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ARTICLES

NOTES

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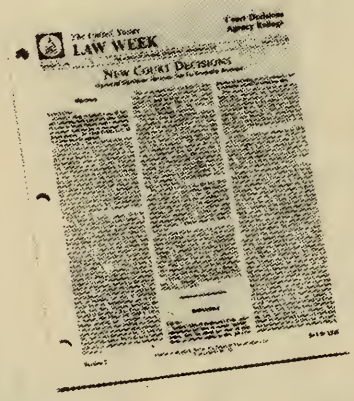

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The Right to a Lawyer at a Lineup: Support From State Courts and Experimental Psychology

Neil Colman McCabe*

I. Introduction

The tales of two Texas bank robbery cases, twenty years apart, tell how the right to have counsel present at a lineup [1] started well but ran afoul of an aberrant interpretation of the sixth amendment. The two cases also provide a backdrop for a demonstration of how state courts, armed with a better understanding of the dangers inherent in eyewitness identifications, are struggling to free themselves from the constraints of United States Supreme Court doctrine.

In both cases the robbers wore disguises of dubious value. In 1964, a man with a small strip of tape on each side of his face robbed a bank in Eustace, Texas. In 1985, another holdup man, sporting a shower cap and sunglasses, struck several banks in Houston. Lineups provided the key identification testimony in both cases.

In the first case, *United States v. Wade*,[2] the United States Supreme Court declared that a criminal suspect has a sixth amendment right to a lawyer at a lineup. By the time of the later case of *Foster v. State*,[3] however, state and federal courts were deciding that no such right exists

* Professor of Law, South Texas College of Law. The author of this article serves as court-appointed counsel for the appellant in Foster v. State, 713 S.W.2d 789 (Tex. Ct. App. 1986).

1. In a lineup identification proceeding a crime witness views several persons standing in a line and is asked whether any of them is the perpetrator of the offense.

2. 388 U.S. 218 (1967). The companion case of Gilbert v. California, 388 U.S. 263 (1967), also involved a lineup. The holdings in the two cases became known as the *Wade-Gilbert* rule. R. LaFave & J. Israel, Criminal Procedure (1985).

3. 713 S.W.2d 789 (Tex. Ct. App. 1986) (The *Foster* case actually involved a series of bank robberies.)

in the typical lineup. That is true because in *Kirby v. Illinois*,[4] only five years after *Wade*, the United States Supreme Court held that, unless "adversary judicial proceedings"[5] have been initiated against him, an arrested suspect is not entitled to have his lawyer attend a lineup.[6] Shortly afterward, in *United States v. Ash*,[7] the Court held that there is no sixth amendment right to counsel at a photographic display,[8] even after indictment.

With *Ash* it became clear that even the initiation of adversarial criminal proceedings did not mean that defense counsel was to be allowed to attend every phase of the prosecution after that point. The actual proceeding in question must be examined to determine whether it is a confrontation that can be considered a "critical stage"[9] of the prosecution, at which counsel's presence is required. The suspect's counsel need not be permitted to attend a photographic display, reasoned the *Ash* Court, because the suspect is not physically present at such an identification proceeding.[10] The photo array witness interview is not a confrontation. Neither is the array proceeding a critical stage of the prosecution. Because the defendant's attorney could examine the photo array in preparing for trial, the Court believed that such a proceeding did not involve the same dangers of suggestiveness as the lineup and was more easily reconstructed for the purpose of cross-examination at trial.[11]

Given the *Kirby* and *Ash* decisions, it can be expected the police will not wait until after the initiation of formal adversarial proceedings to hold a lineup or photo array,[12] thereby precluding any sixth amendment claim that counsel must be present. In the typical case, they conduct the lineup within twenty-four hours after arrest.[13] The *Wade* case was

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4. 406 U.S. 682 (1972).
5. *Id.* at 688.
6. *Id.* at 691.
7. 413 U.S. 300 (1973).
8. In a photographic display or photo array proceeding a witness is shown a group of photographs and is asked whether the suspect is depicted therein.
9. *Ash*, 413 U.S. at 303.
10. *Id.* at 317.
11. *Id.* at 318-19.
12. People v. Fowler, 1 Cal. 2d 335, 82 Cal. Rptr. 363, 461 P.2d 643 (1969); J. ISRAEL, Y. KAMISAR, W. LAFAVE, CRIMINAL PROCEDURE AND THE CONSTITUTION 350 (Rev. ed. 1989) (lineup before formal proceedings "common practice" after *Kirby*).
13. Whitten & Robertson, *Post-Custody, Pre-Indictment Problems of Fundamental Fairness and Access to Counsel: Mississippi's Opportunity*, 13 VT. L. REV. 247, 249 (1988); Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1442 (1987). *See also* United States v. Wade, 388 U.S. 218, 255 (1967) (White, J., dissenting) ("Identifications frequently take place after arrest but before an indictment is returned or an information is filed.").

unusual in that the suspect had been indicted before the lineup.[14] At the time of Foster's lineup he had not been arrested, let alone formally charged or indicted for the bank robberies; he was already in jail serving a sentence on other offenses.[15] For those reasons the Texas intermediate appellate court accorded him no sixth amendment right to counsel at the lineup, and the court saw no reason to recognize such a right under state law.[16]

Of the state courts that have addressed the issue of the right to counsel at a lineup under state constitutions and statutes, most have simply followed *Kirby*.[17] This article will argue that merely adopting formalistic federal precedent is not the proper way to interpret state constitutional guarantees of counsel, especially in light of psychological research into the dangers of eyewitness and lineup identification conducted since the *Wade* and *Kirby* decisions. Although state right-to-counsel provisions sometimes may be comparable in scope to the federal sixth amendment, "an independent examination of the history, policy, and precedent surrounding relevant state law is necessary before that conclusion can be reached."[18] This article will demonstrate how a conclusion contrary to *Kirby* can be justified in light of (1) new research into the dangers inherent in eyewitness identification in general and in lineups particularly, (2) the nature of the *Kirby* line of cases as an aberration to the sixth amendment's rationale, and (3) precedents from state courts. The main goal is to show how a significant expansion of the right to counsel can rest on a truly independent and adequate state constitutional ground[19]—on a principled basis and not merely as a result-oriented reaction to undesirable federal precedent.[20]

II. Dangers Inherent in Eyewitness Identification

Both jurists and social scientists have observed that the inaccuracy of many eyewitness identifications and the resulting injustices are well-

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14. *Wade*, 338 U.S. at 219.

15. *Foster*, 713 S.W.2d at 790.

16. *Id.* at 791.

17. 406 U.S. 682 (1972); *see, e.g.*, State v. Boyd, 294 A.2d 459 (Me. 1972); People v. Hawkins, 55 N.Y.2d 474, 450 N.Y.S.2d 159, 435 N.E.2d 376 (1982); People v. Delahunt, 121 R.I. 565, 401 A.2d 1261 (1979); State v. Taylor, 60 Wis. 2d 506, 210 N.W.2d 873 (1973).

18. Thomas v. State, 723 S.W.2d 696, 702 (Tex. Crim. App. 1986) (citing State v. Jewett, 146 Vt. 221, 500 A.2d 233 (1985)).

19. Michigan v. Long, 463 U.S. 1032 (1983).

20. *See* State v. Jewett, 146 Vt. 221, 224, 500 A.2d 233, 235 (1985) (recognizing the need for principled bases for independent state constitutional analysis); *See also* Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 Tex. L. Rev. 1141, 1179-80 (1985).

known.[21] "Nor are such statements vague speculations; the documentation is exhaustive, explicit and vast."[22] Even a person who eventually is acquitted of the erroneous criminal charge can be victimized by the resulting trauma to his mind, emotions, reputation, job, and family.[23] The *United States v. Wade*[24] opinion, which recognized a right to counsel at a lineup, but which involved a postindictment proceeding, emphasized the dangers inherent in eyewitness identification. At the time of the *Wade* and *Kirby* decisions, "[t]he unreliability of human perception and memory and their susceptibility to suggestive influence [were] well documented in psychological and legal literature," but there were no scientific studies of the behavior of the eyewitness in the context of the lineup.[25] Not until the end of the 1970's did scientists hold the first conference concentrating solely on the psychology of testimony by eyewitnesses.[26] Since that time, much more study has been applied specifically to the lineup problem, and a better understanding of eyewitness memory has developed.[27]

The results of experimental psychology suggest that many of the common-sense assumptions that guide decisions of the participants in a criminal trial may be erroneous. Professor Yarmey has identified some of those questionable assumptions:[28] (1) Subtle differences in the wording of questions (e.g., asking if the witness saw *the* knife instead of asking if she saw *a* knife) have a great effect on the responses of witnesses,[29]

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21. A. YARMEY, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY 7-10 (1979).

22. People v. Hawkins, 55 N.Y.2d 474, 491, 450 N.Y.S.2d 159, 168, 435 N.E.2d 376, 385 (Meyer, J., dissenting) (citing fourteen sources).

23. J. ISRAEL, Y. KAMISAR, W. LAFAVE, CRIMINAL PROCEDURE AND THE CONSTITUTION 450 (Rev. ed. 1989); Twining, *Identification and Misidentification in Legal Processes: Redefining the Problem*, in EVALUATING WITNESS EVIDENCE, 255, 275-77 (S. Lloyd-Bostock & B. Clifford eds. 1983) (hereinafter LLOYD-BOSTOCK); *see also* Wells & Loftus, *Eyewitness Research: Then and Now*, in EYEWITNESS TESTIMONY (G. Wells & E. Loftus eds. 1984) (citing P. HAIN, MISTAKEN IDENTITY (1976)).

24. 388 U.S. 218 (1967).

25. Levine & Tapp, *The Psychology of Criminal Identification: The Gap from Wade to Kirby*, 121 U. PA. L. REV. 1079, 1087-88 (1973).

26. Wells & Lindsay, *How Do People Infer the Accuracy of Eyewitness Memory? Studies of Performance and a Metamemory Analysis*, in LLOYD-BOSTOCK, *supra* note 23, at 41 (citing Wells, *Eyewitness Testimony: The Alberta Conference*, 4 LAW & HUM. BEHAV. 237 (1980)).

27. *See* Wells & Loftus, *Eyewitness Research: Then and Now*, in EYEWITNESS TESTIMONY: PSYCHOLOGICAL PERSPECTIVES (G. Wells & E. Loftus eds. 1984) (hereinafter PERSPECTIVES) (85% of all published writings on eyewitness identification research have emerged since 1978. *Id.* at 3.).

28. A. YARMEY, *supra* note 20, at 7-10 (citing examples and authorities).

29. Loftus & Zanni, *Eyewitness Testimony: The Influence of the Wording of a Question*, 5 BULL. PSYCHONOMIC SOC. 86 (1975).

but many potential jurors fail to recognize the distinction.[30] (2) Testimony given with an air of certainty is treated by the courts as accurate,[31] but studies do not support such an assumption.[32] (3) Courts do not appear to realize how quickly one forgets what has occurred and how complicated the process of forgetting is.[33] (4) Judges who believe that the mind retains more readily the memory of an unusual, startling, or stressful scene than it does the impression of an ordinary occurrence are in error if they think that memory works by simply passively recording, rather than actively reconstructing, events.[34] The human memory is not a smoothly operating mechanical device, "like a videotape recorder."[35] In the pages that follow, this article will deal with the results of experiments illustrating these and other misconceptions.

A. Power of Suggestion

Exposure to new and false information about an event through means of questions containing presuppositions can supplement[36] or even transform[37] memory. "Memory, it appears, is extremely fragile and can be supplemented, altered, or even restructured by as simple an instrument as a strong verb, embedded unnoticed in a question about the event concerned."[38] Experiments show that, if misleading information or suggestions are given to a witness a week or more after the event and just before testing, the accuracy of the witness' memory is drastically reduced.[39] Subjects tend to recall the erroneous information, 80% of

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30. Yarmey & Jones, *Is the Psychology of Eyewitness Identification a Matter of Common Sense?*, in LLOYD-BOSTOCK, *supra* note 22, at 13, 29.

31. Gardner, *The Perception and Memory of Witnesses*, 18 CORNELL L. Q. 391 (1933).

32. *See infra* text accompanying notes 45-50.

33. Gardner, *supra* note 31; Hutchins & Slesinger, *Some Observations on the Law of Evidence-Memory*, 41 HARV. L. REV. 860 (1928).

34. U. NEISSER, COGNITIVE PSYCHOLOGY, 279-305 (1967).

35. Sanders, *Expert Witnesses in Eyewitness Facial Identification Cases*, 17 TEX. TECH. L. REV. 1409, 1427 n.62 (1986) (quoting testimony by Professor Loftus in W. LOH, SOCIAL RESEARCH IN THE JUDICIAL PROCESS: CASES, READINGS AND TEXT at 583 (1984)).

36. Loftus & Ketcham, *The Malleability of Eyewitness Accounts*, in LLOYD-BOSTOCK, *supra* note 23, at 159, 160-63.

37. *Id.* at 163, 168-69; *see also* Loftus, Miller, & Burns, *Semantic Integration of Verbal Information into a Visual Memory*, 4 J. EXP. PSYCHOLOGY: HUM. LEARNING & MEMORY 19, 29 (1978).

38. Loftus & Ketcham, *supra* note 36, at 159. *See also* Loftus, Miller & Burns, *supra* note 36, at 160 (citing Loftus & Palmer, *Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory*, 13 J. VERBAL LEARNING & VERBAL BEHAV. 585 (1974)).

39. Loftus, Miller, & Burns, *supra* note 36, at 163.

them performing incorrectly when tested.[40] Memory for faces, like other memory, is affected by later misleading information.[41] Such studies suggest that in criminal cases, when expected testimony is being reviewed (typically long after a crime has been committed and immediately before trial), witnesses are extremely vulnerable to inadvertent or intentional suggestion by prosecutors.

The *Wade* opinion stressed that eyewitness accuracy can be adversely affected not only by the purposeful scheming of police investigators but also by suggestions given unintentionally: "We do not assume that these risks are the result of police procedures intentionally designed to prejudice an accused. Rather we assume they derive from the dangers inherent in eyewitness identification and the suggestibility inherent in the context of the pretrial identification."[42] The studies suggest that courts have oversimplified the issue of lineup fairness and accuracy. Instead of being a passive viewer, "the victim or witness at a lineup is one 'actor' in a complex social situation."[43]

B. Confidence

The most revealing findings that Professors Wells and Lindsay drew from a series of experiments which they and others performed over several years were that a person's tendency to believe an eyewitness's testimony is strongly related to the confidence of the witness in his identification, as one would expect, but that, contrary to what most people "intuitively believe,"[44] the confidence of an eyewitness is practically worthless as a cue to the witness's accuracy.[45] The latter finding directly contradicts the Supreme Court's notion that the degree of con-

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40. *Id.*

41. *Id.* at 167 (citing Loftus & Greene, *Warning: Even Memory for Faces May be Contagious*, 4 LAW & HUM. BEHAV. 323 (1980). Recognition of voices will almost always be less reliable than memory for faces. Clifford, *Memory for Voices: The Feasibility and Quality of Earwitness Evidence*, in LLOYD-BOSTOCK, *supra* note 22, at 189.

42. United States v. Wade, 388 U.S. 218, 235 (1967).

43. Levine & Tapp, *supra* note 25, at 1110.

44. Wells & Murray, *Eyewitness Confidence*, in PERSPECTIVES, *supra* note 27, at 159 (citing Brigham & Wolfskiel, Opinions of Attorneys and Law Enforcement Personnel on the Accuracy of Eyewitness Identifications (unpublished manuscript, 1982); Deffenbacher & Loftus, *Do Jurors Share a Common Understanding Concerning Eyewitness Behavior?*, 7 LAW & HUM. BEHAV. 15 (1982); Rahaim & Brodsky, Empirical Evidence vs. Common Sense: Juror and Lawyer Knowledge of Eyewitness Accuracy (unpublished manuscript, 1981); Wells, Lindsay, & Ferguson, *Accuracy, Confidence, and Juror Perceptions in Eyewitness Identification*, 64 J. APPLIED PSYCHOLOGY 440 (1979)); Yarmey & Jones, *supra* note 30.

45. Wells & Lindsay, *supra* note 26, at 51; Wells & Murray, *supra* note 40, at 163 ("No applicable value" adheres to knowledge of eyewitness confidence).

fidence the witness shows in his identification is an important factor to consider when deciding whether the identification is reliable.[46] Nevertheless, the expression of confidence or certainty on the part of an eyewitness greatly affects how jurors gauge the accuracy of the witness's identification.[47] In one study of mock jury deliberations following a reenactment of a trial, some jurors spontaneously pointed to the confidence of an eyewitness as an indicator of the witness's accuracy.[48]

Jurors and trial judges have no way of learning that a confident witness can be wrong. If, despite a confident eyewitness, the defendant has a truly solid alibi, the government typically has the case dismissed. In this and other ways, jurors and judges are "neatly protected from learning that the confidence of an eyewitness bears no useful relationship to the accuracy of an eyewitness."[49] In light of the experimental studies, the common but erroneous notion that there is a close relationship between the certainty of a witness and the accuracy of the identification should be expunged from our jurisprudence.[50]

C. Passage of Time

The passage of weeks or months may greatly reduce the accuracy of the identification.[51] In one study, the rate of false identification of supposed armed robbers increased from 48% at 2 days, to 62% at 21 days, and to 93% at 56 days.[52] Yet some jurors think that an eyewitness's

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46. *See, e.g.*, Manson v. Brathwaite, 432 U.S. 98 (1977) (confidence of witness a key factor); Neil v. Biggers, 409 U.S. 188 (1972).

47. Wells & Murray, *supra* note 44, at 155 (citing Wells, Ferguson, & Lindsay, *The Tractability of Eyewitness Confidence and Its Implications for Triers of Fact*, 66 J. Applied Psychology 688 (1981)); Wells, Lindsay, & Ferguson, *supra* note 44.

48. Wells, *How Adequate is Human Intuition for Judging Eyewitness Testimony?*, in Perspectives, *supra* note 27, at 256, 266 (citing Hastie, From Eyewitness Testimony to Beyond Reasonable Doubt (unpublished manuscript, 1980)).

49. Wells & Murray, *supra* note 44, at 169.

50. Deffenbacher, *Eyewitness Accuracy and Confidence: Can We Infer Anything About Their Relationship?*, 4 Law & Hum Behav. 243 (1980); Wells & Murray, *supra* note 44 (citing Leippe, *Effects of Integrative Memorial and Cognitive Processes on the Correspondence of Eyewitness Accuracy and Confidence*, 4 Law & Hum. Behav. 261 (1980)).

51. Shepherd, *Identification After Long Delays*, in Lloyd-Bostock, *supra* note 23, at 173.

52. Egan, Pittner & Goldstein, *Eyewitness Identification: Photographs vs. Live Models*, 1 Law and Hum. Behav. 199 (1977). *Accord*, Malpass & Devine, *Eyewitness Identification: Line Up Instructions and the Absence of the Offender*, 66 J. Applied Psychology 482 (1981); Malpass & Devine, *Guided Memory in Eyewitness Identification*, 66 J. Applied Psychology 343 (1981).

memory remains accurate over long periods,[53] and others believe that accuracy may increase as time passes.[54]

D. Stress

One classic work described twenty-nine convictions of innocent persons, each conviction resulting from the positive identification of the accused by the victim of a violent crime.[55] One explanation for such mistakes is that, because of the extreme psychological and emotional arousal caused by an armed robbery, the victim/witness of a violent crime may block out stimuli or focus on the weapon, rather than on the face of the culprit.[56] Tests involving potential jurors in Canada and the United States indicated that they had some knowledge of the "weapon focus problem," but their responses also suggested that they believed inaccurate explanations of the phenomenon.[57]

Contrary to common-sense beliefs about the accuracy of eyewitnesses to violent crimes, "there is no empirical support for the notion that relatively high levels of arousal facilitate eyewitness testimony."[58] Jurors, however, have expressed the erroneous opinion that stress enhances the accuracy of an eyewitness.[59] Lay persons apparently widely hold such beliefs, unaware of studies demonstrating that the anxiety that witnesses feel, when they think that their identification will have serious results, serves to destroy any accuracy-confidence relationship.[60]

E. Overbelief

Police officers, judges, and jurors often overestimate the accuracy of persons who claim to have made eyewitness identifications.[61] "Overbelief" of eyewitnesses by judges and jurors is a well-recognized prob-

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53. Wells, *supra* note 48, at 259 (15% erroneously thought eyewitness's memory for faces would be 90-95% accurate several months after first seeing the face).

54. Hastie, *supra* note 48.

55. E. BORCHARD, CONVICTING THE INNOCENT (1932) (describing total of sixty-five wrong convictions). *See also* Cunningham & Tyrrell, *Eyewitness Credibility: Adjusting the Sights of the Judiciary*, 37 ALA. LAW. 563, 564-65 n.2 & n.4 (1976) (citing other sources and examples).

56. E. LOFTUS, EYEWITNESS TESTIMONY § 2.15 (1987).

57. Yarmey & Jones, *supra* note 30, at 21.

58. Deffenbacher, *The Influence of Arousal on Reliability of Testimony*, in LLOYD-BOSTOCK, *supra* note 23, at 247.

59. Hastie, *supra* note 48.

60. Wells & Murray, *supra* note 44.

61. *See* Cunningham & Tyrrell, *supra* note 55 at 575-85; K. ELLISON & R. BUCKHOUT, PSYCHOLOGY AND CRIMINAL JUSTICE 80-82 (1981); Wells, Lindsay, & Ferguson, *supra* note 44, at 441-45 (1979).

lem, established by many researchers.[62] "[M]ost of us do not have experience in trying to remember faces in very stressful situations such as being a robbery victim."[63] Likewise, jurors have no experience in trying to judge the accuracy of another's identification.[64] Nevertheless, "visual identification of the defendant by the victim or the witness often provides the most persuasive evidence, which cannot be overcome by contrary evidence supporting the accused."[65] Even after it has been proven false, eyewitness testimony can continue to persuade a jury.[66]

> The question of how adequately the juror can assess the credibility of eyewitness testimony is an important one since it is the juror or some other intuitive trier-of-fact who runs the risk of the ultimate error, namely believing an inaccurate eyewitness account or disbelieving an accurate eyewitness account. Does the lay person understand the problems of eyewitness memory? Many judges seem to think so as it is common for expert testimony on eyewitness matters to be prohibited by a judge on grounds that the problem of eyewitness memory is something that is intuitively appreciated by the jurors. Data . . . call this assumption into question.[67]

The great degree of trust that police, jurors, and judges place in lineups and eyewitnesses is not supported by the psychological experiments on the subject.[68]

F. Police Officers as Witnesses

In a pair of studies two-thirds of the lay persons,[69] as well as most of the legal professionals and law students,[70] thought that police officers

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62. *See* Lindsay, Wells & Rumpel, *Can People Detect Eyewitness-Identification Accuracy Within and Across Situations?*, 66 J. Applied Psychology 79, 83-85 (1981); Deffenbacher, *supra* note 50, at 250-52; Yarmey & Jones, *supra* note 30, at 13.

63. Sanders, *supra* note 35, at 1439.

64. *Id.* at 1440 (citing Saks & Kidd, *Human Information Processing and Adjudication: Trial by Hueristics*, 15 Law & Soc'y Rev. 123, 126-27 (1980-81)).

65. Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 Stan. L. Rev. 969, 970 (1977).

66. Loftus & Ketcham, *supra* note 36, at 170, (citing Cavoukian, *Eyewitness Testimony: The Ineffectiveness of Discrediting Information* (paper presented at the Amer. Psychological Assoc. annual meeting, 1980)).

67. Wells & Lindsay, *supra* note 26, at 41.

68. A. Yarmey, *supra* note 21, at 159 (citing Goldstein, *The Fallibility of the Eyewitness: Psychological Evidence*, in Psychology in the Legal Process (B. Sales ed. 1977)).

69. Wells, *supra* note 48 (citing Tickner & Poulton, *Watching for People Actions*, 18 Ergonomics 35 (1975)).

70. Yarmey & Jones, *supra* note 30.

make better eyewitnesses than lay persons. Most officers themselves believe that their training and experience make them superior at observing and remembering details, but the psychological studies fail to confirm their assumptions.[71] To the contrary, "experiments suggest that policemen are more prone to committing interpretive errors in their perceptions of people and activities."[72]

G. Race

The usual difficulties inherent in eyewitness identification may be compounded when race becomes a factor.[73] Several reviews of the literature on eyewitnesses have concluded that cross-race identifications are less reliable than when the witness and suspect are members of the same race.[74] In a well-known study,[75] subjects viewed a picture of a white man holding a razor while arguing with a black man. Half of the observers later remembered the black man as holding the razor. Some said he was brandishing it wildly, and others remembered him as threatening the white man.

At least ten studies demonstrate that white Americans are significantly less able to recognize black faces than they are white faces.[76] The cross-race phenomenon may not be limited to white observers. Four studies have indicated that American black observers are significantly less able to recognize white faces than black ones.[77] Similar results have been

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71. A. YARMEY, *supra* note 21 (citing Clifford, *Police As Eyewitness*, 22 NEW SOC. 176 (1976)).

72. *Id.* (citing Verinis & Walker, *Policemen and the Recall of Criminal Details*, 81 J. OF SOC. PSYCHOLOGY 217 (1970)).

73. Luce, *Blacks, Whites, and Yellows: They All Look Alike to Me*, PSYCHOLOGY TODAY 105 (Nov. 1974); Galper, *'Functional Race Membership' and Recognition of Faces*, 37 PERCEPTUAL & MOTOR SKILLS 455 (1973).

74. E. LOFTUS, *supra* note 66, at § 4.11; A. YARMEY, *supra* note 20, at 130-31; B. CLIFFORD & R. BULL, THE PSYCHOLOGY OF PERSON IDENTIFICATION (1978); Wells, *Applied Eyewitness-Testimony Research: System Variables and Estimator Variables*, 36 J. PERSONALITY & SOC. PSYCHOLOGY 1545 (1978); Ellis, *Recognizing Faces*, 66 BRIT. J. PSYCHOLOGY 409 (1975). *But cf.* Lindsay & Wells, *What do We Really Know About Cross-Race Eyewitness Identification?*, in LLOYD-BOSTOCK, *supra* note 23 (arguing that such conclusion is premature).

75. K. Ellison and R. Buckhout, PSYCHOLOGY AND CRIMINAL JUSTICE 101 (1981) (citing Allport & Postman, *The Basic Psychology of Rumor*, 8 TRANS. N.Y. ACAD. OF SCI., Series 11, 147-49 (1945)).

76. Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 938-39 n.18 (1984) (citing studies).

77. Johnson, *supra* note 76, at 939 n.23, 938-39 n.18 (citing Brigham & Williamson, *Cross-Racial Recognition and Age: When You're Over 60, Do They Still "All Look Alike?"*, 5 PERSONALITY & SOC. PSYCHOLOGY BULL. 218 (1979); Galper, *supra* note 73; Luce, *The Role of Experience in Inter-Racial Recognition*, 1 PERSONALITY & SOC. PSYCHOLOGY BULL. 39 (1974); Malpass, Lavigneur, & Weldon, *Verbal and Visual Training in Face Recognition*, 14 PERCEPTION & PSYCHOPHYSICS 285 (1973)).

obtained with African blacks viewing African and European faces.[78] Results have not been uniform, however, as four studies failed to show significant differences in accuracy for black observers of white versus black faces.[79]

Such experiments suggest that "the differential recognition of black faces by white and black observers is a highly probable event, and more likely to result in error if the observer is white."[80] At present, however, the studies do not establish whether or to what extent jurors believe cross-race identifications.[81]

H. Other Physical Characteristics

Characteristics other than race may affect attitudes of observers. Two studies have indicated that, upon conviction for a crime, an unattractive person is likely to receive a longer prison sentence than an attractive person receives.[82] Men with dark complexions are more likely to be suspected as villains,[83] to be regarded as dishonest or hostile.[84]

I. Other Misconceptions

Research has exposed other misconceptions about eyewitness testimony.[85] The opportunity the witness had to view the criminal is considered

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78. Shepherd, Deregowski, & Ellis, *A Cross-Cultural Study of Recognition Memory for Faces*, 9 INT'L J. PSYCHOLOGY 205 (1974).

79. Johnson, *supra* note 76, at 938-39 n.18 (citing Barkowitz & Brigham, *Recognition of Faces: Own Race Bias, Incentive, and Time Delay*, 12 J. APPLIED SOC. PSYCHOLOGY 255 (1982); Cross, Cross, & Daly, *Sex, Race, Age, and Beauty as Factors in Recognition of Faces*, 10 PERCEPTION & PSYCHOPHYSICS 393 (1971); Malpass & Kravitz, *Recognition for Faces of Own and Other Race*, 13 J. PERSONALITY & SOC. PSYCHOLOGY 330 (1969); Chance, Goldstein, and McBride, *Differential Experience and Recognition Memory for Faces*, 97 J. SOC. PSYCHOLOGY 243 (1975)).

80. A. YARMEY, *supra* note 21, at 130 (citing Malpass, *Racial Bias in Eyewitness Identification*, 1 PERSONALITY & SOC. PSYCHOLOGY 42-44 (1974)).

81. Sanders, *supra* note 35, at 1454 n.164 (citing Lindsay & Wells, *supra* note 74). *See also* Brigham & Barkowitz, *Do 'They All Look Alike'? The Effect of Race, Sex, Experience and Attitudes on the Ability to Recognize Faces*, 8 J. APPLIED SOC. PSYCHOLOGY 306 (1978).

82. A. YARMEY, *supra* note 21 (citing Landy & Aronson, *The Influence of the Character of the Criminal and His Victim on the Decisions of Simulated Jurors*, 5 J. EXPERIMENTAL SOC. PSYCHOLOGY 141 (1969); Efran, *The Effect of Physical Appearance on the Judgment of Guilt, Interpersonal Attraction, and Severity of Recommended Punishment in a Simulated Jury Task*, 8 J. OF RES. IN PERSONALITY 45 (1974)).

83. A. YARMEY, *supra* note 21 (citing Berelson & Salter, *Majority and Minority Americans: An Analysis of Magazine Fiction*, 10 PUB. OPINION Q. 168 (1946)).

84. A. YARMEY, *supra* note 21 (citing Secord, *The Role of Facial Features in Interpersonal Perception*, in PERSON PERCEPTION AND INTERPERSONAL BEHAVIOR 300 (R. Tagiuri & L. Petrullo eds. 1958)).

85. *See generally* PERSPECTIVES, *supra* note 27 (citing other studies).

by courts to be an important factor in judging the accuracy of an identification.[86] Yet, two-thirds of the persons studied were not aware that an eyewitness is prone to overestimate the time involved in a crime sequence.[87] Such overestimation of time should undermine judicial confidence in the witness's depiction of the opportunity he had to view the crime and, in turn, reduce the value of "opportunity to view" as a factor in judging eyewitness reliability.

A witness's identification of a person's face in a photographic array is likely to produce an identification of the same person in a lineup, even if the suspect is not guilty,[88] but many people appear not to know that.[89] Some jurors seem to believe that photographic identifications increase the accuracy of later lineup identifications.[90]

The consequences of mistaken identification are most harmful in cases in which the conviction rested heavily on the eyewitness identification. The danger of erroneous identification is made even more acute in cases like *Wade*[91] and *Foster*,[92] in which the perpetrators were disguised, however clumsily, and the lineup participants were asked to don similar disguises. As indicated by the research conducted in the United States, as well as abroad,[93] since the *Wade* and *Kirby* decisions, such an identification procedure presents many possibilities for intentional or inadvertent suggestion and for misidentification.[94] In general "[i]t may be concluded on the basis of experimental evidence that mistaken identity from lineups is often the rule and not the exception."[95]

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86. Neil v. Biggers, 409 U.S. 188 (1972).

87. Wells, *supra* note 48, at 259 (citing Shiffman & Bobko, *Effects of Stimulus Complexity on Brief Temporal Events*, 103 J. Exp. Psychology 156 (1974)).

88. Brown, Deffenbacher, & Sturgill, *Memory for Faces and the Circumstances of Encounter*, 62 J. Applied Psychology 311 (1977).

89. Yarmey & Jones, *supra* note 30, at 22; Wells, *supra* note 48, at 259 (citing Gorenstein & Ellsworth, *Effect of Choosing an Incorrect Photograph on a Later Identification by an Eyewitness*, 65 J. Applied Psychology 616 (1980)).

90. Hastie, *supra* note 48.

91. United States v. Wade, 388 U.S. 218 (1967).

92. Foster v. State, 713 S.W.2d 789 (Tex. Ct. App. (1986)).

93. Shepherd, *supra* note 51, at 173 ("the fallibility of eyewitnesses has been acknowledged for many years by legal authorities both in the UK and in the USA") *See also* Watson, The Trial of Adolf Beck (1924) (citing 1904 English committee of inquiry as observing that "evidence as to identity based on personal impressions, however bona fide, is perhaps of all classes of evidence the least to be relied upon, and therefore, unless supported by other facts, an unsafe basis for the verdict of a jury"); P. Devlin, *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases* (1976); B. Clifford & R. Bull, The Psychology of Person Identification (1978).

94. E. Loftus, *supra* note 66.

95. A. Yarmey, *supra* note 21, at 159. *Accord*, Frankfurter, The Case of Sacco

III. Aberrant Nature of Kirby

As noted above, in *United States v. Wade*[96] the United States Supreme Court first recognized a sixth amendment right to council at a lineup. Two bank employees identified Wade in a lineup conducted after indictment but before trial. At trial they again pointed out Wade. On cross-examination, in an attempt to counter the in-court identification, defense counsel asked the witnesses about the pretrial lineup. Wade's counsel unsuccessfully asked the trial judge to strike the courtroom identifications on the ground that the lineup without counsel violated the defendant's sixth amendment right.[97]

The court of appeals reversed the conviction and ordered a new trial at which the in-court identification was to be excluded.[98] The Supreme Court granted review and agreed that Wade had a sixth amendment right to the presence of counsel at the lineup.[99] The Court realized that criminal procedure had changed dramatically since the adoption of the federal Bill of Rights. A pretrial confession or lineup can "settle the accused's fate and reduce the trial itself to a mere formality."[100]

Recognizing that the sixth amendment spoke of the right of the accused to the "[a]ssistance of counsel *for his defence*,"[101] the Court regarded the plain meaning of the provision as guaranteeing the right to counsel "whenever necessary to assure a meaningful 'defence.' "[102] Continuing in that vein, the Court emphasized that a central meaning of the right to counsel is that an accused "need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."[103] The *Wade* Court saw the accused's right to a fair trial "as affected by his right meaningfully to cross-examine the witnesses

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and Vanzetti 30 (1927) ("The identification of strangers is proverbially untrustworthy"); Frank & Frank, Not Guilty 61 (1957) ("[P]erhaps erroneous identification of the accused constitutes the major cause of the known wrongful convictions").

96. 388 U.S. 218 (1967).

97. *Id.* at 220. Wade also made a fifth amendment self-incrimination claim, but a majority of the Supreme Court rejected it.

98. United States v. Wade, 358 F.2d 557 (5th Cir. 1966).

99. The Supreme Court held, however, that the violation of the right to counsel at the lineup did not make the in-court identification automatically inadmissible. On remand the trial court was to determine whether (1) the in-court identification was independent of the tainted lineup or whether, in any event, (2) the admission of the in-court identification was harmless error. 388 U.S. at 242.

100. 388 U.S. at 224.

101. *Id.* at 225 (quoting the sixth amendment) (emphasis by the Court).

