treatments. Presently, the Act is incapable of accomplishing this objective. The Act is not only hampered by social opposition and "compelling state interests;" it is further limited by its own language.²⁷ Since Florida courts have not provided any interpretative assistance,²⁸ the Act's language will be analyzed to reveal limitations that preclude it from accomplishing its objectives.

STATUTORY ANALYSIS AND LIMITATIONS

The Florida legislature enacted the Life-Prolonging Procedure Act of Florida²⁹ in an effort to inject certainty into the process of dealing with life-sustaining measures. The legislature concluded that it is an individual's fundamental right to control his own medical care.³⁰ However, this ability to dictate what, if any, types of medical or surgical procedures will be used, and the extent to which they are

23. See Collin, *supra* note 22, at 5-5 (noting that medical intensive care units were created only 30 years ago). Also, the average life expectancy at birth of all races and sexes in the United States was 74.7 years in 1984, an increase in life expectancy of three years over the last decade. *Id.* at 5-4.

24. See Comment, *Comparison of the Living Will Statutes of the Fifty States*, 14 J. CONTEMP. L. 105, 105 (1988) [hereinafter Comment] (citing a President's Commission Study which found that approximately 80% of all deaths occur in an institutional setting).

25. See Hallagan, *Natural Death Acts and Right to Die Legislation*, 32 MED. TRIAL TECH. 301, 302 (1986).

26. See, e.g., *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, cert. denied *sub nom.*, 429 U.S. 922 (1976).

27. See *infra* notes 36-79 and accompanying text.

28. See *supra* note 4 for an example of court's avoidance of the statute.

29. FLA. STAT. §§ 765.01-15 (1987). It is suggested that the legislature's choice of the word "life-prolonging" to characterize the types of procedures to be affected by the Act, as opposed to using the word "life-sustaining," is an indication of the legislature's perspective or moral view on this issue. Comment, *supra* note 24, at 106-07.

30. FLA. STAT. § 765.02 (1987).

allowed to prolong life, is restricted by certain societal interests.³¹

Florida Statutes section 765.02 specifically designates the preservation of human life and the maintenance of ethical standards in the medical profession as examples of these societal concerns.³² Yet the legislature concluded that artificial means used to sustain the vital bodily functions of a patient with a terminal condition postpone the process of dying while contributing nothing medically necessary or beneficial to the patient.³³ As a result, the Act recognizes the individual's right to actively participate and declare his desires concerning life-prolonging procedures.³⁴ This declaration will effectuate the patient's desires once he becomes incompetent.³⁵

While certain societal interests curb the individual's fundamental right to control medical care,³⁶ the Act itself imposes several substantive limits on the execution of a living will.³⁷ A valid living will, as defined by section 765.02, is a declaration entered into by a competent adult. The declaration stipulates that should the declarant have a terminal condition, procedures that prolong life are to be either withheld or withdrawn.³⁸

Age and Competency

To execute a valid living will, an individual must be an adult.³⁹ However, the statute does not define at what age a person becomes an adult. In other contexts an individual is treated as an adult upon attaining age eighteen.⁴⁰ Requiring an individual to reach majority before being eligible to enter into a valid living will is common among the states with living will legislation.⁴¹ However, such a requirement creates confusion as to the rights of an independent seventeen-year-old who requests that life-sustaining measures not be administered

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* See text accompanying notes 80-95 *infra*.

35. See generally, FLA. STAT. § 765.02 (1987).

36. See *supra* notes 9-11 & 16 and accompanying text.

37. See *infra* notes 80-95 and accompanying text.

38. FLA. STAT. § 765.02 (1987). The legislature also encourages individuals to use living wills to declare their desires to have life-sustaining procedures administered or continued. *Id.*

39. *Id.*

40. See FLA. STAT. §§ 732.501, 744.102(6) (1987). Both of these provisions define an adult as a person 18 years of age or older for purposes of executing a will.

41. Comment, *supra* note 24, at 108.

and subsequently becomes incompetent.⁴²

In addition to being an adult, one must be competent at the time the living will is made.⁴³ Like adulthood, the Act does not set forth any standard for evaluating competency. However, other statutory definitions may be used to determine the meaning of competency for living will purposes. For example, the Florida Probate Code defines an incompetent person as someone "who, because of minority, mental illness, mental retardation, senility, excessive use of drugs or alcohol, or other physical or mental incapacity, is incapable of either managing his property or caring for himself, or both."⁴⁴ Until this issue is clarified by the legislature, competency with regard to living wills will most likely be defined solely through litigation.⁴⁵

Terminal Condition

A living will can only be executed when an individual is diagnosed as having a terminal condition.⁴⁶ The Act defines a 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."⁴⁷ In short, the declarant's condition at the time enforcement of the living will is sought must be one from which there is no possibility of recovery, and death must be imminent.⁴⁸

The imminence of death is a standard that poses problems in evaluating the validity of living wills. The term imminent denotes a progressive event.⁴⁹ It is the speed of the progression that creates difficulty because physicians' senses of time may vary.⁵⁰ Therefore, whether death is imminent depends on the measure of time used to estimate when death will occur. Will it happen in minutes, hours,

42. See *infra* notes 148-49 and accompanying text for recommendations to alleviate this limitation.

43. FLA. STAT. § 765.02 (1987) provides ". . . that every competent adult has the fundamental right to control the decisions relating to his own medical care, including the decision to have provided, withheld, or withdrawn the medical or surgical means or procedures calculated to prolong his life."

44. *Id.* § 744.102(5) (1987).

45. *Id.*

46. *Id.*

47. *Id.* § 765.03(6) (1987).

48. *Id.*

49. Comment, *Choosing How to Die: The Need For Reform of Oregon's Living Will Legislation*, 23 WILLAMETTE L. REV. 69, 79 (1987).

50. *Id.*

days, weeks, months or years?⁵¹ Longer periods are less likely to satisfy the "imminent death" requirement, thereby rendering the Act inapplicable as a statutory basis for terminating life-prolonging procedures.⁵²

The Act also does not clarify whether death must be imminent with or without life-prolonging procedures. Therefore it may require that a patient be so close to death that he is likely to die, even with life-sustaining procedures. If this is the proper interpretation, then it is unlikely that a living will would provide any relief for a comatose patient who has no hope of recovery, but who can be maintained indefinitely through the use of artificial measures.⁵³

A better approach is to require that death be imminent without the use of life-prolonging techniques, because it is more consistent with the rationale for creating a living will.⁵⁴ Opponents contend that this approach defines "imminent death" so broadly that it will include medical conditions that the Act in no way intended to cover.⁵⁵ Conceivably, a diabetic in need of treatment would fit within this definition of imminent death.⁵⁶ One commentator placed the perceived overbreadth of this approach into perspective by pointing to the linkage between the meanings of imminent death and life-prolonging procedures.⁵⁷ When these two definitions are considered together, a potentially expansive interpretation of imminent death using the "without" standard is curbed by the Act's restrictive definition of life-prolonging procedures.⁵⁸

The Act also requires that the condition be one from which there is no chance of recovery. Many states with living will statutes substitute the term incurable in place of the "no recovery" language found in the Florida version.⁵⁹ Both terms represent conditions where treatment can control the symptoms of an illness on a limited basis but cannot totally cure the illness.⁶⁰ An example is diabetes, which is in-

51. *Id.*

52. *Id.*

53. Comment, *Maine's Living Will Act and the Termination of Life-Sustaining Medical Procedures*, 39 ME. L. REV. 83, 96 (1987) [hereinafter *Maine's Living Will Act*].

54. *Id.*

55. *See id.*

56. *Id.*

57. *Id.* at 97. *See also infra* notes 68-79 and accompanying text.

58. *Maine's Living Will Act*, *supra* note 53, at 97.

59. Gelfand, *supra* note 2, at 745 n.25 (citing 11 states and the District of Columbia).

60. *Maine's Living Will Act*, *supra* note 53, at 95.

curable, but can be controlled through the use of insulin.⁶¹ By defining a terminal condition to be one from which there is "no recovery" and which makes "death imminent,"⁶² the Florida legislature has limited the effect of living wills to those persons with conditions that progress rapidly toward death, like cancer.⁶³ By implication, living wills will do little to effectuate the medical desires of patients suffering with "chronic or slowly deteriorating conditions like Multiple Sclerosis, Muscular Dystrophy, Alzheimer's disease or with stable disabilities like brain damage from stroke or accident" because these illnesses do not meet the Act's definition of imminent.⁶⁴

Finally, before a living will can be effective, the patient's condition must be diagnosed as terminal and certified as such in writing by both his attending physician⁶⁵ and by one other physician who examined the patient.⁶⁶ This requirement serves as a precaution to ensure a medically accurate diagnosis.⁶⁷

Life-Prolonging Procedures

In a living will, the maker may bar the use of certain procedures altogether, or discontinue those already in use if they are designed to prolong life.⁶⁸ A life-prolonging procedure, for purposes of the Act, is "any medical procedure, treatment, or intervention which: (a) Utilizes mechanical or other artificial means to sustain, restore, or supplant a spontaneous vital function; and (b) When applied to a patient in a terminal condition, serves only to prolong the process of dying."⁶⁹ The legislature specifically excluded from the definition of life-prolonging procedures the provision of sustenance, the administration of medication and the performance of any medical procedure

61. *Id.*

62. FLA. STAT. § 765.03(6) (1987).

63. Francis, *The Evanescence of Living Wills*, 14 J. CONTEMP. L. 27, 37 (1988) [hereinafter Francis].

64. *Id.*

65. See FLA. STAT. § 765.03(1) (1987), which defines an attending physician as the "primary physician who has responsibility for the treatment and care of the patient."

66. *Id.* § 765.03(5) (1987).

67. Such a requirement logically stems from the state's professed interest in permitting living wills to be effective only when their makers are in the process of dying. *Id.* § 765.02 (1987). However, the second opinion requirement does not insure that the second physician is not a rubber stamp for the first. Furthermore, there is no guidance where the second doctor disagrees with the attending physician.

68. *Id.*

69. *Id.* § 765.03(3) (1987).

deemed necessary to provide comfort care or to alleviate pain.⁷⁰ In other words, if the aid amounts to food or water, comfort care, or care to alleviate pain, then a living will does not prevent the continued administration of the aid, despite the fact that it may be the only measure that is separating the patient from impending death.⁷¹

These exclusions evoke the greatest amount of controversy. Their exclusion from the definition of terminable life-prolonging procedures arguably stems from the fact that they represent ordinary care and acts of human kindness that are symbolic of basic forms of treatment to the ailing.⁷² Care for comfort and the alleviation of pain are excluded from the definition of life-prolonging procedures because such actions are seen as providing treatment to the patient without medically or artificially affecting the progress of the underlying terminal condition.⁷³ A failure to provide such care would cause death itself rather than permitting the already existing cause to fol-

70. *Id.* Care for comfort or care to alleviate pain includes bathing the patient, turning him to prevent sores, and trying to keep him warm. *Maine's Living Will Act*, *supra* note 53, at 100. The Florida House of Representatives and the Senate recently approved a bill that amends the Act's stand on the removal of sustenance. Language excluding the provision of sustenance as a life-prolonging procedure has been deleted; furthermore, the Act now contains a new section providing for the removal of sustenance. Proposed § 765.075 regarding the withholding or withdrawal of sustenance provides that:

(1) Sustenance administered to a patient artificially through an invasive medical procedure may be withheld or withdrawn as a life-prolonging procedure in accordance with §§ 765.01-765.15 if the attending physician and at least one other physician who has examined the patient each determine and document in the patient's medical record that the provision of sustenance is a life-prolonging procedure for that patient.

(2) The determination and documentation required under subsection (1) must be made by physicians other than physicians employed by a health care facility in which the patient is receiving care.

(3) A declaration made by a declarant in accordance with §§ 765.01-765.15 before October 1, 1989 is deemed not to authorize the withholding or withdrawal of sustenance as a life-prolonging procedure unless such withholding or withdrawal is expressly authorized in that declaration.

H.R. 494, § 2, 11th Leg., 1st Sess., Fla. 1989. The bill was vetoed by the governor on July 3, 1989. *St. Petersburg Times*, Jul. 4, 1989, at 1B, col. 1. "The bill was supported by the Florida Medical Association and the American Medical Association, but opposed by the Florida Catholic Conference and Florida Right to Life." *Id.* at 6B, col. 3.

71. FLA. STAT. § 765.03(3) (1987).

72. Francis, *supra* note 63, at 33. The American Medical Association's Council on Ethical Judicial Affairs would include artificially or technologically supplied sustenance in the class of life-prolonging medical procedures and would withhold or withdraw sustenance in response to a valid living will. See Comment, *supra* note 24, at 121 (noting AMA's *Statement on Withdrawing Treatment*, USA Today, Apr. 2, 1986, at 9A).

73. *Maine's Living Will Act*, *supra* note 53, at 100.

low its course.⁷⁴

Many jurisdictions find it difficult to discern a relevant distinction between sustenance, care for comfort or the alleviation of pain, and life-prolonging measures like respirators.⁷⁵ Opponents of these exclusions from terminable life-prolonging procedures assert that sustenance, comfort care, and care to alleviate pain are often in fact the only measures prolonging life.⁷⁶ They express concern that the exclusions themselves are invasive⁷⁷ and may cause pain and discomfort in derogation of the patient's wishes.⁷⁸

Measures such as dialysis, transfusions, palliative chemotherapy, and transplant surgery are not classified as life-prolonging procedures since they often beneficially extend life. Because they are not perceived as drawing out the dying process, these types of procedures cannot be withdrawn or withheld pursuant to a living will despite the patient's desires to the contrary.⁷⁹

EXECUTION OF A LIVING WILL

In addition to setting forth substantive limits,⁸⁰ the Act includes several procedural prerequisites to the execution of a valid living will. The Act refers to a living will as a declaration.⁸¹ The declaration may be created by a written or an oral statement.⁸² The written declaration must be voluntarily executed by its maker⁸³ and signed by the maker in the presence of two witnesses who must also sign the writ-

74. *Id.* at 101. An extreme example is such extensive neglect that death results, not from the disease, but from the failure to administer comfort care. Such abusive care will not be protected under this Act. *Id.*

75. See *In re Jobs*, 108 N.J. 394, 529 A.2d 434 (1987); *Brophy v. New England Sinai Hosp., Inc.*, 398 Mass. 417, 497 N.E.2d 626 (1986); *Corbett v. D'Alessandro*, 487 So. 2d 368, 371 (Fla. 2d DCA 1986) (patient had not executed a living will so the court was able to circumvent the limitations of FLA. STAT. § 765.03(3) (1987) and order the patient's sustenance to be withdrawn).

76. Gelfand, *supra* note 2, at 750-53.

77. Francis, *supra* note 63, at 33. For example, to provide the patient with sustenance and hydration, a tube must be inserted through the patient's nose into his stomach, or surgical entry into the patient's intestine may be required. *Id.*

78. Comment, *supra* note 24, at 115. Opponents of the exclusions contend that while withholding sustenance may seem merciless and uncaring, it is no better to continue sustenance to a patient in an irreversible coma when its continuation is the sole measure preventing the person from dying naturally. Francis, *supra* note 63, at 33.

79. *Id.*

80. See *supra* notes 31-79 and accompanying text.

81. FLA. STAT. § 765.03(2) (1987).

82. *Id.* §§ 765.03(2), .04(1) (1987).

83. *Id.* § 765.03(2)(a) (1987).

ten document.⁸⁴ One of the two witnesses cannot be a spouse or a blood relative of the maker.⁸⁵

The statute also implies that an oral statement can become a valid living will if the declaration is made by its maker subsequent to his being diagnosed as having a terminal condition.⁸⁶ This is misleading because the Act requires that the oral statement be reduced to writing in accordance with the requirements for executing a written declaration.⁸⁷ If this interpretation is correct, the Act really requires a written manifestation of the maker's intentions.⁸⁸ A truly oral declaration, one without the maker's signature and not written by him, is valid only if the declarant was physically unable to sign the written declaration,⁸⁹ and one of the witnesses signed the declarant's signature to the document in his presence and at his direction.⁹⁰

Finally, the declarant must give notice to his attending physician of the existence of a living will.⁹¹ If he is unable to do so due to incompetency or mental or physical incapacity or because he is comatose, anyone can make the physician aware that a living will exists.⁹² When the attending physician is so notified, he must promptly make the original declaration, or a copy of it, a part of the declarant's medical record.⁹³ If the declaration is oral, the physician shall, likewise, promptly make the existence of the living will evident in the patient's medical record.⁹⁴ The statute does not provide any guidelines for evaluating the validity of a living will. Furthermore, the statute does not specify whether the attending physician has an obligation to evaluate the living will. The Act provides a suggested form for a living will but does not require that its form be followed.⁹⁵

84. *Id.* § 765.04(1) (1987).

85. *Id.* This requirement probably stems from a desire to curb the potential for undue influence by replacing a blood relative or spouse with an unrelated witness.

86. *Id.* § 765.03(2)(b) (1987).

87. *Id.* §§ 765.03(2)(b), .04(1) (1987). See also *supra* notes 83-85 and accompanying text.

88. FLA. STAT. § 765.04(1) (1987).

89. *Id.*

90. *Id.* Florida is one of only two states that allow one of the witnesses to sign for the declarant. Such authorization seems to promote "manufacturing" of living wills. One commentator recommends having a special "state" witness or "ombudsman" to authorize the living will in order to avoid a "manufactured" declaration. Gelfand, *supra* note 2, at 762.

91. FLA. STAT. § 765.04(2) (1987).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* § 765.05(1) (1987). The Florida suggested form reads as follows:

Declaration made this ____ day of ____, 19___. I ____, willfully and voluntarily make

MISCELLANEOUS PROVISIONS

Many of the issues raised by the Act are unresolved, due to a lack of explanation on the drafters' part or because the provisions in question have yet to be addressed by the courts. The Act, for example, is silent as to whether a patient's living will may be executed and incorporated into his testamentary will, or whether it must be executed as a separate document. By definition, a will is ineffective until the testator's death.⁹⁶ Conversely, the purpose of a living will is to dictate its maker's desires while he is still living.⁹⁷ Therefore, it is inconsistent to combine these two documents, and to do so may undermine their integrity.⁹⁸ Living will declarants will be better advised to execute a separate document. Also, a valid living will cannot be applied during the course of a woman's pregnancy.⁹⁹ The Act fails to address the rationale for this provision.

known my desire that my dying not be artificially prolonged under the circumstances set forth below, and I do hereby declare:

If at any time I should have a terminal condition and if my attending physician has determined that there can be no recovery from such condition and that my death is imminent, I direct that life-prolonging procedures be withheld or withdrawn when the application of such procedures would serve only to prolong artificially the process of dying, and that I be permitted to die naturally with only the administration of medication or the performance of any medical procedure deemed necessary to provide me with comfort care or to alleviate pain.

In the absence of my ability to give directions regarding the use of such life-prolonging procedures, it is my intention that this declaration be honored by my family and physician as the final expression of my legal right to refuse medical or surgical treatment and to accept the consequences for such refusal.

If I have been diagnosed as pregnant and that diagnosis is known to my physician, this declaration shall have no force or effect during the course of my pregnancy.

I understand the full import of this declaration, and I am emotionally and mentally competent to make this declaration.

(Signed)

The declarant is known to me, and I believe him or her to be of sound mind.

(Witness)

(Witness)

Id.

96. *Id.* § 731.201(35) (1987). The Florida Probate Code defines a will as "an instrument, including a codicil, executed by a person, in the manner prescribed by this code, which disposes of his property on or after his death." *Id.*

97. *Id.* § 765.02 (1987).

98. However, in *Euart v. Yoakley*, 456 So. 2d 1327 (Fla. 4th DCA 1984), the Fourth District Court of Appeal recognized that a will can have a dual character; it can have a testamentary aspect yet be used for present purposes as well. *Id.* at 1329. Therefore, the court held a revocable inter vivos trust could be revoked by a will executed by the settlor subsequent to his establishment of the trust. *Id.*

99. *Id.* § 765.08 (1987).

In addition, the Act indicates that it should not be construed to approve or condone euthanasia or mercy killing, or deliberate action or inaction designed to terminate life rather than to allow the natural process of dying to run its course.¹⁰⁰ The withholding or withdrawal of life-prolonging procedures from a patient in accordance with the provisions of the Act does not constitute suicide.¹⁰¹ The reason for this provision is unclear. Its purpose may be to protect physicians faced with a living will situation or to protect patients from challenges by their insurance carriers. Moreover, the Act precludes a living will from having any effect on the acquisition or issuance of any life insurance policy.¹⁰² The Act also provides that declarations made prior to the enactment of the statute will be "given effect."¹⁰³

THE ROLE OF THE PHYSICIAN

A valid living will by definition directs the maker's physician to provide, withhold, or withdraw life-prolonging procedures.¹⁰⁴ The physician is obliged to follow the directions set forth in a valid living will.¹⁰⁵ The Act grants immunity from civil liability and criminal prosecution to a physician, health care facility, or person acting pursuant to instructions of a physician who withholds or withdraws life-prolonging measures from a patient in accordance with the Act's provisions.¹⁰⁶ When performing in accordance with the Act, health care facilities and physicians may not be considered to have conducted

100. *Id.* § 765.11(1) (1987). See Gelfand, *supra* note 2, at 747 ("Euthanasia is defined as 'an easy death or [the] means of inducing one' ") (quoting Webster's Third New International Dictionary of the English Language 786 (1981)). Gelfand noted, such provisions are basically useless in that they disclaim euthanasia, yet they provide a means of allowing euthanasia. "[C]alling something euthanasia does not make it any less legal, ethical, or proper. Rightly or wrongly, living will statutes provide an easy death." *Id.*

101. FLA. STAT. § 765.11(2) (1987).

102. *Id.* § 765.12 (1987). Likewise, execution of a living will cannot be made a precondition to obtaining insurance for health care services. *Id.* Furthermore, the creation of a living will does not constitute a codification of the terms of the maker's already existing life insurance policy. *Id.* The Act also provides that "[n]o policy of life insurance will be legally impaired or invalidated by the withholding or withdrawal of life-prolonging procedures from an insured patient in accordance with the provisions of sections 765.01-765.15, notwithstanding any term of the policy to the contrary." *Id.*

103. *Id.* § 765.14 (1987).

104. *Id.* § 765.02 (1987). In addition, a living will can also direct a designated individual to make the treatment decision on the maker's behalf. *Id.*

105. *Id.*

106. *Id.* § 765.10(1) (1987).

themselves in an unprofessional manner.¹⁰⁷ It is presumed that such persons authorizing or effectuating the withholding or withdrawal of life-prolonging procedures have acted in good faith and in accordance with the provisions of the Act, unless the contrary can be proven by a preponderance of the evidence.¹⁰⁸

While a living will generally impose a duty on the attending physician to effectuate the patient's desires, the physician may refuse to abide by the declaration.¹⁰⁹ Upon his refusal, however, the attending physician must make a "reasonable effort" to transfer his patient to another physician.¹¹⁰ Unfortunately, the statute does not specify any penalty for failing to transfer a patient.¹¹¹

REVOCATION OF A LIVING WILL

The maker of a living will is presumed to have executed his declaration voluntarily.¹¹² A living will may be revoked by the declarant at any time,¹¹³ regardless of its maker's mental state at the time of revocation.¹¹⁴ Thus, a patient's current desires will prevail over those expressed in his living will, no matter how inconsistent they may be with those conveyed in the past, and regardless of how unreliable they might appear because of his present mental condition.¹¹⁵

A revocation can be expressed in three ways. The first is revocation by a signed and dated writing.¹¹⁶ The Act does not mention whether the declarant's signature must be witnessed.¹¹⁷ The second method of revocation is the physical destruction or cancellation of the declaration by the maker or by another person at the maker's direction and in the maker's presence.¹¹⁸ Thirdly, the declarant may revoke his living will by orally expressing such an intent.¹¹⁹ However,

107. *Id.*

108. *Id.* § 765.10(2) (1987).

109. *Id.* § 765.09 (1987).

110. *Id.*

111. *Id.* § 765.13 (1987).

112. *Id.* § 765.10(2) (1987).

113. *Id.* § 765.06 (1987).

114. Francis, *supra* note 63, at 40.

115. *Id.* at 41.

116. FLA. STAT. § 765.06(1) (1987).

117. Wolf, *Florida Living Will*, 59 FLA. B.J. 13, 14 (Apr. 1985) [hereinafter Wolf]. The principal dangers here concern whether the signature is authentic and whether the revocation is of the patient's own volition.

118. FLA. STAT. § 765.06(2) (1987). The Act is silent as to the enforceability of copies of living wills.

119. *Id.* § 765.06(3) (1987).

the Act is silent as to whom the oral expression must be made, but in any event revocation ultimately becomes effective only when it is communicated to the attending physician.¹²⁰ Like the written revocation provision, the oral revocation provision also is silent as to the necessity of witnesses.¹²¹ Commentators have expressed concern that the absence of specificity in the Act will generate confusion as to whether a revocation occurred and whether the declarant's conduct was intended as a revocation.¹²²

Ultimately, a revocation, in whatever form, remains ineffective until communicated to the patient's attending physician.¹²³ Failure to abide by the dictates of a revocation will not result in the imposition of criminal or civil liability upon any person unless that individual actually knew of the revocation.¹²⁴ The purpose of this provision is unclear. However, physicians who are not notified of a living will's revocation appear to be a class of intended beneficiaries of this protection from liability.¹²⁵ The Act's protections, however, extend only so far. Falsifying or forging a living will or intentionally withholding the revocation of a living will in order to cause life-prolonging procedures to be withheld or withdrawn in a manner contrary to the declarant's desires constitutes a second-degree felony, if such actions hasten death.¹²⁶

THE DOCTRINE OF SUBSTITUTED JUDGMENT

While the provisions of Florida's living will act primarily apply to persons who attempt to execute living wills, the Act also addresses

120. *Id.*

121. Wolf, *supra* note 117, at 14.

122. Francis, *supra* note 63, at 38. Another commentator sees the ambiguity of oral revocations as a potential problem in Florida. Under Florida Statutes § 765.13(2), withholding knowledge of a revocation of a living will is considered a second-degree felony. *See* FLA. STAT. § 765.13(2) (1987). Thus, if a doctor is orally informed of a revocation and he disregards it as not coinciding with what he thinks the patient intended, the doctor may be subject to a serious penalty. Gelfand, *supra* note 2, at 778.

123. FLA. STAT. § 765.06 (1987).

124. *Id.*

125. Wolf, *supra* note 117, at 14.

126. FLA. STAT. § 765.13(2) (1987). *See also* FLA. STAT. § 765.13(1) (1987), which specifies other offenses punishable as third-degree felonies. Conversely, no penalty is assessed to a doctor who fails to transfer a patient after declining to uphold the patient's living will. Furthermore, the statute does not provide a penalty for a doctor who fails to record or make a determination of the terminal condition of a patient. Such omissions from the penalty provisions tend to undermine any enforcement against doctors who do not uphold a patient's advance declarations.

what may be done in the absence of a living will.¹²⁷ In *John F. Kennedy Memorial Hospital v. Bludworth*,¹²⁸ the Florida Supreme Court recognized that "terminally ill incompetent persons being sustained only through the use of extraordinary artificial means have the same right to refuse to be held on the threshold of death as terminally ill competent persons."¹²⁹ Consistent with the statutory provisions, life-prolonging procedures may be withdrawn or withheld from incompetent adult patients with terminal conditions only at the request of the patient's legal guardian or a family member.¹³⁰ In addition to these requirements, the patient must be comatose, physically or mentally incapable of communication, or incompetent, and must not have made a valid living will.¹³¹

Generally, the qualified patient will be unconscious, because an unconscious person meets all the statutory requirements, while a conscious patient, if competent, can dictate the particular course of treatment he desires through a living will.¹³² However, unconsciousness is not the only way to lose competence.¹³³ Most commonly, senility¹³⁴ produces a loss of competence while consciousness remains unaffected.¹³⁵ The rationale behind the doctrine of substituted judgment is that while an incompetent person has the same right to refuse life-prolonging procedures as a competent person, he cannot exercise those rights due to his incompetency. Therefore the incompetent patient's rights may be exercised by a legal guardian.¹³⁶

The Act sets forth, in order of priority, those individuals¹³⁷ who, together with the patient's attending physician, must discuss the patient's condition and enter into a written agreement ordering life-prolonging procedures to be withheld or withdrawn.¹³⁸ Most importantly,

127. *Id.* § 765.07 (1987).

128. 452 So. 2d 921 (Fla. 1984).

129. *Id.* at 926.

130. FLA. STAT. § 765.07(1) (1987).

131. *Id.*

132. Gelfand, *supra* note 2, at 745.

133. *Id.*

134. Senility, as defined by BLACK'S LAW DICTIONARY 1222 (5th ed. 1979), is "an infirmity resulting from deterioration of mind and body experienced in old age."

135. Gelfand, *supra* note 2, at 745-46.

136. *Bludworth*, 452 So. 2d at 926.

137. FLA. STAT. § 765.07(1)(a)-(f) (1987). The Act creates a hierarchy of persons to act on the patient's behalf. The decisionmaker will be the first individual, moving down the list, who is "reasonably available, willing and competent to act" on the patient's behalf. *Id.* § 765.07(1) (1987).

138. *Id.* § 765.07(1) (1987).

the attending physician and decisionmaker are guided in this decision by the express or implied intentions of the patient.¹³⁹ The treatment decision must be witnessed by at least two persons who are present at the consultation at the time the treatment decision is made.¹⁴⁰ Here, the Act is silent as to whether the witnesses must be disinterested parties or whether they may include a spouse, blood relatives, the decisionmaker, the attending physician or his employee or an employee of the health care facility.¹⁴¹ Also, the Act fails to describe the purpose of the witnesses.¹⁴²

In ascertaining the incompetent patient's wishes, the fact that he did not execute a living will does not create any presumption regarding his desires to use or have life-prolonging procedures withheld.¹⁴³ Many people are likely to assume that if they do not wish to terminate life-sustaining treatment, there is no need to execute a living will. Ironically, the Act does not provide guidance in the use of living wills for maintaining medical treatment. Thus, individuals who want their lives prolonged are not required to have a living will, and nothing is presumed from their failure to adopt one.¹⁴⁴

RECOMMENDATIONS

The Act is virtually silent as to the rights of individuals who

139. *Id.* This requirement directly focuses on the actual preferences of the patient and is a subjective test of what the incompetent patient would do if he were competent. *Bludworth*, 452 So. 2d at 926. Courts have applied different tests in this area. The New York Court of Appeals requires clear and convincing evidence of what the patient's actual desires were when competent. *See In re Storar*, 52 N.Y.2d 363, 378-80, 420 N.E.2d 64, 71-72, 438 N.Y.S.2d 266, 274, *cert. denied*, 454 U.S. 858 (1981). Other courts apply a "best interests" standard, which evaluates whether termination of life-prolonging procedures is in the best interests of a patient no longer competent. *See, e.g., Barber v. Superior Court*, 147 Cal. App. 2d 1006, 1021, 195 Cal. Rptr. 484, 493 (1983). Yet another approach exists. When trustworthy evidence of a patient's desires is totally lacking, New Jersey courts apply a purely objective test, which will call for the termination of life-prolonging procedures if "the net burdens of the patient's life with the treatment . . . clearly outweigh the benefits that the patient derives from life." *In re Conroy*, 98 N.J. 321, 366, 486 A.2d 1209, 1232 (1985). If there is some trustworthy evidence that the patient would have refused treatment, the decisionmaker can apply a "limited objective test" and order discontinuation of the life-prolonging procedures, if the decisionmaker believes that the burdens of the patient's life with treatment clearly outweigh the benefits the patient obtains from life after the treatment. *Id.* at 365, 486 A.2d at 1232.

140. FLA. STAT. § 765.07(2) (1987).

141. Wolf, *supra* note 117, at 14.

142. *Id.*

143. FLA. STAT. § 765.07(3) (1987).

144. Gelfand, *supra* note 2, at 783-85.

want life-prolonging procedures administered.¹⁴⁵ Further, as the statute does not presume that patients without living wills intend to be given life-sustaining treatment,¹⁴⁶ it needs revision to provide guidance in how individuals may make formal declarations instructing physicians to maintain life-prolonging procedures.¹⁴⁷

Several other problems prevent the Act from adequately protecting an individual's rights. One such problem is the statute's exclusion of minors.¹⁴⁸ Although minors may be restricted in other facets of life, they should be afforded some protection and input in the determination of whether they should live or die. Obviously, a minor's ability to exercise mature judgment should be considered in drafting a living will, but such concerns could be dealt with through stringent restrictions. Examples of such restrictions are the establishment of emancipation¹⁴⁹ or written parental consent.

Currently, the statute does not indicate whether a living will drafted under another state's laws will be recognized in Florida. One alternative would be to recognize living wills made in other states that satisfy the Florida requirements. If a nonresident being treated in Florida has a declaration drafted under another state's statute that does not meet the requirements of Florida Statutes chapter 765, the living will would not be enforceable in Florida. Although such a result may seem harsh, it is the best way to ensure adherence to the Florida Act.

Other problems arise from the terms used in the statute. An example is the requirement that an adult be "competent."¹⁵⁰ If the defi-

145. FLA. STAT. § 765.02 (1987) contains the only mention of such rights. "[T]he Legislature declares that the laws of this state recognize the right of a competent adult to make an oral or written declaration instructing his physician to provide . . . life-prolonging procedures." *Id.* The Act gives no guidance for drafting an advance declaration providing for maintaining life-sustaining treatment. See text accompanying note 144 *supra*.

146. See *supra* note 143 and accompanying text.

147. A suggested form for removal of treatment is provided for in FLA. STAT. § 765.05 (1987). The Act should be amended to include a sample alternate form which maintains treatment. Furthermore, since one of the state's highest interests is the preservation of life, it seems illogical to maintain the "no presumption" clause in FLA. STAT. § 765.07(3) (1987). See *John F. Kennedy Hosp. v. Bludworth*, 425 So. 2d 921, 924 (Fla. 1984) ("there can be no doubt that the State does have an interest in preserving life"). See also text accompanying notes 143-44 *supra*.

148. FLA. STAT. § 765.02 (1987) (declarant must be a competent adult). See *supra* notes 39-42 and accompanying text.

149. FLA. STAT. § 744.102 (1987) defines a minor as a "person under 18 years of age whose disabilities have not been removed by marriage or otherwise." Thus, this definition could be incorporated into the living will statute, which would allow minors to be emancipated from the restriction.

150. *Id.* § 765.02 (1987) (requiring a declarant to be competent, but competency is not

inition of "incompetent" was incorporated into the Act from the Florida Probate Code,¹⁵¹ confusion over the definition of competency could be avoided.

The Act's exclusion of sustenance from life-prolonging procedures¹⁵² can be remedied by one of two revisions. One alternative is to simply remove the exclusion.¹⁵³ Alternatively, the provision prohibiting sustenance removal could be retained with legislative clarification,¹⁵⁴ which is the preferable reform. This approach ensures that death will result only from the illness rather than from the denial of food and water.

A doctor's obligation to transfer a patient upon refusal to comply with the declaration¹⁵⁵ also needs reconsideration. Currently, the Act does not impose a penalty when a physician fails to transfer a patient with a living will,¹⁵⁶ nor does the Act require that a patient be transferred to a doctor who will comply with the living will.¹⁵⁷ The Act should be amended to require a physician's reasonable effort to transfer the patient to a doctor who will comply with the patient's declaration. If the doctor makes no reasonable effort to heed the living will's provisions, the doctor shall be subject to the penalty provisions of Florida Statutes section 765.13(1), which presently lists violations constituting a third-degree felony.¹⁵⁸

Other suggested revisions involve the present ability to make oral living wills,¹⁵⁹ the effect of the sample form,¹⁶⁰ and the current silence regarding a living will's relationship to a durable power of attorney.¹⁶¹ Currently, the Act is at best confusing with regard to an individual's ability to make a valid oral declaration.¹⁶² All confusion would be alleviated if the statute simply removed any mention re-

defined in the statute). *See supra* notes 43-45 and accompanying text.

151. *Id.* § 744.102(5) (1987).

152. *Id.* § 765.03(3)(b) (1987). *See supra* notes 70-71 and accompanying text.

153. *See* text accompanying notes 75-76 *supra*.

154. *See supra* notes 72-74 and accompanying text.

155. FLA. STAT. § 765.09 (1987).

156. *See id.* § 765.13 (1987) (regarding penalties).

157. FLA. STAT. § 765.09 (1987) provides only that a doctor "shall make a reasonable effort to transfer the patient to *another* physician" (emphasis added).

158. FLA. STAT. § 765.13(1) (1987) (dealing with penalties for willfully falsifying, forging, concealing, cancelling, destroying or revoking a patient's declaration).

159. *See id.* §§ 765.03(2)(b), .04 (1987).

160. *See supra* note 95 for Florida's suggested form declaration. *See also* FLA. STAT. § 765.05 (1987).

161. *See infra* notes 178-80 and accompanying text.

162. *See supra* notes 86-90 and accompanying text.

garding a declarant's ability to make an oral living will.¹⁶³

The sample form is presently classified as a "suggested form of written declaration."¹⁶⁴ Compliance with this form should be required. The statutory provision should also include a separate, required form for individuals wanting to maintain life-support systems.¹⁶⁵

Finally, a conflict may arise between a living will and a durable power of attorney. A durable power of attorney is an instrument that allows a declarant to grant decisionmaking power to a third person in the case of the declarant's incompetency.¹⁶⁶ Where a declarant has drafted a living will under Florida Statutes sections 765.01-761.15, as well as a durable power of attorney, a conflict may arise in determining which document prevails. The living will statute should provide for the living will's precedence over a durable power of attorney. The Act would thereby favor the document that solely and specifically represents the declarant's wishes regarding life-prolonging procedures¹⁶⁷ and would further strengthen the power of living wills.

ALTERNATIVES

Although recent public opinion polls show extensive support for enhancing an individual's right to refuse life-sustaining treatment,¹⁶⁸ such support has not translated into increased use of advance written instructions regarding medical care.¹⁶⁹ The lack of formalized advance medical directives is partially due to public apathy and ignorance of current law surrounding living wills and the right to die.¹⁷⁰

163. See Gelfand, *supra* note 2, at 761-62 (noting that oral declarations may promote confusion and may ultimately undermine the effectiveness of living will legislation since the statutes are basically designed to govern written advance directives).

164. FLA. STAT. § 765.05 (1987). See *supra* note 95.

165. See text accompanying notes 143-44 *supra*.

166. See FLA. STAT. § 709.08 (1987).

167. The durable power of attorney only represents a third party supposedly carrying out the declarant's wishes. See *infra* notes 178-80 and accompanying text.

168. See Kutner, *supra* note 8, at 668 (citing recent Louis Harris Poll showing 85% favored right to die). See also St. Petersburg Times, Jan. 8, 1989, City Times, at 3, col. 2 (citing recent Hemlock Society figures which show 65% of Americans in favor of the right to die).

169. Collin, *supra* note 22, at 5-13. Collin cited a President's Commission Report in 1982 which found that only 8% of the American population had made such advanced declarations. *Id.* As of 1982, thirteen states, including California and Texas, and the District of Columbia, had adopted living will legislation. See Gelfand, *supra* note 2, at 739.

170. Collin, *supra* note 22, at 5-13 & n.46 (citing U.S. Senate Special Committee on Aging Report which found a lack of public awareness regarding advance medical devices). See also Gelfand, *supra* note 2, at 787 (discussing the likelihood of many people not drafting a living

Many commentators also point to the ineffectiveness of current living will legislation as one of the major obstacles obstructing an individual's right to refuse life-prolonging treatment.¹⁷¹

This Comment has detailed the way in which Florida's living will legislation is ineffective in promoting the rights of individuals who want to terminate life-prolonging treatment. Furthermore, this Comment has made a number of proposals recommending changes in statutory language which could better serve patients' interests. However, the answer is not necessarily going to come from legislative amendments. As commentators have noted, states' attempts to "improve" existing living will legislation have met with adversity from the right-to-die opponents.¹⁷² Thus, the inherent structure of legislative decisionmaking continues to be the primary source of the limitations of living will law.¹⁷³ Until Florida lawmakers are able to accomplish the task of drafting a living will statute which satisfies all "interested" parties, individuals have to look to alternative measures to ensure that their advance requests are adhered to should they become incompetent.

Proxy Appointments and the Durable Power of Attorney

Rather than selecting a living will to direct the removal of life-prolonging treatment, individuals have the option of appointing another party to make their medical decisions. Such alternatives are

will because they want to be kept alive in all circumstances). See *supra* notes 143-44 and accompanying text for a discussion of the ramifications of parties not drafting living wills, but wishing to be kept alive.

171. See generally Gelfand, *supra* note 22; Francis *supra* note 63; Comment, *supra* note 24; Bryan, *supra* note 8.

172. In 1988, proposed bills and amendments to existing living will statutes suffered legislative setbacks in Michigan, Nebraska and Ohio. In 1988, also in California, legislators were able to pass a new bill; however, the governor vetoed the bill because he felt it was going too far in relaxing customary definitions of death. AARP News Bull., Feb. 1989, at 1, col. 1. See also Gelfand, *supra* note 2, at 742, for a brief discussion of ineffectual language changes in living will statutes.

173. See Gelfand, *supra* note 2, at 822 (noting that present living will statutes have been obstacles to individual decisionmaking because they were "tempered in the political compromises necessary to secure their enactment"). See also Johnson, *Sequential Domination, Autonomy and Living Wills*, 9 W. NEW ENGL. L. REV. 113, 118-23 (1987) [hereinafter Johnson], for a discussion of the inherent limitations in relying on legislation to govern the right to die. "[L]egislatures reflect the rule of the majority, however . . . [a]utonomy is a value that protects the individual from the majority; thus, the view of the majority should not be the final determinant of the boundaries of individual choice." *Id.* at 122.

commonly referred to as the "proxy appointment"¹⁷⁴ and the "durable power of attorney."¹⁷⁵ These methods have the advantage of flexible decisionmaking. The living will, which deals only with the withdrawal or withholding of life-prolonging procedures, is a fixed instrument incapable of dealing with all treatment possibilities once the patient becomes incompetent.

The Life-Prolonging Procedure Act of Florida specifically provides for proxy appointments.¹⁷⁶ Proxy appointments allow patients who have become incompetent to have an active participant representing their interests in medical decisionmaking. While there remains a possibility that the proxy holder will not carry out the incompetent patient's directions, the likelihood of this situation is diminished by the fact that the proxy was selected by the patient when the patient was competent. The proxy appointment under the Florida Act, however, is also subject to the "terminal condition" requirement in the statute.¹⁷⁷ Thus, like a living will, a proxy appointment is effective once the patient becomes incompetent, and the proxy's decisionmaking authority is likewise limited to the situation in which the patient becomes "terminal."

Another option is the durable power of attorney, for those individuals who desire an active participant to represent them in medical determinations once they become incompetent. Although powers of attorney generally do not survive incompetency, Florida provides for a power that will survive incompetency in Florida Statutes chapter 709.¹⁷⁸ While this option permits a competent declarant to appoint another party to be an agent once the declarant becomes incompetent, and affords benefits similar to the proxy appointment, this power is somewhat limited. The language in Florida Statutes section

174. See generally Johnson, *supra* note 173, at 133-34.

175. See generally Kochman & Schlesinger, *Personal Planning Alternatives for the Elderly Client*, 61 FLA. B.J. 17, 18-20 (May, 1987) [hereinafter Kochman & Schlesinger].

176. FLA. STAT. § 765.05(2) (1987) provides: "A declaration . . . may include . . . a designation of another person to make the treatment decision for the declarant should he be diagnosed as suffering from a terminal condition and comatose, incompetent, or otherwise mentally or physically incapable of communication."

177. *Id.* Perhaps the proxy appointment may be limited, in that, "Any competent adult may, at any time, make a written declaration directing the withholding or withdrawal of life-prolonging procedures in the event such person should have a *terminal condition*." *Id.* § 765.04(1) (1987) (emphasis added). See *supra* notes 46-67 and accompanying text for a discussion of the problems with requiring a "terminal condition."

178. The specific provision that allows a person to give a "durable" power to another party to make decisions regarding the removal of life-sustaining procedures is FLA. STAT. § 709.08 (1987) (entitled "Durable family power of attorney").

709.08 seems sufficiently broad to encompass medical decisionmaking. However, no case in Florida has specifically held that a durable power of attorney under Florida Statutes chapter 709 may be exercised to terminate life-sustaining medical treatment.¹⁷⁹ Thus, although the durable power of attorney has great potential for an individual who wants an active decisionmaker should he become incompetent, it remains to be seen what effect the durable power of attorney will be given by Florida courts¹⁸⁰ when challenges are made to a durable power of attorney's authority to withhold or withdraw life-sustaining treatment from the declarant.

CONCLUSION

The purpose of living will statutes is to provide an understandable and reliable framework through which individuals can plan for future medical events. Unfortunately, Florida's Life-Prolonging Procedure Act fails in many respects to achieve these purposes, because ambiguity and vagueness in the Act's key provisions diminish reliability. This Comment's goal is not to advocate abolishing the Act or to make the statute more cumbersome. Its principal emphasis is to strengthen the existing provisions' usefulness by removing ambiguity and vagueness. Clarity in Florida's Act would satisfy both the interests of physicians faced with living wills, and the concerns of a patient's family that the living will truly reflects the patient's desires. These concerns are even more prominent when a designated family member substitutes his judgment for what he hopes the patient would have wanted.

Any statutory revisions must strengthen the individual's right to make advance medical declarations. Many of the Act's problems may be corrected or clarified through litigation. However, such an approach to revision-making is particularly unacceptable in this case

179. A few cases have discussed the durable family power of attorney under FLA. STAT. § 709.08, but have not clarified the scope of durable powers of attorney regarding medical decisionmaking. Traditionally, durable powers of attorney are used for management of property. See generally Collin, *supra* note 22. See also *In re Guardianship of Browning*, 543 So. 2d 258, 266 (Fla. 2d DCA 1989) (court recommends combining the suggested written declaration form in FLA. STAT. § 765.05 with a durable family power of attorney under FLA. STAT. § 709.08 in order to effectuate the use of durable powers of attorney in making medical decisions for incompetents; also the court upheld a guardian's right to remove feeding tubes under the Florida Constitution, not chapter 709). See *supra* note 4.

180. See Gelfand, *supra* note 2, at 794-95 discussing the weaknesses of durable powers of attorney. Cf. Collin, *supra* note 22; Kochman & Schlesinger, *supra* note 175 (both sources discuss in detail the benefits of durable powers of attorney and how to effectively use them).

because the living will statute was enacted to reduce court involvement regarding living wills. Admittedly, the give and take nature of the legislative process may limit the effectiveness of the various proposals suggested by commentators and by this Comment.

Proxies and durable powers of attorney are presently viable alternatives to living wills. They may even surpass the usefulness of living wills in the future if they, unlike their living will counterparts, are given full effect and are left unencumbered by court interpretation.

In any event, the living will statute as it presently exists, or as it may appear in time, provides the mechanisms for individuals to make an advance medical directive that is both protected and effectuated. However, as some commentators have noted, the sympathetic purpose behind living wills could be carried to extremes.¹⁸¹ Caution should govern the expansion of a patient's right to self-determination in order that living wills do not become a convenient tool for accelerating the process of death. If in doubt, the legislature in considering any new proposals should err on the side of life.

Vivian Cocotas and Fred Storm

181. *See supra* note 11.

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AUTHORS'¹ MORAL RIGHTS² IN THE UNITED STATES AND THE BERNE CONVENTION³

The Congress shall have power . . . [to secure] for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

U.S. Constitution, article I, section 8, clause 8.

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modifications of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

Berne Convention Article 6bis(1)⁴

"When *I* use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean — neither more nor less."

Lewis Carroll, *Through the Looking Glass* Chapter 5 (1872).

I. INTRODUCTION

On October 12, 1988 President Reagan signed the Berne Convention Implementation Act of 1988,⁵ which allowed the United States to join the foremost treaty for the protection of intellectual property.

1. "A person who makes or originates something; creator." WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE, COLLEGE EDITION 99 (1968). The term "author" as used in the United States Constitution, the Berne Convention, and this Comment refers to people who create things for other than solely utilitarian purposes, such as movie directors, painters, sculptors and other fine artists, writers of books and music, musicians and performing artists. The terms "author" and "artist" are used interchangeably throughout this Article.

2. "Moral rights" will be used in this article to refer to the moral rights of authors, particularly the rights of paternity and integrity. See *infra* text accompanying notes 9-14.

3. Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at Paris on May 4, 1886, revised at Berlin on November 13, 1908, completed at Berlin on March 20, 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26, 1948, and revised at Stockholm on July 14, 1967 (with Protocol regarding developing countries), No. 11850, 828 U.N.T.S. 221 [hereinafter Berne Convention]. See *generally Conference Celebrating the Centenary of the Berne Convention*, 11 COLUM. J.L. & ARTS (1986). The volume contains the papers presented at a conference held in 1986 by the Intellectual Property Law Unit of the Centre for Commercial Law Studies at Queen Mary College in the University of London and the British Literary and Artistic Copyright Assoc.

4. "*Bis*" signifies an addition to the Convention.

5. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568 § 3(b), 102 Stat. 2853, 2853-54 (1988), and conversation with Representative Robert W. Kastenmeier's office in December of 1988.

The Implementation Act was the culmination of over two years of congressional study, and was fervently debated throughout the publishing industries and artistic communities of the United States and Europe. One reason that the United States hesitated to join the one-hundred-year-old treaty is that the Berne Convention explicitly recognizes the existence of authors' moral rights, a concept that this country has never accepted.⁶ Although the Implementation Act expressly states that the United States' adherence to the Berne Convention does "not expand or reduce the rights of an author of a work, whether claimed under Federal, State, or the common law,"⁷ there is a belief in many quarters that membership in Berne will be a catalyst for change in United States' moral rights laws.⁸

The rights of an artist can be classified separately as pecuniary rights or personal rights.⁹ The artist's economic, or pecuniary, rights in his work are protected by his copyright.¹⁰ Personal rights, or so-called moral rights, give the artist the rights to withhold publication, to claim authorship, to prevent the mutilation or distortion of the work, and to be free from excessive criticism.¹¹ Thus, moral rights

6. The United States does not explicitly recognize authors' moral rights in the Federal Copyright Act, 17 U.S.C. §§ 101-810 (1982 & Supp. V 1987). See also 2 M. NIMMER, NIMMER ON COPYRIGHT § 8.21[B] (1988) [hereinafter M. NIMMER]. Some states have recognized certain aspects of moral rights in recent years. See *infra* Part IV E. State Moral Rights Laws. See generally Sandison, *The Berne Convention and the Universal Copyright Convention: The American Experience*, 11 COLUM. J.L. & ARTS 89 (1986).

7. Pub. L. No. 100-568 § 3(b), 102 Stat. 2853, 2853-54 (1988).

8. See *infra* Part VI. THE FUTURE OF MORAL RIGHTS IN THE U.S. & Part VII. CONCLUSION.

9. Diamond, *Legal Protection for the "Moral Rights" of Authors and other Creators*, 68 TRADEMARK REP. 244, 244 (1978) [hereinafter Diamond].

10. *Id.* Copyright is defined as "an intangible, incorporeal right granted by statute to the author or creator of literary or artistic creations, whereby he is invested, for a limited time, with the sole and exclusive privilege of multiplying copies of the work and publishing and selling them." BLACK'S LAW DICTIONARY 304 (5th ed. 1979).

Copyright protection subsists in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated either directly or with the aid of a machine or device. Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying works; (3) dramatic works, including any accompanying music; (4) pantomime and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; and (7) sound recordings.

17 U.S.C. § 102(a) (1982). "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." 17 U.S.C. § 102(b) (1982).

11. Diamond, *supra* note 9, at 244-45. These rights have been more fully defined as

enable the artist to control the presentation of his work to the public.¹² Moral rights also protect the artist's interest in the quality of his work and his reputation.¹³ This Comment will concentrate on the artist's right to claim authorship (the right to paternity) and his right to prevent the mutilation or distortion of his work (the right of integrity).¹⁴

The concept of moral rights is expressed in the philosophy of law that looks to the transcendental as its origin — natural law.¹⁵ Natural law purports to express a system of rules and principles for the guidance of human behavior which, independently of enacted law, might be discovered by the rational intelligence of man.¹⁶ These rules grow out of and conform to man's nature, meaning his whole mental, moral, and physical being.¹⁷ "Man [inherently] strives to be perfect."¹⁸ This axiom describes natural law's central historic theme and signifies the rationale for the protection of the artist's moral rights. If an artist is to reach perfection, he must be allowed to control his work.¹⁹

France, Italy, and other European countries influenced by natural law principles expressly recognize an artist's moral rights.²⁰ Natural law gives each man his due, or "that to which each one is ordered according to his natural tendencies toward perfection."²¹ Giving an

follows:

The right to be known as the author of one's work; to prevent others from being credited as the author of his work; to prevent others from falsely attributing to him the authorship of work which he has not in fact written; to prevent others from making deforming changes in his work; to withdraw a published work from distribution if it no longer represents the views of the author; and to prevent others from using the work or the author's name in such a way as to reflect on his professional standing.

2 M. NIMMER, *supra* note 6, § 8.21[A].

12. Amarnick, *American Recognition of the Moral Right: Issues and Options*, 29 COPYRIGHT L. SYMP. (ASCAP) 31, 31 (1984) [hereinafter Amarnick].

13. *Id.* at 31. See generally Sarraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. LAW 465 (1968) [hereinafter Sarraute]; STRAUSS, *The Moral Right of the Author*, 2 STUDIES ON COPYRIGHT 963 (Fisher ed. 1963).

14. Diamond, *supra* note 9, at 258. When a work is distorted and presented to the public with the artist's name, the result is the same as false attribution. Thus, the right of integrity overlaps with the right of paternity. *Id.*

15. Rosen, *Artists' Moral Rights: A European Evolution, An American Revolution*, 2 CARDOZO ARTS & ENT. L.J. 155, 176 (1983) [hereinafter Rosen].

16. BLACK'S LAW DICTIONARY 925 (5th ed. 1979).

17. *Id.*

18. Rosen, *supra* note 15, at 176.

19. *Id.*

20. *Id.*

21. *Id.* See also W. Luijpen, DUQUESNE STUDIES: PHILOSOPHICAL SERIES 22 87 (1967).

artist his due requires that he be allowed to control the integrity of his creation.²²

Moral rights are distinct from ownership rights in that ownership does not originate from a natural law theory of aesthetics.²³ Ownership is a concept that almost all nations protect by means of copyright laws.²⁴ Conversely, moral rights are instruments of natural law. Artists do not want to keep their works; they want to sell them so others may enjoy them. Part of the artist's attempt to accomplish perfection is the creation of others' enjoyment. While the buyer has a property interest in the work he has purchased,²⁵ individual moral rights give the artist an on-going relationship with his work.²⁶ However, a moral rights advocate believes that the artist has the right not to have the work used in an unintended or destructive²⁷ manner.²⁸ For one hundred years there has been a fundamental difference in the recognition of and protection accorded to moral rights in the Berne signatory countries and that given in the United States. The Berne countries have recognized and protected moral rights, while the United States has not.

This Comment examines the debate over the effect, if any, that the United States' joining the Berne Convention will have on the state of moral rights and related causes of action in this country. Its particular focus is how the United States has come to be in compliance with the Berne Convention's requirements without changing any of its substantive laws as they affect moral rights.

II. MORAL RIGHTS AND THE BERNE CONVENTION

The Berne Convention is one of the two²⁹ principal international

22. Rosen, *supra* note 15, at 176-77.

23. *Id.* at 177.

24. *Id.*

25. *Id.* According to Rosen, implicit in the enforcement of moral rights is the recognition that artists do not want to keep their works for themselves. *Id.*

26. *Id.* Thus, some countries have difficulty accepting the concept of moral rights, since the creator no longer owns the work.