102. *Id.*

103. *Id.* at 226.

against him and to have effective assistance of counsel at the trial itself."[104]

In analyzing the dangers inherent in pretrial identifications, the Supreme Court in *Wade* cited considerable authority for the proposition that "the annals of criminal law are rife with instances of mistaken identification."[105] The Court observed that, once the witness has committed himself to an identification, he is unlikely to change his mind.[106] Because the defense lawyer is not present at the lineup, counsel cannot reconstruct the lineup at trial. That is true because neither witnesses nor lineup participants, including the suspect, are likely to be aware of prejudicial conditions surrounding the lineup.[107] The resulting "inability to effectively reconstruct at trial any unfairness that occurred at the lineup may deprive [the accused] of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification."[108] Thus, the Court in *Wade* saw the presence of counsel at a pretrial lineup as essential to insure the right to a fair trial, the right to meaningful cross-examination at trial, and the right to effective assistance of counsel at trial.

A. Kirby As a Break from Wade

Only five years after *Wade*, however, in *Kirby v. Illinois*,[109] a plurality reinterpreted the *Wade* opinion, basing its decision on the literal wording of the sixth amendment. The police arrested Kirby for a robbery, and they took him to the police station. The victim entered the station and identified Kirby, who was seated at a table.[110] At trial the victim described the station confrontation and again identified Kirby. The Court declined to apply *Wade* to a pre-indictment identification.[111]

The plurality in *Kirby* read the sixth amendment right to counsel recognized in *Wade* as being limited to postindictment lineups, because

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104. *Id.* at 227.

105. *Id.* at 228 (citing E. BORCHARD, *supra* note 55; FRANK & FRANK, *supra* note 95; and other authorities).

106. *Id.* at 229 (quoting Williams & Hammelman, *Identification Parades, Part I*, CRIM. L. REV. 479, 482 (1963)).

107. *Id.* at 230.

108. *Id.* at 232.

109. 406 U.S. 682 (1972).

110. Such one-on-one identification proceedings are called "showups" and generally are disfavored but are not *per se* unconstitutional. *See* Neil v. Biggers, 409 U.S. 188 (1972) (showup suggestive but identification reliable).

111. Justice Powell supplied the crucial fifth vote without explanation of his rationale, except to say that he would not extend *Wade*. 406 U.S. at 691 (Powell, J., concurring). The *Kirby* analysis later was adopted by a majority. Brewer v. Williams, 430 U.S. 387 (1977).

the sixth amendment begins with the words "[i]n all criminal prosecutions."[112] Taking those words literally, Justice Stewart's brief and matter-of-fact opinion for the plurality concluded that the sixth amendment's guarantee of the right to counsel applies only at or after "the initiation of adversary judicial criminal proceedings,"[113] or "the onset of formal prosecutorial proceedings."[114] As examples of such starting points for a "criminal prosecution," the plurality opinion listed "formal charge, preliminary hearing, indictment, information, or arraignment."[115]

The *Kirby* plurality attempted to distinguish *Wade* on the basis of procedural posture. The confrontation in *Kirby* was arranged before the commencement of formal criminal proceedings, but the lineup in *Wade* was conducted after indictment. Justice Stewart, while declaring that "[t]he initiation of judicial criminal proceedings is far from a mere formalism,"[116] however, gave no practical reason for concluding that the sixth amendment did not require counsel at Kirby's showup, to protect his rights later at trial, but did require counsel at Wade's lineup, to protect those same trial rights.

In direct contradiction to the *Kirby* plurality, Justice Brennan, the author of the *Wade* opinion, denied that the postindictment wording in *Wade* was anything but descriptive. "*Wade* and *Gilbert*,[117] of course, happened to involve post-indictment confrontations. Yet even a cursory perusal of the opinions in those cases reveals that nothing at all turned upon that particular circumstance."[118] Brennan further noted that even the dissenting justices in *Wade* read his opinion in that case as extending to pre-indictment confrontations.[119] For example, Justice White, dissenting in *Wade*, had described Brennan's opinion for the majority as

> [C]reating a new *per se* rule of constitutional law: a criminal suspect cannot be subjected to a pretrial identification process in the absence of his counsel without violating the Sixth Amendment. . . . The rule applies to any lineup, . . . regardless of when the identification occurs, in time or place, and whether before or after indictment or information.[120]

Brennan also observed in his *Kirby* dissent that several state and federal courts had read *Wade* as applying to pre-indictment lineups.[121] Academic

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112. *Id.* at 689-90.
113. *Id.* at 689.
114. *Id.* at 690.
115. *Id.* at 689.
116. *Id.*
117. Gilbert v. California, 388 U.S. 263 (1967).
118. *Kirby*, 406 U.S. at 704 (Brennan, J., dissenting).
119. *Id.* n.13.
120. 388 U.S. at 250-51 (White, J., dissenting in part and concurring in part).
121. 406 U.S. at 704 n.14. *See also* People v. Hawkins, 55 N.Y.2d 474, 490 n.3,

commentators had done the same.[122] Many commentators have been "critical of the *Kirby* decision and have sided with the four dissenters who pointed out that the decision did not square with the rationale of *Wade*."[123] Judicial and academic comments on the *Kirby* opinion have demonstrated the lack of logic in its attempt to distinguish the holding in *Wade*.[124] Perhaps the most stinging academic criticism of the *Kirby* decision was made by Professor Grano, who thoroughly demonstrated that the *Kirby* decision was not faithful to *Wade*, which *Kirby* purported to follow.[125] Grano concluded that "the plurality opinion in *Kirby* seems wrong from every perspective. The opinion misreads precedent so badly that it appears intellectually dishonest."[126] Other critics have been only slightly more kind to the *Kirby* opinion.[127] The *Wade* majority understood that, when an eyewitness identifies a suspect, for all practical purposes the case is over. Just as *Escobedo v. Illinois*[128] and *Miranda v. Arizona*[129] recognized that a confession made to a police officer is an event that really terminates the accused's chances for acquittal, *Wade* made it clear that "[t]he trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation . . . with little or no effective appeal from the judgment there rendered by the witness—'that's the man.' "[130] The witnesses and the suspect are not likely to be alert to the presence of any suggestiveness in the lineup. Unless he is present at the lineup, defense counsel will find it impossible to reconstruct the conditions by means of questioning in court. The inability to establish suggestiveness through questioning

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450 N.Y.S.2d 159, 167 n.3, 435 N.E.2d 376, 384 n.3 (1982) (Meyer, J., dissenting) ("prior to *Kirby* a substantial majority of courts had applied *Wade* to preindictment identification proceedings and required counsel at all lineups.") *Id.*

122. People v. Hawkins, 55 N.Y.2d at 489 n.2, 450 N.Y.S.2d at 167 n.2, 435 N.E.2d at 384 n.2 (1982).

123. W. LaFave, Criminal Procedure 329 (1985).

124. *Hawkins*, 55 N.Y.2d at 488, 450 N.Y.S.2d 166, 435 N.E.2d 383 (Meyer, J., dissenting).

125. Grano, *Kirby, Biggers, and Ash: Do Any Constitutional Safeguards Remain Against the Danger of Convicting the Innocent?*, 72 Mich. L. Rev. 717, 725-30 (1974).

126. *Id.* at 730 ("*Kirby* created a new, and previously unsupported limitation on the right to counsel.").

127. *See, e.g.*, R. Young, *Supreme Court Report*, 58 A.B.A.J. 1092 (1972) ("perhaps the least defensible, from a technical point of view, of the court's criminal law holdings during the term"); Note, *Criminal Law—The Lineup's Lament, Kirby v. Illinois*, 22 De Paul L. Rev. 660 (1972-73) (exaltation of form over substance); Woocher, *supra* note 65, at 996 ("removes the protective effects of counsel's presence precisely when the danger of convicting an innocent defendant upon a mistaken identification is greatest").

128. 378 U.S. 478 (1964).

129. 384 U.S. 436 (1966).

130. 388 U.S. at 235-36.

results in the denial of effective confrontation of the witnesses at trial, denial of effective assistance of counsel at trial, and denial of a fair trial. The literal-language approach to the interpretation of the sixth amendment right to counsel, highlighted in *Kirby*,[131] ignores the practical difficulties of recreating the lineup through cross examination, as well as the policies that the counsel guarantee exists to serve.

B. Federal "Literal Language" Rationale

As discussed above, in *Kirby*, the Supreme Court employed a "literal language," "explicit wording," or "plain language" approach to the interpretation of the scope of the sixth amendment right to counsel. The opinion relied on the fact that the sixth amendment begins with the phrase "[i]n all criminal prosecutions." Interpreting that phrase, the *Kirby* plurality announced the following doctrine: "The initiation of judicial criminal proceedings is far from a mere formalism. . . . It is this point . . . that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable."[132]

The *Kirby* opinion thus began to reinterpret the *Wade* and *Gilbert*[133] decisions, while emphasizing that it was relying on the explicit wording of the sixth amendment: "The rationale of those cases was that an accused is entitled to counsel at any 'critical stage of the *prosecution*.' "[134] The opinion of Chief Justice Burger, concurring in *Kirby*, reiterated the express-wording rationale: "I agree that the right to counsel attaches as soon as criminal charges are formally made against an accused and he becomes the subject of a 'criminal prosecution.' "[135]

Thus, it can be seen that *Kirby* articulated and relied upon a literal reading of the phrase "criminal prosecution" as restricting the scope of the *Wade* sixth amendment right to counsel. The *Kirby* plurality took the simplistic explicit-wording approach over the objection of Justice Brennan, the author of *Wade*, who observed in dissent as follows:

> While it should go without saying, it appears necessary, in view of the plurality opinion today, to re-emphasize that *Wade* did not require the presence of counsel at pretrial confrontations

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131. Actually *Wade* also relied on the "plain wording" of the sixth amendment when stressing that the provision guarantees "counsel's assistance whenever necessary to assure a meaningful 'defence.'" *Id.* at 225.

132. 406 U.S. at 689-90.

133. Gilbert v. California, 388 U.S. 263 (1967).

134. 406 U.S. at 690 (emphasis added by Justice Stewart for *Kirby* plurality) (quoting Simmons v. United States, 390 U.S. 377, 382-83 (1968)).

135. *Id.* at 691 (Burger, C.J., concurring).

> for identification purposes simply on the basis of an abstract consideration of the words "criminal prosecutions" in the Sixth Amendment.[136]

Only much later, when the literal-language approach created logical and doctrinal difficulties regarding the other rights in the sixth amendment, did the Court begin to look seriously for an alternative rational, examining the purposes of the sixth amendment guarantees as clues to their scope. Such difficulties appeared in *United States v. Gouveia*,[137] in which case the defendant was a prisoner at a federal prison when a murder of another prisoner occurred. Gouveia was placed in administrative detention for a considerable period before he was indicted for the murder. The court of appeals held that he had a right to appointment of an attorney during administrative detention and before indictment.[138] Noting that *Kirby* did not involve a prison context, the court analogized to the sixth amendment speedy trial right.[139] The Ninth Circuit reasoned that, if an arrest starts a "criminal prosecution" for speedy trial calculations, then administrative detention must serve the same purpose for the attachment of the right to counsel in the prison context.[140] The court of appeals held that, even before indictment, an administratively detained prisoner must either be given counsel within a specified period or be released into the general prison population, so that the prisoner or the lawyer can conduct the pretrial investigation necessary to acquire and preserve evidence for presentation of a defense at trial.[141]

The Supreme Court reversed the Ninth Circuit, holding the circuit court's analogy to the speedy trial right to be inapt.[142] While recognizing that the sixth amendment speedy trial right attaches at the time of arrest, the Supreme Court in *Gouveia* reaffirmed the *Kirby* analysis, holding that the sixth amendment right to counsel does not attach until adversarial judicial proceedings have begun. The Court reviewed the *Kirby* line of cases and pronounced it to be "consistent not only with the literal language of the Amendment, which requires the existence of both a 'criminal prosecutio[n]' and an 'accused,' but also with the purposes which we have recognized that the right to counsel serves."[143] The Court also relied again on the "plain language of the Amendment and its purpose."[144]

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136. *Id.* at 696 (Brennan, J., dissenting).
137. 467 U.S. 180 (1984).
138. 704 F.2d 1116 (9th Cir. 1983).
139. *Id.* at 1120.
140. *Id.* at 1124.
141. *Id.*
142. United States v. Gouveia, 467 U.S. 180 (1984).
143. 467 U.S. at 188.
144. *Id.* at 189.

While reiterating reliance on the literal language or plain wording of the sixth amendment, the *Gouveia* Court shifted the focus to the different purposes served by the speedy trial right and the counsel right in order to justify the difference in results between speedy-trial cases and right-to-counsel cases.[145] The *Kirby* plurality had rested its opinion solely on the first few words of the sixth amendment, "[i]n all criminal prosecutions."[146] Justice Stewart's opinion in that case had not referred to the purposes underlying the sixth amendment right to counsel.

The change to reliance on the underlying purposes of the various guarantees of the sixth amendment was made necessary by the fact that the literal-language rationale of *Kirby*, if applied in any way but selectively and arbitrarily throughout the sixth amendment, would be destructive of well-established doctrine regarding the right to a speedy trial. Brennan, dissenting in *Kirby*, had pointed out that, for speedy-trial doctrinal reasons, the phrase "criminal prosecutions" in the sixth amendment could not have the restrictive effect that the *Kirby* plurality proposed.[147] The phrase directly applied to the speedy trial right, but doctrine regarding that guarantee held that the speedy trial right attached at the time of indictment or arrest, whichever came first.[148] The *Kirby* plurality, however, chose to ignore the logical and doctrinal problems resulting from its plain-language approach.

In *Gouveia*, the Court had to face these shortcomings of *Kirby* and address them, because the Ninth Circuit had analogized to the speedy trial guarantee of the sixth amendment, which, like the right to counsel, is preceded by the words "[i]n all criminal prosecutions." However, rather than employing sound analysis the Court resorted to sleight of hand, directing attention away from the literal-language rationale. The Court recognized the doctrine that the right to a speedy trial attaches at the time of arrest, but the Court announced that the difference between the attachment points of the speedy trial right and the right to counsel is "readily explainable given the fact that the speedy trial right and the right to counsel protect different interests."[149] The former protects a "liberty interest," while the latter protects the accused "during trial-type confrontations with the prosecutor."[150]

What the Court failed to recognize is that, once one begins to rely on the purposes underlying the several guarantees in the sixth amendment,

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145. *Id.* at 190.

146. 406 U.S. at 689-90.

147. 406 U.S. at 698 n.7 (Brennan, J., dissenting).

148. *Id.*; *see also* United States v. Marion, 404 U.S. 307 (1971); Dillingham v. United States, 423 U.S. 64 (1975) (arrest activates speedy trial right).

149. 467 U.S. at 190.

150. *Id.*

in order to justify distinctions among the points in time at which those rights attach, then the literal language, "criminal prosecutions," is no longer relevant in determining the scope of a right. That same phrase applies to every one of the rights in the sixth amendment, but it cannot have a "literal" meaning that is the same for each. If the literal meaning is not the same for each right in the amendment, then there is no literal meaning. Once this is recognized, the *Kirby* rationale is lost, and the courts, freed from the bankrupt "plain language" approach, are called upon to examine the purposes of the right to counsel in order to determine the scope of the right.

According to *Wade*, the right to counsel at a lineup before trial is essential for the protection of rights that come into play later at trial: the rights to meaningful cross-examination and confrontation, to effective assistance of counsel, and to a fair trial.[151] Those same purposes exist for the right to counsel at a pretrial lineup whether or not formal adversarial judicial proceedings have commenced.[152] As Justice Brennan made clear in his *Kirby* dissent, "the initiation of adversarial judicial proceedings is completely irrelevant to whether counsel is necessary at a pretrial confrontation for identification in order to safeguard the accused's constitutional rights to confrontation and the effective assistance of counsel at his trial."[153] *Kirby* is an aberration from *Wade*, and state courts have struggled for years to reconcile the two cases.

IV. State Court Decisions

In 1974, only two years after the *Kirby* decision, some state courts began to define a broader scope for the right to counsel because of the interposition of state law. Others are addressing the issue for the first time only now. The state courts follow two approaches. First, Pennsylvania and Mississippi, like the *Kirby* Court, restrict the right to counsel to critical confrontations occurring after the initiation of judicial criminal proceedings, but they refer to state law for the definition of the initiation

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151. 388 U.S. at 227.

152. *See, e.g.*, People v. Bustamante, 30 Cal. 3d 88, 95, 177 Cal. Rptr. 576, 580, 634 P.2d 927, 931 (1981) (quoting People v. Fowler, 1 Cal. 3d 335, 342, 82 Cal. Rptr. 363, 368-69, 461 P.2d 643, 648-49 (1962)):

> [T]he presence or absence of those conditions attendant upon lineups which induced the high court to term such proceedings 'a critical stage of the prosecution' at which the right to counsel attaches . . . is certainly not dependent upon the occurrence or nonoccurrence of proceedings formally binding a defendant over for trial. A lineup which occurs prior to the point in question may be fraught with the same risks of suggestion as one occurring after that point, and may result in the same far-reaching consequences for the defendant.

153. 406 U.S. at 697.

point. Because those courts retain to some extent the *Kirby* requirement of judicial criminal proceedings and see the federal doctrine and state constitutions or statutes as interacting to determine the attachment of counsel, they may be referred to as the "interactive states." Second, Michigan, Alaska, and California, on the other hand, regard the attachment of the counsel right as independent of the initiation of judicial criminal proceedings. Because they completely reject *Kirby* and independently determine the attachment point of the right to counsel, as guaranteed by the state constitution, those states may be called the "independent states."

A. Interactive States

1. Pennsylvania.—In 1974, the Pennsylvania Supreme Court held that the interplay of federal and state law required the presence of counsel at a pre-indictment lineup. In *Commonwealth v. Richman*,[154] several days after the offense the police arrested a suspect and placed him in a lineup at the police station, where the victim identified him. The Pennsylvania court reviewed the *Wade* and *Kirby* opinions and decided that the later decision left to state law the question of when adversary judicial proceedings began for sixth amendment purposes. The *Richman* court reasoned that the *Kirby* plurality did not intend to supply an exhaustive list of possibilities when it held that the sixth amendment right to counsel attached to confrontations conducted "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information or arraignment."[155]

Relying on an earlier decision interpreting state law,[156] the Pennsylvania court held that an arrest initiates judicial proceedings. The court noted that in Pennsylvania judicial approval of a complaint takes place at the issuance of an arrest warrant,[157] or at the preliminary arraignment in the case of a warrantless arrest. The *Richman* court regarded magisterial approval of a complaint as equal in significance to an indictment for determining the commencement of adversarial judicial proceedings. A person arrested pursuant to a warrant, therefore, was entitled to counsel at a resulting lineup. The same was true for a person placed in a lineup after arraignment following a warrantless arrest.

In *Richman*, however, the lineup was conducted after a warrantless arrest but before arraignment. The Court gave two reasons for not

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154. 458 Pa. 167, 320 A.2d 351 (Pa. 1974).

155. *Id.* at 171, 320 A.2d at 353 (quoting *Kirby*, 406 U.S. at 689).

156. *Id.* (citing Commonwealth v. Whiting, 439 Pa. 205, 266 A.2d 738 (1970)).

157. *See* United States ex rel. Robinson v. Zelker, 468 F.2d 159 (2d Cir. 1972) (arrest warrant commenced formal criminal proceedings requiring counsel at showup).

distinguishing Richman's case from one involving a lineup after arraignment or after arrest on a warrant. First, allowing uncounseled lineups would undermine the Pennsylvania Court's "strong policy requiring warrants whenever feasible."[158] Second, the distinction would encourage police to evade a state law requirement that the suspect be brought before a magistrate for the filing of a complaint "without unnecessary delay."[159]

The Pennsylvania approach was to require counsel at practically all pre-indictment lineups, as a result of the interaction of the sixth amendment and state law. The court did not recognize a right to counsel under state law broader in scope than the guarantee in the sixth amendment.

2. Mississippi.—The Mississippi Supreme Court's approach changed over the years from an embrace of the *Kirby* rule, to purported outright rejection, and later to interaction. Immediately after the *Kirby* decision the Mississippi Supreme Court adopted the federal rule that "the right to counsel did not apply to a pre-indictment lineup."[160] By 1984, however, Mississippi had begun to recognize the interplay between state law and the *Kirby* reasoning. Later the Mississippi court flirted with the idea of an independent standard, only to shift the focus again to state law as the determinative component of an interactive approach.

In *Cannaday v. State*,[161] looking to state procedure for the determination of when formal adversarial proceedings have begun, as Pennsylvania had done ten years earlier,[162] the Mississippi court held that the right to counsel may attach as early as the time when a warrant is issued. Two years later in *Page v. State*,[163] the court reasoned that "[f]or purposes of our state constitutional right to counsel, we define the advent of the accusatory stage by reference to state law."[164] Recognizing that state law defined commencement of prosecution as the point when a warrant was issued, or when the person was "bound over" to wait for a grand jury to decide whether to indict,[165] the *Page* court concluded

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158. 458 Pa. at 173, 320 A.2d at 354. (As support for that policy the *Richman* court cited Wong Sun v. United States, 371 U.S. 471 (1963) for the proposition that "a warrantless arrest is justified only in the face of compelling exigent circumstances which preclude the police from going before a detached magistrate." 458 Pa. at 172-3, 320 A.2d at 354. *Richman* was decided before United States v. Watson, 423 U.S. 411 (1976) (warrantless public arrest may be made in public on probable cause without exigent circumstances)).

159. *Id.* (quoting PA. R. CRIM. P. 130).

160. *See* Livingston v. State, 519 So. 2d 1218, 1220 (Miss. 1988) (citing cases).

161. 455 So. 2d 713 (Miss. 1984) *cert. denied*, 469 U.S. 122 (1985).

162. Commonwealth v. Richman, 458 Pa. 167, 320 A.2d 351 (1974).

163. 495 So.2d 436 (Miss. 1986).

164. *Id.* at 439.

165. MISS. CODE ANN. § 99-1-7 (1972).

that it would be "totally irrational" not to consider such a person to be an accused.[166] In light of state law requiring speedy appearance before a magistrate after arrest,[167] which would constitute the commencement of judicial criminal proceedings, the *Page* decision recognized a right to counsel for a person who has been arrested and released on bond and who has obtained the services of an attorney.[168]

In a footnote the court expressly stated that it relied "exclusively upon state law" and rejected *Kirby* as "wholly unworkable."[169] Because in rural counties the meetings of grand juries to consider indictments were held infrequently, the Mississippi court thought that the *Kirby* approach "would have the right to counsel available to the accused only after many months had passed following arrest."[170] Later the Mississippi court took an approach like the one taken by Pennsylvania in *Richman*, holding that the attachment point of both the federal and state right to counsel is determined by reference to state law. Relying on *Page*, which involved not a lineup but incriminatory statements, the Mississippi Supreme Court decided in *Livingston v. State*,[171] that, given state law defining the commencement of prosecution,[172] a person has a right to counsel at a lineup conducted after he has been arrested on a warrant.[173]

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166. 495 So. 2d at 439.

167. Rule 1.04, Miss. Unif. Crim. R. Cir. Ct. Prac.; Miss. Code Ann. § 99-3-17 (Supp. 1985).

168. 495 So. 2d at 439-40.

169. *Id.* at 440 n.5. The court noted:

> We are very much aware of the fact that a number of recent federal cases have held that the right to counsel secured by the Sixth Amendment to the Constitution of the United States is available only after the initiation of judicial criminal proceeding[s], i.e., indictment and arraignment. Application of this approach to our state constitutional right would be wholly unworkable. . . . [W]e reject the federal approach and for purposes of today's decision rely exclusively upon state law.

(citations omitted).

170. *Id.* At the time it appeared Mississippi was rejecting the *Kirby* judicial-proceedings formulation of the attachment point for the state constitutional right to counsel. The *Page* Court actually disavowed something that *Kirby* had not held—that the right to counsel attached only at or after indictment and arraignment. When the *Kirby* Court spoke of arraignment, however, it did not mean only a hearing before a magistrate occurring after indictment but also earlier proceedings, like the initial appearance before a magistrate after arrest. *See, e.g.*, Michigan v. Jackson, 475 U.S. 625 (1986) (initial appearance or "arraignment" after being arrested and formally charged); Brewer v. Williams, 430 U.S. 387 (1977) (arrest on warrant, arraignment, judicial commitment to jail).

171. 519 So. 2d 1218 (Miss. 1988).

172. Miss. Code Ann. § 99-1-77 (Supp. 1986).

173. 519 So. 2d at 1221. (The Court affirmed the conviction because of several procedural problems concerning the preservation of error. Some of the problems were that (1) the record did not show that counsel was not present at the lineup and (2) at trial no objection was made to the admission of testimony about the lineup.)

The *Livingston* case involved counsel claims under both the federal and state constitutions, but the Mississippi court did not employ a different test for the state provision.

The latest refinement of the Mississippi test, however, regards state law, without reference to or reliance on the federal sixth amendment, as dictating attachment of the right to counsel at the point after arrest when the initial appearance before a magistrate "ought to have been held."[174] That rule prevents the police from postponing the attachment of the right to counsel by delaying the arrestee's appearance in court.

Although earlier Mississippi case law displayed "a trend toward rigid restriction of the access to counsel to post-indictment line-ups, that view has clearly been supplanted by a more recent case espousing an approach based squarely on state law and the initiation of judicial proceedings as defined by statute."[175] The Mississippi approach now resembles that of Pennsylvania, the other interactive state, in that it accepts the *Kirby* judicial-proceedings concept regarding the attachment point for the right to counsel but defines that point by reference to state law.[176] In one context or another those two state courts have held that the right to counsel at a lineup attaches when, as a matter of statute, court rule, or policy, a judicial officer should have become involved in the case, despite the fact that no magistrate had yet been consulted. The result is that in Mississippi and Pennsylvania, the right to counsel at a lineup attaches at a point earlier in the criminal process than any United States Supreme Court opinion has yet recognized. Mississippi has gone beyond Pennsylvania in recognizing such an early counsel right without reliance on the sixth amendment, but Mississippi has not expressly declared that the right under state law is greater in scope.[177]

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174. Magee v. State, 542 So. 2d 228 (Miss. 1989).

175. Whitten & Robertson, *supra* note 13, at 293 n.182 (citing statutory and case authority).

176. Some federal courts have recognized the interactive nature of the *Kirby* approach to the question of when the right to counsel attaches. *See, e.g.*, United States v. Muzychka, 725 F.2d 1061 (3d Cir.), *cert. denied*, 467 U.S. 1206 (1984); Clark v. Jago, 676 F.2d 1099 (6th Cir. 1982), *cert. denied*, 466 U.S. 977 (1984); Lomax v. Alabama, 629 F.2d 413 (5th Cir. 1980), *cert. denied*, 450 U.S. 1002 (1981); United States ex rel. Robinson v. Zelker, 468 F.2d 159 (2d Cir. 1972), *cert. denied*, 411 U.S. 939 (1973); United States ex rel. Sanders v. Rowe, 460 F. Supp. 1128 (N.D. Ill. 1978); United States ex rel. Burton v. Cuyler, 439 F. Supp. 1173 (E.D. Pa. 1977), *aff'd without opinion*, 582 F.2d 1278 (3d Cir. 1978) (all cases following interactive approach).

177. Two other states have moved close to independence on the lineup issue without quite crossing the line. *See* State v. Smith, 547 So. 2d 131 (Fla. 1989) (*ex parte* order compelling accused already in police custody to participate in lineup violates due process under state constitution); People v. Coates, 74 N.Y.2d 244, 544 N.Y.S.2d 992, 543 N.E.2d 440 (1989) (suspect incarcerated and represented by attorney on other charge had right to counsel at lineup ordered by court).

B. Independent States

1. Michigan.—The first state high court to reject *Kirby* completely on state law grounds was the Supreme Court of Michigan in *People v. Jackson*,[178] which involved photographic arrays and a lineup apparently conducted without the presence of counsel. At the time of the identification proceedings Jackson, a suspect in an assault case, was in jail under a sentence for a related offense. For practical purposes he was regarded as under arrest for the assault in question.[179] In *Jackson*, the Michigan court exercised its "constitutional power to establish rules of evidence applicable to judicial proceedings in Michigan courts and to preserve best evidence eyewitness testimony from unnecessary alteration by unfair identification procedures."[180] The *Jackson* decision relied on an earlier opinion by the same court in *People v. Anderson*,[181] involving photographic identifications.

Anderson was decided after *Kirby* but before *United States v. Ash*,[182] the photographic display case discussed above. In *Anderson*, the Michigan Supreme Court came to conclusions contrary to *Kirby* and *Ash*. The Michigan court surveyed the legal and scientific writings on eyewitness identification,[183] extensively analyzed the competing interests of the state and the suspect, and concluded that, independent of federal constitutional doctrine, a suspect is entitled to counsel at a live or photographic identification without regard to whether the "judicial phase of a prosecution" has begun.[184] In *Jackson*, after reviewing *Kirby* and *Ash*, the Michigan Supreme Court expressly rejected those two opinions and reaffirmed the *Anderson* holding on the basis of its supervisory powers, independent of federal constitutional analysis.[185] The *Jackson* court thus

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178. 391 Mich. 323, 217 N.W.2d 22 (1974).

179. *Id. Accord*, People v. Anderson, 391 Mich. 419, 216 N.W.2d 780 (1974) (fact that suspect in custody for different crime did not diminish right to counsel at photo lineup). *But cf.* Foster v. State, 713 S.W.2d 789 (Tex. Ct. App. 1986) ("The fact that the appellant was incarcerated on an unrelated matter at the time of the lineup was not relevant to a determination of his sixth amendment right to counsel for the robbery, the offense for which he was identified at the lineup.") *Id.* at 790.

180. 391 Mich. at 338-39, 217 N.W.2d at 27.

181. 389 Mich. 155, 205 N.W.2d 461 (1973).

182. 413 U.S. 300 (1973).

183. The court attached an appendix to the *Anderson* opinion displaying thorough research. *See* 389 Mich. at 192-220, 205 N.W.2d at 479-95.

184. *Jackson*, 391 Mich. at 339, 217 N.W.2d at 27 (The Jackson court defined the "judicial phase of a prosecution" as "[f]iling of a complaint/issuance of an arrest warrant/preliminary examination/filing of an information or indictment.") *Id.* n.11.

185. *Id.* 391 Mich at 338, 217 N.W.2d at 27-28. The court stated:

> [T]he principles developed in and following the announcement of *Wade*, as to corporeal identifications, and *Anderson*, as to photo showings, shall govern the

mandated that counsel be present at pretrial lineups unless exigent circumstances justified proceeding without counsel.

2. Alaska.—The Supreme Court of Alaska in *Blue v. State*[186] was the first state court to ground the rule requiring counsel at a pre-indictment lineup squarely on the state constitutional right to counsel. In that case police conducted an impromptu lineup in a bar shortly after an armed robbery had occurred in another bar nearby. A victim identified Blue in the lineup. While recognizing that *Kirby* had rejected a sixth amendment claim to a right to counsel at pre-indictment lineups, and that the "pre- and post-indictment distinction ha[d] been widely applied by federal and state courts,"[187] the Alaska Supreme Court stated that it "is not limited by decisions of the United States Supreme Court or by the United States Constitution when interpreting its state constitution."[188] The Alaska court noted that the right to counsel under the state constitution already had been given a broader scope than its sixth amendment analogue.[189]

Balancing the need of the state for prompt and efficient investigation of crimes against the right of the suspect to meaningful cross-examination at a later trial, and relying on Justice Brennan's dissent in *Kirby*,[190] as well as California cases interpreting *Wade*,[191] the *Blue* court held that "a suspect who is in custody is entitled to have counsel present at a pre-indictment lineup unless exigent circumstances exist so that providing counsel would unduly interfere with a prompt and purposeful investigation."[192] The Alaska court found exigent circumstances to be present in *Blue*, so that providing counsel would not have been "practical, reasonable or mandated by [the Alaska] constitution."[193]

3. California.—In *People v. Bustamante*,[194] the California Supreme Court followed Alaska's example and rested its decision on an inde-

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receipt in evidence of identification testimony where the witness has viewed or seen photographs of the suspect without regard to when the judicial phase of the prosecution is commenced.

(footnotes omitted).

186. 558 P.2d 636 (Alaska 1977).

187. *Id.* at 640 n.5.

188. *Id.* at 641.

189. *Id.* (citing Roberts v. State, 458 P.2d 340 (Alaska 1969)).

190. *Id.* at 641-42 n.8 (quoting Kirby v. Illinois, 406 U.S. 682, 696 (1982) (Brennan, J., dissenting)).

191. *Id.* at 642 n.10.

192. *Id.* at 642 (footnotes omitted). The court noted that, although Blue had not been placed under formal arrest, he was in custody. *Id.* n.9.

193. *Id.* at 642 n.11 (The court reversed the conviction on a different ground.) *Id.* at 646.

194. 30 Cal. 3d 88, 177 Cal. Rptr. 576, 634 P.2d 927 (1981). The decision in

pendent state constitutional right to counsel. In reaching that decision the California court re-affirmed its decision in *People v. Fowler*,[195] which was decided after *Wade* but before *Kirby*. In the *Fowler* case, the California court, like some federal courts before *Kirby*,[196] had held that the *Wade* right to counsel extended to pre-indictment lineups. In *Bustamante*, the court revisited *Fowler* and noted the intervening decisions in Alaska, Michigan, and Pennsylvania discussed above.[197]

The *Bustamante* court recognized the unreliability of eyewitness identification and the way the witness becomes "unshakable" once the lineup identification removes his doubts and commits him to the proposition that the defendant is the criminal in question.[198] The California court also noted the extreme difficulty of reproducing the lineup procedure at trial with sufficient precision to reveal improper suggestion.[199] Further examining the role of counsel at a lineup, the *Bustamante* court decided that the counsel requirement would encourage police to adopt and to follow fair procedures.[200] By attending the lineup, the attorney could detect intentionally or inadvertently suggestive aspects of the lineup and could better prepare for cross-examination of the eyewitnesses and for argument at trial.[201] In rejecting *Kirby*, however, the California Court again followed the lead of Michigan and Alaska and held that exigent circumstances could justify proceeding without counsel.[202]

C. Retreat from Independence

Texas.—Texas, the scene of the bank robbery in *Wade*, which was the starting point for the right to counsel at a lineup, recently announced a new rule rejecting the *Kirby* rationale and according counsel at any critical pretrial confrontation, before or after the initiation of formal judicial proceedings, as a matter of state law. Within a year, however,

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Bustamante remains valid, despite Proposition 8, which narrowed the California exclusionary rule to a scope identical to the federal rule, because the conduct in *Bustamante* occurred before passage of the initiative. People v. Houston, 42 Cal. 3d 595, 600 n.3, 230 Cal. Rptr. 141, 142 n.3, 724 P.2d 1166, 1167 n.3 (1986).

195. 1 Cal. 3d 335, 461 P.2d 643, 82 Cal. Rptr. 363 (1969).

196. *Bustamante* at 30 Cal. 3d at 95, 634 P.2d at 931, 177 Cal. Rptr. at 580 (citing Wilson v. Gaffney, 454 F.2d 142 (10th Cir. 1972); United States v. Greene, 429 F.2d 193 (D.C. Cir. 1970)).

197. *Id.* at 96 n.5, 177 Cal. Rptr. at 581 n.5, 634 P.2d at 932 n.5.

198. *Id.* at 98, 177 Cal. Rptr. at 582, 634 P.2d at 933.

199. *Id.* at 99, 177 Cal. Rptr. at 583, 634 P.2d at 934.

200. *Id.*

201. *Id.*

202. *Id.* at 100, 177 Cal. Rptr. at 584, 634 P.2d at 935. *See also* Blue v. State, 558 P.2d 636 (Alaska 1977) (state constitution requires presence of counsel at in-custody lineup).

the Texas court reversed itself and retreated to the *Kirby* rule. Until *Kirby* came along, the Texas Court of Criminal Appeals,[203] like the California Supreme Court,[204] regarded *Wade* as applying the sixth amendment right to counsel to pre-indictment lineups, as well as post-indictment confrontations. In *Martinez v. State*[205] in 1969, the Texas court concluded that *Wade* clearly held "that a criminal suspect cannot be subjected to a pretrial identification process in the absence of counsel without violating the Sixth Amendment."[206]

Since *Kirby* re-interpreted the *Wade* decision, however, the Texas Court of Criminal Appeals has not directly re-addressed the pre-indictment lineup issue as a matter of state law. In the 1986 case of *Foster v. State*[207] discussed above,[208] an intermediate court of appeals in Texas tersely rejected the appellant's claim of a right to counsel, saying that it was "unable to find any basis upon which to interpret our state constitution's right-to-counsel provision as giving a criminal defendant any greater protection than is given by the United States Constitution."[209] The Texas Court of Criminal Appeals currently is reviewing *Foster* to decide the question of whether the Texas Constitution guarantees the right to counsel at a lineup before indictment.

Meanwhile, in *Forte v. State*,[210] the Texas Court of Criminal Appeals appeared to open the door to recognition of a state constitutional right to have counsel present at a lineup before formal judicial proceedings begin. Forte claimed that he had a right to counsel at a breath test administered after his arrest for driving while intoxicated. In 1986, the Court of Criminal Appeals, following *Kirby*, rejected his sixth amendment claim and remanded for consideration of the state constitutional law issue.[211] On remand the intermediate court of appeals held against the state constitutional contention,[212] and the Court of Criminal Appeals agreed.[213] In rejecting the state law claim, however, the Court of Criminal Appeals also unanimously rejected the *Kirby* rationale as a "fiction."[214] The court stated:

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203. The Texas Court of Criminal Appeals is the court of last resort for state criminal cases. The Texas Supreme Court handles civil cases. TEX. R. APP. P. 15, 9, respectively.

204. People v. Fowler, 1 Cal. 2d 335, 82 Cal. Rtpr. 363, 461 P.2d 643 (1969).

205. 437 S.W.2d 842 (Tex. Crim. App. 1969).

206. *Id.* at 846.

207. 713 S.W.2d 789 (Tex. Ct. App. 1986).

208. *See supra* text accompanying notes 1-3.

209. 713 S.W.2d at 790.

210. 759 S.W.2d 128 (Tex. Crim. App. 1988).

211. 707 S.W.2d 89 (Tex. Crim. App. 1986).

212. Forte v. State, 722 S.W.2d 219 (Tex. Ct. App. 1986).

213. Forte v. State, 759 S.W.2d 128 (Tex. Crim. App. 1988).

214. *Id.* at 137 (Two judges dissented but obviously agreed with the majority in rejecting *Kirby*. *See* 759 S.W.2d at 139-40 (Clinton, J. and Teague, J., dissenting)).

> We believe that the basis and rationale of the *Wade-Gilbert* rule and the *Kirby* line of cases become difficult if not impossible to reconcile, especially when one considers the realities of the criminal investigatory procedures utilized by most law enforcement agencies. That is, the same dangers of prejudice which *Wade* and *Gilbert* claimed concern will invariably exist at many stages of a criminal prosecution prior to the onset of formal charges; therefore, the demarcation of formal charges before the right to counsel is triggered is probably arbitrary and capricious.[215]

The court surveyed the decisions of other states and recognized a sharp division on the issue of counsel at breath tests. Concentrating on the opinions of the Supreme Court of Oregon,[216] the Texas court concurred with the Oregon court's "repudiation" of *Kirby* but declined to follow the Oregon reasoning that arrest automatically triggers the right to counsel in breath test cases.[217]

The Texas Court did not believe that the *Kirby* fiction (*i.e.*, the right to counsel begins at the time when adversarial judicial proceedings commence) should be replaced with another fiction that the right to counsel automatically attaches at the time of formal arrest. Eschewing any "artificially created time designation,"[218] the Court of Criminal Appeals insisted on a "more flexible standard."[219] Holding that the right to counsel arises at "critical stage[s]"[220] of the criminal process, the court directed that "each case must be judged on whether the pretrial confrontation presented necessitates counsel's presence so as to protect a known right or safeguard,"[221] such as later rights to a fair trial, to meaningful cross-examination, and to effective assistance of counsel at trial.[222] The *Forte* court thus accepted the *Wade* definition of "critical stages" but rejected the *Kirby* designation of formal adversarial judicial proceedings as the starting point. A critical stage, under the *Forte* reasoning, can occur before judicial criminal proceedings begin. Nevertheless, the court reasoned that, under the Texas Implied Consent Statute,[223] which provides that a driver impliedly consents to a breath test by the act of driving on a public road, Forte had no legal right to revoke his implied consent and to refuse a breath test. For that

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215. *Id.* at 134.
216. *See, e.g.*, State v. Spencer, 305 Or. 59, 750 P.2d 147 (1988).
217. *Forte*, 759 S.W.2d at 137.
218. *Id.* at 138.
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.* at 137-38 (quoting United States v. Wade, 388 U.S. 218 (1967)).
223. TEX. REV. CIV. STAT. ANN. §§ 67011-15 (Vernon Supp. 1984).

reason the suspect had no right that needed protection at the time of the breath test or at a later trial. Consequently, the Court held that the time at which a driver is faced with the decision whether to take a test is not a "critical stage" of the criminal process at which counsel's presence is required. Forte's right to counsel under the Texas constitution, just like the sixth amendment right, "did not attach until the time the complaint was filed."[224]

The analysis employed by the *Forte* court seemed to allow the attachment of the right to counsel at lineups like the one in *Foster*. While it is true that Foster, who was in jail serving a sentence for other offenses, was not formally under arrest for the robberies under investigation,[225] nothing in the *Forte* rationale suggested that the suspect must be the subject of an arrest, let alone a judicial warrant, formal complaint, arraignment, preliminary hearing, information or indictment. The only question is whether the pretrial confrontation itself is a critical stage, in that counsel's presence is needed to protect a known right existing at the confrontation or later in the process. *Wade* clearly regarded all such pretrial lineups to be critical stages. The *Forte* opinion's heavy reliance on *Wade*'s rationale, while rejecting *Kirby*, appeared to make it difficult for the Texas Court of Criminal Appeals to deny the claim made in *Foster* that the right to counsel attaches at a lineup for a person serving a sentence in jail for other offenses.

During the next legislative session, however, in reaction to *Forte* and other decisions, opponents of independent state constitutionalism proposed a sweeping amendment to the Texas Constitution that would have stripped the courts of the authority to construe state constitutional provisions more favorably to criminal defendants than the federal courts have construed the federal Bill of Rights.[226] Although the amendment

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224. 759 S.W.2d at 139 (quoting Forte v. State, 707 S.W.2d 89, 92 (Tex. Crim. App. 1986)). Presumably the Texas Court of Criminal Appeals in *Forte* merely meant that the state counsel right did not theoretically attach before the sixth amendment right in that case. The court adopted the federal critical stage analysis, which requires that, for the right to counsel to come into play, the proceeding at which counsel's presence is requested must be a "confrontation" between the accused and the state. *Id.* at 133 (quoting *Wade*, 388 U.S. at 226-27). Unless the filing of the complaint involved a confrontation that is not mentioned in any of the *Forte* opinions, however, it is difficult to see how the Texas counsel right actually became operative when the complaint was filed. *See* R. Dawson & R. Dix, Texas Criminal Procedure 112 (1984) (complaint may be filed before defendant's first appearance in court). *See also* Lara v. State, 740 S.W.2d 823, 834 (Tex. Ct. App. 1987, *pet. ref'd, cert. denied*, Lara v. Texas, 110 S. Ct. 92 (1989) (right to counsel can fail to "come into play" even though theoretically it has "attached" by way of indictment).

225. *Compare* People v. Jackson, 391 Mich. 323, 217 N.W.2d 22 (1974).

226. *See generally* Dix, *Judicial Independence in Defining Criminal Defendants' Texas Constitutional Rights*, 68 Tex. L. Rev. ____ (1990) (origin and consequences of proposed amendment) (draft of forthcoming article).

died in committee, the Texas Court of Criminal Appeals soon disavowed the *Forte* test in *McCambridge v. State*,[227] another case involving the right to counsel before taking a breath test after arrest for driving while intoxicated. In *McCambridge* the court decided that the *Forte* case-by-case approach was "ambiguous, vague, and thus unworkable."[228] Although remaining critical of *Kirby* as irreconcilable with *Wade* and *Gilbert*,[229] the court retreated to the Kirby "bright-line rule," merely in the interest of consistency, because, as the court simply put it, "[c]onsistency is the objective of any legal standard."[230] The *McCambridge* opinion was so lacking in rationale as "to strongly suggest that the court was almost panicstricken in its haste to disavow what had become a politically-damaging pronouncement."[231] The repudiation of the *Forte* approach made no practical difference in *McCambridge* (the result being that, just as in *Forte*, the right to counsel did not attach until the filing of formal charges),[232] but the overall direction of the *McCambridge* opinion appeared to militate against Foster's claim of the right to counsel at a precharging lineup (although the *McCambridge* holding was limited to "the context of this case").[233] The *Foster* case remains undecided.

V. Conclusion

In finding a state law basis for counsel at a lineup, the state court decisions discussed above relied on the policies underlying the right to counsel and the requirements of state statutes. Two of the courts gave considerable attention to recent psychological and legal writings on eyewitness identification in general and lineups in particular.[234] Recent re-

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227. 778 S.W.2d 70 (Tex. Crim. App. 1989).
228. *Id.* at 75.
229. *Id.* at 75-76.
230. *Id.* at 75.
231. Dix, *supra* note 226.
232. McCambridge v. State, 778 S.W.2d 70, 76 (Tex. Crim. App. 1989).
233. *Id.*
234. People v. Anderson, 389 Mich. 155, 205 N.W.2d 461 (1973); People v. Bustamante, 30 Cal. 3d 88, 177 Cal. Rptr. 216, 634 P.2d 927 (1981); People v. Hawkins, 55 N.Y.2d 474, 450 N.Y.S.2d 159, 435 N.E.2d 376 (1982) (Meyer, J., dissenting). *But see* the majority opinion in *Hawkins*, at 487 n.7, 450 N.Y.S.2d at 166 n.7, 435 N.E.2d 383 n.7:

> I further comment on the multiple nonjudicial sources employed in the dissent. While I, in no measure, intend disrespect to my dissenting colleagues, to the view they express, nor to academic sources generally, I am constrained to note that some of these proffered authorities do not realistically or legally justify the result for which they are advanced. Thus, no item by item response is warranted. Rather, I find confirmation and support for the majority viewpoint in the judicial decisions and analyses of our court and the Supreme Court of the United States.

search continues to cast doubt on the fairness of lineups, even when the subjects of the lineup appear to match the general description of the suspect.[235] State courts should not follow the United States Supreme Court in turning a "deaf ear" to the scientific studies,[236] because they indicate that the courts operate under many misconceptions about eyewitness identification and lineups in particular.[237]

Several states have gone beyond discussion of policy or psychology in analyzing the right to counsel. Courts and commentators in several states have taken the historical approach in interpreting state constitutional rights.[238] Despite the difficulties inherent in the search for original intent,[239] the Texas Court of Criminal Appeals resorted to an examination of the history of the state, as well as its many successive constitutions,[240] as a clue to the intended scope of the present state constitutional provision.[241] Where appropriate sources are available,[242] state courts can

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235. *See, e.g.*, Buckhout, Rabinowitz, Alfonso, Kanellis, & Anderson, *Empirical Assessment of Lineups: Getting Down to Cases*, 12 LAW & HUM. BEHAV. 323 (1988) (using real case photo array of six men, and relying on eyewitness description, 58% of mock witnesses picked photo of defendant, whom they had never seen before, although only one in six should pick same photo if procedure unbiased).

236. *See* Sherwood, *The Erosion of Constitutional Safeguards in the Area of Eyewitness Identification*, 30 HOWARD L.J. 731, 771 (1987) (U.S. Supreme Court's eagerness to ignore empirical and other scholarly authorities).

237. *See supra* text accompanying notes 28-95.

238. *See, e.g.*, State v. Henry, 302 Or. 510, 732 P.2d 9 (1987) (obscenity prosecution precluded by state provision protecting free expression); Harris v. State, 645 S.W.2d 447 (Tex. Crim. App. 1983) (state doctrine of separation of church and state overrides ecclesiastically-based rule against judicial proceedings on Sunday); Utter & Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 HASTINGS CONST. L.Q. 451 (1988); Ponton, *Sources of Liberty in the Texas Bill of Rights*, 20 ST. MARY'S L.J. 93 (1988).

239. *See, e.g.*, McCabe, *State Constitutions and the "Open Fields" Doctrine: A Historical-Definitional Analysis of the Scope of Protection Against Warrantless Searches of "Possessions,"* 13 VT. L. REV. 179 (1988) (discussing limitations and citing criticism of quest for original intent). *See also* Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 229 (1980) (relegating original intent to factor not of "determinative" weight).

240. *See generally* Eisenhauer v. State, 754 S.W.2d 159, 166-76 (Tex. Crim. App. 1988) (Clinton, J., dissenting) (early Texas constitutional history).

241. Forte v. State, 759 S.W.2d, 134 (Tex. Crim. App. 1988). In *Forte*, a majority of the court appeared to recognize for the first time that the Texans who proposed and ratified the present state constitution in 1875-76 may have been more sensitive to police abuses than were the framers and ratifiers of the federal Bill of Rights in an earlier era. The court noted that Texans had been subjected to an "extremely repressive" Reconstruction government. *Id.* During that period, the governor made "despotic" use of a state police force that he had created and into which he incorporated all local constabularies. *Id.* n.11 (quoting Thomas, *The Texas Constitution of 1876*, 35 TEX. L. REV. 907, 912-13 (1951)). *See generally* S. MCKAY, MAKING THE TEXAS CONSTITUTION OF 1876, 424-26 (1968).

profitably follow the historical approach to the interpretation of the right to counsel at a lineup.

Michigan, Alaska, and California, on the other hand, recognized the exigent circumstances exception as a necessary practical limitation on the scope of the counsel right, designed to safeguard the efficiency and effectiveness of police investigations.[243] Other courts may be expected to take the same cautious approach, although it has been observed that over the last twenty years little or no evidence has been developed to suggest that law enforcement has been seriously impeded by state court decisions recognizing rights greater in scope than those guaranteed by the federal Constitution.[244]

The interactive states, while retaining the federal "formal adversarial judicial proceedings" formula for the attachment of the right to counsel, have ameliorated the Procrustean nature of that prerequisite by identifying the initiation of such proceedings at ever-earlier points in the criminal process, as a matter of state law. Such an approach can, but does not necessarily, result in independent examination of the state constitution or in recognition of rights under state law that are greater in scope than rights secured by the sixth amendment.

The independent states have rejected the federal judicial proceedings prerequisite, while retaining critical stage analysis. They have regarded a pretrial lineup as such a stage, at which counsel's presence is required, as a matter of the court's supervisory powers, state statute, or constitutional provision. That approach can culminate in recognition of a

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In contrast, "[w]hen the [federal Bill of Rights was adopted, there were no organized police forces as we know them today." *United States v. Wade*, 388 U.S. 218, 224 (1967) (citing authorities).

242. Historical sources for interpreting state constitutions can be scarce for a variety of reasons. For example, in a typical fit of fiscal conservatism, the delegates to the Texas Constitutional Convention of 1875 voted (53-31) against efforts to authorize payment to have a public record made of the debates during the proceedings. S. McKay, *supra* note 218, at 77.

243. *See, e.g.*, P. Bobbitt, Constitutional Fate (1982) (explaining alternative approaches to constitutional interpretation), *cited with approval in* State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987); State v. Jewett, 146 Vt. 221, 500 A.2d 233 (1985). *See also* Utter & Pitler, *Presenting State Constitutional Arguments: Comment on Theory and Technique*, 20 Ind. L. Rev. 635 (1987).

244. Marcus, *State Constitutional Protection for Defendants in Criminal Prosecutions*, 20 Ariz. St. L.J. 151, 169 (1988) (citing Galie, *State Constitutional Guarantees and the Alaska Court: Criminal Procedure Rights and the New Federalism, 1960-81*, 18 Gonz. L. Rev. 221, 259 (1983)); People v. Hawkins, 55 N.Y.2d 474, 495, 450 N.Y.S.2d 159, 171, 435 N.E.2d 376, 388 (1982) (Meyer, J., dissenting) (until real problems for law enforcement have been shown to stem from presence of counsel at prearraignment lineups in Alaska, California, Michigan, and Pennsylvania, nothing except speculation weighs in constitutional balance against requiring counsel).

broader scope for the right to counsel under state law than that provided under the sixth amendment.

In light of the psychological studies showing the dangers of lineup identifications, and the widespread legal criticism of the federal formula, it is time for more state courts to examine the interplay between state and federal provisions, or to analyze state constitutions independently, and to "terminate the guardianship"[245] that the federal courts have exercised over the rights of criminal suspects, especially the right to counsel at lineups.

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245. Duncan, *Terminating the Guardianship: A New Role for State Courts*, 19 ST. MARY'S L.J. 809 (1988).

PARTIAL SETTLEMENT OF MULTIPLE TORTFEASOR CASES UNDER THE INDIANA COMPARATIVE FAULT ACT

I. Introduction

Indiana adopted statutory comparative fault in 1983, effective Jan. 1, 1985.[1] Although Indiana courts have stated that settlement and compromise are encouraged by the law[2], the Indiana Comparative Fault Act makes no provision for settlement. The Uniform Comparative Fault Act[3] and the legislation[4] or judicial decisions of several other States[5] ac-

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1. Ind. Code §§ 34-4-33-1 to 34-4-33-14, effective Jan. 1, 1985. Section 2 of P.L. 317-1983, which enacted this statute, provided that the statute would not apply to any action accruing before its effective date. See Bayliff, *Drafting and Legislative History of the Comparative Fault Act*, 17 Ind. L. Rev. 863, 873 (1984) for an overview of the amendments to the Act made before its effective date.

2. *See, e.g.* Kavanaugh v. Butorac, 140 Ind. App. 139, 221 N.E.2d 824, 829 (1966) (evidence of unsuccessful settlement negotiations excluded so as not to penalize one who has made an effort to compromise a claim out of court); Indiana Insurance Co. v. Handlon, 216 Ind. 442, 447, 24 N.E.2d 1003, 1005 (1939) (same issue as above, stating: "Since it is the policy of the law to favor and encourage the compromise of differences, one who makes an unsuccessful effort toward that end should not be penalized.") The courts of other jurisdictions agree, one going so far as to state: "Compromises are favored by the Court. This is such a universal rule as to require no citation of authority." State Highway Comm'n v. Arms, 163 Mont. 487, 490, 518 P.2d 35, 37 (1974).

3. Unif. Comparative Fault Act § 6, 12 U.L.A. 37 (Supp. 1988), and Comment thereto. *See also* Unif. Contribution Among Tortfeasors Act § 4, 12 U.L.A. 57 (1975 & Supp. 1988). The Uniform Contribution Among Tortfeasors Act has been adopted by eighteen states, but the Prefatory Note to the Uniform Comparative Fault Act states:

> Both of [the Uniform Contribution Acts (1939 and 1955)] provide for pro rata contribution, which may be suitable in a state not applying the principle of comparative fault, but is inappropriate in a comparative-fault state apportioning ultimate responsibility on the basis of the proportionate fault of all the parties involved. . . .
>
> It has . . . been decided not to amend the separate Uniform Contribution Among Tortfeasors Act, 1955, but to leave the act for possible use by states not adopting the principle of comparative fault.

Unif. Comparative Fault Act, Prefatory Note, 12 U.L.A. 37, 38 (Supp. 1988). For an analysis of the Uniform Contribution Among Tortfeasors Act, see Note, *Settlement in Joint Tort Cases*, 18 Stan. L. Rev. 486 (1966).

4. *See, e.g.* N.H. Rev. Stat. Ann. § 507:7h (Supp. 1988), (makes provision for effect of release or covenant not to sue, settlement to reduce claim of plaintiff by amount of consideration given); Alaska Stat. § 09.17.090 (1986) (provides that a release or covenant not to sue releases only the agreeing tortfeasor, credits the remaining defendants with the amount given, and discharges the tortfeasor from any responsibility for contribution); Ariz. Rev. Stat. Ann. §§ 12-2501(D), 12-2504(1) and (2) (1984).

5. *See, e.g.* American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 (1978) (providing for reduction of award by amount of settlement); Giem v. Williams, 215 Ark. 705, 222 S.W.2d 800 (1949).

knowledge the importance of compromise and settlement by providing for it specifically.

The purpose of this Note is to examine some of the possibilities and problems of the Indiana Act in the context of settlement by one of multiple tortfeasors under the statute. Since settlement does not take place in a vacuum, consideration of several corollary or threshold questions is necessary. Therefore, the analysis will focus not only on settlement itself, but on the threshold issues to settlement, including joint and several liability and contribution, and the decision as to whose fault will be considered in any allocation. This will be accomplished by posing questions which will inevitably arise under the Act in the multiple tortfeasor-settlement context, and then undertaking an examination of the caselaw and legislation of selected other states with an eye toward comparing and contrasting them to Indiana's new Act and its existing caselaw. This comparison will highlight the questions which Indiana courts will be called upon to answer, and will show the potential problems caused by omission of definite guidelines for the consequences of settlement in a multiple tortfeasor context.

The primary states used for comparison will be Kansas and Minnesota, with other states illustrating specific points. Kansas enacted its comparative fault act in 1974.[6] The Kansas Act abolishes joint and several liability,[7] making each tortfeasor responsible only for her[8] own percentage of the total award. Kansas defendants may bring in "additional parties" or "phantom tortfeasors," the rough equivalent of Indiana's nonparties, and have their fault considered along with the fault of parties to the action.[9] Kansas courts have not allowed contribution among tortfeasors.[10] These factors tend to make Kansas' comparative fault the most analogous to Indiana's at this time, affording a wealth of case law upon which to predict how Indiana courts might react to the new Comparative Fault Act.

Minnesota's Comparative Fault Act[11] resembles the Uniform Comparative Fault Act.[12] However, the Minnesota legislature has never of-

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6. KAN. STAT. ANN. § 60-258a (Supp. 1987).

7. KAN. STAT. ANN. § 60-258a(d), as interpreted in Brown v. Kiell, 224 Kan. 195, 580 P.2d 867 (1978). There is still some question regarding whether or not the Indiana Act has had the effect of abrogating the common law doctrine of joint and several liability. *See infra*, notes 46-49 and accompanying text.

8. The feminine pronoun is used throughout to represent both genders, except when referring to parties whose gender is specified by facts.

9. Hardin v. Manitowoc-Forsythe Corp., 691 F.2d 449 (10th Cir. 1982).

10. *See, e.g.* Kennedy v. Sawyer, 228 Kan 439, 447, 618 P.2d 788, 797 (1980).

11. MINN. STAT. ANN. §§ 604.01 to 604.08 (West 1988).

12. UNIF. COMPARATIVE FAULT ACT, 12 U.L.A. 37 (Supp. 1988). The Uniform Act has been adopted by Iowa (IOWA CODE §§ 668.1 to 668.14, adopted 1984) and Washington (WASH. REV. CODE §§ 4.22.005 to 4.22.925, adopted 1981).

ficially adopted the Uniform Act. Instead, it modeled its original statute on the Wisconsin Contributory Negligence Act and surrounding caselaw in 1969.[13] Later amendments brought it closer to the Uniform Act. The Minnesota statute provides for joint and several liability,[14] and the case law surrounding it allows contribution.[15] The Minnesota Act does not provide for joinder of nonparties. These factors make the Minnesota comparative fault system almost diametrically opposed to that of Kansas (and perhaps Indiana) in the settlement context. Finally, the Minnesota statute specifically provides for partial settlement of claims.[16]

II. Indiana Law Before and After the Enactment of Comparative Fault

A. Background: Settlement in Indiana Prior to the Act

Prior to the enactment of comparative fault, Indiana courts endorsed and allowed several different types of settlement agreements between plaintiffs and one or more joint tortfeasors. The intent behind the agreement decided the form, which then dictated its legal effect.[17] Settlement agreements could take a number of different forms, including

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13. The Wisconsin Act, enacted in 1931, Wis. Stat. Ann. § 895.045 (West 1983), is one of the oldest in the country. It provides:

> "Contributory negligence shall not bar recovery in an action . . . to recover damages for negligence resulting in death or injury . . . if such negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person recovering."

Id. While the statute itself is simple and sparse, it is supported by a large amount of caselaw. The Minnesota Supreme Court acknowledged the Wisconsin statute as the source of the Minnesota Comparative Fault Act in Busch v. Busch Const., Inc., 262 N.W.2d 377, 393 (Minn. 1977) and Marier v. Memorial Rescue Service, Inc. 296 Minn. 242, 207 N.W.2d 706 (1973), which held that the Minnesota statute's basis in Wisconsin law included the caselaw and interpretation of the Wisconsin statute up until the time of adoption. *See also* 1969 Committee Comment, Minn. Stat. Ann. § 604.01 (West 1988).

14. Minn. Stat. Ann. § 604.02(1) (West Supp. 1989). *See generally* Steenson, *Recent Legislative Responses to the Rule of Joint and Several Liability*, 23 Tort and Insurance Law Journal 482 (1988).

15. Minn. Stat. Ann. § 604.02(2) (West 1988). *See also supra* note 13.

16. Minn. Stat. Ann. § 604.01, subparts (2), (3), (4), and (5) (West 1988). Wisconsin's comparative negligence scheme provides for the consequences of settlement in the Wisconsin evidence code. Wis. Stat. Ann. § 885.285(3) (West Supp. 1988).

17. Fetz v. E & L Truck Rental Co., 670 F. Supp. 261, 263 (S.D. Ind. 1987); Sanders v. Cole Mun. Fin., 489 N.E.2d 117, 120 (Ind. Ct. App. 1986) (lists settlement options open to plaintiff and states that intent of the parties is relevant to the characterization of the settlement); Northern Indiana Public Service Co. v. Otis, 145 Ind. App. 159, 250 N.E.2d 378, 392 (1969).

loan receipt agreements,[18] covenants not to sue,[19] and covenants not to execute[20]. These devices were not considered releases *per se*.[21]

The danger in any settlement agreement for the plaintiff was in the common law maxim that the release of one joint tortfeasor[22] served as

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18. In a loan receipt agreement, a potentially liable defendant advances funds to a plaintiff in the form of a no-interest loan. In exchange, defendant receives a promise not to pursue a cause of action against that defendant. Fullenkamp v. Newcomer, 508 N.E.2d 37 (Ind. Ct. App. 1987) (decided under contributory fault because the cause accrued prior to the effective date of the Comparative Fault Act). Often, the loan is paid back out of recovery from the defendants remaining in the case. American Transp. Co. v. Central Indiana Ry. 255 Ind. 319, 323, 264 N.E.2d 64, 66 (1970). Courts approved of these transactions because they compensated plaintiffs without the usual protracted wait for a trial, and because they allowed plaintiffs to acquire funds to pursue claims against other defendants. Ohio Valley Gas, Inc. v. Blackburn, 445 N.E.2d 1378, 1382 (Ind. Ct. App. 1983). *See also American Transp. Co.*, 255 Ind. at 322-23, 264 N.E.2d at 67; *Northern Ind. Pub. Serv. Co.*, 145 Ind. App. at 179-80, 250 N.E.2d at 392. The amount given for a loan receipt agreement does not diminish the ultimate award to plaintiff because it is not considered to be in partial satisfaction, but is looked at as subject to repayment. *Sanders*, 489 N.E.2d at 120; Barker v. Cole, 396 N.E.2d 964 (Ind. Ct. App. 1980). *See also* Strohmeyer, *Loan Receipt Agreements Revisited: Recognizing Substance Over Form*, 21 IND. L. REV. 439 (1988).

19. Plaintiff agreed in exchange for consideration not to pursue her claim against a settling tortfeasor. Plaintiff did not release or waive her claim against that tortfeasor, retaining the claim in order to pursue it if the settling tortfeasor reneged, and reserving her claim against any other tortfeasors. National Mut. Ins. Co. v. Fincher, 428 N.E.2d 1386, 1388, nn.4-5 (Ind. Ct. App. 1981). The consideration paid under a covenant not to sue was in partial satisfaction of the claim, and therefore diminished any award the plaintiff ultimately received. *Sanders*, 489 N.E.2d at 120 (citing cases).

20. Plaintiff, in exchange for consideration, would agree not to execute any judgment received against the tortfeasor, retaining her cause of action against that tortfeasor and any other potentially liable persons. Barker v. Sumney, 185 F. Supp. 298 (N.D. Ind. 1960). The covenant not to execute was not dispositive of the issue of the settling tortfeasor's negligence, and the plaintiff could pursue her suit to its conclusion, as the covenant would not be effective until a judgment was obtained, at which point the settling tortfeasor could raise it as a defense if plaintiff sought to enforce the judgment. *Barker*, 185 F. Supp. 298; *Sanders*, 489 N.E.2d at 120. Amounts obtained by plaintiff under such a covenant were in partial satisfaction of her claim and so reduced her ultimate award *pro tanto*. *Sanders*, 489 N.E.2d at 120.

21. *Fetz*, 670 F. Supp. at 262-63 (1986)(citing cases).

22. Joint liability may be incurred when the acts of wrongdoers, through cooperation or concert, injure a plaintiff. Also, independent acts of several tortfeasors which combine to produce a single injury may subject them to joint liability. Young v. Hoke, 493 N.E.2d 1279, 1280 (Ind. Ct. App. 1986). Independent successive acts, *e.g.* an auto accident followed by medical malpractice in the emergency room, may not lead to joint responsibility between the tortfeasors. Wecker v. Kilmer, 260 Ind. 198, 294 N.E.2d 132 (1973). This Note will not deal with determination of the jointness of responsibility of tortfeasors, assuming that aspect in dealing with settlement questions.

a release of all.[23] In *Cooper v. Robert Hall Clothes*,[24] the Supreme Court of Indiana vacated a Court of Appeals judgment[25] dealing with a document which was entitled "Release," but which had reserved certain parts of plaintiff's cause of action against another defendant in the action.[26] The Court of Appeals had attempted to abandon the common law rule and institute instead the Restatement rule,[27] which would allow a plaintiff to give a release to one joint tortfeasor without releasing all. The Indiana Supreme Court expressly rejected the Restatement,[28] stressing the difference between transactions such as covenants not to sue and releases. A release entirely waived a claim, rendering a reservation of part of a claim inconsistent and void.[29] The court stated that the purpose of this rule was to prevent a plaintiff from recovering in excess of her actual damages by piecemeal settlements with various defendants.[30] Additionally, the court stressed that because joint tortfeasors constitute one jointly and severally liable entity, a release of part of that entity acknowledged that none of the components of the entity were liable.[31] A plaintiff also ran the risk of having a covenant not to sue or execute held to be a release as to all tortfeasors if the consideration which a settling tortfeasor paid equaled all of plaintiff's damages.[32]

This settlement and release regime inevitably worked injustices on various parties. Plaintiffs were disadvantaged if they executed a contract

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23. Cooper v. Robert Hall Clothes, Inc., 390 N.E.2d 155 (Ind. 1979); Bedwell v. DeBolt, 221 Ind. 600, 609, 50 N.E. 875, 878 (1943); Cleveland, C., C. & St. L. Ry. v. Hilligoss, 171 Ind. 417, 422-23, 86 N.E. 485, 487 (1908). "Release" is defined in Standard Auto Ins. Ass'n v. Reese, 83 Ind. App. 500, 149 N.E. 137 (1925): "A release is the act or writing by which some claim or, interest is surrendered to another person . . . . It is a species of contract, and like any other contract, it must have a consideration." *Id.* at 503, 149 N.E. at 138 (quoting Jaqua v. Shewalter, 10 Ind. App. 234, 36 N.E. 173 (1893), *reh'g denied*, 37 N.E. 1072 (1894)). *See also* PROSSER, HANDBOOK OF THE LAW OF TORTS § 49 (1971).

24. 390 N.E.2d 155 (Ind. 1979).

25. Cooper v. Robert Hall Clothes, Inc., 375 N.E.2d 1142 (Ind. Ct. App. 1978).

26. Parts of the release document are reproduced in *Cooper*, 390 N.E.2d at 156-57.

27. RESTATEMENT (SECOND) OF TORTS § 885(1) (1965) provides: "A valid release of one tortfeasor from liability for a harm, given by the injured person, does not discharge others liable for the same harm, unless it is agreed that it will discharge them."

28. *Cooper*, 390 N.E.2d at 157.

29. *Id.*

30. *Id.*

31. *Id.*

32. Bedwell v. Debolt, 221 Ind. 600, 609, 50 N.E.2d 875, 879; Moffett v. Gene B. Glick Co., Inc., 621 F. Supp. 244, 289 (N.D. Ind. 1985). In Scott v. Krueger, 151 Ind. App. 479, 514, 280 N.E.2d 336, 357 (1972), the court stated that the amount paid could be brought before the jury, who would then decide whether it had served to satisfy all plaintiff's damages and would therefore be a release. *Id.*

believing it to be a covenant and the court found it to be a release,[33] thereby denying plaintiffs a full recovery. Inequities to settling defendants also resulted because the settling joint tortfeasor had no right of contribution against the other tortfeasors who benefitted when the contract was found to be a release, or when a covenant not to sue was found to fully satisfy plaintiff's damages.[34] This meant that the settling defendant was released, but other, perhaps more blameworthy, defendants paid nothing at all. The settling defendant could not get any repayment from other defendants for procuring their release because contribution was not allowed.

When a covenant not to sue or not to execute was held to be valid, that is, it did not release all the tortfeasors, only the one who executed the settlement, the remaining defendants suffered. Joint and several liability,[35] combined with the fact that plaintiff's award was diminished only by the dollar amount of the settlement,[36] meant that the remaining defendants would pay the entire balance of any award, regardless of how faulty they were. The remaining defendants would have no right to seek contribution from the settling tortfeasor. Indeed, they had no right to seek contribution against *any* of their fellow joint tortfeasors.[37]

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33. *See Cooper*, 390 N.E.2d 155. Although both the appellate court and supreme court clearly found the *Cooper* settlement to be a release, it is logical to assume that since the plaintiff included a reservation of rights against the remaining defendants she thought that she could do so and have the release operate as a covenant not to sue. This becomes even more obvious when the amounts given in exchange for the release are considered: plaintiff originally stated her claim at Seventy-Five Thousand Dollars, and settled with one defendant for One Thousand Nine Hundred and Ninety Nine Dollars and the other defendant for Ten Dollars. *Id.* at 156.

34. Sanders v. Cole Mun. Fin., 489 N.E.2d 117, 121. *See* Recent Decisions, *Release of Joint Tortfeasors—Document Styled "Covenant Not To Sue" Held to Amount to Release*, 36 NOTRE DAME LAWYER 443 (1960).

35. Indiana followed the common law doctrine of joint and several liability which allowed a plaintiff to recover all her damages from any one of the named defendants against whom she received a judgment. Barker v. Cole, 396 N.E.2d 964, 971 (Ind. Ct. App. 1979)

36. *Sanders*, 489 N.E.2d 117, 120. Amounts received by a plaintiff under a loan receipt agreement did not diminish the final award at all. *Id. See supra* note 18.

37. Contribution is a system by which a tortfeasor who has paid plaintiff's full damages or more than that defendant's equal share is entitled to seek repayment from the other joint tortfeasors. The shares were calculated on a *pro rata* basis, that is, the full amount of the judgment was divided by the number of tortfeasors liable, each defendant being responsible for her equal share. This is a traditional common law doctrine. *See* PROSSER, HANDBOOK OF THE LAW OF TORTS 50. There has never been a right to contribution among joint tortfeasors in Indiana. Barker v. Cole, 396 N.E.2d 964, 971; The American Express Co. v. Patterson, 73 Ind. 430, 436 (1881); Hunt v. Lane, 9 Ind. 248 (1857). *See also* Recent Decisions, *Torts-Joint Tortfeasors-Contribution-Exceptions*, 6 NOTRE DAME LAWYER 267 (1930-1931).