27. The word "destructive" is used here in regard to the author's self-expression and his reputation.

28. Rosen, *supra* note 15, at 177. This is the essence of the moral rights concept.

29. The other major international copyright treaty is the Universal Copyright Convention (UCC). Universal Copyright Convention, September 6, 1952, No. 2937, 216 U.N.T.S. 132. At the end of World War II, the United States and several other American republics perceived a need to develop simplified multilateral copyright relations with members of the Berne Convention. Since joining Berne would have required major changes in United States copyright law, a new multilateral instrument, the UCC, was created by the United Nations Educational Scientific

agreements that provide protection for intellectual property.³⁰ Each country that is a member of the Convention agrees that its copyright law will conform to the high level of protection required by the Convention.³¹

The Berne Convention, created in September 1886,³² was the result of twenty-five years of scholarship and conferences. The proceedings leading to its creation were instituted by representatives of authors and artists, publishers, journalists, governments and academics, who sought to substitute the patchwork of European bilateral copyright agreements with one simple, multilateral treaty protecting the rights of authors.³³ The original Convention was designed to achieve five objectives:

- (1) the development of copyright laws for authors in all civilized countries; (2) the elimination over time of basing rights upon reciprocity; (3) the end of discrimination in rights between domestic and foreign authors in all countries; (4) the abolition of formalities [required] for the recognition and protection of copyright in foreign works; and (5) ultimately, the promotion of uniform international legislation for the protection of artistic and literary works.³⁴

The first Berne Convention was a simple document that accepted two important principles: union and national treatment. Under the union concept, member countries organized themselves into a union for the protection of the rights of artists in their artistic and literary works. In creating the union, the original members envisioned a political and legal undertaking. Members of the Convention would operate as a cooperative unit that would continue in existence regardless of future withdrawals from or accessions to the Conven-

and Cultural Organization (UNESCO) in 1952. Though it is considered to provide copyrights a lower level of protection than Berne, the UCC has eighty adherents. However, it does not recognize authors' moral rights. The United States became a member in 1957. H.R. REP. NO. 100-609, 100th Cong., 2nd Sess., pt. III, at 14 (1988) [hereinafter H. REP. NO. 100-609].

30. *Berne Convention Implementation Act of 1987: Hearings on H.R. 1623 Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary*, 100th Cong., 1st & 2nd Sess. 275-81 (1988) [hereinafter *Hearings*] (statement of the National Committee for the Berne Convention, *Why the United States Should Join the Berne Copyright Convention 2* (July 2, 1987)).

31. *Id.*

32. H. REP. NO. 100-609, *supra* note 29, at 11. See *supra* note 3.

33. *Id.* See generally *Hearings*, *supra* note 30; Ricketson, *The Birth of the Berne Union*, 11 COLUM. J.L. & ARTS 9 (1986); Plaisant, *Droit de Suite and Droit Moral under the Berne Convention*, 11 COLUM. J.L. & ARTS 157 (1986).

34. H. REP. NO. 100-609, *supra* note 29, at 12.

tion. The rule of national treatment provides that authors should enjoy in other signatory nations the same protection for their works as those nations grant to their own artists.³⁵

Since its creation, the Convention has been revised five times to meet technological developments and changed conditions affecting artists' rights.³⁶ Subsequent texts generally have extended and improved rights granted to artists. The Berne Convention has also adapted to many developing countries arriving on the world scene.³⁷

Article 6*bis* of the Berne Convention states:

(1) Independently of the author's economic rights and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.³⁸

These rights that Article 6*bis* sets out recognize the existence of artists' moral rights.³⁹ Although the term "moral rights" often covers more than the rights encompassed by Article 6*bis*, only the rights of integrity and paternity are provided for by the Berne Convention.⁴⁰ The Convention requires member countries to grant works under its protection the rights outlined by this clause.⁴¹

35. *Id.*

36. *Id.* The first revision was the 1908 Berlin Act which prohibited formalities as a condition of the enjoyment and exercise of rights under the Convention. The Berlin Act also expanded the subject matter of copyright under the Convention. The 1928 Rome Act was the first to expressly recognize the "moral rights" of artists. The 1948 Brussels Act established the term of copyright protection for the life of the artist and 50 years post mortem as mandatory. It also added improvements in copyright protection. *Id.* at 12-13.

In the 1967 Stockholm Act, the right of reproduction was expressly recognized. Rules regarding reconciling different national rules of authorship and ownership of movies were also added by this act. Protection was given to artists who were residents in a union country, regardless of their citizenship. The 1967 revision established a "Protocol Regarding Developing Countries," which would have allowed these countries to limit rights of translation and reproduction. However, the 1967 Act has not come into force because it was superseded by the 1971 Paris Act. The 1971 Paris Act is practically the same as the 1967 Stockholm Act with important revisions made to "Protocol Regarding Developing Countries." *Id.*

37. *Id.*

38. Berne Convention, *supra* note 3, Art. 6*bis*.

39. H. REP. NO. 100-609, *supra* note 29, at 33.

40. *Id.* See *supra* note 11.

41. *Id.* In other words, members of the treaty must provide for these minimum moral rights that are granted by Berne. They can also grant greater moral rights protection, as long as Berne's requirements are met.

Since the Berne Convention does not require reciprocity, it is possible for an artist's moral rights to be granted greater protection in another Convention country than in his own country. Even if the artist's own country does not provide for certain moral rights, he will not be deprived of protections under the law of another country that does provide for these rights. It is important to realize that the Berne Convention itself does not provide for every existing moral right.⁴² Other moral rights are recognized in varying degrees, by the courts and legislation of the member countries. France is the leader in recognizing moral rights.⁴³ The important provision in the French statute states:

The author shall enjoy the right of respect for his name, his authorship, and his work. This right shall be attached to his person. It shall be perpetual, inalienable, and imprescriptible. It may be transmitted [upon the author's death] to the heirs of the author. The exercise of this right may be conferred on a third party by testamentary provisions.⁴⁴

Germany and Italy are probably the two next most loyal followers of the moral rights doctrine.⁴⁵ The German statute dealing with the right to integrity states: "[T]he author shall have the right to prohibit any distortion or any other mutilation of his work which would prejudice his lawful intellectual or personal interest in the work."⁴⁶ In Italy, the artist has the right to oppose "any distortion, mutilation or any other modification thereof capable of prejudicing his honor or reputation."⁴⁷

Neither the United States nor Great Britain has a copyright statute expressly recognizing moral rights, though both are now members of the Berne Convention. An important issue arises regarding whether the United States automatically adopted the Convention's provisions regarding moral rights.⁴⁸ In other words, is the Berne Convention a self-executing treaty in the United States?

42. Rosen, *supra* note 15, at 247. The Berne Convention only recognizes the paternity and integrity interests.

43. *Id.* See generally Sarraute, *supra* note 13.

44. UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD 1 [hereinafter UNESCO] (France Copyright Stat. art. 6).

45. Diamond, *supra* note 9, at 247.

46. UNESCO, *supra* note 44, at 2a (Germany (Fed. Rep.) Copyright Stat. art. 14).

47. *Id.* at 3-4 (Italy Copyright Stat. art. 20).

48. H. REP. No. 100-609, *supra* note 29, at 28.

III. THE BERNE CONVENTION AS A NON-SELF-EXECUTING TREATY

According to the United States Constitution, treaties are the supreme law of the land.⁴⁹ Thus, they supersede existing laws that are in conflict. Some treaties are self-executing when they are ratified, and take effect without additional governmental action. Treaties that are not self-executing take effect only after additional governmental action, such as implementing legislation.⁵⁰

Whether the Berne Convention is self-executing depends on the constitution and laws of the member country.⁵¹ The question is important in determining the United States' obligations under Article 6bis of the Convention.⁵² According to the *Guide to the Berne Convention*,⁵³ published by the World Intellectual Property Organization (WIPO), in some countries after ratification "the Convention becomes part of that country's law. If its constitution is apt to confer rights directly, individuals may bring actions based on the Convention itself to enforce them."⁵⁴

The WIPO *Guide* notes that other

countries, such as those following the British legal tradition, treat conventions as agreements between nations. Obligations imposed on these nations by the Convention have to be conferred by implementing legislation. It is the legislation, not the Convention itself, that provides the citizens of these member nations the right to sue in their own courts.⁵⁵

The Committee on the Judiciary of the House of Representatives

49. *Id.* See U.S. CONST. art. VI, cl. 2.

50. H. REP. NO. 100-609, *supra* note 29, at 28.

51. *Id.*

52. *Id.* Article 36 of the Berne Convention states:

(1) Any country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention.

(2) It is understood that, at the time a country becomes bound by this Convention, it will be in a position under its domestic law to give effect to the provisions of this Convention.

Berne Convention, *supra* note 3, art. 36.

53. WORLD INTELLECTUAL PROPERTY ORGANIZATION WIPO, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY WORKS (PARIS ACT 1971) [hereinafter WIPO GUIDE], cited in H. REP. NO. 100-609, *supra* note 29, at 29.

54. WIPO GUIDE, *supra* note 53, § 2.20, at 21, cited in H. REP. NO. 100-609, *supra* note 29, at 29.

55. *Id.*

has determined, based upon its review of this guide and the United States Constitution, that the Convention itself is not self-executing in the United States.⁵⁶ Consequently, the Berne Convention Implementation Act of 1988 was enacted on October 31, 1988.⁵⁷ Only at this point did the United States officially join the Berne Convention. The treaty became binding on United States citizens as of March 1, 1989.⁵⁸

Another important issue the United States considered before joining the Berne Convention is whether the current law of the United States meets the moral rights requirements set out in Article 6bis of the Convention.⁵⁹ As noted above, there is no single federal statute in the United States specifically providing for moral rights.⁶⁰ Nonetheless, the Committee on the Judiciary of the House of Representatives has determined that existing law enables the United States to adhere to the Berne Convention.⁶¹ As a result the Implementation Act is completely neutral toward the issue of whether and how protection of paternity and integrity rights should develop in the future.⁶² The courts are free to apply common law precedent and existing statutes, and to consider the experience of foreign nations to the same degree as they would if the United States had not joined Berne.⁶³

56. H. REP. No. 100-609, *supra* note 29, at 28-32.

57. Pub. L. No. 100-568, 102 Stat. 2853 (1988).

58. The Berne Convention Implementation Act of 1988 states in pertinent part: Sec. 2 DECLARATIONS.

(1) [The Berne Convention is] not self-executing under the Constitution and laws of the United States.

(2) The obligations of the United States under the Berne Convention may be performed only pursuant to appropriate domestic law.

(3) The amendments made by this Act, together with the law as it exists on the date of the enactment of this Act, satisfy the obligations of the United States in adhering to the Berne Convention and no further rights or interests shall be recognized or created for that purpose.

Pub. L. No. 100-568 § 2, 102 Stat. 2853, 2853 (1988).

The words "for the purpose of satisfying such obligations" in § 2(3) is intended to assure United States courts that membership in Berne is not, of itself, a basis for a cause of action. H. REP. No. 100-609, *supra* note 29, at 39.

59. H. REP. No. 100-609, *supra* note 29, at 33. *See infra* Part V. UNITED STATES MORAL RIGHTS AND BERNE'S MINIMUM REQUIREMENTS.

60. H. REP. No. 100-609, *supra* note 29, at 37. *See infra* Part IV. MORAL RIGHTS PROTECTION IN THE UNITED STATES TODAY.

61. H. REP. No. 100-609, *supra* note 29, at 38.

62. *Id.* at 38-39. The law relating to moral rights is intended to be the same the day before and the day after adherence. *Id.* at 40.

63. *Id.* at 40.

Section 3 of the Implementation Act gives direction to the courts on how to interpret United States' adherence to the Berne Convention.⁶⁴ Subsection (a) describes the correlation between United States domestic law and the Berne Convention's provisions.⁶⁵ Paragraph (1) states that "the provisions of the Berne Convention shall be given effect under title 17, as amended by this Act and any other relevant provisions of federal or state law, including the common law."⁶⁶ This provision must be read in *pari materia* with the other provisos.⁶⁷ Paragraph (2) states that "the provisions of the Berne Convention shall not be enforceable in any action brought pursuant to the provisions of the Berne Convention itself."⁶⁸

Subsection (b) states that United States' membership in the Berne Convention, and the satisfaction of United States' obligations thereunder, do not expand or reduce certain authors' rights.⁶⁹ These are the moral rights stated in Article 6*bis* of the Berne Convention.⁷⁰ Thus, the Implementing Act expresses Congress' conclusion that the condition of current United States law is adequate to meet the requirements of Article 6*bis*, and that the implementing act will not effect current United States law regarding moral rights.⁷¹

IV. MORAL RIGHTS PROTECTION IN THE UNITED STATES TODAY

The United States Copyright Act does not recognize moral rights⁷² in the same sense that the word is used in other Berne countries. It has been announced by the Second Circuit Court of Appeals that "the moral right, as such, is not recognized in this country."⁷³

64. Pub. L. No. 100-568 § 3, 102 Stat. 2853, 2853-54 (1988). H. REP. No. 100-609, *supra* note 29, at 23.

65. Pub. L. No. 100-568 § 3(a), 102 Stat. 2853 (1988). See H. REP. No. 100-609, *supra* note 29, at 23.

66. Pub. L. No. 100-568 § 3(a)(1), 102 Stat. 2853 (1988) (referring to Title 17, the United States Copyright Act of 1976, 17 U.S.C. §§ 101-810 (1982 & Supp. V 1987)). See H. REP. No. 100-609, *supra* note 29, at 23.

67. H. REP. No. 100-609, *supra* note 29, at 23.

68. Pub. L. No. 100-568 § 3(a)(2), 102 Stat. 2853 (1988). See H. REP. No. 100-609, *supra* note 29, at 23.

69. Pub. L. No. 100-568 § 3(b), 102 Stat. 2853, 2853-54 (1988). H. REP. No. 100-609, *supra* note 29, at 23.

70. *Id.*

71. *Id.* See *infra* Part VI.A. Moral Rights Will Not Change.

72. 2 M. NIMMER, *supra* note 6, § 8.21[B], at 8-24. See 17 U.S.C. §§ 101-810 (1982 & Supp. V 1987).

73. *Miller v. Commissioner*, 299 F.2d 706, 709 n.5 (2d Cir. 1962).

However, moral rights, or what is considered to be the equivalent of moral rights, have been protected by other means, such as causes of action for: 1) breach of contract, 2) libel, 3) invasion of privacy, 4) unfair competition, and 5) copyright infringement.⁷⁴ The first three causes of action are based on state law, which means that an author's protection of his moral rights may vary depending on where he brings his suit.⁷⁵ The unfair competition cause of action is based on federal law, so an author will receive uniform treatment throughout the country under this cause of action.⁷⁶ Additionally, a few states have statutes that protect authors' moral rights to varying degrees.⁷⁷ Unfortunately, these developments have not brought moral rights the protections received in Europe.⁷⁸

A. Contract

An artist in the United States can best procure protection for his moral rights by demanding an appropriate clause during contract negotiations. For example, an artist can insist that no alterations be made in the work without his consent. This would protect his integrity interests.⁷⁹ However, this requires bargaining power that the artist may not possess.⁸⁰

Additionally, if a work cannot be exactly reconstructed in another medium, the user may be allowed, in contradiction of the contract's terms, to make the necessary changes.⁸¹ *Manners v. Famous Players Lasky Corporation*⁸² held that a movie company may make modifications in a play if necessary to bring the play to the screen, although the contract reserved to the writer the right to approve all

74. See *infra* Part IV. MORAL RIGHTS PROTECTION IN THE UNITED STATES TODAY.

75. Also, in certain cases, a state court may apply the law of another state under choice of law principles.

76. Section 43(a) of the Lanham Act has been used to protect both the integrity and the paternity interests. See Lanham Act, ch. 540, § 43(a), 60 Stat. 427 (1946) (codified as amended at 15 U.S.C. § 1125(a) (1982)). See *infra* IV.C. Unfair Competition.

77. See *infra* IV.E. State Moral Rights Laws.

78. 2 M. NIMMER, *supra* note 6, § 8.21[B], at 8-248.

79. Amarnick, *supra* note 12, at 64. See also Diamond, *supra* note 9, at 261.

80. Diamond, *supra* note 9, at 261. Most users will probably have more bargaining power than a struggling artist. For example, a movie producer will usually have more financial power than a screenwriter. "In most contracts the producer will insist upon a reasonably free hand, if he intends to reproduce the play in motion pictures." *Manners v. Famous Players Lasky Corp.*, 262 F. 811, 815 (S.D.N.Y. 1919).

81. Amarnick, *supra* note 12, at 64-65.

82. 262 F. 811 (S.D.N.Y. 1919).

changes in the work.⁸³ However, that movie company could not make any material changes in the "focus of the play or the order and sequence of the development of the plot."⁸⁴ The changes had to be consistent with the theme of the play.⁸⁵

In another case a contract allowed for "elaboration" by the purchaser of the motion picture rights in a novel.⁸⁶ It was held that the right to elaborate includes the right to add characters, scenery, and action. Subordinate portions of a story could be replaced.⁸⁷ However, the purchaser must maintain and give proper expression to the story's theme, thought, and main action.⁸⁸ These two cases adopted a "reasonableness" approach to the integrity of the artist's work. Inferentially, certain changes may be inequitable when adapting a literary work to a motion picture.

This reality, that certain changes must be made when transforming a work from one medium to another, has been consistently recognized by the courts. In one case the producer of a movie authorized its showing on television without expressly forbidding any editing of the movie. The court held that in the absence of a specific contractual provision, the parties will be deemed to have adopted the custom prevailing in the trade.⁸⁹ Thus, a movie company who had licensed television stations to broadcast the motion picture could make minor cuts for commercial breaks.⁹⁰

83. *Manners*, 262 F. at 815. The contract provided: "No alterations, eliminations, or additions to be made in the play without the approval of the author." *Id.* at 813.

84. *Id.* at 815. The court stated that in most contracts a movie producer will probably require a free hand to make changes in a play that he buys. *Id.*

85. *Id.* at 813.

86. The contract stated:

This is to ratify our understanding whereby James Oliver Curwood agrees upon payment to him . . . of \$1,000 . . . to relinquish all claim or claims he may have or have had in the screen rights to his story Poetic Justice of Ulco San, and grants to you his permission, as far as he is concerned, to produce a feature motion picture of five reels or more from said story; it being understood that you are to select a capable man to elaborate on said story, with addition of characters, etc., however needed.

Curwood v. Affiliated Distrib., 283 F. 219, 221 (S.D.N.Y. 1922).

87. *Id.* at 222.

88. *Id.* Otherwise, the grant of the right to elaborate with no right of approval in the author would be hazardous to a prominent author. *Id.*

89. *Preminger v. Columbia Pictures Corp.*, 49 Misc. 2d 363, —, 267 N.Y.S.2d 594, 603 (Sup. Ct. 1966).

90. *Id.* at —, 267 N.Y.S.2d at 603. The right to interrupt the broadcasting of a motion picture on television for commercials and to make small cuts to meet time constraints were considered a normal part of the exhibition of motion pictures on television. *Id.* at —, 267 N.Y.S.2d at 599-600.

On the other hand, other cases have held that it is not always necessary for a contract to expressly provide for the right of integrity. In a case involving a musical group, which had sued to stop the use of its name on a record which also included the work of other musicians, the court stated that it is implied at law in contracts for the sale of artistic creations that the user may not materially change the work in the absence of express language.⁹¹ In the landmark decision of *Granz v. Harris*,⁹² the contract required the purchaser of master musical recordings to give a credit-line to their producer on the manufactured records offered for sale.⁹³ However, the purchaser sold shortened versions of the producer's recordings.⁹⁴ The *Granz* court held that the contractual obligation required, by implication, the duty not to sell records that make the required credit-line a false representation. The sale of the abbreviated records was therefore a breach of contract.⁹⁵

Thus, in the United States authors may secure moral rights in their works against parties with whom they have a contractual relationship, providing they possess adequate bargaining power when forming the contract. This requirement obviously may preclude the unknown and untried from enjoying any moral rights in their works. In addition, given the "reasonableness" and "industry standards" approaches that courts have used in interpreting contractual language, the author is advised to use extremely explicit language covering every possible contingency.

B. Tort Law

American courts have been reluctant to announce a moral rights tort doctrine.⁹⁶ However, critics have pointed out that some decisions

91. *Bonner v. Westbound Records, Inc.*, 49 Ill. App. 3d 543, — & —, 364 N.E.2d 570, 573 & 575 (1977). The contract provided:

All master recordings made hereunder, as well as all performances embodied thereon and all phonograph records derived therefrom, together with any property rights therein, whether presently existing or hereafter created, will be the exclusive property of [Westbound] free of any claim whatsoever by Artist or by anyone deriving rights from Artist.

Id. at —, 364 N.E.2d at 575. The contract did not give the defendant the right to modify the plaintiff's performances by writing and recording new music and words and then adding the new material to the plaintiff's performances. *Id.*

92. 198 F.2d 585 (2d Cir. 1952).

93. *Id.* at 586.

94. *Id.* at 586-87.

95. *Id.* at 588. An express prohibition was not necessary. *Id.*

96. *Amarnick*, *supra* note 12, at 65. See generally *Gilliam v. ABC*, 538 F.2d 14 (2d Cir. 1976); *Granz v. Harris*, 198 F.2d 585 (2d Cir. 1952); *Vargas v. Esquire, Inc.*, 164 F.2d 522 (7th

that claim to rest on grounds other than tort do so unconvincingly.⁹⁷ They argue that the court's decision is actually based on the court's feeling that the user of the work owes a duty of care to the creator.⁹⁸ For example, in *Jaeger v. American Int'l Pictures, Inc.*, decided under the Lanham Act, the court stated that the plaintiff had made a sufficient showing of "tortious behavior" when the defendant distributed a work under the plaintiff's name that severely distorted his work.⁹⁹

1. Libel

Another possible means of protecting an artist's moral rights in the United States is a cause of action for libel.¹⁰⁰ It has been held that the unauthorized publishing of a work of literature in the name of a well-known author is libel, if the author's reputation is harmed.¹⁰¹ This decision implied that the author must be sufficiently well known to have a reputation that can be injured. In another case the plaintiff was the author of a book about law practice in New York,¹⁰² which had been revised by the publisher without the author's supervision.¹⁰³ The revised edition contained many errors.¹⁰⁴ Since a jury could have reasonably found that the title page would mislead the reader to believe that the revised (and inferior) edition had been done by the plaintiff, the facts stated a cause of action for defamation.¹⁰⁵

Cir. 1947); *Geisel v. Poynter Prods., Inc.*, 295 F. Supp. 331 (S.D.N.Y. 1968).

97. Amarnick, *supra* note 12, at 65.

98. Diamond, *supra* note 9, at 263.

99. 330 F. Supp. 274, 278 (S.D.N.Y. 1971). See *infra* notes 131-32 and accompanying text.

100. Libel is "[a] method of defamation communicated by print, writing, pictures or signs. In its most general sense it is any publication which is injurious to another's reputation." BLACK'S LAW DICTIONARY 824 (5th ed. 1979). Defamation is the invasion of the interest in reputation and good name. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS 771 (5th ed. 1984) [hereinafter PROSSER].

101. *Ben-Oliel v. Press Pub. Co.*, 251 N.Y. 250, —, 167 N.E. 432, 434 (1929).

102. *Clevenger v. Baker, Voorhis & Co.*, 8 N.Y.2d 187, 168 N.E.2d 643, 203 N.Y.S.2d 812 (1960).

103. *Clevenger, Id.* at —, 168 N.E.2d at 644-45, 203 N.Y.S.2d at 813-14.

104. *Id.* at —, 168 N.E.2d at 646, 203 N.Y.S.2d at 816.

105. *Id.* at —, 168 N.E.2d at 645, 203 N.Y.S.2d at 815. The defendants did have the right to state that the plaintiff was the author of the original text, but the purchase of the copyright did not grant a license to defame by impliedly misrepresenting plaintiff as reviser of an annual edition that contained many errors for which the plaintiff was not responsible for. *Id.* at —, 168 N.E.2d at 645-46, 203 N.Y.S.2d at 816.

In *Geisel v. Poynter Products, Inc.*¹⁰⁶ the artist brought suit against the purchaser and copyright holder of his cartoon, alleging that the copyright holder's activities injured the artist's reputation.¹⁰⁷ The defendant manufactured and sold dolls based on a drawing by the plaintiff, which dolls the plaintiff alleged were "unattractive and of an inferior" quality.¹⁰⁸ The plaintiff contended the sale of the dolls with his name held him up to ridicule in his profession as a distinguished artist and author.¹⁰⁹ The court acknowledged that if the plaintiff's accusations were true, he had stated a cause of action for defamation. But in this case the court found that the dolls were made with skill by a qualified manufacturer and there was thus no defamation.¹¹⁰

Many artists, particularly authors and performing artists, are widely enough known to qualify as public figures.¹¹¹ It is difficult for public figures to state a cause of action for defamation since they must prove that the publication was made with "actual malice,"¹¹² an element that is hard to prove.¹¹³ In a case involving a cause of action for defamation by an author against a critic of her book, the court held that the author was a public figure.¹¹⁴ It dismissed her complaint because she did not prove that the critic acted with knowledge of the falsity of his review or with reckless disregard for the truth or falsity of the review.¹¹⁵

To vindicate his or her moral rights under a libel cause of action, it is most advantageous for United States authors to be well known enough to have protectable reputations, but not quite famous enough

106. 295 F. Supp. 331 (S.D.N.Y. 1968).

107. *Id.* at 333.

108. *Id.* The plaintiff was Theodor Seuss Geisel, the world-famous artist and author, better known as Dr. Seuss. Geisel alleged that the defendants manufactured and sold dolls "derived from" cartoons that he prepared for the now defunct *Liberty Magazine*. He averred he had nothing to do with the dolls, which were sold as "Dr. Seuss Creations," and that the dolls were tasteless. *Id.* 333.

109. *Id.*

110. *Id.*

111. Diamond, *supra* note 9, at 265. A "public figure" is a person who has assumed a role of importance in the resolution of public affairs or affairs of general importance or concern to the people generally. PROSSER, *supra* note 100, at 806.

112. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

113. Diamond, *supra* note 9, at 265.

114. *Guitar v. Westinghouse Elec. Corp.*, 396 F. Supp. 1042, 1054 (S.D.N.Y. 1975). Moral rights are sometimes construed to protect an author from excessive criticism. *See supra* note 11 and accompanying text.

115. *Id.*

to be public figures with the resulting burden of proving actual malice. It is advisable to bring such an action as soon as possible, since a libel cause of action does not survive the libeled author's death,¹¹⁶ and failing to protect a work in a timely manner might seriously impair its value to the author's heirs.

2. Privacy

Courts recognize the appropriation of an author's name or likeness for the benefit of another to be an invasion of privacy.¹¹⁷ It has been held that the unauthorized publication of a professor's notes with the use of the teacher's name is an invasion of privacy.¹¹⁸ In *Williams v. Weisser*, this conduct amounted to an unauthorized appropriation of the plaintiff's personality.¹¹⁹ In another case, a publisher breached an agreement with an author by publishing a revision of one of the author's works without the author's approval.¹²⁰ This appropriation of the author's name was held to be an invasion of privacy.¹²¹

Generally, before an author has a cause of action for invasion of privacy against one who appropriates his name, he must prove that the appropriator profited from using the author's name.¹²² So this gives an author no legal protection from an entrepreneur who appropriates his name or likeness, as long as the entrepreneur's use is generally unsuccessful.

C. Unfair Competition

Section 43(a) of the Lanham Act¹²³ has been used to protect

116. Diamond, *supra* note 9, at 264.

117. PROSSER, *supra* note 100, at 851.

118. *Williams v. Weisser*, 273 Cal. App. 2d 726, —, 78 Cal. Rptr. 542, 551 (1969).

119. *Id.* at —, 78 Cal. Rptr. at 551. Although the professor felt that his notes were sufficient for classroom instruction, he did not think that they were adequate for publishing. The published notes had many omissions. *Id.*

120. *Zim v. Western Publishing Co.*, 573 F.2d 1318, 1321 (5th Cir. 1978).

121. *Id.* at 1326-27.

122. PROSSER, *supra* note 100, at 853.

123. Ch. 540, § 43(a), 60 Stat. 427 (1946) (codified as amended at 15 U.S.C. § 1125(a) (1982)). This section has recently been expanded and clarified. The 1989 prospective amendment of section 43(a) (15 U.S.C. § 1125(a)) provides:

(a) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which —

both the integrity and the paternity interests. That section states that:

any person who shall affix or use in connection with any goods or services which are placed into commerce a false designation of origin, or any false description or representation, shall be liable in a civil action by any person who believes that he is, or is likely to be, damaged by the use of any such false description or representation.¹²⁴

The "false designation of origin" language can be applied to protect an author's paternity right, while the possibility of misleading the public through a false description may be used to protect an author's integrity interest.¹²⁵

In *Gilliam v. ABC*,¹²⁶ a television network aired a program that had been edited, without the writers' consent, into a form that varied substantially from the initial work.¹²⁷ In a suit by the authors to enjoin further broadcasts of any truncated versions of their works, the court held that an allegation that a defendant has presented to the public a "garbled" version of the plaintiff's work attempts to redress the same rights protected under the Lanham Act, and states a cause of action under that statute.¹²⁸ To deform an author's work and pub-

(1) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(2) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

Pub. L. No. 100-667, 102 Stat. 3946 (1988).

124. *Id.*

125. Diamond, *supra* note 9, at 266.

126. 538 F.2d 14 (2d Cir. 1976).

127. The plaintiffs in *Gilliam* were a group of British writers known as "Monty Python." The plaintiffs wrote scripts for British Broadcasting Company (BBC) to be used in a television series. The plaintiffs' agreement with BBC was that while BBC had final authority to make changes, the plaintiffs had ultimate control over the scripts consistent with BBC's authority, and only minor cuts could be made without prior approval by the writers. *Id.* at 17. BBC had the authority under the agreement to license the transmission of recordings of the televised programs in any overseas country. *Id.* Time-Life acquired the rights to distribute the *Monty Python* series in the United States. *Id.* Thereafter, ABC agreed with Time-Life to broadcast two 90-minute special programs. However, during the first broadcast, approximately one-third of the original material was omitted. *Id.* at 18.

128. *Id.* at 24-25. The court found that the altered version deleted the climax of the skits and essential elements in the schematic development of the story line.

lish the result under his name is to present him to the public as the creator of a work not his own.¹²⁹ The Lanham Act is violated by a representation of a product, which creates a false impression of the product's origin.¹³⁰

In another case, the court found a cause of action based upon an accusation that the English version of a German film distorted the plaintiff's work.¹³¹ Since the defendant attributed the distorted work to the plaintiff, a work with which the plaintiff was not involved, there was arguably a claim under the Lanham Act.¹³²

One useful feature of the Lanham Act is that a contractual relationship between the author and the defendant is not necessary to protect an author's moral rights.¹³³ However, barriers to its use for this purpose are the requirements that the defendant's product be introduced into interstate commerce and that consumers are, or are likely to be, deceived by the false description. Thus, a derogatory action in relation to a work that is not introduced into interstate commerce or that does not confuse the public would not be a basis for an action under this Act.

D. Copyright Infringement

In *Gilliam*,¹³⁴ the court applied the doctrine of copyright infringement to the unauthorized editing of a script that led to the broadcasting of a distorted version of the work.¹³⁵ A copyright allows the owner of the underlying copyright to control the way in which the work is presented to the public.¹³⁶ The holder of a copyright often grants limited rights to a licensee. When a licensee goes beyond time or media restrictions on his license, or makes an unauthorized use of

129. *Id.* at 24. The edited version impaired the integrity of the plaintiff's work and represented to the public as the plaintiffs what was actually a distortion of their talents.

130. *Id.* This makes him subject to criticism for work he has not created. *Id.*

131. *Jaeger v. American Int'l Pictures, Inc.*, 330 F. Supp. 274, 281 (S.D.N.Y. 1971).

132. *Id.* at 278. The court stated that the plaintiff was not pleading a contract cause of action; the plaintiff was pleading a variety of tort, an extracontractual right of authors. *Id.* at 279.

133. *Diamond*, *supra* note 9, at 267. In *Geisel*, see *supra* text accompanying notes 106-10, there was no direct contractual relationship between the author and the defendant. *Id.*

134. *Gilliam v. ABC*, 538 F.2d 14 (2d Cir. 1976). See *supra* notes 126-30 and accompanying text.

135. *Id.* at 20-21.

136. The copyright's owner has the exclusive rights to undertake and to authorize, in relation to the copyrighted work, (1) reproductions of the copyrighted work, (2) preparation of derivative works, (3) distribution of copies to the public, (4) performance of the work, and (5) displaying of the work. 17 U.S.C. § 106 (1982).

the underlying work by publishing it in a distorted version, a copyright infringement occurs.¹³⁷ The court in *Gilliam* found that unauthorized editing of the work by a sublicensee, if proven, would be an infringement of the work's copyright, just as any other use of a work that exceeded the license granted by the copyright's owner.¹³⁸

In a recent case, the court held that where a video game licensee created a faster version of the copyrighted game, he altered the plaintiff's copyrighted work to such a degree that a copyright infringement occurred.¹³⁹ The faster video game was a substantial change of the original work.¹⁴⁰ The plaintiff had never authorized this change in his video game.¹⁴¹

E. State Moral Rights Laws

The recent public debate over moral rights has brought wider recognition of these rights. Increased interest is evidenced by the acts of state legislatures. Several states have now passed statutes expressly protecting various aspects of moral rights.¹⁴² The New York moral rights statute is illustrative of the rights and obligations involved. New York's statute is known as the Artists' Authorship Rights Act.¹⁴³ Section 14.53 prohibits the "unauthorized public display or publishing of a work of fine art or a reproduction thereof in an altered, defaced, mutilated, or modified form."¹⁴⁴ However, this prohibition applies only "if the work is displayed, published, or re-

137. *Gilliam*, 538 F.2d at 21. The court stated whether intended to allow greater economic exploitation of the work, as in media and time cases, or to ensure that the copyright owner has a veto power over revisions, the ability of the copyright owner to control his work remains of utmost importance in our copyright law. *Id.*

138. *Id.*

139. *Midway Mfg. Co. v. Artic Int'l, Inc.*, 704 F.2d 1009, 1013-14 (7th Cir. 1983).

140. *Id.* at 1014. The court contrasted the "speeding up" of a video game with playing a record recorded at 33 revolutions per minute at 45 revolutions per minute. *Id.* at 1013. If a discotheque did the latter, it would probably not be an infringement of a record company's copyright in an album. The reason is that no one would want to hear the record. *Id.* However, alot of people wanted to play the faster video games. *Id.*

141. *Id.* at 1010-11.

142. Eight states currently have statutes giving some degree of protection to authors' moral rights: CAL. CIV. CODE § 987 (West 1988); LA. REV. STAT. ANN. §§ 51.2151-.2156 (West 1987); ME. REV. STAT. ANN. tit. 27, § 303 (1988); MASS. GEN. LAWS ANN. ch. 231, § 855 (West 1988); N.J. STAT. ANN. §§ 2A:24A-1 (West 1987); N.Y. ARTS & CULT. AFF. LAW §§ 14.51 -.59 (McKinney 1984); PA. STAT. ANN. tit 73. §§ 2101-2110 (Purdon Supp. 1988); R.I. GEN. LAWS §§ 5-62-2 (1987).

143. N.Y. ARTS & CULT. AFF. LAW art. 14-A (McKinney 1984).

144. *Id.* § 14.53.

produced as being the work of the artist, or under circumstances under which it would reasonably be regarded as being the work of the artist, and damage to the artist's reputation is reasonably likely to result therefrom."¹⁴⁵

While it appears that liability for unauthorized alteration, defacement, mutilation, or modification may be avoided by not identifying the artist, this would only be true if the artist's work was not so popular that people would identify a work as his.¹⁴⁶ If a well-known artist would be likely to be identified with the work even without mention of his name, liability might be avoided by an appropriate disclaimer, stating that the changes were made by someone other than the artist.¹⁴⁷ However, failure to identify the artist by name could result in the violation of another provision of the Act.¹⁴⁸ Section 14.55(1) provides that "the artist shall retain at all times the right to claim authorship."¹⁴⁹ If the artist's name is included, a disclaimer would have to be carefully worded to not violate the right to be identified as the author of one's work.¹⁵⁰

Section 14.57(1) of the statute further provides that "alteration, defacement, mutilation or modification of a work of fine art resulting from the passage of time or the inherent nature of the materials will not by itself create a violation of the artist's rights."¹⁵¹ However, such defacement or alteration must not be the result of gross negligence.¹⁵² There is also no liability if a change is the ordinary result of the medium of reproduction.¹⁵³ "Conservation does not constitute an alteration or defacement unless the conservation work was shown to be negligent."¹⁵⁴ In addition, the act "does not apply to work prepared under contract for advertising or trade use unless the contract so provides."¹⁵⁵ Works produced in either a "work for hire" situation or

145. *Id.*

146. 2 M. NIMMER, *supra* note 6, § 8.21[D], at 8-263.

147. *Id.*

148. *Id.*

149. N.Y. ARTS & CULT. AFF. LAW § 14.55(1) (McKinney 1984). See 2 M. NIMMER, *supra* note 6, § 8.21[D], at 8-263.

150. 2 M. NIMMER, *supra* note 6, § 8.21[D], at 8-263.

151. N.Y. ARTS & CULT. AFF. LAW § 14.57(1) (McKinney 1984).

152. *Id.*

153. *Id.* § 14.57(2).

154. *Id.* § 14.57(3).

155. *Id.* § 14.57(4).

works made on commission are apparently outside the scope of the Act.¹⁵⁶

Because states have enacted their own separate moral rights legislation, artists of foreign nations will have to look to these various statutes for protection. For example, a French artist might have a cause of action in New York for a distortion of his work, but no cause of action in California. Thus, the foreign artist may well be confused as to the nature and extent of his rights in the United States. Even though by joining the Berne Convention the United States automatically grants the existing moral rights protection in the United States to other members of Berne, this protection is inconsistent from state to state. To fully protect his moral rights in this country the artist may have to bring a number of suits in different state courts. Thus, while moral rights per se are not explicitly acknowledged in American jurisprudence, the net effect of the several available causes of action is to give moral rights a certain limited degree of protection in this country.

V. UNITED STATES MORAL RIGHTS AND BERNE'S MINIMUM REQUIREMENTS

Now that the United States has joined the Berne Convention, a non-self-executing treaty that contains an express recognition of an author's rights of paternity and integrity,¹⁵⁷ the question presented is whether the state of moral rights in the United States today meets Berne's minimums.¹⁵⁸ Congress'¹⁵⁹ official answer is that the state of

156. 2 M. NIMMER, *supra* note 6, § 8.21[D], at 8-264 (construing N.Y. ARTS & CULT. AFF. LAW § 14.51(4) (McKinney 1984)).

157. See *supra* text accompanying note 14.

158. "The Berne Convention like all other international standards-making bodies, whatever they may be, has as its function establishing minimum standards for member nations to follow. There is nothing that precludes a nation to go beyond those standards in moral rights or any other issue if they wish to do so." *Hearings, supra* note 30, at 180 (statement of Clayton Yeutter, United States Trade Representative).

159. "Congress and the President are the sole arbiters of the compatibility of U.S. law with Berne." *Hearings, supra* note 30, at 199 & 217 (statement of Irwin Karp, Chairman, Ad Hoc Working Group on United States Adherence to the Berne Convention 5 & 6 (July 23, 1987)).

Any claim that United States law is incompatible with Berne would have to be decided by the World Court, and only could be made by another Berne country (Berne Art. 33(1)). Moreover, the United States could disavow the Court's jurisdiction on acceding to Berne. United States courts have no power to determine whether or not the amended Copyright Act is compatible with Berne. In any event, they do not have the power to correct any incompatibilities they might perceive, particularly since Berne is not a self-executing treaty.

moral rights in the United States today does meet Berne's minimum standards for the protection of authors' moral rights.¹⁶⁰ Congress adopted the position of the Ad Hoc Working Group on United States Adherence to the Berne Convention: "The protection of moral rights under existing U.S. law is compatible with the Berne Convention."¹⁶¹ In reaching its conclusion, the Ad Hoc Working Group considered the following factors: remedies now available in the United States,¹⁶² the lack of uniformity of protection in other Berne countries, the absence of moral rights provisions in the copyright laws of some Berne nations, and the reservation of control over remedies to each member country.¹⁶³ Many other individuals, industry groups,¹⁶⁴ scholars, and lawyers agree that current United States law "now affords sufficient protection for creative artists so as to meet Berne requirements in [the moral rights] area. Enactment of special moral rights legislation . . . is not necessary, nor desirable."¹⁶⁵ Thus, a country can be in compliance with Article 6bis of Berne without having statutes that specifically address moral rights.¹⁶⁶

On the other hand, groups such as the Coalition to Preserve the American Copyright Tradition (CPACT) maintain that "fundamental changes in the American copyright system" are required before United States law complies with Berne.¹⁶⁷ Motion picture directors

Id. at 199-200.

160. The official conclusion that moral rights in the United States meets the minimum requirements of Art. 6bis of the Berne Convention was only arrived at after almost two years of investigation, hearings and heated debate in Congress and the copyright and artistic communities. *See supra* text accompanying notes 5 & 6.

161. *Hearings, supra* note 30, at 198-99 (statement of Irwin Karp, Chairman, Ad Hoc Working Group on U.S. Adherence to the Berne Convention).

162. *See supra* Part IV. MORAL RIGHTS PROTECTION IN THE UNITED STATES TODAY.

163. *Hearings, supra* note 30, at 210 (statement of Irwin Karp, Chairman, Ad Hoc Working Group on United States Adherence to the Berne Convention, which included the document "Summary of Conclusions of Ad Hoc Working Group on U.S. Adherence to the Berne Convention"). "The Ad Hoc Working Group was formed at the State Department's suggestion . . . to study the compatibility of the U.S. Copyright Act with the Berne Convention." *Id.* at 196.

164. Some of the industry groups that agree with the Ad Hoc Working Group's conclusion are the Motion Picture Association of America and the National Committee for the Berne Convention (composed of companies and individuals who create, publish, and otherwise disseminate works protected by the Copyright Act). *Hearings, supra* note 30, at 660 (statement of the National Committee for the Berne Convention 2 (July 2, 1987)).

165. *Id.* at 241 (statement of the Motion Picture Association of America 6 (Sep. 16, 1987)).

166. *Id.* at 213-14 (letter from Arpad Bogsch, Director General, World Intellectual Property Association (June 16, 1987) (stating that the association agrees with the conclusions of the Ad Hoc Working Group)).

167. *Id.* at 341 (statement of Coalition to Preserve the American Copyright Tradition 2).

feel that present United States law is not sufficient to protect artists' moral rights in the spirit of Berne.¹⁶⁸ Edward J. Damich, an associate professor of law at George Mason University School of Law, in his testimony before Congress, stated that "[t]here is more and clearer case authority for the non-existence of moral rights as such than there is case authority to the contrary."¹⁶⁹

The disagreement as to whether United States law concerning moral rights today meets Berne minimums is threefold: Does United States moral rights law (a) fulfill the spirit of the Berne Convention, (b) meet the literal wording of Article 6*bis* of the Berne Convention, and (c) meet Berne's minimum requirements in the same practical sense that other member countries meet Berne's moral rights minimums? As Ralph Oman, the Register of Copyrights, noted when commenting on proposed implementing legislation to a House subcommittee, "[A] consensus has not been reached about the precise nature of the Berne Convention obligations . . . [and] copyright experts disagree on the extent [that] United States law must be changed"¹⁷⁰ to meet the Convention's minimum requirements. The diverse interest groups concerned with the issue of authors' moral rights in the United States largely maintained their opposing stances through the conclusion of the congressional hearings on the Berne Implementation Act. Though most agree that current United States law meets neither the spirit nor the letter of the Berne Convention's requirements, Congress concluded that United States law meets the Berne minimums in the same practical sense that other member countries meet them, and so the United States could properly become a signatory to the Berne Convention.

A. United States Moral Rights and the Spirit of Berne

The Berne Convention is intended to encourage authors to create by protecting the authors' rights.¹⁷¹ As Berne is a product of au-

Accord, Id. at 387 (statement of John Mack Carter on Behalf of the Magazine Publishers Association (Sep. 16, 1987)).

168. *Hearings, supra* note 30, at 530 (statement of director Sydney Pollack).

169. *Id.* at 543 (statement of Edward J. Damich, Associate Professor of Law, George Mason University School of Law, Summary (Sep. 30, 1987)).

170. *Id.* at 65 (statement of Ralph Oman, Register of Copyrights and Assistant Librarian for Copyright Services (June 17, 1987)).

171. *Id.* at 97. The Preamble to the Berne Convention provides in pertinent part, "The countries of the Union, being equally animated by the desire to protect . . . the rights of authors in their literary and artistic works" WIPO GUIDE, *supra* note 53, at 7.

thors and artists,¹⁷² it is generally a pro-creator, pro-author document. As Sydney Pollack observed, "[T]he heart of Berne is protection of artists."¹⁷³ Though its original purpose was to protect authors' rights, it was recognized that any creative activity encouraged by the protection afforded by moral rights would enrich the national cultural heritage of the member nations.¹⁷⁴ While the copyright clause of the United States Constitution¹⁷⁵ was also written to encourage creative endeavors, it is the product of revolutionaries and statesmen whose concerns were not merely the rights of authors, but the health of an entire nation. The United States Constitution was established "to promote the general Welfare"¹⁷⁶ of the nation, not to assist any particular special interest group. Thus, though both Berne and the United States Constitution seek to encourage creative endeavors, the essential purpose of each system for protecting creative works is different.

Each system also takes its implementing authority from different sources. Ralph Oman, the Register of Copyrights, stated that "[t]he concept of moral rights embodied in the Berne Convention was derived from European notions of the natural, inalienable rights of authors."¹⁷⁷ On the other hand, Professor L. Ray Patterson submitted

172. See *supra* text accompanying note 32-35.

173. *Hearings*, *supra* note 30, at 520 (statement of director Sydney Pollack).

174. It is popularly believed that an artist's desire to create is proportional to the money he might receive for his work.

Copyright, for its part, constitutes an essential element in the development process. Experience has shown that the enrichment of the national cultural heritage depends directly on the level of protection afforded to literary and artistic works. The higher the level, the greater the encouragement for authors to create; the greater the number of a country's intellectual creations, the higher its renown . . . [I]n the final analysis, encouragement of intellectual creation is one of the basic prerequisites of all social, economic and cultural development.

Preface to WIPO GUIDE, *supra* note 53.

175. See *supra* after title.

176. U.S. CONST. preamble.

177. *Hearings*, *supra* note 30, at 83 (statement of Ralph Oman 76 (June 17, 1987)). Accord *id.* at 345-56 (statement of Coalition to Preserve the American Copyright Tradition, citing Saraute, *Current Theory on the Moral Right of Authors and Artists Under French Law*, 16 AM. J. COMP. L. 465, 465 (1968) (the moral right "give[s] legal expression to the intimate bond which exists between a literary or artistic work and author's personality"); and DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artist's Rights in France and the United States*, 28 BULL. COPYRIGHT SOC'Y U.S. AM. 1, 7-8 (1980) ("French scholars regard the *droit d'auteur* as a natural right, deeply rooted in the principles of the French Revolution from which modern French jurisprudence emerged").

"The Berne Convention is based on the natural law theory of copyright as an author's property right." *Hearings*, *supra* note 30, at 106 (statement of L. Ray Patterson, Pope Brock Professor of Law, University of Georgia).

that [United States copyright law] is based on the theory that copyright is the statutory grant of a monopoly primarily for the benefit of the public."¹⁷⁸ This means, as Frank Pierson noted when speaking for the Writer's Guild of America before Congress, that "something created for the common good, as the Constitution mandates, becomes part of our common heritage, and is owned in a sense not only by the copyright owner but by the nation as a whole. It is part of the cultural wealth."¹⁷⁹

The American copyright system really had two parents: the natural law ideals of the Constitution's framers and the English copyright system as it was known and practiced by the businessmen of the day. The ideal purpose of copyright, as stated in the Constitution, is to promote the common good. It is widely conceded that the Constitution intends to motivate creative activity through economic incentives¹⁸⁰ to authors. After a period prescribed by statute,¹⁸¹ during which time an author is expected to recoup his investment in his work, the work then inures to the public benefit by being readily available to the public. Conversely, English copyright was developed for the benefit of publishers. The English considered copyright to be an economic interest similar to other property interests.¹⁸²

Because of this mixed heritage, the United States' grant of a "monopoly for the benefit of the public" has become a property right for the benefit of the copyright owner. United States copyright law, rooted as it is in economics,¹⁸³ favors neither the creator nor the pub-

178. *Hearings*, *supra* note 30, at 106 (statement of L. Ray Patterson, Pope Brock Professor of Law, University of Georgia (June 17, 1987)).

179. *Id.* at 427 (statement of Frank Pierson).

180. *Id.* at 346 (statement of Coalition to Preserve the American Copyright Tradition 7). *Cf. Id.* at 407 (statement of Sydney Pollack).

181. Under 17 U.S.C. § 302 (1982), Duration of Copyright, a work is generally protected from the time that the work is fixed in a tangible medium, for a term consisting of the life of the author and 50 years after the author's death. This is consistent with the period of protection provided by the Berne Convention in article 7. *See supra* note 36.

182. R. Miller & H. Davis, *INTELLECTUAL PROPERTY: PATENTS, TRADEMARKS, AND COPYRIGHT IN A NUTSHELL* at 278-79 (1984) [hereinafter *NUTSHELL*]. By the eighteenth century an important commercial distinction was made between an author's legal rights in an unpublished work, and a publisher's rights in that work after publication. American copyright law perpetuated this distinction by recognizing an author's common law rights prior to publication (basically, a right to prevent publication or disclosure in perpetuity). Upon publication, an author lost all common law rights and was limited to such statutory rights as existed. This distinction was abolished by the Copyright Act of 1976, which granted only statutory rights at the time of fixation of the work in a tangible form. *Id.*

183. *cf.* "Surely [the protection of economic rights] is not the whole intention of the Copy-

lic — it favors the copyright owner who is usually the disseminator or exploiter of intellectual property.¹⁸⁴ For instance, while the author is initially the copyright owner of a work he creates, he can and usually does sell “all the rights” in his work to a publisher. In hearings before the congressional committee studying whether the United States should join the Berne Convention, Professor L. Ray Patterson described the situation: “We continually speak of copyright as an author’s right, but we treat it as a publisher’s right, and while Congress enacts copyright legislation in the public interest, courts tend to interpret that legislation in the interest of the copyright proprietor.”¹⁸⁵ Present copyright law protects the copyright owner’s economic rights, not the author’s moral rights or the public’s right to benefits from creative labors.¹⁸⁶ The author is merely an incidental, not a primary, beneficiary of United States copyright law.¹⁸⁷

It is widely believed in the United States that the Berne Convention’s natural rights concept of intellectual property is inimical to the statutory and common law copyright jurisprudence that has developed in the United States. The United States’s use of economic incentives¹⁸⁸ is thought to be incompatible with the existence of moral rights. The issue of moral rights in the United States is an ethical question about the integrity of creative works — not an economic question. No one should profit from the existence of moral rights.¹⁸⁹

The amount of protection for moral rights that a Berne member nation provides its authors is a direct reflection on the values that that society places on the integrity of artistic works.¹⁹⁰ Robert W.

right clause. Surely the underlying foundation for that law, like most others in the Constitution, is in the spirit of the individual as well.” *Hearings, supra* note 30, at 407-08 (statement of Sydney Pollack).

184. *See infra* note 207 and accompanying text.

185. *Hearings, supra* note 30, at 106 (statement of L. Ray Patterson, Pope Brock Professor of Law, University of Georgia (June 17, 1987)).

186. *Id.*

187. *Id.* at 103.

188. *See supra* note 174.

For the serious artist and author economic incentive is not the issue. The serious artist and author and scientist — those whose creations are the most profound and valuable, that change history, enrich nations, start new businesses — those the Constitution most emphatically addressed — will work at their art or science regardless. [T]he economic benefit of copyright merely frees them to do what the Constitution says it wants them to do.

Hearings, supra note 30, at 426 (statement of Frank Pierson).

189. *Id.* at 523 (statement of Sydney Pollack).

190. *Id.* at 520.

Kastenmeier, the chairman of the House subcommittee¹⁹¹ holding hearings on the Berne Implementation Act, said, "The United States has chosen not to join the Berne Union in the past, presumably because we did not want for our society the kind of copyright laws that the Convention requires."¹⁹² By not joining Berne for so many years, the United States tacitly admitted that it did not fulfill the moral rights requirements of Berne, nor did it want to.

The Berne Convention is a pro-author document, and Article 6*bis* of the Convention requires that the legislation of member nations protect authors' moral rights.¹⁹³ Adherence to Berne by a nation that is indifferent to authors' rights logically requires enhancement of that nation's protection of authors.¹⁹⁴ But section 3(b) of the Berne Convention Implementation Act of 1988,¹⁹⁵ the implementing legislation that allegedly brought United States copyright law into compliance with Berne, expressly states that the status quo will be maintained on moral rights in the United States:

The provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligations thereunder, do not expand or reduce any right of an author of a work, whether claimed under Federal, State, or the common law — (1) to claim authorship of the work; or (2) to object to any distortion, mutilation, or other derogatory action in relation to, the work, that would prejudice the author's honor or reputation.¹⁹⁶

Further, the Berne Convention Implementation Act does not contain any language similar to that of Article 6*bis*, as did the originally proposed Berne adherence bill.¹⁹⁷ Yet the United States' official

191. House Subcommittee on Courts, Liberties, and the Administration of Justice.

192. *Hearings, supra* note 30, at 2 (statement of Representative Kastenmeier).

193. *Id.* at 144 (statement of Donald J. Quigg, Assistant Secretary and Commissioner of Patents and Trademarks (July, 23, 1987)).

194. *Id.* at 97 (statement of Ralph Oman, Register of Copyrights).

195. Pub. L. No. 100-586 § 3(b), 102 Stat. 2853, 2853 (1988).

196. *Id.*

197. The relevant portion of H.R. 1623, which was introduced by Reps. Kastenmeier and Moorehead on March 16, 1987, read:

Moral rights of the author

Independently of the copyright in a work other than a work made for hire, and even after a transfer of copyright ownership, the author of the work or the author's successor in interest shall have the right, during the life of the author and fifty years after the author's death —

(1) to claim authorship of the work; and

(2) to object to any distortion, mutilation, or other alteration of the work that would prejudice the author's honor or reputation

position is that its current law adequately protects moral rights so as to comply with Berne's minimum requirements. Not all are taken in by this legerdemain. The Directors Guild of America put it bluntly:

We are skeptical that the Administration, or the [Motion Picture Association of America], really believes U.S. law currently provides moral rights protection sufficient to satisfy the spirit of Berne . . . [since] they [did] not favor [the language of Representative Kastenmeier's bill]. They [were] not in favor of stating directly what is presumed to be there in the law already.¹⁹⁸

So the United States has come from the position that "moral rights as such are not recognized,"¹⁹⁹ to the official position that United States law is adequate to protect moral rights in this country — all without changing the letter of the law. A country that treats creative works the same as any other commodity is joining an international convention that ideally²⁰⁰ accords authors and their works a high degree of protection beyond that given to ordinary property — with no change in the substantive law. One congressional witness was "puzzled by the attempts of the proponents of adherence to minimize the differences between U.S. law and the requirements of the language of Article 6bis, the moral rights provision."²⁰¹

The rights conferred by this section shall be referred to in this title as 'moral rights.'

H.R. 1623, 100th Cong., 1st Sess. § 7 (1987), reprinted in *Hearings*, *supra* note 30, at 938.

198. *Hearings*, *supra* note 30, at 423 (statement of the Directors Guild of America 12 (Sep. 30, 1987)). When Representative Robert W. Kastenmeier introduced H.R. 1623 in March 1987, the first in the recent series of bills proposing that the United States join the Berne Convention, it contained specific language that would have established the rights of paternity and integrity. The language essentially repeated the text of the first paragraph of Art. 6bis of the Berne Convention. *Id.* at 91 (statement of Representative Patricia Schrader [sic]). See *supra* note 197.

199. See *supra* text accompanying note 6.

200. The Berne Convention, by its genesis and wording, is meant to provide the highest protection to authors and their works. That other signatories to the Convention do not reach these standards does not excuse a member from complying with them.

201. *Hearings*, *supra* note 30, at 538 (statement of Edward J. Damich, Associate Professor of Law, George Mason University School of Law).

If we join Berne our laws must be consistent with every reasonable Berne obligation — not because European states would criticize us or take us to the International Court of Justice — but because we, as a people respect our laws, and our own courts will be vigilant to enforce our treaty obligations. And yet, some of the strongest supporters of Berne adherence want the United States to shirk its obligations.

Hearings, *supra* note 30, at 83-84 (statement of Ralph Oman, Register of Copyrights and Assistant Librarian for Copyright Services (June 17, 1987)). "Either our law is compatible when we join Berne or we are in breach of our treaty obligations." *Id.* at 84.

Joining the Berne Convention in fact without joining the treaty in spirit sends a clear message to the world's creative community that nothing has changed in the United States, except that now the copyright holders of pirated United States works will receive even greater economic protection.²⁰² Sydney Pollack observed,

If we ratify Berne, the heart of which is to find some sort of protection for artists, and all we really do is solidify the financier's point of view — there is something terribly ironic about that, and a bit embarrassing in terms of the moral leadership the United States ought to show to the world community. It shows a contempt for the value of art.²⁰³

B. United States Moral Rights and the Wording of Article 6*bis*.

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modifications of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.²⁰⁴

Since it is acknowledged that United States copyright law has never explicitly recognized authors' moral rights, and now that Congress has refused to include language in the Berne adherence implementing legislation that explicitly recognizes moral rights, it is clear that the state of moral rights in the United States does not conform to the literal wording of Article 6*bis*. This was the conclusion of Edward J. Damich, who testified that "A comparison of the language of Article 6*bis* with the protection afforded moral rights in the U.S. leads to the inescapable conclusion that this protection is virtually nonexistent."²⁰⁵ He felt strongly that to ensure that United States moral rights meet Berne's requirements, "any Berne implementation bill ought to contain a moral rights provision that fairly complies with the language of Article 6*bis*."²⁰⁶ L. Ray Patterson's testimony

202. Since the United States is a major producer of popular culture in the forms of phonorecords and computer programs, it stands to lose a great deal when copyrighted works are pirated. The Berne Convention has built up a high level of economic protection for author's works. *Hearings*, *supra* note 30, at 96.

203. *Hearings*, *supra* note 30, at 520-21 (statement of Sydney Pollack).

204. Berne Convention Art. 6*bis*(1).

205. *Hearings*, *supra* note 30, at 539 (statement of Edward J. Damich, Associate Professor of Law, George Mason University School of Law).

206. *Id.*

before Congress was in agreement with Damich's: American copyright law treats the rights of the author (who creates the work), and those of the entrepreneur (who distributes the work) as equivalent economic rights (i.e. property). "The moral rights of the author have been ignored, and the rights of the consumer under the fair use doctrine are minimal and continually minimized. Berne deals with all three rights."²⁰⁷

The law of the United States does not provide the equivalent of Berne's paternity right. The paternity right gives the author the right to assert that he is the work's creator. This is also known as attribution.²⁰⁸ But there is no clear authority in United States law for this right.²⁰⁹ The Ad Hoc Working Group on United States Adherence to the Berne Convention²¹⁰ conceded that United States copyright law as embodied in title 17 does not require attribution, nor could it cite a case where this right was judicially implied. The leading case in the area, *Vargas v. Esquire, Inc.*²¹¹ stands for the proposition that, except for the few states with statutes to the contrary,²¹² an author does not have a legal right to be credited as the author of his work. "Nevertheless," as Professor Damich observed, "we are supposed to believe that it is likely that courts will imply a covenant of fair dealing which will require attribution."²¹³

A most egregious example of the fact that United States law does not provide the real equivalent of the moral right of paternity is the case of William A. Smith's Maryland House murals. Under commis-

207. *Id.* at 106 (statement of L. Ray Patterson, Pope Brock Professor of Law, University of Georgia (June 17, 1987)). "If the United States is to adhere to Berne, it would be wise to amend the Title 17 to accommodate all three interests in a manner compatible with Berne and consistent with the copyright clause of the Constitution." *Id.* Professor Patterson sets out the interests involved in a schematic:

Entrepreneur	Copyright	Economic right	Property
Author	Moral Rights	Personal right	Reputation
Consumer	Fair Use	Political right	Access

Id.

208. See *supra* text accompanying note 14.

209. *Hearings, supra* note 30, at 543 (statement of Edward J. Damich, Associate Professor of Law, George Mason University School of Law).

210. See *supra* note 163.

211. 164 F.2d 522 (7th Cir. 1947) (Vargas produced distinctive drawings under contract for *Esquire* magazine; after a falling out between the artist and the publisher, *Esquire* continued to publish the drawings, but without Vargas' signature, calling the drawings "Esquire Girls").

212. See *supra* note 142.

213. *Hearings, supra* note 30, at 545 (statement of Edward J. Damich, Associate Professor of Law, George Mason University School of Law 2 (Sep. 30, 1987)).

sion from the State of Maryland, Smith designed and executed a set of mural paintings for the lobby of Maryland House, a building designed by one of Baltimore's leading architects, and owned by the state of Maryland.²¹⁴ The design and execution of the paintings took Smith over a year to complete and covered more than a thousand square feet of canvas, Smith personally painting every brush stroke. The paintings are in the form of nine panels depicting people and events from Maryland's history. Since the completed panels were installed in 1968 the work has been seen by thousands, has been widely reproduced, and is well known as being Smith's work. The murals have been critically acclaimed and have been called "among the most important historical murals in our nation" and "part of America's best art heritage."²¹⁵

In 1986 Maryland authorities, while in the process of altering Maryland House to accommodate a new restaurant concessionaire, permitted the new concessionaire to have some additions made to the largest, central panel of Smith's murals, without consulting Smith. The additions were made by Othmar Carli, the artist hired by the Maryland authorities for the task.²¹⁶ Carli added canvas panels where doors had been, and a new painting that has been described as "without exception, ill-conceived, very poorly drawn, and amateurishly incompetent — completely out of accord with the original work."²¹⁷ Carli signed his work, thus violating Smith's paternity right by adding another signature to the painting. Smith's right of paternity was further violated when the York, Pennsylvania *Daily Record* published a detail of the mural painted by Smith and attributed it to Carli.²¹⁸ Several lawyers have told Smith that United States law provides no redress for these violations.²¹⁹ Since the mural is owned by the State of Maryland, Smith has no right to remove his name from the altered painting if he wants to.

A fine arts appraiser familiar with the original mural stated that

214. Maryland House is a "highway rest stop" located on the John F. Kennedy Memorial Highway, Interstate 95, near Aberdeen, Maryland. It houses several restaurants and is open 24 hours a day, 365 days a year; approximately 3 million people pass through it each year. *Hearings*, *supra* note 30, at 447 (statement of William A. Smith).

215. *Hearings*, *supra* note 30, at 453 (statement of William A. Smith quoting art critic Alexander Eliot).

216. *Id.* at 455.

217. *Id.* at 457 (letter from Raymond M. Spiller and Associates, Inc., Fine Art Appraisers to Nina Ozlu, Artists Equity Assoc., Inc. (Aug. 24, 1987)).

218. *Id.* at 455 (statement of William A. Smith).

219. *Id.*

Carli's work is "a slur on the reputation and professional integrity of the artist who painted the mural," and that "the mural is so corrupted that, in its present state, it is not valid to expose the work as that of William A. Smith, whose signature it bears."²²⁰ Previously appraised at \$500,000, the altered panel is now worth only \$70,000.²²¹ As it stands, any observer can read Smith's name there and, not knowing the work's entire history, attribute it to Smith, much to the injury of his honor and reputation. Clearly, under the actual phrasing of Article 6bis, Smith would have had the right to claim authorship of the work. Additionally, according to the World Intellectual Property Organization's *Guide to the Berne Convention*,²²² an author may also refuse to have his name applied to a work that is not his. And a person permitted to display a work, as the state of Maryland was here, may not change the work either by deletion or by addition.²²³

United States law does not provide the equivalent of Berne's integrity right.²²⁴ Ralph Oman, in his extensive testimony before Congress stated that "[l]egal opinion is divided about the extent to which existing state law or federal trademark law protects against distortion or other alteration prejudicial to the author's reputation. It seems obvious that few, if any, states have settled rules regarding the integrity right."²²⁵ An illustration of the United States' laws lack of protection against mutilation of a work and the potential such mutilation has to injure an artist's reputation is the case of Richard Serra's *Tilted Arc*. Serra's specialty is creating "site specific" works — sculpture conceived for, dependent upon, and inseparable from its location, so that the surroundings become part of the work and make it impossible to move the work without destroying it. Serra was commissioned by the General Services Administration (GSA) to build a sculpture for Federal Plaza in New York City.²²⁶ The work, titled *Tilted Arc*, was finalized in 1981. Three years later when a GSA administrator sought to have *Tilted Arc* removed from the plaza, Serra went to court to enjoin its destruction by removal from the site. The court found that

220. *Hearings*, *supra* note 30, at 457 (letter from Raymond M. Spiller and Associates, Inc., Fine Arts Appraisers to Nina Ozlu, Artists Equity Assoc., Inc. (Aug. 24, 1987)).

221. *Id.* at 458.

222. WIPO Guide, *supra* note 53, at 41, ¶ 6bis.3.

223. *Id.* at 42, ¶ 6bis.5.

224. See generally Diamond, *supra* note 9, at 256-59, and Rosen, *supra* note 15, at 161-68.

225. *Hearings*, *supra* note 30, at 69-70 (statement of Ralph Oman, Register of Copyrights).

226. Serra's contract specified that the work was to be permanently installed. *Hearings*, *supra* note 30, at 805-11 (letter from Richard Serra to House Judiciary Committee (Sept. 22, 1987)).

Serra had no protection under United States copyright law from such destruction.²²⁷

Some experts hold that the United States protects the right of integrity through the derivative works doctrine. The derivative works doctrine states that the holder of the copyright in a work has the exclusive right to create other works based on that work.²²⁸ This protects a copyright holder from a strict interpretation of the Copyright Act's reproduction right,²²⁹ which might permit another to vary elements of the original work enough to reasonably assert that the second work was not actually a copy.²³⁰ But the right to prepare derivative works does not equate with the right of integrity as stated in Article 6bis.²³¹ The right to prepare derivative works is an economic right, while "integrity" is the right to control the quality of derivative works, rather than the right to permit the creation of derivative works.²³² Thus, since under Article 6bis an author's moral rights exist independently of the work's economic rights, even after the transfer of the economic right to create derivatives of a work, an author still retains the right to ensure that such works do not reflect unfavorably on his honor or reputation. Title 17 grants the copyright holder, rather than the author of the original work, the exclusive right to prepare derivative works from works protected by the copyright. In his testimony before Congress, Professor Damich noted that the late University of California law professor, Melville B. Nimmer, thought that distortions and mutilations might not be encompassed in the definition of "derivative works."²³³

The Ad Hoc Group's reliance on section 43(a) of the Lanham Act to protect the right of integrity is misplaced, since section 43(a) is a deception-based cause of action aimed at preventing misrepresenta-

227. *Id.* See *Serra v. United States General Services Admin.*, 667 F. Supp. 1042 (S.D.N.Y. 1987), *aff'd* 847 F.2d 1045 (2d Cir. 1988). "Tilted Arc" was removed from Federal Plaza in March 1989 and sent to the Federal Motor Pool in Brooklyn where it will remain until its fate is decided. N.Y. Post, Mar. 17, 1989, at 13, col. 1.

228. 17 U.S.C. § 106(2) (1982).

229. *Id.* § 106(1) (1982).

230. 17 U.S.C. § 101 (1982) contains a comprehensive definition of "derivative works," including translations, arrangements, dramatizations, fictionalizations, films, recordings, abridgments, condensations, or any other form in which a work may be recast, transformed, or adapted. NUTSHELL *supra* note 182, at 316.

231. *Hearings, supra* note 30, at 543 (statement of Edward J. Damich, Associate Professor of Law, George Mason University School of Law, Summary (Sep. 30, 1987)).

232. *Id.* at 546.

233. *Id.* (statement of Edward J. Damich, Associate Professor of Law, George Mason University School of Law 3 (Sep. 30, 1987) (citing 2 M. NIMMER, *supra* note 6, § 8.21[C][2])).

tion.²³⁴ Thus, removing any explicit evidence of misrepresentation, such as a signature, would remove any cause of action under the Lanham Act. So the author of a work that has been mutilated would have no cause of action as long as his signature had been removed, or a disclaimer made, even though any observer would instantly recognize the essence of the author's style in the work and attribute it to him anyway.²³⁵

Reputation-based causes of action do not fulfill the requirement of Article 6bis regarding protection of "honor."²³⁶ While most authors will not have a reputation sufficient to support a cause of action for libel or slander,²³⁷ most authors have a sense of honor — pride in their work. "The use of 'honor' as well as 'reputation' [in Article 6bis of the Berne Convention] suggests that regardless of how the public judges a modification, the author can still object to it."²³⁸

Kenneth W. Dam of IBM Corporation would eviscerate the soul of Article 6bis by combining an insistence on a strict interpretation of its language,²³⁹ with an illogical statutory definition. He pointed out that "by its own terms, Article 6bis applies only to 'authors' and to those who share in the initial copyright . . . and contains no discussion of 'works for hire.'"²⁴⁰ A work-for-hire is a work prepared by an employee within the scope of his employment, or a product produced at the behest and direction of one other than the creator.²⁴¹ Under United States copyright law when one creates a work-for-hire, the employer, not the employee, is considered to be the "author" for purposes of copyright ownership.²⁴² Ignoring that this premise does not

234. 15 U.S.C. § 1125 (1982).

235. *Hearings, supra* note 30, at 547 (statement of Edward J. Damich, Associate Professor of Law, George Mason University School of Law 4 (Sep. 30, 1987)).

236. *Id.* at 543.

237. *See supra* Part IV.B. 1. *Libel*.

238. *Hearings, supra* note 30, at 547 (statement of Edward J. Damich, Associate Professor of Law, George Mason University School of Law 4 (Sep. 30, 1987)).

239. This language was drafted over one hundred years ago by artists, not legal experts or politicians.

240. *Id.* at 265 (statement of Kenneth W. Dam, Vice President, IBM Corp. 19 (Sep. 16, 1987)).

241. 17 U.S.C. § 101 (1982).

242. Such legislative legerdemain does not fool everyone.

This is a clever way of getting around the difficulty the Constitution poses for employers; the Constitution says flatly the founding fathers wished to secure to artists and inventors the rights to their creations. By simply saying 'but — if the artist is paid, the employer is the artist,' does not make it so; or do they believe the Pope painted the Sistine Chapel ceiling and Wagner's operas were composed by Mad King Ludwig of Bavaria?

recognize the concept of a creator's personal moral right in his creation, Dam concluded that "many of the situations in which 'moral rights' are typically invoked are not touched by Article 6bis."²⁴³ He noted that "since few (if any) of the directors of Hollywood black-and-white movies were ever the copyright owners, the 'colorization' controversy would not be affected by Article 6bis."²⁴⁴ Calling one who commissions a work-for-hire the author of the resulting work may be convenient for the administration of title 17 within the United States, but such an expediency should not obscure the reality (and more common usage) that the term "author" refers to the person who conceptualized and executed the work and not to the one who paid for it.

Dam further noted that Article 6bis "does not appear to bar the separate alienability of 'moral rights.'"²⁴⁵ It also does not appear to not bar such alienability, since the provision does not mention alienability at all. Assuming, without support, that moral rights are alienable under Article 6bis, Dam concluded that moral rights would be subsumed under contract law in this country, "as, indeed, they are now."²⁴⁶ In reality, however, the United States does not recognize moral rights but provides pale substitutes that function adequately only as long as the author retains the copyright in his work.

C. United States Moral Rights Meet Berne Minimum Requirements in the Same Practical Sense That Other Countries Meet Berne Minimums

In reaching its conclusion that current United States law meets the moral rights requirements of Berne, one of the factors that the Ad Hoc Working Group On United States Adherence to the Berne Convention²⁴⁷ took into account was the fact that there are no moral rights provisions in the statutes of several Berne member nations. The United Kingdom, for example, which joined the Convention at its founding, does not have a statutory provision on moral rights.²⁴⁸

Hearings, supra note 30, at 426 (statement of Frank Pierson).

243. *Id.*

244. *Hearings, supra* note 30, at 266 (statement of Kenneth W. Dam, Vice President, IBM Corp. 19 (Sep. 16, 1987)).

245. *Id.*

246. *Id.*

247. *See supra* note 163.

248. *Hearings, supra* note 30, at 219 (statement of Irwin Karp, Chairman, Ad Hoc Working Group on United States Adherence to the Berne Convention).

Another consideration was the total lack of uniformity in protection of moral rights among the Berne Convention countries.²⁴⁹ In other words the Group concluded that since no one was following the letter of the law, the United States was not required to do so either. "[T]he totality of United States law provides protection for the rights of paternity and integrity sufficient to comply with 6bis as it is applied by various Berne countries."²⁵⁰

It is not certain whether all the Convention members actually meet the minimum requirements of Article 6bis, but whether they do or not, it is clear that no member country has ever challenged another Berne nation with regard to inadequate moral rights protection.²⁵¹ In his testimony before Congress, the Chairman of the Ad Hoc Working Group on United States Adherence to the Berne Convention, Irwin Karp stated that

[i]n reality, the moral rights protection under our law today probably is superior to that actually applied in many Berne countries. There is a paucity of cases and very little information to indicate . . . [that other Berne countries have done as much] to protect moral rights as [has the United States].²⁵²

No news is good news.

VI. THE FUTURE OF MORAL RIGHTS IN THE UNITED STATES

Only time will tell if the United States' joining the Berne Convention will have any effect on the state of moral rights in this coun-

249. *Hearings*, *supra* note 30, at 219.

Given the lack of uniformity of moral rights protection among other Berne nations, the absence of moral rights provisions in the copyright laws of some Berne nations, and the reservation of control over remedies to each country, the moral rights type of protection afforded by the United States' statutory and common law meets the level of protection required by the Berne Convention.

Id. at 84 (statement of Ralph Oman, Register of Copyrights and Assistant Librarian for Copyright Services (June 17, 1987) (citing the Ad Hoc Working Group on U.S. Adherence to the Berne Convention's final report)).

250. Ad Hoc Working Group Final Report, ch. V, Part E3 (*cited in* Damich, *Moral Rights in the United States and Art. 6bis of the Berne Convention: A Comment on the Preliminary Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 10 COLUM. J.L. & ARTS 655 (1986)).

251. *Hearings*, *supra* note 30, at 286 (statement of Peter F. Nolan, Counsel of the Walt Disney Co.).

252. *Id.* at 219 (statement of Irwin Karp, Chairman, Ad Hoc Working Group on U.S. Adherence to the Berne Convention).

try. There are circumstances that support logical arguments for both positions — that authors' moral rights in the United States will not change, and that they will.

A. Moral Rights Will Not Change

Some supporters of moral rights think that adherence to Berne may impede the adoption of strict moral rights legislation because "we have done all we are required to do."²⁵³ The official position, that current United States law already meets the minimum requirements of Berne on moral rights,²⁵⁴ indicates reluctance to change United States law on the subject.

Because the Berne Convention is not self-executing, the mere fact that the United States has now joined the convention should have no effect on copyright law in this country. United States law would have changed only if the implementing legislation changed it.²⁵⁵ As noted above,²⁵⁶ the Berne Implementation Act did not change United States law as it relates to authors' moral rights. Congress expressly stated that any rights in a work eligible for protection under United States copyright law would not be expanded or reduced by virtue of this country's adherence to the Berne Convention.²⁵⁷

Courts may be less likely to go beyond United States copyright law as it now stands because the implementation act contains no specific moral rights provision. As it is, there is little risk of the courts interpreting our joining Berne as creating any higher moral rights than existed previously.²⁵⁸ Kenneth W. Dam stated that "courts cannot write on a blank slate . . . where Congress clearly expresses its intent."²⁵⁹ The language of the Berne adherence implementation bill makes it abundantly clear that Congress intends to maintain the sta-

253. *Id.* at 270 (statement of Kenneth W. Dam, Vice President, IBM Corp. (Sep. 16, 1987)). This fear is as speculative as the notion that adherence will increase moral rights. *Id.*

254. *See supra* notes 159-60 and accompanying text.

255. "As a matter of policy, the Dept. of State takes the position that intellectual property treaties should not be self-executing." *Hearings, supra* note 30, at 169-71 (statement of Allen Wallis, Under Secretary for Economic Affairs). The implementing legislation, the Berne Convention Implementation Act of 1988, does in fact make some changes in United States copyright law in the areas of notice, registration, and recordation.

256. *See supra* text accompanying note 7.

257. Pub. L. No. 100-568 § 4(c), 102 Stat. 2853, 2855 (1988).

258. *Hearings, supra* note 30, at 182 (statement of Malcolm Baldrige, Secretary of Commerce).

259. *Id.* at 267 (statement of Kenneth W. Dam, Vice President, IBM Corp. 20 (Sep. 16, 1987)).

tus quo.²⁶⁰

Another reason that our adherence to Berne should not affect the state of moral rights in this country is found in article 5 of the Berne Convention. Article 5 says that (1) protection in the country of origin is governed by domestic law, and (2) protection other than in the country of origin is governed by the law of the country where protection is sought, and that such protection will be the same as that granted to nationals of that country.²⁶¹ So, even if joining Berne somehow increased a United States artist's rights of paternity and integrity in the world at large, those rights would still remain at the level of United States domestic law for a foreign artist seeking protection within the United States.

B. Moral Rights Will Change

There are also those who hope, or fear, that the United States' admission into the Berne Convention will increase the protection afforded authors' moral rights in the United States. In his statement before Congress, Ralph Oman noted, as an argument against the United States joining Berne, that "adherence to Berne will cost the United States the high price of substantial changes in our law, and potential disruption of established business practices structured upon that law, and will limit future legislative options."²⁶² The Coalition to Preserve the American Copyright Tradition (CPACT) was opposed to United States adherence to Berne because it believed that adherence would introduce "the European concept of 'droit moral' . . . which is inconsistent with the United States tradition of copyright as an economic incentive."²⁶³ CPACT believed that the introduction of moral rights into United States law would "disturb the historical balance among authors, publishers, and the public and upset decades of settled practices, contract conventions, expectations, and risk allocations."²⁶⁴ Additionally, they believe moral rights would interfere with publishers' first amendment freedoms and restrict the flow of information to the public.²⁶⁵

260. Pub. L. No. 100-568, 102 Stat. 2853 (1988).

261. Universal Copyright Convention as revised at Paris on July 24, 1971, art. 5, 25 U.S.T. 1341, T.I.A.S. No. 7868.

262. *Hearings, supra* note 30, at 82 (statement of Ralph Oman, Register of Copyrights and Assistant Librarian for Copyright Services).

263. *Id.* at 337 (statement of CPACT).

264. *Id.*

265. *Id.* The CPACT list of negative effects that would inevitably occur once moral rights

Since, in its adherence legislation, Congress took no decisive action regarding moral rights, preferring to state simply that the status quo regarding moral rights would be maintained, the effect might be to absorb fragments of state statutory and common law into the national treaty obligation created by Berne, with entirely unpredictable results.²⁶⁶ Additionally, as Kenneth W. Dam noted when testifying before Congress, "nothing currently stands in the way of 'moral rights' legislation if Congress wishes to adopt it."²⁶⁷ Several bills have been proposed to create a right of integrity for visual artists and a director's right to prevent colorization.²⁶⁸ These bills also address the works-for-hire issue. The very words in the implementing legislation that expresses Congress' intent that no changes occur may have opened a back door to admit increased authors' moral rights in the United States. By passing legislation that specifically refrains from making moral rights a part of federal copyright law, moral rights remain the province of the states and are not subject to preemption by the federal copyright act.²⁶⁹ Further, since title 17's preemption clause means that the only copyright law in the United States is federal copyright law, moral rights are not considered to be a copyright issue.²⁷⁰ Then the courts and legislatures of fifty different states are

invaded the United States goes on.

The moral right also would: raise serious questions of author identification in collaborative works such as magazines, textbooks and broadcasts; permit second-guessing of split second editorial decisions that are necessary to time sensitive publications or productions; cloud the status of adaptations and revisions; intrude on content judgments if creators objected to the context in which their work is placed; interfere with the editing of films for television; and apply retroactively to existing works, thereby jeopardizing settled expectations and investments.

Id.

266. *Hearings, supra* note 30, at 83-84 (statement of Ralph Oman, Register of Copyrights and Assistant Librarian for Copyright Services).

267. *Id.* at 270 (statement of Kenneth W. Dam, Vice President, IBM Corp.) Senator Kennedy has introduced S. 1198 (June 16, 1989) to amend Title 17, U.S.C., and provide certain rights of attribution and integrity to authors of works of visual art. This bill addresses a narrow and specific problem — the mutilation and destruction of works of fine art which are often one of a kind and irreplaceable (statement of Edward M. Kennedy).

268. *Hearings, supra* note 30, at 270 (statement of Kenneth W. Dam, Vice President, IBM Corp.). See *supra* text accompanying note 244.

269. 17 U.S.C. § 301 (1982).

270. Compare this line of reasoning to the following:

But one of the features of the copyright law actually provides some basis for the assurance of moral rights protection in this country. And that is the right, exclusive right of the copyright owner to authorize the preparation of derivative works, and that right is one which gives the author the ability to safeguard himself against uses of the work that he does not want.

free to go their own ways to change or not change the status of moral rights in their own jurisdictions, and thus there is no way to predict what the state of moral rights will be in this country ten years from now.

David Ladd, speaking before Congress on behalf of CPACT, opined that joining Berne, even with the minimalist approach,²⁷¹ would change United States law, because the very act of joining, together with the Ad Hoc Group's assertion that current United States law meets the minimum requirements of the Berne Convention, is an implicit acknowledgment that the body of United States law contains moral rights. There is a possibility that some courts will now feel less restrained from expanding the doctrines that make up the "moral rights equivalents" in United States law.²⁷² United States adherence to Berne with legislation that contains only a narrowly prescribed, alienable moral rights provision will ultimately "lead to expanded moral rights protection in the judicial interpretation of United States law."²⁷³ However, even if a court tried to use the language of Article 6bis to interpret United States law, the Berne Convention is not par-

Hearings, supra note 30, at 193 (statement of Mike Keplinger).

Irwin Karp, Chairman of the Ad Hoc Working Group, stated,

[I]f someone prepares a mutilated version of an author's work, that is a derivative work. And if one did not have authority to do that, that is infringement, and the author can sue for infringement. So that if a publisher got a license to publish a manuscript and then published a mutilated version without the author's permission, the author could sue him for infringement. . . . It would be a moral right we were protecting even though the label for the remedy was libel, infringement, etc.

Id. at 223.

Keplinger's and Karp's statements are accurate only if they are using the terms "copyright owner" and "author" to refer to the same person, that is, an author who has retained the copyright in his work. Once the author parts with the copyright in a work, she can no longer safeguard against uses of the work that offend her, a fact to which some directors of black and white films will testify. Senator Leahy has a similar misunderstanding of the issue. He noted that:

the Copyright Act by granting the right to prepare derivative works 'protects authors against any unauthorized distortion, mutilation, or modification regardless of its effect on the author's honor or reputation. Furthermore, other Federal and State statutes, and the common law of torts, including defamation, protect the interests implicated by moral rights.'

Id. at 206 (citing 133 CONG. REC. S7370 (daily ed. May 29, 1987)).

271. The "minimalist approach" to joining Berne was to change United States law as little as possible in order to conform to Berne minimums. A danger in the minimalist approach is that concepts, definitions, and interpretations of United States laws would be stretched beyond recognition to fit the contours of Berne.

272. *Hearings, supra* note 30, at 398 (statement of David Ladd).

273. *Id.* at 83 (statement of Ralph Oman, Register of Copyrights and Assistant Librarian for Copyright Services 76 (June 17, 1987)).

ticularly clear as to the extent to which the moral rights granted by Article 6bis can be limited by domestic law. The World Intellectual Property Organization's guide to the Berne Convention suggests that member states can choose whether to make moral rights alienable or inalienable.²⁷⁴

VII. CONCLUSION

The United States has historically lagged behind the rest of the world in protecting authors' moral rights by refusing to explicitly recognize an author's rights of paternity and integrity. Although United States law contains a hodgepodge of causes of action that provide a rough equivalent of the moral rights protected by the Berne Convention, authors have never enjoyed the level of protection for their rights that is expressly provided by Article 6bis of the Convention.²⁷⁵ Now, after much debate and consideration, one hundred and two years after the Berne Convention's inception, the United States finally enacted a law that enabled it to join the premier treaty for the protection of intellectual property.

Before joining, Congress found that current United States law does provide the level of protection for author's moral rights required by the Berne Convention. It concluded, in the face of voluminous conflicting testimony, that the amalgam of common law causes of action and state and federal statutes regarding intellectual property provide the equivalent of the moral rights embodied in Berne,²⁷⁶ even though the courts have consistently held that these laws do not protect authors' moral rights.²⁷⁷ The enabling legislation explicitly states Congress' intention that United States membership in the Berne Convention is to have no effect whatever on the state of moral rights law in the United States.²⁷⁸ The results of this legislative legerdemain is that the United States recognizes authors' moral rights for purposes of complying with the requirements of an international intellectual property treaty, but does not recognize those same rights for the purpose of actually protecting an author's moral rights. Humpty

274. *Id.* at 91-92 (statement of Representative Patricia Schroeder, noting that H.R. 1623, which used language similar to Art. 6bis took the approach that moral rights are freely alienable, but that other Berne countries maintain that moral rights are inalienable).

275. See *supra* text accompanying notes 6 & 191-94.

276. See *supra* text accompanying notes 157-66.

277. 2 M. NIMMER, *supra* note 6, § 8.21[B].

278. See *supra* text accompanying note 196.

Dumpty would be proud.²⁷⁹

The future of author's moral rights in the United States remains uncertain.²⁸⁰ Congress' intent that the admission of the United States into the Berne Convention would have absolutely no effect on the state of authors' moral rights in the United States was made abundantly clear through the wording and history of the enabling legislation. However, since the enabling act, which is an amendment to the federal copyright law, explicitly declined to address authors' moral rights, the fifty states remain free to deal with authors' moral rights as they see fit, and state law remains the most accessible vehicle for improving authors' moral rights in this country. It is impossible to predict how the courts will rule on future moral rights cases, since they will be faced with interpreting a treaty whose literal meaning clearly conflicts with Congress' interpretation. It can only be said that the United States has finally taken a long-awaited step in this arena of intellectual property. It remains to be seen in which direction that step was taken.

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279. *See supra* after title.

280. *See supra* Part VI. THE FUTURE OF MORAL RIGHTS IN THE UNITED STATES.

NOTES

THE ADMISSIBILITY OF SCIENTIFIC EVIDENCE: DNA PRINT IDENTIFICATIONS

Andrews v. State, 533 So. 2d 841 (Fla. 5th DCA 1988).

On the morning of February 21, 1987, an Orange County woman was attacked in her home by an intruder whom the victim could only describe as being a strong, black male.¹ During the attack, the intruder cut the victim on the face, neck, legs, and feet, then forced sexual intercourse, and stole the victim's purse containing approximately forty dollars.²

The police investigation at the scene of the crime revealed that one of the windows in the victim's house was open and its screen was missing.³ Two fingerprints were lifted from the window frame, and at trial a fingerprint expert testified that these prints matched those of the defendant's right index and middle fingers.⁴ A physical examination, followed by laboratory analysis, revealed the presence of semen and the blood-type O antigen in the victim's vagina.⁵ Both the defendant and the victim were blood type O.⁶ The presence of this antigen could have come from either the semen or the victim's own blood.⁷ The defendant was a secretor of the O antigen, meaning the antigen could be found in his bodily fluids, such as saliva or semen.⁸ Thus, the analyst testified that he could not exclude the defendant as a possible source of the semen.⁹

The prosecution also introduced "deoxyribonucleic acid (DNA)

1. *Andrews v. State*, 533 So. 2d 841, 842 (Fla. 5th DCA 1988). Later the victim did identify the defendant as her attacker at a photo lineup and at trial. *Andrews v. State*, 533 So. 2d 851, 851 (Fla. 5th DCA 1988) (merely noting the additional identifications).

2. *Andrews*, 533 So. 2d at 842.

3. *Id.* at 843.

4. *Id.*

5. *Id.* at 842-43.

6. *Id.* at 843.

7. *Id.*

8. *Id.* The victim was not a secretor. *Id.*

9. *Id.*

print identification evidence," which purported to compare and match the DNA found in the defendant's blood with DNA found in the semen taken from the vaginal swab.¹⁰ The prosecution experts testified that the chance of another person's DNA print matching the defendant's was approximately one in eight hundred million.¹¹

The defense objected to the admission of this evidence, and a hearing on a motion in limine was convened on its admissibility.¹² The defense argued that this scientific technique had never before been recognized by a court in the United States and did not meet the standard of reliability necessary for the admission of scientific evidence.¹³ After hearing testimony from three expert witnesses regarding the evidence, its quality controls, and its acceptance in the scientific community, the trial judge ruled that the evidence was admissible.¹⁴ The defendant was subsequently convicted by the jury of aggravated battery, sexual assault and armed burglary.¹⁵

On review by the Fifth District Court of Appeal, the defense attacked the procedural methods used by the laboratory which conducted the test, rather than the admissibility of DNA print identification evidence in general. The court of appeal decided that the novelty of the procedure required that both the general question of admissibility and the question of specific application be addressed. HELD: DNA print identification evidence is admissible scientific evidence, and the trial court did not err in finding the procedures used in this case reliable.¹⁶

The *Andrews* decision is significant in two respects. It is the first reported appellate decision from any United States court to pass on the admissibility of DNA print identification evidence in a criminal setting.¹⁷ This procedure has been described as being "the new fingerprints" and is predicted to "revolutionize" law enforcement.¹⁸ Of

10. *Id.*

11. *Id.* The actual number was 1 in 839,914,540. *Id.*

12. Brief for the Appellant at 1, *Andrews v. State*, 533 So. 2d 841 (Fla. 5th DCA 1988) (No. 87-2166).

13. *Id.*

14. 533 So. 2d at 847.

15. *Id.* at 843.

16. *Id.*

17. The issue had been dealt with by an appellate court in a civil paternity suit. *In re Baby Girl S*, 140 Misc. 2d 299, 532 N.Y.S.2d 634 (Sup. Ct. 1988). It had also been dealt with in a criminal case by a New York county court. *People v. Wesley*, 140 Misc. 2d 306, 533 N.Y.S.2d 643 (Albany County Ct. 1988).

18. Moss, *DNA-The New Fingerprints*, A.B.A. J., May 1, 1988, at 66.

greater importance, though, is the *Andrews* court's rejection of the requirement that scientific evidence be "generally accepted" in the scientific community. By adopting a "relevancy" standard, the *Andrews* court has mandated that novel scientific evidence be admitted by the same standard as is used for other kinds of expert testimony.

This Note will briefly describe the DNA print identification test and then review the longstanding debate concerning the proper standard for the admissibility of scientific evidence. It will also examine the standards used in Florida and the *Andrews* court's application of the "relevancy" standard. Finally, it will discuss those differences that exist between the "general acceptance" test and the standard adopted by the *Andrews* court.

DNA AS A FORENSIC TOOL

Central to any criminal prosecution is the identification of the defendant as the individual who committed the crime. In theory, the DNA molecule should be an extremely useful tool for making these identifications.¹⁹ This molecule, often referred to as the "blueprint of life,"²⁰ preserves all the genetic information necessary for an organism's characteristic identity.²¹ It is variations in the DNA molecule

19. Of course the applications of DNA testing would not be limited to criminal identification. Already the technique has been accepted in paternity cases, *see supra* note 17; clearing wrongly accused suspects, *see Gill & Werret, Exclusion of a Man Charged with Murder by DNA Fingerprinting*, 35 FORENSIC SCI. INT'L 145 (1987); *but also see* *Yorke v. State*, 315 Md. App. 578, 556 A.2d 289 (Ct. Spec. App. 1989) (newly discovered DNA print evidence, showing that the sperm taken from a rape victim's vagina did not match the defendant's DNA, did not entitle the defendant to new trial; the victim had testified at trial that she had sexual intercourse with her boyfriend prior to the rape; further, she could not say for certain whether her attacker had ejaculated); and in a probate case. *Alexander v. Alexander*, 42 Ohio Misc. 30, 537 N.E.2d 1310 (P. Ct. 1988) (child born out of wedlock was allowed to prove his paternity by genetic testing, and probate court could permit disinterment to effect such a test). Other suggested applications include the identification of victim remains, and the distinguishing between "copycat" and serial crimes. Beeler & Wiebe, *DNA Identification Test and the Courts*, 63 WASH. L. REV. 903, 905 n.2 (1988).

20. Beeler & Wiebe, *supra* note 19, at 904.

21. A. LEHNINGER, PRINCIPLES OF BIOCHEMISTRY 6 (1982). The DNA molecule is a chain molecule consisting of subunits called nucleotides. There are four nucleotides from which the molecule is put together: adenine, thymine, cytosine, and guanine (A, T, C, and G). When the DNA molecule is in its double-stranded configuration A will only bond with T, and C will only bond with G. *Id.* at 807-08. Three consecutive nucleotides will form a segment known as a codon, which will ultimately code for a specific amino acid. A series of codons will form a gene, which ultimately codes for a string of amino acids, which is referred to as a polypeptide, or protein. Proteins perform a wide variety of biochemical functions. It is estimated that there may be well over fifty thousand different kinds of proteins in human beings. *Id.* at 6-7.

Not all sections of the DNA molecule code for proteins. There are sections of the DNA

which account for many of the differences that exist between individuals.²² As a forensic tool, the DNA molecule's usefulness arises from the existence of a complete and identical copy of the molecule in nearly every cell in the body.²³ Thus, any time some tissue or cell containing bodily fluid is left behind at the scene of the crime, a unique genetic "fingerprint" will also be left behind.²⁴

The structure of the DNA molecule has been understood and accepted by most biochemists for over thirty years.²⁵ The techniques that would allow for the identification of different DNA molecules have been in existence for approximately ten years.²⁶ The initial, and perhaps still primary, thrust of the technology has been directed towards finding the chromosomal locations of the genes responsible for hereditary diseases.²⁷ The nonforensic use of DNA testing has been diverse enough, though, to include its use in the research of human development, evolution, and migration patterns, as well as in a wide variety of agricultural and zoological studies.²⁸ Only more recently, has a forensic use of the technology been developed.²⁹ The lead in developing a technique for forensic purposes was taken in Great Britain,³⁰ where it has already been applied in a number of instances.³¹

molecule called Restriction Fragment Length Polymorphisms (RFLP), which consist of repeating sequences of nucleotides (11 to 66 base pairs in length) whose function is not yet understood. RFLP's vary in length between individuals. However, the repeating sequences within the RFLP's remain the same. The DNA print identification test has been built around RFLP's. Beeler & Wiebe, *supra* note 19, at 913 n.51.

22. F. AYALA & J. KIGER, *MODERN GENETICS* 145-46 (1980). Of course it does not account for the whole of one's individuality. Identical twins begin with identical DNA molecules, and yet from conception their individuality is shaped by their environment. *Id.*

23. Beeler & Wiebe, *supra* note 19, at 909. The major exception is the red blood cells (erythrocytes), which have no nuclei. There are however many other kinds of cells in the blood stream which do contain a nucleus with DNA. D. LUCIANO, A. VANDER & J. SHERMAN, *HUMAN FUNCTION AND STRUCTURE* 363 (1978).

24. Beeler & Wiebe, *supra* note 19, at 904.

25. A. LEHNINGER, *supra* note 21, at 804. The structure was theorized in 1953 by Watson and Crick. *Id.*

26. Brief of Amicus Curiae on Behalf of Appellee at 6, *Andrews v. State*, 533 So. 2d 841 (Fla. 5th DCA 1988) (No. 87-2166).

27. Beeler & Wiebe, *supra* note 19, at 907. Defects in DNA have been identified with diseases such as Huntington disease, Duchenne muscular dystrophy, sickle cell anemia, and cystic fibrosis. *Id.*

28. *Id.* at 908.

29. *Id.*

30. White & Greenwood, *DNA Fingerprinting and the Law*, 51 MOD. L. REV. 145, 145 (1988). The technique has primarily been the result of work done by Dr. A.J. Jefferys of Leicester University. The techniques and probes developed by Dr. Jefferys are now being offered in the United States by Cellmark Diagnostics. The test used in the *Andrews* case was

The DNA identification test is the synthesis of several laboratory procedures. The test involves the DNA being isolated from the biological sample,³² then "cut" into many pieces by special enzymes that act upon specific base sequences,³³ sorted by length through a process known as gel electrophoresis,³⁴ labeled with radioactive probes,³⁵ and finally exposed to film, thus forming a picture known as an autoradiograph.³⁶ The autoradiograph will appear as a pattern of bands.³⁷ It may then be used for identification by comparing the bands of different autoradiographs.³⁸ The band patterns will vary between individuals, but will remain constant for any given individual throughout his life.³⁹ To decrease the chance that the autoradiographs of two different persons will match, a number of bands will be examined and probes for DNA fragments with extreme variability in length will be selected.⁴⁰

developed by Dr. R. White of the University of Utah, and is now being offered by Lifecodes Corporation. Beeler & Wiebe, *supra* note 19, at 923.

31. White & Greenwood, *supra* note 30, at 148. The most dramatic example of its use so far was in the investigation of two rape-murders. The police, after the occurrence of these crimes, requested that all male inhabitants in the village of Leicestershire between the ages of 13 and 30 submit to a DNA identification test. In all, some seven thousand tests were performed. The murderer, however, managed to elude the authorities by passing off a fellow worker as himself for the testing. The deception was only foiled when the worker boasted of the switch at a local pub. *Id.* at 149-50.

32. Beeler & Wiebe, *supra* note 19, at 911. The exact method for separation depends upon the source of the DNA. For examples see *id.* at 911 n.36.

33. *Id.* at 912 n.42.

34. *Id.* at 912. Gel electrophoresis involves putting the fragmented DNA in one end of a jello-like slab. The slab is then subjected to an electrical current, with the positive electrode on the end of the slab opposite to the DNA fragments. Because DNA has a negative charge, the pieces will be attracted and will migrate towards the positive electrode. The shorter pieces will travel through the gel faster than the longer pieces, thus completing the separation. Burk, *DNA Fingerprinting: Possibilities and Pitfalls of a New Technique*, 28 JURIMETRICS J. 455, 459-60 (1988).

35. Beeler & Wiebe, *supra* note 19, at 914. Prior to labeling the DNA fragments with the radioactive probes, it is necessary to split, or "denature," the double stranded DNA molecule into two single strands. The denatured DNA is then transferred to a nylon membrane (working with the gel is messy) by a process known as "southern blotting." The probes mark the DNA segments by pairing bases (A to T, and C to G) with strands of DNA which have complementary sequences of nucleotide bases (thus A-T-G-G would pair with T-A-C-C). See *supra* note 21. The technique is known as "DNA hybridization." *Id.* at 910-11.

36. *Id.* at 914. This is done by laying an x-ray film over the nylon membrane to which the DNA was transferred. The labeled DNA will show up as a band on the film. *Id.*

37. *Id.*

38. *Id.* at 915.

39. *Id.*

40. *Id.* See *supra* note 21.

The test has its limitations. An insufficient sample⁴¹ or environmental contamination can affect the test.⁴² The impact however appears to affect the technician's ability to obtain any results rather than creating a potential for false positives.⁴³ There have also been concerns that in some studies the sample populations for determining the band frequencies were either too small or too homogeneous to be reliable for application to the general population.⁴⁴ As the makers of the test continue to expand the base of their sample populations, this concern should diminish.⁴⁵

Proper interpretation of the autoradiographs is not without its hazards. DNA fragments of different lengths may be difficult to distinguish because the electrophoresis separation process has poor resolution within certain ranges.⁴⁶ Another problem is a phenomenon known as "band shifting," where DNA fragments of the same length travel different distances in their separate gels.⁴⁷ This problem however can be overcome by running DNA fragments of known lengths

41. *Id.* at 920. The sample for the test does not have to be very large. With the test offered by Lifecodes, a dried blood stain the size of a quarter, a dried drop of semen the size of a nickel, a few hairs, or a small patch of skin will be sufficient to run the test. Moss, *supra* note 18, at 66. See *supra* note 30. A different kind of test developed by Cetus Corporation known as "DNA Amplification" will allow the typing of a single hair, a tiny speck of blood, or forty sperm heads. The test is not as specific however. Thompson & Ford, *DNA Typing; Promising Forensic Technique Needs Additional Validation*, TRIAL, Sept. 1988, at 56, 57.

42. Beeler & Wiebe, *supra* note 19, at 920. Sunlight, moisture, heat, radiation, chemical agents, and age will all degrade DNA samples. *Id.*

43. *Id.* at 921-22. If there is any potential for false positives, contamination by bacterial DNA is considered the most likely source. However, screening tests for bacterial DNA are typically employed. *Id.*

44. Burk, *supra* note 34, at 466. These charges were mostly directed at some of the initial studies where the chance of a match between two individuals was put at one to thirty billion. This study had been conducted upon a sample population of twenty British Caucasians. *Id.*

45. *Andrews*, 533 So. 2d at 850. The Lifecodes test at the time of trial in *Andrews* had a sample population size of 710 persons, and the odds for a misidentification had risen to approximately one in eight hundred million. *Id.* However, since *Andrews* experts from Lifecodes have testified to statistical probabilities of one in two hundred and thirty-four billion. *Martinez v. State*, 14 Fla. L. Weekly 1989 (Fla. 5th DCA Sept. 1, 1989) (where statistical probabilities are scientifically and reliably grounded, they are admissible, no matter how high the probabilities may be).

46. Thompson & Ford, *supra* note 41, at 63. Two leading forensic scientists, Cecilia von Beroldingen and George Sensabaugh, speaking of the technique, stated that "[t]he procedure itself is time-consuming and somewhat tricky. Bands may appear or disappear depending upon the hybridization conditions. The pattern of bands is complex and may be difficult to interpret." *Id.*

47. Lewin, *News & Comment: DNA Typing and the Witness Stand*, 244 SCIENCE 1033, 1034 (1989).

in the gels as an internal control.⁴⁸

Since the *Andrews* opinion was entered, the DNA identification test offered by Lifecodes, maker of the test used in *Andrews*, has come under some criticism.⁴⁹ Most of the criticism has centered on Lifecodes' apparent lack of internal controls in its procedures.⁵⁰ The most damaging criticism was issued in a "consensus statement" of defense and prosecution expert witnesses testifying in *People v. Castro*,⁵¹ a 1989 New York case. The expert witnesses, after a highly unusual gathering, concluded that "overall, the DNA data in this case was not scientifically reliable enough" to reach a trustworthy conclusion, and "if this data were submitted to a peer reviewed journal in support of a conclusion, it would not be accepted."⁵² The prosecution then conceded that the evidence offered by Lifecodes should not be admitted.⁵³

THE ADMISSIBILITY OF SCIENTIFIC EVIDENCE

The *Frye* Test

The historic standard of admissibility for scientific evidence was set out in *Frye v. United States*.⁵⁴ In a two-page opinion, the *Frye* court held that evidence derived from a novel scientific technique was not admissible until the technique had achieved "general acceptance in the particular field in which it belongs."⁵⁵ *Frye* has governed

48. *Id.*

49. St. Petersburg Times, June 15, 1989, at 5A, col. 4. The leading critic has been Dr. Eric S. Lander of the Whitehead Institute for Biomedical Research in Cambridge, Massachusetts. *Id.* See *supra* note 30.

50. Lewin, *supra* note 47, at 1034.

51. *Id.* at 1033 (discussing No. 1508/87 (N.Y. Bronx County Ct. Aug. 14, 1989); (an opinion from the same case dealing with a different issue may be found at *People v. Castro*, — Misc. —, 540 N.Y.S.2d 143 (Sup. Ct. 1989)).

52. Lewin, *supra* note 47, at 1033. The statement itself was ruled inadmissible hearsay. However, the defense managed to introduce the substance of the statement by calling two of the expert witnesses who participated in the gathering. *Id.* The experts also expressed doubt that any methods currently exist for the forensic use of DNA. Nat'l L.J., July 31, 1989, at 6, col. 1-2.

53. Nat'l L.J., July 31, 1989, at 6, col. 1-2. On August 14, 1989, Justice Shendlin ruled that the DNA testing lab in *Castro* failed to use "generally accepted scientific techniques," thus the evidence, in this case, was inadmissible. Anderson, *DNA Evidence Questioned*, A.B.A. J., October 1989, at 18. In the wake of the *Castro* case, the National Association of Criminal Defense Lawyers is forming a committee with the mission of reopening cases in which conviction has been based on DNA print identifications. Nat'l L.J., July 3, 1989, at 14, col. 1-2.

54. 293 F. 1013 (D.C. Cir. 1923).

55. *Id.* at 1014. The full passage most often quoted reads:

the admissibility of scientific evidence in most jurisdictions for the last fifty years.⁵⁶

Three major arguments have arisen in support of *Frye*. It has been argued that *Frye* (1) ensures the existence of an adequate pool of experts who may critically examine the reliability of the technique,⁵⁷ (2) promotes uniformity in decisions, and (3) avoids time-consuming litigation over a technique's validity.⁵⁸

The first argument, voiced in *United States v. Addison*,⁵⁹ is founded on the notion that a technique's reliability is best judged by the scientists who are experts in the field.⁶⁰ By requiring general acceptance in the field, *Frye* ensured that the technique would have been examined by those experts who possess the specialized knowledge necessary for weighing its reliability.⁶¹ In this respect, one commentator has suggested that *Frye* does not relate so much to the admissibility of scientific or expert testimony, but rather to the availability of scientific or expert testimony.⁶² Thus, *Frye* ensured that the novelty of a technique did not deprive a party of the opportunity to introduce rebuttal evidence in the form of expert testimony.⁶³

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Id.

56. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197, 1205 (1980).

57. Note, *Expert Testimony Based On Novel Scientific Techniques: Admissibility Under the Federal Rules of Evidence*, 48 GEO. WASH. L. REV. 774, 777 (1980).

58. Giannelli, *supra* note 56, at 1207. In his treatise on Florida evidence law, Graham mentioned three other justifications for the *Frye* test. *Frye* assures that the evidence will be reliable, it prevents juries from making determinations based upon an undue regard for the "infallibility" of scientific evidence, and it recognizes that counsel will most likely be unable to bring to the attention of the jury any inaccuracy in expert scientific testimony, providing a minimum threshold for reliability in its place. M. GRAHAM, HANDBOOK OF FLORIDA EVIDENCE ¶ 704.2 (1987).

59. 498 F.2d 741 (D.C. Cir. 1974) (holding evidence based on voice spectrograms inadmissible).

60. *Id.* at 743-44.

61. *Id.*

62. Comment, *The Admissibility of Evidence and Expert Testimony Based on Science, Technology or Other Specialized Knowledge - Is the "Frye" Standard consistent with the Federal Rules of Evidence?*, 4 COOLEY L. REV. 641, 652 (1987).

63. *Id.*

The second argument was made by the California Supreme Court in *People v. Kelly*.⁶⁴ The court argued that greater uniformity in decisions would result under the *Frye* test, because judges who might disagree as to the reliability of a technique would still be able to come to the same conclusion regarding the technique's acceptance in the scientific community.⁶⁵ In practice, the courts in *Frye* jurisdictions are often accused of being unpredictable and selective in applying the test.⁶⁶ Part of the problem lies in the difficulties involved in labeling evidence as either scientific or nonscientific.⁶⁷

The third argument in favor of *Frye* was used by the Maryland Supreme Court in *Reed v. State*.⁶⁸ The *Reed* court reasoned that a court is not in a good position to evaluate the reliability of scientific evidence; thus inquiry into a technique's validity would be an unnecessary waste of the court's time.⁶⁹ The *Reed* court was also concerned by the possibility of a court misunderstanding the technical aspects of an expert witness's testimony when it tried to assess the merits of a scientific principle or technique.⁷⁰ While the *Reed* court praised

64. 17 Cal. 3d 24, 549 P.2d 1240, 130 Cal. Rptr. 144 (1976) (voiceprint evidence held inadmissible).

65. *Id.* at 30-32, 549 P.2d 1244-45, 130 Cal. Rptr. at 148-49.

66. C. McCORMICK, ON EVIDENCE § 203 (2d ed. 1972) (referring to application of *Frye* as "highly selective"). Giannelli offered as an example the Supreme Judicial Court of Massachusetts which, in a series of cases, chose to apply *Frye* in rejecting polygraph evidence, chose not to apply *Frye* in accepting x-ray comparison evidence for the identification of skeletal remains, and then cited *Frye* in holding voiceprint evidence admissible. The court in *Commonwealth v. Lykus*, 367 Mass. 191, 327 N.E.2d 671 (1975), cited in Giannelli, *supra* note 56, at 1220-21, acknowledged that it was being highly selective in its application of *Frye*, but gave no reason for its doing so. 367 Mass. at __ n.5, 327 N.E.2d at 678 n.5.

67. Imwinkelried, *A New Era in the Evolution of Scientific Evidence — A Primer On Evaluating the Weight of Scientific Evidence*, 23 WM. & MARY L. REV. 261, 264-65 (1981). See also C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5168, at 87 n.10 (1978) ("What is 'scientific evidence' to which the test applies? When a witness testifies that he saw the defendant throw a rock at the victim, the inferences to be drawn from this testimony involve a number of principles of physics, but few courts would apply the *Frye* test"), quoted in Giannelli, *supra* note 56, at 1219 n.160. Professor Giannelli, however, did not regard the definitional problem to be a complete explanation for the selectivity applied by the *Frye* courts. *Id.* at 1219-21. Strong concluded that courts will tend to apply *Frye* when the scientific evidence either cannot be assigned to a specific scientific discipline, involves mechanical devices, or "trenches very closely to the ultimate issues." Strong, *Questions Affecting the Admissibility of Scientific Evidence*, 1970 U. ILL. L.F. 1, 12-13.

68. 283 Md. 374, 391 A.2d 364 (1974). The court wrote "without the *Frye* test or something similar, the reliability of an experimental scientific technique is likely to become a central issue in each trial in which it is introduced, as long as there remains serious disagreement in the scientific community over its reliability." *Id.* at __, 391 A.2d at 371.

69. *Id.* at __, 391 A.2d at 371-72.

70. *Id.* at __, 391 A.2d at 371.

Frye for avoiding time-consuming litigation,⁷¹ commentators have criticized *Frye* for obscuring the issues, primarily the relevancy of the evidence offered.⁷² According to its critics, *Frye*, by focusing on acceptance, fails to consider other factors, such as whether more reliable alternatives to the offered technique exist.⁷³

The criticism of *Frye* has been longstanding and is mounting.⁷⁴ Dean McCormick, an early critic of *Frye*, wrote in his 1954 text, "General scientific acceptance is a proper condition upon the court's taking judicial notice of scientific facts, but not a criterion for the admissibility of scientific evidence."⁷⁵ Critics have continued to argue that the test provides no guidance as to how courts are to determine the "relevant field,"⁷⁶ or as to what constitutes general acceptance.⁷⁷ In addition, the *Frye* test is viewed as being too conservative, often depriving the jury of newly discovered scientific evidence.⁷⁸

71. *Id.*

72. Giannelli, *supra* note 56, at 1226.

73. *Id.* at 1226-28.

74. *Id.* at 1250 ("The *Frye* test, which has cast its shadow over the admissibility of scientific evidence for more than a half-century, has proven unworkable"). Other commentators have agreed: *Frye*'s "main drawbacks are its inflexibility, confusion of issues, and superfluity." M. McCormick, *Scientific Evidence: Defining a New Approach to Admissibility*, 67 IOWA L. REV. 879, 915 (1982). "[T]he rule does not adequately screen novel scientific techniques." Moenssens, *Admissibility of Scientific Evidence — An Alternative to the Frye Rule*, 25 WM. & MARY L. REV. 545, 547 (1984). Lacey, *Scientific Evidence*, 24 JURIMETRICS J. 254, 256 (1984), refers to "The *Frye* case, or as I like to put it, the dead hand of *Frye*." In 1983, at a workshop sponsored by the National Conference of Lawyers and Scientists, three work groups were charged with determining whether *Frye* should be retained. All three concluded it should be discarded. *Symposium on Science and the Rules of Evidence*, 99 F.R.D. 188 (1983).

75. C. MCCORMICK, ON EVIDENCE § 170 (1954).

76. *See*, Giannelli, *supra* note 56, at 1208-09. Courts have resorted to narrowing fields into subfields. *See, e.g.*, *People v. Williams*, 164 Cal. App. 2d 858, 331 P.2d 251 (1958). The relevant field of consideration for a medical test that was unfamiliar to the general medical community was narrowed to "those who would be expected to be familiar with its use." *Id.* at 860, 331 P.2d at 253-54.