A loan receipt agreement did not diminish plaintiff's award at all and left the remaining nonprevailing defendants to pay the whole amount, with any sort of repayment of the loan being a contractual matter between plaintiff and settling tortfeasor.[38] These features combined to make settlement relatively predictable, despite the technical risks to unwary settlers (especially the release rule) characterized as "boobytraps" by the drafters of the Restatement rule.[39]

B. The Indiana Comparative Fault Act

In 1985, Indiana joined the numerous states which have adopted some form of comparative fault.[40] The Indiana Act strongly emphasizes the procedural aspects of comparative fault.[41] The basic change in the law made by this statute is, of course, that contributory fault no longer bars a plaintiff's recovery against a tortfeasor unless the plaintiff's fault is "greater than the fault of all persons whose fault proximately contributed to the claimant's damages."[42]

1. Joint and Several Liability and Contribution.—Section 34-4-3-5(b) of the Indiana Act gives the jury explicit instructions on how to apportion the fault of multiple parties.[43] It makes no provision, however, for how

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38. In *Northern Indiana Public Service Co. v. Otis*, the court noted that "authorities from Indiana and other jurisdictions certainly provide for the use of a loan receipt agreement and use of the same is neither contribution among joint tortfeasors or [sic] an assignment of a cause of action sounding in tort." 145 Ind. App. 159, 180, 250 N.E.2d 378, 392-93. (citing cases collected in 1 A.L.R. 1528, 132 A.L.R. 607, and 157 A.L.R. 1261). A loan receipt agreement could be considered an "end run" on the prohibition against contribution insofar as the loaning party was paid back out of the proceeds of judgments against other parties. *See* Strohmeyer, *supra* note 18.

39. RESTATMENT (SECOND) OF TORTS § 885, Comment (d) (1965).

40. IND. PUB. L. 317-1983 (which enacted most of the provisions of IND. CODE §§ 34-4-33-1 to -14 in 1983); IND. PUB. L. 174-1984 (which amended various sections of the Act). Each provided that its effective date was to be January 1, 1985. For a list of the states which had judicially or legislatively adopted comparative fault or comparative negligence before Indiana, see Smith and Wade, *Fairness: A Comparative Analysis of the Indiana and Uniform Comparative Fault Acts*, 17 IND. L. REV. 969, n.3 (1984).

41. *See, e.g.* IND. CODE § 34-4-33-5 (1988) (providing the procedure by which a jury arrives at the ultimate allocation of fault and recovery); IND. CODE § 34-4-33-6 (1988) (providing for special verdict forms); and IND. CODE § 34-4-33-10 (1988) (providing for nonparty defense, including time for pleading and burden of proof).

42. IND. CODE § 34-4-33-4(b) (1988). IND. CODE § 34-4-33-3 (1988) provides: "In an action based on fault, any contributory fault chargeable to the claimant diminishes proportionally the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery except as provided in section 4 of this chapter."

43. IND. CODE § 34-4-33-5(b) (1988) provides:

In an action based on fault that is brought against two (2) or more defendants,

a settlement might affect the apportionment of fault or how any award of damages might be diminished by a settlement between a plaintiff and one of several defendants.[44] The Act is also silent on the topic of joint and several liability, which has sparked a debate among the legal scholars of Indiana as to whether the joint and several liability doctrine survived the enactment of the Comparative Fault Act.[45] Some of these scholars and writers have assumed the abrogation of joint and several liability,[46] while others have assumed its continued existence or argued in favor of retention of the doctrine.[47]

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and that is tried to a jury, the court, unless all the parties agree otherwise, shall instruct the jury to determine its verdict in the following manner:

(1) The jury shall determine the percentage of fault of the claimant, of the defendants, and of any person who is a nonparty. The percentage of fault figures of parties to the action may total less than one hundred percent (100%) if the jury finds that fault contributing to cause the claimant's loss has also come from a nonparty or nonparties.

(2) If the percentage of fault of the claimant is greater than fifty percent (50%) of the total fault involved in the incident which caused the claimant's death, injury, or property damage, the jury shall return a verdict for the defendants and no further deliberation of the jury is required.

(3) If the percentage of fault of the claimant is not greater than fifty percent (50%) of the total fault,the jury shall then determine the total amount of damages the claimant would be entitled to recover if contributory fault were disregarded.

(4) The jury next shall multiply the percentage of fault of each defendant by the amount of damages determined under subdivision (3) and shall enter a verdict against each such defendant (and such other defendants as are liable with the defendant by reason of their relationship to such defendant) in the amount of the product of the multiplication of each defendant's percentage of fault times the amount of damages as determined under subdivision (3).

IND. CODE § 34-4-33-5(b) (1988). *See also* suggested jury verdict forms in Indianapolis Bar Association Young Lawyer's Division Handbook, SUPER SATURDAY IN COURT - COMPARATIVE FAULT (April 9, 1988).

44. Mr. Bayliff, one of the drafters of the Act, states, "Jurors will simply diminish the claimant's recovery by the percentage of fault (not by the amount paid) of the tortfeasors who have settled." Bayliff, *Drafting and Legislative History of the Indiana Comparative Fault Act*, 17 IND. L. REV. 863, 869 (1984). This assumes the abrogation of joint and several liability.

45. *See generally*, *Symposium on Indiana's Comparative Fault Act*, 17 IND. L. REV. (1984). This has been an issue in other states when comparative systems are adopted legislatively and judicially. *See* H. WOODS, COMPARATIVE FAULT § 13:4 (1987).

46. *See* Bayliff, *supra* note 44, at 867, stating that the Act "implicitly abrogates the traditional rule of joint and several liability for concurrent wrongs"; Easterday and Easterday, *The Indiana Comparative Fault Act: How Does It Compare With Other Jurisdictions?*, 17 IND. L. REV. 883, 899 (1984); Eilbacher, *Nonparty Tortfeasors in Indiana: The Early Cases*, 21 IND. L. REV. 413, 417. (1988) (assuming the abolition of joint and several liability). Other non-Indiana authors have also assumed the abrogation of joint and several liability by the Indiana statute. *See, e.g.* 2 MATTHEW BENDER, COMPARATIVE NEGLIGENCE § 13.20[3] (1984); H. WOODS, COMPARATIVE FAULT, app., at 587 (1987).

47. *See* Pardieck, *The Impact of Comparative Fault in Indiana*, 17 IND. L. REV.

The importance of joint and several liability to settlement lies in its effect on the ultimate award to a plaintiff, who will recover fully if she can arrive at the full award by a combination of the settlement amount and recovery from the tortfeasors remaining in the action. For defendants, the effect of joint and several liability can be that one defendant ends up paying the entire judgment (because of insolvency or unavailability of co-tortfeasors) without being able to resort to contribution to recoup some of the amount paid. This is problematic in that the purpose of the allocation of proportional fault is defeated if a plaintiff may recover more than a defendant's allocated share of the damages from that defendant. As Lawrence Wilkins points out in his article analyzing the Indiana Act:

> Adoption of comparative fault signals the embrace of a policy of refining the compensation function of tort law in order that injured parties' needs may be more widely and accurately served. Abolition of joint and several liability operates against that policy. At the same time, the fairness element inherent in the comparative fault system powerfully favors the interests of tortfeasors who rightfully claim that liability apportioned to fault is meaningless if they are made to bear more than their assessed percentage of fault.[48]

In *Gray v. Chacon*,[49] Judge Barker of the Southern District of Indiana cited the abrogation of joint and several liability as one of the reasons for the demise of the release rule under Indiana's Comparative Fault Act.[50] Referring to the Indiana Supreme Court's justifications for

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925, 936-938 (1984) (arguing that the policies of tort law and the availability of insurance militate in favor of the retention of joint and several liability, especially in cases where the plaintiff is fault-free); Schwartz, *Comparative Negligence in Indiana: A Unique Statute That Will Reshape the Law*, 17 IND. L. REV. 957, 967 (1984) (assuming that the statute has preserved joint and several liability). One author notes the arguments of both sides and recommends solutions that neither entirely abrogate joint and several liability nor keep it intact. Wilkins, *The Indiana Comparative Fault Act at First (Lingering) Glance*, 17 IND. L. REV. 687, 717 (1984).

48. Wilkins, *supra* note 47 at 717. The polar policies mentioned by Professor Wilkins are in this Note termed "allocation oriented" (favoring the precise allocation of fault and the idea that each should be responsible only for her own share of fault) and "compensation oriented" (favoring full compensation of injured parties, even at the expense of defendants). Professor Wilkins points out that the abrogation of joint and several liability will curtail the use of such devices as the loan receipt agreement, because if the plaintiff must repay the loan from her proportional recovery from remaining defendants, she has not only lost the proportional recovery from the settling defendant, but has her remaining recovery from the other defendants diminished by the amount of repayment. *Id.* at 719, n.156.

49. 684 F. Supp. 1481 (S.D. Ind. 1988).

50. *Id.* at 1485.

the release rule set forth in *Cooper v. Robert Hall Clothes*,[51] Judge Barker concluded that the Comparative Fault Act removed any danger of a plaintiff receiving more than her proven damages by piecemeal successive settlement.[52] This is because no defendant or nonparty would ever be required to pay more than her own share of fault, and no incentive exists under the Act for a tortfeasor to settle and be released for more than her estimated proportion of fault.[53] Judge Barker further stated: "[D]ue to the Act's abolition of joint and several liability multiple tortfeasors can no longer be properly considered as 'one entity' in Indiana. . . . [F]ar from being 'one entity,' joint defendants in Indiana are now as separate and independent from each other as they are from the plaintiff herself."[54] Acknowledging that "it is possible to create a 'law professor's' argument in favor of the notion that the Act retained joint and several liability, . . . such an interpretation lacks persuasive force and is at odds with the legislative motivation otherwise evidenced throughout the Act."[55] It is unclear what the effect of this dicta will be because no Indiana state court has made a pronouncement on whether joint and several liability has survived, whether intact or modified.

One result effected by the *Gray* decision with regard to settlement under the Comparative Fault Act is that the court made it abundantly clear that the common law release rule[56] has no place in a comparative fault system which does not incorporate joint and several liability.[57] The court recommended, instead, adoption of the Restatement Section 885 rule: release of one tortfeasor does not serve to release all unless intended to do so.[58] This position is in keeping with that expressed in *Young v. Hoke*,[59] a case decided by the Indiana Court of Appeals. *Young* was decided under the old contributory negligence scheme because the cause of action accrued before the 1985 effective date of the Comparative Fault Act.[60] Although the result in the case was that the release rule was applied,[61] concurring and dissenting opinions questioned its continued vitality.

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51. 271 Ind. 63, 390 N.E.2d 155 (1979).
52. *Gray*, 684 F. Supp. at 1484. *See supra* notes 23-32 and accompanying text.
53. *Gray*, 684 F. Supp. at 1484.
54. *Id.* at 1485 (footnote omitted).
55. *Id.* at n.6.
56. *See supra* text accompanying notes 24 -36.
57. *Gray*, 684 F. Supp. at 1485.
58. RESTATEMENT (SECOND) OF TORTS § 885 (1965): *See supra* note 27.
59. 493 N.E.2d 1279 (Ind. Ct. App. 1986).
60. *Id.* The Young's cause of action arose out of an automobile accident which took place on December 18, 1981. *Id.*
61. *Id.* at 1280.

The concurring opinion compared the Indiana Act to that of Kansas and noted that Kansas courts reasoned that the release rule no longer applied under the Kansas comparative fault system.[62] The concurrence agreed that the release rule should apply in cases not within the ambit of the Comparative Fault Act, declining to join the dissent in advocating an abrogation of the release rule in that particular case,[63] but stated clearly that the release rule should not apply to cases where fault is proportioned. This reasoning, like that in *Gray*, was based on an assumption that Indiana, like Kansas, left joint and several liability behind in enacting comparative fault.[64] The effect of the *Gray* opinion and the *Young* concurrence regarding the release rule will depend on the decisions Indiana courts eventually make on the issue of joint and several liability and how they interact with proportioned fault.

These decisions will be affected by the fact that the Act unambiguously continues Indiana's common law bar against contribution between tortfeasors: "In an action under this chapter, there is no right of contribution among tortfeasors."[65] Contribution has been looked upon as balancing joint and several liability, ameliorating its harsh effect on defendants forced to pay plaintiff's entire damages despite the presence of other defendants who should rightfully pay a share.[66] With contribution statutorily circumscribed, courts might feel constrained to abrogate joint and several liability in order to avoid the unbalanced, harsh effect on defendants which would result with joint and several liability only.[67]

2. The Nonparty Provisions of the Act.—The Indiana Act makes specific provision for consideration of the fault of tortfeasors not parties to the action.[68] According to Section 34-4-33-5(b)(1) of the Act, the jury is to be instructed to "determine the percentage of fault of the claimant,

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62. *Id.*

63. The dissent, written by Judge Garrard, attacked the release rule on the basis of policy, stating that the rule is outdated and an anachronism which fails to give effect to the clear intent of the parties. *Id.* at 1281-1283.

64. *Id.* at 1280-81.

65. IND. CODE § 34-4-33-7 (1988).

66. *See* PROSSER, HANDBOOK OF THE LAW OF TORTS § 50 (1971).

67. *See* Wilkins, *supra* note 47, at 718. Wilkins notes: "Why the Indiana legislature considered it necessary to include the ban is open to question, given the Act's purported abolition of joint and several liability, and the fact that contribution is presently unavailable in Indiana." *Id.* (footnotes omitted). Wilkins states: "When joint and several liability is abolished, the rule against contribution is redundant; no detriment is imposed against defendant's interests which needs to be counterbalanced. All of the detrimental effects are borne on the plaintiff's side of the bar." *Id.* at 720. *See generally* Comment, *Tort Law: Joint and Several Liability Under Comparative Negligence-Forcing Old Doctrines on New Concepts*, 40 U. FLA. L. REV. 469 (1988) (disapproving of Florida judicial retention of joint and several liability because detrimental to defendants).

68. IND. CODE §§ 34-4-33-5(b)(1), 34-4-33-10 (1988).

of the defendants, and of any person who is a nonparty."[69] Nonparty is defined as "a person who is, or may be, liable to the claimant in part or in whole for the damages claimed but who has not been joined in the action as a defendant by the claimant."[70]

Another section provides for a "nonparty defense," made by a defendant in order to have the fault of a tortfeasor not joined as a defendant considered.[71] The defense must be affirmatively asserted in order to have the nonparty's fault considered.[72] Finally, in providing

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69. IND. CODE § 34-4-33-5(b)(1) (1988). See *supra* note 44 for the full text of IND. CODE § 34-4-33-5(b). The section provides that "[t]he percentage of fault figures of parties to the action may total less than one hundred percent (100%) if the jury finds that fault contributing to cause the claimant's loss has also come from a nonparty or nonparties." *Id.* While IND. CODE § 34-4-33-5(b)(1) may seem to imply that juries may consider the fault of nonparties spontaneously, without having the issue introduced by the court or a party, IND. CODE § 34-4-33-10 (1988) provides specific procedural provisions for the introduction of the issue, and juries are apparently not allowed to consider nonparty fault unless it is introduced into the case. *See* Wilkins, *supra* note 47, at 739.

70. IND. CODE § 34-4-33-2(a) (1988). The statute specifies that an employer may not be a nonparty. *Id.* This Note does not deal with the ramifications of the exclusion of employers from nonparty status.

71. IND. CODE § 34-4-33-10 (1988).

72. IND. CODE § 34-4-33-10 (1988) provides in pertinent part:

> (a) In an action based on fault, a defendant may assert as a defense that the damages of the claimant were caused in full or in part by a nonparty. Such a defense is referred to in this section as a nonparty defense.
>
> (b) The burden of proof of a nonparty defense is upon the defendant, who must affirmatively plead the defense. However, nothing in this chapter relieves the claimant of the burden of proving that fault on the part of the defendant or defendants caused, in whole or in part, the damages of the claimant.
>
> (c) A nonparty defense that is known by the defendant when he files his first answer shall be pleaded as part of the first answer. A defendant who gains actual knowledge of a nonparty defense after the filing of an answer may plead the defense with reasonable promptness. However, if the defendant was served with a complaint and summons more than one hundred fifty (150) days before the expiration of the limitation of action applicable to the claimant's claim against the nonparty, the defendant shall plead the nonparty defense not later than forty five (45) days before the expiration of that limitation of action. The trial court may alter these time limitations or make other suitable time limitations in any manner that is consistent with:
>
> (1) giving the defendant a reasonable opportunity to discover the existence of a nonparty defense; and
>
> (2) giving the claimant a reasonable opportunity to add the nonparty as an additional defendant to the action before the expiration of the period of limitation applicable to the claim. . .

IND. CODE § 34-4-33-10 (1988). The first case to interpret the statutory nonparty defense was Walters v. Dean, 497 N.E.2d 247 (Ind. Ct. App. 1986) (a single defendant case in which the defendant pleaded a nonparty defense in his answer to plaintiff's complaint). After reviewing some of the case law of other jurisdictions, the court concluded that the allocation of nonparty fault is to be made "only in those cases where the non-party defense is specially pleaded by a named defendant." *Id.* at 253.

for the forms of the verdicts, the legislature has required that "[i]f the evidence in the action is sufficient to support the charging of fault to a nonparty, the form of verdict also shall require a disclosure of the name of the nonparty and the percentage of fault charged to the nonparty."[73] This effectively precludes the consideration of the fault of unidentified tortfeasors. These provisions of the Act are unique in comparative fault jurisdictions, with other states answering the questions brought up by nonparty inclusion by means of case law.[74]

The status of nonparties has an impact in the area of settlement with regards to what happens to the fault of a settling tortfeasor. If the settling tortfeasor is considered a nonparty, her fault will be allocated under the nonparty provisions of the Act. This result has been assumed by several Indiana authors, one of whom states that "[t]he nonparty likely to be encountered by the jury most frequently is that tortfeasor with whom the plaintiff has reached a settlement."[75] If so, Indiana courts will be called upon to make decisions regarding whether juries should be told that a tortfeasor is a nonparty rather than a defendant because she has settled with the plaintiff. This creates a potential problem if unsophisticated juries view settlement as evidence of admitted liability, allocating undue amounts of fault to nonparty settling tortfeasors. The problem created if juries are not told of a settlement is the confusion engendered when a clearly faulty tortfeasor is a nonparty who does not defend herself. Besides being told of the mere fact of a settlement, there will be questions as to whether juries should be told the amount of a settlement.[76]

Situations will also arise where nonsettling defendants bring settling tortfeasors back in as nonparties and attempt to heap fault on them. This would, in effect, force the plaintiff to defend the settling wrongdoer,

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73. IND. CODE § 34-4-33-6 (1988).

74. Eilbacher, *Comparative Fault and the Nonparty Tortfeasor*, 17 IND. L. REV. 903, 905, n.2 (1984). *See also* C. HEFT & C.J. HEFT, COMPARATIVE NEGLIGENCE MANUAL § 8.100 (1986); 2 MATTHEW BENDER COMPARATIVE FAULT § 13.20[2] (1989).

75. Eilbacher, *supra* note 74, at 908.

76. This would also be an evidentiary question. Evidence of offers to compromise or evidence of settlements made is, as a rule, inadmissible. 12 R. MILLER, INDIANA PRACTICE § 408.101 (1984). This rule does not apply if the evidence of settlement is offered for some other purpose than to prove liability. *Id.* Also, "[e]vidence that a party made an offer to settle a related claim with a non-party is not admissible to show the party's belief in the weakness of his case. If the non-party is called as a witness, however, evidence of the offer may be admissible to show the witness' bias or prejudice." *Id.* at § 408.103. *See also* Note, *Knowledge by the Jury of a Settlement Where a Plaintiff has Settled With One or More Defendants Who Are Jointly and Severally Liable*, 32 VILL. L. REV. 541 (1987), which looks at the problems involved in this issue in a number of jurisdictions, including those which control the exposure of the jury to settlement agreements statutorily.

who has no incentive to defend herself because she has been released. On the other side of this is the unfairness to defendants if plaintiffs are allowed to keep settling tortfeasors out of the fault allocation equation entirely, which would force the trier of fact to allocate the fault between plaintiff and the nonsettling defendant, causing the nonsettling defendant to pay more than her fair share of the damages.[77] The case law involving the Indiana Act has focused primarily on the nonparty provisions of the Act.[78] Several cases deal with the question of whether a tortfeasor may be a nonparty under the provision of the statute defining a nonparty as one who "is or may be liable" to the claimant.[79] In *Hill v. Metropolitan Trucking,*[80] the Northern Federal District Court of Indiana held that fellow employees of the plaintiff's decedent could not be nonparties because the plaintiff had no right of recovery against them.[81] Since the would-be nonparties were state employees and no Tort Claims notice had been filed, they were immune to suit; therefore they could not be liable, and further, could not be named as nonparties.[82] A different result was reached several months later in the Southern District of Indiana in *Huber v. Henley*,[83] in which the court found that the State could have been liable if a Tort Claims notice had been filed, and as a result could be named as a nonparty even though plaintiff had waived his right to recover from the State by not filing the notice.[84]

In the settlement context, these cases bring up the issue of whether a settling defendant can be considered a party who is or may be liable to the claimant. In the larger sense, a settling tortfeasor is still one who is liable, but that liability has been dealt with by contract between the parties. This controls not necessarily the right, but the recovery (as in a covenant not to sue). In the narrow sense, if a release has been given, the settling party is freed. The plaintiff in this situation has contracted away her right to pursue that tortfeasor any further, thereby precluding the naming of that tortfeasor as a nonparty who is or may be liable to the plaintiff.

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77. *See* Wilkins, *supra* note 47, at 732. *See also* 2 MATTHEW BENDER COMPARATIVE NEGLIGENCE § 13.20 (breaks down the advantages and disadvantages to parties when nonparty tortfeasors are brought in or kept out in joint and several liability or several liability only jurisdictions).

78. *Supra* notes 69-77 and accompanying text.

79. IND. CODE § 34-4-33-2 (1988).

80. 659 F. Supp. 430 (N.D. Ind. 1987).

81. *Id.* at 434-35.

82. *Id.*

83. 669 F. Supp. 1474 (S.D. Ind. 1987). This case had been in the same court earlier on the same issue. Huber v. Henley, 656 F. Supp. 508 (S.D. Ind. 1987).

84. *Huber*, 669 F. Supp. at 1479.

The federal court in *Moore v. General Motors Corp.*[85] ruled that the conduct of plaintiff's employer (who could not be brought in as a nonparty because the statute specifically precludes an employer from being a nonparty)[86] could be brought in and considered under the proximate cause provisions of the Act.[87] The court issued a warning in the opinion that the defendants must not try to do indirectly what they could not do directly, that is, to have the employer's fault considered by the jury, but stated that evidence of the employer's conduct could be presented to defend against plaintiff's claim of negligence on the causation level only.[88] The court's admonition made it clear that the employer was not to be allocated any fault. However, consideration of a wrongdoer's fault without allocation is bound to be confusing to juries, and begins to resemble the "phantom tortfeasor" concept (dealt with later in this Note), which also involves bending the nonparty provisions of a statute.[89]

Bowles v. Tatom,[90] decided in June 1988 by the Indiana Court of Appeals, refined the interpretation of the nonparty defense further in terms of how and whether the defense is pleaded. In *Bowles*, plaintiff was injured when he was hit broadside in an intersection by the defendant, who had run a stopsign obscured by foliage.[91] Plaintiff Tatom originally named as defendants Bowles, the city, the mayor, and the adjacent property owners whose trees had obscured the stopsign.[92] When Plaintiff had finished presenting his evidence and rested, the defendants city, mayor, and landowners moved to have the claims against them dismissed. The court granted the motion without objection by defendant Bowles.[93]

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85. 684 F. Supp. 220 (N.D. Ind. 1988).
86. IND. CODE § 34-4-33-2(a) (1988).
87. IND. CODE § 34-4-33-1(b)(1) and (2) (1988).
88. *Moore*, 684 F. Supp. at 222:

> Defendants are cautioned, however, that in presenting evidence to refute the elements of plaintiff's negligence claim, they must be very careful to structure their arguments so as to avoid confusing the jury. . . . The defendant's arguments cannot be used to indirectly accomplish an allocation of fault to unnamed defendants by the jury, a result inconsistent with the express provisions of the Indiana Comparative Fault Act.

Id. The court based its decision in part on the portion of the Act that states: "[N]othing in this chapter relieves the claimant of the burden of proving that fault on the part of the defendant or defendants caused, in whole or in part, the damages of the claimant." IND. CODE § 34-4-33-10(b) (1988). This stricture appears in the nonparty defense portion of the statute. *Id.* at 221.

89. *See infra* notes 151-55 and accompanying text.
90. 523 N.E.2d 458 (Ind. Ct. App. 1988).
91. *Id.* at 460.
92. *Id.*
93. *Id.*

This left Bowles as the only defendant, and the trial judge assessed one hundred percent liability against her.[94]

The appellate court found this one hundred percent fault allocation inappropriate, stating that while the evidence of the obstruction of the stopsign did not show that Bowles was not at fault, it did establish that she could not be one hundred percent at fault. The court also held:

> Although the City, the Mayor, and the [landowners] were dismissed from the lawsuit, fault percentage could be allocated to them even though Bowles did not plead the empty chair defense. In the present case, the City, the Mayor, and the [landowners] were parties up until the close of Tatom's case-in-chief. As such, Bowles was entitled to rely on the fault allocation provisions of the Comparative Fault Act without specific pleading, and could continue to rely on the fault allocation after the other named defendants were dismissed. . . . [T]he dismissal did not amount to a zero percent (0%) fault allocation.[95]

This appears to indicate that a defendant need not plead a nonparty defense to assert it if the nonparties were defendants in the action and were dismissed. If a court determines that the principles in *Bowles* apply equally when the dismissal is by agreement between the plaintiff and a settling defendant, rather than by the court, then a defendant who settled during trial and was released and dismissed would automatically have her fault allocated as though she had remained in the action. The nonsettling defendants would not have to plead any nonparty issues in order to have the settling defendant's fault allocated.

The *Bowles* dissent took a different view, focusing on the statutory definition of nonparty, which requires that the nonparty be one "who is or may be liable to the claimant . . . but *who has not been joined in the action as a defendant* by the claimant."[96] The dissenting judge stated: "By statutory definition, parties in a comparative fault action can never revert to nonparty status,"[97] and thus the dismissal of the city, the mayor and the landowners functioned as an allocation of zero percent of the fault to them. Under this view, a defendant who settles cannot be brought back in to the action as a nonparty for fault allocation. However, the dissent also focused on the fact that the dismissal was by the court under T.R. 50(A) motion,[98] which would distinguish the *Bowles*

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94. *Id.*

95. *Id.* at 461.

96. *Id.* at 462 (Conover, J. dissenting) (emphasis in original).

97. *Id.* at 462.

98. IND. TRIAL R. 50 provides for Judgment on the Evidence (Directed Verdict). The trial court in *Bowles* dismissed the City, the Mayor, and the adjacent landowners because it determined that there was no evidence of liability on the part of those defendants. 523 N.E.2d at 460.

case from a case where the dismissal is by agreement between a defendant and the plaintiff.

It is clear that Indiana courts will be called upon to further interpret the nonparty provisions of the Indiana Act. Because the comparative fault statute is unique in its precise, procedural nonparty provisions, courts will face the interpretation without much help from the case law of other jurisdictions such as Kansas, which has a vague nonparty provision its courts have found very malleable.[99] While it is simple to dismiss settlement issues under the nonparty provisions by stating that settling parties will become nonparties for the allocation of fault, this does not necessarily solve the practical and policy-oriented consequences of doing so. The questions raised above can and will be brought up by parties, and the courts will have to balance the policies of full compensation for claimants with fairness to defendants and the ideal of completely proportional liability.

III. Comparison With the Kansas Act

A. Background

Prior to the enactment of the Kansas comparative fault statute, settlement in Kansas was much the same as in Indiana. Tortfeasors were jointly and severally liable for the injuries they caused concurrently or in concert.[100] The effect of a settlement document was determined by examining the intent of the parties to the agreement as manifested by the agreement.[101] As in Indiana, a covenant not to sue or a loan receipt agreement was distinguished from a release and did not release all joint tortfeasors, only those who were parties to the agreement.[102] The amount received under such a covenant or loan receipt reduced the recovery of the plaintiff by the dollar amount received.[103] If the amount received

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99. *See supra* notes 113-16, 154-59 and accompanying text.

100. Note, *Multiple Party Litigation Under Comparative Negligence in Kansas—Damage Apportionment as a Replacement for Joint and Several Liability*, 16 Washburn L.J. 672 (1977).

101. Harvest Queen Mill & Elevator Co. v. Newman, 387 F.2d 1 (10th Cir. 1967); Reynard v. Bradshaw, 196 Kan. 97, 409 P.2d 1011 (1966).

102. Cullen v. Atchison, Topeka & Santa Fe Ry. Co., 211 Kan. 368, 507 P.2d 353 (1973) (loan receipt agreement found to be valid, and in context of rule that release of one tortfeasor releases all joint tortfeasors was found to constitute a covenant rather than a release) Sade v. Hemstrom, 205 Kan. 514, 471 P.2d 340 (1970) (language indicating that parties intended the settlement amount to be full satisfaction for the injuries suffered by plaintiff caused agreement to be interpreted as release rather than covenant not to sue); Jacobsen v. Woerner, 149 Kan. 598, 601, 89 P.2d 24, 27 (1939).

103. *Cullen*, 211 Kan. at 220, 507 P.2d at 362; *Jacobsen*, 149 Kan. at 602, 89 P.2d at 28 (judgment reduced by amount received under covenant not to sue even though settling defendant was not in fact liable).

fully satisfied plaintiff's claim the settlement, regardless of the form, served as a release because plaintiff was entitled to only one satisfaction. An unconditional release still served to release all joint tortfeasors.[104]

Technically, a defendant in Kansas had no right to contribution.[105] It was plaintiff's prerogative to decide who to sue and against whom she would collect any judgment.[106] This meant that defendants had no option to bring in other defendants who might be involved in the incident unless they were persons who had a responsibility to indemnify the defendant. Thus plaintiff could effectively foreclose any chance of a defendant receiving a joint judgment. However, if there were multiple defendants, once a joint judgment was entered and paid in full by one of them under joint and several liability, that defendant then had a statutory right to pursue contribution from other jointly liable defendants and recover a pro rata amount of the judgment paid.[107] This gave "implicit expression to the common law rule that in the absence of a judgment against them there is no right of contribution between joint tortfeasors."[108]

B. Kansas Comparative Fault

Kansas enacted statutory comparative fault in 1974.[109] At the time,

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104. *Cullen*, 211 Kan. at 219, 507 P.2d at 361; *Jacobsen*, 149 Kan. 598, 89 P.2d 24. Kansas' release rule was interpreted much less strictly than the Indiana release rule. Plaintiffs were allowed to give a release to one joint tortfeasor which reserved a right against another joint tortfeasor, and have the agreement found to be valid. Edens v. Fletcher, 79 Kan. 139, 98 P. 784 (1908). This was because the release rule was combined with the rule that the intent behind the release determined its effect, and a reservation of rights evidenced an intent not to release all joint tortfeasors. *Id. See also* Sade v. Hemstrom, 205 Kan. 514, 521, 471 P.2d 340, 347 (1970). The reservation could be oral. Scott v. Kansas State Fair Ass'n, 102 Kan. 653, 171 P. 634 (1918). A general background on the release rule and the exceptions made to avoid its Procrustean effect is found in Stueve v. American Honda Motors Co., Inc., 457 F. Supp. 740 (D. Kan. 1978).

105. Alseike v. Miller, 196 Kan 547, 551, 412 P.2d 1007, 1011 (1966); Rucker v. Allendorph, 102 Kan. 771, 172 P. 524 (1918). In *Alseike*, defendant was not allowed to join a third party defendant who she claimed was responsible for plaintiff's injuries because the third party defendant was not liable to indemnify the defendant. The court decided that allowing her to join the third party would amount to contribution. *Alseike*, 196 Kan. at 551, 412 P.2d at 1011-12.

106. *Alseike*, 196 Kan. at 552, 412 P.2d at 1012.

107. McKinney v. Miller, 204 Kan. 436, 464 P.2d 276 (1970). The statute was KAN. STAT. ANN. § 60-2413(b) (1983), which provides: "Contribution between joint obligors. . . (b) Judgment debtors. A right of contribution or indemnity among judgment debtors, arising out of the payment of the judgment by one or more of them, may be enforced by execution against the property of the judgment debtor from whom contribution or indemnity is sought."

108. *McKinney*, 204 Kan. 436, 439, 464 P.2d 276, 279. *But see* dissent, 204 Kan. at 440, 464 P.2d at 280. *See also* Comment, *Civil Procedure - Tort-feasor's Right to Contribution*, 10 WASHBURN L.J. 135 (1970) (casenote on *McKinney).*

109. KAN. STAT. ANN. § 60-258a (Supp. 1987). *See* Comment, *Comparative Neg-*

the Kansas Act was described in much the same terms that the Indiana Act is presently being described:

> In this instance the pains and strains of abrupt change may prove particularly acute, for the Kansas statute is of mixed ancestry and its effect is more uncertain than if the legislature had chosen as a model an existing statute with a history of judicial construction. While the Kansas act borrows from the laws of other jurisdictions, it is identical with none. The result is a truly unique version of comparative negligence. Nothing can be more certain to breed uncertainty.[110]

The Kansas Act, like Indiana's, does not provide specifically for settling tortfeasors. It does provide that in multiple tortfeasor cases,

> [w]here the comparative negligence of the parties in any action is an issue and recovery is allowed against more than one party, each such party shall be liable for that portion of the total dollar amount awarded as damages to any claimant in the proportion that the amount of such party's causal negligence bears to the amount of the causal negligence attributed to all parties against whom such recovery is allowed.[111]

This provision has been interpreted by the Kansas Supreme Court to eliminate the common-law concept of joint and several liability in negligence actions.[112]

The Kansas Act provides for the joinder of causally negligent individuals who have not been made defendants. Section (c) states: "On

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ligence - A Look at The New Kansas Statute, 23 U. KAN. L. REV. 113 (1974) for a basic overview of the Kansas Act at the time of enactment.

110. Kelly, *Comparative Negligence - Kansas*, 43 J. KAN. BAR ASS'N 151, 151 (1974). Cf. Schwartz, *Comparative Negligence in Indiana: A Unique Statute That Will Reshape the Law*, 17 IND. L. REV. 957 (1984).