77. A. MOENSSENS, F. INBAU & J. STARRS, *SCIENTIFIC EVIDENCE IN CRIMINAL CASES* ¶ 1.03 (3d ed. 1986). Questions arise as to the degree of acceptance required; whether the theory underlying the technique, as well as the technique, need be generally accepted; and what method is to be used to determine general acceptance. *See* P. GIANNELLI & E. IMWINKELRIED, *SCIENTIFIC EVIDENCE* ¶ 1-5(B)(2-3) (1986).

78. Imwinkelried, *supra* note 67, at 265: "The test ensures that the courts will constantly lag behind the advances of science while the courts wait for novel scientific techniques to win 'general acceptance.'" *See also* Giannelli, *supra* note 56, at 1224. Professor Giannelli stated that:

[T]he critical issue is whether other approaches can better achieve the *Frye* objective of "prevent[ing] . . . the introduction into evidence of specious and unfounded scientific principles or conclusions based upon such principles." If such alternative approaches exist, then the conservatism implicit in the *Frye* test is not an "advantage,"

The Relevancy Standard

Due to perceived flaws in the *Frye* standard, Dean McCormick advocated the use of a traditional relevancy standard.⁷⁹ The traditional relevancy standard involves a three-step analysis: (1) the court must determine the probative value of the evidence,⁸⁰ (2) it must identify the potential of the evidence to unfairly prejudice the jury, and (3) it must balance the dangers against the probative value.⁸¹ The evidence must be excluded only if the danger of unfair prejudice outweighs its probative value.⁸²

It has been asserted that *Frye* did not survive the creation of the Federal Rules of Evidence.⁸³ Advocates of this view focus on the language in Federal Rules 401, 402, and 702.⁸⁴ The critics have argued that *Frye*, by requiring general acceptance, works contrary to the liberal admissibility standards of the Rules. Furthermore, nowhere in the Federal Rules, or in the Advisory Committee's Notes to the Rules, is the *Frye* standard incorporated.⁸⁵ Critics of *Frye* have interpreted this as being an abandonment of the general acceptance standard and a return to pure relevancy.⁸⁶ At the very least, they have argued that the Rules provide a principled alternative for courts that

but rather an unjustified obstacle to the truth-determining process.

Id. (quoting Strong, *supra* note 67, at 14).

79. C. McCORMICK, *supra* note 75, § 170.

80. J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 702[03] (1988). To accomplish this, Weinstein and Berger list six factors that courts should consider: (1) the technique's state of acceptance in the field, (2) the expert's qualifications and stature, (3) the uses to which the technique has been put, (4) the potential rate of error, (5) the existence of specialized literature, (6) the novelty of the new technique, and (7) the extent to which the technique relies upon the expert's own subjective opinion. *Id.*

81. Giannelli, *supra* note 56, at 1235.

82. *Id.* at 1237.

83. See P. GIANNELLI & E. IMWINKELRIED, *supra* note 77, ¶ 1-5(F).

84. FED. R. EVID. 401, 402, 702. Rule 401 provides: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 402 provides in part: "All relevant evidence is admissible" Rule 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." The Florida courts are guided by the Florida Code of Evidence. However, since the Florida Statutes essentially adopted the same language as the Federal Rules in this instance, FLA. STAT. §§ 90.401, 90.402, 90.702 (1987), the arguments raised by *Frye* critics would be applicable in Florida courts as well as federal courts.

85. J. WEINSTEIN & M. BERGER, *supra* note 80, ¶ 702[03] (1988).

86. *Id.*

choose to abandon the general acceptance test,⁸⁷ as was done by the Third Circuit Court of Appeals in *United States v. Downing*.⁸⁸

The defenders of *Frye* have argued that the failure of the Advisory Committee to make any mention of *Frye*, which at the time was the dominant standard, reflected an intention to leave things alone.⁸⁹ They focus instead upon rule 403, arguing that the general acceptance standard does not expand the grounds for exclusion beyond those which are required by that rule.⁹⁰ They further point out that the Federal Rules were not intended to be a comprehensive codification of the rules of evidence.⁹¹

Difficulties with the relevancy test often arise because judges usually lack the requisite scientific backgrounds to truly assess the validity, hence relevancy, of a novel scientific technique.⁹² Thus, courts often are accepting scientific evidence on the expert's assessment of the evidence's probative value, rather than the judge's assessment of the probative value.⁹³ As Professor Giannelli has observed, the probative value of a piece of evidence under a relevancy standard could be established by the testimony of a single expert.⁹⁴

Relying heavily on one expert's testimony can involve some risk. Other scientists may not, due to a technique's recent development, be able to evaluate the reliability of that technique. The application of the relevancy standard in *United States v. Williams*⁹⁵ provides a good example of this problem. This case involved the admissibility of voice spectrographic identification evidence.⁹⁶ Williams argued that the evidence should have been ruled inadmissible under the general acceptance standard.⁹⁷ The United States Court of Appeals for the

87. M. McCormick, *supra* note 74, at 888.

88. 753 F.2d 1224 (3d Cir. 1985).

89. Giannelli, *supra* note 56, at 1229.

90. Graham, *Relevancy and the Exclusion of Relevant Evidence: Admissibility of Evidence of a Scientific Principle or Technique—Application of the Frye Test*, 19 CRIM. L. BULL. 51, 54-55 (1983). FED. R. EVID. 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

91. Giannelli, *supra* note 56, at 1229.

92. Note, *The Admissibility of Electrophoretic Methods of Genetic Marker Bloodstain Typing Under the Frye Standard*, 11 OKLA. CITY U.L. REV. 773, 802 (1986).

93. Strong, *supra* note 67, at 22.

94. Giannelli, *supra* note 56, at 1236.

95. 583 F.2d 1194 (2d Cir. 1978).

96. *Id.* at 1196.

97. *Id.* Williams produced a list of 10 scientists in favor of the technique, and 17 opposed.

Second Circuit instead applied the relevancy approach, using in its opinion some of the factors suggested by Weinstein and Berger.⁹⁸ In ruling that the evidence was not per se inadmissible, the *Williams* court relied heavily on a Michigan State University study asserting a low rate of erroneous identifications.⁹⁹ At the time, this was the only study looking into the matter.¹⁰⁰ Within a year after *Williams*, the National Academy of Sciences, at the request of the Federal Bureau of Investigation, assembled a multidisciplinary board of scientists to examine voice spectrographic analysis.¹⁰¹ The group concluded that the technique "lack[ed] a solid theoretical basis of answers to the scientific questions concerning the foundations of voice identification,"¹⁰² and that the error estimate did "not constitute a generally adequate basis for a judicial or legislative body to use in making judgments concerning the reliability and acceptability."¹⁰³

Giannelli referred to *Williams* as an example of a case decided in an "information gap" between the innovation of a novel technique and its subsequent independent validation.¹⁰⁴ Since *Frye* avoided this information gap, defenders of its standard have argued that this remains its main advantage over a pure relevancy test.¹⁰⁵ Cases such as *Williams* have led to the proposal of numerous alternative standards that purport to be less rigid than *Frye*, and yet provide protection not provided by the relevancy test.¹⁰⁶

Id. at 1198.

98. See *supra* note 80.

99. 583 F.2d at 1198. The court also relied upon the existence of standards set up by an association of voice examiners; a lack of abuse in using the technique; a perceived analogous relationship between voice prints and fingerprints, handwriting exemplars, and gun barrel striation; and finally, inherent safeguards in the technique, which removed the possibility that factors such as bad tape quality would result in misidentifications. *Id.* at 1198-99. For a critical analysis of these factors, see Giannelli, *In Defense of Frye*, 99 F.R.D. 202, 204-06 (1983).

100. Giannelli, *supra* note 99, at 204.

101. *Id.*

102. COMMITTEE ON EVALUATION OF SOUND SPECTROGRAMS, NATIONAL RESEARCH COUNCIL, ON THE THEORY AND PRACTICE OF VOICE IDENTIFICATION 10 (1979).

103. *Id.* at 60.

104. Giannelli, *supra* note 99, at 207.

105. Spaeth, *Proposed Amendments to the Federal Rules on Admissibility of Scientific Evidence: A Judge's Perspective*, 115 F.R.D. 112, 118-20 (1986).

106. See Giannelli, *supra* note 56, at 1245-50 (proposing an increased burden of proof regarding the reliability of a scientific technique); Moenssens, *supra* note 74, at 567-74 (proposing procedural changes in discovery, pretrial hearings, and the manner in which admissibility is decided). See also *Rules For Admissibility of Scientific Evidence*, 115 F.R.D. 81, 84-108 (1986) (four proposed changes to rule 702 in a project sponsored by the Section of Science and Technology of the American Bar Association).

The Admission of Scientific Evidence in Florida

It is not clear whether any standard for the admissibility of scientific evidence has been adopted in Florida. The Florida Supreme Court, in *Kaminski v. State*,¹⁰⁷ appeared to have adopted the *Frye* test. In that case, the court quoted with approval from *Frye* and wrote that systolic blood pressure evidence would be inadmissible for showing untruthfulness, since the test had not yet achieved general acceptance in the scientific community.¹⁰⁸ *Kaminski*, however, did not involve the admission of results from a systolic blood pressure deception test, but rather concerned the admissibility of testimony for impeachment purposes that such an examination had taken place.¹⁰⁹ Due to the narrowness of the facts in *Kaminski*, it has not been considered an explicit adoption of *Frye*.¹¹⁰

*Coppolino v. State*¹¹¹ is the most widely discussed Florida case on the admissibility of scientific evidence. The facts in *Coppolino* make it significant. Dr. Carl Coppolino had been accused of murdering his wife Carmela Coppolino with a lethal injection of succinylcholine chloride.¹¹² At the time of the investigation there was no analytical procedure for the detection of succinylcholine chloride or its metabolites, nor was it generally believed possible to do so.¹¹³ A toxicologist serving the chief medical examiner of New York, however believed it was possible to detect the substance.¹¹⁴ He developed a set of procedures for the detection of succinylcholine, using some standard, as well as some novel procedures. The procedures were developed specifically for the Coppolino investigation, and it was on the strength of this evidence that Dr. Coppolino was convicted.¹¹⁵

On appeal, the defendant contested the admission of this evidence.¹¹⁶ The Second District Court of Appeal, citing *Kaminski*, determined that *Frye* was the rule for the admissibility of scientific evidence.¹¹⁷ However, the court also observed that in Florida the trial

107. 63 So. 2d 339 (Fla. 1952).

108. *Id.* at 340 (quoting *Frye*, 293 F. at 1014).

109. *Id.*

110. *Brown v. State*, 426 So. 2d 76, 87 (Fla. 1st DCA 1983) (court stated *Kaminski* had not explicitly adopted *Frye*).

111. 223 So. 2d 68 (Fla. 2d DCA 1968).

112. *Id.* at 69.

113. *Id.* at 70.

114. *Id.* at 69.

115. *Id.*

116. *Id.*

117. *Id.* at 70.

judge enjoys wide discretion in questions of admissibility, and that the trial judge's ruling should only be overturned if there is an abuse of this discretion.¹¹⁸ The court then ruled that in this case the trial judge had not abused his discretion.¹¹⁹

Coppolino was interpreted by some critics as being a repudiation of *Frye*.¹²⁰ Other commentators viewed *Coppolino* as ignoring, rather than rejecting, *Frye*.¹²¹ Whether *Coppolino* did or did not reject *Frye* does not matter; in practice *Coppolino* has become persuasive authority for rejecting *Frye*.¹²²

In *Jent v. State*,¹²³ the Florida Supreme Court upheld the admission of hair analysis evidence, finding there was no abuse of discretion in its introduction in that case.¹²⁴ In its decision, the *Jent* court made no reference to *Frye*, *Kaminski*, or the general acceptance standard. *Coppolino* was cited only for the proposition that the trial judge enjoys wide discretion in the admission of evidence.¹²⁵

The Florida Supreme Court also cited *Coppolino* in *Stevens v. State*.¹²⁶ Here though, *Coppolino* was cited as authority for the proposition that general acceptance in the scientific community was requisite to the admissibility of scientific evidence.¹²⁷ Immediately preceding this statement, the *Stevens* court also reaffirmed the notion that "[t]he admissibility of a test or experiment lies within the discretion of the trial judge."¹²⁸ The conflict between these two statements led the First District Court of Appeal, in *Brown v. State*,¹²⁹ to the conclusion that *Stevens* had not adopted *Frye*.¹³⁰

The *Brown* court reviewed the above cases and, while observing

118. *Id.*

119. *Id.* at 71.

120. See C. McCORMICK, ON EVIDENCE § 203, at 606 (3d ed. 1984); A. MOENSSSENS, F. INBAU & J. STARRS, *supra* note 77, ¶ 1.03, at 10-11.

121. Giannelli, *supra* note 56, at 1235.

122. M. McCormick, *supra* note 74, at 890.

123. 408 So. 2d 1024 (Fla. 1981).

124. *Id.* at 1029.

125. *Id.*

126. 419 So. 2d 1058 (Fla. 1982).

127. *Id.* at 1063.

128. *Id.*

129. 426 So. 2d 76 (Fla. 1st DCA 1983).

130. *Id.* at 87. The facts in *Stevens* also lends support to the conclusion of the *Brown* court. *Stevens*' "scientific experiment" constituted nothing more than a request that he be allowed to drink two cases of beer before the jury so as to demonstrate his level of intoxication at the time of the crime. The court's ruling that the experiment was inadmissible seemed to have more to do with the value of conducting such an experiment than with any perceived unreliability in its results. 419 So. 2d at 1063.

that some uncertainty existed as to whether *Frye* had been adopted in Florida, concluded that it had not.¹³¹ The *Brown* court adopted the relevancy view of Dean McCormick,¹³² concluding that McCormick's view was in accord with the Florida Evidence Code.¹³³ Sections 90.401, 90.402, 90.403, and 90.702 of the Florida Evidence Code¹³⁴ are almost identical with the corresponding Federal Rules 401, 402, 403, and 702.¹³⁵ Thus, the *Brown* opinion was largely an extension to Florida law of the argument that the Federal Rules had eliminated *Frye*.¹³⁶ Whether the Florida Evidence Code precludes the *Frye* test, however, was not definitively resolved. The *Brown* court's opinion was only dicta, since the court also found that other evidence would have sustained the conviction without regard to the contested scientific evidence.¹³⁷

In the first of several *Bundy v. State*¹³⁸ opinions (*Bundy I*), the Florida Supreme Court examined the admissibility of hypnotically induced testimony.¹³⁹ The *Bundy I* court agreed with the *Brown* court that *Frye* had never been authoritatively adopted in Florida as the test for the admissibility of scientific evidence.¹⁴⁰ The court, though, declined to resolve this issue.¹⁴¹ It found instead that the hypnotic session in this case had not changed or added to the witness' testimony.¹⁴² Thus, the court concluded that this was not a case of hypnotically refreshed recall testimony.¹⁴³

The *Bundy I* court did address the admissibility of bite mark

131. 426 So. 2d at 87.

132. See *supra* notes 79-82 and accompanying text.

133. 426 So. 2d at 88.

134. FLA. STAT. §§ 90.401, 90.402, 90.403, 90.704 (1987).

135. FED. R. EVID. 401, 402, 403, 702. See *supra* note 84.

136. See *supra* notes 83-88 and accompanying text.

137. *Id.* at 79. The contested evidence was hypnotically induced testimony. *Id.* The court wrote, "[w]hether *Frye* is the rule to be applied to a new or controversial scientific technique is not one we are called upon to decide since we conclude that the method by which testimony is hypnotically induced is not one that falls within the ambit of *Frye*." *Id.* at 89. The court's reasoning was that *Frye* applied to questions involving the admissibility of expert testimony deduced by scientific knowledge or techniques. The issue of hypnotically induced testimony concerned the admissibility of eyewitness testimony manipulated by an ostensibly scientific technique. *Id.*

138. 455 So. 2d 330 (Fla. 1984).

139. *Id.* at 339-43.

140. *Id.* at 341.

141. *Id.*

142. *Id.* at 342.

143. *Id.*

evidence that had been used at trial.¹⁴⁴ The opinion noted that the trial court had found the technique to be "generally recognized by scientists in the relevant fields."¹⁴⁵ The opinion further noted that bite mark evidence had an additional indicia of reliability provided by the jury's ability to compare bite marks.¹⁴⁶ The language used by the court suggested it was applying a *Frye* standard. The court's holding, however, was only that Bundy had failed to show that the trial judge had abused his discretion in admitting this evidence.¹⁴⁷ The narrowness of the holding was significant. While the language may have suggested that the court was using a *Frye* standard, the holding revealed that it was not. Rather, the court was only exercising a wide deference to the trial judge.

In the second *Bundy v. State*¹⁴⁸ opinion (*Bundy II*), the Florida Supreme Court decided to examine hypnotically refreshed recall testimony again, and held it to be per se inadmissible.¹⁴⁹ Again, the court did not directly state whether it was adopting the *Frye* standard. However, in reaching its decision, the *Bundy II* court quoted very heavily from courts that had adopted the *Frye* standard, often quoting language very similar to that used in *Frye*.¹⁵⁰ Some of the quoted language could be considered consistent with the relevancy standard: specifically, a phrase noting that hypnosis' failure to gain acceptance in the scientific community kept it from being "sufficiently reliable to outweigh the risks of abuse and prejudice."¹⁵¹ Graham, though, considered this language to be only a reference to the court's concern regarding "jury overvaluation underlying the *Frye* rule."¹⁵² Observers have noted that either *Frye* or the relevancy standards of admissibility would have been consistent with the result in *Bundy II*.¹⁵³ Since *Bundy II*, the Florida Supreme Court has continued to use language in its opinions that suggests the court favors *Frye*.¹⁵⁴

144. *Id.* at 348.

145. *Id.*

146. *Id.* at 349.

147. *Id.*

148. 471 So. 2d 9 (Fla. 1985).

149. *Id.* at 18.

150. *Id.*

151. *Id.* (quoting *People v. Gonzales*, 415 Mich. 615, 626-27, 329 N.W.2d 743, 748 (1982)).

152. M. GRAHAM, *supra* note 58, ¶ 704.2, at 550 n.10.

153. C. EHRHARDT, *FLORIDA EVIDENCE* ¶ 702.2 (2d ed. Supp. 1989). *See also* M. GRAHAM, *supra* note 58, ¶ 704.2.

154. *See, e.g., Mills v. State*, 476 So. 2d 172, 176 (Fla. 1985) ("The neutron activation

The Fourth District Court of Appeal, in *Kruse v. State*,¹⁵⁵ has chosen to adopt a relevancy standard as it believes is called for by Florida Statutes section 90.702.¹⁵⁶ In *Kruse*, the court determined that expert testimony on post-traumatic stress syndrome was admissible.¹⁵⁷ The *Kruse* court cited *Brown*,¹⁵⁸ but made no reference to either *Bundy I* or *Bundy II*. The Fourth District seemed to back away slightly from *Kruse* in *Robinson v. Hunter*.¹⁵⁹ In *Robinson*, the court held that the results of a thermography test were admissible where the expert was qualified to testify, and the reliability of the scientific procedure had been accepted by other scientists.¹⁶⁰

THE ANDREWS COURT'S ANALYSIS

The Admissibility of Novel Scientific Evidence

The *Andrews* court began its examination by stating there is some uncertainty concerning the applicable standard in Florida for determining the admissibility of new scientific techniques.¹⁶¹ In its examination of the case law, the court accepted the *Brown* court's view that neither *Kaminski*, *Coppolino*, *Jent*, nor *Stevens* represented an adoption of the *Frye* standard.¹⁶² The court then quoted at length and without comment passages from *Bundy I* regarding the admissibility of bite mark evidence.¹⁶³ In discussing *Bundy II*, the *Andrews* court pointed out that the Florida Supreme Court had never specifically declared that it was adopting the *Frye* standard.¹⁶⁴ The court went on to observe that the language used by the *Bundy II* court had been drawn heavily from opinions rendered in *Frye* jurisdictions.¹⁶⁵ The above analysis led the *Andrews* court to conclude that *Frye* had not been adopted in Florida.¹⁶⁶

analysis has attained sufficient standing among scientists to be accepted as reliable evidence in the courts"). The *Andrews* court took note of the *Mills* decision but made no comment on it. *Andrews*, 533 So. 2d at 845.

155. 483 So. 2d 1383 (Fla. 4th DCA 1986).

156. *Id.* at 1385 (citing FLA. STAT. § 90.702 (1987)).

157. *Id.*

158. *Id.* at 1384-85.

159. 506 So. 2d 1106 (Fla. 4th DCA 1987).

160. *Id.* at 1107.

161. 533 So. 2d at 843.

162. *Id.* at 844. See also *supra* notes 107-37 and accompanying text.

163. *Id.* at 845. See also *supra* text accompanying notes 144-47.

164. *Id.*

165. *Id.*

166. *Id.* at 847 n.6. The court never stated this outright in the text. In a footnote, however,

The court chose the "relevancy approach" as preferable to the *Frye* standard, which it characterized as being predicated on "nose counting."¹⁶⁷ The court cited with favor *Kruse* and *Downing*, and like those courts, qualified its relevancy standard with a balancing test that required the trial court to weigh a technique's reliability against the potential for juror confusion.¹⁶⁸ The *Andrews* court felt that the relevancy approach had the advantage of recognizing relevancy as the "linchpin of admissibility," while also allowing only reliable evidence to be admitted.¹⁶⁹ Drawing heavily from language in *Kruse*, the court viewed this test as emanating from both Florida Statutes sections 90.702 and 90.403.¹⁷⁰ The *Andrews* court listed four factors which bear on the reliability of the evidence. These were the novelty of a technique, the existence of specialized literature on the technique, the stature and qualifications of the expert witnesses who testified about the technique, and the nonforensic uses to which the technique has been put.¹⁷¹

The Admissibility of DNA Identification Evidence

After reviewing the evidence presented with regard to DNA print identification the *Andrews* court applied its relevancy test.¹⁷² It found that the DNA print results would be helpful to the jury.¹⁷³ The question for the court was whether the probative value of the test was substantially outweighed by its potentially prejudicial effects.¹⁷⁴ To determine the technique's reliability, the court looked to the four factors enumerated in its opinion.¹⁷⁵ The first factor, the novelty of the technique, was mitigated by the test's "relationship to more established modes of scientific analysis."¹⁷⁶ The court noted that most of the techniques used in the test had been in existence for over ten

the court wrote: "We have reviewed the authorities discussing the standards of admissibility to determine which of these will apply in this district, pending a definitive interpretation by our supreme court." *Id.*

167. 533 So. 2d at 846 (quoting *United States v. Downing*, 753 F.2d 1224, 1238 (3d Cir. 1985)).

168. *Id.*

169. *Id.*

170. *Id.* (citing FLA. STAT. §§ 90.403, 90.702 (1987)).

171. *Id.* at 847.

172. *Id.* at 849-51.

173. *Id.* at 849.

174. *Id.*

175. *Id.* See *supra* text accompanying note 171.

176. *Id.*

years and were used in a number of laboratories around the world.¹⁷⁷ The court also noted that Dr. Werner Arber, discoverer of the reagents used in "cutting" the DNA molecule, received the Nobel Prize for his work in the field.¹⁷⁸ According to the court, the record also revealed a great body of specialized literature dealing with DNA identification, satisfying the second factor indicating reliability.¹⁷⁹ An examination of the stature and qualifications of the expert witnesses presented by the prosecution convinced the court that the third factor had been satisfied.¹⁸⁰ The court further noted that no experts testified for the defense.¹⁸¹ The fourth factor was satisfied with a finding that the laboratory techniques had many nonjudicial applications, notably in the research of hereditary diseases.¹⁸²

The procedures used by Lifecodes were also reviewed.¹⁸³ It was noted that every reagent purchased by Lifecodes was tested against DNA fragments of a known length.¹⁸⁴ The court dismissed a technical argument by the defense that the procedures used by Lifecodes were flawed in that the new gels were only tested to insure that they performed as the old gels did.¹⁸⁵ The defense had contended that if the old gels worked improperly, the error would be carried over to the new gels.¹⁸⁶ The court held that the contention was without merit because control samples of known length were also loaded into the gels to monitor the electrophoresis.¹⁸⁷ Further testimony was received to the effect that if the gel was bad, ordinarily there would be no result, rather than an erroneous result.¹⁸⁸ This aspect of the test es-

177. *Id.*

178. *Id.* at 847-48.

179. *Id.* at 850.

180. *Id.* at 849. Dr. David Houseman, a professor of molecular biology at Massachusetts Institute of Technology, who had published over 120 papers on molecular genetics, testified as an outside observer of the Lifecodes DNA Identification Test. Alan Guisti, a forensic scientist at Lifecodes with a bachelor's degree in science from Yale, had published several papers on genetics and performed the test in this case, as well as 200 previous tests. Dr. Michael Baird, the manager of forensic testing at Lifecodes, received his doctorate in genetics from the University of Chicago and had published numerous articles on DNA testing. *Id.* at 847.

181. *Id.* at 849.

182. *Id.* at 849-50. See *supra* notes 26-28 and accompanying text.

183. *Id.* at 848-49.

184. *Id.* at 849.

185. *Id.* See *supra* note 34.

186. *Id.*

187. *Id.* This statement is interesting because it seems to conflict with some of the criticisms coming from scientists that the Lifecodes test is missing certain internal controls. See *supra* notes 49-53 and accompanying text.

188. 533 So. 2d at 849.

pecially impressed the court.¹⁸⁹ The court considered it an important indicia of reliability, citing as authority *United States v. Williams*.¹⁹⁰ The court thus concluded that the testimony indicated there was acceptance of the testing procedure, and that the probative value of the evidence was for the jury to decide.¹⁹¹

The court also dismissed Andrews' contention that the sample population for deriving the frequency of DNA bands in the general population was too small.¹⁹² Expert testimony was accepted showing that as a human genetic data base expands beyond a few hundred, the frequencies do not statistically change.¹⁹³

Finally, the *Andrews* court admitted that the highly technical nature of the evidence presented an area for concern. Unlike some kinds of evidence, such as bitemark evidence, the jury could not in this case evaluate the evidence themselves. However, this fact did not, by itself, render the evidence unreliable.¹⁹⁴ The court then concluded that the technique of DNA identification, being based on proven scientific principles and administered in a manner that ensured a reliable result, was admissible as scientific evidence.¹⁹⁵

CRITICAL ANALYSIS

Andrews reveals that after the *Bundy* opinions, considerable confusion continues to exist in Florida as to the standard for the admission of scientific evidence. Sufficient confusion exists such that appellate courts have felt justified in adopting their own standards for admissibility. A close examination of the *Andrews* court's four-factor test also reveals that in practice there are few differences between a relevancy standard and *Frye*.¹⁹⁶ Only where the *Andrews* court contends that a court may look to the likelihood of an erroneous result does the court stray significantly from *Frye*.¹⁹⁷ This difference is significant, though, because it creates a situation where courts will render decisions from within an information gap between the innovation of a technique and its subsequent verification. The rele-

189. *Id.* at 850.

190. 583 F.2d 1194 (2d Cir. 1978). See *supra* notes 95-106 and accompanying text.

191. 533 So. 2d at 849.

192. *Id.* at 850. See *supra* notes 44-45 and accompanying text.

193. *Id.*

194. *Id.*

195. *Id.* at 850-51.

196. See *supra* note 171 and accompanying text.

197. See *supra* notes 188-90 and accompanying text.

vancy standard that the *Andrews* court advocates is an impractical approach for determining the reliability of a scientific technique. This approach ultimately miscomprehends the very nature of a scientific theory. Further, by the *Andrews* court's own admission, this opinion may have been an unnecessary exercise of judicial rulemaking.¹⁹⁸

The *Andrews* court asserted in a footnote that the facts in this case would have supported admission under either the relevancy or the *Frye* standards of admissibility.¹⁹⁹ If this was the situation, this case did not offer the opportunity to choose one standard over another. There are reasons, however, to believe that the *Andrews* court could be incorrect in its assertion. While the potential of DNA typing remains solid, serious questions have arisen in the scientific community regarding the reliability of Lifecodes' DNA fingerprint test.²⁰⁰ The indications are that this particular test has not yet achieved general acceptance.²⁰¹

The *Andrews* Test

The *Andrews* opinion gives few clues as to what kinds of evidence are now admissible that would not have been admissible before under *Frye*. Most of the factors used by the *Andrews* court in its decision are, in substance, only marginally different from the *Frye* standard.

The first factor, the technique's novelty, is immediately elaborated by the court as meaning "its relationship to more established modes of scientific analysis."²⁰² The term "more established modes" is nothing more than a substitution for the word "accepted" used in

198. 533 So. 2d at 847 n.6.

199. *Id.*

200. *Id.* See *supra* notes 49-53 and accompanying text.

201. It could also be argued that the test was generally accepted at the time of the *Andrews* case, but has since lost that acceptance. In *People v. Wesley*, 140 Misc. 306, 533 N.Y.S.2d 643 (Albany County Ct. 1988), a New York court applying a *Frye* standard came to the conclusion that the procedures employed by Lifecodes did enjoy general acceptance. *Id.* at 651. The court based its decision largely on the testimony of two scientists, Dr. Kenneth Kidd and Dr. Richard Roberts. *Id.* Since this case, Dr. Roberts has come to change his opinion regarding the reliability of the test. Lewin, *supra* note 47, at 1034. Lewin quoted Dr. Roberts as saying, "I hadn't really seen the evidence in great detail before [being given a report by Dr. Eric Lander] and I quickly became rather concerned. Eric left his report with me, so that I could go through it thoroughly. I soon realized something had to be done." *Id.*

202. 533 So. 2d at 847.

Frye.²⁰³ The operation of this factor is still grounded in acceptance. Any difference that exists between this factor and the *Frye* test must lie in the use of the term "relationship." Presumably, the closer the relationship the more likely the evidence will be admitted. The rationale for this must be that the closely related technique is not significantly different, or novel, from the well accepted technique. This factor may best be described as an inferred acceptance.

The second factor, the existence of a specialized literature dealing with the technique, could only serve as evidence supporting the degree of acceptance. The literature itself lends no additional reliability to the technique. It may, however, serve as an indicator that there has been inquiry into the reliability of the proffered technique. Clearly though, the admission of the scientific evidence must ultimately be contingent upon the acceptance of the technique in the literature, not the mere existence of the literature.

The third factor, the qualifications and professional stature of the expert witnesses, is again related to acceptance, though in a more indirect manner. Here it is the acceptance of the expert by the relevant field that is under examination. The acceptance of the expert bears on the acceptance of the expert's opinions. The more respected the expert, the more the expert's opinions will be respected. Hence, this factor eventually bears on the acceptance the proffered scientific principle or technique will enjoy. Again, this factor may be described as an inferred acceptance.

Finally, the fourth factor, nonjudicial uses to which the scientific technique is put, also relates to acceptance. Scientists, like all people, are not apt to use a technique the underlying premises of which are unacceptable to them. Usage of a technique by a community will only come after it has been generally accepted. Thus, usage of the technique is direct evidence of acceptance.

The one factor used by the *Andrews* court that is definitely contrary to the *Frye* standard is the likelihood that an erroneous result would occur. The *Andrews* court cited *United States v. Williams* as its authority.²⁰⁴ Ironically, the history of voiceprint analysis subsequent to the *Williams* decision demonstrates just how inadequate courts can be in evaluating the reliability of a scientific technique.²⁰⁵

203. 293 F. at 1014.

204. *Andrews*, 533 So. 2d at 850 (citing *United States v. Williams*, 583 F.2d 1194 (2d Cir. 1978)).

205. See *supra* notes 99-103 and accompanying text.

In the *Williams* case, the only inquiry into the likelihood of error was a single, flawed study.²⁰⁶ The *Williams* court fell into what Giannelli has referred to as the "information gap" between innovation and validation.²⁰⁷ As the criticisms of the Lifecodes DNA test have increased, it appears possible that the *Andrews* court may have fallen into an information gap as well.²⁰⁸

Conceptions of Reliability

The difficulty in dealing with scientific evidence lies not so much in its relevancy, but in its reliability. The underlying differences between the *Frye* and relevancy standards arise from the differing conceptions of reliability that exist between the various proponents. Implicit in the relevancy standard is the notion that the reliability of a scientific principle or technique lies in its "validity."²⁰⁹ In applying a true relevancy standard, analysis should focus on the validity of the scientific principles. Therefore, a court should not have need to rely upon the degree of acceptance in the scientific community.²¹⁰ Courts could look to other factors that show the validity of the proffered principle. At its furthest extension, this would include a court making its own assessment of the merits of the principle, even where the scientific community has failed to make such an assessment itself.²¹¹

In fact, the *Andrews* court never made its own assessment of the merits of the scientific principles underlying the DNA print identification test. The court's only discussion of the merits of the scientific principles was to note that they have been generally accepted.²¹² The task of actually examining the validity of a scientific principle is probably too great to be feasible in a courtroom setting. Consider

206. See *supra* note 99 and accompanying text.

207. See *supra* notes 104-06 and accompanying text.

208. See *supra* notes 49-53 and accompanying text.

209. See Lacey, *supra* note 74, at 255 (reliability is dependent upon three factors: (1) that the principle has some validity, (2) that the technique by which the evidence is obtained is a valid application of the principle, and (3) that in this particular case the technique was applied properly). See also Giannelli, *supra* note 56, at 1201, *But see* Moenssens, *supra* note 74, at 556 ("Evolution of a Scientific Technique . . . Stage 1: A theory is postulated. Stage 2: Experiments are designed to verify the validity of the theory. Stage 3: If the theory's validity is not disproved after a searching inquiry and empirical testing, it is 'proven' valid and a court may take judicial notice of the theory.").

210. Giannelli, *supra* note 56, at 1230.

211. See e.g., *Williams v. State*, 583 F.2d 1194 (2d Cir. 1978). See *supra* notes 95-106 and accompanying text.

212. 533 So. 2d at 847-48.

how the *Andrews* court might have tried to determine the reliability of DNA fingerprint identification in a manner other than noting general acceptance in the scientific community. The DNA identification test, as a technology, is a wholly different kind of test than fingerprints and bitemarks. Fingerprints and bitemarks, as the *Andrews* court observed, may be easily interpreted by the jury.²¹³ However, the physical evidence available to the jury from a DNA identification test merely consists of a series of bands on an autoradiograph. An autoradiograph would be totally meaningless to a person without some knowledge of the test's underlying scientific principles. Fingers and teeth are known through everyday experience. DNA, however, is as much a postulate as it is a tangible reality. Before the autoradiograph can be deemed relevant, the court would need to show that DNA really exists, that it is truly unique between individuals, and that it can indeed be distinguished between individuals. The only way to do this would be to review the logic and repeat the experiments that initially suggested the technique's potential.

Certainly no court is going to reproduce all the experiments performed during the innovation of a scientific technique. Therefore, it is unlikely that the adversarial process would reveal any defect in the development of the test. Fortunately for the courts, all the procedures that are involved in a technique will usually have already been replicated, confirmed, and accepted by the scientific community. *Frye* takes advantage of the technique's reliability having been established prior to trial.

Unlike the relevancy approach's search for "validity," under *Frye* the reliability of a scientific technique is inferred from its acceptance in the scientific community. This conception of reliability does not depend upon a full or even correct understanding of the underlying scientific principles.²¹⁴ A given principle or technique could be widely accepted and hence reliable under *Frye*, and yet be fundamentally incorrect.²¹⁵ Under *Frye*, the courts will not presume to weigh the merits of the scientific principle. Inquiry into the merits of a scientific principle is left to the scientific community. In this sense, *Frye* is not an analytical exercise on the part of the court, but rather an act of faith. It is, as Dean McCormick suggested, more like taking notice of a technique's reliability than making a determination

213. *Id.* at 850.

214. Giannelli, *supra* note 56, at 1212.

215. *Id.*

of its reliability.²¹⁶

Ultimately the fundamental problem with the approach that the *Andrews* court wishes to adopt is that it miscomprehends the nature of scientific theory. The advocates of the relevancy approach tend to refer to scientific principles and techniques in terms of validity; that is, their "correctness."²¹⁷ Scientists and philosophers of the natural sciences in general do not speak of theories or techniques in terms of their "validity," but rather speak in terms of "utility."²¹⁸ A modern understanding of the sciences recognizes that scientific theories are not descriptions of reality, but rather speculative models of reality. Good models can have a great utility for the scientist.²¹⁹ Ultimately, it is the utility of a model, not its underlying validity or correctness, that leads a scientist to conclude that a model is reliable.

A scientist can apply his theory against different fact situations (called experimentation) and thereby determine the principle's utility and hence its reliability. Eventually, he will report his findings, and they will be verified by the scientific community. If later the theory fails to resolve a critical problem, it will be discarded, and a theory with greater utility will be adopted. How a court might determine the utility of a scientific theory is a more difficult proposition. A court has but one fact situation, the case before it.²²⁰ Unless the scientific community has verified reliability prior to trial, the court has no way to determine the reliability of a theory.

When *Andrews* was decided, the scientific principles underlying the DNA identification test clearly had wide acceptance. However, the reliability of the test developed by Lifecodes had yet to be verified by the scientific community. The *Andrews* court had but two

216. See *supra* text accompanying note 75.

217. See *supra* note 209.

218. For example Thomas Kuhn, professor of philosophy at Massachusetts Institute of Technology, writes that scientific theories or "[p]aradigms gain their status because they are more successful than their competitors in solving a few problems that the group of practitioners has come to recognize as acute." T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 23 (2d ed. 1970).

219. See generally T. KUHN, *supra* note 218, at 10-51.

220. See *Reed v. State*, 283 Md. 374, —, 391 A.2d 364, 371 (1974). The court wrote:

When the positions of the contending factions are fixed in the scientific community, it is evident that controversies will be resolved only by further scientific analysis, studies and experiments. Juries and judges, however, cannot experiment. If a judge or jurors have no foundation, either in their experience or in the accepted principles of scientists, on which they might base an informed judgment, they will be left to follow their fancy.

Id. See *supra* notes 68-73.

alternatives before it: wait for the collective experience of the scientific community (and possibly lose the conviction), or chance that the technique was reliable.

This choice could have been avoided. The state could have promoted the acceptance of the technique prior to its introduction into police investigations. A conference or committee of interested scientists could have been established to study this novel scientific technique. Conferences have the advantage over test trials, such as *Andrews*, in that conferences can correct any flaws discovered in the technique and promote standards to insure reliability. The National Academy of Sciences, in fact, tried unsuccessfully to convene a study on DNA print identification in the summer of 1988.²²¹ Attempts are again underway to arrange such a study.²²² Hopefully these attempts will succeed, for while the potential of DNA typing remains unquestioned, clearly there is a need for adequate guidelines and standards.²²³ It would be a great misfortune if impatience by the courts in the present hindered the implementation of this powerful forensic tool in the future.²²⁴

The *Frye* standard is not "nose counting" as the *Andrews* court contended.²²⁵ Properly understood, it should only require that two questions be answered. First, has there been diligent inquiry by qualified scientists into the proffered scientific technique or principle?²²⁶ Second, did the inquiry produce substantial discord in opinion regarding its reliability? If the first question is answered in the affirmative, and the second in the negative, the requirement of general acceptance will have been met. This is a workable standard. While criticized as anachronistic, the *Frye* standard is in fact more in accord with a modern understanding of science than is the relevancy

221. Lewin, *supra* note 47, at 1035. The academy was unable to obtain funding.

222. *Id.* The Office of Technology is currently conducting a study of the technique and the National Academy of Sciences is soon expected to announce the formation of a panel on the subject. Lewin, *DNA Typing is Called Flawed*, 246 *SCIENCE* 335 (1989). The FBI's Scientific Analysis Section is also developing a protocol which it hopes private laboratories will adopt. Anderson, *supra* note 53, at 19.

223. Lewin, *supra* note 47, at 1035.

224. See *supra* note 53. Tom Smith of the A.B.A.'s Criminal Justice Section has remarked "unless standards are soon established there is a great risk that the credibility of this type of evidence could be compromised through mishandling, mismanagement and improper analysis." Anderson, *supra* note 53, at 18.

225. See *supra* text accompanying note 167.

226. Inquiry is essential for the *Frye* standard to be viable. Acceptance on something less than inquiry should not be considered acceptance for purposes of *Frye*. See *supra* note 201.

standard, and should thus be retained.

CONCLUSION

With questions of admissibility of novel scientific evidence, a true determination of reliability hinges on a scientific inquiry into the proffered evidence. Scientific inquiry is a communal endeavor involving experimentation by an individual scientist and verification by the scientist's peers. It is the utility of a theory, not its validity, that ultimately leads scientists to conclude that a theory is reliable. By failing to recognize this the *Andrews* court miscomprehends the very nature of a scientific theory. Absent inquiry by the scientific community, the only way a court could determine the validity of a scientific technique would be to conduct the scientific inquiry itself. This is an impossible task for any court.

If the *Andrews* court truly moved away from the *Frye* test for the admission of scientific evidence, it was a small step indeed. The *Andrews* test when strictly read used factors that either showed present acceptance or inferred future acceptance. Only in the sense that the *Andrews* court would look into the likelihood of erroneous identification did its standard differ from *Frye*. Here the court elected to act as a scientist by its own right. The court thereby created the possibility that decisions will be made in the information gap between the innovation of a scientific technique and its subsequent verification by the scientific community.

After *Andrews*, questions regarding the reliability of the DNA identification test continue. However, the test still holds great promise as a forensic laboratory technique. It is time for a governmental entity to take the lead in the development of the DNA identification test. The establishment of a conference or commission of scientists to study the technique and promote standards for testing is clearly needed.

Frederick A. Bechtold

FOURTH AMENDMENT AERIAL PRIVACY: EXPECT THE UNEXPECTED

Florida v. Riley, 109 S. Ct. 693 (1989).

Michael Riley was growing marijuana in a greenhouse behind his home in rural Pasco County, Florida.¹ A fenced yard surrounded both the greenhouse and Riley's home.² The greenhouse was enclosed on two sides, and the view into one of the remaining sides was obscured by shrubbery within the fenced perimeter.³ The other open side was shielded from view by the home.⁴ The contents of the greenhouse were not visible from the ground.⁵

A Pasco County Sheriff's deputy had been anonymously informed of the nature of Riley's activities and chose to view Riley's property from the air.⁶ The deputy carried a camera with a telephoto lens, and while circling over the property at an altitude of 400 feet,⁷ observed marijuana growing within the greenhouse.⁸ The deputy was able to see through the roof because two of the panels in the roof were missing.⁹ The deputy was also able to see through at least one of the open sides.¹⁰

After the airborne sheriff's deputy had spotted Riley's crop, the deputy obtained a search warrant.¹¹ A subsequent search of the

1. *State v. Riley*, 476 So. 2d 1354, 1354 (Fla. 2d DCA 1985).

2. *Riley v. State*, 511 So. 2d 282, 283 (Fla. 1987). Riley lived in a mobile home situated on five acres in a rural area. A "DO NOT ENTER" sign was also posted on the front of the mobile home. *Id.*

3. *Id.*

4. 476 So. 2d at 1354.

5. *Id.* The deputy had tried to view the contents of the greenhouse from the road but was unable to discern the building's contents. 511 So. 2d at 283.

6. *Id.*

7. 476 So. 2d at 1355. The evidence is unclear regarding whether the helicopter descended below 400 feet. *Id.*

8. *Id.* The deputy took photographs from the air, but the trial judge accepted the fact that the deputy's identification was based on his view from the air and not from the photographs. *Id.* The Supreme Court stated that the deputy's identification from the air was achieved with his "naked eye." *Florida v. Riley*, 109 S. Ct. 693, 695 (1989) (plurality opinion). See *infra* note 126 for a discussion of photographic magnification techniques.

9. 109 S. Ct. at 695. The roof was constructed of corrugated roofing material. Some panels were opaque, and others were translucent. The two missing panels constituted approximately 10% of the roof surface. *Id.*

10. *Id.*

11. *Id.*

premises revealed marijuana in the greenhouse.¹² Riley was charged with possession of marijuana.¹³ At trial, Riley moved to suppress the evidence¹⁴ which had been seized pursuant to the search warrant.¹⁵ The trial court suppressed the evidence because the greenhouse enclosure was within the curtilage of the defendant's home.¹⁶ Additionally, the court noted that the structure had been constructed in order to obscure the view of those who attempted to peer into the premises.¹⁷ The trial court therefore reasoned that Riley had a reasonable expectation of privacy under the fourth amendment.¹⁸ The Florida Second District Court of Appeal reversed,¹⁹ but certified the question to the Florida Supreme Court as a question of great public importance.²⁰

12. *Id.* The activity was being conducted within 10 to 20 feet of Riley's home. *Id.*

13. 511 So. 2d at 284. FLA. STAT. § 893.13(1)(a) (1987) provides in part: "[I]t is unlawful for any person to sell, manufacture, or deliver . . . a controlled substance." *Id.* Under § 893.03(1)(c), marijuana (cannabis) is a controlled substance. *Id.* at § 893.03(1)(c).

14. 476 So. 2d at 1355. The evidence consisted of 44 marijuana plants that were found growing in the greenhouse. *Id.*

15. *Id.*

16. *Id.* Curtilage is defined as the "land immediately surrounding and associated with the home." *Oliver v. United States*, 466 U.S. 170, 180 (1984).

17. 476 So. 2d at 1355.

18. *Id.* The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

FLA. CONST. art. I, § 12, is similar but additionally provides:

This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions construing the 4th Amendment to the United States Constitution.

19. 476 So. 2d at 1357. The court discounted Riley's efforts to cover his greenhouse with opaque roofing material and reversed the trial court citing *inter alia* *Randall v. State*, 458 So. 2d 822 (Fla. 2d DCA 1984) (aerial view of backyard from helicopter not a search). 476 So. 2d at 1356.

20. *Id.* The question certified was:

WHETHER POLICE OFFICERS RESPONDING TO AN ANONYMOUS TIP, MAY MAKE A LEGALLY PERMISSIBLE PREINTRUSION OPEN VIEW FROM THE VANTAGE POINT OF A HELICOPTER TRAVELING AT 400 FEET ABOVE A BACK YARD AREA IN WHICH AN INDIVIDUAL HAS MANIFESTED A REASONABLE EXPECTATION OF PRIVACY FROM GROUND AND AIR SURVEILLANCE, AND ON THE BASIS OF SUCH AERIAL OBSERVATION OBTAIN A SEARCH WARRANT JUSTIFYING THE SEIZURE OF SIGHTED CONTRABAND?

Id. at 1356-57.

The Florida Supreme Court quashed the appellate court's ruling.²¹ The court reasoned that the deputy's aerial surveillance was an improper invasion of Riley's privacy.²² Thus, the court held that the motion to suppress the evidence obtained had been properly granted by the trial court.²³ The United States Supreme Court reviewed the case on a writ of certiorari to the Florida Supreme Court.²⁴ HELD: The judgment of the Florida Supreme Court was reversed.²⁵

The *Riley* case is significant because it is now questionable whether there are reasonable expectations to be free from the probing eye of the government above. Even those activities within the close confines of the home are now subject to aerial scrutiny. Therefore, activity which one wishes to remain private must now be confined to areas strictly within the walls of the home, with the curtains securely drawn. The Court's rejection of Riley's privacy claim signals the continued erosion of personal privacy rights under the fourth amendment.

This Note will briefly trace the modern development of the Court's approach to privacy claims. Particularly, this Note will examine the open field and curtilage doctrines and summarize their application to privacy claims under the fourth amendment. The Court's utilization of these doctrines will be discussed, and the reasoning used by the *Riley* court in declining to strictly apply either doctrine will be reviewed. Federal regulation of the public airspace, which has

21. 511 So. 2d at 289.

22. *Id.* The court stated: "There is little that an individual can do to bar either the public or the police from aerial viewing of an open area, even if the area is within the curtilage and otherwise entitled to fourth amendment protection." *Id.* at 288.

23. *Id.* The Florida Supreme Court recognized that the question of Riley's expectation of privacy was "a close one." The court then quoted the seasoned language of *Boyd v. United States*, 116 U.S. 616 (1886): "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely by silent approaches and slight deviations from legal modes of procedure." 511 So. 2d at 289 (quoting 116 U.S. at 635).

24. The Florida Supreme Court restated the question which had been certified to it by the Florida Second District Court of Appeal. 511 So. 2d at 283. The restatement of the certified question was:

WHETHER SURVEILLANCE OF THE INTERIOR OF A PARTIALLY COVERED GREENHOUSE IN A RESIDENTIAL BACKYARD FROM THE VANTAGE POINT OF A HELICOPTER LOCATED 400 FEET ABOVE THE GREENHOUSE CONSTITUTES A "SEARCH" FOR WHICH A WARRANT IS REQUIRED UNDER THE FOURTH AMENDMENT AND ARTICLE I, SECTION 12 OF THE FLORIDA CONSTITUTION?

Id. The Court reviewed the Florida Supreme Court's restated question. 109 S. Ct. at 695.

25. 109 S. Ct. at 697.

played a critical role in the development of the Court's approach to aerial privacy claims, will also be outlined. Finally, this Note explores the technological developments that will continue to redefine citizens' reasonable expectations of privacy and how technology has provided ever more intrusive surveillance techniques, which may force a retreat from the sanctuary of the yard, to seek privacy within the home.

FROM TRESPASS TO REASONABLE EXPECTATION

Early cases addressed fourth amendment privacy claims under a trespass standard. For example, *Olmstead v. United States* held that the telephonic surveillance of importers of illegal liquor was not prohibited under the fourth amendment.²⁶ Chief Justice Taft, writing for a closely divided Court, reasoned that since there had been no physical trespass of Olmstead's house, there was no search or seizure.²⁷ Also, the Court held that violation of a state law that prohibited wiretapping was not grounds for exclusion of the evidence that the government agents had obtained.²⁸

Silverman v. United States ruled that government agents who inserted a microphone into Silverman's home had intruded into a constitutionally protected area, and accordingly the information they gathered was excluded.²⁹ The Court continued to apply a standard based largely upon the physical penetration of the premises until 1967, when it decided *Katz v. United States*.³⁰

The government attached a listening device to the outside of a public phone booth that Katz was using.³¹ Although the device had not physically intruded into the booth, the Court ruled that Katz was still protected under the fourth amendment's right to privacy.³² The

26. *Olmstead v. United States*, 277 U.S. 438 (1928) (5-4 decision).

27. *Id.* at 466.

28. *Id.* at 468-69. A state statute made it a misdemeanor to intercept messages which had been sent over telephone lines. *Id.* at 468. The statute did not contain any provision for the exclusion of evidence gathered in violation of the statute. *Id.* at 469.

29. 365 U.S. 505 (1961). The minimal trespass consisted of the insertion of a microphone into a common wall between two residences. The spike mike contacted the heating duct of the adjoining residence, "thus converting the entire heating system into a conductor of sound." *Id.* at 506-07.

30. 389 U.S. 347 (1967). Katz was convicted based upon evidence gathered by the government through a listening device attached to the outside of a telephone booth. The device allowed the police to listen in on Katz' end of the conversation. *Id.* at 348.

31. *Id.*

32. *Id.* at 353.

trespass analysis was abandoned in *Katz*, which established a two-prong "expectation of privacy"³³ standard upon which a citizen's right to privacy would be evaluated.³⁴ Under the *Katz* test, to receive protection of the fourth amendment, a "person must have exhibited an actual (subjective) expectation of privacy and . . . the expectation [must] be one that society is prepared to recognize as 'reasonable.'"³⁵

OPEN FIELD AND CURTILAGE DOCTRINES

The fourth amendment affords little protection for outdoor activities. *Hester v. United States*³⁶ involved illegal alcohol or "moonshine."³⁷ The occupants of Hester's home told revenue agents that there was no whiskey on the premises.³⁸ Meanwhile, on the property surrounding the house, the agents discovered some abandoned containers that held whiskey residue.³⁹ The Court held that the fourth amendment did not extend its protection to the "open field" surrounding the home and ruled that the testimony of the agents who found the contraband was properly admitted.⁴⁰

In 1984 the Court revisited the open field doctrine in *Oliver v. United States*.⁴¹ Oliver was also charged with a controlled-substance violation.⁴² State police officers, who had walked around a fence which partially surrounded Oliver's premises, found marijuana growing in a field approximately one mile from Oliver's home.⁴³ The court reaffirmed its prior holding in *Hester* and ruled that even though the

33. *Id.* at 361 (Harlan, J., concurring). The language of Justice Harlan's concurrence has come to stand for the majority opinion. See *infra* notes 62-70 and accompanying text for a discussion of *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (adopting the language of Justice Harlan's concurrence). See generally 1 W. LAFAYE, A TREATISE ON THE FOURTH AMENDMENT § 2.1 (2d ed. 1987) (discussion of the *Katz* expectation of privacy test). *Katz* expressly overruled *Olmstead*, citing the erosion of the trespass doctrine by subsequent decisions of the Court. 389 U.S. at 353.

34. *Id.* at 361 (Harlan, J., concurring).

35. *Id.*

36. 265 U.S. 57 (1924).

37. *Id.* at 58.

38. *Id.*

39. *Id.* The agents had surrounded the house and observed what appeared to them as activity associated with the delivery of illegal alcohol outside of the house. *Id.*

40. *Id.* at 59.

41. 466 U.S. 170 (1984).

42. *Id.* at 173. Oliver was charged with manufacturing a controlled substance, marijuana. *Id.*

43. *Id.* at 173. The Court recognized that the field was secluded and not visible from "any point of public access." *Id.* at 174.

officers were trespassing on the defendant's farm, the fourth amendment's applicability was not determined by the common law of trespass.⁴⁴ The Court held that the defendant had no "legitimate expectation of privacy"⁴⁵ for an activity carried on in an open field, even if he had taken precautions to conceal his agricultural pursuits.⁴⁶ Clearly, under the Court's current analysis, the fourth amendment will not provide much protection for outdoor activities.

More protection may be available for activities within the close confines of the home. The curtilage⁴⁷ doctrine was most recently addressed in *United States v. Dunn*.⁴⁸ Dunn and his accomplice had set up a laboratory in a barn for the manufacture of amphetamines.⁴⁹ The barn was approximately sixty yards from their ranch house.⁵⁰ The 198-acre ranch was completely surrounded by a fence.⁵¹ The *Dunn* Court established a test for defining the extent of the curtilage.⁵² The Court ruled that if the area is "intimately tied to the home,"⁵³ it is deserving of the fourth amendment's protection.⁵⁴

44. *Id.* at 183-84.

45. *Id.* at 182. The Court then defined a test to determine the legitimacy of a privacy expectation: "The test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity. Rather the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Id.* at 182-83.

46. *Id.* at 182.

47. For a concise definition of "curtilage," see *supra* note 16.

48. 480 U.S. 294 (1987). "The curtilage concept originated at common law to extend to the area immediately surrounding a dwelling house the same protection under the law of burglary as was afforded the house itself." *Id.* at 300. "[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law." *Hester*, 265 U.S. at 59 (quoting 4 W. BLACKSTONE, COMMENTARIES *223, *225, *226).

49. 480 U.S. at 298. The defendant was convicted of conspiracy to manufacture controlled substances with intent to distribute. *Id.* at 296.

50. *Id.* at 302.

51. *Id.* at 297. In addition to the perimeter fences, the buildings on the property were also surrounded by separate fences. By the time the Drug Enforcement Administration (DEA) agents had a view into the barn on the property, they had crossed several fences. *Id.* at 297-98. The officers were able to see over the barn's gate without entering the property. *Id.* at 298. The Court refused to adopt a bright line rule that the curtilage should extend only to the first fence surrounding a fenced house. *Id.* at 301 n.4.

52. *Id.* at 301. The factors to be tested are: 1) the proximity of the area in question to the home, 2) whether the area is within an enclosed perimeter around the home, 3) the types of uses to which the area is put, and 4) the actions taken by the residents to protect from observation by passers by. *Id.*

53. *Id.*

54. *Id.* Applying the curtilage test the Court ruled that 1) the barn was too far away from the home, 2) the barn was not within the fence surrounding the home, 3) the DEA had objective data to support their contention that the barn was not being used for "intimate activities

Accepting for the purposes of argument that the barn was within the curtilage,⁵⁵ the *Dunn* Court applied the rule of *Oliver v. United States*.⁵⁶ Under the *Oliver* analysis, the Court reasoned that since the agents had not entered Dunn's barn, but merely observed the activities within the barn from an "open field,"⁵⁷ the manner in which they observed was not forbidden under the fourth amendment.⁵⁸

TECHNOLOGY DRIVES A REVISION OF THE MODERN LAW OF PRIVACY

Emergent technologies may sculpt the fourth amendment's protections of privacy rights. *Katz* indirectly addressed the issue of technological advances and their impact upon fourth amendment privacy rights.⁵⁹ Justice Harlan stated that the "legitimate needs of law enforcement may demand specific exceptions" to the warrant requirement; however, the Justice deferred consideration of these circumstances to such time as they were presented to the Court.⁶⁰ Such circumstances arose in 1986 when the Court again visited both the curtilage and open field doctrines.⁶¹

The issue of aerial privacy arose in *California v. Ciraolo* when the Court reviewed the usage of aircraft by law enforcement personnel.⁶² Ciraolo was convicted after officers observed and photographed the defendant's marijuana patch, using an ordinary thirty-five millimeter camera, from a fixed wing aircraft at an altitude of 1000 feet.⁶³ The plot was adjacent to Ciraolo's home and had been surrounded by

of the home," and finally 4) the fences were not designed to keep persons from observing the activities on the property, but were solely for corralling livestock. *Id.* at 302-03. See *supra* note 52 for the Court's factors in analyzing the extent of the curtilage.

55. *Id.* at 303.

56. *Oliver v. United States*, 466 U.S. 170 (1984). See *supra* notes 41-46 and accompanying text.

57. 480 U.S. at 304. The barn's owner had attempted to block the view into the barn by using a fish-net material. *Id.* at 297-98 & n.1. A view into the barn was only possible if the observer was within "a few feet" of the barn entrance. *Id.* at 312 (Brennan, J., dissenting) (quoting *United States v. Dunn*, 766 F.2d 880, 883 (5th Cir. 1985)).

58. 480 U.S. at 305.

59. 389 U.S. at 362 (Harlan, J., concurring).

60. *Id.*

61. *California v. Ciraolo*, 476 U.S. 207 (1986); *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986).

62. 476 U.S. 207 (1986).

63. *Id.* at 209. A warrant was obtained based upon an anonymous tip and photographs taken from the air. *Id.* The marijuana plants were discernible to the naked eye from the air. *Id.* at 215.

a ten-foot fence.⁶⁴ The Court ruled that under the first prong of the *Katz* test,⁶⁵ it was unclear whether the defendant had a subjective expectation of privacy. Even though Ciraolo attempted to shield the yard from view, he had concealed the crop from some but not all views.⁶⁶ The Court noted that a policeman or a citizen atop a double-deck bus could have seen over the ten-foot-high fence.⁶⁷ Even assuming that Ciraolo had a subjective expectation of privacy, the Court held that under the second prong of *Katz*,⁶⁸ Ciraolo could have no reasonable expectation of privacy since he had not taken measures to shield his activities from aerial observations made from a point where the public had a right to be.⁶⁹ Consequently, the fourth amendment afforded him no right to aerial privacy.⁷⁰

In a companion case, *Dow Chemical Co. v. United States*,⁷¹ the Court extended the reach of the government's gaze by permitting the use of high-power cameras to photograph activity from an altitude of 1200 feet.⁷² The premises in *Dow* were an industrial complex, where Dow had taken numerous precautions to prevent both terrestrial and aerial observations.⁷³ The Court stated that photographic technology had indeed advanced law enforcement's techniques of gathering data.⁷⁴ However, the fact that state law could bar private parties from utilizing the same techniques to violate trade secret laws (through laws prohibiting espionage) was deemed irrelevant in the Court's analysis of the government's use of these photographs.⁷⁵ The Court held that Dow's 2000-acre manufacturing facility was subject

64. *Id.* at 209.

65. 389 U.S. at 361 (Harlan, J., concurring) (subjective expectation of privacy). See *supra* notes 33-35 and accompanying text for a discussion of the test.

66. 476 U.S. at 213.

67. *Id.* at 211.

68. 389 U.S. at 361 (Harlan, J., concurring) (society recognizes the privacy interest as reasonable). See *supra* notes 30-35 and accompanying text for a discussion of *Katz*.

69. 476 U.S. at 215.

70. *Id.*

71. 476 U.S. 227 (1986).

72. *Id.* at 229.

73. *Id.* at 241-42 (Powell, J., concurring in part and dissenting in part). Dow took action any time aircraft overflew the plant. Dow traced the identification numbers of aircraft that flew over the premises, attempting to find the pilot and determine whether aerial photographs had been taken. *Id.*

74. *Id.* at 231.

75. *Id.* at 232. The photographs were capable of resolving objects as small as one-half inch. *Id.* at 243 (Powell, J., concurring in part and dissenting in part) (citing *Dow Chem. Co. v. United States*, 536 F. Supp. 1355, 1357 (E.D. Mich. 1982)). The camera was the finest aerial camera available and cost in excess of \$22,000.00. *Id.* at 242 n.4 (citation omitted in original).

to regulatory inspections by the EPA. Consequently, the Court ruled that what was visible to the public or government inspectors was not subject to the strictures of the warrant requirement.⁷⁶

Advancing technology, which has allowed the government to listen into phone conversations,⁷⁷ to fly over areas that had historically been inaccessible to law enforcement personnel without a search warrant,⁷⁸ and to photograph such areas with a high degree of resolution,⁷⁹ has forced the Court to redefine modern fourth amendment privacy rights.

FEDERAL AVIATION ADMINISTRATION REGULATIONS

The Constitution and the common law have not been the only source of guidance that courts have used in redefining the modern expectation of privacy doctrine. The Federal Aviation Administration promulgates the regulations applicable to various types of aircraft and the altitudes at which they may legally operate.⁸⁰ The regulations have special altitude provisions for the operation of helicopters.⁸¹ The helicopter may operate at lower altitudes than fixed-wing aircraft, with the lower limit defined by the point at which the helicopter's operation becomes a hazard to those on the ground.⁸²

Regulations applicable to helicopters also provide that, except for take-off and landing operations, the helicopter may not operate at an altitude of less than 300 feet.⁸³ This section applies only to opera-

76. *Id.* at 238. The Court stated that it had previously held that "[w]hat is observable by the public is observable without a warrant, by the Government inspector as well." *Id.* (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 315 (1978) (fourth amendment protects commercial property; OSHA regulation authorizing warrantless search of work place is unconstitutional).

77. *See supra* notes 30-35 and accompanying text.

78. *See supra* notes 62-76 and accompanying text.

79. *See supra* note 75 and accompanying text.

80. 14 C.F.R. § 91.79 (1988) provides that aircraft generally must operate at an altitude no lower than that necessary to make a power-off emergency landing without endangering persons or property on the ground. *Id.* § 91.79(a). Over congested areas, aircraft are required to remain 1000 feet above the highest obstacle that is within 2000 feet horizontally of the aircraft. *Id.* § 91.79(b). In other than congested areas the minimum altitude is 500 feet. *Id.* § 91.79(c).

81. *Id.* § 135.203.

82. 14 C.F.R. § 91.79(d) (1988) provides in part: "Helicopters may be operated at less than the minimums prescribed in paragraph (b) or (c) of this section if the operation is conducted without hazard to persons or property on the surface." *Id.* *See supra* note 80 for the text of 14 C.F.R. § 91.79(b)-(c) (1988). The *Riley* plurality interpreted the hazard referred to in the FAA regulation as "undue noise," wind, dust, or threat of injury. 109 S. Ct. at 697 (plurality opinion).

83. 14 C.F.R. § 135.203(b) (1988).

tions over congested areas.⁸⁴ As a result, helicopter operations in rural areas remain largely unchecked. Some types of aircraft are not even under the FAA's control. For example, radio-controlled aircraft are not subject to the altitude minimums of the FAA regulations.⁸⁵ If the right to aerial privacy is to be defined in light of aircraft legally operating within flight minimums, the regulations promulgated by the FAA will provide some important parameters. Against this background, the Supreme Court reviewed the *Riley* decision.

THE RILEY COURT'S ANALYSIS

Jurisdiction in the Supreme Court was based upon Riley's claim that the helicopter overflight constituted a search under the fourth amendment.⁸⁶ The plurality found that the Florida Supreme Court's decision did not rest upon adequate and independent state grounds, and consequently the United States Supreme Court was not precluded from reviewing the decision.⁸⁷

The plurality agreed with Florida's claim that *California v. Ciraolo*⁸⁸ was the appropriate authority for the decision in this case.⁸⁹

84. *Id.*

85. Other sections specifically provide for different types of aircraft. For example, 14 C.F.R. § 101.33 (1988), provides operating rules for moored balloons, kites, unmanned rockets, and unmanned free balloons. The enabling statute that delegates the areas to be regulated by the FAA does not allow the Administrator to regulate the operation of radio-controlled aircraft. 49 U.S.C. §§ 1421-1423 (1982). The FAA has attempted to regulate the operation of remote-controlled aircraft through an advisory circular, which urged voluntary compliance with safety standards; however this document merely suggests an upper altitude limit of 400 feet. Fed. Aviation Admin., U.S. Dep't of Transp., Advisory Circular No. 91-57, Model Aircraft Operating Standards (June 9, 1981).

86. 109 S. Ct. at 695 n.1 (plurality opinion).

87. *Id.* at 695 & n.1 (citing *Michigan v. Long*, 463 U.S. 1032, 1041 (1983)). The Florida Supreme Court asserted that FLA. CONST. art. I, § 12, provided protection from surveillance of the type in Riley's case. 511 So. 2d at 289. The plurality reasoned that merely posing the question and then concluding that the search violated the state constitution provided "no indication that the decision 'clearly and expressly . . . [was] alternatively based on bona fide separate, adequate, and independent grounds.'" 109 S. Ct. at 695 n.1 (quoting *Michigan v. Long*, 463 U.S. 1032, 1041 (1983)). The Florida Constitution gives the Florida Supreme Court some discretion on search and seizure issues. If the court finds that: 1) there is no Supreme Court decision on point; or 2) the Supreme Court's opinion was a plurality; or 3) the language was dicta. Then the Florida court will be "free to interpret the constitution on its own." Cooper, *Beyond the Federal Constitution: The Status of State Constitutional Law in Florida*, 18 STETSON L. REV. 241, 279 (1989) (footnote omitted). See *supra* note 18 for the text of the Florida Constitution's provision.

88. 476 U.S. 207 (1986). See *supra* notes 62-70 and accompanying text.

89. 109 S. Ct. at 695 (plurality opinion). Justice White delivered the plurality opinion in which Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy joined. Justice O'Connor

The plurality relied almost completely upon *Ciraolo*, stating that Riley could have reasonably expected that routine overflights would occur and that activities on his property would be observed.⁹⁰ Accepting that Riley's greenhouse was within the curtilage of the home, the plurality found that observations from the helicopter were nevertheless permissible under the fourth amendment because he had knowingly exposed the greenhouse's contents to view from above.⁹¹

The plurality detailed the widespread use of helicopters, and noted that helicopters were utilized by law enforcement agencies in every state.⁹² A discussion of applicable federal regulations governing the operation of rotorcraft followed.⁹³ Under these regulations the helicopter was found to be in compliance with the altitude and operational minimums established by the FAA.⁹⁴

Concurring in the judgment, Justice O'Connor discounted the plurality's reliance on federal regulations, since those regulations were established to promote public safety rather than to define the public's right to privacy.⁹⁵ She agreed with the plurality, which had also applied *Katz*,⁹⁶ that Riley's expectation of privacy was not recognized by society as reasonable.⁹⁷ In disagreeing with the plurality's reliance on *Ciraolo*,⁹⁸ Justice O'Connor stated that Ciraolo's expectation of privacy was unreasonable because of the frequency of such flights and not merely because of the public's right to travel in public airspace.⁹⁹ Similarly, Justice O'Connor reasoned that Riley's fourth amendment privacy claim should be denied based upon the fact that the public could have been expected to fly over his back yard at 400 feet and not solely upon the right of the public to be in the airspace over his home.¹⁰⁰ Justice O'Connor concluded her analysis by placing

concurring in the judgment. The dissenters were Justice Brennan, joined by Justices Marshall and Stevens. Justice Blackmun wrote a separate dissent.

90. *Id.* at 696.

91. *Id.*

92. *Id.* at 696 n.2 (citing E. BROWN, *THE HELICOPTER IN CIVIL OPERATIONS* 79 (1981)).

93. *Id.* at 696-97 & n.3. 14 C.F.R. § 91.79 (1988) applies to the operation of helicopters and provides in part that they may be operated at lower altitudes than fixed wing aircraft so long as "the operation is conducted without hazard to persons or property on the surface." See *supra* notes 80-85 and accompanying text.

94. 109 S. Ct. at 697 (plurality opinion). See *supra* notes 80-85 and accompanying text.

95. *Id.* at 697 (O'Connor, J., concurring in the judgment).

96. *Id.* at 696 (plurality opinion).

97. *Id.* at 697 (O'Connor, J., concurring in the judgment).

98. *Id.* at 695 (plurality opinion).

99. *Id.* at 698 (O'Connor, J., concurring in the judgment).

100. *Id.* at 697. In an age where air travel has become a common part of everyday living,

the burden upon Riley to show that he had a reasonable expectation of privacy. Riley had not met that burden, but the Justice stated in dictum that there may be circumstances where helicopter usage below 400 feet would violate a citizen's reasonable expectation of privacy.¹⁰¹

The Dissent: A Vision of the Future

The dissent criticized the plurality's failure to apply the Court's prior holding in *Katz*.¹⁰² It leveled criticism at the plurality's application of federal regulations to define a citizen's aerial privacy rights,¹⁰³ and opined that the reasonable expectation of privacy rule established in *Katz* should be controlling.¹⁰⁴ Noting that the FAA regulations provide for no minimum altitude requirement, the dissent hypothetically questioned the ramifications of a silent helicopter capable of hovering without disturbing the property below. Such a helicopter would not violate FAA regulations and would be capable of hovering at altitudes sufficiently low to peer into the windows of the home.¹⁰⁵ Under the plurality's analysis, citizen's privacy rights would not be infringed by such an aircraft.¹⁰⁶

The dissent concluded with an ominous quotation from "George Orwell's dread vision of life in the 1980's."¹⁰⁷

The black-mustachio'd face gazed down from every commanding corner. There was one on the house immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said . . . In the

Justice O'Connor stated that reasonable people should expect to be observed by those flying overhead. *Id.* at 697-98.

101. 109 S. Ct. at 699. The Justice stated that such a violation could occur even if the aircraft were fully in compliance with the FAA regulations. *Id.*

102. *Id.* (Brennan, J., dissenting). Justices Marshall and Stevens joined in Justice Brennan's dissent. Justice Blackmun filed a separate dissent. The dissenters stated that the plurality decision "reads almost as if *Katz* . . . had never been decided." *Id.* Justice Brennan wrote that a large portion of the plurality's opinion relied upon the fact that the officer made his observations from a position where he had a legal right to be. *Id.* Therefore, the plurality's opinion had discounted the Court's prior holding in *Katz*, that a citizen may have a reasonable expectation of privacy — even though the government legally has a right to be in such a position to observe the activity. *Id.*

103. *Id.* at 699-700.

104. *Id.* at 700-01.

105. *Id.* at 702-03. The dissenters posited a situation where the police were not only discovering what crops were under cultivation, but what books the residents were reading and who their houseguests were. *Id.*

106. *Id.* at 703.

107. *Id.* at 704-05.

far distance a helicopter skimmed down between the roofs, hovered for an instant like a bluebottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows.¹⁰⁸

Justice Blackmun wrote a separate dissent based upon the reasonableness of Riley's expectation that flights over his rural home would be infrequent.¹⁰⁹ The Justice would have placed the burden of proving the frequency of overflights upon the prosecution.¹¹⁰ Justice Blackmun contended that the case should have been remanded for proceedings to allow the prosecution to meet its burden of proving that Riley's expectation of privacy had been unreasonable.¹¹¹

A CRITICAL LOOK AT RILEY

The Supreme Court has nearly eliminated any right which a citizen has to aerial privacy. Such privacy, if it ever existed, is all but gone as we have reached a point where further erosion of citizens' fourth amendment rights to aerial privacy is not easy to envision. After the recent line of aerial privacy decisions in *Ciraolo*, *Dow*, and now *Riley*, the public can be reasonably certain that the government will be able to aerially observe ground activities, free from the restraint of the fourth amendment. Even with the curtains drawn, it is conceivable that from an aerial perch an officer could peer into the home through a crack in the curtains and be free to report his observations and use such information to the government's advantage.

The result in *Riley* was foreseeable after the Court's holding in *Katz*.¹¹² Application of the *Katz* reasonable expectation of privacy test and abandonment of the protected places analysis had resulted in expansion of the scope of the fourth amendment's protections.¹¹³ It was inevitable that there would be cases where the right would be constricted. *Riley* is such a case. The *Riley* plurality's result became probable when the Court shifted its emphasis from protecting places to protecting people.

It may also be argued that with the advance of technology, *Katz*

108. 109 S. Ct. at 705 (quoting G. ORWELL, NINETEEN EIGHTY-FOUR 4 (1949)).

109. *Id.* (Blackmun, J., dissenting).

110. *Id.*

111. *Id.*

112. 389 U.S. 347 (1967). See *supra* notes 30-35 and accompanying text.

113. See *Walter v. U.S.*, 447 U.S. 649 (1980) (individual may expect that contents of a package in domestic mail will remain private).

itself is no longer a viable interpretation of the fourth amendment. The government could easily destroy any subjective expectation of privacy, simply by informing people that the capability to spy on them exists and will be used.¹¹⁴ It is clear that the Court's position on the aerial privacy issue has empowered the government to literally watch over all of us.¹¹⁵

Federal Regulations Defining Constitutional Rights

The dangers inherent in defining the right to privacy using federal regulations as perimeters are particularly evident when certain aircraft are not subject to the FAA's altitude and operating minimums.¹¹⁶ The future may find camera-equipped drones legally operating and doing the work of the present-day sheriff and helicopter duo. With such drones the government could fly lower than ever without disturbing the property below. Remote-controlled aircraft are currently available to the general public at hobby shops, and the military is developing even more sophisticated remote-piloted vehicles specifically for intelligence-gathering purposes.¹¹⁷ The utilization of these tools by law enforcement agencies, if left unchecked, will greatly assist the government in law enforcement, but will be highly invasive to the privacy rights of the public.

Balloons are currently being used in drug interdiction efforts in the Florida Keys.¹¹⁸ The balloon provides an exceptionally stable observation platform with tremendous lifting capabilities. The balloons are able to lift sophisticated monitoring equipment to positions best suited for legally monitoring both surface and air activities.¹¹⁹ Around-the-clock surveillance is possible from these vantage points.

114. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974). See *supra* text accompanying notes 33-35 for discussion of the "reasonable expectation of privacy" standard which also requires that an expectation of privacy be subjectively reasonable.

115. The *Riley* decision may not necessarily impact upon FLA. CONST. art. I, § 12. The Florida Supreme Court may still have some discretion on aerial search and seizure issues, because only a *plurality* has now specifically ruled on the issue of aerial surveillance from a low-altitude aircraft without fixed-wings. See *supra* note 87.

116. See *supra* note 85 and accompanying text.

117. Greeley, AVIATION WEEK & SPACE TECH., Mar. 9, 1987, at 58. These aircraft are neither helicopters nor fixed-wing aircraft. They utilize tilt-rotor technology, which makes these craft lightweight (504 pounds); they also have the high speed flight characteristics of a fixed-wing aircraft and the ability to hover as a helicopter. *Id.* See *supra* note 85 for discussion of remote-controlled aircraft, which are not within the purview of the FAA's regulations.

118. *Eye in the Sky*, TIME, May 13, 1985, at 27.

119. *Id.*

In the future, the balloon could easily be cast as a permanent fixture in neighborhoods, shifting its duties from drug interdiction to all-purpose general monitoring of the community's activities.

Advances in Technology: What's Next

The *Dow* Court stated that orbital satellite observations could require a search warrant.¹²⁰ Given the Court's current trend toward erosion of aerial privacy rights, the frightening possibility of the government monitoring activities on a global scale becomes reasonably expected. Under the Court's current analysis, a proliferation of orbital craft will decrease the individual's reasonable expectation of privacy. If logically consistent, the Court should find high-altitude observations to be reasonably expected and consequently not infringements of fourth amendment aerial privacy rights.¹²¹ Just as the commercialization of air travel has resulted in the use of civil aircraft for law enforcement tasks, so too will the commercialization of space. Once this frontier is reached, any remaining right to be free from aerial surveillance would be virtually nonexistent.

The *Dow* court indicated that the mere fact that an aerial observer's vision had been "enhanced somewhat" did not present Constitutional problems.¹²² Mapping cameras are capable of resolving objects as small as one-half inch from aircraft operating legally within federal regulations.¹²³ This has rendered it certain that activities conducted in the open can be very carefully monitored, if law enforcement deems it necessary.

The *Riley* plurality adopted the term "naked eye" which was repeatedly used in the State's brief.¹²⁴ However, the investigating deputy had a telephoto lens on his airborne camera.¹²⁵ The plurality failed to address the fact that a telephoto lens can magnify an image

120. 476 U.S. at 238.

121. Note, *California v. Ciraolo and Dow Chemical v. U.S. — A View From Above: Is It Ever Private?*, 14 J. SPACE L. 172, 174 (1986). Private industry will launch commercial satellites such as the LANDSAT which will soon present issues of privacy from higher altitudes than ever before. *Id.* Commercial privacy issues may be raised which will require formulation of new guidelines, since these *private* craft may not be the subject of fourth amendment analysis because there will be no government intrusion. *Id.*

122. 476 U.S. at 238 (footnote omitted). See *supra* notes 71-76 and accompanying text.

123. *Id.*

124. Petitioner's Brief on the Merits, *Riley v. State*, 109 S. Ct. 693 (1989) (No. 87-764). The State used the term "naked eye" approximately sixteen times to characterize the identification. *Id. passim.*

125. 511 So. 2d at 283 n.2.

by a factor of forty.¹²⁶ Even though the Florida Supreme Court had accepted the trial court's finding that the officer made his identification from the air,¹²⁷ the Court failed to address the fact that enhancing vision can render such aerial observations substantially more intrusive.

Allowing enhancement of vision was predictable after the Court's approval of the high-powered mapping camera in *Dow*.¹²⁸ But in ignoring the magnification powers of such optical equipment, the Court has ignored the fact that now almost all law enforcement agencies can have the technology to discretely scrutinize activities from afar. After *Riley* relaxed the altitude constraint, police who commonly have helicopters,¹²⁹ and may also have telephoto camera equipment as well as high-powered binoculars, are now constitutionally equipped to make sure all citizens, not just the smugglers, growers, and other criminals, do not engage in objectionable outdoor activities as defined by the government.

Although *Dow* reflected the Court's intention to reevaluate the warrant requirement when applied to satellite surveillance,¹³⁰ some experts hold that suborbital aircraft, which are permissible under the Court's current scheme, are in many ways more intrusive than satellites.¹³¹ Aircraft, unlike satellites whose orbits are fixed, can descend and circle over targets which the pilot wishes to observe more closely.¹³² As a result, the pilot can gather much more information about a specific location with an aircraft than with a satellite.¹³³

In light of this fact, the Court must realize that the real damage to citizens' right to privacy will not be in the future, when the police may have the power to monitor neighborhoods live via satellite. The harm was done when the Court allowed telephoto-equipped sheriffs to monitor activities on the ground from a helicopter, without a search warrant.

126. C. SHIPMAN, NIKON SLR CAMERAS 49 (1980). Relative magnification is defined as the focal length of the lens being used (usually expressed in millimeters) divided by 50 (the focal length of a normal lens on a 35 millimeter camera). For example, a 2000 millimeter telephoto lens is capable of magnifying an image by 2000/50 or 40 times. *Id.*

127. 511 So. 2d at 283 & n.2.

128. 476 U.S. at 238 & n.5. See *supra* notes 71-76 and accompanying text.

129. See *supra* note 92 and accompanying text.

130. 476 U.S. at 238.

131. Bak, *The technology behind . . . Arms Verification*, DESIGN NEWS, Sept. 7, 1987, at 136.

132. W. BURROWS, DEEP BLACK: SPACE ESPIONAGE AND NATIONAL SECURITY 153-54 (1986).

133. *Id.*

Riley was rightly decided based upon the Court's prior holdings in *Katz*, *Ciraolo*, and *Dow*.¹³⁴ The *Riley* result was an inevitable corollary of the Court's earlier reasoning that the frequency of legal overflights and the use of technologically advanced photographic equipment for aerial surveillance had diminished an expectation of privacy from above. Thus, the *Riley* plurality's opinion was compelled by the collision of its preceding decisions with advancing aerospace technology.

A LONG-TERM ALTERNATIVE APPROACH TO AERIAL PRIVACY

A legitimate expectation of aerial privacy under the *Katz* standard has been reduced to the point where there is virtually no reasonable expectation of privacy from above. The government's interest in law enforcement may justify the application of the open field and open view doctrines to the curtilage. But the erosion of the curtilage doctrine, which the plurality has continued in *Riley*, is a most disturbing trend. Protection of the home from the intruding arm of the government must have been the very essence of what the Framers sought to protect when drafting the fourth amendment.¹³⁵

A return of the fourth amendment's protections for aerial privacy of the home could be readily achieved. The Court could revise its application of the *Katz* standard as applied to the curtilage and develop a standard immune from technological advances. Views into the curtilage could be limited to those possible without the aid of devices that enhance the senses of the viewer or contrivances that allow the officer to position himself for a better view.¹³⁶

This rule would eliminate the use of visual magnification techniques¹³⁷ and views from aircraft, remote-controlled¹³⁸ or otherwise.

134. See *supra* notes 30-35 & 62-76 and accompanying text for a discussion of the reasoning used in this line of cases.

135. The very use of the word "houses" in the amendment and the Court's later interpretations of that language establish that "[a]t the very core [of the fourth amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Payton v. New York*, 445 U.S. 573, 589-90 (1980) (citation omitted). "In assessing the degree to which a search infringes upon individual privacy, the Court has given much weight to such factors as the intention of the Framers" *Oliver*, 466 U.S. at 178 (citing *United States v. Chadwick*, 433 U.S. 1, 7-8 (1977)).

136. Corrective lenses should not be considered such an enhancement. Views from natural structures such as trees, hills, and mountains likewise should not be excluded under the proposed solution.

137. See *supra* note 126 and accompanying text.

138. See *supra* note 117 and accompanying text.

Such an approach would leave intact both the open field and open view doctrines, as long as the officer's view was not enhanced. The elimination of these procedures would require that both *Riley* and *Ciraolo* be overruled; however, limiting surveillance capabilities to those that are innately human would prevent the Court's continuous redefinition of what a reasonable expectation of privacy is, in light of the day's technological developments.

CONCLUSION

The United States Supreme Court must apprise itself of the emergent and contemporary technologies that have rendered its prior holdings lethal weapons to the provisions of a Constitution originally drafted to prevent invasions into the private lives of citizens. The Court must reconsider its application of the *Katz* standard in approaching aerial privacy claims. Otherwise, we will all be expected to expect the unexpected.

W.F. "Casey" Ebsary, Jr.

ADDENDUM

The Florida Supreme Court vacated its decision and remanded *Riley* "to the district court with directions to return the matter to the trial court for further proceedings consistent with the opinion of the United States Supreme Court in this cause."¹³⁹ The majority cited four portions of the Supreme Court opinion in its remand of the case.

First, the court concluded that in Justice White's opinion, *Riley* had the obligation to support his aerial privacy claim by showing that his expectation of privacy was reasonable.¹⁴⁰ Justice Barkett arrived at this conclusion by virtue of Justice White's statement that there was "no indication that [helicopter] flights are unheard of in Pasco County" and that the record had not shown that such flights were "sufficiently rare."¹⁴¹ Second, the court cited Justice O'Connor's

139. *Riley v. State*, 549 So. 2d 673, 674 (Fla. 1989). Justice Barkett delivered the majority opinion in which Chief Justice Ehrlich, Justice Overton, Justice Shaw and Justice Kogan concurred. Justice McDonald wrote a separate concurring opinion. Justice Grimes did not participate in the decision.

140. *Id.*

141. *Id.* (quoting *Florida v. Riley*, 109 S. Ct. at 696-97 (1989) (plurality opinion)). See *supra* notes 88-94 and accompanying text for discussion of the plurality's opinion.

opinion for the proposition that Riley had not presented evidence regarding the frequency of helicopter overflights and that he had not met his burden that "his expectation of privacy was . . . reasonable."¹⁴²

Third, the majority cited the *Riley* dissenters for the premise that the burden was upon the state to show "the extent of public use of the airspace at that altitude."¹⁴³ Fourth, the Florida Supreme Court asserted that Justice Blackmun would also have "impose[d] upon the prosecution the burden of proving contrary facts necessary to show that Riley lacked a reasonable expectation of privacy."¹⁴⁴ After reviewing these four positions, Justice Barkett reasoned that a majority of the Court had "agreed that the record below lacked evidentiary development concerning the reasonableness of Riley's expectation of privacy."¹⁴⁵

The Florida Supreme Court's decision may allow Riley to reargue the privacy issue under article one, section twelve of the Florida Constitution.¹⁴⁶ Because a majority of the United States Supreme Court has not decided the issue of aerial privacy rights from a helicopter, the Florida court may now decide the issue under the Florida Constitution, which may provide greater protection for activities within the curtilage.¹⁴⁷ But a claim of protected privacy interests under section twelve may be res judicata due to its inclusion in the United States Supreme Court's decision. Accordingly, Justice McDonald's concurrence appears to limit the scope of the court's inquiry on remand.¹⁴⁸ Thus, Riley may be precluded from further argument under article one, section twelve.

A much stronger claim, in light of two recent Florida Supreme Court decisions, would contend that Riley has a right to be "let

142. 549 So. 2d at 674 (quoting 109 S. Ct. at 699 (O'Connor, J., concurring in the judgment) (citations omitted)). See *supra* notes 95-101 and accompanying text for discussion of Justice O'Connor's opinion.

143. *Id.* (quoting 109 S. Ct. at 704 (Brennan, J., dissenting) (citation and footnote omitted)). See *supra* notes 102-08 and accompanying text for discussion of Justice Brennan's opinion.

144. *Id.* (quoting 109 S. Ct. at 705 (Blackmun, J., dissenting)). See *supra* notes 109-11 and accompanying text for discussion of Justice Blackmun's opinion.

145. *Id.*

146. See *supra* note 18 for the text of the provision.

147. See *supra* note 87 for discussion of FLA. CONST. art. I, § 12. See generally Slobogin, *State Adoption of Federal Law: Exploring the Limits of Florida's "Forced Linkage" Amendment*, 39 U. FLA. L. REV. 653 (1987).

148. 549 So. 2d at 674-75. (McDonald, J., concurring).

alone" under article one, section twenty-three of the Florida Constitution.¹⁴⁹ The court recently held that the Florida Constitution afforded additional privacy protection not available under the United States Constitution.¹⁵⁰ The court ruled that the compelling state interest standard applies to gathering of telephone numbers using a pen register.¹⁵¹ The court specifically rejected the application of traditional reasonable expectation of privacy analysis in its evaluation of claims under article one, section twenty-three.¹⁵² In another recent case the court held that the right to be let alone under section twenty-three guaranteed the right of an unmarried pregnant fifteen-year-old to obtain an abortion free from parental consent.¹⁵³ The Florida Supreme Court held that a state statute requiring such consent was unconstitutional.¹⁵⁴ The court ruled that the right to privacy "demand[ed] the compelling state interest standard."¹⁵⁵ In so ruling, the burden of proof was placed upon the state to show that the invasion of privacy was justified.¹⁵⁶ The court specifically decided the case

149. That section provides: "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law." Fla. Const. art. I, § 23.

150. *Shaktman v. State*, 14 F.L.W. 522 (Fla. Oct. 12, 1989).

151. *Id.* at 523. The compelling state interest standard was described as "shift[ing] the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means." *Id.* (citing *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 547 (Fla. 1985) (citation omitted)).

A pen register is "a device which records or decodes electronic or other impulses which identify the numbers dialed or otherwise transmitted on the telephone line to which such device is attached." FLA. STAT. § 934.02(20) (Supp. 1988).

152. The court dispensed with the terminology familiar under fourth amendment analysis as follows:

The words "unreasonable" or "unwarranted" harken back to the federal standard of "reasonable expectation of privacy," which protects an individual's expectation of privacy only when society recognizes that it is reasonable to do so. The deliberate omission of such words from article I, section 23, makes it clear that the Florida right of privacy was intended to protect an individual's expectation of privacy regardless of whether society recognizes that expectation as reasonable.

Id. at 524 (Ehrlich, C.J., concurring specially) (citation omitted in original).

153. *In re T.W.*, 14 F.L.W. 497 (Fla. Oct. 5, 1989).

154. FLA. STAT. § 390.001(4)(A) (Supp. 1988). The statute provides, in part: "1. If the pregnant woman is under 18 years of age and unmarried, in addition to her written request [for an abortion], the physician shall obtain the written informed consent of a parent, custodian, or legal guardian of such unmarried minor" *Id.* (emphasis added).

155. 14 F.L.W. at 499 (quoting *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 547 (Fla. 1985)).

156. *Id.*

under the Florida Constitution and "state law grounds . . . cit[ing] federal precedent only to the extent" necessary to illuminate Florida law.¹⁵⁷

In a courageous posture the court has opened the door for use of the Florida Constitution to protect privacy interests, despite the erosion of such protection under the United States Constitution. The ramification of these recent decisions is unclear as applied to Riley's case on remand. One issue is clear: The court has extended an invitation to argue some privacy claims under article one, section twenty-three.¹⁵⁸

157. *Id.* at 501.

158. The court concluded its analysis in *Shaktman* by stating: "Personal and private information comes within the zone of privacy protected by article I, section 23 of the Florida Constitution." 14 F.L.W. at 524 (Ehrlich, C.J., concurring specially).

ANALOGY'S FAILURE SUPPORTS THE ADOPTION OF ARTICLE 2A OF THE UCC: A PROPOSED STATUTORY HOME FOR THE ORPHANED CONSUMER LESSEE

Sellers v. Griffin AMC Jeep, Inc., 526 So. 2d 147 (Fla. 1st DCA 1988).

Timothy and Kristi Sellers entered into a "Retail Lease Agreement" with Frank Griffin AMC Jeep, Inc.. Pursuant to the lease agreement, they took possession of a new Jeep Cherokee.¹ Several days after the Sellerses had taken possession of the vehicle, the motor exploded causing extensive damage to the Jeep's engine.² After the engine had been repaired, the appellants began to notice numerous other problems with the vehicle.³ Finally, after being in possession of the Jeep for eleven months, the Sellerses attempted to return the vehicle to the dealer and revoke their acceptance.⁴ The dealer refused to accept the vehicle's return.⁵ Appellants then filed suit against Frank Griffin and American Credit Corporation (AMCC), assignee of the lease agreement,⁶ and sought revocation of acceptance under Florida Statutes section 672.608,⁷ and 15 U.S.C. sections 2301-

1. 526 So. 2d 147, 148 (Fla. 1st DCA 1988).

2. *Id.* When the motor exploded, it sent large portions of the engine through the engine block. *Id.*

3. *Id.* In addition to the blown engine, the appellants discovered that: 1) the Jeep rattled, 2) leaks in the passenger compartment caused flooding, 3) the cruise control and gauges did not operate properly, 4) the seat covers were separating, 5) the air conditioning did not cool the vehicle, 6) the vehicle "choked out" in four-wheel-drive, and 7) the brakes began to fail. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* The lease agreement provided that upon execution of the contract by the parties, the lease would be immediately assigned to AMCC. The vehicle would be titled in the name of AMCC, and all payments were to be made to that corporation. *Id.* at 152-53.

7. In Count I of the complaint, it was alleged that the lease agreement was a "transaction in goods" within the meaning of FLA. STAT. § 672.102; that appellants were under the assumption that their vehicle would be free of substantial defects, but the vehicle did in fact have defects; that Griffin was unable to correct the defects; that the defects were nonconformities and constituted a breach of implied warranty; and that the breach substantially impaired the value of the Jeep. *Id.* at 148.

FLA. STAT. § 672.102 (1987), Florida's codification of the Uniform Commercial Code, provides:

Unless the context otherwise requires, this chapter applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction

2308, the Magnuson-Moss Warranty Act.⁸ The appellants alleged no other theory of relief.⁹

The trial court determined that the transaction was a closed-end lease¹⁰ and would therefore not fall within the scope of protection afforded by either Florida Statutes section 672.608 or the Magnuson-Moss Warranty Act.¹¹ As a result of this finding, the trial court refused to address the questions of whether there was a written or implied warranty and whether the disclaimers contained in the lease would defeat the appellants' claim.¹² Consequently, a summary judg-

nor does this Chapter impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.

FLA. STAT. § 672.608 (1987) provides:

(1) The buyer may revoke his acceptance of a lot or commercial unit whose nonconformity substantially impairs its value to him if he has accepted it;

(a) On the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or

(b) Without discovery of such nonconformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them.

8. 526 So. 2d at 148. The appellants alleged in Count II of their complaint that Griffin had made written warranties and breached both express and implied warranties that fell under the protection of the Magnuson-Moss Act. The appellants sought revocation of acceptance, recovery of their down payment, all the money paid AMCC, and consequential damages. In order to qualify for the Act's protection, the appellants relied on the language provided in 15 U.S.C. § 2301(3):

The term "consumer" means a buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of an implied or written warranty, and any other person who is entitled by the terms of such warranty (or service contract) or under applicable state law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract).

15 U.S.C. § 2301(3) (1982).

9. 526 So. 2d at 148.

10. *Id.* The agreement explicitly stated that it was a lease only, for a 48-month period, and with no present or future transfer of title from supplier to consumer. *Id.* at 148-49.

11. *Id.* The trial court found that either a present or future transfer of title had to occur in order to qualify for the protection offered under FLA. STAT. § 672.608 or the Magnuson-Moss Warranty Act. *Id.*

12. *Id.* The trial court stated that the question as to whether the disclaimers in the lease agreement would affect appellants' claim was an affirmative defense which was not necessary to address at the summary judgment stage. *Id.* at 149.

ment was granted in favor of the defendant.¹³

The *Sellers* appealed the grant of summary judgment to Florida's First District Court of Appeal. HELD: The appellants' lease agreement is not sufficiently analogous to the Uniform Commercial Code's definition of a sale in terms of a transfer of title. Therefore, the appellants are not afforded the relief available to a buyer of goods under Florida Statutes section 672.608.¹⁴ Additionally, the court held that the present transaction takes the form of a pure lease and is void of any intent to create a present or future sale as required to fall within the scope of the Magnuson-Moss Warranty Act.¹⁵

The *Sellers* case is significant because it focuses attention on three critical points regarding statutory protection afforded to consumer lessees in Florida. First, the *Sellers* court has ruled that Florida's currently adopted provisions of the Uniform Commercial Code and the Magnuson-Moss Warranty Act do not apply to the growing class of consumer leases. Second, the Florida courts that have attempted to extend the Uniform Commercial Code to leases through the use of analogy have achieved only a limited form of protection and an inconsistent theory of relief. Finally, as evidenced by the drafting of Article 2A¹⁶ of the Uniform Commercial Code, the growing trend in consumer leasing necessitates a comprehensive body of governing law. The *Sellers* decision has succeeded in narrowing the scope of protection afforded lessees of personal property to such an

13. *Id.* at 148. An order granting a partial summary judgment in favor of the defendant on the Magnuson-Moss claim was filed August 12, 1985. Order Granting Summary Judgment as to Count II of Amended Complaint, *Sellers v. Griffin* (Fla. 4th Cir. Ct. Aug. 12, 1985) (No. 85-1966-CA). An order granting final summary judgment in favor of defendant as to both counts was filed October 15, 1985. Final Summary Judgment, *Sellers v. Griffin* (Fla. 4th Cir. Ct. Oct. 15, 1985) (No. 85-1966-CA).

14. 526 So. 2d at 149. See *supra* note 7 for text of FLA. STAT. § 672.608.

15. *Id.* at 156.

16. Article 2A of the Uniform Commercial Code, along with conforming amendments to Articles 1 and 9, was officially presented on May 22, 1987.

As stated in section 2A-102: "This Article applies to any transaction, regardless of form, that creates a lease." U.C.C. § 2A-102 (1987).

Section 2A-103(1)(j) defines a lease:

"Lease" means a transfer of the right of possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.

Id. § 2A-103(1)(j).

As stated in the Foreword to Article 2A, "Such a statute has become especially appropriate with the exponential expansion of the number and scale of personal property lease transactions." *Id.* Art. 2A foreword.

extent that a large class of consumers are now excluded from statutory relief in Florida.

This Note will discuss Florida's treatment of consumer leases and personal property leases with regard to Article 2 of the Uniform Commercial Code and the Magnuson-Moss Warranty Act. The primary goal of this Note is to demonstrate that (1) the State's need for uniform and consistent results in determining the outcome of disputed lease transactions has not been accomplished through the implementation of current statutory or common law, and (2) the adoption of Article 2A by the Florida Legislature would provide a much needed uniform and consistent body of law in the field of personal property lease transactions.

GENERAL OVERVIEW OF THE LAW REGARDING PERSONAL PROPERTY LEASES AND CONSUMER LEASES

During the period that the UCC was originally being drafted, the leasing of personal property was a form of commercial transaction that very rarely occurred.¹⁷ However, in the years following the Code's adoption, the practice of leasing personal property has expanded to the point where it now encompasses a significant portion of today's market transactions.¹⁸ As a result of this growing trend and the lack of a corresponding uniform body of substantive law that specifically applies to personal property leases, the disputes that arise from these leases have been traditionally governed by the law of contracts and the emerging body of consumer laws.¹⁹ However, given the vague and confusing state of the common law in regard to personal property leases,²⁰ the courts have under certain circumstances begun to consider extending the scope of Article 2 of the UCC to this type of lease.²¹

Under a strict interpretation of Article 2, a personal property

17. Comment, *The Extension of Article 2 of The Uniform Commercial Code to Leases of Goods*, 12 TULSA L.J. 556, 561 & n.36 (1977).

18. See Boss, *History of Article 2A: A Lesson for Practitioner and Scholar Alike*, 39 ALA. L. REV. 575, 576-77 & nn.5-17 (1988).

19. Miller, *Consumer Leases Under Uniform Commercial Code Article 2A*, 39 ALA. L. REV. 957, 958 (1988). See also Boss, *supra* note 18, at 578. The primary federal consumer protection law governing lease disclosures is the Consumer Leasing Act, 15 U.S.C. § 1667 (1982), and the Florida anti-fraud law governing consumer lease transactions is the Florida Deceptive and Unfair Trade Practices Act, FLA. STAT. §§ 501.201-.213 (1987).

20. Boss, *Panacea or Nightmare? Leases in Article 2*, 64 B.U.L. REV. 39, 46, 78 (1984).

21. Comment, *supra* note 17, at 561.

lease cannot be considered a sale of goods within the scope of the UCC.²² Thus, the parties to such a lease will not be afforded the remedies that are available to buyers and sellers under the UCC.²³ The courts adopting this rule of strict interpretation have stated that any extension of the UCC's provisions to lease agreements must necessarily be the result of legislative action.²⁴

However, under the theory that nothing in Article 2 explicitly limits it to sales,²⁵ some courts have focused on a more liberal interpretation of the UCC and have applied Article 2 to certain leases by finding that such "transactions in goods" fall within the scope of section 2-102.²⁶ Additionally, in an attempt to avoid the conclusion that Article 2 applies only to sales, some courts have found that while a lease is not by its definition subject to Article 2, there are leases that are so similar to a sale that Article 2 will apply by analogy.²⁷ In making this analogy, the courts focus on various factors that have tradi-

22. Under FLA. STAT. § 672.105 (1987), "Goods means all things . . . which are movable at the time of identification to the contract for sale" Under FLA. STAT. § 672.106 (1987), "A sale consists in the passing of title from the seller to the buyer for a price."

23. 1 R. Anderson, *UNIFORM COMMERCIAL CODE* § 2-102:11 (3d ed. 1981). See also Note, *Disengaging Sales Law From the Sales Construct: A Proposal to Extend the Scope of Article 2 of the UCC*, 96 HARV. L. REV. 470, 476 & nn.34-42 (1982); *Briscoe's Foodland, Inc. v. Capital Assocs., Inc.*, 42 U.C.C. Rep. Serv. (Callaghan) 1234 (Miss. 1986) (absent a present or future sale, UCC inapplicable to equipment lease).

24. See Special Project, *Article Two Warranties in Commercial Transactions: An Update*, 72 CORNELL L. REV. 1159, 1166 n.15 (1987).

25. *Lousin, Heller & Co. Et Al. v. Convalescent Home Et Al.: Leases, Sales and the Scope of Article Two of the U.C.C. in Illinois*, 67 ILL. B.J. 468, 470 (1979). See also *supra* note 7 for the text of FLA. STAT. § 672.102.

26. Note, *supra* note 23, at 480 & nn.58-60. See also *Walter E. Heller & Co. v. Convalescent Home of the First Church of Deliverance*, 49 Ill. App. 3d 213, 8 Ill. Dec. 823, 365 N.E.2d 1285, 22 UCC Rep. Serv. (Callaghan) 574 (Ill. App. 1 Dist. 1977) (certain provisions in UCC will apply to an equipment lease); *Hertz Commercial Leasing Corp. v. Transportation Credit Clearing House*, 59 Misc. 2d 266, 298 N.Y.S.2d 392 (N.Y. Civ. Ct. 1969) ("transaction in goods" encompasses more than a sale), *rev'd on other grounds*, 674 Misc. 2d 910, 316 N.Y.S.2d 585 (N.Y. App. Term 1970).

27. See *J.L. Teel Co. v. Houston United Sales, Inc.*, 491 So. 2d 851 (Miss. 1986) (UCC § 2-608, regarding revocation of acceptance, Article 2 applicable to lease transaction); *Freeman v. Hubco Leasing, Inc.*, 324 So. 2d 462 (Ga. 1985) (revocation of acceptance under UCC is applicable where lease provides option to purchase); *Glenn Dick Equip. Co. v. Galey Constr., Inc.*, 75 Idaho 216, 541 P.2d 1184 (1975) (UCC § 2-316 applicable to lease through analogy to sale); *Walter E. Heller & Co. v. Convalescent Home of the First Church of Deliverance*, 49 Ill. App. 3d 213, 8 Ill. Dec. 823, 365 N.E.2d 1285, 22 UCC Rep. Serv. (Callaghan) 574 (Ill. App. 1 Dist. 1977) (Article 2 applies to lease for the purposes of § 2-302); *Barco Auto Leasing Corp. v. PSI Cosmetics*, 125 Misc. 2d 68, 478 N.Y.S.2d 505 (N.Y. City Civ. Ct. 1984) (lease analogous to sale). See also 1 R. Anderson, *supra* note 23, § 2-102:11; Note, *supra* note 23, at 477-78 & nn.43-51.

tionally defined the practical characteristics of a transaction in goods.²⁸ However, even though these courts are willing to find the UCC applicable to certain leases, these decisions are usually qualified by adopting a "selective applicability theory" which allows only certain provisions of the Code to apply in nonsale transactions.²⁹

FLORIDA'S TREATMENT OF CONSUMER LEASES AND PERSONAL PROPERTY LEASES UNDER THE UCC

The Florida Supreme Court explicitly endorsed a theory of selective applicability in *Johnson Equipment Co. v. United Airlines*.³⁰ In this case of first impression, the Florida Supreme Court addressed the issue of whether the warranty of fitness that arises under the UCC in regard to sales would be applicable to an equipment lease.³¹ The court found that the same reasons forwarded for imposing a warranty of fitness in sales appear to be present in leasing transactions.³² Additionally, given the growing trend in the leasing of personal property, it would be an important public policy to afford lessees the same protections given to consumers in a purchasing transaction.³³ However, while expanding the UCC warranty protections to consumer lessees, the court noted that such protection would only be granted in appropriate circumstances where the total commercial setting surrounding the transaction rendered it justifiable.³⁴ Furthermore, the court established that any expansion of the UCC's warranty provisions must be limited to those provisions that are not expressly confined to sales.³⁵

In a more liberal interpretation of the UCC's applicability to leases, Florida's Fourth District Court of Appeal decided in *Capital*

28. Comment, *supra* note 17, at 565. Some of the factors that the courts consider when finding a lease analogous to a sale are: (1) whether there is an option to purchase in the lease; (2) the length of the lease term relative to the object's useful life; (3) whether there was or will there be a passing of title; (4) who has the duty for repair and maintenance; (5) who bears the risk of loss; (6) who has the duty to pay licensing fees and property taxes; and (7) whether the lessor normally engages in the sale of such objects. *Id.* at 565-67 & nn.68-74.

29. See 1 R. Anderson, *supra* note 23, § 2-102:11. See also Note, *supra* note 23, at 479; *Hertz Commercial Leasing Corp.*, 59 Misc. 2d at —, 398 N.Y.S.2d at 397 (lease governed by UCC to the extent its provisions are applicable); Lousin, *supra* note 25, at 471-72 (court will not apply UCC in its totality, but only where specific provisions are applicable).

30. 238 So. 2d 98 (Fla. 1970).

31. *Id.* at 99.

32. *Id.* at 99-100.

33. *Id.* at 100.

34. *Id.*

35. *Id.*

Associates, Inc. v. Hudgens that a lease fell under the definition of "transaction in goods" and would thus be subject to the UCC's prohibition against unconscionable contracts.³⁶ The *Capital* court opined that even though Article 2 did not expressly apply to leases, the term "transaction" provided a broad enough scope to include leasing transactions within its definition.³⁷ Based on this finding, the court expanded the application of Florida Statutes section 672.302 to a commercial leasing agreement.³⁸ Thus, after *Capital*, it seemed that the trend in Florida courts was toward a more comprehensive application of the UCC to leasing transactions.³⁹ However, given the *Sellers* court's theory of selective applicability and its subsequent retreat to common law principles in deciding the case,⁴⁰ Florida's treatment of the law governing lease transactions can only be described as inconsistent and uncertain.

THE APPLICABILITY OF THE MAGNUSON-MOSS WARRANTY ACT TO CONSUMER LEASES

Congress enacted the Magnuson-Moss Warranty Act⁴¹ with the intention of creating a private cause of action for a consumer⁴² who is injured through the violation of any written⁴³ or implied⁴⁴ warranty

36. 455 So. 2d 651 (Fla. 4th DCA 1984). See FLA. STAT. § 672.302 (1987) which provides:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

37. 455 So. 2d at 653.

38. *Id.*

39. See *supra* notes 26-29 and accompanying text for trends in other jurisdictions.

40. See *infra* note 71 and accompanying text.

41. 15 U.S.C. §§ 2301-2310 (1982).

42. See *supra* note 8 for a definition of consumer under § 2301(3) of the Magnuson-Moss Act.

43. See 15 U.S.C. § 2301(6) (1982) under which:

The term "written warranty" means -

(A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or

(B) any undertaking in writing in connection with the sale by a supplier of a

subject to the Act's provisions.⁴⁵ The Act coexists with and enhances the established state warranty laws affecting consumer transactions.⁴⁶ Also, it serves to expand the consumer protections afforded under the Uniform Commercial Code by prohibiting implied warranty disclaimers and authorizing the recovery of attorney fees for actions brought under the Act.⁴⁷

In determining whether the Act applies to a lease of personal property, the courts have developed a methodology quite similar to that which has been previously discussed in regard to the Uniform Commercial Code. Some courts have applied a strict interpretation of the Act and determined that a consumer lease does not fall within the scope of the statute because there is an absence of sale.⁴⁸ However, in some instances, an alternative to the theory of strict interpretation has been implemented where a consumer lease is analogous to a sale.⁴⁹ Under this theory, where a lease exhibits what a court considers to be the fundamental characteristics of a sale, that lease will fall within the regulatory guidelines of the Act by analogy.⁵⁰

In determining the applicability of the Act to a specific lease, the

consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking, which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

44. See 15 U.S.C. § 2301(7) (1982) under which, "The term 'implied warranty' means an implied warranty arising under state law (as modified by sections 2308 and 2304(a) of this title) in connection with the sale by a supplier of a consumer product."

45. See *Skelton v. General Motors Corp.*, 660 F.2d 311, 319 (7th Cir. 1981).

46. See *Schroeder, Private Actions Under the Magnuson-Moss Warranty Act*, 66 CALIF. L. REV. 1, 35-36 (1978).

47. See *id.*

48. See *Barco Auto Leasing Corp. v. PSI Cosmetics, Inc.*, 125 Misc. 2d 68, 478 N.Y.S.2d 505, 508-09 (N.Y. City Civ. Ct. 1984) (Act applies only in connection with a sale to a buyer); see also *Corral v. Rollins Protective Servs.*, 240 Kan. 678, 732 P.2d 1260, 1267 (1987) ("Act does not apply to leases of consumer products since a written warranty under the Act arises in connection with the sale of a consumer product"); *Schroeder, supra* note 46, at 11 n.56. But see *Freeman v. Hubco Leasing, Inc.*, 253 Ga. 698, 324 S.E.2d 462, 468 (Ga. 1985) (under Georgia law a lease with an option to purchase constitutes a sale; Act would therefore apply under this definition).

49. See *Henderson v. Benson-Hartman Motors, Inc.*, 41 U.C.C. Rep. Serv. (Callaghan) 782 (1985) (Magnuson-Moss Act applies by analogy where lease had most of the characteristics of a sale); see also *Becker & Co. v. Kessler Motor Cars*, 135 Misc. 2d 1069, 517 N.Y.S.2d 692 (N.Y. Sup. Ct. 1987) (terms and conditions of lease were no different than those under a conditional sales contract); but see *Corral v. Rollins Protective Servs.*, 240 Kan. 678, 732 P.2d 1260 (1987) (lease not analogous to sale for purposes of Magnuson-Moss Act).

50. See *supra* note 49.

threshold issue for the court is whether the lessee can be defined as a consumer under section 2301(3) of the Act.⁵¹ If this question is answered in the affirmative, and the existence of an implied warranty⁵² arising from a written warranty is established, the warrantor is barred from making any modification or disclaimer of such implied warranty.⁵³ The Act, taken in conjunction with the Uniform Commercial Code, forms the basis for the warranty protections currently available to consumer lessees under statutory law.⁵⁴ As the issue had not been directly addressed prior to the *Sellers* decision, there is a conspicuous absence of any substantive guidelines for determining the applicability of the Act to consumer leases in Florida.

THE CONSUMER LESSEE AND ARTICLE 2A OF THE UNIFORM COMMERCIAL CODE

In response to the inconsistencies in the law regarding personal property leases and consumer leases, the National Conference of Commissioners on Uniform State Laws and the American Law Institute have drafted and adopted Article 2A, with conforming amendments to Articles 1 and 9 of the Uniform Commercial Code.⁵⁵ The

51. See *supra* note 8 for text of § 2301(3).

52. See *supra* note 44.

53. 15 U.S.C. § 2308 (1982), provides that:

(a) No supplier may disclaim or modify (except as provided in subsection (b) of this section) any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product, or (2) at the time of the sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.

(b) For purposes of this chapter (other than section 2304(a)(2) of this title), implied warranties may be limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty.

(c) A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this chapter and State law.

54. See generally Schroeder, *supra* note 46.

55. See U.C.C. Article 2A foreword (reprinted in SELECTED COMMERCIAL STATUTES 210 (West ed. 1988)) ("The legal rules and concepts derived from the [UCC Article 2 and the common law] imperfectly fit a transaction that involves personal property rather than realty, and a lease rather than either a sale or a security interest as such. A statute directly addressing the personal property lease is therefore appropriate"). See also Cooper, *Identifying a Personal Property Lease Under the UCC*, 49 OHIO ST. L.J. 195, 201 (1988); Boss, *supra* note 18. While an analysis of U.C.C. § 1-201(37) (1987) is outside the scope of this Note, for a discussion of the implications of Article 2A in regard to "security interests," see generally Cooper, *supra*; see also Naples, *A Review and Analysis of the New Article 2A-Leases Amendment to the U.C.C. and its Impact on Secured Creditors, Equipment and Finance Lessors*, 93 COMM. L.J. 342 (1988).

drafters of Article 2A codified the law in regard to personal property leases, with an intent to alleviate the uncertainty presently surrounding such transactions.⁵⁶ In doing so, they created an article that "applies to any transaction, regardless of form, that creates a lease."⁵⁷

While in theory the drafters of Article 2A created an entirely new body of law, many of the UCC's provisions under Article 2 were carried over to Article 2A and modified to reflect the differences in leasing terminology and practices.⁵⁸ The drafters provided that the text of the official comments to those provisions which were carried over from Article 2 would be incorporated by reference.⁵⁹ Additionally, any case law applicable to those sections carried over from Article 2 should be deemed persuasive but not binding on courts deciding similar questions in regard to leases.⁶⁰

Currently, only Oklahoma and California have adopted Article 2A.⁶¹ While these states immediately stand as the sole sources of a developing body of interpretive case law, the full implications of Article 2A will not be totally clear for some time. However, given the fact that Article 2A represents such a comprehensive body of law, it can

56. See U.C.C. § 2A-101 official comment (1987).

57. See *supra* note 16 for text of § 2A-102. However, the scope of the Article is limited to leases in personal property through the language in § 2A-103(j), which states that a "[l]ease means a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease." See U.C.C. § 2A-103(j) (1987). See *supra* note 22 for FLA. STAT. § 672.105's definition of "goods."