111. KAN. STAT. ANN. § 60-258a(d) (Supp. 1987).

112. Brown v. Keill, 224 Kan. 195, 580 P.2d 867 (1978). The abrogation of joint and several liability in Kansas was subject to the same criticisms that are being leveled at that interpretation of the Indiana Act. *Compare* Kelly, *Comparative Negligence - - Kansas*, 43 J. KAN. BAR ASS'N 151, 189-90 (1974) (suggesting that the Kansas statute had not abolished joint and several liability but had instead created a system of comparative contribution, which would include a retention of joint and several liability) *with* Wilkins, *supra* note 48. *See also* Vasos, *Comparative Negligence Update - A Discussion of Selected Issues*, 44 J. KAN BAR ASS'N 13, 16-17 (1975) (suggesting that the abrogation of joint and several liability, throwing the risk of nonrecovery totally on the plaintiff, is inconsistent with the aim of comparative fault to expand the ability of injured persons to recover fully). In Oklahoma, joint and several liability was judicially abrogated only to have it immediately reinstated by the legislature. *See* McNichols, *Judicial Elimination of Joint and Several Liability Because of Comparative Negligence - A Puzzling Choice*, 32 OKLA. L. REV. 1, (1979).

motion of any party against whom a claim is asserted for negligence . . . any other person whose causal negligence is claimed to have contributed to such death, personal injury, property damage, or economic loss, shall be joined as an additional party to the action."[113] Clearly, Kansas' "additional part[ies]" are not nearly so well defined and regimented as Indiana's nonparties.[114] The procedural section of the Kansas statute directs the trier of fact to allocate percentages of fault among the "parties,"[115] but the Kansas Supreme Court has recognized that the comparative negligence statute is "silent as to what position the added party occupies once that party is joined."[116]

1. The Demise of Joint and Several Liability and Interpretation of the Kansas Additional Party Provisions.—The Kansas Act, like its Indiana counterpart, was first interpreted by federal courts.[117] In *Nagunst v. Western Union Tel. Co.*,[118] the Kansas District Court looked at the effect of the Kansas "forced joinder" provisions on settlement. The plaintiff-passenger in *Nagunst* settled with the driver of the vehicle in which she had been injured, and then sued Western Union, lessee of the other car involved.[119] Defendant Western Union attempted to join the released party under Kansas Statute Section 60-258a(c), which would have destroyed the court's diversity jurisdiction.[120] The court also saw the covenant not to sue given to the settling party by the plaintiff as a potential bar to the joinder, because Kansas law held that a covenant not to sue barred a subsequent action although it did not extinguish the right.[121] The court denied the joinder on the basis that the covenant

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113. KAN. STAT. ANN. § 60-258a(c) (Supp. 1987). *See also* Comment, *Comparative Negligence—A Look At the New Kansas Statute*, 23 U. KAN L. REV. 113, 123 (1974).

114. IND. CODE § 34-4-33-10 (1988).

115. KAN. STAT. ANN. § 60-258a(b) (1983). This section of the act provides:

> (b) Where the comparative negligence of the parties in any such action is an issue, the jury shall return special verdicts, or in the absence of a jury, the court shall make special findings, determining the percentage of negligence attributable to each of the parties, and determining the total amount of damages sustained by each of the claimants, and the entry of judgment shall be made by the court. No general verdict shall be returned by the jury.

Id.

116. Kennedy v. City of Sawyer, 228 Kan. 439, 454, 618 P.2d 788, 803 (1980); Brown v. Keill, 224 Kan. 195, 580 P.2d 867 (1978).

117. Beach v. M & N Modern Hydraulic Press Co., 428 F. Supp. 956 (D. Kan. 1977); Greenwood v. McDonough Power Equip., Inc., 437 F. Supp. 707 (D. Kan 1977); Nagunst v. Western Union Tel. Co., 76 F.R.D. 631 (D. Kan. 1977). *See* Comment, *Torts: Damage Apportionment Under the Kansas Comparative Negligence Statute - the Unjoined Tortfeasor*, 17 WASHBURN L.J. 698 (1978) (analyzing *Beach*, *Greenwood*, and *Nagunst*).

118. 76 F.R.D. 631 (D. Kan. 1977).

119. *Id.* at 632.

120. *Id.*

121. *Id.* at 633.

precluded it, stating that "[d]efendants' right to have their proportionate liability reduced by that attributable to others should not be defeated by plaintiff's voluntary decision to settle with other potential defendants."[122] The court explained this conclusion as follows:

> If a plaintiff voluntarily chooses not to sue such a person, as by execution of a covenant not to sue, he simply loses his right to recover against that person the percentage of the total award which corresponds to the percentage of negligence attributable to the party not sued. . . . While such a percentage-crediting procedure may introduce an element of risk into plaintiff's settlement negotiations with the non-party (that is, the plaintiff is not guaranteed of recovery of 100% of the jury's award), the risk is certainly no greater than that which would inure were the named defendant(s) to join the party as an additional defendant under K.S.A. 60-258a(c).[123]

The court also noted that allowing joinder of the nonparty under Section 60-258a(c) would serve to nullify part of the consideration given for entering the covenant not to sue, which included freeing the released party from the expense and inconvenience of defending herself in the action.[124] Preventing the joinder was seen as encouraging settlement and

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122. *Id.* at 634. The court viewed this as carrying over to the comparative fault system the traditional common law principle that mandated that the amount given in a covenant not to sue diminished the plaintiff's recovery accordingly. However, to continue the dollar for dollar credit given to the nonsettling defendant would be to continue joint and several liability, which would defeat the allocation ideal behind comparative fault. *Id.*

123. *Id.* at 634-35. The court also cited Pierringer v. Hoger, 21 Wis.2d 182, 124 N.W.2d 106 (1963), which involved an innovative (at that time) settlement and release whereby plaintiff released a defendant from his ultimate proportion of fault by agreement, regardless of what that proportion was determined to be by the trier of fact. The *Nagunst* conclusion was consistent with the one arrived at in Greenwood v. McDonough Power Equip., Inc., 437 F. Supp. 707 (D. Kan. 1977), an earlier federal case in products liability, where the court refused to allow formal joinder by defendant of parties whose joinder would destroy diversity jurisdiction, but stated that the negligence of those parties must be considered in allocating fault. The *Greenwood* court achieved this by allowing the negligence of the nonparties to be considered under the provisions of KAN. STAT. ANN. § 60-258a(d), which was characterized as substantive because it granted the defendant the right to have the causal negligence of all involved parties considered. At the same time, the court refused to allow the *Greenwood* defendants to destroy its diversity jurisdiction by joining the nonparties under KAN. STAT. ANN. § 60-258a(c), which it characterized as procedural. This allowed the court to retain its jurisdiction while preventing plaintiff from getting unfair advantage by strategic choice of defendants, who would otherwise end up paying for the fault of the nonparties.

124. *Nagunst*, 76 F.R.D. at 634. However, the court specifically rejected the result in Mihoy v. Proulx, 113 N.H. 698, 313 A.2d 723 (1973), where the New Hampshire

release. However, in holding that fairness required the consideration of the released party's fault, the court failed to acknowledge the practical aspects of who would plead and prove or disprove the fault of the released party and what her actual involvement would amount to.

This case is comparable to the initial cases interpreting the Indiana nonparty provisions. Courts in both jurisdictions are concerned with ensuring that all fault is allocated properly. The Kansas statute, being rather inexact, allowed the courts to consider the fault of the nonparty without formal joinder, foreshadowing the "phantom tortfeasor" concept. The procedural exactitude of the Indiana statute would prevent such a result because it requires that the defendant raise and plead the nonparty defense within a specific timeframe,[125] and that the nonparty be named in the verdict form.[126] In *Moore v. General Motors*,[127] the Indiana court could not allow plaintiff's employer to be joined because the employer was statutorily excluded from nonparty status. In *Nagunst*, the potential destruction of the court's diversity jurisdiction and the fact that the covenant was considered a bar prevented joinder as an additional party.[128]

The respective courts arrived at the same solution: ignore the statutory nonparty joinder provisions and allow the fault of the nonparty to be considered without formal joinder. This is a much greater bending of the Indiana Act than the Kansas Act, because the Indiana Act is much more precise in its requirements. The restraints of the Indiana Act show in that the Indiana federal court felt constrained to reinforce the idea that fault would not and could not be *allocated* to the employer as a nonparty,[129] although it is not clear how this was to be communicated to a jury. The Kansas federal court allowed the fault of the released individual to be considered and allocated along with the fault of the defendants.

Nagunst presaged the interpretation that the Kansas Supreme Court would adopt in *Brown v. Keill*,[130] the first major state case interpreting the Kansas Act. In *Brown*, the plaintiff sued for property damage to his Jaguar, caused when plaintiff's son was driving the car and had a

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Supreme Court decided that the apportionment of fault would be only among named defendants and would not include tortfeasors not sued because of the prior execution of a covenant not to sue. *See also* UNIF. COMPARATIVE FAULT ACT § 6, 12 U.L.A. 52, § 6 Comment (Supp. 1989); *infra* note 224.

125. IND. CODE § 34-4-33-10 (1988).

126. IND. CODE § 34-4-33-6 (1988).

127. 684 F. Supp. 220 (1988). *See also supra* notes 85 - 89 and accompanying text.

128. *Nagunst*, 76 F.R.D. at 634-35.

129. *Moore*, 684 F. Supp. at 222.

130. 224 Kan. 195, 580 P.2d 867 (1978).

collision with the defendant.[131] Prior to the filing of this suit, the defendant driver had settled with the driver of the Jaguar.[132] The trial court found the defendant responsible for ten percent of the fault involved, and the driver of the Jaguar, who had not been joined by either plaintiff or defendant, responsible for ninety percent of the fault involved, and the plaintiff free of fault.[133]

The Kansas Supreme Court saw the issues as being 1) whether the doctrine of joint and several liability had been retained under comparative fault and 2) whether the fault of all individuals involved in the collision was to be considered even though one of the negligent parties was not joined or served with process.[134] The court perceived the legislative intent in enacting the comparative negligence statute as being to "equate recovery and duty to pay to degree of fault"[135] and noted:

> Of necessity, this involved a change of both the doctrine of contributory negligence and of joint and several liability. There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss. Plaintiffs now take the parties as they find them. . . . Any other interpretation of K.S.A. 60-258a(d) destroys the fundamental conceptual basis for the abandonment of the contributory negligence rule and makes meaningless the enactment of subsection (d).[136]

The court held that joint and several liability no longer applied in Kansas comparative negligence actions and that as a result, defendant's liability was to be based on her proportional fault alone, obviating the need for contribution between joint judgment debtors.[137]

The court's emphasis in this analysis was on allocation of fault rather than compensation of injured parties.[138] It appears that the intent

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131. *Id.* at 197, 580 P.2d at 869.

132. *Id.*

133. *Id.* The plaintiff was free of fault because the negligence of his son, the driver of the Jaguar, could not be imputed to him as bailor. *Id.*

134. *Id.* at 198, 580 P.2d at 870.

135. *Id.* at 201, 580 P.2d at 873-74.

136. *Id.* at 202, 580 P.2d at 874.

137. *Id. See supra*, notes 107 - 108 and accompanying text.

138. In *Brown*, this was probably an equitable question as well, because in reading the case it becomes clear that the owner of the Jaguar, the plaintiff, was attempting to manipulate the system by recovering for the damage to his car when it must have been clear to him, as it apparently was to the jury, that his son the driver was more faulty than the defendant. *Brown*, 224 Kan. 195, 580 P.2d 867. Knowing that the driver's fault would not be imputed to him as bailor, and that as a result he would be fault free, the

of the legislature was perceived to encompass only the policy of ensuring that every party, whether plaintiff or defendant, be responsible only for her own fault. While this is a valid policy stance, the policies inherent in abolishing the bar of contributory fault in the first place involved not only a more precise allocation of fault, but also an expanded compensation function.[139] The court merely stated:

> The law governing tort liability will never be a panacea. There have been occasions in the past when the bar of contributory negligence and the concept of joint and several liability resulted in inequities. There will continue to be occasions under the present comparative negligence statute where unfairness will result.[140]

While it is clear that the court is correct in stating that no system of compensation can be perfectly and without exception fair, the court did not follow through with an analysis of *who* would suffer most of the inequities caused, and why it would be best that those parties be the ones to bear that burden.

The result in *Brown* was clearly fair to the parties involved, but the ultimate result, the abrogation of joint and several liability, left the comparative fault system in Kansas less flexible and more hostile to plaintiffs. Defendants under the Kansas system pay only the determined percentage of their own fault or any settlement amount they may negotiate with the plaintiff. Plaintiffs, on the other hand, absorb their own percentage of fault, the percentages of any tortfeasor they have settled with, joined or unjoined, the percentage of any judgment-proof defendant, and the percentage of any faulty nonparty. The Kansas Supreme Court acknowledged that "[t]he ill fortune of being injured by an immune or judgment-proof person now falls upon plaintiffs rather than upon the other defendants,"[141] and stated that this risk was in exchange for the risk of total bar to a plaintiff's recovery under the contributory fault system.[142] The only ameliorating factor is that plaintiffs are allowed to keep any windfall resulting when a settlement amount represents more than the ultimate percentage of fault of the settling tortfeasor would dictate.[143]

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plaintiff apparently wanted to force the defendant, only ten percent at fault, to pay for all the damage to the car. The court could hardly do else than consider the fault of the driver, in fairness. It is possible that the case was carried as far as it was specifically to have the questions of joint and several liability and additional parties answered.

139. Wilkins, *supra* notes 47-48 and accompanying text.

140. *Brown*, 224 Kan. 195, 202, 580 P.2d 867, 874.

141. Miles v. West, 224 Kan. 284, 288, 580 P.2d 876, 880 (1978).

142. *Id. See generally* Comment, *Brown and Miles: At Last An End To Ambiguity In The Kansas Law of Comparative Negligence*, 27 KAN. L. REV. 111 (1978) (critical analysis of the two cases).

143. Geier v. Wikel, 4 Kan. App. 2d 188, 190, 603 P.2d 1028, 1030 (1979).

The Indiana cases intimating that joint and several liability has been abrogated are thus far all federal, and no state court has yet made a binding determination regarding joint and several liability. Hopefully when Indiana state courts are called upon to answer this question, they will consider both sides of the policy question involved, considering who is to bear the most risk and why.

The second issue presented in *Brown* was that of allocation of fault to actors not joined as parties, either by the plaintiff or as "additional parties."[144] The Kansas federal court examined a similar question in *Beach v. M & N Modern Hydraulic Press.*,[145] where the defendant tried to join the plaintiff's employer to have the employer's fault determined even though plaintiff had no right of recovery against the employer.[146]

The *Beach* court focused on the language of Section 60-258a(d) which specifies that a defendant is liable for her fault in proportion to the fault of negligent parties "against whom . . . recovery is allowed."[147] The court decided that the immunity of the employer did not prevent allocation of fault to it,[148] but that the employer could not be found liable for that fault, its liability instead falling on the defendant.[149] This was because the plaintiff had not voluntarily left out the employer when naming defendants, but was involuntarily prevented by the employer's immunity from joining it as a named defendant.[150] The harshness of this result, which appears to impose a type of joint and several liability on the named defendant, was, according to the court, ameliorated if the defendant could prove negligence on the part of both the plaintiff and the employer in order to reduce the plaintiff's award.[151] These

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144. KAN. STAT. ANN. § 60-258a(c) (1983).

145. 428 F. Supp. 956 (D. Kan. 1977).

146. Worker's Compensation is an exclusive remedy for injured employees in Kansas. *Id.* at 958-59, 963.

147. KAN. STAT. ANN. § 60-258a(d): *See supra* text accompanying note 111.

148. *Beach*, 428 F. Supp. at 966. Apparently this was to be done under the "phantom tortfeasor" method later elaborated on by the *Greenwood* and *Nagunst* courts: that is, the fault was to be allocated, but the employer was not to be formally joined either by the plaintiff or under KAN. STAT. ANN. § 60-258a(c).

149. *Id.*

150. *Id.*

151. *Id.* at 966. The *Beach* court stated:

> Under our interpretation of this section, plaintiff's award of damages is reduced by the ratio which his percentage of negligence bears to the total amount of negligence allocated among the plaintiff and any third parties against whom the plaintiff may recover. Thus in this case the plaintiff's award of damages is reduced by a fraction: the numerator of which is the plaintiff's percentage or negligence; the denominator of which is the combined percentages of negligence of the plaintiff and the (allegedly negligent) third parties, M & N and Monroe.

Id. The reasoning used was later elaborated on in Greenwood v. McDonough Power

ponderings were on issues similar to the Indiana cases of *Hill*[152] and *Huber*.[153] In Kansas, the issue of whether an "additional party" or "phantom tortfeasor" had to have actual or potential liability to plaintiff was rendered moot by the *Brown* opinion. The *Brown* court stated:

> [W]ill proportionate liability be defeated when a party joined under subsection (c) has a valid defense such as interspousal immunity, covenant not to sue and so forth? The added party in such case would not be a party "against whom such recovery is allowed" and if subsection (d) is taken literally such a party's percentage of fault should not be considered in determining the judgment to be rendered. It appears after considering the intent and purposes of the entire statute that such a party's fault should be considered in each case to determine the other defendant's percentage of fault and liability, if any. . . . [W]e conclude the intent and purpose of the legislature in adopting K.S.A. 60-258a was to impose individual liability for damages based on the proportionate fault of all parties to the occurrence . . . even though one or more parties cannot be joined formally as a litigant or be held legally responsible for his or her proportionate fault.[154]

Although the nonparty in question had not been joined under Section 60-258a(c), the court found that the pleadings and evidence were sufficient to have his fault considered, thus initiating the "phantom tortfeasor" concept.[155] This encompasses tortfeasors not joined for whatever reason,

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Equip., 437 F. Supp. 707 (D. Kan. 1977), where the court distinguished between plaintiff's voluntary choice not to sue an involved entity or individual (as when plaintiff settles with a potential defendant) and an involuntary non joinder by plaintiff. *See* Nagunst v. Western Union, 76 F.R.D. 631 (D. Kan. 1977). The *Greenwood* court stated that plaintiff should not be able to use a voluntary choice not to sue in order to avoid a damaging allocation of fault to immune or insolvent tortfeasors, but notes that a different result obtains in a situation such as in *Beach*, where the plaintiff's inability to sue the employer was involuntary. *Greenwood*, 437 F. Supp. at 713.

152. Hill v. Metro. Trucking, 659 F. Supp. 430 (N.D. Ind. 1987).

153. Huber v. Henley, 669 F. Supp. 1474 (S.D. Ind. 1987). *See supra* notes 79 - 84 and accompanying text.

154. Brown v. Kiell, 224 Kan. 195, 204, 580 P.2d 867, 876 (1978).

155. *Id.* The Kansas District Judges Association Committee on Pattern Jury Instructions has provided an instruction to be used in directing the jury in the consideration of the fault of a nonparty or phantom:

> In this case it is claimed that [name] was at fault in the (collision) (occurrence) in question. Even though (he) (she) has (they have) not appeared or offered evidence, it is necessary that you determine whether [name] was at fault in the (collision) (occurrence) and determine the percentage of fault, if any, attributable

whose fault is still presented to and allocated by the jury: "Under [Section] 60-258a all tortfeasors may be made parties to a lawsuit and even if they are not made parties their percentage of fault may be determined."[156]

With *Brown*, the Kansas Supreme Court summarily disposed of common law joint and several liability in favor of totally proportionate liability, which then paved the way for an interpretation of the Kansas "additional party" provisions of section 60-258a(c) designed to prevent plaintiff from circumventing proportional allocation.[157] The interpretation of the additional party portion of the statute apparently included endowing courts with a discretionary power to create "phantom parties," whose fault was evaluated without their being joined by a named defendant, as was done in *Brown*. The feasibility of such a solution to allocation questions is questionable in Indiana because the nonparty defense must specifically be asserted by a named defendant, and apparently may not be raised *sua sponte* by the court.[158] If defendants desire to spread the fault among nonparties, they must plan ahead and

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to (him) (her) (them).

Pattern Instructions for Kansas, Civil, PIK 20.05 (Supp. 1975). The Comment to PIK 20.05 states:

> Where the evidence warrants it, the court must add that person as a party solely for the purpose of determining and allocating fault on a one hundred percent basis. . . . This situation may exist where a contributing tortfeasor was given a release with reservations, a covenant not to sue, or may be unavailable as a party for lack of jurisdiction or unidentifiability, such as a phantom driver. A settling tortfeasor or absent tortfeasor is a party only for the purpose of allocation of percentage of fault.

Id., Comment to PIK 20.05. The Comment then cites Pierringer v. Hoger, 21 Wis.2d 182, 124 N.W.2d 106 (1963) for the "reason and procedure in accounting for the fault of a settling tortfeasor who was not joined as a party." *Id.*

156. Miles v. West, 224 Kan. 284, 287, 580 P.2d 876, 879 (1978). *Miles* was decided four days after *Brown*, and served to reaffirm the conclusions reached in *Brown*. *Cf.* V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 16.5 (1986), stating: "A result . . . compatible with the goals of comparative negligence is reached by determining the negligence of all concurrent tortfeasors irrespective of whether they are parties to the suit." *Id.*

157. Plaintiff was not allowed to circumvent proportional allocation by carefully choosing whom to name as defendant. This hearkens back to the concerns aired by the federal court in Beach v. M & N Modern Hydraulic Press, 428 F. Supp. 956 (D. Kan. 1977) and Greenwood v. McDonough Power Equip., 437 F. Supp. 707 (D. Kan. 1977), both of which refused to allow plaintiff to circumvent total allocation, whether the circumvention was purposeful on plaintiff's part (not joining a settled party) or involuntary (due to immunity on the part of a tortfeasor). *See supra* notes 117 - 124 and accompanying text; Wilkins, *supra* note 47, at 732-33.

158. IND. CODE § 34-4-33-10(b) (1988). *See* Walters v. Dean, 497 N.E.2d 247 (Ind. Ct. App. 1986); *supra* notes 70-80 and accompanying text.

carefully follow the Act, and may name only identified or identifiable nonparties.[159]

The Kansas cases evidence a strong orientation toward the fair allocation policies of tort systems, which tend to favor defendants, without consideration of the compensation oriented policies. The Indiana Act, with its emphasis on precise allocation, has the potential to be very similar to the Kansas system as interpreted in *Brown* if the state courts decide, as the Kansas court did, that joint and several liability has been displaced by comparative fault.

2. Kansas Settlement Cases.—As contemplated in Indiana's *Gray v. Chacon*,[160] the abolition of joint and several liability in Kansas resulted in the concomitant abolition of the release rule. Again, the issue first came up in federal court. In *Stueve v. American Honda Motors Co.*,[161] the plaintiff settled with the other party involved in a collision, and then pressed suit against the manufacturer of plaintiff's decedent's motorcycle.[162] Predicated on the *Brown* opinion, the court decided that the abolition of joint and several liability made any release irrelevant as far as the manufacturer was concerned, because each defendant could be held liable "only for that percentage of injury attributable to his fault, [and] a release of [one] defendant cannot inure to the benefit of potential co-defendants."[163]

A state court decided this question in *Geier v. Wikel*,[164] where plaintiff gave a release to a railroad company, whose train had been involved in an accident which injured plaintiff, and then sued the driver of the car involved.[165] The court of appeals decided that because all the fault was to be allocated to the persons involved regardless of immunity or whether they had been joined, and because the abrogation of joint and several liability prevented the plaintiff from collecting anything but a defendant's assigned portion of liability from that defendant, the release rule was no longer applicable.[166] The court stated:

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159. IND. CODE § 34-4-33-6 (1988) requires that the name of the nonparty appear on the verdict form.

160. 684 F. Supp. 1481 (S.D. Ind. 1988). *See supra* notes 50-59 and accompanying text.

161. 457 F. Supp. 740 (D. Kan. 1978).

162. *Id.* at 745. The court established that it believed that Kansas state courts would find the comparative fault act applicable to products liability cases. *Id.* at 750-56. *See also* 3 KAN. STAT. ANN. § 167 (Vernon Supp. 1988).

163. *Stueve*, 457 F. Supp. at 748-49. The court also decreed the effect that the covenant not to sue should have on the overall award: "[D]efendant should receive a *pro rata* credit against any award calculated with reference to the percentage of fault attributed to [the releasee]." *Id.*

164. 4 Kan. App. 2d 188, 603 P.2d 1028 (1979).

165. *Id.* at 1030.

166. *Id.*

> An injured party whose claim is exclusively subject to the Kansas comparative negligence statute may now settle with any person or entity whose fault may have contributed to the injuries without that settlement in any way affecting his or her right to recover from any other party liable under the act. The injured party is entitled to keep the advantage of his or her bargaining, just as he or she must live with an inadequate settlement should the jury determine larger damages or a larger proportion of fault than the injured party anticipated when the settlement was reached.[167]

This decision clearly shows the effect of *Brown* and the federal decisions on partial settlements under the Kansas comparative negligence scheme. The fault of the settling tortfeasor will be considered with the fault of named defendants, regardless of whether the settling party was joined as an "additional party" or had her fault considered in the "phantom" mode. Plaintiff is free to settle with any party she chooses, but her award will be diminished by the settling tortfeasor's proportion of fault.

Geier made it clear that plaintiffs must accurately estimate the defendant's proportion of fault and get the absolute best bargain they can, in order to offset the potential loss of large percentages of their damages. Defendants must estimate accurately in order to avoid a settlement which would allow plaintiff a windfall. However, under this system, a defendant who does not settle need not worry about paying more than her proportion of fault, and need not worry that she will be responsible for the fault of unjoined tortfeasors. Plaintiff, on the other hand, knows that she will have to be concerned with the proportionate fault of *all* involved tortfeasors, and may not control from whom she will recover. This means that the flexibility of the Kansas system is minimal and that it does not particularly encourage partial settlement unless the defendant is convinced that she is settling for much less than her proportionate fault and unless the plaintiff is sure she is settling for more than the settling defendant's proportion of fault.

3. "Comparative Implied Indemnity".—Settling tortfeasors had no right of contribution in Kansas under contributory fault,[168] and it appeared that the same finality would be true of settlement under com-

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167. *Id.*

168. Settlements were final, contractual matters between plaintiff and the settling defendant. Statutory contribution was reserved for joint judgment debtors, and had to be triggered by the payment of the entire judgment by one of the jointly liable defendants, who could then pursue other defendants for contribution. *See supra* notes 106-09 and accompanying text.

parative negligence until the case of *Kennedy v. City of Sawyer*.[169] In *Kennedy*, plaintiff sued the city, which had had weedkiller sprayed near plaintiff's land, killing plaintiff's cattle.[170] The city filed a third party complaint against the chemical company that had sold the weedkiller to the city; the chemical company in turn filed a third party petition against the manufacturer of the weedkiller.[171] The trial court found against the city and dismissed both third party complaints.[172] While the city's appeal was pending, plaintiff and the city settled, using a document which released the entire claim.[173]

The City of Sawyer persisted in its appeal, objecting to the dismissal of the third party defendants against whom it sought indemnification.[174] The Kansas Supreme Court decided that although the chemical company and manufacturer had not been brought in as additional parties under Section 60-258a(c), the pleadings were complete enough to consider them in that light.[175]

The court determined that traditional indemnity shifted one hundred percent of the loss from the indemnitee to the indemnitor,[176] where contribution shifted only a portion of the responsibility. Finding that the release given to the City of Sawyer had relieved the third party defendants of any possible liability to the plaintiff,[177] the court held:

> [I]n comparative negligence cases when full settlement of all liability to an injured party has been accomplished and a release obtained, proportionate causal responsibility among the tortfea-

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169. 228 Kan. 439, 618 P.2d 788 (1980). *See* Note, *Torts - Indemnification, Settlement, and Release in Strict Products Liability in the Wake of Kennedy v. City of Sawyer*, 30 UNIV. KAN. L. REV. 131 (1981) for an exploration of some of the issues brought up in *Kennedy*, which was procedurally both awkward and complex.

170. *Kennedy*, 228 Kan. at 442, 618 P.2d at 791.

171. *Id.* at 793-94. (The third party joinder provisions appear at KAN. STAT. ANN. § 60-214 (1983)).

172. *Id.* at 792. The trial court had not considered comparative fault in this decision. *Id.*

173. *Id.* at 791-93.

174. *Id.*

175. *Id.* at 794-95. This included a determination that the comparative negligence act was applicable in strict products liability cases. *Id.* at 797-98.

176. The court distinguished between express indemnity (by contract) and implied indemnity, where one is made to pay a loss that, by rights, another was responsible for, *e.g., respondeat superior*. The indemnity claimed in *Kennedy* was implied indemnity. *Id.* at 801-2.

177. The court distinguished the release from the one used in Geier v. Wikel, 4 Kan. App. 2d 188, 603 P.2d 1028, because the *Geier* release had indicated an intent to pursue the claim further against other tortfeasors, whereas the *Kennedy* release had indicated an intent to completely release all parties involved. *Kennedy*, 228 Kan. at 450, 618 P.2d at 799.

> sors should be determined and indemnity should be decreed based on degree of causation of the respective tortfeasors.[178]

This scheme was christened "comparative implied indemnity," and was triggered when one party with actual legal liability obtained a full release in exchange for a reasonable amount, and then continued the action against the nonsettling defendants under an indemnity theory.[179] While the court called this solution indemnity, it is clear that the proportionate nature of the repayment, and the overtones of joint and several liability evident in one tortfeasor's paying the entire obligation (albeit voluntarily), have more the flavor of contribution than indemnity. The court itself described indemnity as a one hundred percent reallocation, proportional reallocation being the mark of contribution.[180] Judge Woods of the Eastern District of Arkansas stated: "This form of 'comparative implied indemnity' is nothing more than contribution according to proportionate fault."[181]

The Kansas Supreme Court appeared to regret this broad holding, and narrowed and explained itself in *Ellis v. Union Pacific Railroad Co.*[182] Following a car-train collision, plaintiffs sued the railroad company which then joined certain governmental entities for a determination of their proportion of fault pursuant to Section 60-258a(c).[183] Plaintiffs did

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178. *Kennedy*, 228 Kan. at 455, 618 P.2d at 804.

179. *Id.* at 803. The court was very specific on the procedures to be used: plaintiff's fault was to be determined only insofar as to establish that actual legal liability had existed (i.e., that plaintiff was not forty-nine percent or more at fault); defendant had the responsibility to bring in all parties it considered causally negligent; the apportionment was to be made in the pending action, or a separate action if suit had not been filed; the court would determine a reasonable settlement figure if the action had not progressed as far as the jury for determination of damages; and the maximum amount to be redistributed was to be the amount of the settlement. *Id.*

180. In Note, *supra* note 169, the author describes this innovation in his conclusion as comparative contribution. The dissenting opinion took issue with the majority's cavalier treatment of the fact that the chemical company and the manufacturer were in the action as third-party defendants under KAN. STAT. ANN. § 60-214 (1983) for indemnity rather than being in the action as joint tortfeasors, and preferred that the action be treated as one for one hundred percent indemnity on a contractual theory. *Id.* at 805-07. The comparative implied indemnity concept not only differed from traditional indemnity (which could be sued for post-settlement, Cason v. Geis Irrigation Co., 211 Kan. 406, 507 P.2d 295 (1973), if the proposed indemnitee could prove that she was legally liable) but also from Kansas' limited statutory contribution under contributory fault, which was not allowed for mere settlement, but required that one defendant pay an entire joint *judgment*. *See supra* notes 107-08.

181. H. WOODS, COMPARATIVE FAULT § 13:20, at 293 (1987).

182. 231 Kan. 182, 643 P.2d 158, *aff'd on rehearing*, 232 Kan. 194, 653 P.2d 816 (1982) (with dissenters also affirming their dissents).

183. *Id.* The governmental entities were the county, township, and city in which the accident occurred.

not amend their complaint to assert any claims against the governmental entities, and the governmental entities specifically forbade the defendants to settle the case on their behalf. The railroad defendants then settled with the plaintiffs in a form which specifically released the governmental entities and pledged the plaintiffs' assistance to the railroad in obtaining indemnity for the settlement. The trial court dismissed the indemnity claims and the railroad appealed.[184]

The Kansas Supreme Court analyzed *Ellis* in terms of its decision in the *Kennedy* case.[185] Comparative implied indemnity was seen as a method to encourage complete settlements: for plaintiffs because they could achieve full compensation in one transaction, for defendants because they could get proportional repayment for settling the entire claim if the consideration given was reasonable.[186]

The pivotal point in distinguishing *Ellis* from *Kennedy* was the position occupied by and the liability of the additional parties.[187] The court perceived the purposes of Section 60-258a(c) to be to reduce the defendant's potential liability by allocating fault to other causally responsible persons and to prevent the plaintiff from circumventing the allocation procedures by strategic choice of defendants.[188] The provision benefitted defendants only, not affecting plaintiff's case by the possibility of greater recovery from the additional parties.[189] This led to the conclusion that although defendant had followed the procedures laid down in *Kennedy*, its joinder of the governmental entities by use of Section 60-258a(c) had not asserted a claim against those entities that would subject them to monetary liability, and plaintiff had not asserted any claim against them.[190]

The upshot of this was that the *Kennedy* decision was strictly limited: if the proposed indemnitor could not have had any actual liability to

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184. *Id.* The dismissal was because plaintiffs had never asserted a valid claim against the governmental entities, although they had had the opportunity to do so before the statute of limitations ran. *Id.*

185. *Id.* at 186, 643 P.2d at 162. The court noted that the new comparative implied indemnity concept, which it compared to the "partial indemnity" concept of American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 146 Cal. Rptr. 182, 578 P.2d 899 (1978), had the potential to be confused with the traditional concept of contribution. The court stated that this confusion should be avoided, and that the concept was a modernization to bring the traditional all or nothing indemnity concept into accord with the principles of comparative negligence. *Id.*

186. *Ellis*, 231 Kan. at 186, 643 P.2d at 162.

187. *Id.* at 188, 643 P.2d at 164.

188. *Id.*

189. *Id.*

190. In contrast, the court found that the settling defendant in *Kennedy* had asserted a third party claim against the additional parties which *would* have subjected them to monetary liability. *Id.* at 189, 643 P.2d at 165.

plaintiff, then the proposed indemnitee could not call for comparative implied indemnity. The court would not allow the settling defendant to "broaden another defendant's liability beyond what it would have been had the case gone to trial."[191]

Two dissents to the *Ellis* majority opinion vociferously contested the analysis leading to this holding. The first stated that a joinder under Section 60-258a(c) should be a joinder for all purposes.[192] The other stated that *not* treating Section 60-258a(c) as a joinder for all purposes also had the effect of rendering it useless, as the apportionment of fault to parties not named by plaintiff could just as easily be accomplished by defendant's naming the nonparties in her answer, the "phantom tortfeasor" concept, as was approved in *Brown*.[193]

Indiana has always forbidden contribution,[194] and the Comparative Fault Act perpetuates this in Section 34-4-33-7: "In an action under this chapter, there is no right of contribution among tortfeasors. However, this section does not affect any rights of indemnity."[195] Proportional repayment between joint tortfeasors is usually a remedy aimed at evening out the effects of joint and several liability, and so is not considered necessary in the absence of joint and several liability. The Kansas court found this to be untrue in a context where one defendant settles on behalf of all, and in *Kennedy* attempted to make this settlement situation more fair to the defendant who has settled.

However, questions arose out of *Kennedy* relating to the finality of settlements and releases in the one defendant-full settlement context. The *Kennedy* decision muddied the water on the issue of whether contribution was or was not allowed after a full settlement, who would have to contribute, and what their liability to plaintiff had to be. *Ellis*, in attempting to refine "comparative implied indemnity," further confused

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191. *Id.* "The plaintiff may choose to forgo any recovery from other tort-feasors. In that event, a settling defendant has no claim to settle but his own." *Id.* at 190, 643 P.2d at 166. *See also* Teepak, Inc. v. Learned, 237 Kan. 320, 699 P.2d 35 (1985) (later case in which *Ellis* was followed).

192. *Ellis*, 231 Kan. at 190, 643 P.2d at 166. (Herd, J., dissenting) Justice Herd noted that a distinction had been made in *Brown* between parties formally joined and those who were not formally joined but had their fault allocated anyway, stating: "This distinction indicates formal joinder with service of process can impose liability independant of a formal assertion of a claim." *Id.*

193. *Id.* at 192, 643 P.2d at 168 (Fromme, J., dissenting). Fromme, J., who had authored the *Brown* and *Kennedy* opinions, joined in Herd's dissent and elaborated further in his own, stating that he saw "no valid reason for the court to set up a different rule in cases based on ordinary negligence," *Id.* at 167, and that he felt that the majority had limited the *Kennedy* opinion to products liability cases, thus discouraging settlement of plaintiff's entire claim by defendants. *Id.*

194. *See supra* note 38 and accompanying text.

195. IND. CODE § 34-4-33-7 (1988).

the issue, and the court's distinction between indemnity and contribution (made with the intent of assuring that comparative implied indemnity was not to be confused with contribution) remains unclear.

Despite the fact that indemnity is specifically permitted by the Indiana Act, given Indiana's tradition of barring contribution between tortfeasors, even if Indiana follows the case law of Kansas in interpreting its own Act, it is unlikely that Indiana courts will take the path that Kansas courts took in this settlement situation. This is so regardless of the fact that Indiana encourages full settlement by defendants early in the proceedings. The cases illustrate, however, the awkwardness of the solutions to the problems caused by the inflexibility of the Kansas system, which should warn Indiana courts to avoid the pitfalls of interpreting the Act in a haphazard fashion.

Apparently the Kansas court felt the need to reinstate some sort of allocation between wrongdoers in the full settlement context. In doing so, it hit upon "comparative implied indemnity," which is remarkably similar to the joint judgment obligor statutory system of contribution which had been used under contributory fault in Kansas.[196] The difference between the two is that the reallocation is proportional (which means that the fault must be allocated in court) rather than in equal shares, and that "comparative implied indemnity" apparently applies only in the full settlement context, whereas statutory contribution applied only if a joint tortfeasor paid an entire judgment.

The *Kennedy* and *Ellis* cases continue the emphasis of the Kansas system on proper allocation of fault so that no defendant pays more than her fair share of a plaintiff's damages. The Kansas Act has as its main focus the proper proportional allocation of fault between tortfeasors, leaving plaintiff to bear the possibility of insolvent or immune tortfeasors and the risks involved in settlement. Other states, specifically Minnesota, demonstrate that a system which has the opposite emphasis, that is, a compensation-oriented system, can achieve the fairness sought by the Kansas courts.

IV. Minnesota Comparative Fault

A. Background: Prior to Comparative Fault

Under contributory fault, Minnesota differentiated between covenants not to sue and releases.[197] Prior to the enactment of Minnesota's comparative fault act in 1969, the courts had arrived at a system whereby

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196. *See supra* notes 107-08 and accompanying text.

197. *See, e.g.*, Gronquist v. Olson, 242 Minn. 119, 123, 64 N.W.2d 159, 163-64 (1954).

the intent behind a settlement determined whether it constituted a covenant not to sue or a release, regardless of what the document was called.[198] While a release of one joint tortfeasor released all,[199] several factors were considered in determining whether a compromise was a release or merely a covenant not to sue, the first being the intent of the parties to the agreement.[200] If by its terms the release only applied to some of the joint tortfeasors, it was not a release unless it plainly said so, a reservation of rights being unnecessary to retain those rights, but indicative of the intent behind the settlement.[201]

The second determinative factor was whether or not the plaintiff had received full compensation under the agreement.[202] Plaintiff was entitled to only one recovery, and a full satisfaction amounted to a release.[203] However, if plaintiff received a partial satisfaction not intended to be a release of the entire claim, she was free to pursue her claim among the other tortfeasors and was not barred on her claim until she received full satisfaction.[204] Any partial satisfaction served to diminish plaintiff's ultimate award *pro tanto*.[205]

Joint and several liability balanced by contribution among tortfeasors was the rule in Minnesota.[206] The courts imposed a strict requirement that in order to garner contribution from codefendants after having paid more than her equal share of a joint judgment, the proposed contributee must show that there was common liability, not merely common negligence, between herself and the co-defendants.[207]

B. Comparative Fault

Minnesota initially adopted comparative negligence based on the Wisconsin statute in 1969.[208] The system was refined over the years and

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198. *Id.* at 163 (citing Musolf v. Duluth Edison Elect. Co., 108 Minn. 369, 122 N.W. 499 (1909); Joyce v. Massachusetts Real Estate Co., 173 Minn. 310, 217 N.W. 337 (1928)).

199. *Joyce*, 173 Minn. at 311, 217 N.W. at 338.

200. *Gronquist*, 242 Minn. at 124, 64 N.W.2d at 165.

201. *Joyce*, 173 Minn. at 311, 217 N.W. at 338.

202. *Gronquist*, 242 Minn. at 124, 64 N.W.2d at 165.

203. Philips v. Aretz, 215 Minn 325, 10 N.W.2d 226 (1943).

204. *Gronquist*, 242 Minn. at 124, 64 N.W.2d at 164-65 (citing Musolf v. Duluth Edison Elect. Co., 108 Minn. 369, 122 N.W. 499).

205. *Id.*

206. *See* Underwriters at Lloyd's of Minneapolis v. Smith, 166 Minn. 388, 208 N.W. 13 (1926); American Auto Ins. Co. v. Molling, 239 Minn. 74, 57 N.W.2d 843 (1953). *See also* Note, *Contribution and Indemnity - An Examination of the Upheaval in Minnesota Tort Loss Allocation Concepts*, 5 WM. MITCHELL L. REV. 109, 118 (1979).

207. *American Auto Ins.*, 239 Minn. 74, 57 N.W.2d 847; Lunderberg v. Bierman, 241 Minn. 349, 63 N.W.2d 355 (1954).

208. *See supra* notes 11-16 and accompanying text.

in 1978 was revised to resemble the Uniform Comparative Fault Act.[209] Section 604.01 of the Minnesota Act provides for the abolition of contributory fault and its replacement with comparative fault,[210] defines fault,[211] and specifically makes provision for the effects of settlement in subdivisions (2), (3), (4), and (5).[212]

Section 604.04(5) of the Minnesota Act requires that settlements made "shall be credited against any final settlement or judgment," provided only that if the settlement is for more than the settling party's liability, if any, the plaintiff is not required to refund any part of it.[213] The subdivision further provides that the plaintiff's proportion of fault shall first be measured against the defendant's and if the defendant's is greater, the plaintiff's proportion of fault shall be subtracted (pursuant

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209. *See supra* notes 11-16 and accompanying text.

210. Contributory fault shall not bar recovery in an action by any person . . . to recover for fault resulting in death or injury to person or property, if the contributory fault was not greater than the fault of the person against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of fault attributable to the person recovering.

MINN. STAT. ANN. § 604.01(1) (West 1988). It should be noticed that this statute requires that the plaintiff's fault be measured against that of each defendant individually, as opposed to the fault of all the defendants in aggregate as is done in Kansas and apparently Indiana. *See* H. WOODS, COMPARATIVE FAULT, Appendix (1987). This became an issue in several cases involving settlement and contribution issues because a defendant with less fault than the plaintiff is considered not liable to the plaintiff, and hence has no common liability with the defendant seeking contribution. *See* Hosley v. Armstrong Cork Co., 364 N.W.2d 813, 817 (Minn. App. 1985), *rev'd on other grounds*, 383 N.W.2d 289 (Minn. 1986).

211. MINN. STAT. ANN. § 604.01(1)(a) (West 1988).

212. MINN. STAT. ANN. § 604.01(2), (3), (4), and (5). Subdivisions (2) and (3) provide that any settlement or payment for personal injury, death or damage to property shall not be considered admissions of liability. Subdivision (4) states: "Except in an action in which settlement and release has been pleaded as a defense, any settlement or payment referred to in subdivisions 2 and 3 shall be inadmissible in evidence on the trial of any legal action." Subdivision (5):

All settlements or payments made under subdivisions 2 and 3 shall be credited against any final settlement or judgment; provided however that in the event that judgment is entered against the person seeking recovery or if a verdict is rendered for an amount less than the total of any such advance payments in favor of the recipient thereof, such person shall not be required to refund any portion of such advance payment voluntarily made. Upon motion to the court in the absence of a jury and upon proper proof thereof, prior to entry of judgment on a verdict, the court shall first apply the provisions of subdivision 1 and then shall reduce the amount of the damages so determined by the amount of the payments previously made to or on the behalf of the person entitled to such damages.

MINN. STAT. ANN. § 604.01(5) (West 1988).

213. MINN. STAT. ANN. § 604.04(5) (West 1988).

to section 604.04(1)) before the award is diminished by the settlement amount.[214]

Despite the fact that the Minnesota statute provides for the effect of a settlement on the allocation process and result, elaboration was required and was forthcoming from the Minnesota courts. The statute does not, for example, specify whether the amount subtracted from the overall award is proportionate to the settling party's fault, or is a straight subtraction of the amount given in settlement. Logically, under joint and several liability, with its compensation orientation, only the dollar amount would be subtracted, thus guaranteeing plaintiff a full recovery under joint and several liability but no more.[215] However, the apportionment orientation of modern comparative fault statutes would dictate that the subtraction be based on the proportional amount.

In *Rambaum v. Swisher*,[216] the Minnesota Court of Appeals plainly endorsed the proportional credit in the settlement context, diminishing the award to plaintiff not by the settlement amount but by the settling party's percentage of fault.[217] Other methods discouraged settlements by plaintiff because she would gain no benefit from a good bargain if the settlement amount were subtracted regardless of proportion, but would still be disadvantaged by a bad bargain.[218] Defendants would be dis-

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214. MINN. STAT. ANN. § 604.04(5). The order in which the plaintiff's fault and the settlement amount are subtracted from the total award can make a difference in the amount of plaintiff's ultimate recovery. See examples given and analysis made in Note, *A Dollars and Sense Approach to Partial Settlements: Judicial Application of the Gross Damages Method*, 72 IOWA L. REV. 1147 (1987).

215. *See* Lanning, *Settlement and Liability in Montana: State Ex Rel Deere & Co. v. District Court*, 48 MONT. L. REV. 401, 408-13 (1987), for a concise description of the "dollar credit rule" (nonsettling defendant credited with the dollar amount of the settlement) and the "percent credit approach" (nonsettling defendant credited with the settling party's percentage of the judgment based on her percentage of the fault). Mr. Lanning states: "[T]he percent credit rule merely places the plaintiff in a multiple-defendant action on an equal basis with the plaintiff in a single-defendant action. In the latter, the plaintiff takes a chance when settling: he may receive more through settlement than through trial, or he may receive less." *Id.* at 410. *See also* SCWARTZ, COMPARATIVE NEGLIGENCE § 16.5 (1986).

216. 423 N.W.2d 68 (Minn. App. 1988) (citing Anunti v. Payette, 268 N.W.2d 52 (Minn. 1978)). In *Anunti*, the settlement was effected during the trial, after the jury had begun deliberating but before the verdict was returned. The court interpreted the word "settlement" in MINN. STAT. ANN. § 604.01(2) and (5) to refer to payments made "prior to the determination of the case," and found that since the settlement between plaintiff and a third party defendant had been effected during trial and the settling defendant was found to be without fault, the nonsettling tortfeasor should not benefit by the agreement. The court refused to reduce the judgment against the nonsettling defendant at all. *Anunti*, 268 N.W.2d at 56.

217. *Rambaum*, 423 N.W.2d at 77.

218. *Id.* The settlement agreement released the settling defendant's proportion of

couraged from settling if they received a credit in the dollar amount of the settlement because as soon as one tortfeasor settled, defendants would know that they would get the benefit of plaintiff's bargain if she settled for more than the settling party's proportion of fault. Also, if plaintiff settled for less than the settling party's proportion of fault, the nonsettling defendant would still be liable for only her own percentage of fault.[219] The parties in *Rambaum* had used a *Pierringer* release, designed to have the effect of giving the nonsettling party a credit based on the settling party's proportion of fault.

The Minnesota legislature wisely avoided a furor over how the statute affected joint and several liability by specifically providing in Section 604.02(1) that joint and several liability was retained, with certain limits added in 1988.[220] The caselaw interpreting this section of the statute has

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fault and indemnified him against contribution claims by the nonsettling defendant. This means that plaintiff could get no more than the settlement amount from the settling party and if the settlement amount were much less than the settling party's percentage of liability, she could apply joint liability to collect the rest from the nonsettling defendant, but if the nonsettling defendant pressed a contribution action against the settling party, plaintiff would have to pay that proportional contribution under the agreement. *See infra* notes 225-35 and text accompanying for further explanation of this particular type of release, widely used in Minnesota.

219. *Id.* at 76. The nonsettling defendant would be liable only for her percentage of fault despite joint and several liability because a *Pierringer* release was used. This released the settling party's percentage of fault and indemnified the settling party for any contribution claims. This means that even if plaintiff pressed for the payment of any shortfall between the settlement amount and the settling party's percentage of fault under joint and several liability, the nonsettling defendant could still sue the settling party for contribution of the amount paid over her proportional liability, and plaintiff would be required to pay that contribution amount. The effect of this rather convoluted path is that the nonsettling defendant ends up paying no more than her proportional liability dictates.

220. MINN. STAT. ANN. § 604.02 (West 1988 and Supp. 1989):

> When two or more persons are jointly liable, contributions to awards shall be in proportion to the percentage of fault attributable to each, except that each is jointly and severally liable for the whole award. Except in cases where liability arises under [naming certain environmental and pollution statutes] . . . environmental or public health law, . . . a person whose fault is 15 percent or less is liable for a percentage of the whole award no greater than four times the percentage of fault.

MINN. STAT. ANN. § 604.02(1) (West Supp. 1989). This Note will not deal with the limitation "a person whose fault is 15 percent or less" because it has been added very recently and impinges on settlement issues only in a peripheral way.

MINN. STAT. ANN. § 604.02(2) also provides a procedure whereby uncollectible portions of a judgment are reallocated among all faulty parties, including plaintiff, in proportion to their fault. See Hosley v. Pittsburg Corning Corp., 401 N.W.2d 136 (Minn. App. 1987) for a discussion of the reallocation statute. Subdivision (3) of the same Section provides for reallocation in products liability actions and also that in a products action "a person

balanced the retention of joint and several liability with the retention of Minnesota's common law right to contribution between joint tortfeasors.[221]

The effect of the retention of joint and several liability and contribution has occupied much of the caselaw interpreting the settlement provisions of the Minnesota Act. Part of this preoccupation stems from the problem of finality of settlements. A settling party wishes to be freed entirely of any worry of having to pay further and enters a settlement agreement to achieve this. However in Minnesota, a settlement does not necessarily offer this finality. Nonsettling defendants subject to a joint judgment (that is, one which includes the settling party's fault) may pursue contribution from the settling party if the nonsettling party has paid more than her percentage share of the judgment under joint and several liability.[222] This means that a settlement and release under Minnesota's Comparative Fault Act does not truly release the settling tortfeasor, which can be a disincentive to settlement since the settling tortfeasor will end up responsible for her percentage of any judgment

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whose fault is less than that of the claimant is liable to the claimant only for that portion of the judgment which represents the percentage of fault attributable to the person whose fault is less." MINN. STAT. ANN. § 604.02(3) (West 1988). This seems to change, for products liability purposes, the provision of MINN. STAT. ANN. § 604.01(1) (West 1988) which mandates the comparison of plaintiff's fault with each defendant individually, barring plaintiff if her fault is more. The products provision makes a defendant whose fault is less than plaintiffs pay, but only to the extent of their proportion. Cases commenting on the retention of joint and several liability are Maday v. Yellow Taxi Co., 311 N.W.2d 849 (Minn. 1981) (when acts concur to cause injury or when injury is indivisible, joint liability results); Ruberg v. Skelly Oil Co., 297 N.W.2d 746 (Minn. 1980) (if the injury is indivisible and the defendant against whom joint and several liability is asserted is indeed liable to the plaintiff, that defendant is liable for the whole award).

221. *See, e.g.* Lange v. Schweitzer, 295 N.W.2d 387 (Minn. 1980). The court specified that the contribution was to be only for those amounts the nonsettling defendant paid that exceeded his proportional liability. This was regardless of the dimunition of plaintiff's award due to the execution of a settlement agreement in which plaintiff agreed to indemnify the settling defendant for all contribution claims, as that dimunition was forseeable at the time of execution of the agreement. *Id.* at 390. The Uniform Act also retains both joint and several liability and contribution:

> The common law rule of joint and several liability continues to apply under this Act. . . . The plaintiff can recover the total amount of his judgment against any defendant who is liable. The judgment for each claimant also sets forth, however, the equitable share of the total obligation to the claimant for each party, based on his established percentage of fault. This indicates the amount that each party should eventually be responsible for as a result of the rules of contribution. Stated in the judgment itself, it makes the information available to the parties and will normally be a basis for contribution without the need for a court order arising from motion or separate action.

UNIF. COMPARATIVE FAULT ACT, Comment to § 2, 12 U.L.A. 37, 44 (Supp. 1988).

222. *See, e.g. Lange*, 295 N.W.2d 387.

and will not get the benefit of any bargain she may strike.[223] The plaintiffs and defendants of Minnesota have reached a middle ground regarding joint and several liability, contribution, and finality of settlement through the use of a "*Pierringer* release."[224] This is a settlement device whereby plaintiff releases the settling joint tortfeasor's proportion of fault and agrees to indemnify her for any contribution, plaintiff retaining her right to pursue the remainder of her recovery from the other tortfeasors involved.[225] The settling party is included in the allocation of fault, but is not required to remain a party to the action.[226]

The Minnesota Supreme Court pronounced *Pierringer* releases acceptable in Minnesota and laid down guidelines for their use in *Frey v. Snelgrove*.[227] *Frey* involved a car accident in which plaintiff, a passenger, was injured due to the alleged negligence of the driver and the manufacturer of the tires on the car.[228] On the sixth day of trial, the plaintiff settled and executed a *Pierringer* release with the driver and the owner of the car, informed the court of the settlement, and continued against the manufacturer.[229] The settling co-defendants were not dismissed and the jury was not informed of the settlement.[230] The tire manufacturer appealed the trial court's ruling permitting the settled co-defendants to continue as parties.[231]

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223. This is in contrast to the Uniform Act, which provides:

> A release, covenant not to sue, or similar agreement entered into by a claimant and a person liable discharges that person from all liability for contribution, but it does not discharge any other persons liable on the same claim unless it so provides. However, the claim of the releasing person against other persons is reduced by the amount of the released person's equitable share of the obligation.

UNIF. COMPARATIVE FAULT ACT § 6 12 U.L.A. 37, 50 (Supp. 1988). The Comment to § 6 of the Uniform Act explains why this configuration was chosen: if a release does not free the released person from liability for contribution, then there exists no incentive for tortfeasors to settle, as they will end up paying their percentage of fault anyway. This is the problem that Minnesota defendants, plaintiffs, and courts faced under their statute and the existing caselaw. UNIF. COMPARATIVE FAULT ACT Comment to § 6, 12 U.L.A. 37, 50 (Supp. 1988).

224. Based on Pierringer v. Hoger, 21 Wis. 2d 182, 124 N.W.2d 106 (1963). *See* V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 16.5 (2d ed. 1986); C. HEFT & C.J. HEFT, COMPARATIVE NEGLIGENCE MANUAL § 4.140 (1987).

225. *Pierringer*, 21 Wis. 2d at ____, 124 N.W.2d at 108. The Wisconsin Supreme Court upheld and enforced the agreement.

226. *Id.* at ____, 124 N.W.2d at 111-12.

227. 269 N.W.2d 918 (Minn. 1978). "The use of a so-called Pierringer release is in accord with Minnesota practice and our law of comparative negligence in tort actions." *Id.* at 921.

228. *Id.* at 920.

229. *Id.*

230. *Id.* at 920-21.

231. *Id.* at 920.

The court listed the elements of a *Pierringer* release:

> (1) The release of the settling defendants from the action and the discharge of a part of the cause of action equal to the part attributable to the settling defendant's causal negligence; (2) the reservation of the remainder of plaintiff's causes of action against the nonsettling defendants; and (3) plaintiff's agreement to indemnify the settling defendants from any claims of contribution made by the nonsettling defendants to the extent the settling defendants have been released.[232]

Mr. John Simonett, in his article on *Pierringer* releases in Minnesota,[233] notes that the *Pierringer* release is "designed to operate in a jurisdiction which has comparative negligence to apportion liability between defendants, uses the special verdict form,[234] and allows contribution between joint tortfeasors,"[235] making it the ideal form of settlement for Minnesota.

The *Frey* court held that defendants settling under a *Pierringer* release should usually be dismissed from the action, "but their negligence should nevertheless be submitted to the jury."[236] Nonparties and phantom parties

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232. *Id.*, n.1. The court notes that the release in *Frey* contained two unusual provisions: "The indemnity clause covered cross-claims for indemnity as well as contribution and the amount paid for the settlement was contingent upon the amount recovered from the nonagreeing party at trial rather than a sum certain." *Id.*

233. Simonett, *Release of Joint Tortfeasors: Use of the Pierringer Release in Minnesota*, 3 WM. MITCHELL L. REV. 1 (1977).

234. That is, each defendant is assigned a specific percentage of fault, rather than having an overall percentage assigned to all the defendants together. Special verdict forms are necessary to the comparison contemplated in MINN. STAT. ANN. § 604.01(1) (West 1988). IND. CODE § 34-4-33-6 (1988) provides for special verdict forms.

235. Simonett, *supra* note 233, at 11.

236. *Frey*, 269 N.W.2d at 922. The Uniform Act would have the percentage of fault of released parties considered:

> In all actions involving fault of more than one party to the action, including third-party defendants *and persons who have been released* . . . the court . . . shall instruct the jury to answer special interrogatories . . . indicating:
> (1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded; and
> (2) the percentage of the total fault of all the parties to each claim that is allocated to each claimant, defendant, third-party defendant, *and person who has been released from liability under Section 6.*

(emphasis added) UNIF. COMPARATIVE FAULT ACT § 2, 12 U.L.A. 43, (Supp. 1988). The Comment to § 2 goes on to explain why causally negligent but unjoined tortfeasors are not considered:

> The limitation to parties to the action means ignoring other persons who may have been at fault with regard to the particular injury but who have not been joined as parties. This is a deliberate decision. It cannot be told with certainty whether that person was actually at fault or what amount of fault should be

are not dealt with in the Minnesota Act, but *Frey*[237] and *Lines v. Ryan*[238] make it clear that the settling party's fault is to be considered in the allocation process. The Minnesota District Judges Association, citing *Lines*, supplies a jury instruction directing the jury to consider the fault of all causally involved persons, whether parties or not.[239] This puts Minnesota in line with Kansas on the nonparty issue, with the crucial difference being that the plaintiff has the incentive to join all tortfeasors because under joint and several liability she will not be penalized for doing so by having fault allocated to one who cannot pay, which fault is absorbed by plaintiffs under the Kansas regime. This is, however, hard on defendants because they absorb the fault of such persons under joint and several liability and must seek contribution, which is costly and time consuming. For this reason, defendants are encouraged to settle by means of a *Pierringer* release, thereby freeing themselves of this possibility.

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attributed to him, or whether he will ever be sued, or whether the statute of limitations will run on him, etc. An attempt to settle these matters in a suit to which he is not a party would not be binding on him.

Id., Comment to § 2. This Comment acknowledges the practical problems of a the inclusion of nonparties in the allocation process, but the Kansas courts would rightly note that this allows plaintiffs to circumvent the allocation procedure by strategic choice of which tortfeasors to sue and which to let go.

237. *Frey*, 269 N.W.2d at 922-23.

238. 272 N.W.2d 896 (Minn. 1978).

It is established without doubt that, when apportioning negligence, a jury must have the opportunity to consider the negligence of all parties to the transaction, whether or not they be parties to the lawsuit and whether or not they can be liable to the plaintiff or to the other tort-feasors either by operation of law or because of a prior release.

Connar v. West Shore Equip., 68 Wis. 2d 42, 45, 227 N.W.2d 660, 662 (1975). *See also* Hosley v. Armstrong Cork Co., 383 N.W.2d 289 (Minn. 1986), where the fault of fourteen asbestos manufacturers was allocated even though twelve had settled prior to trial.

239. JIG 149 instructs:

During the trial evidence has been presented concerning the involvement in the (accident) (injury) (collision) (occurrence) of persons who are not parties, that is, not plaintiffs or defendants, to this lawsuit. Even though [name of person] is not a party, you will still be asked to determine whether [name of person] was (negligent) (at fault) and whether [name of person] (negligence) (fault) was a direct cause of the (accident) (injury) (collision) (occurrence). That is to ensure that the apportionment of (negligence) (fault) you make in answering question [number] is fair and accurate.

4 Minn. Prac. Jury Instruction Guides Civil 127, JIG 149 (1986). The Comment to the instruction advises that "[i]f the fault of an absent person is considered, it may be desirable to explain to the jury why the fault of an absent person is being considered." *Id.*

C. Practical Matters: Informing the Jury and the Problem of Secret Settlements

The *Frey* court also addressed the practical point of what the jury is to be told when a party has settled but her fault must still be allocated.[240] In this situation the settled party, if she has executed a *Pierringer* release, has no incentive to further defend herself because she will not have to pay any more, due to the plaintiff's indemnification in case of contribution claims. However, a settlement may give the impression of admitted liability to the jury, causing them to put undue amounts of fault on the settling defendant, which would be absorbed by plaintiff under a *Pierringer* release. If the settling party is dismissed, as is recommended in *Frey*,[241] the jury may be puzzled by her absence and possibly attribute undue fault to the remaining parties.

The *Frey* court suggests guidelines which include a notification of the court and the other parties and making the settlement agreement part of the record.[242] "Where the settlement and release agreement is executed during trial, the court should usually inform the jury that 'there has been a settlement and release if for no other reason than to explain the settling tortfeasor's conspicuous absence from the courtroom.' "[243] The court notes that a settlement agreement would be admissible to prove bias or prejudice of a witness, and leaves the admissibility of the actual agreement to the trial court's discretion.[244] The court last specifies that "as a general rule the amount paid in settlement should never be submitted."[245]

1. "Mary Carter" Agreements.—The question of who should be informed of a settlement is most fiercely argued in relation to secret settlements, also referred to as "*Mary Carter* agreements"[246] or "*Gallagher* agreements."[247] These agreements typically have the following features: the guarantee of a certain amount of recovery for plaintiff if she does not prevail or recovers less than expected from the remaining

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240. *Frey*, 269 N.W.2d at 923-24.

241. *Id.* at 923.

242. *Id.*

243. *Id.* (quoting Simonett, *supra* note 233, at 30). *See generally* Note, *Knowledge by the Jury of a Settlement Where a Plaintiff Has Settled With One or More Defendants Who Are Jointly and Severally Liable*, 32 VILL. L. REV. 541 (1987).

244. *Frey*, 269 N.W.2d at 923.

245. *Id.* This is because the settlement amount is arrived at through the use of factors not appropriately put before the jury, such as estimations of liability and compromise. Also, the settlement figure may have little relation to the plaintiff's actual damages. *Id.*

246. Named after Booth v. Mary Carter Paint Co. 202 So. 2d 8 (Fla. Dist. Ct. App. 1967). *See generally* H. WOODS, COMPARATIVE FAULT § 13:21 (1987).

247. Named for City of Tucson v. Gallagher, 108 Ariz. 140, 493 P.2d 1197 (1972).

defendants; a limit on the settling defendant's liability to that amount; a requirement that the settling defendant stay in the case as a defendant; and finally, they are secret from the court, the opposing parties, and the jury.[248] This is obviously unfair to defendants who remain in the action unaware that such an agreement has been made. It also does nothing to encourage true settlement because if plaintiff is aware that one or more defendants will, *sub rosa*, be "on her side," giving her the advantage over the remaining defendant(s), she need not be vitally interested in compromising with those remaining defendants.

Ethical considerations aside, these features make such agreements very appealing in jurisdictions which have abolished joint and several liability and contribution.[249] This is because plaintiff has a guaranteed minimum recovery and assistance from the settling defendant in putting maximum blame on the nonsettling defendants, with the result that plaintiff's and settling defendant's fault is small and nonsettling defendant's proportional fault is large. This lessens the need on plaintiff's part for joint and several liability to attain full recovery, and the settling defendant need not worry about contribution.[250]

The courts which have dealt with such agreements have objected not to the agreements themselves but to the secrecy which is one of their main elements.[251] The agreement itself, without the secrecy and cooperation between the plaintiff and the settling defendant, somewhat resembles a *Pierringer* release. In *Johnson v. Moberg*,[252] the Minnesota Supreme Court dealt with a secret settlement made minutes before final

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248. Mullins and Morrison, *Who is Mary Carter and Why is She Saying All Those Nasty Things About My Pre-trial Settlements?*, 23 For the Defense 14, 15 (1981). The Mary Carter agreement was described as "basically a contract by which one co-defendant secretly agrees with the plaintiff that, if such defendant will proceed to defend himself in court, his own maximum liability will be diminished proportionately by increasing the liability of the other co-defendants." Ward v. Ochoa, 284 So. 2d 385, 387 (Fla. 1973).

249. Entman, *Mary Carter Agreements: An Assessment of Attempted Solutions*, 38 Univ. Fla. L. Rev. 521, 557 (1986). The author notes that the commentary on these agreements arises mostly from non-contribution jurisdictions, but that they are unfair in all jurisdictions. *Id.* at 524. *See also* Eubanks and Cocchiarella, *In Defense of Mary Carter*, 26 For the Defense 14 (February 1984), stating that when the nonsettling defendant is not making a realistic attempt, commensurate with her share of fault, to settle plaintiff's case, a Mary Carter agreement is fair to the parties and may encourage settlement. The authors recommend disclosure to minimize any adverse effects. *Id.* at 21.

250. Eubanks and Cocchiarella, *supra* n.249, at 19.

251. *See, e.g.* Johnson v. Moberg, 334 N.W.2d 411, 415 (Minn. 1983), citing cases which have required disclosure of Mary Carter agreements. However, one court has held that such agreements are void as a matter of public policy, finding that they are unethical and encourage champerty and maintenance, as well as make it impossible for the nonsettling defendant to get a fair trial. Lum v. Stinnett, 87 Nev. 402, 488 P.2d 347 (1971).

252. 334 N.W.2d 411 (Minn. 1983).

arguments in a "dram-shop" case, where the settling defendant continued and made a closing argument.[253]

The court held that *Mary Carter* agreements must be disclosed to the court and the other litigants immediately when made, stating: "This kind of settlement can affect the motivation of the parties, and, indeed, the credibility of witnesses, and only by bringing these settlements into the open can a trial proceed in a fair and proper adversarial setting."[254] The court recommended that on remand the guidelines laid down in *Frey* regarding revelation of settlement agreements be followed.[255]

Disclosure of settlements does not afford a final solution to the problem of *Mary Carter* settlements, because revealing a self-serving agreement containing protestations of innocence and condemnation of the nonsettling defendant can be just as damaging to the nonsettling defendant as secret cooperation between the plaintiff and the settling defendant to achieve the same end.[256] Prejudice results also if the disclosure leads the jury to think that the nonsettling defendant did not settle because she was more at fault or that plaintiff has received a recovery through settlement and does not deserve any more.[257] Further, if the agreement is entirely secret, nonsettling defendants will not even know to ask for revelation of the agreement.[258]

It is probable that Indiana courts will face this problem as comparative fault is refined with the passage of time. This is because if a plaintiff is faced with the prospect of no joint and several liability and the knowledge that the fault of a settling party will be considered and allocated, then she will join as many defendants as possible and enlist as many as possible to her cause. This may be done through the use of agreements which require defendants to stay in the case post-settlement and defend themselves rather than leave plaintiff to defend an absent nonparty tortfeasor.[259]

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253. *Id.* at 414.

254. *Id.* at 415.

255. *Id. See supra* notes 240-45 and accompanying text for the *Frey* guidelines.

256. Entman, *supra* note 249, at 559.

257. Note, *Appellate Decisions - Evidence - Disclosing Gallagher Agreements to The Jury*, 22 ARIZ. L. REV. 1135, 1141 (1980)

258. Entman, *supra* note 249, at 561-62. Mullins and Morrison, *supra* note 248, at 18, refer to Mary Carter agreements as "Typhoid Mary" and recommend using discovery requests to discover agreements when they seem likely.

259. Professor Wilkins, in his article describes the "empty chair" defense as a weapon in the plaintiff's arsenal, which it was when plaintiff had control over whose fault was to be considered. This was because the trier of fact had no choice but allocate one hundred percent of the involved fault, and if the "empty chair" tortfeasor was not in court, the only place to put that fault was on the defendants in court. Under a comparative fault regime where the fault of all parties is considered, the "empty chair" becomes a tool of use to the defense, in that fault may be allocated to the "empty chair" tortfeasor. Wilkins, *supra* note 47, at 732-33.

Although ethical considerations will hopefully prevent most attorneys from entering secret agreements,[260] Indiana courts and legislators will have to consider the temptations that will arise under the comparative fault system. This consideration will lead to putting in place a requirement that settlement agreements be timely revealed to the court and the other litigants, as has been done in other jurisdictions.[261] Such a requirement would serve to keep honest lawyers honest.

To counterbalance the possible bad effects of revealing and admitting an agreement condemning a nonsettling defendant, the trial court should be given the discretion to decide which parts can be revealed without prejudice to any party. This is recommended in *Frey*.[262] Minnesota courts also have Jury Instruction Guides tailored to the settlement situation described above, telling the jury that a defendant has settled and that the jury is not to concern itself with why the settlement occurred, warning them not to draw conclusions from the settlement, and telling them that they will be required to allocate the settling party's fault.[263]

2. Reasonableness Hearings.—The Washington comparative fault statute includes a provision requiring that the court and other parties to the action be informed of any contemplated settlement agreement and that the agreement be subject to approval by the court.[264] This

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260. Eubanks and Cocchiarella, *supra* note 249, at 22, stress that such agreements are doubtful ethically.

261. *See, e.g.* Johnson v. Moberg, 334 N.W.2d 411 (Minn. 1983), and cases cited *Id.* at 415. Frey v. Snelgrove, 269 N.W.2d 918, 923-24 makes it clear that the court is to be informed of *Pierringer* releases.

262. *Frey*, 269 N.W.2d at 923-24.

263. Jury Instruction Guide 148:

> [Defendant] is no longer a party to this lawsuit, because [defendant] and [plaintiff] have entered into a settlement agreement. You are not to concern yourselves with the reasons for the settlement agreement. You are not to draw any conclusions from the fact of settlement or from the fact that other defendants remain in the lawsuit. The settlement agreement between [plaintiff] and [defendant] should in no way influence your judgment about the (negligence)(fault) of [defendant], the remaining defendant(s) or the plaintiff(s). Even though [defendant] is no longer a party to this lawsuit, you will still be asked to determine whether [defendant] is (negligent) (at fault) and whether that (negligence) (fault) was a direct cause of the(accident) (injury) (collision) (occurrence). This is to ensure that the apportionment of (negligence) (fault) you make in answering question [number] is fair and accurate.

4 MINN. PRAC. JURY INSTRUCTION GUIDES CIVIL 125, JIG 148, (1986).

264. WASH. REV. CODE. § 4.22.060(1) (1987). The section provides:

> (1) A party prior to entering into a release, covenant not to sue, covenant not to enforce judgment, or similar agreement with a claimant shall give five days' written notice of such intent to all other parties and the court. The court may for good cause authorize a shorter notice period. The notice shall contain a copy of the proposed agreement. A hearing shall be held on the issue of the

section provides for a hearing on the proposed settlement, including evidentiary presentations, and also that settlements entered into before the action was filed may be subject to hearing upon motion by a party.[265] This portion of the Washington statute serves several purposes. First, it guarantees that any settlement is brought to the attention of the court, thereby avoiding the collusion and prejudice of a *Mary Carter* agreement. Second, it assures both parties of a fair settlement, as judged by the court. Third, it assists the parties in realistically assessing the amount of fault for which each is responsible.[266]

The reasonableness hearing requirement was examined in *Glover v. Tacoma General Hosp.*,[267] where the court was attempting to determine how much credit a remaining defendant should receive for settlements with other defendants.[268] The court noted that the legislature had not set out factors or guidelines for courts to use in determining reasonableness.[269] The factors which the court decided upon included a balance of plaintiff's damages, the merits of the party's cases, ability to pay,

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> reasonableness of the amount to be paid with all parties afforded an opportunity to present evidence. A determination by the court that the amount to be paid is reasonable must be secured. If an agreement was entered into prior to the filing of the action, a hearing on the issue of the reasonableness of the amount paid at the time it was entered into may be held at any time prior to final judgment upon motion of a party. The burden of proof as to the reasonableness of the settlement offer shall be on the party requesting the settlement.