58. U.C.C. § 2A-101 official comment (1987).

59. *Id.*

60. *Id.*

61. See OKLA. STAT. tit. 12A, § 2A-101 to § 2A-531 (Supp. 1988) (approved March 30, 1988, effective November 1, 1988); CAL. COM. CODE § 10101 to § 10600 (West Supp. 1989) (operative January 1, 1990). See also Boss, *supra* note 18, at 594 n.89 (identifying Connecticut, Massachusetts, Minnesota, New Hampshire, Colorado, Illinois, Rhode Island, and Utah as states contemplating adopting Article 2A). Oklahoma essentially adopted Article 2A as proposed by the drafters, and thus furthered the UCC's main objective of uniformity among the states. On the other hand, based upon the recommendation of the state's Article 2A revisionary committee, California has adopted an individually tailored model of Article 2A. For an excellent discussion of both the implications, history, and general policies of Article 2A, and the substantive changes in the California model, see generally *Symposium: Article 2A of the Uniform Commercial Code*, 39 ALA. L. REV. 559 (1988).

Since the date that this Note was originally drafted, four other states (Minnesota, Nevada, South Dakota and Oregon) have adopted Article 2A. See Minn. Stat. Ann. §§ 336.2A-101 to -531 (West 1989) (effective January 1, 1990); Nev. Rev. Stat. Ann. §§ 104A.010 to .2531 (Michie 1989) (effective January 1, 1990); S.D. Codified Laws Ann. §§ 57A-2A-101 to -531 (1990) (effective July 1, 1990); 1989 Or. Laws Adv. Sh. No. 5, Ch. 676 (effective September 1, 1991, conforming amendment to Or. Stat. § 71.2010 effective October 1, 1989).

be expected that the "uniform" codification of leasing laws will result in the same consistency that has been experienced with regard to sale transactions through the implementation of Article 2.

THE SELLERS COURT'S ANALYSIS

The *Sellers* court stated that the critical issue on review was whether the lease agreement executed between Sellers and Griffin was subject to Florida Statutes section 672.608 or the Magnuson-Moss Warranty Act as a sale transaction within the meaning of those two statutes.⁶² Addressing the issue relating to section 672.608, the court found that there was substantial authority supporting the application of this section of the UCC to the buyer of a new car who was seeking revocation of acceptance under similar circumstances.⁶³ Additionally, the court resolved that the buyer of a new automobile was entitled to assume that his new car would be free of substantial defects.⁶⁴ Consistent with a consumer's right to an automobile free of substantial defects, the court pointed out that a liberal construction would be given to the UCC where such defects were present, and a warranty disclaimer that was not conspicuous or made part of the bargain would not serve to defeat the consumer's revocation of acceptance in such instances.⁶⁵

After recognizing that the Sellerses would probably hold the same expectations as a new car buyer, and after also recognizing that Florida courts favored a liberal construction of the UCC in order to provide remedies to purchasers of defective new cars, the *Sellers* court turned its attention to whether its construction of section 672.608 would allow the appellants the same remedies afforded a purchaser.⁶⁶ The court determined that while other courts had applied some sections of the UCC to leases,⁶⁷ there was an absence in this

62. 526 So. 2d at 149. See *supra* notes 7-8 for text of FLA. STAT. §§ 672.608, 672.102, and 15 U.S.C. § 2301(3).

63. 526 So. 2d at 149 (citing cases).

64. *Id.* at 148-50 (citing *Rehurek v. Chrysler Credit Corp.*, 262 So. 2d 452 (Fla. 2d DCA 1972)).

65. *Id.* at 149-50.

66. *Id.* at 150. See *supra* note 7 for the text of FLA. STAT. § 672.102. The court in reviewing Count I of appellants' claim found that the "unless the context otherwise requires" clause relating to "transactions in goods" dealt exclusively with the present or future sale of goods as evidenced in § 672.106(1), and it resolved that the passing of title was a necessary element of a sale. *Id.*

67. *Id.* at 151. The court collected cases that had applied Article 2 of the UCC to lease transactions, including § 2-302 (unconscionable contracts) and §§ 2-314, -315, and -316 (war-

state of any established criteria regarding the applicability of the Code to a lease transaction.⁶⁸ In light of this fact, the court reviewed decisions in other jurisdictions and formulated a list of factors that had to be satisfied in order to treat a lease transaction as a sale under the UCC.⁶⁹

Through a comparative analysis of these incorporated criteria and the Sellerses' lease agreement, the court found that even though some of the factors suggested the lease should be analogous to a sale, there was insufficient cause to treat the transaction as a sale under the provisions of the UCC.⁷⁰ Additionally, the court retreated to a strict contractual interpretation and held that the appellants were bound by the "unambiguous expression of intent to create only a lease."⁷¹ However, while bowing to legislative authority and finding that any extension of the UCC by analogy in the present case was outside the parameters of judicial power, the court added the unequivocal recommendation that a transaction of this nature should be made subject to the provisions of the UCC through legislative action.⁷²

ranty provisions). *Id.*

68. *Id.*

69. *Id.* The court cited a collection of cases that established the elements of a sale as: (1) whether the total amount of rental payments is sufficient to amortize the object's value with interest; (2) whether the term of the lease covers the useful life of the object, leaving it without residual value; (3) whether there is an option to purchase at a nominal cost; (4) whether the lessee is responsible for incidents of ownership; (5) whether the lessee bears the risk of loss or damage; (6) the nature of the lessor's business; (7) whether the lessee is responsible for taxes; (8) whether the lessee is responsible for licensing fees; (9) whether there is an acceleration clause; and (10) whether the lessee is required to pay a substantial security deposit. While these factors were used by other courts to qualify a lease under Article 9 of the UCC, the court accepted them as valid criteria for establishing a lease as a sale under Article 2. *Id.*

70. *Id.* at 152-55. The court's comparison led to the conclusion that: (1) the total amount of the rental payments was apparently sufficient to amortize the value of the vehicle plus interest, but the vehicle would probably have some residual value after the leasing period; (2) the lease did not cover the entire useful life of the vehicle; (3) there was no option to purchase the vehicle during or at the end of the lease, however, nothing precluded the Sellerses from purchasing the Jeep at the end of the lease; (4) the Sellerses were responsible for the incidents of ownership such as insurance and repairs; (5) the Sellerses bore the risk of loss; (6) the nature of Griffin's business was to sell or lease vehicles; (7) the Sellerses were responsible for paying sales taxes and other taxes incident to ownership; (8) the Sellerses were required to pay all licensing fees and title transfer fees; (9) the agreement permitted an acceleration of rental payment for a default; and (10) the Sellerses had been required to make a \$250.00 refundable security deposit in addition to the \$2,476.00 nonrefundable trade-in allowance for their old car. *Id.*

71. *Id.* at 155.

72. *Id.* at 156.

In considering the Sellerses' claim that the Magnuson-Moss Warranty Act should apply to their lease agreement, the court applied a similar analysis.⁷³ Consistent with its initial finding in regard to the applicability of the UCC, the court held that while the Act is designed to protect a broad spectrum of consumers, the explicit language of section 2301(3) bars its application to the Sellerses' lease agreement because there was no initial sale directly related to the lease.⁷⁴ Additionally, the court held that the lease agreement did not bear a significant relationship to a sale, and it would amount to nothing less than judicial legislation for the court to extend coverage to the transaction.⁷⁵ However, in spite of this finding, the court went on to state that given the current market structure, the legislature should make the principles of the Magnuson-Moss Warranty Act applicable to lease transactions of this nature.⁷⁶

THE CONSUMER LESSEE'S DILEMMA

The case of *Sellers v. Griffin* represents a concrete example of the presently confused state of the law regarding consumer lease transactions. The *Sellers* court was confronted with an appellant claiming revocation of acceptance and breach of implied warranties under Article 2 of Florida's Uniform Commercial Code and the Magnuson-Moss Warranty Act.⁷⁷ In attempting to resolve the issues, the court unfortunately found itself trapped between outdated common law principles and an inconsistent body of statutory interpretation.

The *Sellers* court began its analysis with a strict interpretation of the UCC and found that (1) Florida Statutes chapter 672 expressly applies to sales,⁷⁸ (2) Florida Statutes section 672.608 applies only to transactions involving a buyer and a seller,⁷⁹ and (3) the passing of

73. *Id.*

74. *Id.* The court determined the appellants' claim would not apply by looking to the express language of the statute. See *supra* note 8 for text of § 2301(3). The court found that § 2301(3) "speaks in terms of an initial sale to a buyer in which warranties are made by the seller, and as such, it does not apply to a pure lease of automobiles or other consumer goods unless the lease bears a significant relationship to an actual purchase and sale." *Id.* at 156 (citing *Barco Auto Leasing, Inc. v. PSI Cosmetics, Inc.*, 125 Misc. 2d 68, 478 N.Y.S.2d 505 (N.Y. City Civ. Ct. 1984).

75. *Id.*

76. *Id.*

77. See *supra* notes 7-8.

78. 526 So. 2d at 150.

79. *Id.* See FLA. STAT. § 672.103(1)(d) (1987) ("Seller" means a person who sells or con-

title is an essential element of the sale required under section 672.608.⁸⁰ Given the *Sellers* court's interpretation of the UCC and its finding that the unambiguous intent of the parties was to create a lease and not a sale,⁸¹ and reasonably anticipating the court's application of the principle that the Code is "self-explanatory,"⁸² the *Sellers* should have expected very little in the way of relief under Article 2.

However, due to the unsettled state of the law in regard to consumer leases, and notwithstanding its initial interpretation of the UCC, the *Sellers* court took notice of the fact that other Florida courts have held that certain lease agreements were within the scope of Article 2.⁸³ In acknowledging that Article 2 could apply to consumer leases under a broad interpretation of "transactions in goods,"⁸⁴ or by an analogy to a sale, the *Sellers* court recognized that Florida did not have established legal criteria for deciding the issue.⁸⁵ This court responded to the problem by ascertaining whether the "requisite incidents of a sale [were] present" through the application of factors considered in other states.⁸⁶ Unsurprisingly, the result of this confusing comparative analysis was that some factors indicated the transaction was a sale, while other factors indicated the transaction was only a lease.⁸⁷

It can be assumed that the court went through the aforementioned analysis because it was aware of the fact that the consumer lessee suffers from a lack of substantive protection under Florida's commercial statutes. However, ultimately, and seemingly in spite of its alternative analysis, the *Sellers* court held that the UCC could not apply to this transaction because the lack of a transfer of title was contrary to the UCC definition of a sale, and the appellants were bound by the "unambiguous language in the written agreement [stat-

tracts to sell goods).

80. 526 So. 2d at 150.

81. *Id.* at 155.

82. See D. King, C. Kuenzel & B. Stone, *COMMERCIAL TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* 7 (4th ed. 1987).

83. See *Capital Assocs., Inc. v. Hudgens*, 455 So. 2d 651 (Fla. 4th DCA 1984). See also *Xerographic Supplies Corp. v. Hertz Commercial Leasing Corp.*, 386 So. 2d 299 (Fla. 3d DCA 1980).

84. 526 So. 2d at 150-51. See *supra* note 7 for text of FLA. STAT. § 672.102.

85. *Id.* at 151.

86. *Id.* See *supra* note 69 for factors used in determining applicability of Article 2. See also *supra* note 28.

87. *Id.* at 152-55. See *supra* notes 69-70 for comparative analysis.

ing] that this was a lease and not a sale.”⁸⁸ In following this line of reasoning, the court enforced its initial strict interpretation of the UCC in direct conflict with earlier Florida precedent,⁸⁹ and retreated to an outdated concept of the necessity of passage of title.⁹⁰

Taken in its totality, the *Sellers* court recognized or alternately applied (1) the principles of outdated common law regarding commercial transactions and the necessity of locating title, (2) a combination of the theories of selective applicability and a liberal interpretation of “transactions in goods,” and (3) a strict construction of the Uniform Commercial Code in regard to its applicability to consumer leases. The *Sellers* court’s decision has resulted in an inequitable and short-sighted solution to a problem that will continue to plague consumer lessees. By retreating to a pre-Code title concept and strict contractual interpretation, this court has effectively excluded lessees of consumer goods from the protections afforded by the primary piece of state legislation designed to regulate commercial transactions.

COULD SELLERS HAVE BEEN DECIDED DIFFERENTLY UNDER ARTICLE 2?

Under pre-Code law, a lessor of goods could provide warranties for the goods he leased.⁹¹ The drafters of the UCC provided the vehicle for applying the warranty provisions of the Code to leases in comment 2 of section 2-313.⁹² In that comment, the invitation to extend

88. *Id.* at 155.

89. See *supra* notes 36-38 and accompanying text.

90. See Note, *supra* note 23, at 471-75. In pre-Code sales law, the location of title was essential to making a decision regarding the risk of loss, the seller’s right to recover, a buyer’s right to goods, insurance issues, taxes, creditor’s rights, and the rights of other interested third parties. *Id.* See also Comment, *supra* note 17, at 559 (1977) (pre-Code title theory possessed inherent practical problems); U.C.C. § 2-401 (1987) (“[e]ach provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provisions refers to such title”); *id.* § 2-401 comment 1 (“[t]his Article 2 deals with the issues between seller and buyer in terms of step by step performance or non-performance under the contract for sale and not in terms of whether or not ‘title’ to the goods has passed”); *id.* § 2-101 official comment (1987) (“[t]he legal consequences [of Article 2] are stated as following directly from the contract [for sale] and action taken under it without resorting to the idea of when property or title passed or was to pass as being the determinative factor”).

91. See Lousin, *supra* note 25, at 478.

92. See U.C.C. § 2-313 comment 2 (1987) which provides that:

Although this section is limited in its scope and direct purpose to warranties made by the seller to the buyer as part of a contract for sale, the warranty sec-

the Code's principles is apparent in that it specifically mentions bailments for hire and that the "policies of this Act may offer useful guidance in dealing with further cases as they arise."⁹³ Additionally, comment 4 of section 2-313 suggests that the agreement should be measured by the guidepost of "good faith" and an appreciation of the fact that in all probability, a bargain for consideration will not be made if it is known to be based on a "pseudo-obligation."⁹⁴ While the *Sellers* court acknowledged that the UCC should apply to this leasing transaction, it decided to follow a path of restraint and leave a solution of the problem up to the Florida legislature.⁹⁵ However, the invitation offered through the comments in section 2-313, when taken in conjunction with the Code's rebuking of title transfer as the determinative factor in establishing legal consequences,⁹⁶ should have persuaded the court to at least expand the application of the warranty provisions of the UCC to a lease transaction of this kind. Additionally, by accepting this invitation, the court would have allowed the appellants' claim of revocation of acceptance to be decided along the modern principles of uniform commercial law.

Further, a strong case can be made that the conduct of the dealer was oppressive and overreaching. The *Sellers* court recognized and discussed other Florida courts that have imposed upon consumer lease transactions the remedies available under Florida Statutes section 672.302.⁹⁷ Accordingly, the dealer's disclaimer may have been a subject for the court's inquiry. As stated in comment 11 of section 2-314, in a transaction where the warranty of merchantability is normally implied and commonly taken for granted, "its exclusion from a contract is a matter threatening surprise and therefore requiring special precaution."⁹⁸ While the appellant did not allege that there was

tions of this Article are not designed in any way to disturb those lines of case law growth which have recognized that warranties need not be confined either to sales contracts or to the direct parties to such a contract. They may arise in other appropriate circumstances such as the case of bailments for hire, whether such bailment is itself the main contract or is merely a supplying of containers under a contract for the sale of their contents. . . . Beyond that, the matter is left to the case law with the intention that the policies of this Act may offer useful guidance in dealing with further cases as they arise.

93. *See id.*

94. *See id.* comment 4.

95. 526 So. 2d at 156.

96. *See* U.C.C. § 2-101 official comment (1987). *See also supra* note 90.

97. *See supra* note 83. *See also supra* note 36 for text of FLA. STAT. § 672.302.

98. *See* U.C.C. § 2-314 comment 11 (1987).

unconscionable conduct,⁹⁹ the court may as a matter of law find that a contract or clause of any contract was unconscionable at the time of the making of such contract.¹⁰⁰ The *Sellers* court could have chosen this alternative and found unconscionability based on the dealer's disclaiming all implied warranties of merchantability and fitness of purpose for a brand new four-wheel-drive Jeep. The court then would have had the requisite discretion to take such action as would have avoided any unconscionable result.¹⁰¹

*A COMPELLING CASE TO EXPAND THE PROTECTIONS
AFFORDED UNDER THE MAGNUSON-MOSS WARRANTY
ACT TO LEASING TRANSACTIONS*

In determining whether the Magnuson-Moss Warranty Act applied to this leasing transaction, the *Sellers* court looked to the language of section 2301(3).¹⁰² If the appellants' qualified as consumers under this section, the dealer would be barred from disclaiming any implied warranties arising from a written warranty.¹⁰³ The court found that the Act necessarily required an initial sale to a buyer unless the lease was sufficiently analogous to an actual purchase and sale.¹⁰⁴ Additionally, the court found that the present lease was in the form of a pure lease because it did not manifest an intent to create a present or future sale.¹⁰⁵ Therefore, the court found the Act inapplicable to the Sellerses' lease transaction and stated that the appellants' failure to cite any decisions in which the Magnuson-Moss Warranty Act had been applied to leases was due cause not to engage in "judicial legislation."¹⁰⁶ However, it is ironic that in a mistaken attempt to avoid "judicial legislation," the court effectively barred a broad class of consumers from the protection of a federal warranty statute that is intended to encompass a transaction of this very nature.

There is judicial authority that would support an extension of

99. See *supra* notes 6-9 and accompanying text.

100. See *supra* note 36 for text of FLA. STAT. § 672.302.

101. *Id.*

102. 526 So. 2d at 156. See *supra* note 8 for text of 15 U.S.C. § 2301(3).

103. See 15 U.S.C. § 2308(a) (1982).

104. 526 So. 2d at 156 (citing *Barco Auto Leasing Corp. v. PSI Cosmetics, Inc.*, 125 Misc. 2d 68, 478 N.Y.S.2d 505 (N.Y. City Civ. Ct. 1984)).

105. *Id.*

106. *Id.*

the Magnuson-Moss Warranty Act to leasing transactions.¹⁰⁷ Courts have ruled that where an automobile is transferred to a lessee during the life of the initial warranty, or where the dealer is under an obligation to repair the vehicle under the manufacturer's warranty, the manufacturer's written warranty has been adopted and the lessee is entitled to the Act's prohibition against any disclaimer of implied warranties arising under the written warranty.¹⁰⁸ While *Sellers* is a case of first impression and therefore not in conflict with any Florida court decisions, the *Sellers* court's finding that the Act does not apply to a lease is inconsistent with other jurisdictions.¹⁰⁹

In *Sellers*, the court noted that the dealer had purchased the Jeep wholesale from the manufacturer.¹¹⁰ Additionally, the court stated that the lease transaction "carried the warranties offered by the manufacturer as well as the warranties imposed by law" on both the manufacturer and the dealer.¹¹¹ In recognizing that the Magnuson-Moss Warranty Act was designed to protect a broad range of consumers, the *Sellers* court ended its analysis of the issue by stating that "[o]bviously, in today's market place, a compelling case can be made for applying the principles of the Magnuson-Moss Warranty Act to transactions of the type before us, but that remains a matter for legislative decision."¹¹² However, it appears from the opinion that there was a clear factual basis for determining that the Act applied to this lease transaction, and the court's call for additional legislative action in regard to the Magnuson-Moss Warranty Act may amount to unnecessary judicial dumping.

*LEGISLATIVE ENACTMENT OF ARTICLE 2A OF THE
UNIFORM COMMERCIAL CODE AND A CONSISTENT
APPROACH TO A LEASE OF PERSONAL PROPERTY*

Leasing agreements are currently governed by a patchwork body

107. See *Business Modeling Techniques v. General Motors Corp.*, 123 Misc. 2d 605, 474 N.Y.S.2d 258 (N.Y. Sup. Ct. 1984) (right to sue is given to person in possession of product while initial warranty is in effect, even though that person is not the buyer of the product). See also *Freeman v. Hubco Leasing, Inc.*, 253 Ga. 698, 324 S.E.2d 462 (1985) (Act applies where dealer is under obligation to repair leased vehicle and does so; manufacturer's warranty is transmitted to and adopted by dealer).

108. See *supra* note 107.

109. See *supra* note 107.

110. 526 So. 2d at 154.

111. *Id.*

112. *Id.* at 156.

of laws that include some of the elements of common law, Article 2 of the Uniform Commercial Code, and the Magnuson-Moss Warranty Act.¹¹³ Because of the lack of comprehensive regulative guidelines, the decisions involving disputed lease transactions have resulted in contradictory and inconsistent adjudications in the courts.¹¹⁴ As evidenced by the previous analysis, a buyer of goods in a sale transaction receives all the rights and privileges of the Florida commercial statutes and the Magnuson-Moss Warranty Act.¹¹⁵ Yet, a consumer lessee engaging in a similar transaction, lacking only an actual sale of goods and transfer of title, is denied those same statutory protections afforded to the buyer.

The opportunity has presented itself to correct this legal quagmire and substantively change the inconsistent and uncertain area of leasing law through an application of the same principles and policy considerations that initially resulted in a codification of commercial law in Article 2.¹¹⁶ By adopting Article 2A of the Uniform Commercial Code, the Florida legislature could bring consumer leases under a unified and modern body of state law that would give lessees the rights they deserve, and also significantly reduce the uncertainty that surrounds rights and obligations created through a lease transaction.

Courts and commentators recognize that sales and leases are distinct transactions.¹¹⁷ The UCC was purposely created to "simplify, clarify, and modernize the law governing commercial transactions, [and] to make uniform the law among various jurisdictions," and Florida adopted it for those reasons.¹¹⁸ Consistent with the original purposes of the UCC and in furtherance of those objectives, the National Conference of Commissioners on Uniform State Laws and the American Law Institute have drafted and adopted the new Article 2A of the Uniform Commercial Code.¹¹⁹ Article 2A codifies the law in regard to leases of goods in the same manner as Article 2 codified the law in regard to the sale of goods.

The *Sellers* court made two direct appeals to the Florida legislature to solve what they saw as an anomalous situation in regard to a

113. Boss, *supra* note 20, at 41.

114. *Id.* at 78-79.

115. See *Tom Bush Volkswagen, Inc. v. Kuntz*, 429 So. 2d 398 (Fla. 1st DCA 1983).
See also *Maserati Autos, Inc. v. Caplan*, 522 So. 2d 993 (Fla. 3d DCA 1988).

116. See FLA. STAT. § 671-102(2)(a),(c) (1987).

117. See *Cooper*, *supra* note 55, at 207.

118. See FLA. STAT. § 671-102(2)(a),(c) (1987).

119. See *supra* note 16. See also Boss, *supra* note 18, at 576.

lack of statutory protection afforded consumers engaged in lease transactions.¹²⁰ Given the current trend of growth in the leasing of goods,¹²¹ and the fact that nothing in Article 2 of the Uniform Commercial Code defines the rights and obligations of lessees and lessors of personal goods,¹²² an application of Article 2A to the facts in *Sellers* would reveal its practical and legal value.

In *Sellers*, the appellants entered into a four-year leasing agreement through which they took possession of a new Jeep and were to make monthly rental payments to AMCC.¹²³ The leasing agreement contained a disclaimer of all express and implied warranties of merchantability, suitability, and fitness for purpose of the vehicle.¹²⁴ Upon taking possession of the vehicle, numerous defects were discovered that caused the appellants to attempt a revocation of their acceptance of the vehicle.¹²⁵ Both the trial and appellate court ruled that the provisions of Florida Statutes section 672.608 were inapplicable to this lease, and therefore both courts failed to address the critical issues of whether the revocation of acceptance or disclaimer of warranties were effective.¹²⁶

Under Article 2A of the Uniform Commercial Code, the consumer lease transaction in *Sellers* would have been subject to all provisions contained therein.¹²⁷ Thus, the need for any attempted implementation of the inconsistent theory that a lease is analogous to a sale, any discussion of the selective applicability of statutory provisions, or any reversion to the antiquated principles of the common law would be unnecessary. By creating a new Article directly concerned with the obligations and rights of parties engaged in leasing transactions, the drafters of Article 2A have furthered the principle that "commercial transactions" should be a single subject of the

120. 526 So. 2d at 156.

121. See *supra* note 18 and accompanying text.

122. See Cooper, *supra* note 55, at 202.

123. 526 So. 2d at 148.

124. Answer Brief for Appellee Frank Griffin AMC Jeep, Inc., app. at 33, *Sellers v. Griffin AMC Jeep, Inc.*, 526 So. 2d 147 (Fla. 1st DCA 1988) (No. BJ-373).

125. See *supra* notes 2-7.

126. 526 So. 2d at 149.

127. See *supra* note 16 for the scope of Article 2A. See U.C.C. § 2A-103(1)(e) (1987) for a definition of consumer lease and § 2A-103(1)(g) for the definition of a finance lease. Both the consumer lessor and the finance lessor are held to § 2A-210's express warranties and § 2A-212's warranties of title. However, the distinctions made in the definitional section are important because §§ 2A-212, -213 explicitly provide that the finance lessor will not be held by this statute as impliedly warranting a good's merchantability or fitness of purpose.

law.¹²⁸

The five critical issues that should have been addressed in the *Sellers* case were (1) whether there were any written or implied warranties arising from the transaction, (2) whether the dealer had breached any of those written or implied warranties, (3) whether the dealer's disclaimer of all implied warranties would serve as an available affirmative defense, (4) whether there had been a valid revocation of acceptance, and (5) whether the disparity in bargaining power or the dealer's conduct had resulted in an unconscionable contract or clause in the contract. The *Sellers* court did not address these issues because Florida does not currently have a comprehensive commercial statute governing the lease of goods.¹²⁹ Consequently, the *Sellerses* were deprived of an opportunity to have their dispute settled under a cohesive body of law. The result of this decision is that people like the *Sellerses* are left helpless and without a remedy simply because they have agreed to a lease transaction and not a sale. However, an application of Article 2A would have provided the statutory law necessary for the court to resolve the issues in a fair and objective manner.

First, UCC section 2A-517 provides that a lessee may revoke his acceptance where a commercial unit's "non-conformity substantially impairs its value to the lessee."¹³⁰ This section has been carried over

128. See U.C.C. general comment (1987).

129. In 1986, the Florida legislature amended Florida Statutes ch. 681, the Motor Vehicle Warranty Enforcement Act (also known as Florida's Lemon Law), to govern automobile sales and leases that are covered under the manufacturer's "express warranty." FLA. STAT. § 681.102(3) (1987). However, pursuant to § 681.102(4), "express warranty" means a written affirmation of fact or promise made in connection with the transaction, and for the purposes of §§ 681.10-108 express warranties do not include implied warranties. The legislature's intent in making the amendment was to provide remedies for the lessee who received a nonconforming vehicle in breach of an express warranty. It did not otherwise expand the rights or remedies available to a consumer under any other law. FLA. STAT. § 681.101 (1987). While this statute seeks to provide some remedies for a specific class of consumer lessee, it falls far short of the broad remedies mandated by the harsh realities facing today's consumer lessee.

130. U.C.C. § 2A-517 (1987), provides:

- (1) A lessee may revoke acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to the lessee if he [or she] has accepted it:
 - (a) except in the case of a finance lease, on the reasonable assumption that its nonconformity would be cured and it has not been seasonably cured; or
 - (b) without discovery of the non-conformity if the lessee's acceptance was reasonably induced either by the lessor's assurances or, except in the case of finance leases, by the difficulty of discovery before acceptance.
- (2) Revocation of acceptance must occur within a reasonable time after the lessee discovers or should have discovered the grounds for it and before any substantial

from Article 2 and is "revised to reflect leasing practices and terminology."¹³¹ Section 2A-508¹³² provides in part that when a lessee justifiably revokes acceptance of a good,¹³³ the lessor is then in default of the lease. The lessee is then entitled to cancel the lease and recover certain enumerated damages.¹³⁴ However, before revocation of acceptance can occur, the lessee must have accepted the goods without knowledge of the defect, or accepted the goods with knowledge of the defect in the belief that such nonconformity would be seasonably cured and such defect was not subsequently cured within a reasonable period of time.¹³⁵ Had Article 2A been available to the *Sellers* court, its application would have allowed the court to determine the issue regarding revocation of acceptance and the lessee's available remedies without turning to an inconsistent theory of analogy or to the uncertainty of the common law.

Additionally, an express warranty by the lessor is created where any affirmation of fact or promise, any description of the goods, or any sample or model is made a part of the basis of the bargain.¹³⁶ The implied warranties of merchantability and fitness for particular purpose arise under the same instances as in Article 2.¹³⁷ These implied warranties can be disclaimed only where they are mentioned by name and the disclaimer is conspicuous.¹³⁸ Additionally, section 2A-108 incorporates the provisions and remedies of section 2-302 and at the same time expands judicial power to "grant appropriate relief" from unconscionable conduct and provide for reasonable attorney's fees.¹³⁹

change in the condition of the goods which is not caused by the nonconformity. Revocation is not effective until the lessee notifies the lessor.

(3) A lessee who so revokes has the same rights and duties with regard to the goods involved as if the lessee had rejected them.

131. *Id.*

132. *Id.* § 2A-508. The official comment reflects that this is a substantial revision of U.C.C. §§ 2-711, -717 (1987).

133. *See supra* note 130.

134. *See* U.C.C. §§ 2A-505(1)-(3) (1987) (cancellation of lease contract); *id.* § 2A-508(1)(b) (recovery of rent and security deposit); *id.* § 2A-508(1)(5) (lessee's security interest in leased goods); *id.* §§ 2A-508(1)(c), -518, -520 (lessee has a right to "cover" goods and recover incidental and consequential damages); *id.* §§ 2A-507, -508(1)(a)(c), -519(1)(2), and -520 (damages recoverable by lessee for revocation of acceptance).

135. *See id.* § 2A-516.

136. *See id.* § 2A-210.

137. *See id.* §§ 2A-212, -213.

138. *See id.* § 2A-214.

139. *See id.* § 2A-108 & official comment. *See also supra* notes 97-101 and accompanying text.

Anticipating a period of transition, the drafters of Article 2A provided that any case law interpreting provisions of Article 2 that correspond to provisions of Article 2A should be deemed as persuasive authority when applied to the corresponding Article 2A cases.¹⁴⁰ The application of Article 2's analogous case law and the incorporation of established lines of reasoning and precedent would allow for a smooth transition into Article 2A.

After realizing that the state of the present law regarding leasing transactions unjustifiably excluded a growing class of consumers from statutory protection, the *Sellers* court made two separate appeals to the Florida legislature to solve the problem.¹⁴¹ The *Sellers* court did not give the legislature a clear solution to this farreaching problem; however, logic, reasoning, and the necessity of a perceived fairness in public policy eventually dictate a demand for change in antiquated law. The UCC has previously modernized and simplified the law in regard to sale transactions with the result being consistency and certainty in the application of statutory commercial law. Given the recommendation of the Permanent Editorial Board of the Uniform Commercial Code¹⁴² and the subsequent movement toward adoption of Article 2A by a host of other states, the Florida legislature is presented with a reasonable and immediate opportunity to alleviate an anomalous legal disparity in the rights of consumers within the State.¹⁴³

CONCLUSION

In the State of Florida, the law governing lease transactions is currently inconsistent and uncertain. Since the *Sellers* court has ruled the Magnuson-Moss Warranty Act is inapplicable to consumer leases, parties entering into a lease of goods cannot be sure if their transaction will be subject to the common law, Florida commercial law under the Uniform Commercial Code, or some mixture of both common and statutory law. As a result, lessee/lessor rights and obligations are in a state of confusion. However, Florida's dilemma is not

140. See *id.* § 2A-101 official comment.

141. 526 So. 2d at 156.

142. See U.C.C. Art. 2A foreword (1987).

143. The Uniform Commercial Code's new Article 2A governing personal property leases and consumer leases was proposed in the Florida House of Representatives (House Bill 93) and in the Florida Senate (Senate Bill 200) during the 1989 session. However, when the legislature adjourned the 1989 session on June 3rd, Article 2A died in committee.

simply a matter of alleviating judicial anxiety. Florida needs to correct a body of law that denies people who lease consumer goods a chance to realize a judicial remedy. The drafters of the Uniform Commercial Code have recently created and adopted a comprehensive Article 2A which is designed to govern the rights and obligations of parties engaged in personal property leases. Article 2A represents an opportunity for the Florida legislature to simplify and modernize the law in regard to commercial transactions. Given the economic significance of the lease in the modern marketplace, and also given the necessity of a consonant means of resolving issues relating to such leases, the Florida legislature should seize upon this opportunity and adopt Article 2A of the Uniform Commercial Code.

Richard P. Hirtreiter

THE FLORIDA PROFESSIONAL MALPRACTICE STATUTE OF LIMITATIONS: DOES IT MEET THE RATIONAL RELATIONSHIP TEST FOR CONSTITUTIONALITY?

Pierce v. AALL Insurance, Inc., 531 So. 2d 84 (Fla. 1988).

Donald Pierce (Pierce) was injured in an automobile accident on November 1, 1982.¹ His insurance company, in denying coverage, alleged that Pierce had not purchased uninsured motorist insurance.² In April 1985, Pierce brought this action against AALL Insurance, Inc. (AALL), the company that sold him the policy.³ Pierce claimed that he had asked for full uninsured motorist coverage when he purchased the policy, and that AALL had told him he would be fully covered.⁴ In addition, Pierce contended that AALL was negligent because the agent failed to inform him of his uninsured motorist coverage options under section 627.727(2) of the Florida Statutes,⁵ and also failed to obtain the waiver of uninsured motorist coverage required by section 627.727(1).⁶

1. *Pierce v. AALL Ins., Inc.*, 531 So. 2d 84, 85 (Fla. 1988).

2. *Id.* Uninsured motorist coverage is protection for the insured (by first party insurance) against bodily injury inflicted by an uninsured motorist. The purpose is to place the injured motorist in the same position as if he had been injured by a motorist carrying liability insurance. BLACK'S LAW DICTIONARY 1373 (5th ed. 1979).

3. 531 So. 2d at 85.

4. *Id.*

5. *Id.* Ch. 76-266, § 3, 1976 Fla. Laws 716, 720, provided:

The limits of uninsured motorist coverage shall be not less than the limits of bodily injury liability insurance purchased by the named insured, or such lower limit complying with the company's rating plan as may be selected by the named insured, but in any event the insurer shall make available, at the written request of the insured, limits up to \$100,000 each person, \$300,000 each occurrence, irrespective of the limits of bodily injury liability purchased, in compliance with the company's rating plan.

The language of this statute is no longer in force. FLA. STAT. § 627.17(2) (1987) sets out the current requirements for uninsured motorist coverage.

6. 531 So. 2d at 85. Ch. 76-266, § 3, 1976 Fla. Laws 716, 719, (emphasis added), stated: No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom; *provided, however, the coverage required under this section shall not be applicable when, to*

The trial court granted summary judgment⁷ in favor of AALL on the ground that AALL's alleged acts involved professional negligence and that the applicable two-year statute of limitations for professional malpractice had elapsed.⁸ In reaching the decision, the trial court refused to apply the four-year statute of limitations applicable to negligence actions.⁹

Upon appeal, the district court affirmed the trial court's decision,¹⁰ holding that an insurance agent was a professional for purposes of applying the malpractice statute of limitations.¹¹ However, the court certified the following question to the Florida Supreme Court as one of great public importance: FOR THE PURPOSES OF THE PROFESSIONAL MALPRACTICE STATUTE IS AN INSURANCE AGENT A PROFESSIONAL?¹² The supreme court accepted review,¹³ and answered the question by defining a "profes-

the extent that, any insured named in the policy shall reject the coverage.

The language of this statute is no longer in force. FLA. STAT. § 627.727(1) (1987) sets out the current law on rejection of uninsured motorist insurance.

7. At the hearing for summary judgment, Pierce did not argue the unconstitutionality of the malpractice statute of limitations. Respondent's Answer Brief at 1, *Pierce v. AALL Ins., Inc.*, 531 So. 2d 84 (Fla. 1988) (No. 71,381). However, the issue was argued before, considered by, and rejected by the trial court. Pierce's argument was that the statute was unconstitutionally void for vagueness. Petitioner's Reply Brief on the Merits at 1, *Pierce v. AALL Ins., Inc.*, 531 So. 2d 84 (Fla. 1988) (No. 71,381).

8. *Pierce v. AALL Ins., Inc.*, 513 So. 2d 160, 160 (Fla. 5th DCA 1987). FLA. STAT. § 95.11(4)(a) (1987) sets out the professional malpractice statute of limitations, enacted in 1974 and amended in 1975:

Actions other than for recovery of real property shall be commenced as follows:

....

(4) WITHIN TWO YEARS.—

(a) An action for professional malpractice, other than medical malpractice, whether founded on contract or tort; provided that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence. However, the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional.

9. 513 So. 2d at 160. FLA. STAT. § 95.11(3)(a) (1987) sets out the statute of limitations for negligence: "Actions other than for recovery of real property shall be commenced as follows: (3) WITHIN FOUR YEARS.—(a) An action founded on negligence."

10. Pierce briefed the constitutional issue to the district court as a second issue, but the court considered only the first issue of whether an insurance agent is a professional. Petitioner's Initial Brief on the Merits at 4, *Pierce v. AALL Ins. Inc.*, 531 So. 2d 84 (Fla. 1988) (No. 71,381).

11. 513 So. 2d at 162. In her dissenting opinion, Judge Sharp pointed out that professionals are normally held to higher standards of care, but in this case AALL, because of its classification as a "professional," was excused from all liability. *Id.* (Sharp, J., dissenting). See *infra* note 160 and accompanying text.

12. *Id.* at 163.

13. 531 So. 2d at 85. The court accepted review pursuant to FLA. CONST. art. V, § 3(b)(4).

sion.”¹⁴ HELD: Reversed. For purposes of the professional malpractice statute of limitations, a profession is a vocation requiring, as a minimum standard, a four-year college degree in the specific field.¹⁵ Consequently, an insurance agent is not a professional for purposes of the professional malpractice statute of limitations.¹⁶ The court answered the certified question in the negative, reversed the Fifth District Court’s holding, and remanded the case to the district court for further proceedings.¹⁷

Pierce v. AALL Insurance, Inc. is significant because the court’s definition of “profession” creates classifications that exacerbate the discriminatory effect of a statute that is unconstitutional on its face.¹⁸ The decision also perpetuates the illogical concept that anyone who bears the label “professional” should receive the benefit of a short statute of limitations for his or her negligence.¹⁹

This Note will examine the evolution of statutes of limitations generally, and the Florida professional malpractice statute of limitations specifically. It will explore the judicial application of professional malpractice statutes of limitations in Florida and other states. The Note will explain the elements of due process and equal protection required for a statute to be constitutional. Finally, after analyzing the *Pierce* court’s decision, the Note will explain why the *Pierce* decision was flawed and recommend an alternative statutory solution to the problem of providing limitations of actions for professional malpractice.²⁰

14. 531 So. 2d at 85.

15. *Id.* The court pointed out that education was a common factor among all vocations that are considered professions. The court further explained that a vocation is a profession if a person can only be licensed to practice an occupation, under the laws and administrative rules of Florida, upon completion of a four-year college degree in that field. *Id.*

16. *Id.* at 88. The court pointed out some professions requiring at least a four-year university degree for licensure under Florida Statutes: optometry, FLA. STAT. § 463.006(1)(b) (1987); dentistry, *id.* § 466.006(2); veterinary medicine, *id.* § 474.207(2)(b); architecture, *id.* § 481.209(2)(b); physical therapy, *id.* § 486.031(3)(a); psychology, *id.* § 491.005(1)(b); clinical counselling and psychotherapy, *id.* § 491.005(1)(b), (2)(b), (3)(b); and geology, *id.* § 492.105(1)(d)(1). 531 So. 2d at 87 n.2.

17. 531 So. 2d at 88, 101-28.

18. See *infra* notes 170-89 and accompanying text.

19. *Panther Air Boat Corp. v. MacMillan-Buchanan & Kelly Ins. Agency*, 520 So. 2d 601, 604 (Fla. 5th DCA 1987) (Cobb, J., concurring). See generally *Recent Developments in Utah Law*, 95 UTAH L. REV. 31, 143-56 (1986). See also *infra* note 193 and accompanying text.

20. See *infra* note 194 and accompanying text.

HISTORICAL DEVELOPMENT OF STATUTES OF LIMITATIONS

Statutes of limitations prescribe time limits during which plaintiffs must file complaints or lose their right to do so.²¹ Modern law of limitations on personal actions began when England adopted the Limitations Act of 1623.²² While the purpose of the statute was to minimize hardship on poor defendants being sued in the King's courts, and to prevent overcrowding the courts with insignificant claims,²³ the statute is most notable today because the limitation periods were similar to those in modern statutes.²⁴ For example, the statute provided for a limitation of six years for actions in debt and contract, four years for personal injury, and two years for slander.²⁵ Although the statute provided no rationale for the varying limitation periods, the choices were probably grounded in concern with the reliability of memory and the durability of evidence.²⁶

American statutes of limitations are patterned after the Limitations Act of 1623.²⁷ Early state legislatures adopted the statute with only minor modifications.²⁸ Originally, statutory limitations were based on the common law form of pleading in the action.²⁹ Later statutory limitations were based on the type of liability or injury, such as contract or tort.³⁰

Industrialism and mechanization in the early 1900's generated

21. *Farrell v. Votator Div. of Chemetron Corp.*, 62 N.J. 111, 113, 299 A.2d 394, 396 (1973) (plaintiff's identification of defendant as John Doe, when defendant's true identity was unknown, preserved right of action).

22. 21 Jac. 1, ch. 16 (1623). See *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1178 (1950) [hereinafter *Developments*]. The statute also imposed limitations on land recovery and formed the basis for common law adverse possession. *Id.* at 1177.

23. *Developments*, *supra* note 22, at 1178. The Limitations Act, which was brief and general, included liberal provisions for personal injury. *Id.*

24. *Id.* at 1192 n.148. "The shorter period for torts involving injuries to the person may indicate early recognition of the unreliability of the evidence upon which such actions were based, or a general disfavor of personal-injury actions." *Id.*

25. *Id.*

26. 2 F. Pollock & F. Maitland, *The History of English Law* 606 (2d ed. 1899). The common law acknowledged that some kinds of evidence were less durable than others and required an assault victim to bring "fresh suit with hue and cry, so that the neighborhood . . . is witness to his prompt action, to the wounds of a wounded man, to the torn garments of a ravished woman." *Id.* See *infra* notes 35-40 and accompanying text.

27. *Developments*, *supra* note 22, at 1178.

28. See, e.g., 1820 N.J. Rev. Laws 410 (enacted in 1799).

29. *Developments*, *supra* note 22, at 1192.

30. *Id.* Present statutes have created a range of different periods based on kind of liability, contract or statutory, and kind of injury, personal or property. *Id.*

shortened periods of limitation for personal injury actions.³¹ Legislatures passed laws reducing the time during which plaintiffs could sue, to protect the new socioindustrial forces from an overwhelming number of personal injury suits,³² and to reduce the evidentiary problems inherent in proving the extent of damages.³³ The shorter time span tends to promote a more exact measure of the injuries and reduce the risk of false claims.³⁴

THE COURTS AND STATUTES OF LIMITATIONS

American courts have affirmed the evidentiary argument that statutes of limitations are necessary to cut off "claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."³⁵ A period of limitation protects a party from bogus claims which might be difficult to defend against after the evidence has naturally deteriorated.³⁶ Even a dated but valid claim would seem justifiably barred where the plaintiff has delayed so long that a defendant can gather no evidence for his defense.³⁷ Fairness to the defendant is a valid reason for barring claims and has its basis in the social policy that after a time the defendant should be given "repose"³⁸ and "the right to be free of stale claims."³⁹

31. *Id.* at 1193.

32. *Id.*

33. See *Howard v. Middlesborough Hosp.*, 242 Ky. 602, 611, 47 S.W.2d 77, 81 (1932) (evidence difficult to perpetuate and easy to manufacture or manipulate after number of years).

34. *Id.*

35. *Order of Railroad Tels. v. Railway Express Agency, Inc.*, 321 U.S. 342, 349 (1944) (award not barred by six-year state statute of limitations merely because claims became six years old while suit was pending).

36. *Gates Rubber Co. v. USM Corp.*, 508 F.2d 603, 611 (7th Cir. 1975) (statutory protection not available where fraudulent concealment tolls the limitation period).

37. See *Applewhite v. Memphis State Univ.*, 495 S.W.2d 190, 195 (Tenn. 1973) (in libel suit, the court looked with favor on statute of limitations as a statute of repose). See also *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945) (statutes of limitations designed to spare a citizen from having to defend a claim after memories have faded, witnesses are no longer available, and evidence has disappeared).

38. *Gregory v. Porterfield*, 26 Ariz. App. 353, 355, 548 P.2d 847, 849 (1974) (defendant should be able to rely on conclusive effects of statute of limitations as it is a statute of repose). Both statutes of limitations and statutes of repose prescribe the time limits within which plaintiff must bring suit, but there are important differences between the two. Note, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 VAND. L. REV. 627, 629 (1985). Statutes of limitations limit the time in which a plaintiff may bring suit *after* the cause of action accrues, where statutes of repose potentially bar the plaintiff's suit *before* the cause of action arises. *Id.* Usually a statute of repose adds an additional maximum time limit in which the plaintiff can bring an action under the statute of limitations. *Id.*

39. *Chase*, 325 U.S. at 314.

A defendant deserves adequate and continued notice of possible claims.⁴⁰

Courts have also held that a plea of the statute of limitations is a personal defense and a vested right which cannot be taken without consent.⁴¹ A person's right to assert a statute of limitations as a complete defense is considered to be property within the protection of the fourteenth amendment guarantee of due process of law.⁴²

Statutes of limitations have also been rationalized as justifiably requiring certain conduct on the part of the plaintiff. In *O'Neill v. Gray*, the court held, "The injured person knows his injury, and may be properly required to decide promptly whether it is serious enough to justify suit."⁴³ Blackstone⁴⁴ noted that when a litigant is negligent in making a legal claim to realty for an unreasonably long time, the

40. *Bigelow v. Walraven*, 392 Mich. 561, 566, 221 N.W.2d 328, 333 (1974) (potential defendants to be protected from protracted fear of litigation). See also *Order of Railroad Tels. v. Railway Express Agency, Inc.*, 321 U.S. 342, 349 (1944).

41. *Quitmeyer v. Theroux*, 144 Mont. 302, 307, 395 P.2d 965, 970 (1964) (defense of statute of limitations is legitimate, substantive and meritorious, and one to which, in proper circumstances, all men are entitled to as a right).

42. *Board of Educ. v. Blodgett*, 155 Ill. 441, 443, 40 N.E. 1025, 1027 (1895) (citing *Campbell v. Holt*, 115 U.S. 620 (Bradley, J., dissenting)). The *Board* court stated that the dissent in *Campbell* is more in concert with previous decisions and represents the better view. The dissent, as spokesman for a divided Court, said,

[T]he constitutional provision that forbids that any person shall be deprived "of life, liberty, or property, without due process of law" was intended to protect every valuable right which a man has . . . The words, 'life,' 'liberty,' and 'property' are constitutional terms, and are to be taken in their broadest sense. . . . The term 'property' embraces all valuable interests which a man may possess, outside of himself; that is to say, outside of his life and liberty. It is not confined to tangible property, but extends to every species of vested right . . . Now, an exemption from a demand, or an immunity from prosecution in a suit, is as valuable to the one party as the right to the demand or to prosecute the suit is to the other. The two things are correlative, and to say that the one is protected by constitutional guaranties, and that the other is not, seems to me almost an absurdity. One right is as valuable as the other . . .

Id. See also *Aldana v. Holub*, 381 So. 2d 231, 237 (Fla. 1980) (citing *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)); *Rochester American Ins. Co. v. Cassel Truck Lines*, 195 Kan. 51, 54, 402 P.2d 782, 785 (1965) (statutes of limitations held to be rules of property vital to the welfare of society); Randall, *Due Process Challenges to Statutes of Repose*, 40 Sw. L.J. 997, 1010-11 (1986) (statutes of limitations represent legislative compromise between the competing rights and interests of plaintiff and defendant).

43. 30 F.2d 776, 778 (2d Cir. 1929). *O'Neill* was the first important attorney malpractice case applying New York law. The decision removed attorney malpractice actions from personal tort limitations periods, but left unanswered the question of whether such actions should be characterized as tortious injuries to property or as breaches of contract. *Id.*

44. 3 W. BLACKSTONE, COMMENTARIES *188. The law refuses to aid the plaintiff as punishment for the plaintiff's neglect. The law also presumes that after a time the supposed wrongdoer has procured a legal title; otherwise, the plaintiff would have sued before. *Id.*

law will not assist the plaintiff.⁴⁵ Courts have held that a plaintiff's duty to litigate promptly is consistent with the desire to put the defendant on notice for a finite and reasonable period of time.⁴⁶

EVOLUTION OF THE PROFESSIONAL MALPRACTICE STATUTE OF LIMITATIONS IN FLORIDA

Until 1972, malpractice resulting in personal injury was not distinguished under the statute of limitations from any other negligence, and was subject to a four-year limitation period.⁴⁷ In 1971, the Florida Legislature enacted a short-lived two-year statute of limitations specifically for medical negligence.⁴⁸ The statute expressly enumerated coverage of personal injuries resulting from optometric, podiatric, chiropractic, dental and surgical care, but did not include the terms "professional" or "malpractice."⁴⁹ The statute in no way indicated that professions other than medicine were covered.

The legislature substantially rewrote the medical negligence statute in 1974.⁵⁰ The new version incorporated a discovery provision, deleted the enumerated categories of medical actions, and included any action for "professional malpractice," whether in contract or

45. *Id.*

46. *Bigelow v. Walraven*, 392 Mich. 561, 561, 221 N.W.2d 333, 334 (1974) (if defendant not on notice, defendant will not gather evidence for suit, but plaintiff can be gathering evidence while it is fresh).

47. *Garofalo v. Community Hosp.*, 382 So. 2d 722, 723 (Fla. 4th DCA 1980). Most personal injury actions were based on negligence, not contract. *Id.*

48. *Id.* Ch. 71-254, § 1, 1971, Fla. Laws 1372, 1372, provided:

Actions other than those for the recovery of real property can only be commenced as follows:

• • • •

(6) WITHIN TWO YEARS. — . . . an action to recover damages for injuries to the person arising from any medical, dental, optometric, podiatric or chiropractic treatment or surgical operation, the cause of action in such case is not to be deemed to have accrued until the Plaintiff discovers, or through use of reasonable care should have discovered, the injury.

49. *Garofalo*, 382 So. 2d at 723.

50. *Id.* Ch. 74-382, § 7, 1974 Fla. Laws 1207, 1211, stated:

Actions other than for recovery of real property shall be commenced as follows:

• • • •

(4) WITHIN TWO YEARS. —

(a) An action for professional malpractice whether founded on contract or tort; provided that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence; provided, however, the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional

tort.⁵¹ The legislature gave no reason for the change, and did not define the scope of the term "professional."⁵² A transcript of a committee hearing indicated that the committee did not want to define a professional because the committee might "hurt some people's feelings" by excluding them from the definition of professional.⁵³ The legislature wanted the courts to define professional when the courts applied the statute.⁵⁴

The 1974 professional malpractice statute had been in existence less than five months when the legislature revised the limitation period applicable to medical malpractice.⁵⁵ This time, the legislature created a new, separate medical malpractice statute of limitations,⁵⁶

51. *Garofalo*, 382 So. 2d at 723.

52. *Id.* See Ch. 74-382, 1974 Fla. Laws 1207.

53. Hearing of the Law Revision Subcomm. of the House Comm. on the Judiciary, Jan. 29, 1974, Series 414, Carton 162, Fla. Archives. A transcription excerpt of tape 1 reads as follows:

[W]e used the category of professional malpractice rather than naming the professions that we wanted to have a special limitation period on . . . Well, on page 7 what McPherson touched on professional malpractice and I wonder if, for example, it was brought to my attention that you were an architect and for example, he would be considered a professional, would he not? Yes, and that again is another point we discussed last time and that is the pros and cons of naming individuals like that, you know, like are plumbers professionals or are they not? . . . I think last year's discussion resulted in a desire to not categorize everything as either professional or not and leave it to judicial interpretation. I think that was our point. The reason for that is if we got into that we would hurt people's feelings who would consider themselves professionals.

Id.

54. *Id.* There was no indication that the legislature was aware of nor considered that courts are bound by rules of statutory construction. See *Parker v. State*, 406 So. 2d 1089 (Fla. 1981) (if a literal interpretation of a statute would lead to an illogical result or one not intended by the legislature, courts may depart from the plain literal meaning of the words and consider subsequent legislation on a subject to aid in determining legislative intent in enacting a statute); *Ex parte Amos*, 93 Fla. 5, 112 So. 280 (1927) (statute supplanting common law must be strictly construed, and a statute supplementing common law should not displace the common law any more than is clearly necessary); *Hialeah, Inc. v. B & G Horse Transp., Inc.*, 368 So. 2d 930 (Fla. 3d DCA 1979) (invoking a limitation or adding words to a statute is forbidden); *In re Levy's Estate*, 141 So. 2d 803 (Fla. 2d DCA 1962) (a statute will not be held to have changed common law principles by implication unless common law right is contrary to the statute).

55. This action was part of the Medical Malpractice Reform Act of 1975. Ch. 75-9, 1975 Fla. Laws 13.

56. FLA. STAT. § 95.11(4)(b) (1987) states:

Actions other than for recovery of real property shall be commenced as follows:

....

(4) WITHIN TWO YEARS. —

....

(b) An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the

but left intact the professional malpractice statute.⁵⁷ However, no one was sure how to apply the remaining professional malpractice statute because neither "professional" nor "professional malpractice" had ever been defined.⁵⁸

Since Florida was a common law state, the common law definition of "professional" was in effect incorporated into the statute.⁵⁹ At common law, the professions were theology, law, medicine, and education.⁶⁰ Since the legislature had removed medical malpractice actions, the professional malpractice statute, under Florida common law, applied only to attorneys, teachers, and ministers.⁶¹

JUDICIAL APPLICATION OF THE PROFESSIONAL MALPRACTICE STATUTE OF LIMITATIONS IN FLORIDA

Since 1975, the professional malpractice statute of limitations has been quietly applied by Florida courts in only a few cases. In each of these cases, the parties assumed that the professional malpractice statute was appropriate, and no one questioned whether the party to whom the statute applied was a professional. For example, the Third District Court utilized the statute in legal malpractice

time the incident is discovered, or should have been discovered with the exercise of due diligence; however, in no event shall the action be commenced later than 4 years from the date of the incident or occurrence out of which the cause of action accrued In those actions covered by this paragraph in which it be shown that fraud, concealment, or intentional misrepresentation of fact prevent the discovery of the injury within the 4-year period, the period of limitations is extended forward 2 years from the time that the injury is discovered or should have been discovered with the exercise of due diligence, but in no event to exceed 7 years from the date the incident giving rise to the injury occurred.

57. See *supra* note 8. The legislature adopted the Medical Malpractice Reform Act of 1975 to counteract the rising cost of malpractice insurance. One purpose of the Act was to provide a statute of repose for doctors. See *supra* note 56 and accompanying text.

58. See *supra* note 53 and accompanying text.

59. See *supra* note 54 and accompanying text.

60. *Pierce*, 531 So. 2d at 86. Historically, in Florida as in other jurisdictions, lawsuits characterized "professional malpractice" as actions having involved suits against persons engaged in the practice of law or medicine. See, e.g., *Hine v. Fox*, 89 So. 2d 13 (Fla. 1956) (physician sued for malpractice); *Foster v. Thornton*, 125 Fla. 699, 170 So. 459 (1936) (chiropractor guilty of malpractice); *St. Paul Fire & Marine Ins. Co. v. Icard, Merrill, Cullis & Timm, P.A.*, 196 So. 2d 219 (Fla. 2d DCA 1967) (suit for legal malpractice). Courts have held that the common meaning and common law definition of "professional malpractice" is "limited to professional misconduct of members of the medical profession and attorneys." *Panther Air Boat v. MacMillan-Buchanan*, 520 So. 2d 601, 603 (Fla. 5th DCA 1987) (citing *Hocking Conservancy Dist. v. Dodson-Lindblom Assocs., Inc.*, 62 Ohio St. 2d 195, 197, 404 N.E.2d 164, 166 (1980)).

61. *Pierce*, 531 So. 2d at 86.

cases,⁶² and the Fifth District Court extended the professional malpractice statute of limitations to accountants.⁶³

In other actions, the United States District Court for the Southern District of Florida suggested that the statute applied to engineers,⁶⁴ and the Florida Supreme Court extended coverage to architects in a new professional malpractice jury instruction 4.2(c) entitled "Negligence of Lawyer, Architect, and Other Professional."⁶⁵

The first significant case that contested the status of an individual as a professional was heard before the jury instruction was enacted.⁶⁶ In an action for breach of contract and professional malpractice, the Fourth District Court held that a land surveyor was not a professional under the statute of limitations, even though land surveyors are regulated by the Florida Department of Professional Regulation (DPR).⁶⁷ The district court explained that if regulation by the DPR were dispositive as to whether vocations were professions for purposes of the professional malpractice statute of limitations, activities such as embalming and cosmetology would be included.⁶⁸ The court stated that the legislature did not intend to include these activities under the professional malpractice statute of limitations.⁶⁹

The Fifth District Court declined to follow the Fourth District and held that a land surveyor was a professional in *Cristich v. Allen*

62. *Rosa v. Roth*, 442 So. 2d 323 (Fla. 3d DCA 1983) (appeal from summary final judgment in favor of defendant attorney in a legal malpractice action on the basis that the action was barred by the applicable two-year statute of limitations in FLA. STAT. § 95.11(4)(a) (1987)); *Zeccola v. Ezzo*, 370 So. 2d 38 (Fla. 3d DCA 1979) (suit for legal malpractice).

63. *Don Mar, Inc. v. Gillis*, 483 So. 2d 870, 871 (Fla. 5th DCA 1986) (summary judgment in favor of appellee certified public accountant based on application of FLA. STAT. § 95.11(4)(a) (1987)).

64. *Lisbon Contractors, Inc. v. Miami-Dade Water & Sewer Auth.*, 537 F. Supp. 175, 177 (S.D. Fla. 1982) (third-party professional malpractice action against third-party engineering firm).

65. *In re Standard Jury Instruction*, 459 So. 2d 1023, 1024 (Fla. 1984). The instruction regarding professional malpractice read:

Negligence is the failure to use reasonable care. Reasonable care on the part of a [lawyer] [architect] [name other professional] is that degree of care which a reasonably careful [lawyer] [architect] [name other professional] would use under like circumstances. Negligence may consist in doing something that a reasonably careful [lawyer] [architect] [name other professional] would not do under like circumstances or in failing to do something that a reasonably careful [lawyer] [architect] [name other professional] would do under like circumstances.

66. *Toledo Park Homes v. Grant*, 447 So. 2d 343 (Fla. 4th DCA 1984).

67. *Id.* at 344.

68. *Id.*

69. *Id.*

*Engineering, Inc.*⁷⁰ The court compared a land surveyor to an attorney and explained that both engaged in work requiring specialized knowledge⁷¹ and long, intensive academic preparation.⁷² Since a land surveyor was a professional, the surveyor would be covered by the professional malpractice statute of limitations just as an attorney would be.⁷³

Relying on *Cristich*, the Fifth District Court, in *Panther Air Boat Corp. v. MacMillan-Buchanan & Kelly Insurance Agency*, held that an insurance agent was a professional under the statute of limitations.⁷⁴ The district court quoted the *Webster's Dictionary* definition of "professional" as one who engages in a pursuit or activity often engaged in by amateurs;⁷⁵ however, professionals such as actors, golfers, and boxers engage in the activity for remuneration, not sport or pleasure, as amateurs do.⁷⁶ The *Panther* court reasoned that others who engage in activities for remuneration, and whose skill, judgment and advice is relied upon by lay people in the community are also professionals.⁷⁷ Under this classification, mechanics, plumbers, electricians and insurance agents are professionals.⁷⁸

70. 458 So. 2d 76, 79 (Fla. 5th DCA 1984).

71. *Id.* FLA. STAT. § 472.005(4)(a) (1987) reads:

Practice of land surveying means, among other things, any professional service or work, the adequate performance of which involves the application of special knowledge of the principles of mathematics, the related physical and applied sciences, and the relevant requirements of law for adequate evidence of the act of measuring, locating, establishing, or reestablishing lines, angles, elevations, natural and man-made features in the air, on the surface, and immediate subsurface of the earth.

72. 458 So. 2d at 79. Section 472.013 of the Florida Statutes (1987) enumerated the prerequisites for sitting for the land surveying state examination: graduation from a university land surveying program and two years' experience in land surveying under a professional land surveyor, or at least eight years' experience under a land surveyor. The statute provides other alternatives such as military service and various combinations of academic and experiential preparation. The eight-year experience requirement cited by the court requires only a high school diploma.

73. 458 So. 2d at 78. The court cited *Rosa v. Roth*, 442 So. 2d 323 (Fla. 3d DCA 1983) (two-year professional malpractice statute of limitations applicable in action against attorney for malpractice).

74. 520 So. 2d 601, 603 (Fla. 5th DCA 1987).

75. *Id.* The court cited *Webster's Third New International Dictionary* 1811 (17th ed. 1976).

76. 520 So. 2d at 603.

77. *Id.*

78. *Id.* Judge Cobb, in a specially concurring opinion, stated that he reluctantly concurred in the majority opinion, and only because of the *Pierce* decision. Judge Cobb would narrowly construe the professional malpractice statute of limitations to emphasize the statute's unreasonable and prejudicial nature so that the statute might ultimately be repealed, invalidated, or revised. *Id.* (Cobb, J., specially concurring).

Extending this reasoning, the court pointed out that Panther Air Boat relied on MacMillan for correct insurance advice just as Cristich had relied on Allen Engineering for adequate land surveying services.⁷⁹ Consequently, an insurance agent, like a land surveyor, is a professional for purposes of the professional malpractice statute.⁸⁰ The court was concerned that if it applied the statute to lawyers and land surveyors, upon whom people rely, but not to insurance agents, upon whom people also rely for advice and counseling, it would be discriminating and its action might be unconstitutional.⁸¹

OTHER JURISDICTIONS AND PROFESSIONAL MALPRACTICE

Like Florida, other states have faced the dilemma of determining how to apply their malpractice statutes of limitations.⁸² In *Richard-*

79. *Id.* Courts have held that because of reliance on an insurance agent, the agent has a duty to the insured to provide accurate counseling. See *Hardt v. Brink*, 192 F. Supp. 879 (M.D. Wash. 1961); *Seascope of Hickory Point Condominium Ass'n, Inc. v. Associated Ins. Servs., Inc.*, 443 So. 2d 488 (Fla. 2d DCA 1984). Some courts have held that for a duty to arise, the relationship between the insurance agent and the insured must be a long-established relationship of entrustment, but others have held that almost any interaction creates a duty on the part of the insurance agent. See *Nowell v. Dawn-Leavitt Agency, Inc.*, 127 Ariz. 48, 617 P.2d 1164 (Ct. App. 1980) (longstanding relationship); *Robinson v. John E. Hunt & Assocs., Inc.*, 490 So. 2d 1291 (Fla. 1st DCA 1986) (agent liable under oral contract even though no premium had been paid).

80. 520 So. 2d at 604. Pursuant to Panther's motion for rehearing, the court certified the question of whether an insurance agent could be a professional to the Florida Supreme Court. The certified question read: "FOR THE PURPOSES OF THE PROFESSIONAL MALPRACTICE STATUTE, IS AN INSURANCE AGENT A PROFESSIONAL?" *Id.* The *Pierce* case was heard first. Subsequently, the court relied on *Pierce* in deciding *Panther*, holding that an insurance agent was not a professional. *Panther Air Boat Corp. v. MacMillan-Buchanan & Kelly Ins. Agency, Inc.*, 531 So. 2d 333, 334 (Fla. 1988).

81. 520 So. 2d at 603. Judge Sharp, in a concurring opinion, complained that the court, in its effort to avoid constitutional challenge, had construed the statute so broadly that it would apply to anyone who performed a service for money. The judge, pointing out that she concurred only because the court was bound by its previous decision in *Pierce*, said that the court had violated rules of statutory construction by including all persons as professionals who were not amateurs or rank beginners, because this was not the legislative intent. The court had in effect repealed the four-year statute of limitations, and had interpreted the statute in such a way to lead to an unreasonable and ridiculous result. *Id.* at 604 (Sharp, J., concurring). See *supra* notes 74-80 and accompanying text.

82. Indiana limited malpractice actions to members of the medical profession and groups enumerated in the malpractice statute until 1976, when the court in *Cordial v. Grimm* extended the statute to attorneys. 169 Ind. 58, 64, 346 N.E.2d 266, 272 (Ct. App. 1976). The court extended the malpractice statute of limitations based on the substance of the action against an attorney. The applicable statute reads:

No action of any kind for damages, whether brought in contract or tort based upon

son v. Doe, the Ohio Supreme Court refused to extend the benefit of a one-year malpractice statute of limitations to nurses, holding that the statute was limited by common law to the professional misconduct of physicians and attorneys.⁸³ The Ohio statute, like Florida's, did not enumerate the specific groups covered by the statute of limitations.⁸⁴ The *Richardson* court explained that the statute of limitations should be shorter for physicians because physicians' inability to accomplish their desired purpose is often the result of circumstances beyond their control.⁸⁵ Subsequent treatment and care impact a patient's condition, and after a considerable time, physicians find it difficult or even impossible to prove that they exercised due care at the time of treatment.⁸⁶ The court stated that these factors spawn unwarranted and fraudulent claims that physicians find difficult to rebut. Consequently, statutes of limitations should be short for physicians.⁸⁷

In addition, Ohio courts have continued to construe the malpractice statute very narrowly, limiting coverage to physicians, podia-

professional services rendered or which should have been rendered, shall be brought, commenced, or maintained, in any of the courts of this state against physicians, dentists, surgeons, hospitals, sanitariums, or others, unless said action is filed within two [2] years from the date of the act, omission or neglect complained of.

IND. CODE ANN. § 34-4-19-1 (Burns 1971).

83. 176 Ohio St. 370, 372, 190 N.E.2d 878, 880 (1964). The court based its decision on a rule of statutory construction requiring that the common law meaning, rather than a loose popular meaning, should be attached to a word used in a statute. *Id.*

84. *Id.* Ch. 91, 1894 Ohio Laws 299, amended by OHIO REV. CODE ANN. § 2305.11(A) (Anderson —). The revised statute reads: "An action for libel, slander, assault, battery, malicious prosecution, false imprisonment, or malpractice against a physician, podiatrist, or a hospital, or upon a statute for a penalty or forfeiture, shall be brought within one year after the cause thereof accrues."

The original statute, in pertinent part, read as follows: "An action for . . . malpractice . . . shall be brought within one year after the cause thereof accrued" Ch. 91, 1894 Ohio Laws 299.

85. 170 Ohio St. at 372, 199 N.E.2d at 879-80. The court indicated that this might be true for lawyers also.

It is the misfortune of both physicians and lawyers that, in a very considerable proportion of their cases, they are unable to accomplish the purpose desired. The general public often fails to realize that circumstances over which these persons have no control may make it impossible for them to accomplish what they set out to do. Since physicians must often fail to fulfill expectations, they, along with lawyers, are peculiarly susceptible to the charge of failure in the performance of their professional duties.

Id.

86. *Id.*

87. *Id.*

trists, hospitals, and attorneys.⁸⁸ The Ohio statute covers attorneys because at the time the statute was enacted, attorneys, as well as physicians, were included in the common and legal meaning of malpractice.⁸⁹ The courts have refused to extend the benefit of the statute to engineers,⁹⁰ optometrists,⁹¹ and pharmacists.⁹²

Like Ohio, Michigan has declined to judicially expand coverage under its malpractice statute since 1973, when the Michigan Supreme Court held that nurses were not covered by the statute.⁹³ Michigan courts stated that the legislature should define groups that were protected by the malpractice statute,⁹⁴ and in 1975, the Michigan Legislature revised the malpractice statute to enumerate specific health care professionals covered by the statute of limitations.⁹⁵

88. *Whitt v. Columbus Coop. Enter.*, 64 Ohio St. 2d 355, 356, 415 N.E.2d 985, 986 (1980). Ohio courts apply the malpractice statute of limitations only to lawyers, under the common law definition of malpractice, and the groups enumerated in the statute, physicians, podiatrists, and hospitals. *Id.* OHIO REV. CODE ANN. § 2305.11(A) (Anderson 1980) reads: "An action for libel, slander, assault, battery, malicious prosecution, false imprisonment, or malpractice against a physician, podiatrist, or a hospital, or upon a statute for a penalty or forfeiture, shall be brought within one year after the cause thereof accrues."

89. *Richardson*, 170 Ohio St. at 372, 199 N.E.2d at 880.

90. *Hocking Conservancy Dist. v. Dodson-Lindblom Assocs., Inc.*, 62 Ohio St. 2d 195, 196, 404 N.E.2d 164, 167 (1980) (negligence of professional engineering firm in design and supervision of construction of storm sewer not professional malpractice for purposes of malpractice statute of limitations).

91. *Whitt*, 64 Ohio St. 2d at 355, 415 N.E.2d at 985 (optometrist covered by two-year bodily-harm statute of limitations, not one-year professional malpractice statute of limitations).

92. *Reese v. K-Mart*, 3 Ohio App. 123, 124, 443 N.E.2d 1391, 1392 (1981) (one-year professional malpractice statute of limitations not applicable to pharmacists; limited to physicians and enumerated categories).

93. *Kambas v. St. Joseph's Mercy Hosp.*, 389 Mich. 249, 252, 205 N.W.2d 432, 435 (1973). The court held that there was "no compelling reason for a nurse to be given the protection of a one-year statute of limitations." The court reasoned that she "is not in the same category as a physician who is required to exercise his independent judgment on matters which may mean the difference between life and death" *Id.*

94. *Id.* at 252, 205 N.W.2d at 435 (citing *Richardson v. Doe*, 176 Ohio St. 370, 199 N.E.2d 878 (1964)).

95. MICH. COMP. LAWS § 600.5838(1) (1978), as amended by 1975 Mich. Pub. Acts 142 provides, in part:

A claim based on the malpractice of a person who is, or holds himself out to be, a member of a state licensed profession, intern, resident, registered nurse, licensed practical nurse, registered physical therapist, clinical laboratory technologist, inhalation therapist, certified registered nurse anesthetist, X-ray technician, hospital, licensed health care facility, employee or agent of a hospital or licensed health care facility who is engaging in or otherwise assisting in medical care and treatment, or any other state licensed health professional, accrues at the time that person discontinues treating or otherwise serving the plaintiff in a professional or pseudo-professional capacity as to the matters out of which the claim for malpractice arose, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim.

However, until 1981, attorneys were not included under the Michigan malpractice statute.⁹⁶ In *Sam v. Balardo*, the Michigan Supreme Court extended the statute's benefits to attorneys, because the number of legal malpractice actions had increased.⁹⁷ The *Sam* court pointed out that both attorneys and doctors must make serious decisions based on their independent professional judgment.⁹⁸ Therefore, both should be protected by the shorter malpractice statute of limitations.⁹⁹ The court declined to say which other professions would receive the benefit of the malpractice statute of limitations.¹⁰⁰

CONSTITUTIONAL CONCERNS

Statutes of limitations are creations of the legislature, and their existence is justified by the legislative power to "represent a public policy about the privilege to litigate."¹⁰¹ Even constitutional claims may be barred by a reasonable statute of limitations.¹⁰² Despite the

96. *Sam v. Balardo*, 411 Mich. 405, 414, 308 N.W.2d 142, 151 (1981).

97. *Id.* at 417, 308 N.W.2d at 154. The court stated:

In the early 1900's, when the malpractice period of limitations was first enacted, there were some, albeit very few, malpractice actions brought against attorneys. Medical malpractice actions were far more prevalent, which explains the protection given to physicians . . . in the early statutes of limitations. In most recent times, however, attorneys have fared less well in eluding the net of malpractice liability. By the middle of this century, malpractice actions against attorneys became more frequent. The increased number . . . logically explains the 1961 legislative action in deleting . . . physicians, surgeons or dentists from the malpractice statute of limitations.

Id.

98. *Id.* at 418, 308 N.W.2d at 155.

99. *Id.* The court commented:

An attorney is called upon to make decisions that involve the exercise of independent professional judgment of essentially the same serious quality as those made by a physician, albeit involving a different expertise In our view, attorneys are deserving of the same protection afforded physicians, surgeons and dentists by the two-year malpractice period of limitations.

Id.

100. *Id.* The dissent objected to extending the statute to include attorneys. *Id.* at 419, 308 N.W.2d at 156 (Levin, J., dissenting). The same court, in *Adkins v. Annapolis Hospital*, held that hospitals could invoke the benefits of the shorter malpractice statute of limitations, based on the enumerated categories in the revised statute. 422 Mich. 87, 91, 360 N.W.2d 150, 154 (1984) (hospital being sued for negligence in providing medical services could invoke protection of governing malpractice statute of limitations). No further extensions have been granted. See *supra* note 95.

101. *Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945) (shelter of statutes of limitations held not to be a "fundamental" right).

102. *Rutledge v. State*, 100 Ariz. 174, 180, 412 P.2d 467, 472 (1966) (statute requiring that action to recover compensation for land taking be brought within two years found to be constitutional).

possible unfairness of attaching different limitations periods to seemingly similar types of claims, a statute does not violate the fourteenth amendment¹⁰³ of the Constitution as long as the classifications are not arbitrary and unreasonable,¹⁰⁴ and those within the class are treated uniformly.¹⁰⁵ Conversely, a statute violates the fourteenth amendment if the classifications are arbitrary and unreasonable, and those within a class are not treated uniformly.

The fourteenth amendment includes both due process¹⁰⁶ and equal protection¹⁰⁷ elements. Due process analysis focuses on whether a state regulation deprives an individual of life, liberty, or property,¹⁰⁸ while equal protection analysis focuses on how a regulation

103. U.S. CONST. amend. XIV, § 1 states:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

104. See, e.g., *Sellers v. Edwards*, 289 Ala. 2, 6, 265 So. 2d 438, 440 (1972) (statute requiring medical malpractice actions to be brought within two years not outside wide discretion of legislature); *Chaffin v. Nicosia*, 261 Ind. 698, 701, 310 N.E.2d 867, 870 (1974) (shorter statute of limitations solely for medical malpractice suits held not to violate the equal protection clause of either the fourteenth amendment or the Indiana Constitution since there existed a reasonable basis for distinguishing between those rendering medical services and those not doing so).

105. See *Landgraft v. Wagner*, 26 Ariz. App. 49, 55, 546 P.2d 26, 32 (1976) (state health providers' malpractice statute held constitutional).

106. "No State shall . . . deprive any person of life, liberty, or property, without due process of law" U.S. CONST. amend. XIV, § 1.

107. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

108. *United Yacht Brokers, Inc. v. Gillespie*, 377 So. 2d 668, 671 (Fla. 1979) (state could constitutionally require yacht brokers to have written commission contract though other brokers were not required to have written contract to collect commission). *Id.* See generally Marks & Greenwood, *The Burger Court and Substantive Rights, An Analytical Approach*, 57 STETSON L. REV. 751 (1980). There are two aspects to due process: procedural and substantive. Procedural due process is related to the fact that parties whose rights are affected by a law are entitled to notice and an opportunity to be heard. Procedural due process is very much alive on both federal and state levels. Substantive due process is related to the substantive law of a statute.

Under the substantive due process clause of the fourteenth amendment, the Supreme Court would determine whether a substantive state law (as opposed to a procedural law) deprived a person of life, liberty, or property. However, since *Ferguson v. Skrupa*, 372 U.S. 726 (1963), federal substantive due process under the fourteenth amendment (except for rights guaranteed by the Bill of Rights) has been virtually nonexistent largely because the Supreme Court has not wanted to substitute its social and economic beliefs for the judgment of legislative bodies. Marks, *Mr. Joseph Lochner and the Social Contract*, 12 OKLA. CITY U.L. REV. 709, 726-27 (1987). However, in *Roe v. Wade*, 410 U.S. 113 (1979), the Court found the right to privacy to be part of an individual's right to liberty under the fourteenth amendment. The

classifies individuals.¹⁰⁹ The test applied to sustain legislative action against constitutional attack when neither fundamental rights nor suspect classes are involved¹¹⁰ is the same for either the due process or equal protection analysis.¹¹¹ The test, known as the rational relationship test, requires that several elements be met: a state statute must bear a rational relationship to a constitutionally permissible legislative objective and must not be discriminatory, arbitrary, or oppressive.¹¹²

Due process was the issue in *Aldana v. Holub*.¹¹³ In *Aldana*, the Florida Supreme Court held that the State Medical Mediation Act, which included a ten-month processing period, violated the due pro-

Court then invalidated a state law because the law deprived an individual of her right to liberty as defined by the court and guaranteed by the fourteenth amendment. *Id.*

The Florida Constitution also contains a due process clause that provides, "No person shall be deprived of life, liberty or property without due process of law." FLA. CONST. art. I, § 9. However, the Florida Supreme Court has not always interpreted the state due process clause in the same manner the federal courts have interpreted the fourteenth amendment due process clause. Unlike the federal courts, Florida courts routinely apply the doctrine of substantive due process in economic matters. Cooper, *Beyond the Federal Constitution: The Statute of State Constitutional Law in Florida*, 18 STETSON L. REV. 241, 258, 272-73. When a state court discusses the due process clauses of the United States and Florida Constitutions in the same case, and applies due process analysis to a statute that affects an economic matter, the courts may appear confused, since the federal courts have abandoned the doctrine of substantive due process in economic matters. *Id.*

109. *Barrio v. San Manuel Div. Hosp.*, 143 Ariz. 111, 692 P.2d 290, 292 (1983) (equal protection not violated by creation of medical malpractice statutes of limitations that meet the rational relationship test).

110. Three fundamental rights, in addition to those in the Bill of Rights, are voting, interstate travel, and privacy. Marks, *Three Ring Circus*, 18 STETSON L. REV. 301, 330 (1989). Suspect classes include those based on alienage, national origin, and race. *Id.* at 329. When a law restricts a fundamental right, or discriminatorily affects a group classified on the basis of alienage, national origin, or race, the court applies a heightened scrutiny test, rather than the rational relationship test. *Id.* at 330. There must be a compelling government purpose for enacting such a statute, and the means chosen by the government to achieve the purpose of the statute must be "narrowly tailored" to the goal. *Id.*

"Between [the] two extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex and illegitimacy [Case citations omitted]. To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective." *Id.* at 337 (citing *Clark v. Jeter*, 108 S. Ct. 1910, 1914 (1988)).

111. *United Yacht Brokers, Inc. v. Gillespie*, 377 So. 2d 668, 671 (Fla. 1979) (citing *Lasky v. State Farm Ins. Co.*, 296 So. 2d 9, 15 (Fla. 1974)) (if state law bears a reasonable relationship to a permissible objective, then law meets the test for equal protection and due process). Unlike the federal courts that apply a spectrum of tests, Florida frequently applies the two-tiered rational relationship or very strict compelling government interest standard for testing constitutionality of a statute. See generally Marks, *supra* note 110.

112. 377 So. 2d at 671.

113. 381 So. 2d 231, 235 (Fla. 1980).

cess clauses of the United States and the Florida Constitutions, since application of its rigid jurisdictional periods had proven arbitrary and capricious in operation.¹¹⁴ The Act conferred a valuable legal right on doctors, the right to mediate claims for malpractice prior to suit.¹¹⁵ However, in applying the Act, the state had denied doctors the right to use the procedure through prejudice and unavoidable delay caused by a congested court docket.¹¹⁶ The doctors' rights were arbitrarily undermined and their right to due process denied.¹¹⁷ Inherent in the concept of due process is the notion that property interests conferred by state law cannot be arbitrarily subverted, as they were in *Aldana*.¹¹⁸ Consequently, the court ruled that the Act was unconstitutional.¹¹⁹

A state statute is also unconstitutional when it violates the equal protection clause of the fourteenth amendment.¹²⁰ In *McGeehan v. Bunch*, the New Mexico Supreme Court held that an automobile guest statute was unconstitutional because it arbitrarily prevented nonpaying guests from suing owners for negligence, but permitted paying guests to do so.¹²¹ The *McGeehan* court referred to *Reed v. Reed* and pointed out that the fourteenth amendment prevents states from passing laws that create classifications and then arbitrarily treating persons within the classification in different ways.¹²² The court also stated that if persons within a statutory classification are

114. *Id.* This Act was part of the 1975 Medical Malpractice Reform Act. A rule of the Medical Mediation Procedure required that medical mediation jurisdiction terminates if final hearing has not been concluded within ten months from the date the claim was filed, regardless of the reason. *Id.*

115. *Id.*

116. *Id.* at 236.

117. *Id.*

118. *Id.* at 235. The current medical malpractice statute of limitations was also created by the Medical Malpractice Reform Act of 1975. The current professional malpractice statute of limitations was retained when the separate medical malpractice statute of limitations was created. See *supra* notes 56-57 and accompanying text and *infra* note 173 and accompanying text.

119. *Id.*

120. See *infra* note 128 and accompanying text.

121. 88 N.M. 308, 311, 540 P.2d 238, 241 (1975). Automobile guest statutes provide that operators of automobiles shall only be liable for injuries to guests carried gratuitously for gross or willful negligence, willful or wanton misconduct, or the like. Many states have declared such statutes unconstitutional, or have repealed them. BLACK'S LAW DICTIONARY 636 (5th ed. 1979).

122. *Id.* at 311, 540 P.2d at 241 (citing *Reed v. Reed*, 404 U.S. 71, 75-76 (1971)). In *Reed*, a statute created gender-based classifications. 404 U.S. at 75-76. A midrange test is applied to such statutes, and a statute must have a fair and substantial relationship to the object of the legislation so that all persons similarly situated are treated alike. *Id.* The test applies stricter scrutiny than the rational relationship test, but less than the compelling governmental purpose test. *Id.* at 76. See *supra* note 121 and accompanying text.

treated differently, their treatment must be related to the objective of the statute.¹²³ Any classification created by a statute must be reasonable, and must rest upon some ground of difference having a fair and substantial relation to the objective of the statute.¹²⁴

The Supreme Court, in *Yick Wo v. Hopkins*, held that if an apparently fair and impartial law is applied and administered so as to discriminate between persons in similar circumstances, denying them equal justice, the law is unconstitutional.¹²⁵ *Yick Wo* was cited by the First District Court of Appeals when it held that a Jacksonville ordinance was unconstitutional¹²⁶ because, for no apparent reason, the ordinance automatically granted plumbers of Jacksonville Beach their master plumber's certificates while denying the same to the plumbers of Atlantic Beach.¹²⁷ The city provided no rationale for the differentiating classifications, and the court found that the statute classified in an unreasonable arbitrary and capricious manner.¹²⁸

123. *Reed*, 404 U.S. at 76. The *McGehean* court cited *Reed*, dealing with a gender-based classification, although there was no gender issue in *McGehean*.

124. *McGehean*, 88 N.M. at 311, 540 P.2d at 241. See also *McLaughlin v. Florida*, 379 U.S. 184, 193 (1964) (nothing in legislative purpose made it necessary to punish promiscuity in one racial group and not another).

125. 118 U.S. 356, 373-74 (1886). The *Yick Wo* court held that an ordinance that allowed officials to grant licenses for laundries on a discriminatory basis was unconstitutional. *Id.* at 374. *Yick Wo* was a disproportionate impact case that involved a suspect class. *Id.* The test for constitutionality for statutes that affect a suspect class, like the test that affects a fundamental right, is the compelling government interest test. Marks, *supra* note 111, at 329. The compelling governmental interest test is much more stringent than the reasonable or rational basis test and more stringent than the midrange test of *Reed*. *Id.* See *supra* notes 108-14 & 120 and accompanying text.

126. *Wiggins v. City of Jacksonville*, 311 So. 2d 406, 408 (Fla. 1st DCA 1975). Jacksonville Beach is a municipality adjacent to Jacksonville. The relevant Jacksonville ordinance provided that licensed Jacksonville Beach master plumbers would be issued a master plumber's license by the city of Jacksonville without any examination or license fee. While the ordinance "grandfathered in" Jacksonville Beach master plumbers, it specifically excluded the master plumbers from surrounding Atlantic Beach, Neptune Beach, and Baldwin, three other urban services districts set out in the 1968 consolidated government plan for Duval County. *Id.* at 407.

127. *Id.* at 408.

128. *Id.* The *Wiggins* court cited Florida cases also: *State ex rel. James v. Gerrell*, 137 Fla. 324, 326, 188 So. 812, 814 (1938) (classification for purpose of license requirements or impositions must be reasonable and may not be arbitrary or capricious); *Curry v. Osborne*, 76 Fla. 39, 40, 79 So. 293, 294 (1918) (regulatory ordinance must tend to promote public health, morals, safety or welfare of community; means utilized must be adapted to that end; and ordinance must be impartial in operation). See also *In re Estate of Fernandez*, 335 So. 2d 829 (Fla. 1976) (fourteenth amendment prohibits statutory classifications that discriminate between groups without a valid, substantial basis).

A recent Supreme Court case supports the requirement that there must be a rationale for adopting a statute and the means of implementing the objectives of the statute. In *Allegheny Pittsburg Coal Co. v. County Commission*, the assessment policy of the Webster County As-

The court in *Panther Air Boat Corp. v. MacMillan-Buchanan & Kelly Insurance Agency* feared a similar constitutional challenge if it failed to interpret the malpractice statute of limitations broadly, so the court held that almost everyone was a professional.¹²⁹ The court thus avoided problems with the due process and equal protection restraints of the fourteenth amendment. Because the parties in *Panther* had not raised a constitutional question, the district court could not address the question of the constitutionality of the professional malpractice statute of limitations.¹³⁰

THE PIERCE COURT'S REASONING

In *Pierce v. AALL Insurance, Inc.*, the Florida Supreme Court held that an insurance agent was not a professional for purposes of the two-year professional malpractice statute of limitations. This conclusion was based on the court's defining a profession as a vocation requiring, as a minimum standard, a four-year college degree in the specific field.¹³¹ Since the insurance agent in the case did not have a four-year college degree in insurance, the agent was not a professional.¹³²

essor systematically resulted in appraisals for property that were excessive compared to the appraisal value of similar parcels that had not been recently conveyed. Each year the county commission affirmed the assessments, and each year the petitioners appealed to the state circuit court. When the case reached the Supreme Court, the Court applied the rational basis test and held that the state may divide different kinds of property into classes and assign different tax burdens so long as those divisions and tax burdens are reasonable. While the Court found the statute passed the rational relationship test, the Court held the statute unconstitutional because the state's means of accomplishing the objective of the statute were illogical and unreasonable. *Allegheny Pittsburg Coal Co. v. County Comm'n*, 109 S. Ct. 633, 635 (1989).

129. 520 So. 2d 601, 604 (Fla. 5th DCA 1987). *See supra* note 81 and accompanying text.

130. *Id.* at 603 n.3.

131. 531 So. 2d at 87.

132. *Id.* FLA. STAT. § 626.732(1)(b), (c) (1987) states:

Except as provided in subsection (3), no applicant for a license as a general lines agent, other than as to a limited license as to baggage insurance, shall be qualified therefor or be so licensed unless within the 4 years immediately preceding the date his application for license is filed with the department, he has:

. . . .

(b) Completed a correspondence course in insurance satisfactory to the department and regularly offered by accredited institutions of higher learning in this state, and, except if he is applying for a limited license under s. 626.321, has had at least 6 months of responsible insurance duties as a substantially full-time bona fide employee of an agent or an insurer, its managers, general agents, or representatives, in all lines of insurance set forth in s. 626.041(1); or

(c) Completed at least 1 year in responsible insurance duties as a substantially full-time bona fide employee of an agent or of an insurer, its managers, managing

The court opened its opinion by looking at the plain language of the statute, which, as the court explained, must control if possible.¹³³ However, the court found no definition of the term "professional" in chapter 95.11(4)(a) of the Florida Statutes, the professional malpractice statute of limitations, and found no definition of "professional" or "professional malpractice," in the chapter.¹³⁴

After reviewing the legislative history of the statute, the court explained that the only evidence of the legislature's intent as to who is a professional was found in the words of a committee member who said that the legislature did not want to define "professional" and "hurt some people's feelings who thought themselves professionals" but were not included.¹³⁵ The court pointed out that the committee member stated that decisions such as defining the term "professional" were best left to the judiciary.¹³⁶

The court recognized that the legislature intended to leave the term undefined; however, the court suggested that the legislature amend the statute and provide a definition for the term "professional."¹³⁷ The court pointed out that it had to resolve the *Pierce* case, "with or without the guidance of the legislature."¹³⁸

The court began its reasoning by considering the definitions advocated by the opposing parties. *Pierce* argued that because the legislature did not define "professional," the court was bound by the common law definition under which only doctors, lawyers, teachers and clergy were professionals.¹³⁹ *Pierce* cited *Richardson v. Doe*,¹⁴⁰ an

general agents, or representatives, in all lines of insurance, exclusive of aviation and wet marine and transportation insurance, but not exclusive of boats of less than 36 feet in length or aircraft not held out for hire, as set forth in s. 626.041(1), without the education requirement mentioned in paragraph (a) or paragraph (b).

133. 531 So. 2d at 86. See *supra* note 54.

134. *Id.* The court pointed out that there were separate limitations statutes for medical malpractice and malpractice or negligence in connection with the construction of an improvement to real property. *Id.*

135. The court read transcripts of tape recordings of meetings of the Law Revision Subcommittee of the House Committee on the Judiciary discussing § 95.11. See *supra* note 53.

136. 531 So. 2d at 86.

137. *Id.*

138. *Id.* See also *Leatherman v. State ex rel. Somerset Co.*, 133 Fla. 630, 182 So. 831 (1938) (legislature may enact a statute as restrictive or encompassing as it sees fit, and the courts must give effect to its intent). The *Pierce* court was forced to apply the professional malpractice statute of limitations with little knowledge about the legislature's intent. 531 So. 2d at 86.

139. 531 So. 2d at 86. To explain the public policy behind professional malpractice statutes of limitations, *Pierce* defined "profession," in contrast to vocation, occupation, business, or trade. *Pierce* cited Pound's definition of "profession":

A profession is a group of men pursuing a learned art as a common calling in the

Ohio case, and *Sam v. Balardo*,¹⁴¹ a Michigan case, as authorities for this position. However, as the court pointed out, AALL refuted the contention by arguing that *Richardson* and *Sam* were not authority for Florida common law, and that, under Pierce's proposed common law definition of professional, even accountants would not fall under the professional malpractice statute of limitations.¹⁴² The court declined to adopt Pierce's position, because, according to the court, the common law definition was too narrow.¹⁴³

Alternatively, AALL advocated defining "profession" as "a vocation or occupation requiring advanced education and training, and involving intellectual skills, as medicine, law, theology, engineering, and teaching."¹⁴⁴ In addition, AALL proposed that the definition of profession be extended to any vocation regulated by the DPR or other statutory body.¹⁴⁵ The court declined to extend the statute of limitations to vocations regulated by the DPR, and did not provide any reason for its decision.¹⁴⁶ However, the court considered AALL's

spirit of public service—no less a public service because incidentally it may be a means of livelihood A profession, such as the ministry, medicine, law, teaching, is much more than a calling which has a certain traditional dignity. Certain other callings in recent times have achieved or claim a like dignity, but lack the essential primary purpose [of public service]. For example, if an engineer discovers a new process or invents a new mechanical device he may obtain a patent and retain for himself a profitable monopoly. If, on the other hand, a physician discovers a new surgical procedure, they each publish their discovery or invention to the profession and so to the world

[I]n its idea and in its history a profession is a body of learned men pursuing a learned art. Learning is one of the qualities which sets off a profession from a vocation or occupation

Petitioner's Initial Brief On the Merits at 9, *Pierce v. AALL Ins., Inc.*, 531 So. 2d 84 (Fla. 1988) (No. 71,381) (citing 5 R. POUND, JURISPRUDENCE § 151, at 676-79 (1959)).

140. 531 So. 2d at 86. See *Richardson v. Doe*, 176 Ohio St. 370, 190 N.E.2d 878 (1964). See *supra* notes 83-87 and accompanying text.

141. 531 So. 2d at 86. See *Sam v. Balardo*, 411 Mich. 405, 308 N.W.2d 142 (1981); See *supra* notes 97-100 and accompanying text.

142. *Id.*

143. *Id.* at 87.

144. *Id.* AALL relied on the dictionary definition that the district court had used to determine the scope of the term "profession." The district court used WEBSTER'S NEW WORLD DICTIONARY 1134 (2d ed. 1978). In determining that an insurance agent was a professional for purposes of the professional malpractice statute of limitations, the district court focused on the act of giving advice upon which a client would rely. *Id.*

145. 531 So. 2d at 86. This definition would include not only insurance salesmen, but also barbers, cosmetologists, embalmers, and pest controllers. *Id.*

146. *Id.* at 87. The court stated that it intended no disrespect for these time-honored vocations. *Id.*

initial definition of a profession as a vocation requiring advanced education and training.¹⁴⁷

After its examination of the opposing definitions of "professional" and "profession," the court stated that the common law definition was too narrow and that AALL's proposed definition was too broad because terms such as "advanced education and training" were very speculative as to the amount of education required.¹⁴⁸ However, the court determined that academic preparation was a common important factor among all vocations considered professions, and that a minimum of a four-year degree was required before persons could be called professionals in the field in which they completed their college work.¹⁴⁹ As examples of such professionals, the court cited section 473.306(2)(b)(2) of the Florida Statutes, which requires certified public accountants to complete a baccalaureate degree in accounting plus thirty additional semester hours in that field.¹⁵⁰ The court also cited the Fifth District Court decision in *Cristich v. Allen Engineering, Inc.*,¹⁵¹ which held that a land surveyor was a professional under section 472.013(2)(a) of the Florida Statutes.¹⁵² In a footnote, the court listed other professions requiring at least a four-year degree¹⁵³ and added that the list was not fully inclusive.¹⁵⁴

In holding that insurance agents were not professionals, the

147. *Id.*

148. *Id.* The court stated that it had to draw a firm line somewhere between the narrow and broad definition. *Id.*

149. *Id.*

150. *Id.* FLA. STAT. § 473.306(2)(b)(2) (1987) reads as follows:

(2) An applicant is entitled to take the licensure examination to practice in this state as a certified public accountant if the applicant:

....

(b) Has met the following educational requirements from an accredited college or university:

....

2. If application is made after August 1, 1983, a baccalaureate degree with a major in accounting or its equivalent plus at least 30 semester or 45 quarter hours in excess of those required for a 4-year baccalaureate degree

151. 458 So. 2d 76, 79 (Fla. 5th DCA 1984).

152. 531 So. 2d at 87. See *supra* notes 70-73 and accompanying text.

153. *Id.* at 87 n.2. See *supra* note 16.

154. *Id.* The second part of footnote 2 read as follows:

This list is by no means fully inclusive. It is only intended to illustrate those professions, in addition to the common law professions of medicine, law, education, and clergy, which require at least a baccalaureate degree for licensure under Florida Statutes. These are among the occupations which would qualify as professions under our definition.

Id.

court cited a Florida statute that allows people to become insurance agents by completing a short correspondence course or acquiring one year of experience in the field.¹⁵⁵ Mindful of the district court's reliance on the act of giving advice as the element distinguishing professions from other occupations, the *Pierce* court further distinguished between the acts of giving advice with and without the necessary educational background for doing so.¹⁵⁶ The court asserted that giving advice without sufficient academic knowledge was not the act of a professional.¹⁵⁷ As a corollary, the court pointed out that giving advice about a topic that required little or no knowledge was also not the act of a professional.¹⁵⁸

The court, citing the district court's dissenting opinion, agreed that a professional should not be able to use professional status as a shield from liability for negligence.¹⁵⁹ The court pointed out that a profession was usually guided by a code of ethics, and misconduct resulted in discipline from the profession itself.¹⁶⁰ Using accountants and doctors as examples, the court explained that doctors¹⁶¹ and accountants¹⁶² must prove their moral character before they can be licensed to practice in Florida. However, insurance agents are not required to do so under the statute licensing insurance agents.¹⁶³

The court formally defined a profession as a calling requiring, for

155. See *supra* note 132 and accompanying text.

156. 531 So. 2d at 87.

157. *Id.*

158. *Id.*

159. *Id.* See 513 So. 2d at 162 (Sharp, J., dissenting). In her dissenting opinion, Judge Sharp said, "Ironically, the consequence of being categorized as a 'professional,' rather than imposing a higher duty or standard of care on the provider of the service, excuses AALL from any liability in this lawsuit. Normally a 'professional' is exposed to additional ethical and moral obligations." *Id.* See also *Recent Developments in Utah Law*, *supra* note 19, at 143-56. The Utah Supreme Court expanded the doctrine of professional negligence and held that skilled tradespersons may be held to a professional standard of care in negligence actions. *Id.*

160. 531 So. 2d at 88. For example, the American Institute of Certified Public Accountants states that "Integrity is an element of character which is fundamental to reliance on the certified public accountant." AICPA PROFESSIONAL STANDARDS, CODE OF PROFESSIONAL ETHICS § 52.03 (1988).

161. 531 So. 2d at 88. FLA. STAT. § 458.311(1)(c) (1987) provides: "Any person desiring to be licensed as a physician shall apply to the department to take the licensure examination. The department shall examine each applicant whom the board certifies: . . . [i]s of good moral character."

162. 531 So. 2d at 88. FLA. STAT. § 473.306(2)(a) provides: "An applicant is entitled to take the licensure examination to practice in this state as a certified public accountant if the applicant: . . . is of good moral character"

163. 531 So. 2d at 88. FLA. STAT. § 626.731 (1987) has no clause similar to FLA. STAT. §§ 458.311(1)(a), 473.306(2)(a) (1987). See *supra* note 132.

licensing under the laws of Florida, specialized knowledge and academic preparation amounting to at least a four-year university-level degree in the field of study specifically related to that calling.¹⁶⁴ The court held that insurance agents are not professionals for purposes of the malpractice statute of limitations.¹⁶⁵ Consequently, the court answered the certified question in the negative.¹⁶⁶

The dissent stated that it would have approved the district court's decision that an insurance agent was a professional.¹⁶⁷ Like the district court, the dissent would consider the act involved, rather than a person's title, to determine whether the professional malpractice statute of limitations applied.¹⁶⁸ In the opinion of the dissent, an act of a professional is one that requires giving knowledgeable advice or imparting instruction and recommendations in the learned arts.¹⁶⁹

THE PIERCE COURT ANALYZED THE WRONG ISSUE

Rather than concentrating on defining "profession" in *Pierce v. AALL Insurance, Inc.*, the Florida Supreme Court should have analyzed¹⁷⁰ whether the professional malpractice statute of limitations

164. 531 So. 2d at 87.

165. *Id.*

166. *Id.*

167. *Id.* (McDonald, J., dissenting).

168. *Id.* (citing 513 So. 2d at 161).

169. *Id.*

170. The Florida Supreme Court has the authority to go beyond the certified question propounded to it. In *Tillman v. State*, 471 So. 2d 32, 34 (Fla. 1985), the Florida Supreme Court stated:

The district court's certification that its decision passed upon a question of great public importance gives this Court jurisdiction, in its discretion, to review the district court's "decision." Art. V, § 3(b)(4), Fla. Const. Once the case has been accepted for review here, this Court may review any issue arising in the case that has been properly preserved and properly presented.

See *Bell v. State*, 394 So. 2d 979 (Fla. 1981) (once Florida Supreme Court accepts the case for consideration, its review power not limited to the certified question only). See also *Trushin v. State*, 425 So. 2d 1126, 1129, 1130 (Fla. 1983) (Florida Supreme Court itself has considered constitutionality of statutes, under the doctrine of fundamental error, in civil cases, even though that issue had not been raised at the trial court level; once "appellate court has jurisdiction it may, if it finds it necessary to do so, consider any item that may affect the case"). Since *Pierce* had addressed the question of constitutionality, the supreme court could address this issue even though it was not certified. See *supra* notes 7 & 10. The supreme court has the power to address the issue of constitutionality as fundamental error; consequently, it would seem that the court has the power to address a constitutional issue that has been properly raised and to apply all constitutional tests, not just those raised by the parties. Therefore, even though *Pierce* argued only that the professional malpractice statute of limitations was void for vagueness, the *Pierce* court should have addressed the constitutionality of the statute using a

met the "legitimate purpose" element of the rational relationship test for constitutionality, and whether the statute violated the equal protection clause of the fourteenth amendment when applied using the court's definition of "professional."¹⁷¹ The test for constitutionality requires that a state law be rationally and reasonably related to some legitimate legislative purpose and not be arbitrarily or capriciously imposed.¹⁷²

The professional malpractice statute of limitations fails to meet the "legitimate purpose" element of the rational relationship test because the legislature had no stated valid purpose for retaining the professional malpractice statute of limitations when the legislature created the separate medical malpractice statute of limitations in 1975.¹⁷³ There was no purpose for the professional malpractice statute of limitations because the legislature did not define to whom the statute would apply, and did not provide any rationale for extending a shortened limitation period to any one who might be defined as a professional. Later, the *Panther* court stated that it could think of no rational reason to apply a two-year statute of limitations period for only the traditional professionals, but a four-year period to all others.¹⁷⁴ Since the professional malpractice statute of limitations has no legislative purpose, it cannot meet the element of the rational relationship test that requires a state law to be rationally and reasonably related to a permissible legislative purpose; thus the statute is unconstitutional.

The professional malpractice statute of limitations is also unconstitutional because, as applied, it violates the equal protection clause of the fourteenth amendment by arbitrarily and capriciously creating the classifications of "professional" and "nonprofessional." The equal protection clause requires that a statutory classification include all people who are similar in the same class unless there are practical

more encompassing basis of analysis, including the equal protection and due process tests.

The district court, in *Panther Air Boat Corp. v. MacMillan-Buchanan & Kelly Insurance Agency*, recognized the equal protection and due process problems inherent in defining "professional," but could not address the constitutional issue because the parties had not addressed any constitutional question. 520 So. 2d 601, 602 n.1 (Fla. 5th DCA 1987). See *supra* notes 81, 129-30 and accompanying text. In *Pierce*, the supreme court had an opportunity to deal with the question of whether the professional malpractice statute of limitations is unconstitutional, but declined to do so.

171. See *supra* notes 104-12 and accompanying text.

172. See *supra* notes 111-13 and accompanying text.

173. See *supra* notes 50-54 and accompanying text.

174. *Panther*, 520 So. 2d at 603. See *supra* notes 129-30 and accompanying text.

differences that warrant a special classification for the general welfare.¹⁷⁵ Florida courts have recognized that the legislature may create classifications and regulate vocations within the state when the regulations operate with substantial fairness upon persons similarly situated.¹⁷⁶ However, for legislative classifications to be upheld, there must be a valid difference between the classes, and the difference must be related to the reason the classes are created by the legislature.¹⁷⁷ The *Panther* court's concern with the equal protection issue was apparent when the court, in a footnote, questioned the possible constitutional effect of the legislature's failure to define the term "professional," and the legislature's decision to shorten the limitation period for court-defined "professionals," but to retain the formerly established four-year period for all other acts of negligence.¹⁷⁸

The professional malpractice statute of limitations created classes that allowed professionals to enjoy a shorter statute of limitations than nonprofessionals. However, most of the reasons that have been stated in the past for favoring professionals are invalid. The reasons set out for implementing shorter periods of limitations for personal injury during the early 1900's, such as preventing fraudulent claims and connecting the injury to the damages¹⁷⁹ do not apply to professions such as accountancy, assuming that accountants are professionals.

The reasons Michigan proposed for favoring professionals are fallacious. The Michigan courts applied a shorter malpractice statute of limitations to attorneys because the number of legal malpractice suits increased, and because attorneys make decisions based on their independent judgment, as doctors do.¹⁸⁰ A Florida court applied the

175. See *supra* note 104 and accompanying text.

176. See *supra* note 105 and accompanying text.

177. See *supra* note 111 and accompanying text.

178. 520 So. 2d at 602 n.1.

179. The shorter periods of limitation accompanied the rise in industrialism and development of mechanized modes of transportation in the late 1800's and early 1900's. *Developments*, *supra* note 22, at 1193. These conditions typically do not apply to a situation in which a professional is rendering services today. See e.g., 1897 Conn. Pub. Acts 197. The Connecticut statute required that, to maintain an action against "any electric, cable, horse, or steam railroad company," written notice had to be provided within four months of the date of the injury. A one-year limitation was created for all actions for personal injuries against a corporation. *Id.* See also CONN. GEN. STAT. § 1119 (1902).

Reductions in time periods were instituted, even where specific references to railroads were lacking. See e.g., 1895 Pa. Laws 135(2). See *supra* notes 31-34 and accompanying text.

180. See *supra* notes 98-100 and accompanying text. In *Panther*, the respondent insurance company pointed out that there had been a proliferation of suits against insurance agents

latter reasoning in *Cristich v. Allen Engineering, Inc.* and held that a land surveyor is a professional because he makes independent judgments as attorneys do.¹⁸¹

Exercising independent judgment and experiencing an increase in the number of law suits are not factors exclusive to doctors and lawyers. They apply to many others such as real estate brokers, insurance salesmen, teachers, stockbrokers, computer system designers, and consultants. There is no practical, social, or general welfare reason for classifying real estate brokers, attorneys, and other vocations differently so as to hold them liable for their misconduct for different periods of time. Physicians are perhaps the only group that deserves a shorter period of limitations, because in emergency situations, physicians are often required to make split-second life and death decisions, and because, in aftercare, they may have little control over the patient's actions.¹⁸² The *Panther* court recognized the problem of classification, and feared that if it differentiated between professionals and nonprofessionals and failed to interpret the statute broadly, it would face a serious constitutional challenge.¹⁸³

In *Panther*, Judge Cobb, in his specially concurring opinion, suggested that the legislature may have had a political reason for retaining the professional malpractice statute of limitations.¹⁸⁴ The judge pointed out that the negligence of professionals usually becomes evident later than the negligence of nonprofessionals and is more difficult to detect.¹⁸⁵ Consequently, the judge said, the statute of limitations for professionals should be longer, not shorter, than the statute for nonprofessionals, and a statute that made the liability period shorter was probably based on political influence rather than logic or fairness.¹⁸⁶ It does seem inherently unfair that a professional may

"when a particular policy did not cover a particular risk after the policy was interpreted legally by the courts," and argued that "the Florida legislature's substantive change to the professional malpractice statute of limitations must have taken into account the barrage of malpractice suits against those other than doctors when they revised the statute in 1974 and retained the expanded version after the Medical Malpractice Reform Act in 1975." Respondent's Brief on the Merits at 16, *Panther v. MacMillan-Buchanan & Kelly Ins. Agency, Inc.*, 520 So. 2d 601 (Fla. 1988) (No. 72,800).

181. 458 So. 2d 76, 79 (Fla. 5th DCA 1984). See *supra* note 73 and accompanying text.

182. See *supra* note 85 and accompanying text.

183. See *supra* note 81 and accompanying text.

184. *Panther*, 520 So. 2d at 603 (Cobb, J., specially concurring). The judge emphasized the unreasonable and preferential nature of the professional malpractice statute of limitations. *Id.*

185. *Id.* at 603-04.

186. *Id.* at 604.

have four years to sue a client for unpaid fees¹⁸⁷ while a client has only two years to sue a professional for malpractice. The *Pierce* court erred in failing to consider inequalities inherent in the classifications based on its definition of "profession."

The equal protection clause also requires that all persons within a class be treated equally.¹⁸⁸ The *Pierce* court held that an occupation is a profession if, under the laws and administrative rules of Florida, persons can only be licensed to practice the occupation upon completion of a four-year degree in the field. The *Pierce* court overlooked the fact that some professions have alternative ways of meeting the licensure requirements. For example, surveyors may become licensed by having a four-year degree from a university surveying program and one year's experience, or by having a high school diploma and eight years' experience.¹⁸⁹ The surveyor with a four-year degree would be a professional, but the other would not, even though both did the same work and committed the same negligent act. The former surveyor would be liable for the results of his negligent act for only two years while the latter would be liable for four years. When the *Pierce* court's definition of "profession" is applied to the professional malpractice statute of limitations, the statute discriminates between persons within the same classification. The *Pierce* court's narrow definition of "profession" exacerbates the unconstitutionality of the professional malpractice statute of limitations.

The *Pierce* court further confused the issue when it said that the four-year degree requirement "does not mean that insurance agents who have college degrees in insurance are necessarily professionals. Certainly one may become an insurance agent simply by completing a short correspondence course or by working full time in an insurance agency for one year."¹⁹⁰ The court might have clarified this statement by holding that a land surveyor is not a professional because there are several alternatives by which a land surveyor can be licensed and

187. FLA. STAT. § 95.11(3)(k) (1987) reads as follows:

Actions other than for recovery of real property shall be commenced as follows:

.....

(3) WITHIN FOUR YEARS. —

.....

(k) A legal or equitable action on a contract, obligation, or liability not founded on a written instrument, including an action for the sale and delivery of goods, wares, and merchandise, and on store accounts.

188. See *supra* notes 104-05 and accompanying text.

189. See *supra* note 72 and accompanying text.

190. See *supra* note 132.

some alternatives require less than a four-year degrees in the field of surveying.¹⁹¹ However, the court specifically stated that a "person cannot be licensed as a land surveyor in Florida unless he or she has graduated from a four-year university surveying program and worked for two years in land surveying under a licensed land surveyor."¹⁹² The relationship of these statements to the court's definition of "professional" is not clear.

The *Pierce* court also failed to explain why education was chosen as the sole basis for its definition of a profession. If the court were going to uphold a professional malpractice statute of limitations for any group, the court should have imposed a greater duty and a higher standard of care on professionals to justify their having the benefit of a shorter period of liability for negligence.¹⁹³ However, the court mentioned nothing about any duty or standards in its definition of "profession."

As an alternative to the current situation after *Pierce*, the Florida Legislature should revoke the professional malpractice statute of limitations and apply the four-year negligence statute to malpractice actions.¹⁹⁴ Since medical malpractice is covered by a separate statute, revoking the professional malpractice statute of limitations would not have any effect on medical malpractice limitations.¹⁹⁵ Revoking the professional malpractice statute of limitations would achieve the constitutional and equitable result of applying the same four-year limitations period to all others guilty of malpractice.

CONCLUSION

The *Pierce* court erred in failing to address the constitutionality of the professional malpractice statute of limitations, and in creating discriminatory classifications under the statute by arbitrarily defining "profession." The legislature should revoke the unconstitutional pro-

191. See *supra* note 72.

192. 531 So. 2d at 87.

193. *Recent Developments in Utah Law*, *supra* note 19, at 143. In a general negligence action, Utah holds a defendant to a standard of care of a reasonable person under the circumstances. In a professional negligence action, "one offering professional services to the public is held to a higher standard of care and owes a duty to his client to possess and exercise the knowledge skill and care ordinarily possessed by members of the profession in good standing." *Id.* at 144.

194. See *supra* note 9.

195. Courts have held that applying different statutes of limitations to the medical field is constitutional. See *supra* notes 104-05 and accompanying text. Doctors, for various reasons, deserve a shorter period of limitations. See *supra* notes 85-87 & 93 and accompanying text.

fessional malpractice statute of limitations and apply the four-year negligence statute to all malpractice actions not covered by the medical malpractice statute of limitations.

Sheila McNeill

CASHIER'S CHECKS IN FLORIDA COMMERCIAL TRANSACTIONS: AS GOOD AS CASH? DON'T BANK ON IT!

Barnett Bank v. Warren Finance, Inc., 532 So. 2d 676 (Fla. 1st DCA 1988).