Id. Washington has adopted the Uniform Act, UNIF. COMPARATIVE FAULT ACT, 12 U.L.A. 37 (Supp. 1988), but the reasonableness requirement for settlements is a variation on the Uniform Act's § 6. California has a similar "good faith" requirement for settlements. *See* River Garden Farms, Inc. v. Superior Court, 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972).

265. WASH. REV. CODE § 4.22.060(1) (1987).

266. Accurately assessing the percentages of fault attributable to the various parties will always be a major practical headache. *See* Handbook for Indianapolis Bar Ass'n, *Super Saturday in Court - - Comparative Fault*, 6 (April 9, 1988); HEFT & HEFT, COMPARATIVE NEGLIGENCE MANUAL §§ 4.40 - 4.110 (1987), suggesting various percentages of fault to be used in settlement negotiations, according to the type of accident involved.

267. 98 Wash. 2d 708, 658 P.2d 1230 (1983).

268. *Id.* at 713, 658 P.2d at 1235.

269. *Id.* at 714, 658 P.2d at 1236. The court quoted the Senate Select Committee on Tort and Product Liability Reform Final Report at 54: "The bill does not establish any standards for determining whether the amount paid for the release was reasonable or not. It is felt that the courts can rule on this issue without specific guidance from the Senate." Stating that "sweetheart deals" (Mary Carter agreements) were one of the concerns of the legislature in enacting the provision, the court refused to allow total discretion in the lower court. *Id.* at 713, 658 P.2d at 1235. The court also refused a test which strictly reflected the remaining defendant's relative liability, on the basis that determining the liability would entail a mini-trial or waiting until the jury had allocated all the fault. *Id.*

collusion or fraud, good faith, the cost and timeframe of the litigation, and the interests of the parties not being released.[270]

This system would not be as efficient as allowing the parties to work out their settlements under comparative fault without the interference of the court, but would encourage fair settlement. It would also serve the purpose of discouraging unfair *Mary Carter* agreements and assist the parties in their negotiations.

The Minnesota system embodies a concern for the compensation aspects of the tort system which tend to favor plaintiffs. It is interesting to note that given a system with joint and several liability which guarantees plaintiff a full recovery, and contribution to assure that no defendant pays more than her full share, the bar and courts of Minnesota have favored *Pierringer* settlements which approximate a completely allocation-oriented system.[271] The difference lies in that it is plaintiff's choice to bear the risks associated with *Pierringer* releases, and if she chooses not to, she can pursue a judgment and have any of the jointly and severally liable defendants pay. In such a case, it is the defendant who bears the risk of insolvency or immunity of one of the other defendants. In Kansas this is impossible, and the plaintiff bears all the risks, both of an unwise settlement and of the immunity or insolvency of a defendant.

Clearly the Minnesota legislature and courts considered carefully both policy and practicality in enacting the Minnesota statute. The statute created is detailed enough that courts could interpret it in a logical and consistent fashion, giving litigants some certainty, yet flexible enough that parties are given the most room possible to negotiate and arrive at creative, final, and fair settlements.

V. Summary and Conclusion

The systems of both Kansas and Minnesota have features which recommend them in the settlement context, Kansas' being the precise allocation of fault to parties, which makes it fairest for those accused of negligence, Minnesota's being the joint and several liability doctrine

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270. *Id.*

271. The effect of a *Pierringer* release is that plaintiff receives the settlement amount and any remaining judgment amount less the settling defendant's proportion of fault. The settling defendant is freed of any threat of a contribution suit by an agreement whereby plaintiff will indemnify that defendant in case a codefendant presses a contribution suit. The nonsettling defendant pays only her own proportion of fault, or, if forced to pay part of a settling defendant's fault can go against the settling defendant for contribution. This circuitous route leads to each defendant being responsible for her own fault and no more, as under a system such as Kansas'. *See supra* notes 218, 219 and 225-35, and accompanying text.

balanced by contribution, which emphasizes the compensation of injured persons. For ease of administation, the Kansas Act, by not allowing contribution, makes for more efficiency.[272] The Minnesota system, which requires further action on the part of a defendant in order to get contribution, is less efficient, but gives the parties more flexibility to craft fair and effective settlements, and in combination with *Pierringer* releases provides a strong incentive to settlement.

Which state Indiana follows will depend in part upon how her courts answer the threshold questions of whether joint and several liability has been retained and the position of settling parties in the case post-settlement. The fact that the Act has foreclosed contribution and the federal court's decision in *Gray*[273] indicate that Indiana will probably follow Kansas in abrogating joint and several liability. The position of settled tortfeasors will be a harder question for Indiana courts and lawyers, dealing with nonparty provisions which are more detailed than any other state's and with no indication yet as to whether settled parties will be nonparties or *sui generis*. The courts must decide what role a settling defendant or tortfeasor will play in the consideration and allocation of fault.

The practical aspects of trying a case in which one of multiple tortfeasors has settled will center around the position the settling parties will occupy vis a vis the plaintiff and remaining defendants. The courts must state whether or not the settling tortfeasor will become an automatic nonparty and give guidelines for settlement under the Act and the allocation of fault to the settling tortfeasors, providing jury instructions and procedures designed to protect both the plaintiff and defendant.

By referring to the caselaw and statute interpretation of other states, as well as the policies represented by the fault allocation systems involved, Indiana courts will be equipped to provide cogent answers to the threshold questions and provide the certainty which lawyers and parties need in order to effect the most advantageous settlements possible.

Elizabeth Moran Behnke

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272. Except in a comparative implied indemnity case such as *Kennedy*, which encompasses a further action by settling defendants in order to get proportional contribution.

273. 684 F. Supp. 1481 (S.D. Ind. 1988)

Retroactive Application of Legislatively Enlarged Statutes of Limitations for Child Abuse: Time's No Bar to Revival

I. Introduction

In the United States, child sexual abuse and neglect have reached major, if not epic, proportions.[1] An estimated 200,000 to 400,000 children are sexually abused each year.[2] A recent study suggests that perhaps one third of the female population experienced some form of sexual abuse as a child.[3] Increased societal recognition of child sexual abuse, attributable in part to increased reporting requirements, has reignited an age-old debate over the relative scope of such abuse and society's role in curbing it.[4]

The problem has received legislative and executive attention. For example, numerous state legislatures enacted legislation enlarging the criminal statute of limitations for child sex abuse offenses in an effort to facilitate criminal prosecution.[5] Additionally, the United States Attorney General's Office recently advocated the extension of such statutes of limitations.[6] These actions, although well-intentioned, frequently create agonizing dilemmas for the judiciary in applying the revised limitations period, especially where the legislature fails to expressly dictate its intentions as to the revised statute's application. Moreover, the legislation may run afoul of constitutional *ex post facto* prohibitions when applied in accordance with legislative dictates.

Preliminarily, this Note will illuminate the magnitude of the child sexual abuse problem, and the impact of the statute of limitations on

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1. ten Bensel, *Child Abuse and Neglect: The Scope of the Problem*, 35 Juv. and Fam. Ct. J. 1 (Winter 1984) [hereinafter *Child Abuse and Neglect*].

2. Middleton, *Plight of the Victim: A Plea for Action*, 66 A.B.A.J. 1190, 1192 (1980).

3. Landis, *Experiences of 500 Children with Adult Sexual Deviation*, 30 Psychology Q. Supp. 91 (1956).

4. *See* Myers, *Protecting Children from Sexual Abuse: What Does the Future Hold?*, 15 J. Contemp. L. 31, 32 (1989) [hereinafter *Protecting Children*].

5. *See, e.g.*, Alaska Stat. 12.10.020(c) (Supp. 1988); Ariz. Rev. Stat. Ann. 13-107(B)(1) (Supp. 1988); Cal. Penal Code 801 (West 1985); Colo. Rev. Stat. 18-3-411 (1986); Tex. Crim. Proc. Code Ann. 12.01 (Supp. 1988).

6. *Attorney General's Task Force on Family Violence, Federal Executive and Legislative and State Legislative Action, Recommendations*, U.S. Atty. Gen., Final Report 103 (Sept. 1984) [hereinafter *Task Force on Family Violence*]. The task force recommended extending the statute of limitations to five years, such period commencing at the time the victim attains majority, or the age of sixteen, whichever first occurs.

the states' ability to prosecute child sexual abusers. The Note will then analyze the constitutional ramification of retroactive application of the revised statute. The Note will further address the various judicial approaches to the interpretation and application of a revised statute of limitations for child sexual abuse, especially where the legislature failed to expressly dictate the revised statute's application. Finally, the Note will suggest a uniform approach to interpretation and application of the revised statute, and propose that the states' compelling interest in prosecuting child sex abusers permits the revival of "time-barred" prosecutions.

II. Child Sexual Abuse - The Problem's Parameters

A. The Scope of The Problem

The painful reality of child sexual abuse has emerged from secrecy at least three times previously, only to retreat under threat to the dark chasms and inner recesses of society's consciousness.[7] Each time, however, society ignored, suppressed and condemned the enlightened few who dared suggest the existence of widespread child sexual abuse.[8] Most recently, beginning in 1978,[9] child sexual abuse recaptured the public spotlight, inducing an avalanche of media and scholarly works.[10] Mass child sexual abuse cases blanket the evening news: *McMartin* in Los Angeles, the *Jordan* case in Minnesota, *Country Walk* in Florida, and others.[11] Increased societal cognizance of child sexual abuse is in large part attributable to the implementation of mandatory reporting requirements.[12] Various statutory reporting schemes require medical personnel, educators, relatives, social workers and even attorneys to report abuse.[13] However, even the increased reporting requirements fail to reveal the true scope of the problem. Incest, the most intimate form of child sexual abuse, is commonly unreported.[14] Often, the perpetrator, if not a family

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7. *Protecting Children*, *supra* note 4, at 32.
8. *Id.* at 31-36.
9. *Id.* at 32.
10. *Id.* Mass child sexual abuse cases blanket the evening news: *McMartin* in Los Angeles, the *Jordan* case in Minnesota, *Country Walk* in Florida, and others.
11. *Id.* The *McMartin* case is reported as McMartin v. County of Los Angeles, 202 Cal. App. 3d 848, 249 Cal. Rptr. 53 (1988).
12. Besharov, *Child Protection: Past Progress, Present Problems, and Future Directions*, 17 Fam. L.Q. 151, 153-55 (Summer 1983).
13. Note, *Sexually Abused Children: The Best Kept Legal Secret*, 3 Hum. Rts. Ann. 441, 443-44 (1986) [hereinafter *Sexually Abused Children*].
14. *Id.* at 445.

member, is a relative or an adult known to the victim.[15] An estimated 90% of all cases involving female victims under the age of 12 are not reported to the police.[16] Although estimates of the extent of child sexual abuse vary widely, the problem is unquestionably of major magnitude.

Child sexual abuse inflicts staggering economic, psychological and social costs on society and its victims. These costs are "taken out of [the victims'] current and future health, happiness, and . . . productivity. . . . In effect, a large mortgage on their future life is taken out when children's legal interests are not satisfied. . . ."[17] The abused child often becomes the abuser.[18] Other long-term effects may include a propensity for promiscuity and prostitution as well as a predisposition to engage in sexually abusive relationships.[19] Various studies indicate other long-term effects including anxiety, pseudo-seductive behavior, substance abuse, sexual dysfunction, homosexuality and various forms of psychosis such as depression and suicidal obsession.[20]

In response to public outcries over the scope and treatment of the child sexual abuse problem, the criminal justice system initiated numerous

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15. LLOYD, CORROBORATION OF SEXUAL VICTIMIZATION OF CHILDREN, CHILD SEXUAL ABUSE AND THE LAW 122, n.88 (A.B.A. Nat'l Legal Resource Ctr. For Child Advoc. And Prot. (5th ed. 1984)).

16. Libai, *Protection of the Child Victim*, 15 WAYNE L. REV. 977, 1016, n.134 (1969) [hereinafter *Protection of the Child Victim*].

17. Miller & Miller, *Protecting the Rights of Abused and Neglected Children*, 19 TRIAL 68, 72 (June 1983) [hereinafter *Protecting the Rights*] (quoting Bross & Munson, *Alternative Models of Legal Representation for Children*, 5 OKLA. CITY U.L. REV. 561 (1980)). Child Abuse & Neglect; *supra* note 1, at 2. The author notes that the initial costs for child protective services is $10,000 per case, exclusive of legal costs. Psychological care may run as high as $24,000 per year. Thus, a conservative estimate of $50,000 a year per case is given. *Id.*

18. DeRose, *Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and Long Term Damages*, 25 SANTA CLARA L. REV. 191 (1985) [hereinafter *Adult Incest Survivors*.] The well-documented fact that abused children frequently become child abusers is noted as follows:

> In nearly all of the studies of male sexual offenders that have been done to date, well over half or in some cases nearly three-quarters of the men studied who are serving time in prison were found to have been sexually abused as young boys. . . . Therefore . . . from generation to generation, emotional, physical and sexual abuse are behaviors exhibited by men who most likely experienced such abuse in their own childhoods. Sadly, what these men learned from their parents, they learned too well.

Id. at 218, n.139 (quoting S. BUTLER, CONSPIRACY OF SILENCE: THE TRAUMA OF INCEST 67 (1978)).

19. Note, *Sexually Abused Children*, *supra* note 13, at 452.

20. *Id. See also* J. HERMAN, FATHER-DAUGHTER INCEST 105 (1981); B. JUSTICE & R. JUSTICE, THE BROKEN TABOO: SEX IN THE FAMILY 184-5 (1979); S. BUTLER, CONSPIRACY OF SILENCE: THE TRAUMA OF INCEST 121 (1978); *Adult Incest Survivors*, *supra* note 18, at 194; *Child Abuse and Neglect*, *supra* note 1, at 4-5.

reforms in an effort to address the needs of child abuse victims.[21] For example, commentators and critics propose that child abuse victims testify on videotaped recordings, thus reducing the trauma experienced by child abuse victims in testifying.[22] Additionally, numerous jurisdictions promulgated mandatory reporting requirements to increase the likelihood that child sexual abuse will be discovered.[23] Thus, increased societal cognizance has encouraged the judiciary and legislature to adopt meaningful measures to assist the child abuse victim.

B. Barriers to Prosecution of Abusers

As a preliminary barrier to prosecution, one must recognize the gross disparity between victim and offender in terms of power, knowledge and resources.[24] Adults and older children utilize this disparity to psychologically manipulate the victim.[25] In the case of incest, the victim is even more vulnerable, for the differences in power, knowledge and resources are multiplied by the victim's dependence upon the offender for life's basic necessities.[26]

Very limited force is required to molest a child. The child victim is seldom able to understand the significance or wrongfulness of the perpetrator's conduct.[27] Over 75% of reported incest cases involve father-daughter relations.[28] The father's position as an authority figure may be utilized to persuade the child to acquiesce. Although the request may seem unpleasant, distasteful, or even frightening, the child may be motivated by a strong desire not to displease the offender.[29] In other cases, the child may be assured that the activity is perfectly normal,

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21. *See* Comment, *Child Sexual Abuse in California: Legislative and Judicial Responses*, 15 GOLDEN GATE U.L. REV. 437 (1985). The article deals with proposed and adopted alterations to California's system. Many of the procedures have been adopted by other states, for example, the revision of reporting requirements.

22. *See* Note, *Sexually Abused Children*, *supra* note 13, at 478-80.

23. *See, e.g.*, CAL. PENAL CODE §§ 11165-11166 (West Supp. 1985). California's bill requires teachers, social workers, probation officers, psychologists, coroners, police, physicians, surgeons, dentists and numerous others to report suspected cases of child abuse. *Id.*

24. ten Bensel, *Child Abuse and Neglect: Definitions of Child Neglect and Abuse*, 35 JUV. & FAM. CT. J. 23, 29 (Winter 1984) [hereinafter *Definitions of Child Neglect*].

25. *Id.*

26. *Id.*

27. Note, *Balancing The Statute Of Limitations And The Discovery Rule: Some Victims Of Incestuous Abuse Are Denied Access To Washington Courts* - Tyson v. Tyson, 10 U. PUGET SOUND L. REV. 721, 727 (1987) [hereinafter *Balancing The Statute Of Limitations*].

28. Note, *Sexually Abused Children*, *supra* note 13, at 445 n.18.

29. Note, *The Crime of Incest Against the Minor Child and the State's Statutory Responses*, 17 J. FAM. L. 93, 96 (1978-79) [hereinafter *Incest Against the Minor Child*].

given the relationship between the adult and child.[30] Whether the cause of the offense is a disparity in power, knowledge or resources, the common result is an unwillingness or inability on the part of the child to report the offense.

Most children never tell anyone about the sexual encounter.[31] An estimated 75% to 90% of incest victims reach adulthood without revealing the incident(s).[32] The failure or inability of the child to report the offense may be motivated by one of several factors. First, incest victims may be ashamed or embarrassed, believing themselves to be the cause of the attack.[33] Other incest victims, frightened by the offender's threats, fear that the innocent parent will break-up the family.[34] Other children fear that revealing the relationship will encourage the father's anger, rejection or physical harm.[35] The child may fear her father will be imprisoned,[36] or at a minimum, that her mother will blame her.[37]

Another major cause of unreported offenses stems from the child's mental defense mechanisms. To cope with undisclosed victimization, children frequently mentally block-out the abuse.[38] As a result, the child may not remember or divulge the abuse for years.[39] Compounding the problem of non-reporting by child victims is the fact that incest occurs

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30. *Id.*
31. *Definitions Of Child Neglect*, *supra* note 24, at 31.
32. *Adult Incest Survivors*, *supra* note 18, at 194.
33. *Definitions Of Child Neglect*, *supra* note 24, at 30.
34. *Balancing the Statute of Limitations*, *supra* note 27, at 727.
35. *Id.*
36. *Id.*
37. *Id.* Dr. Judith Herman, a noted expert in father-daughter incest at Harvard Medical School summarizes such incest as follows:

> Incestuous abuse usually begins when the child is between the ages of six and twelve, though cases involving younger children, including infants, have been reported. The sexual contact typically begins with fondling and gradually proceeds to masturbation and oral-genital contact. Vaginal intercourse is not usually attempted until the child reaches puberty. Physical violence is not often employed, since the overwhelming authority of the parent is usually sufficient to gain the child's compliance. The sexual contact becomes a compulsive behavior for the father, whose need to preserve sexual access to his daughter becomes the organizing principle of family life. The sexual contact is usually repeated in secrecy for years, ending only when the child finds the resources to escape. The child victim keeps the secret, fearing that if she tells she will not be believed, she will be punished, or she will destroy the family.

Note, *Civil Claims of Adults Molested as Children: Maturation of Harm and the Statute of Limitations Hurdle*, 15 FORDHAM URB. L.J. 709, 716 (1987) (quoting Herman, *Recognition And Treatment Of Incestuous Families*, 5 INT'L J. FAM. THERAPY 81, 82 (C. Barnard Ed. 1983)).

38. *Task Force On Family Violence*, *supra* note 6, at 103.
39. *Id.*

in secrecy and exhibits few outwardly detectable signs.[40] Thus, if the child does not report, the abuse may continue unnoticed.

Once abuse is reported, the chance of prosecuting the abuser is low. A mere 24% of all child sexual abuse cases result in criminal action.[41] Once reported, familial indecision[42] or prosecutorial discretion[43] may preclude criminal prosecution. Thus, the vast majority of child sexual abuse incidents go unreported or unprosecuted.

A final impediment to prosecution is the tolling of the statute of limitations. Most criminal statutes of limitations accrue from the date of the offense.[44] Thus, by the time the child becomes emotionally or psychologically capable of confronting the experience and seeks legal redress, the statutory period for prosecution may have expired.[45] Frequently, disclosure may not occur for one to three years subsequent to the offense.[46]

C. Changing Statutes of Limitations to Increase the Likelihood of Prosecution

The emotional and psychological barriers to reporting child sex abuse frequently foreclose the victim's opportunity for legal redress and preclude societal intervention.[47] Obviously, the opportunity for legal redress varies

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40. Note, *Incest Against The Minor Child*, *supra* note 29, at 96.

41. *Sexually Abused Children*, *supra* note 13, at 446. Even after detection, prosecution is impeded by (1) social skepticism about the reliability of the child's accusations; (2) classification of pedophilia as a mental disorder rather than a criminal offense; (3) procedural systems which traumatize the victim; and (4) reluctance of prosecutors to pursue prosecutions where the case rests primarily upon the content and stability of the child's testimony. *Id.*

42. *Id.* at 448-49.

43. *See supra* note 41.

44. *Task Force on Family Violence*, *supra* note 6, at 103. Of the jurisdictions addressing the issue of retroactive application of the enlarged limitations period within the context of child sexual abuse offenses, the following states have statutes of limitations accruing from the commission of the offense: California, CAL. PENAL CODE §§ 800, 801 (West 1985); Colorado, COLO. REV. STAT. § 18-3-411(2) (1986); Texas, TEX. CRIM. PROC. CODE ANN. § 12.01 (Vernon 1977, 1988 Supp.); Washington, WASH. REV. CODE ANN. § 9A.04.070 (1988). In the remaining two jurisdictions, the limitations period accrues from the time the minor reaches the age of 16: Alaska, ALASKA STAT. § 12.10.030(c) (1984) (The period runs from the earlier of the victim attaining the age of 16, or the report to a peace officer. The section does not extend the limitations period by more than five years.); Massachusetts, MASS. GEN. LAWS ANN. ch. 277, § 63 (West 1972, Supp. 1988) (The limitations period commences at the earlier of the victim attaining the age of 16, or the report to a law enforcement agency.

45. *Task Force on Family Violence, supra* note 6, at 103.

46. *Definitions of Child Neglect*, *supra* note 24, at 30.

47. *Task Force on Family Violence*, *supra* note 6, at 103.

in direct proportion to the length and accrual date of the limitations period. Limitations periods commencing at the date of the offense and expiring within five years are currently the norm.[48] However, lesser limitations periods still exist.[49] The statute of limitations in these jurisdictions remains a major impediment to legal redress.

In recognition of the delays common in the reporting of child sex abuse, the United States Attorney General recommended that the states enlarge the statutes of limitations so as to commence from the date of the victim's disclosure.[50]

Where legislatures respond to these concerns by extending the limitations period,[51] retroactive application may become an issue in implementing the revised statute. Several policy considerations support a presumption for retroactive application. First, retroactive application furthers the goal of reducing barriers to the prosecution of offenders and of permitting victims an opportunity for legal redress.[52] Abused children must recognize that society is concerned with their plight and that children's rights are being actively protected. Retroactive application of enlarged limitations periods channels the benefits of increased societal and legislative awareness to those children who have been abused, rather than merely protecting the abused children of tomorrow. Early societal intervention diminishes the psychological costs children pay by permitting prompt psychological care, and also by preventing additional abuse at the hands of the offender. Children, not adults, are the judges of our present civilization.[53]

A second policy consideration supporting retroactive application is the need to permit child abuse victims a day in court. The American legal system is designed to channel conflict resolution from the streets into the court system.[54] Fundamental to the operation of the legal system is the requirement that each litigant have his or her "day in court." Although in the criminal context it is the prosecution, not the victim,

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48. *See, e.g.*, IDAHO CODE § 19-40 (1987) (prosecution must be commenced within 5 years after offense committed); KAN. CRIM. CODE ANN. § 21-3106 (1971, Supp. 1988) (prosecution must be commenced within 5 years after offense committed).

49. *See, e.g.*, ARK. STAT. ANN. § 5-1-109 (1987) (prosecution must be commenced with 3 years after commission; first degree child sexual abuse is a class C felony per 5-14-108).

50. *Task Force on Family Violence*, *supra* note 6, at 103.

51. *See, e.g.*, Commonwealth v. Bargeron, 402 Mass. 589, 593, 524 N.E.2d 829, 831-32 (1988); State v. Hodgson, 108 Wash. 2d 662, 666, 740 P.2d 848, 850 (1987).

52. As well, society obtains an opportunity to deter, rehabilitate or incarcerate the offender.

53. *Protecting the Rights*, *supra* note 17, at 72.

54. *See, e.g.*, H. GRILLIOT, INTRODUCTION TO LAW AND THE LEGAL SYSTEM 3 (2d ed. 1979); 1 C. TORCIA, WHARTON'S CRIMINAL LAW 1 (14th Ed. 1978).

who has his "day in court," the victim may experience relief and satisfaction from the defendant's prosecution, and thus indirectly, have his own day in court. The statute of limitations limits this right by forcing the party to bring his or her action in a timely manner or be forever barred. In the civil context, the use of exceptions to the limitations period's accrual such as the "discovery rule," limits the harshness imposed by stringent application of the limitations period.[55]

Retroactive application of revised statutes of limitations can serve a similar function in the context of child sexual abuse.

In the criminal context, the state and not the injured party prosecutes the action. In the civil context, the prospective plaintiff is generally cognizant of the injury when it occurs, and as a result, may bring an action in a timely manner. In the context of child sexual abuse the state is powerless to prosecute the child sex abuse offender until the state is informed of the offense. As discussed above, a variety of physical, emotional and psychological factors prevent the victim from reporting the offense.[56] As a result of this delay in reporting the offense, the limitations period and the state's right to prosecute may expire prior to the time a child reports the offense.

A final policy consideration compelling retroactive application of the enlarged limitations period is the need to punish the offender. One of the principal functions of criminal law is to deter the offender and all aspiring offenders.[57] The deterrence theory is predicated upon the belief that individuals are rational, hedonistic beings.[58] The unpleasantness of punishment, coupled with its certainty, deter the offender from repeating his lawless conduct.[59] A secondary benefit of the deterrence theory is the intimidation of potential offenders.[60] Thus, both the offender and the potential offender, faced with the certainty of severe punishment, will likely refrain from committing a contemplated crime.[61]

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55. *See, e.g.*, N.Y. Civ. Prac. L. & R. 214-c (McKinney Supp. 1987). This statute provides in pertinent part:

> "[W]here the discovery of the cause of the injury is alleged to have occurred less than five years after discovery of the injury or when with reasonable diligence such injury should have been discovered, whichever is earlier, an action may be commenced . . . within one year of such discovery of the cause of the injury."

Id.

56. *See supra* notes 24-39 and accompanying text.

57. 1 C. Torcia, *supra* note 54, § 3. Criminal law may be premised upon any of three theories; deterrence, retribution or reformation. The deterrence theory is particularly appropriate for child sexual abuse offenses because of its focus upon the individual offender. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

Studies reveal that child sex abusers are extremely likely to continue their nefarious conduct, absent societal intervention.[62] Documentation of unreported sexual assaults against children dramatize the magnitude of the problem.[63] A study of first offenders[64] demonstrated that many offenders commit numerous offenses prior to prosecution or conviction.[65] Additionally, sexual offenders avoid detection approximately twice as often as they are apprehended.[66] These figures are conservative estimates, given the fact that the majority of offenses go unreported, while numerous others go unrecognized by the criminal justice system.[67] Therefore, absent societal intervention, most offenders will continue their activities unimpeded.

The typical pedophile commits his first offense as an adolescent.[68] Pedophiles are likely to continue their illicit activities once commenced.[69] Thus, from a societal perspective, the opportunity for societal intervention at the earliest possible juncture is imperative so as to maximize deterrence. To be an effective deterrent, the punishment must be certain and severe.[70] Retroactive application of the revised statute of limitations maximizes society's opportunities for intervention, and therefore, increases the deterrent effect of criminal punishment. Furthermore, early intervention extirpates the offender from his criminal habitat, protects the child from continued victimization, and terminates the offender's reign of terror.

Critics contend that society has overreacted to the perceived demon, child sexual abuse.[71] Conceivably, this position has merit. However, at either extreme, either over or under reporting, truth seldom resides.[72] Legislatures mandate longer prison sentences for convicted child sexual offenders, while reducing judicial sentencing discretion.[73] Despite these

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62. *See* Groth, Longo, & McFadin, *Undetected Recidivism Among Rapists and Child Molesters*, 28 CRIME AND DELINQ. 450, 451 [hereinafter *Undetected Recidivism*]; *but see* B. KARPAN, THE SEXUAL OFFENDER AND HIS OFFENSES 276-78 (New York 1954).

63. *Undetected Recidivism*, *supra* note 62, at 453.

64. Here, meaning those who experienced a first conviction, and not necessarily their first offense.

65. *Undetected Recidivism*, *supra* note 62, at 453-54. The study's authors interviewed offenders at correctional facilities in Connecticut and Florida. The number of undetected sexual assaults reported by the subjects ranged from 0 through 250. Undetected assaults averaged 4.7, representing the number of different victims molested, rather than the number of sexual contacts. *Id.* Additionally, sexual offenders avoid detection approximately twice as often as they are apprehended.

66. *Id.* at 456.

67. *Id.* at 457.

68. *Id.* at 450.

69. *Id.* at 451.

70. 1 C. TORCIA, supra note 54, § 3.

71. *Protecting Children*, *supra* note 4 at 39.

72. *Id.*

73. *Id.*

perceived overreactions, increased societal cognizance has resulted in the correction of at least one glaring impediment to criminal prosecution of the child sexual abuser, that is, the short statute of limitations period.

III. State Court Approaches To the Interpretation and Application of Legislatively Enlarged Statutes of Limitations for the Criminal Prosecution of Child Sexual Abuse Offenses

Within the criminal context,[74] the courts of six[75] jurisdictions have addressed the issue of the interpretation and application of legislatively enlarged statutes of limitations for child sexual abuse offenses. In interpreting and applying these statutes, the courts have applied a variety of procedures.[76] However, a two-step analysis predominates. First, the court must determine whether the revised statute survives *ex post facto* analysis; then, the court must determine how to interpret and apply the statute.

A. Ex Post Facto Analysis

The United States Constitution expressly prohibits the states from enacting *ex post facto* laws.[77] An *ex post facto* law, to be considered impermissible in the criminal context, "must be retrospective; that is, it must apply to events occurring before its enactment and must disadvantage the offender affected by it."[78] The classic exposition of *ex*

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74. This note is expressly limited to criminal prosecutions for child sex abuse. The statute of limitations is characterized differently within the civil context such that factors including minority or incapacity may apply so as to prevent the running of the statute of limitations until the child attains majority.

75. Those jurisdictions are: Alaska, California, Colorado, Massachusetts, Texas and Washington. A majority of the states have addressed the same issue within the general criminal statute of limitations context. As explained within this note, the state courts have reached diverse results using varied analysis. *See, e.g.*, State v. Paradise, 189 Conn. 356, 456 A.2d 305 (1983) (absent clear legislative intent requiring retroactive application, criminal statute of limitations applied prospectively; court did not determine whether the statute of limitations is procedural or substantive); Rubin v. State, 390 So. 2d 322, 324 (Fla. 1980) (statute of limitations is a substantive right, and so statute of limitations in effect at time of offense is controlling).

76. *Cf.* State v. Creekpaum, 732 P.2d 557 (Alaska Ct. App. 1987), *rev'd*, 753 P.2d 1139 (Alaska 1988) (statute of limitations vests a substantive right; therefore, retroactive application of enlarged period prohibited); Archer v. State, 557 S.W.2d 244 (Tex. Crim. App. 1979) (statute may be applied to all offenses not time-barred); State v. Hodgson, 108 Wash. 2d 662, 740 P.2d 848 (1987) (statute of limitations is procedural; thus, judicial presumption of retroactivity requires retrospective application of revised statute).

77. U.S. Const. art. I, § 10, cl. 1.

78. Weaver v. Graham, 450 U.S. 24, 29 (1981).

post facto laws is found in the seminal case of *Calder v. Bull*,[79] which states:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender.[80]

The *ex post facto* prohibition was intended "to secure substantial personal rights against arbitrary and oppressive legislation, but not to limit legislative control of remedies and modes of procedure which do not affect matters of substance."[81] Thus, although the category of retroactive changes forbidden by the *ex post facto* clause includes more than just the elements and punishment for a crime, the prohibition, as defined in *Calder v. Bull*,[82] arguably does not extend to a retroactive application of the statute of limitations because extension of the statute of limitations performs none of the impermissibles forbidden by the *Calder* decision.

A fundamental issue in determining whether or not retroactive application of an enlarged statute of limitations is barred by the *ex post facto* prohibition is whether the statute of limitations vests substantive rights in the accused, or is merely a procedural barrier. If the statute vests substantive rights, then retroactive application of the statute of limitations should be prohibited by the *ex post facto* clause. If the statute is merely procedural, and vests no substantive rights, the enlarged statute of limitations survives *ex post facto* scrutiny.

In the context of child sexual abuse, few states have determined that statute of limitations vests substative rights in the accused.[83] However, the "substantive vested rights" analysis is important to understanding the "time-barred" approach, and the argument for more expansive retroactive application of enlarged statutes of limitations. One case which illustrates the substantive versus procedural rights analysis, and the vague-

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79. 3 U.S. (1 Dall.) 386 (1798).

80. *Id.* at 390.

81. Beazell v. Ohio, 269 U.S. 167, 170-71 (1925).

82. 3 U.S.(1 Dall.) 386 (1798).

83. *See, e.g.*, People v. Sweet, 207 Cal. App. 3d 78, 84, 254 Cal. Rptr. 567, 571 (1989). Additionally, both Florida and Alabama have held that the statute of limitations is substantive within the general eriminal context.

ness and uncertainty involved in the definition of an *ex post facto* law, is *State v. Creekpaum*.[84] In *Creekpaum* the Alaska Court of Appeals held that a criminal statute of limitations vests a substantive right in the defendant;[85] the Alaska Supreme Court, in overturning the decision, held that the statute of limitations is procedural, and as such, extension prior to the original period's expiration does not violate either the United States or the Alaska Constitution.[86]

The Alaska Court of Appeals determined that to be classified as substantive for purposes of *ex post facto* analysis, a change in the law must merely adversely affect the defendant, and operate so as to place the defendant "at a disadvantage in relation to the substance of the offense charged or the penalties prescribed for that offense."[87] The Alaska Court of Appeals found *Weaver v. Graham*[88] dispositive. In *Weaver*, the United States Supreme Court stated that although the "substantive vested rights" theory[89] is useful for due process analysis, the theory is irrelevant to the question of whether a change is substantive or procedural for *ex post facto* purposes.[90] Critical to *ex post facto* analysis is

> the lack of fair notice and governmental restraint when the legislature increases punishment beyond what is prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.[91]

The court of appeals found that retrospective application of the enlarged limitations period disadvantaged the offender affected by the change and was more onerous than the law in effect at the time of the offense. Thus, the Alaska Court of Appeals held that the *ex post facto* clauses of the federal and Alaska Constitutions prohibit retrospective change in a criminal statute of limitations.[92]

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84. 732 P.2d 557 (Alaska Ct. App. 1987), *rev'd* 753 P.2d 1139 (Alaska 1988).

85. 732 P.2d at 569.

86. 753 P.2d at 1144.

87. *Id.* at 560. *See* Thompson v. Utah, 170 U.S. 343 (1898) ("[A] statute is *ex post facto* which . . . in its relation to the offense or its consequences, alters the situation of the accused to his disadvantage.").

88. 450 U.S. 24 (1981).

89. *See* Falter v. United States, 23 F.2d 420, 425 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928).

90. *Weaver*, 450 U.S. at 29-30.

91. *Id.* at 30-31.