Warren Finance, Inc. ("Warren"), and Redan Engineering, Inc. ("Redan"), entered an agreement in which Warren advanced funds to Redan to finance construction work performed by Redan.¹ As security for repayment of the loans, Redan assigned to Warren its rights to receive payment for work performed.² In August 1986, Blossam Contractors, Inc., and T. Butler Co., paid for Redan's construction work with checks made out to Redan.³ In accordance with the assignment, Redan delivered the checks to Warren.⁴ Warren refused to take the Blossam and Butler checks and demanded payment by cashier's check.⁵

Redan then bought three cashier's checks from Barnett Bank of Jacksonville, N.A., which Redan paid for with the Blossam and Butler checks. The cashier's checks were made out to Redan.⁶ Redan in-

1. *Barnett Bank v. Warren Finance, Inc.*, 532 So. 2d 676, 678 (Fla. 1st DCA 1988).

2. *Id.*

3. Brief for Petitioner at 3, *Warren Finance, Inc. v. Barnett Bank* (Fla. Apr. 7, 1988) (No. 73,350).

4. 532 So. 2d at 678.

5. *Id.* Warren alleged that Redan had a history of bouncing checks. Therefore, in order to receive certain payment and immediate credit, Warren demanded payment by cashier's check. Brief for Petitioner at 3, *Warren Finance, Inc. v. Barnett Bank* (Fla. Apr. 7, 1988) (No. 73,350).

6. *Id.* Redan was the payee. The word "purchaser" refers to the bank's customer who buys the cashier's check. Often the cashier's check is made payable to the customer, in which case the purchaser and the payee are the same person. The holder then is the person in possession of a check that has been issued or indorsed to him. See U.C.C. § 1-201(20) (1987) (codified at FLA. STAT. § 671.201(20) (1987)). When a purchaser-payee indorses and delivers the check, the indorsee becomes the holder. See *infra* note 33 for text of U.C.C. § 1-201(20) defining "holder." Some cashier's checks list the name of the purchaser on the check. This does not indicate that the purchaser is a party to the check but is purely for information. See Benson, *Stop Payment of Cashier's Checks and Bank Drafts Under the Uniform Commercial Code*, 2 OHIO N.U.L. REV. 445 (1974).

There was some confusion in the *Barnett* case as to who the purchaser was, as Blossam and Butler were not present when the cashier's check was bought, though they were listed as purchasers on the check. Further, the Blossam and Butler checks were made out to and delivered to Redan. Redan then indorsed and delivered the Blossam and Butler checks to Barnett as payment for the cashier's checks. 532 So. 2d at 678.

dorsed the cashier's checks and delivered them to Warren.⁷ Warren then refused to advance more funds to Redan.⁸

Redan alleged that it indorsed the checks to Warren in return for Warren's promise to advance more funds.⁹ Therefore, at Blossam's and Redan's request, Barnett stopped payment on the cashier's checks and issued replacement cashier's checks to Redan.¹⁰ Subsequently, Barnett refused to honor the cashier's checks presented by Warren.¹¹

Warren sued Barnett for payment of the cashier's checks. Warren was granted summary judgment, and Barnett appealed.¹² HELD: In defense of refusal to pay a cashier's check, a bank may assert the defenses of a payee or an indorsee against the right to payment of a subsequent indorsee who is not a holder in due course.¹³ The court certified the following question as one of great public importance: "MAY THE ISSUING BANK ASSERT THE DEFENSES OF A PAYEE OR INDORSEE AGAINST THE RIGHT OF A SUBSEQUENT INDORSEE TO RECEIVE PAYMENT ON A CASHIER'S CHECK?"¹⁴ The case was remanded to determine whether the indorsee, Warren, was a holder in due course.¹⁵

Barnett is a case of first impression in Florida. The *Barnett* court's holding significantly increases the defenses a bank may use to resist payment of a cashier's check. This increase diminishes the cash-like nature of cashier's checks and thus undermines their free negotiability. Furthermore, the *Barnett* court failed to follow either of the two statutory approaches used to determine the treatment of

7. 532 So. 2d at 678.

8. *Id.*

9. *Id.* Warren alleged that Redan did not request more funds until after the checks had been indorsed and delivered. *Id.*

10. 532 So. 2d at 678. Barnett did not obtain an indemnity agreement from Redan as is required by Barnett's operating procedure manual. Brief for Petitioner at 4, *Warren Finance v. Barnett Bank* (Fla. Apr. 7, 1988) (No. 73,350). Before paying a person other than the holder of a cashier's check, most banks require indemnity agreements to protect the bank from having to pay the check twice, i.e., to protect the bank from double liability. See Wallach, *Negotiable Instruments: The Bank Customer's Ability to Prevent Payment on Various Forms of Checks*, 11 IND. L. REV. 579, 587 (1978).

11. 532 So. 2d at 678.

12. *Id.* Barnett joined Redan as a third party. Redan appeared before the court and agreed to defend Barnett. Prior to being joined, an involuntary petition in bankruptcy was filed against Redan. Brief for the Respondent at 8, *Warren Finance v. Barnett Bank* (Fla. Apr. 7, 1988) (No. 73,350).

13. 532 So. 2d at 680.

14. *Id.* at 681.

15. *Id.*

cashier's checks: the cash equivalent theory or the negotiable instrument theory. By misconstruing precedent and ignoring the procedural remedies delineated by the Uniform Commercial Code (UCC), the *Barnett* holding increases uncertainty in business transactions and fosters confusion in the treatment of cashier's checks in Florida.

This Note will review the theoretical underpinnings and policy considerations that govern the treatment of cashier's checks. The application of the UCC in the two statutory approaches to cashier's checks will also be reviewed. Finally, the resulting consequences of the *Barnett* court's expansion of the defenses available under the negotiable instrument theory as well as its unique application of the UCC will be examined.

THE TWO STATUTORY APPROACHES TO CASHIER'S CHECKS

There are two statutory approaches to determine what defenses a bank may assert against the taker of a cashier's check: the cash equivalent theory and the negotiable instrument theory.¹⁶ Using either theory, a cashier's check is defined as a bank check drawn by a bank upon its own funds where the issuing bank is both the drawer and the drawee.¹⁷ Banks are less likely to be insolvent than the drawer of a personal check, and the risk of loss or theft associated with cash is also reduced.¹⁸ Therefore, because the public believes the bank stands behind the check, cashier's checks are often used as a substitute for cash or a personal check to reduce the risk of the

16. *DaSilva v. Sanders*, 600 F. Supp. 1008, 1010-11 (D.D.C. 1984). The UCC does not specifically address the treatment of cashier's checks. The UCC's only reference to cashier's checks is in § 4-211 which describes the type of items a bank may take in collection. *Id.* at 1010 n.4.

17. *Laurel Bank & Trust Co. v. City Nat'l Bank*, 33 Conn. Supp. 641, —, 365 A.2d 1222, 1224 (Super. Ct. 1976); *Dziurak v. Chase Manhattan Bank*, 58 A.D.2d 103, 106, 396 N.Y.S.2d 414, 415-16 (1977), *aff'd*, 44 N.Y.2d 776, 377 N.E.2d 474, 406 N.Y.S.2d 30 (1978); *Moon over the Mountain, Ltd. v. Marine Midland Bank*, 87 Misc. 2d 918, —, 386 N.Y.S.2d 974, 975 (Civ. Ct. 1976). A person who writes and signs a personal check is the drawer of the check, and the funds for the check are drawn from that person's account. The issuing bank is the drawee. Therefore, since a cashier's check is signed by the bank and drawn from its own account, it is both drawer and drawee. See *Kaufman v. Chase Manhattan Bank*, 370 F. Supp. 276, 278 (S.D.N.Y. 1973); *Moon*, 87 Misc. 2d at —, 386 N.Y.S.2d at 975; *Pennsylvania v. Curtiss Nat'l Bank*, 427 F.2d 395, 399 (5th Cir. 1970). See also Fox, *Stopping Payment on a Cashier's Check*, 19 B.C.L. Rev. 683 (1978).

18. Lawrence, *Making Cashier's Checks and Other Bank Checks Cost Effective; A Plea for Revision of Article 3 and 4 of the UCC*, 64 MINN. L. REV. 275, 279 (1980). See also *National Newark & Essex Bank v. Giordano*, 111 N.J. Super. 347, —, 268 A.2d 327, 329 (1970).

drawer's insolvency.¹⁹ Furthermore, since a drawer of a personal check may issue a stop payment order,²⁰ thus subjecting the taker of a check to possible litigation to receive his funds, cashier's checks are often preferred to reduce the risk of litigation.²¹

The Cash Equivalent Theory

The majority of courts treat a cashier's check as a cash equivalent.²² These courts find the commercial world's need for a cash substitute paramount to the need to protect the bank or parties to the check.²³ Therefore, to preserve the cash-like function of cashier's checks, defenses to payment of cashier's checks are prohibited.²⁴

19. Lawrence, *supra* note 18, at 279.

20. A personal check can be stopped when reasonable notice is given by the drawer to the drawee bank. *Dziurak*, 58 A.D.2d at —, 396 N.Y.S.2d at 415. See also Fox, *supra* note 17, at 684.

U.C.C. § 4-403(1) (1987) (codified at FLA. STAT. § 674.403 (1987)):

A customer may by order to his bank stop payment of any item payable to his account but the order must be received at such time . . . as to afford the bank a reasonable opportunity to act on it prior to any action by the bank with respect to the item described.

U.C.C. § 4-403 comment 2 states that stopping payment is a service the bank provides its depositors. Furthermore, comment 5 states, "There is no right to stop payment after . . . acceptance of a draft." U.C.C. § 4-403 comment 5 (1987). Since a bank is not its own customer and the account on which a cashier's check is drawn is the bank's own account, § 4-403 has been held as being inapplicable to cashier's checks. See Wallach, *supra* note 10, at 580-81.

21. Lawrence, *supra* note 18, at 279. By paying with a personal check and then stopping payment, the cost of litigation is shifted to the holder who must sue to receive payment and pay his own attorney's fees regardless of whether he wins the litigation. By demanding a cashier's check, the cost of litigation is shifted to the non-holder, usually the buyer or payee who must assert his right to payment in a breach of contract claim against the holder. Lawrence, *supra* note 18, at 279. See also Shupack, *Cashier's Checks, Certified Checks, and True Cash Equivalence*, 6 CARDOZO L. REV. 467, 473 (1985).

22. Lawrence, *supra* note 18, at 279.

23. *National Newark & Essex Bank v. Giordano*, 111 N.J. Super. 347, —, 268 A.2d 327, 329 (1970) (if banks were permitted to stop payment on cashier's checks, public confidence in the issuing bank and the usefulness of cashier's checks as cash substitutes would be eroded). See also *DaSilva v. Sanders*, 600 F. Supp. 1008, 1013-14 (D.D.C. 1984) (preventing stop payment orders on cashier's checks promotes certainty in commercial transactions); *Kaufman v. Chase Manhattan Bank*, 370 F. Supp. 276, 278-79 (S.D.N.Y. 1973) (public policy prohibits stop payment orders on cashier's checks due to their use in the commercial world as cash equivalents); *First Fin. v. First Am. Bank & Trust Co.*, 489 So. 2d 388, 391-92 (La. Ct. App. 1986) (cashier's checks should be treated as cash substitutes for public policy reasons); *Missouri ex rel. Chan Siew Lai v. Powell*, 536 S.W.2d 14, 16 (Mo. 1976) (public policy does not favor stop payment orders on cashier's checks); *Moon over the Mountain, Ltd., v. Marine Midland Bank*, 87 Misc. 2d 918, —, 386 N.Y.S.2d 974, 976 (Civ. Ct. 1976) (permitting stop payment orders of cashier's checks would undermine public confidence in the banking system).

24. *DaSilva*, 600 F. Supp. at 1013; *Kaufman*, 370 F. Supp. at 278; *First Financial*, 498 So. 2d at 391-92; *Chan Siew Lai*, 536 S.W.2d at 16. See also Lawrence, *supra* note 18, at 289 n.23.

Using the cash equivalent theory, the general rule is that a cashier's check is not subject to countermand.²⁵ "cash equivalent" courts view a cashier's check as being a draft accepted upon issuance in which any stop-order necessarily comes too late.²⁷ In doing so, the courts reject the bank's assertion of any defenses to payment of the check, even when there is a failure of consideration for the check²⁸ or the indorsement of the check was induced by an underlying fraudulent obligation.²⁹ The bank is also denied the defenses otherwise available to the drawer of a negotiable instrument under UCC sections 3-305³⁰

25. See *supra* note 24. Though courts and commentators continue to refer to "stopping payment" of a cashier's check, the real issue is what defenses a bank may assert when sued for payment by the taker. When a bank issues a cashier's check, it enters into a drawer's contract to pay the holder of the check. See U.C.C. § 3-413(20) (1988). Like other contracts, the parties to a drawer's contract are free to breach the agreement. Therefore, the bank is free to refuse payment of a cashier's check. The question then concerns only what defenses the bank may assert in defense of dishonor. J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 14-10, at 644 (student's ed. 1988); *Id.* at 736. (practitioner's ed. 1988).

Relying on UCC section 4-303,²⁶

26. U.C.C. § 4-303 (1987) (codified at FLA. STAT. § 673.303 (1987)):

Any knowledge, notice, or stop-order received by, legal process served upon or setoff exercised by a payor bank, whether or not effective under rules of law to terminate, suspend or modify the bank's right or duty to pay an item or to charge its customer's account for the item, comes too late to so terminate, suspend or modify such right or duty if the knowledge, notice, stop-order or legal process is received or served . . . after the bank has done any of the following:

(a) accepted or certified the item . . .

27. See *supra* note 24. See also U.C.C. § 3-410 (1987) (codified at FLA. STAT. § 673.410 (1987)): "Acceptance is the drawee's signed engagement to honor the draft as presented. It must be written on the draft, and may consist of his signature alone. It becomes operative when completed by delivery." The bank's signature on the cashier's check operates as its acceptance.

28. *Munson v. American Nat'l Bank & Trust Co.*, 484 F.2d 620, 624 (7th Cir. 1973) (cashier's check was accepted by issuance, and therefore bank had no right to assert failure of consideration defense); *DaSilva*, 600 F. Supp. at 1014 (although there was failure of consideration, bank had "no choice" but to pay cashier's check); *Kaufman*, 370 F. Supp. at 278 (presumption that cashier's check is issued for value cannot be overcome by evidence of failure of consideration); *First Financial*, 489 So. 2d at 392 (bank forbidden to use failure of consideration defense).

29. See *National Newark & Essex Bank v. Giordano*, 111 N.J. Super. 347, —, 268 A.2d 327, 329-30 (1970). See also *Missouri ex rel Chan Siew Lai v. Powell*, 536 S.W.2d 14, 16 (Mo. 1976) (fraud perpetrated by purchaser on the payee did not give payee standing to countermand payment of the cashier's check); *Moon over the Mountain, Ltd. v. Marine Midland Bank*, 87 Misc. 2d 918, —, 386 N.Y.S.2d 974, 977 (Civ. Ct. 1976) (underlying fraud not material to dispute).

30. U.C.C. § 3-305 (1987) (codified at FLA. STAT. § 673.305 (1987)):

To the extent that a holder is a holder in due course he takes the instrument free from:

(1) All claims to it on the part of any person; and

and 3-306.³¹ These courts prohibit the bank's use of any third-party defenses or claims even when the third party posts an indemnity bond to protect the bank against double liability on the check as provided in section 3-603(1).³² This focus on the bank's absolute obligation to pay the check's holder³³ facilitates the use of cashier's checks as cash equivalents.

The Negotiable Instrument Theory

A minority of courts make a narrow exception to the general rule that a cashier's check cannot be countermanded.³⁴ Using the second

(2) All defenses of any party to the instrument with whom the holder has not dealt except;

(a) Infancy . . .

(b) Such other incapacity, or duress, or illegality . . .

31. See Lawrence, *supra* note 18, at 289. U.C.C. § 3-306 (1987) (codified at FLA. STAT. § 673.306 (1987)) (emphasis added):

Unless he has the rights of a holder in due course any person takes the instrument subject to

(a) all valid claims to it on the part of any person; and

(b) all defenses of any party which would be available in an action on a simple contract; and

(c) the defenses of want or failure of consideration . . . and

(d) the defense that he or a person through whom he holds the instrument acquired it by theft or that payment or satisfaction to such holder would be inconsistent with the terms of a restrictive indorsement. *The claim of any third person to the instrument is not otherwise available as a defense to any party liable thereon unless the third person himself defends the action for such party.*

32. See Moon, (bank can not assert defenses of purchaser even when purchaser provided indemnity bond); *Giordano*, 111 N.J. Super. at —, 268 A.2d at 328 (bank cannot assert purchaser's defenses even though purchaser offered to post indemnity bond).

U.C.C. § 3-603(1) (1987) (codified at FLA. STAT. § 673.603(1) (1987)) (emphasis added):

(1) The liability of any party is discharged to the extent of his payment or satisfaction to the holder even though it is made with knowledge of a claim of another person to the instrument *unless prior to such payment or satisfaction the person making the claim either supplies indemnity deemed adequate by the party seeking the discharge or enjoins payment or satisfaction by order of a court of competent jurisdiction in an action in which the adverse claimant and the holder are parties.* This subsection does not, however, result in the discharge of the liability:

(a) of a party who in bad faith pays or satisfies a holder who acquired the instrument by theft . . . or

(b) of a party . . . who pays or satisfies a holder of an instrument which has been *restrictively indorsed* in a manner not consistent with the terms of such restrictive indorsement.

33. U.C.C. § 1-201(20) (1987) (codified at FLA. STAT. § 671.201(20) (1987)) provides, "A holder means a person who is in possession of . . . an instrument . . . issued or indorsed to him . . ."

34. Lawrence, *supra* note 18, at 286. See also *supra* note 25.

statutory approach, the negotiable instrument theory, these courts treat a cashier's check as a negotiable instrument governed by applicable sections of the UCC.³⁵ Cases applying the negotiable instrument theory are analyzed in terms of the status of the taker, whether the taker has dealt with the bank, and whose defenses the bank asserts.

In *Pennsylvania v. Curtiss National Bank*,³⁶ a leading case using the negotiable instrument theory, the court recognized the application of sections 3-305 and 3-306 to cashier's checks.³⁷ In *Curtiss*, a bank loaned money to a borrower who used part of the loan proceeds to buy a cashier's check. The bank dishonored the cashier's check when the borrower failed to provide collateral for the loan.³⁸ When the holder sued for payment, the bank asserted the defense of failure of consideration. Because there was consideration for the cashier's check, the holder in due course issue was not decided.³⁹ However, the United States Court of Appeals for the Fifth Circuit, interpreting Florida law, stated in dicta that a bank is entitled to defend on the ground of lack or failure of consideration when the holder is not a holder in due course based on UCC sections 3-408 and 3-306.⁴⁰ Further, citing section 3-305, the court noted that a holder in due course takes free from the defense of want of consideration.⁴¹

35. *Id.* The cashier's check is considered either a draft or a note. U.C.C. § 3-118 (1987) (codified at FLA. STAT. § 673.118 (1987)) provides, "A draft drawn on the drawer is effective as a note." Applying § 3-118, some courts reason that a cashier's check is a note, and therefore the holder takes the check subject to U.C.C. §§ 3-305, -306. *TPO, Inc. v. FDIC*, 487 F.2d 131, 135-36 (3d Cir. 1973); *Banco Ganadero y Agricola v. Society Nat'l Bank*, 418 F. Supp. 520, 524 (N.D. Ohio 1976). Other courts view the check as a draft accepted upon issuance. *Rezapolvi v. First Nat'l Bank*, 296 Md. 1, 7-9, 459 A.2d 183, 187-88 (1983). However, U.C.C. § 3-413(1) (1987) (codified at FLA. STAT. § 673.413(1) (1987)) provides, "The maker or the acceptor engages that he will pay the instrument according to its tenor" Since the maker's contract is the same as the acceptor's contract, these courts reason that the check is also subject to U.C.C. §§ 3-305, -306. Lawrence, *supra* note 18, at 286 n.36. See also *DaSilva v. Sanders*, 600 F. Supp. 1008, 1011 (D.D.C. 1984). But see *supra* notes 26-31 and accompanying text.

36. 427 F.2d 395 (5th Cir. 1970).

37. *Id.* at 399.

38. *Id.* at 398.

39. *Id.* at 399. The court found that the cashier's check was purchased for adequate consideration. Therefore, the court held the bank had no defense to payment regardless of whether the holder was a holder in due course. *Id.* at 399 n.1 & 400.

40. *Id.* at 399. See *supra* note 31 for the text of U.C.C. § 3-306. See also *Tropicana Pools, Inc. v. First Nat'l Bank*, 206 So. 2d 48 (Fla. 4th DCA 1968).

U.C.C. § 3-408 (1987) (codified at FLA. STAT. § 673.408 (1987)) states, "Want or failure of consideration is a defense as against any person not having the rights of a holder in due course (Section 3-305)"

41. 427 F.2d at 399 n.1. See *supra* note 30 for the text of U.C.C. § 3-305.

The court in *Curtiss* did not consider whether the holder had dealt with the bank.⁴² Prior to the adoption of the UCC, banks could not resist payment of a cashier's check when presented by a holder in due course.⁴³ A holder in due course is a holder⁴⁴ who takes a check for value, in good faith, and without any notice of a defense against it.⁴⁵ However, the UCC draws a distinction between holders that have dealt with the bank and those that have not. Both UCC sections 3-305 and 3-306 focus on the status of the taker in relation to the instrument.⁴⁶ Applying sections 3-305 and 3-306, if a taker of a cashier's check is a holder in due course who has not dealt with the bank, he takes the check free of all claims and defenses of the bank or prior holders to the check.⁴⁷ However, when the taker has dealt with the bank or is not a holder in due course, the cases are analyzed in the context of two fact patterns: 1) when a bank asserts its own defenses and 2) when a bank asserts the defenses of its customer-purchaser.⁴⁸

If a bank asserts its own defenses, both the status of the holder and whether the holder has dealt with the bank must be considered. A bank attempts to assert its own defenses primarily in situations where the bank does not receive payment for the cashier's check, i.e., failure of consideration, or the cashier's check has been procured through fraud perpetrated upon the bank.⁴⁹ Section 3-305(2) of the

42. See also *Sani-Serv Div. of Burger Chef Sys. v. Southern Bank*, 244 So. 2d 509, 513 (Fla. 4th DCA 1970) (without considering whether the holder had dealt with the bank, the court stated in dicta that a bank "has no right to countermand" payment of a cashier's check in the hands of a holder in due course).

43. *Tropicana Pools, Inc. v. First Nat'l Bank*, 206 So. 2d 48, 49 (Fla. 4th DCA 1968). See also *Sani-Serv*, 244 So. 2d at 513.

44. See *supra* note 33.

45. *Sani-Serv*, 244 So. 2d at 513. U.C.C. § 3-302 (1987) (codified at FLA. STAT. § 673.302) (1987)):

(1) A holder in due course is a holder who takes the instrument

(a) for value; and

(b) in good faith; and

(c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person.

(2) A payee may be a holder in due course . . .

46. See *supra* notes 30 & 31 for the texts of U.C.C. §§ 3-305, -306.

47. U.C.C. § 3-305 (1987) (codified at FLA. STAT. § 673.305 (1987)). The check is subject to "real" defenses listed in U.C.C. § 3-305(2). These defenses include infancy, incapacity, and duress. See *supra* note 30 for the text of U.C.C. § 3-305.

48. Fox, *supra* note 17, at 686.

49. *Banco Ganadero y Agrícola v. Society Nat'l Bank*, 418 F. Supp. 520, 522 (N.D. Ohio 1976) (bank asserted defense of failure of consideration when personal check used to purchase cashier's check was drawn on account with insufficient funds); *Tropicana Pools, Inc. v. First Nat'l Bank*, 206 So. 2d 48, 50 (Fla. 4th DCA 1968) (bank asserted defense of failure of consider-

UCC states that a holder in due course takes free of all defenses only from a party with whom he has not dealt.⁵⁰ Courts have interpreted section 3-305(2) to mean a bank may assert its own defenses against payment of a cashier's check presented for payment by a payee who has dealt with the bank even if the payee is a holder in due course,⁵¹ i.e., even if the payee is not involved in the fraud perpetrated upon the bank or the failure of consideration for the check.⁵² These courts permit the bank to assert only its own defenses, not those of third parties.⁵³

A bank may also assert its own defenses under UCC section 3-306 against a person presenting a cashier's check for payment if the person is not a holder in due course.⁵⁴ The strong policy considerations of the free transferability and negotiability of cashier's checks do not control, and there are no innocent third parties involved.⁵⁵

ation when payment was stopped on personal check used to purchase cashier's check); TPO, Inc. v. FDIC, 487 F.2d 131 (3d Cir. 1973) (bank asserted defense of fraud perpetrated upon the bank by payee). See also *infra* note 52.

50. U.C.C. § 3-305(2) (1987). See *supra* note 30 for the text of U.C.C. § 3-305(2).

51. Prior to the enactment of the UCC, there was some controversy whether a payee could be a holder in due course. U.C.C. § 3-302(2) settled this issue. U.C.C. § 3-302 comment 2 (1987). See *supra* note 45 for the text of U.C.C. § 3-302(2).

52. See *Rezapolvi v. First Nat'l Bank*, 296 Md. 1, 12 n.9, 459 A.2d 183, 189 & 189 n.9 (1983) (when bank mistakenly released funds being held to back a third party's personal check used to purchase cashier's check, it was allowed to assert failure of consideration defense against a purchaser-payee because payee, as purchaser, had dealt with the bank); *Travi Constr. v. First Bristol County Nat'l Bank*, 10 Mass. App. Ct. 32, —, 405 N.E.2d 666, 669 (1980) (when a stop payment order was placed on a third party's personal check used to purchase a cashier's check, bank was allowed to assert failure of consideration defense against purchaser-payee because payee, as purchaser, had dealt with the bank). See generally Lawrence, *supra* note 18, at 292-93. If the holder of a cashier's check is also the purchaser, the bank can assert its own defenses in a counterclaim. *Id.*

53. *Rezapolvi*, 296 Md. at 12, 459 A.2d at 189.

54. U.C.C. § 3-306 (1987). See also *Pennsylvania v. Curtiss Nat'l Bank*, 427 F. Supp. 395, 399 (5th Cir. 1970); *Banco Ganadero*, 418 F. Supp. at 524. See *supra* note 31 for the text of U.C.C. § 3-306. Allowing a bank to assert its defenses against a person who is not a holder in due course presents an anomaly. A person who is not a holder in due course is better protected by taking a personal check than by taking a cashier's check because U.C.C. § 3-802(1)(a) (1987) (codified at FLA. STAT. § 673.802(1)(a) (1987)) provides, "where an instrument is taken for an underlying obligation the obligation is pro tanto discharged if a bank is drawer, maker, or acceptor of the instrument" Since the bank is a drawer of a cashier's check, § 3-802 of the UCC applies. Therefore, if the bank dishonors the check, the person presenting the check has no remedy since the bank has a defense and the person from whom the check was obtained has been discharged. J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 14-10, at 646 n.8 (student's ed. 1988); *Id.* at 738 n.8 (practitioner's ed. 1988).

55. TPO, Inc. v. FDIC, 487 F.2d 131, 135 (3d Cir. 1973). See also *Anderson Clayton & Co. v. Farmers Nat'l Bank*, 624 F.2d 105, 110 (10th Cir. 1980); *Travi Constr. v. First Bristol County Nat'l Bank*, 10 Mass App. Ct. 32, —, 405 N.E.2d 666, 668 (1980); *Pulaski Chase Co-op v. Kel-*

Therefore, when victimized by failure of consideration or fraud, a bank may assert its own defenses only against a holder in due course with whom the bank has dealt⁵⁶ or a holder who is not a holder in due course.⁵⁷

If a bank does not assert its own defenses, it may attempt to assert a customer-purchaser's claims or defenses. A customer-purchaser's claims or defenses arise when the customer has a defense or claim relating to the underlying transaction for which the cashier's check was issued.⁵⁸ When a bank attempts to assert the defenses of its customer-purchaser, a holder in due course takes the instrument free of all defenses or claims of third parties⁵⁹ both under the common law and the UCC.⁶⁰ This holder in due course immunity is rooted in the policy that the free negotiability of cashier's checks is paramount to any third-party claims or defenses to the instrument.⁶¹

If a person in possession of a cashier's check is not a holder in due course, a review of pre-UCC law is helpful to clarify when a bank can raise its customer-purchaser's claims and defenses. Prior to the UCC, courts permitted banks to raise a purchaser's or third party's

logg-Citizens Nat'l Bank, 130 Wis. 2d 200, ___, 386 N.W.2d 510, 512 (1986).

56. See *supra* text accompanying notes 49-51. See also *Pulaski*, 130 Wis. 2d at ___, 386 N.W.2d at 511.

57. See, e.g., *TPO*, 487 F.2d at 137; *Curtiss*, 427 F.2d at 399. See also *Anderson*, 624 F.2d at 110; *Banco Ganadero*, 418 F. Supp. at 524.

58. Wallach, *supra* note 10, at 588. See also Lawrence, *supra* note 18, at 305, 312; Shupack, *supra* note 21, at 485. A claim refers to a right to ownership. There are two kinds of claims, legal and equitable. Legal claims arise when the cashier's check or instrument is stolen or lost or there is a forged indorsement, and therefore there is a claim to legal title of the instrument. The holder parts with the instrument involuntarily. An equitable claim arises when the holder of the check is fraudulently induced to part with the instrument. The holder of the check parts with the instrument voluntarily.

Defenses refer to ordinary personal defenses arising from a breach of contract. A defense becomes an equitable claim when the breach is so egregious as to permit a rescission of the contract. See generally Lawrence, *supra* note 18, at 307-08; Shupack, *supra* note 21, at 486 n.78.

59. Wallach, *supra* note 10, at 589. When a bank asserts its own defenses, the bank asserts a first-party defense. If the bank asserts the defenses of its customer, the bank asserts a third-party defense. *Id.*

60. *Sani-Serv*, 244 So. 2d at 513. Using either statutory theory, third-party defenses to payment may not be asserted against any holder in due course. No defenses at all, whether the bank's own or third-party, are permitted using the cash equivalent theory. Regarding the cashier's check as a note, U.C.C. § 3-305 (1987) protects the holder in due course. If the instrument is viewed as a draft accepted upon issuance, U.C.C. § 3-418 (1987) makes acceptance final as to a holder in due course. See generally Lawrence, *supra* note 18, at 305 n.117.

61. *TPO, Inc. v. FDIC*, 487 F.2d 131, 136 (3d Cir. 1973).

claim to resist payment of a cashier's check.⁶² Under pre-UCC law, banks or obligors were required to pay in due course.⁶³ Therefore, once a bank was notified of a competing claim of ownership to a cashier's check, the bank could not discharge its obligation without incurring double liability.⁶⁴

For example, in *Leo Syntax Auto Sales, Inc. v. Peoples Bank & Savings Co.*,⁶⁵ an Ohio court of common pleas permitted a bank to assert the equitable claim of a purchaser-payee against an indorsee. The purchaser-payee indorsed a check to a car dealer, and the car proved defective.⁶⁶ The *Leo Syntax* court held the bank not liable.⁶⁷ Although *Leo Syntax* was a post-UCC case, the court based its holding on pre-UCC cases that permitted banks to dishonor cashier's checks when the underlying transaction was for an illegal purpose such as gambling debts.⁶⁸

Because banks were unable to discharge their obligations when faced with competing claims to an instrument, the UCC outlined a procedure for handling third-party claims in sections 3-306(d) and 3-603(1).⁶⁹ Applying section 3-603(1), unless there is a competing legal claim, a bank discharges its liability by paying the holder regardless of whether the holder is a holder in due course, unless the adverse claimant enjoins payment of the check or posts an indemnity bond with the bank.⁷⁰ The policy of the UCC is to extricate the bank-obli-

62. Lawrence, *supra* note 18, at 290 n.52.

63. See U.C.C. § 3-603 comment 1 (1987).

64. *Id.* See also Lawrence, *supra* note 18, at 309. Under pre-UCC law, if the bank received notice of a third-party claim of ownership to a cashier's check, there was no way for the bank to discharge its obligation to pay. Therefore, the bank was subjected to double liability. If the bank paid the holder and the third-party claim was valid, the bank was liable. On the other hand, if the bank paid the third-party claimant, the bank was still subject to suit by the holder. Further, the third party was not bound by the results of the holder's suit. *Id.*

65. 6 Ohio Misc. 226, 215 N.E.2d 68 (Tuscarawas County C.P. 1965).

66. *Id.* at —, 215 N.E.2d at 69.

67. *Id.* at —, 215 N.E.2d at 71.

68. *Id.*

69. See *supra* notes 31 & 32 for the texts of U.C.C. §§ 3-306(d), -603(1). *Curtiss* recognizes the application of the Uniform Commercial Code to cashier's checks. See *supra* text accompanying notes 36-41.

70. U.C.C. § 3-603(1) (1987). See *supra* notes 32 & 58. See also *Dziurak v. Chase Manhattan Bank*, 58 A.D.2d 103, —, 396 N.Y.S.2d 414, 416 (1977); *Santos v. First Nat'l State Bank*, 186 N.J. Super. 52, —, 451 A.2d 401, 411 (1982).

U.C.C. § 3-306 comment 5 states:

The contract of the obligor is to pay the holder of the instrument and claims against the holder are generally not his concern. He is not required to set up such a claim as a defense, since he usually will have no satisfactory evidence of his own on the issue; and the provision that he may not do so is intended as much for his protection as for

gor from the dilemma of double liability as well as to protect the holder.⁷¹ The intent of the UCC to shift the risk of litigation to the nonholder or third-party claimant is evident from the comments.⁷²

However, should a bank elect to not discharge its obligation by paying the holder, the bank-obligor may not assert the purchaser's claims but must join the third-party claimant and rely on the third party to defend it.⁷³ A bank may not assert its customer's contract defenses or other third-party defenses.⁷⁴ Thus, under section 3-306(d), only third-party legal claims are available to the bank.⁷⁵

For example, in *Crosby v. Lewis*,⁷⁶ the Florida Fifth District Court of Appeal found that the purchasers of a cashier's check had no "right" to order stop payment on the check even though they were victims of a pyramid scheme perpetrated by the payee.⁷⁷ The court stated that the issuance of a cashier's check is a "separate independent transaction from the contract or relationship between the purchaser of the cashier's check and the payee."⁷⁸ Consequently, the *Crosby* court found that even when the underlying transaction is tainted with fraud, the primary obligation of the bank runs to the payee.⁷⁹

The UCC also determines when the holder in due course issue arises. As a negotiable instrument, a cashier's check is governed by section 3-307 of the UCC.⁸⁰ Section 3-307 provides that unless there

that of the holder.

71. U.C.C. § 3-603(1) comment 5 (1987). See also *supra* note 70.

72. U.C.C. § 3-306 comment 5 (1987) states, "The claimant who has lost possession of an instrument so payable or indorsed that another may become holder has lost his rights on the instrument, which by its terms no longer run to him. This provision includes all claims for rescission of negotiation" See *supra* note 70 for additional text of U.C.C. § 3-306 comment 5.

73. *Id.* at § 3-306(d).

74. *Id.* at § 3-306(d). See also *Rezapolvi v. First Nat'l Bank*, 296 Md. 1, 12, 459 A.2d 183, 189 (1983) ("bank may not rely upon the defenses of any third party").

75. "[E]xcept where theft or taking through a restrictive indorsement is alleged the payor must rely on the third party claimant to litigate the issue and may not himself defend" U.C.C. § 3-603 comment 3. See also *supra* note 58; Fox, *supra* note 17, at 690, 695; Shupack, *supra* note 21, at 486.

76. 523 So. 2d 1154, 1156 (Fla. 5th DCA 1988).

77. *Id.* The *Crosby* court did not directly address whether a bank can assert the defenses or claims of a purchaser of a cashier's check since the bank was not party to the suit. *Id.*

78. *Id.*

79. *Id.*

80. *Sani-Serv Div. of Burger Chef Sys. v. Southern Bank*, 244 So. 2d 509, 511 (Fla. 4th DCA 1970). See also J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* § 14-10, at 643 (student's ed. 1988); *Id.* at 735 (practitioner's ed. 1988).

U.C.C. § 3-307 (1987) (codified at FLA. STAT. § 673.307 (1987)) (emphasis added):

is a claim of forgery of the signature, the bank is required to pay the check unless the bank can establish a defense to it.⁸¹ The issue of holder in due course does not arise until after the bank has proven a defense.⁸² For example, in *Sani-Serv Division of Burger Chef Systems v. Southern Bank*,⁸³ since the bank was unable to prove a defense to payment of the check, the Florida court held the bank must pay the holder who need not have proved he was a holder in due course.⁸⁴

THE REASONING OF THE BARNETT COURT

Writing for the majority, Judge Barfield viewed the relationship between the bank (Barnett) and the payee (Redan), and the relationship between the bank and the subsequent indorsee (Warren), as two distinct obligations.⁸⁵ The defenses a bank may assert are determined by the holder in due course status of the person presenting the check for payment.⁸⁶ As between the payee and the bank, the bank can assert its own defenses to resist payment only if the payee is not a holder in due course.⁸⁷ Between the bank and indorsee or subsequent indorsees, if the person presenting the check is not a holder in due course, the bank can assert the defenses of the payee or previous indorsees as well as its own defenses.⁸⁸ The bank can never assert the defenses and claims of the purchaser of the cashier's check.⁸⁹

As between the bank and the payee, the court, citing *Curtiss*,

(1) Unless specifically denied in the pleadings each signature on an instrument is admitted

(2) When signatures are admitted or established, production of the instrument entitles the holder to recover on it *unless* the defendant establishes a defense.

(3) *After it is shown that a defense exists* a person claiming the rights of a holder in due course has the burden of establishing that he . . . is in all respects a holder in due course.

81. U.C.C. § 3-307 (1987) (codified at FLA. STAT. § 673.307 (1987)). See *Sani-Serv*, 244 So. 2d at 511.

82. U.C.C. § 3-307(3) comment 3 (1987). See also *Sani-Serv*, 244 So. 2d at 513.

83. 244 So. 2d 509 (Fla. 4th DCA 1970).

84. *Id.* at 513.

85. 532 So. 2d at 680.

86. *Id.* at 680.

87. *Id.* The bank would be permitted to raise the defenses of fraud perpetrated upon the bank, failure of consideration, or other defenses under FLA. STAT. §§ 673.305, .306 (1987). 532 So. 2d at 680.

88. 532 So. 2d at 680.

89. *Id.*

found the bank had an absolute obligation to pay a payee who is a holder in due course.⁹⁰ As in *Curtiss*, the *Barnett* court recognized an exception to the bank's obligation to pay when the bank is a victim of fraud perpetrated by the payee or there is a failure of consideration for the check.⁹¹ The court noted the bank may use the defenses available under Florida Statutes sections 673.305 and 673.306⁹² in cases of fraud or failure of consideration.⁹³ However, the court stated the purchaser's defenses may never be asserted by the bank against the payee.⁹⁴ In the hands of a payee with the status of a holder in due course, a cashier's check is equivalent to cash.⁹⁵

Additionally, when the payee indorses the cashier's check and delivers it to a third person, the court found the cashier's check loses its "cash-like" qualities and becomes similar to a negotiable instrument subject to the claims and defenses of third parties.⁹⁶ Citing five cases as precedent, the court noted that jurisdictions that treat a cashier's check as a negotiable instrument permit banks to assert the defenses of a purchaser, payee, or indorsee against the holder.⁹⁷ Agreeing with the holding in *Leo Syntax*, the majority held that a bank could assert its own defenses or those of the payee or intervening indorsee against payment of a cashier's check presented by an indorsee who is not a holder in due course.⁹⁸ The court reasoned that as the check is circulated through the commercial world, serving as payment in transactions unrelated to the original transaction for which the cashier's check was issued, persons accepting the check would "naturally place less reliance" on its cash-like aspects.⁹⁹ Fur-

90. *Id.* (citing *Pennsylvania v. Curtiss Nat'l Bank*, 427 F.2d 395 (5th Cir. 1970)). See *supra* text accompanying notes 36-42.

91. *Id.*

92. FLA. STAT. §§ 673.305, 306 (1987). The corresponding sections of the UCC are §§ 3-305, -306.

93. 532 So. 2d at 680.

94. *Id.*

95. *Id.* The court's statement should not be confused with the cash equivalent theory. Because the *Barnett* court recognized some defenses to payment of a cashier's check, the court did not follow the cash equivalent theory which prohibits all defenses to payment. See *supra* notes 22-33 and accompanying text.

96. 532 So. 2d at 680.

97. *Id.* at 679 & n.4. (citing *TPO, Inc. v. FDIC*, 487 F.2d 131 (3d Cir. 1973); *Banco Canadero y Agricola v. Society Nat'l Bank*, 418 F. Supp. 520 (N.D. Ohio 1976); *Rezapolvi v. First Nat'l Bank*, 296 Md. 1, 459 A.2d 183 (1983); *Santos v. First Nat'l State Bank*, 186 N.J. Super. 52, 451 A.2d 401 (App. Div. 1982); *Leo Syntax Auto Sales, Inc. v. Peoples Bank & Savings Co.*, 6 Ohio Misc. 226, 215 N.E.2d 68 (Tuscarawas County C.P. 1965)).

98. *Id.* See *supra* text accompanying notes 62-68.

99. *Id.*

thermore, under Florida Statutes section 673.306(4),¹⁰⁰ the court stated the bank could assert third-party claims arising from the transaction in which the check was used by joining the third party.¹⁰¹ Therefore, the court held that because Barnett joined Redan as a third party, Barnett may resist payment to Warren by asserting Redan's defense of fraud in the transaction between Warren and Redan.¹⁰² The court further stated that by issuing replacement cashier's checks to Redan, Barnett was subrogated to the claims of Redan and could therefore raise Redan's claims against Warren.¹⁰³

Judge Barfield in his concurring opinion noted that Barnett did not stop payment on the cashier's checks, but had chosen to pay one claimant over another.¹⁰⁴ If any holder were entitled to the proceeds of a check regardless of defenses and claims associated with it, the check would "truly" be the same as cash.¹⁰⁵ Such a construction would be both "commercially" unsound and unconstitutional as a violation of Article I, sections 8 and 10 of the United States Constitution.¹⁰⁶

DISSENTING OPINION

In a dissenting opinion, Judge Ervin noted the adverse effect created upon the commercial world's use of cashier's checks as cash substitutes when cashier's checks are treated like negotiable instruments subject to third-party defenses.¹⁰⁷ Questioning the practical result of the majority's holding, Judge Ervin would have treated cashier's checks as cash equivalents and would have allowed dishonor in only limited circumstances.¹⁰⁸ Using this approach, a bank would not be allowed to assert its own or third-party defenses.¹⁰⁹ Rejecting the treatment of cashier's checks as negotiable instruments, Judge Ervin stated that cashier's checks should be treated as cash equivalents regardless of the status of the holder.¹¹⁰

100. FLA. STAT. § 673.306(4) (1987) (corresponding to U.C.C. § 3-306(d) (1987)). See *supra* note 31 for the text of U.C.C. § 3-306(d).

101. 532 So. 2d at 680.

102. *Id.* See *supra* note 12.

103. 532 So. 2d at 681.

104. *Id.* (Barfield, J., concurring). See also *supra* note 25.

105. 532 So. 2d at 681.

106. *Id.*

107. *Id.* at 681-82 (Ervin, J., dissenting).

108. *Id.* at 682.

109. *Id.*

110. *Id.* Judge Ervin stated, "[T]he question of whether Warren Finance has the status of

The dissent did not distinguish between the payee and other subsequent holders of the check.¹¹¹ It reasoned that since a cashier's check is a draft accepted upon issuance, the transaction is complete between the bank and the payee.¹¹² The bank is powerless to pay anyone other than the holder.¹¹³ Precluding a bank from raising the contract defenses of its customer would preserve the cash equivalent characteristic of cashier's checks.¹¹⁴ The dissent advocated that cashier's checks be subject only to legal claims such as alteration and forged indorsement.¹¹⁵

Further, the dissent criticized the reasoning of the *Leo Syntax* court as being unsupported by the precedent cited within the case.¹¹⁶ With the exception of *Leo Syntax*, the dissent recognized that the cases allowing dishonor involved a bank asserting its own defenses such as fraud or failure of consideration.¹¹⁷ The dissent noted that the holding in *Barnett* is outside the mainstream of judicial opinion and is followed in only one other jurisdiction in the United States.¹¹⁸

CRITICAL ANALYSIS

The *Barnett* dissent correctly analyzes established precedent and policy considerations concerning cashier's checks. In choosing to follow previous courts' interpretations of cashier's checks as cash equivalents, the rule advocated by the dissent would promote certainty in the treatment of cashier's checks to preserve their essential use in the commercial world as substitutes for cash. The novel approach of the *Barnett* majority follows neither of the two statutory approaches nor the law governing negotiable instruments. By misconstruing or ignoring applicable sections of the UCC and expanding the defenses available to a bank under the negotiable instrument theory, the *Barnett* decision creates confusion as to the treatment of cashier's checks in Florida and further diminishes the use of cashier's

'a holder in due course is immaterial to a determination of its right to receive payment' since a cashier's check is a cash equivalent. *Id.*

111. *Id.*

112. *Id.* See *supra* text accompanying notes 26-33. But see *supra* note 35.

113. 532 So. 2d at 682 (Ervin, J., dissenting).

114. *Id.* Judge Ervin agreed with Professor Lawrence's theory that the UCC should be revised so that cashier's checks are treated as cash equivalents in order to facilitate their use as cash substitutes in commercial transactions. See Lawrence, *supra* note 18, at 316-20.

115. 532 So. 2d at 682 (Ervin, J., dissenting). See *supra* note 58.

116. *Id.* at 683. See *supra* text accompanying notes 62-68.

117. *Id.* See *supra* note 59.

118. 532 So. 2d at 683 (Ervin, J., dissenting).

checks as cash substitutes.

In *Barnett*, the majority distinguished between the defenses a bank could assert against a payee and those a bank could assert against an indorsee. When in the hands of a payee who is a holder in due course, the majority would treat cashier's checks as a negotiable instrument. Though stating that a cashier's check is a cash equivalent in the hands of a payee who is a holder in due course, the court recognized the exception that a bank may assert its own defenses against a payee who is not a holder in due course.¹¹⁹ As in the negotiable instrument theory, the court precluded the bank's use of the third-party defenses of the purchaser against the payee regardless of whether the payee is a holder in due course. However, unlike the negotiable instrument theory applied by other courts, when a cashier's check is in the hands of an indorsee who is not a holder in due course, the majority would permit a bank to assert the third-party defenses of a payee or intervening indorsees.¹²⁰ As a consequence of this bifurcated treatment, the payee is placed in a better position than an indorsee.¹²¹ This preferential position accorded a payee decreases the free transferability of cashier's checks, minimizing their use and circulation in commercial transactions. The protection traditionally afforded by the use of a cashier's check would only be afforded to the person who, often by happenstance, is named as payee.

Though the majority found that a cashier's check is to be treated as a negotiable instrument between the bank and an indorsee, the court neglected to apply or misconstrued appropriate sections of the UCC. As in *Sani-Serv*, Florida Statutes section 673.307(2) applies.¹²² Therefore, under section 673.307 as construed in *Sani-Serv*, *Barnett* must prove a defense to payment of the check before the issue of whether Warren is a holder in due course arises.¹²³ If Warren or any holder of a cashier's check is forced to prove his status of holder in

119. 532 So. 2d at 680. Only the negotiable instrument theory recognizes the defenses of failure of consideration and fraud perpetrated upon the bank. The cash equivalent theory prohibits all defenses. See *supra* text accompanying notes 28-31 & 55-56. The *Barnett* court reasoned that where a payee was involved in fraud perpetrated upon the bank, the payee would not be a holder in due course. Therefore, the bank could assert its own defenses of failure of consideration or fraud. 532 So. 2d at 680. See *supra* text accompanying notes 49-53.

120. 532 So. 2d at 680.

121. *Id.*

122. FLA. STAT. § 673.307 (1987). See *supra* note 46 for the text of corresponding U.C.C. § 3-307.

123. 244 So. 2d at 511.

due course before receiving payment, the risk of litigation to receive the check funds is increased and the free transferability of cashier's checks further undermined. Additionally, the *Sani-Serv* court, in construing UCC section 3-307, permitted the bank to prove only its own defenses.¹²⁴

Further, though holding that a cashier's check is like a negotiable instrument between the payee and an indorsee, the majority then misconstrued the law applicable to negotiable instruments.¹²⁵ Authorities have consistently construed corresponding UCC sections 3-306(d) and 3-603(1) as precluding any third-party defenses to a bank except for theft or restrictive indorsement.¹²⁶ Section 3-306(d) plainly provides that third-party defenses are not available to a bank unless the "third person himself defends the action."¹²⁷ Accordingly, since Barnett had joined Redan, Redan may then have defended the bank.¹²⁸ However, contrary to what the majority indicated,¹²⁹ section 673.306(4) does not permit the bank itself to utilize the third-party equitable claims or defenses of Redan.¹³⁰

Because the bank had paid Redan instead of Warren, the court in *Barnett* further reasoned that Barnett was subrogated to the claims of Redan against Warren.¹³¹ The court cited no authority to support this position. UCC section 4-407 is inapplicable.¹³² Section 4-407 governs the situation where a bank makes payment over a timely stop payment order.¹³³ In *Barnett*, the opposite fact situation oc-

124. *Id.*

125. FLA. STAT. §§ 673.306(4), .603(1) (1987). See *supra* notes 31 & 32 for the texts of these statutes.

126. Lawrence, *supra* note 18, at 311; J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 14-10, at 644 (student's ed. 1988); *Id.* at 736-37 (practitioner's ed. 1988).

127. U.C.C. § 3-306(d) (1987).

128. See *supra* note 12.

129. 532 So. 2d at 680.

130. See *supra* note 58.

131. 532 So. 2d at 681 & n.10.

132. The court cited U.C.C. § 4-407 (1987) in a footnote but did not cite the statute as authority for finding Barnett subrogated to Redan. *Id.* at 681 & n.10.

U.C.C. § 4-407 (1987) (codified at FLA. STAT. § 674.407 (1987)) (emphasis added):

If a payor bank has paid an item over the stop payment order of the drawer or maker or otherwise . . . the payor bank shall be subrogated to the rights

(a) of any holder in due course on the item against the drawer or maker; and

(b) of the payee or any other holder of the item against the drawer or maker . . .

and

(c) of the drawer or maker against the payee or any other holder of the item

. . . .

133. U.C.C. § 4-407 (1987) (codified at FLA. STAT. § 674.407 (1987)). See *supra* note 131 for the text of U.C.C. § 4-407.

curred, i.e., the bank honored a stop payment order.

Also, Florida Statutes section 673.603 provides that a bank may discharge its obligation by paying the holder unless the third party obtains an injunction or posts an indemnity bond.¹³⁴ Thus, section 673.603(1) shifts the risk of litigation from the bank to the third party. In addition, banks can further protect themselves by interpleading the disputed funds. The *Barnett* court recognized that Barnett could have used these methods to protect itself from double liability.¹³⁵ However, Barnett voluntarily assumed the risk of litigation and exposure to double liability when it chose to pay Redan rather than the holder. The court, by permitting Barnett to assert the defenses of Redan, a third party, shifted the risk of litigation back to banks simply because one bank failed to avail itself of the protective procedures provided by statute and interpleader.

Moreover, the court's reasoning fails because it misstated the case law in other jurisdictions. The court noted that other jurisdictions allow banks to assert the defenses of a purchaser, payee, or indorsee against a person presenting a cashier's check for payment.¹³⁶ Four of the five cases the court then cited did not support this proposition. In three of the cases cited, banks were permitted to assert their own defenses, fraud perpetrated upon the bank or failure of consideration, not third-party defenses.¹³⁷ One case involved a unique equitable remedy not involving the defenses of any party to the check.¹³⁸ The decision in the fifth case, *Leo Syntax*, though permitting a third-party defense, was based on pre-UCC law.¹³⁹

The *Barnett* majority's decision to allow the bank to assert the contract defenses of its customer greatly extends a bank's defenses beyond those envisioned by the legislature. Using either statutory ap-

134. FLA. STAT. § 673.603 (1987). See *supra* note 32 for the text of corresponding U.C.C. § 3-306.

135. 532 So. 2d at 681 n.10.

136. *Id.* at 679 & 679 n.4.

137. The three cases cited were *TPO, Inc. v. FDIC*, 487 F.2d 131 (3d Cir. 1973) (bank asserted defense of fraud perpetrated upon the bank); *Banco Ganadero y Agricola v. Society Nat'l Bank*, 418 F. Supp. 520 (N.D. Ohio 1976) (bank asserted defense of failure of consideration for cashier's check); *Rezapolvi v. First Nat'l Bank*, 296 Md. 1, 459 A.2d 183 (1983) (bank asserted defense of failure of consideration for cashier's check).

138. *Santos v. First Nat'l State Bank*, 186 N.J. Super. 52, 451 A.2d 401 (App. Div. 1982) (since cashier's check had not been presented for payment within four years, court ordered bank to purchase certificate of deposit in customer-purchaser's name and hold it for him until the statute of limitations had run for presentation of the cashier's check).

139. See *supra* text accompanying notes 62-68.

proach applied to cashier's checks, a bank is limited to its own defenses or those of theft, forgery, or restrictive indorsement. These limitations preserve the cash-like nature of cashier's checks. Furthermore, the reason behind the passage of sections 673.603(1) and 673.306(d) was to solve the very problem that the *Barnett* majority has now recreated; the confusion inherent in permitting banks to assert third-party defenses thus creating uncertainty in commercial transactions.

Also, the *Barnett* majority contended that there is less reliance on the cash-like nature of cashier's checks as subsequent indorsees take the check.¹⁴⁰ However, this view contradicts the common perception that a cashier's check insulates the holder from the risk of litigation to receive payment because the check is backed by the bank's own funds.¹⁴¹ Though the dissent questioned the results of the majority's holding, it did not adequately defend its position by explaining what the detrimental effects of allowing third-party defenses would be.¹⁴² The dissent merely stated that Warren's claims that such a policy would "wreak havoc" in the commercial world were exaggerated.¹⁴³ The *Barnett* dissent, advocating the cash equivalent approach to cashier's checks, correctly noted that a cashier's check's function as a cash substitute is greatly impaired if a bank is permitted to assert its own or third-party defenses to payment of the check.¹⁴⁴

Finally, both case law and statutes recognize legal claims to cashier's checks such as theft, forgery, and restrictive indorsement.¹⁴⁵ Therefore, though treated as a cash substitute, cashier's checks provide some safeguards, and suffer some subsequent loss of transferability, that cash does not. Further, though a cashier's check is backed by the bank's funds, cash bears the imprimatur of the government and hence is more certain payment than a cashier's check. These characteristics distinguish cashier's checks from cash and therefore prevent any unconstitutional infringement upon the government's sole right to coin money.

140. 532 So. 2d at 680.

141. Lawrence, *supra* note 18, at 281. See also *supra* note 23.

142. 532 So. 2d at 681 (Ervin, J., dissenting).

143. *Id.*

144. *Id.* at 682.

145. *Id.* See U.C.C. § 3-603(1) (1987) (codified at FLA. STAT. § 673.603(1) (1987)). See also note 58.

CONCLUSION

In reaching its decision, the *Barnett* court misconstrued or ignored case law and applicable sections of the UCC. The court's failure to follow precedent and its misconstruction of the Florida Statutes governing negotiable instruments will further add to the confusion existing in the treatment of cashier's checks. Further, the *Barnett* decision greatly expands the defenses available to a bank under the negotiable instrument theory. This expansion diminishes the use of cashier's checks as cash substitutes in commercial transactions in Florida.

Audrey Belitz Rauchway

ADDENDUM

In *Warren Finance, Inc. v. Barnett Bank*, 14 Fla. L. Weekly 567 (Fla. Nov. 17, 1989), the Florida Supreme Court elected to follow the negotiable instrument approach in the treatment of cashier's checks. Though the court stated it "refused to adopt the note theory approach" of Barnett Bank, the court's holding is in accord with the negotiable instrument theory which disallows third party defenses but permits the bank's defenses. The rationale for the court's holding was the necessity to maintain the essential purpose of cashier's checks as cash substitutes. The court expressly rejected the argument that payment of cashier's checks should be determined by the endorsee's or payee's status as holder or holder in due course. In a special concurring opinion, Justice Shaw agreed with the result of the majority but predicated his reasoning on the cash equivalent theory.