92. State v. Creekpaum, 732 P.2d 557, 568 (Alaska Ct. App. 1987).

After determining that the constitutional prohibition was not limited to retroactive changes in the elements of or punishment for a crime,[93] the court of appeals addressed the issue of whether the criminal statute of limitations vests a substantive right upon the accused.[94] Preliminarily, the court opined that the legislature may not revive an expired statute of limitations.[95] The court then reviewed historical precedents, noting that Alaskan courts had previously held that a civil statute of limitations was substantive, not procedural.[96] Additionally, criminal statutes of limitations had been held to be substantive, but only within other decisional contexts and not for purposes of *ex post facto* analysis.[97] The line dividing "substance and procedure shifts as the context changes . . . [and] implies different variables depending upon the particular problem for which it is used."[98] The *Creekpaum* court recognized that the distinction between a procedural and substantive change "cannot be reduced to a simple formula," but must be determined on a "case-by-case basis."[99] The *Creekpaum* court rejected the argument that the statute of limitations is a mere limitation upon the remedy,[100] instead finding that because the statute of limitations limits the circumstances under which guilt can be found and is intended to preserve the accuracy and basic integrity of the adjudicatory process in criminal procedure, the statute operates as a substantive right for purposes of *ex post facto* analysis.[101] Thus, without directly addressing the issue of legislative intent, the court forbade retroactive application of legislatively enlarged criminal statutes of limitations.[102]

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93. *Creekpaum*, 732 P.2d at 563-64.

94. *Id.* at 564.

95. *Id.* at 560-61. *See also* Falter v. United States, 23 F.2d 420 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928).

> Certainly it is one thing to revive a prosecution already dead, and another to give it a longer lease of life. The question turns upon how much violence is done to our instinctive feelings of justice and fair play. For the state to assure a man that he has become safe from its pursuit, and thereafter to withdraw assurance, seems to most of us unfair and dishonest. But, while the chase is on, it does not shock us to have it extended beyond the time first set, or if it does, the stake forgives it.

Id. at 425-26.

96. *Creekpaum*, 732 P.2d at 566. *See* Nolan v. Sea Airmotive, Inc., 627 P.2d 1035 (Alaska 1981).

97. *See* State v. Frech Funeral Home, 185 N.J. Super 385, 448 A.2d 1037 (1982).

98. Hanna v. Plumer, 380 U.S. 460, 471 (1965). A court may seek to ascertain the differences between substance and procedure in the following contexts: conflict of laws, retrospective application of statutes and law-making. Busik v. Levine, 63 N.J. 351, 364-65, 307 A.2d 571, 578-79 (1973).

99. *Creekpaum*, 732 P.2d at 562.

100. *Id.* at 567.

101. *Id.* at 568.

102. *Id.*

The appellate court premised its decision to classify the statute of limitations as substantive largely upon the belief that, because the enactment of the statute serves notice to the accused of the period for which he must be prepared to defend his act, "basic fairness militates against requiring the accused to defend his acts once the period . . . has expired."[103] Although the decision is laudable for its effort to preserve the rights of the criminally accused, the court failed to consider or address the legislature's intent or the child victim's right to legal redress.

On appeal, the Alaska Supreme Court reversed, holding that criminal statutes of limitations are procedural[104] and as such, extension of the statute prior to the original period's expiration does not violate the United States or Alaska Constitutions.[105] Like both lower courts, the Alaska Supreme Court found *Weaver v. Graham*[106] dispositive.[107] In *Weaver*, the petitioner challenged, on *ex post facto* grounds, a change in Florida's statutory formula for the accrual of good time reductions in prisoners' sentences. The change made accrual of good time reductions more difficult, thus increasing the quantum of punishment suffered by each inmate. The Supreme Court held that the statute violated the *ex post facto* prohibition because it "makes more onerous the punishment for crimes committed before its enactment."[108]

Creekpaum argued that the *Weaver* decision introduced a new analytic approach to *ex post facto* analysis.[109] In place of the vested rights approach,[110] the court should focus upon only two criteria: (1) whether the law was retrospective, and (2) whether the change disadvantaged the offender affected by the change.[111] The Alaska Supreme Court rejected Creekpaum's argument, noting that the *Weaver* decision did not nullify existing *ex post facto* precedent.[112] Instead, the *Creekpaum* court found that the holding in *Weaver* fell within the traditional prohibition announced in *Calder v. Bull*[113] because "it focused on the change in the

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103. *Id.* The court further stated that the statute of limitations defines "the outer limit of delay, beyond which prosecution will not be tolerated, even where the government has exercised good faith in attempting to file . . . and when the accused is incapable of identifying prejudice . . . from the delay." *Id.*

104. State v. Creekpaum, 753 P.2d 1139, 1144 n.13.

105. *Id.* at 1144.

106. 450 U.S. 24 (1981).

107. *Creekpaum*, 753 P.2d at 1140.

108. 450 U.S. at 36.

109. 753 P.2d at 1141.

110. *See* Falter v. United States, 23 F.2d 420, 425 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928).

111. *Creekpaum*, 753 P.2d at 1141.

112. *Id.*

113. 3 U.S. (1 Dall.) 386, 390 (1798).

quantum of punishment Weaver suffered as a result of the new law."[114]

The *Creekpaum* court then applied a two-step test. First the court noted that the revised statute of limitations was explicitly retroactive.[115] Second, the court rejected Creekpaum's argument that the new law was more onerous simply because Creekpaum remained liable for prosecution when he would have been immune under the old statute.[116] The court determined that the extension of the statute of limitations was a mere procedural change[117] and, applying the *Calder v. Bull* test,[118] found that retroactive application did not violate the *ex post facto* clause because the change neither made conduct criminal which was innocent when undertaken, aggravated a crime, permitted more severe punishment than permissible when the crime was committed, nor altered the rules of evidence to permit conviction on different or lesser testimony than permissible when the crime was committed.[119]

B. Analysis of Court's Interpretation and Retroactive Application of Enlarged Statues of Limitation

If the enlarged statute of limitations survives a facial *ex post facto* analysis (i.e., the statute does not vest the defendant with a substantive right), the issue becomes whether the enlarged statute of limitations should be retroactively applied, and if so, whether the application is limited solely to offenses not time-barred as of the statute's effective date. The determinative question is whether prosecution is legally permissible as of the new statute's effective date.

Typically, courts' analysis rests upon what has become a fundamental precept of criminal law, that is, the legislature may not extend the statute of limitations so as to revive an offense already time-barred.[120] However, unless prospective application is expressly mandated, a statute which extends the limitations period applies to all offenses not time-barred as of the statute's effective date, "so that a prosecution may be commenced at any time within the newly established period, although the old period of limitations has then expired."[121] Thus, the principal consideration is

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114. *Creekpaum*, 753 P.2d at 1142.
115. *Id.*
116. *Id.*
117. *Id.* at 1144, n.13.
118. 3 U.S. (1 Dall.) 386, 390 (1798).
119. *Creekpaum*, 753 P.2d at 1143.
120. *See* Falter v. United States, 23 F.2d 420, 425-26 (2d Cir.) *cert. denied* 277 U.S. 590 (1928) Sobiek v. Superior Ct., 28 Cal. App. 3d 846, 850, 106 Cal. Rptr. 516, 519 (1972).
121. Archer v. State, 577 S.W.2d 244. *See* Hill v. State, 146 Tex. Crim. 333, 171 S.W.2d 880 (1943). Thus, the principal consideration is whether the accused had acquired a vested right to avoid prosecution as of the new statute's effective date.

whether the accused had acquired a vested right to avoid prosecution as of the new statute's effective date.[122] Traditionally, the new statute will be applied only where the accused does not own a vested right to avoid prosecution.[123] However, legislative intent, the doctrine of strict construction, and judicial presumptions may limit the statute's application. Generally, courts refuse to apply the statute to those defendants against whom the right to prosecute has expired prior to legislative extension, regardless of legislative intent.[124]

In discerning legislative intent as to the statute's retroactive application, courts use three different approaches. In the first approach, the revised statute applies prospectively in the absence of manifest legislative intent to the contrary.[125] In the second approach, the revised statute applies retrospectively in the absence of manifest legislative intent to the contrary.[126] Finally, where legislative intent is unclear, the courts apply the statute either prospectively or retrospectively, depending upon judicial presumptions and the judiciary's perception of legislative intent.[127]

In the first approach, the revised statute applies prospectively in the absence of manifest legislative intent to the contrary. The bare determination that there is no *ex post facto* barrier to retroactive application does not, without clear legislative intent, permit retroactive application.[128] Clear legislative intent is necessary because, as a general rule, changes

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122. *See, e.g.*, Archer v. State, 577 S.W.2d 244 (Tex. Crim. App. 1979); Hill v. State, 146 Tex. Crim. 333, 171 S.W.2d 880 (1943).

123. *Sobiek*, 28 Cal. App. 3d at 850, 106 Cal. Rptr. at 519.

124. The majority opinion did not address Legislative intent in either Texas case. In People v. Smith, 171 Cal. App. 3d 997, 217 Cal. Rptr. 634 (1985), the court addressed the issue of legislative intent, citing People v. Smith, 161 Cal. App. 3d 1053, 208 Cal. Rptr. 318 (1984) for the proposition that the revised statute may be retroactively applied without express legislative intent. This proposition is premised on the existence of established precedents permitting application of extended limitations periods to crimes committed before the enactments and a legislative awareness of the court's existing judicial precedents. Thus, the judiciary may infer that the legislature enacted the statute with the knowledge and purpose that the revised statute would apply to all cases not time-barred. A presumption of prospectivity "is to be applied only after, considering all pertinent factors, it is determined that it is impossible to ascertain the legislative intent." *Smith*, 171 Cal. App. 3d at 1003, 217 Cal. Rptr. at 637.

125. *See, e.g.*, People v. Whitesell, 729 P.2d 985 (Colo. 1986); People v. Midgley, 714 P.2d 902 (Colo. 1986); People v. Holland, 708 P.2d 119 (Colo. 1985).

126. *See, e.g.*, State v. Hodgson, 44 Wash. App. 592, 722 P.2d 1336 (1986), *aff'd in part, rev'd in part, remanded in part*, 108 Wash. 2d 662, 740 P.2d 848 (1987).

127. *See, e.g.*, Commonwealth v. Pellegrino, 402 Mass. 1003, 524 N.E.2d 835 (1988); Tigges v. Commonwealth, 402 Mass. 1003, 524 N.E.2d 834 (1988); Commonwealth v. Bargeron, 402 Mass. 589, 524 N.E.2d 829 (1988).

128. *Holland*, 708 P.2d at 120. *See also* United States v. Richardson, 512 F.2d 105 (3d Cir. 1975); State v. Paradise, 189 Conn. 346, 456 A.2d 305 (Conn. 1983).

in criminal statutes operate prospectively.[129] This presumption of prospectivity is premised upon several maxims fundamental to criminal law. A cardinal rule of statutory interpretation requires criminal statutes to be strictly construed in favor of the accused[130] and against the government.[131] Second, criminal limitations statutes are interpreted liberally in favor of repose.[132] However, despite the existence of these two maxims, it is commonly held that the words of a statute should be given their fair meaning,[133] and the statute interpreted in relation to the entire enactment purpose.[134]

A desire to protect the rights of the accused against disadvantageous procedural changes which could result in abuse or attainder may underlie the presumption for prospectivity.[135] Today, however, statutes of limitations are more likely to be liberally rather than strictly construed,[136] and as a result, the presumption for prospectivity should carry less weight. Where there is a presumption of prospective application, the court may apply the presumption in the absence of clear legislative intent to the contrary.

By rotely applying a presumption for prospective application, this approach fails to address the victim's right of legal redress. Although the presumption for prospectivity may have valid application where both

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129. *See* State v. Jones, 132 Conn. 682, 685, 47 A.2d 185, 187 (1946); Yates v. General Motors Acceptance Corp., 356 Mass. 529, 531, 254 N.E.2d 785, 786 (1969).

130. *Holland*, 708 P.2d at 120. *See also* United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 94-95 (1820)

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. . . . The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially, in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.

See 1 C. Torcia, *supra* note 54, § 12.

131. United States v. Emmons, 410 U.S. 396, 411 (1973) ("this being a criminal statute, it must be strictly construd, and any abiguity must be resolved in favor of lenity.").

132. United States v. Scharton, 285 U.S. 518, 522 (1932); Waters v. United States, 328 F.2d 729, 742 (10th Cir. 1965).

133. Singer v. United States, 323 U.S. 338 (1945).

134. 1 C. Torcia, *supra* note 54, § 12.

135. *See* Munzer, *A Theory of Retroactive Legislation*, 61 Tex. L. Rev. 425, 464-65 (1982). The author suggests that retroactive changes in the statute of limitations are impermissible because the changes carry a risk of abuse and attainder and also because the changes are "unlikely to meet the special burden of justification applicable to all retroactive laws affecting personal liberties." *Id.*

136. E. Crawford, The Construction of Statutes § 349 (1940).

victim and accused are of majority, and are equally competent to protect their own rights, this presumption overcompensates for the accused's perceived disadvantages within the criminal justice system and awards the accused a decided advantage at the expense of the minor victim. This is because prospective application guards against disadvantageous procedural changes which operate to the detriment of the accused, but prevents the victim, an individual who is often unaware of his rights or powerless to protect them, from exercising his right to redress.[137]

The second approach mandates retroactive application of the revised statute in the absence of manifest legislative intent to the contrary.[138] In *State v. Hodgson*,[139] the Washington Court of Appeals, although recognizing that penal statutes are to be strictly construed in favor of the accused, stated that the strict construction doctrine should not be rotely applied, but instead, the judiciary should examine the rationale behind the doctrine to determine proper classification and application of the revised limitations statute.[140] The strict construction doctrine applies to penal statutes because "it is unjust to convict a person without clear notice to him that (1) his contemplated conduct is unlawful, and (2) certain penalties will attach to that conduct."[141] The effect of strict construction is to raise a judicial presumption of prospectivity.[142] However, where a statute relates to practice, procedures or remedies and does not affect a substantive or vested right, Washington courts reverse the presumption, and apply a general rule whereby procedural statutes are presumed to apply retroactively.[143] Therefore, to determine which presumption is applicable, a court must determine whether the statute of limitations operates as a substantive right or merely performs a procedural function.[144] The *Hodgson* court, however, rejected a strict substantive-procedural classification, finding that labeling the statute of limitations as one or the other tends to obscure rather than clarify the law.[145] The court therefore undertook to classify the statute of limitations based upon definition and function rather than mere label.[146]

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137. *See supra* notes 24-56 and accompanying text.

138. *See, e.g.*, State v. Hodgson, 44 Wash. App. 592, 722 P.2d 1336 (1986), *aff'd in part, rev'd in part*, and *remanded in part*, 108 Wash. 2d 662, 740 P.2d 848 (1987).

139. *Id.*

140. *Hodgson*, 44 Wash. App. at 602, 722 P.2d at 1342.

141. *Id. See* Commonwealth v. Broughton, 257 Pa. Super. 369, 377, 390 A.2d 1282, 1286 (1978).

142. *Hodgson*, 44 Wash. App. at 602, 722 P.2d at 1342.

143. *Id. See* Johnston v. Beneficial Management Corp., 85 Wash. 2d 637, 641, 538 P.2d 510, 514 (1975).

144. *Hodgson*, 44 Wash. App. at 602, 722 P.2d at 1342.

145. *Id.*

146. *Id.*

Emphasizing the fact that statutes of limitations are subject to the will of the legislature,[147] the *Hodgson* court found that retroactive application did not impair vested or substantial rights, provided however, that the offense was not time-barred as of the statute's effective date.[148] This is so because "the statute is a mere regulation of the remedy, subject to legislative control, and does not become a vested right until the offense becomes time-barred."[149]

Because the statute of limitations approximates a procedural remedy rather than a substantive right, the *Hodgson* court determined that retroactive application did not violate the *ex post facto* clause. Applying the equivalent of the *Calder v. Bull* test,[150] the court permitted retroactive application because increasing the limitation period neither aggravated the crime, increased the punishment nor permitted the accused to be convicted under rules permitting "lesser" testimony.[151] In the absence of contrary legislative intent, the presumption of retroactivity applies to the revised limitations statute.[152] Thus, because the statute of limitations is not substantive, the *ex post facto* clause permits retroactive application of the enlarged limitations period in accordance with the judicial presumption of retroactive application.

The *Hodgson* court recognized the policy considerations underlying the legislature's extension of the limitations period.[153] Although failing to cite the policy considerations as a factor in the decision permitting retroactive application, the court at least recognized the legislature's intentions in extending the statute.[154] Thus, although not premising a decision for retroactive application upon policy considerations, the court

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147. *Id.* The court characterized statutes of limitations as "matters of legislative grace . . . [and] a surrendering by the sovereign of its right to prosecute." *Id.*

148. *Id.* Therefore, until the right to a dismissal is absolutely vested, the legislature may change or repeal the limitations period. *Id. See also* Waters v. United States, 328 F.2d 739, 743 (10th Cir. 1964); Clements v. United States, 266 F.2d 397, 399 (9th Cir.), *cert. denied*, 359 U.S. 985 (1959); Falter v. United States, 23 F.2d 420, 425 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928).

149. *Hodgson*, 108 Wash. 2d at 668, 740 P.2d at 851.

150. *See supra* text accompanying note 80; Calder v. Bull, 3 U.S. (1 Dall.) 386, 390 (1798).

151. *Hodgson*, 108 Wash. 2d at 669, 740 P.2d at 852.

152. *Id.*

153. *Id.* at 665, 740 P.2d at 850. The court, citing the legislature's final reports, noted that the limitations period was extended based upon experience showing that victims of child abuse, due to fear, lack of understanding or manipulation by the offender, often fail to report the abuse within the shorter limitations period. Although failing to cite the policy considerations as a factor in the decision permitting retroactive application, the court at least recognized the legislature's intentions in extending the statute.

154. *Id.* at 666, 740 P.2d at 850.

nonetheless adopted a position which maximizes the protection of the child abuse victim.

In the final approach, the legislature's intent is not manifestly expressed, and as a result, the court resorts to judicial presumptions and the judiciary's perception of legislative intent to determine the revised statute's application.

The mere fact that the legislature extends the statute of limitations may support a presumption for retroactive application.[155] Where the legislature fails to clearly express an intention as to the application of the revised statute, a court may look to the various steps in the enactment process to resolve any ambiguity.[156] In *Commonwealth v. Bargeron*, the Massachusetts Supreme Court applied a two-step test to determine whether the revised limitations statute could be retroactively applied.[157] Noting that retroactive statutes are not *per se* unconstitutional,[158] the court applied the *Calder v. Bull* test,[159] determining that extension of the statute merely extends the time in which the government may prosecute, and as such, extension did not violate the *ex post facto* prohibition.[160] The court noted the absence of any express language evidencing the legislature's intent for retroactive application.[161] The court noted however, that the omission did not foreclose retrospective application.[162] Retroactive statutes are unconstitutional only when, on a balancing of opposing considerations, the statute is unreasonable.[163] A court may consider "the precise evil which is targeted in legislation under review."[164] The intent of the legislature, ascertained "from all the words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the

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155. *See, e.g.*, Commonwealth v. Bargeron, 402 Mass. 589, 524 N.E.2d 829 (1988).

156. Commonwealth v. Collett, 387 Mass. 424, 433, 439 N.E.2d 1223, 1229 (1982).

157. *Bargeron*, 402 Mass. at 590, 524 N.E.2d at 830. Although the defendant was not charged with sexual abuse of a minor, the court's reasoning was applied to two other cases decided on the same date, both of which involved child sex abuse charges and application of the revised limitations period.

158. League v. Texas, 184 U.S. 156, 161 (1902).

159. *See supra* text accompanying note 80; Calder v. Bull, 3 U.S. (1 Dall.) 386, 390 (1798).

160. *Bargeron*, 402 Mass. at 591, 524 N.E.2d at 830.

161. *Id.* at 592-93, 524 N.E.2d at 831.

162. *Id.* at 592, 524 N.E.2d at 831. *See* Commonwealth v. Greenberg, 339 Mass. 557, 578-79, 160 N.E.2d 181, 195 (1959).

163. *See* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14-20 (1976); American Mfrs. Mut. Ins. Co. v. Commissioner of Ins., 374 Mass. 181, 189-90, 372 N.E.2d 520, 525 (1978).

164. *Bargeron*, 402 Mass. at 593, 524 N.E.2d at 832. *See* Commonwealth v. Collett, 387 Mass. 424, 432, 439 N.E.2d 1223, 1228-29 (1982).

purpose of its framers may be effectuated,"[165] determines the reasonableness of retroactive application and the legislature's intent. Thus, the court in *Bargeron* held there was no constitutional or statutory barrier to retroactive application of the revised statute.[166]

The court in *Bargeron* concluded that the mere extension of the limitations period for child sex abuse offenses furnished adequate indication of the legislature's intention to permit retroactive application of the revised statute.[167] The court reasoned that the Massachusetts legislature, recognizing the delays associated with a child's report of sexual abuse, may have sought to accommodate such delays by extending the limitations period.[168] The court, lauding the legislature for addressing the child sexual abuse issue, determined that "it is not reasonable to assume that the Legislature intended to delay the application of the new . . . statute of limitations which would eventuate if the amendment applied only to crimes occurring after its enactment."[169] Thus, the court reasoned that retroactive application best reflected the legislature's intentions in passing the revised statute. Moreover, the court buttressed the decision in favor of retroactive application by noting that the statute of limitations is procedural, and as such, the judicial presumption of retroactivity which applies to non-substantive rights permits retroactive application.[170] Thus, although the legislature omitted language requiring retroactive application, the court found sufficient basis to permit retrospective application through the use of a judicial presumption for retroactivity, and the mere act of the legislature extending the limitations period.

IV. The Proposal: A Uniform Approach to the Interpretation and Application of a Revised Limitations Statute

Where the legislature acts to extend the criminal statute of limitations for child sex abuse offenses, strong policy considerations compel a presumption of retroactivity, absent manifest legislative intent to the contrary. This Note proposes that courts adopt an approach which realistically balances the needs of both offender and victim in light of the victim's inability to effectively protect his or her legal rights. Further, this Note suggests that retroactive application of an enlarged statute of limitations does not violate the *ex post facto* prohibition, even if applied

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165. Hanlon v. Rollins, 286 Mass. 444, 447, 190 N.E. 606, 608 (1934).
166. *Bargeron*, 402 Mass. at 594, 524 N.E.2d at 832.
167. *Id.* at 591-94, 524 N.E.2d at 831-32.
168. *Id.* at 593, 524 N.E.2d at 831-32.
169. *Id.* at 594, 524 N.E.2d at 832.
170. *Id.*

to offenses "time-barred" at the extension date. The difficulty of child victims in obtaining legal redress, the need to afford the child victim a day in court, and the need to prevent offenders from escaping prosecution, collectively compel the application of a judicial presumption of retroactivity. Moreover, the mere fact that the legislature has addressed the issue by extending the statute of limitations may be construed as intending retroactive application.[171]

A. Uniform Approach: A Presumption of Retroactivity

Retroactive application of a legislatively enlarged criminal limitations period does not violate the constitutional prohibition against *ex post facto* laws. The majority of jurisdictions addressing the issue held that, for purposes of *ex post facto* analysis, the statute of limitations is procedural.[172] The statute of limitations, in criminal contexts, is an act of legislative grace[173] and a surrendering of the sovereign's right to prosecute.[174] At common law, criminal limitations periods were nonexistent.[175] The statute of limitations is clearly a reflection of public will and a matter of grace at least until such time as the limitations period expires.[176] In *Chase Securities Corp. v. Donaldson*,[177] the Supreme Court expounded upon the origin and application of statutes of limitations, stating that:

> [s]tatutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from

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171. *See Bargeron*, 402 Mass. 589, 524 N.E.2d 829 (1988). "[I]t is not reasonable to assume that the Legislature intended to delay the application of the new ten-year statute of limitations which would eventuate if the amendment applied only to crimes occurring after its enactment." *Id.* at 593, 524 N.E.2d at 832.

172. *See, e.g.*, United States ex rel. Massarella v. Elrod, 682 F.2d 688, 689 (7th Cir.), *cert. denied*, 460 U.S. 1037 (1982); Clements v. United States, 266 F.2d 397, 399 (9th Cir.), *cert. denied*, 359 U.S. 985 (1959); Falter v. United States, 23 F.2d 420, 425-26 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928); State v. Ferrie, 243 La. 416, 144 So. 2d 380 (1962); State v. Merolla, 686 P.2d 244 (Nev. 1984); Rose v. State, 716 S.W.2d 162, 163 (Tex.App. 1986). *But see, e.g.*, Stoner v. State, 418 So. 2d 171, 178 (Ala. Crim. App. 1982) (statute of limitations in criminal context vests substantive right); Rubin v. State, 390 So. 2d 322 (Fla. 1980) (statute of limitations vests substantive right in criminal context).

173. State v. Hodgson, 108 Wash. 2d 662, 667, 740 P.2d 848, 851 (1987).

174. *Id.*

175. 1 C. TORCIA, *supra* note 54, § 90.

176. *See* Falter v. United States, 23 F.2d 420, 425 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928).

177. 325 U.S. 304 (1945).

> being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the [a]voidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.[178]

However, mere categorization of the statute of limitations as substantive or procedural sidesteps the central question of the enlarged limitations period's effect.[179] Instead, courts should look to the nature and function of criminal statutes of limitations.[180] *Ex post facto* laws, as pronounced in *Calder v. Bull*,[181] are those laws which (1) make an act criminal which was innocent when done; (2) aggravate a crime or make it greater than when committed; (3) increase the punishment; or (4) alter the rules of evidence and require lesser or different evidence to convict than that required at the time of the offense.[182] The statute of limitations' extension performs none of these impermissibles. The statute's extension merely extends the time in which prosecution is permissible. As such, the legislature presumably could free an offense of any limitations period or could provide for successive extensions of finite periods.[183] However, statutes should not be given a construction which destroys or impairs a vested right.[184] Obviously, when the legislature extends the statutory period prior to the expiration of the original period, the accused has not obtained a vested right to be free from prosecution. If expressly directed, the legislature may even apply the extended lim-

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178. *Id.* at 314 (citation omitted).

179. *Hodgson*, 108 Wash. 2d 662, 667, 740 P.2d 848, 851 (1987). *See also* State v. Frech Funeral Home, 185 N.J. Super 385, 389-90, 448 A.2d 1037, 1039 (quoting Busik v. Levine, 63 N.J. 351, 364, 307 A.2d 571, 578 (1973) ("it is simplistic to assume that all law is divided neatly between 'substance' and 'procedure.' A rule of procedure may have an impact upon the substantive result and be no less a rule of procedure on that account. . . .").

180. *Hodgson*, 108 Wash. 2d at 667, 740 P.2d at 851.

181. 3 U.S. (1 Dall.) 386 (1798).

182. *Id.* at 390.

183. People v. Smith, 171 Cal. App. 3d 997, 1003, 217 Cal. Rptr. 634, 637 (1985).

184. E. CRAWFORD, *supra* note 136, § 278.

itations period to revive "time-barred" claims.[185] The extension therefore, does not divest the accused of a vested right. Thus, neither the *Calder ex post facto* test, nor the vested rights theory prohibit retroactive application of the enlarged period.

The strict construction doctrine is frequently utilized as a judicial procedure, limiting retroactive application unless clearly required by express language or necessary implication.[186] Strict construction of penal statutes is favored because the legislature owes the citizenry a duty to clearly state those acts for the commission of which a citizen may lose his life or liberty.[187] Although the citizenry may rely upon existing elemental definitions or proof requirements,[188] the accused cannot reasonably develop a reliance or expectation as to the time limit for prosecution. Even if developed, is there any societal interest to be served by protecting the reliance? When the accused has committed all of the elements of an offense, the statute of limitations functions only to restrain prosecution within legislatively prescribed temporal limits. Logic rejects the argument that altering the statute of limitations affects the expectations of the citizenry as to the lawfulness of their conduct. At most, only the perpetrator develops a reliance upon the statute of limitations, purposefully evading detection until the legislatively prescribed period expires. Numerous jurisdictions recognize this phenomena and by statute, prevent the tolling of the limitations period during the period when the accused is out of state or beyond the sovereign's jurisdiction.[189]

The statute of limitations serves as a buffer, preventing the expenditure of judicial resources where logically, evidentiary items such as testimony and documents, have disappeared, grown stale, or been destroyed, and can no longer perform the necessary evidentiary function.[190] Thus, at worst, extension or elimination of the limitations bar results in reduced judicial efficiency by forcing the court to determine the validity of a prosecution, rather than rotely applying the limitations period to bar the same. Granted, the accused must be protected from the retroactive application of a definitional alteration of the criminal

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185. *See infra* notes 195-246 and accompanying text.

186. Kopczynski v. County of Camden, 2 N.J. 419, 424, 66 A.2d 882, 884 (1949) "[w]ords in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intent of the Legislature cannot otherwise be satisfied."); N. SINGER, SUTHERLAND STAT. CONSTRUCTION § 41.04 (4th Ed. 1986).

187. N. SINGER, *supra* note 186, § 59.03.

188. For a discussion of the citizen's reliance interest and the need to protect such interests, *see* Note, *Retroactive Application Of Statutes: Protection Of Reliance Interests*, 40 ME. L. REV. 183 (1988).

189. 1 C. TORCIA, *supra* note 54, § 94.

190. *See* United States v. Kubrick, 444 U.S. 111, 117 (1979).

elements.[191] However, retroactive application of the enlarged statutory period does not prevent the citizenry from making everyday decisions with reasonable certainty, and does not alter the definition of unlawful conduct.

The strict construction doctrine provides that penal statutes should not apply retroactively without clear notice that one's contemplated conduct is unlawful and that certain penalties will attach.[192] The strict construction doctrine is not an impediment to retroactive application of a legislatively enlarged statute of limitations because retroactive application of the enlarged period neither affects the definition nor the penalty for the crime.[193] Moreover, retroactive application does not breach *ex post facto* prohibitions because extending the period prior to prosecution neither aggravates the crime, increases the punishment nor alters the rules of legal testimony necessary for conviction.[194] Thus, there are no constitutional or doctrinal barriers to retroactive application of a legislatively-enlarged limitations period.

B. Reviving Time-Barred Claims

Courts which permit retroactive application of an enlarged criminal limitations period deny application to offenses "time-barred" at the extension.[195] However, revival of a time-barred offense does not offend *ex post facto* prohibitions. The *ex post facto* prohibition has long been confined to the criminal context[196] but has never been defined with great clarity. Instead, vague notions of "justice and fair play"[197] are used to support judicial restraints on perceived *ex post facto* legislation. Courts suggest that a right, if either "substantial" or "vested," may not be altered after the fact.[198]

Nineteenth century treatise writers like Judge Cooley first coined the notion of "substantial rights."[199] Cooley opined that legislatures may

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191. Alteration of the definitional elements of the crime is a classic example of *ex post facto* legislation and would be prohibited.

192. Commonwealth v. Broughton, 257 Pa. Super. 369, 377, 390 A.2d 1282, 1286 (1978).

193. State v. Hodgson, 44 Wash. App. 592, 603, 722 P.2d 1336, 1342 (1986) *aff'd in part, rev'd in part*, and *remanded in part*, 108 Wash. 2d 662, 740 P.2d 848 (1987).

194. *See* United States ex rel. Massarella v. Elrod, 682 F.2d 688 (7th Cir. 1982), *cert. denied*, 460 U.S. 1037 (1983).

195. *See, e.g.*, People v. Smith, 171 Cal. App. 3d 997, 217 Cal. Rptr. 634 (1985); State v. Hodgson, 108 Wash. 2d 662, 740 P.2d 848 (1987).

196. *See* Note *Ex Post Facto Limitations on Legislative Power*, 73 MICH. L. REV. 1491, 1492 n.4 (1975) [hereinafter *Ex Post Facto Limitations*].

197. *See* Falter v. United States, 23 F.2d 420, 425-26 (2d. Cir.), *cert. denied*, 277 U.S. 590 (1928).

198. *See, e.g.*, Kring v. Missouri, 107 U.S. 221, 232 (1882).

199. *See* T. COOLEY, CONSTITUTIONAL LIMITATIONS 272 (1868).

prescribe different forms of criminal procedure but may not dispense with any substantial protections which existing criminal law affords the accused.[200] This vague notion of a substantial right "vested" in the defendant, unlawfully taken away by legislative change, formed the foundation for the Supreme Court's decision in *Kring v. Missouri*.[201] *Ex post facto* analysis and the propriety of retroactive application require consideration of three factors: reliance, legislative function, and potential for legislative abuse.[202] *Ex post facto* legislation is objectionable because purportedly, citizens rely upon the law currently in effect to shape their conduct. Certainly, this premise is supportable with respect to the elements of a crime. However, few alleged criminals know the law, much less rely on it.[203] Certainly, ignorance of the law will not excuse conduct in violation of current statutes.[204] Reliance should be protected only if reasonable. If an individual commits a crime, the mere passage of time should not endow the individual with a vested right to escape punishment for the alleged wrong. An alleged defendant can not reasonably rely upon the statute of limitations to shelter his wrongful conduct, and society owes him no such guarantee.

Ex post facto laws are also undesirable because they fail to serve their primary purpose, deterrence.[205] This concept of *ex post facto* laws assumes that criminal legislation is promulgated primarily for deterrent effect. However, statutes of limitations are mere procedural limitations and purport to serve no deterrent purpose. The statute of limitations has no measurable impact on allegedly criminal behavior, neither encouraging nor deterring such conduct.

Finally, *ex post facto* laws are objectionable because they represent a potential for legislative abuse.[206] No legislative vindictiveness exists where the legislature extends the statute of limitations, unless directed principally to one individual. Unlike the enactment of legislation directed specifically toward a single individual or group, extension of child sexual abuse limitation periods neither suggests nor represents an abuse of legislative process.

In the civil context, courts have upheld the legislature's power to revive time-barred actions.[207] In *Chase Securities Corp. v. Donaldson*,[208]

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200. *Id.*

201. 107 U.S. 221, 232 (1882).

202. *Ex Post Facto Limitations*, *supra* note 196, at 1497-1501.

203. *Id.* at 1497.

204. *See, e.g.*, United States v. Casson, 434 F.2d 415, 422 (D.C. Cir. 1970).

205. *Ex Post Facto Limitations*, *supra* note 196, at 1498.

206. *Id.* at 1500-01.

207. *See, e.g.*, Chase Sec. Corp. v. Donaldson, 325 U.S. 304 (1945); Campbell v. Holt, 115 U.S. 620 (1885); Liebig v. Superior Court, 209 Cal. App. 3d 828, 257 Cal. Rptr. 574 (1989).

208. 325 U.S. 304 (1945).

the Supreme Court ruled that revival of a personal cause of action, where the lapse of time did not vest the party with title to real or personal property, did not offend the fourteenth amendment.[209] Statutes of limitations are arbitrary, and their shelter has never been recognized as a fundamental right.[210] Furthermore, statutes of limitations are measures of legislative grace, subject to legislative control.[211] "[S]tatutes of limitation go to matters of remedy, not to destruction of fundamental rights."[212]

In *Campbell v. Holt*,[213] the progeny of *Chase Securities*, the Supreme Court found that the right to defeat a debt by the statute of limitations was not a vested right, and the legislature's determination that time shall be no bar did not violate any right.[214] Man has no "*property* in the bar of the statute as a defense to his promise to pay."[215] "It is no natural right, . . . but the creation of conventional law."[216] No right is destroyed when the law restores a remedy which has been lost.[217]

Similarly, logic suggests that revival of the statute of limitations in the criminal context violates no constitutional barriers. The majority of jurisdictions have found the statute of limitations to be procedural, not substantive.[218] However, courts have suggested that the defendant acquires a right not to be prosecuted when the statute expires.[219] Supposedly, the defendant's full liberty has been restored in a manner analogous to the acquisition of property through adverse possession.[220] The distinction between extension and revival in the criminal context can only be justified on the premise that only when a right to prosecute is revived does an act which could not have been punished without the statute become punishable.[221] Such reasoning begs the question and only tortures an initially weak definition of the *ex post facto* prohibition.[222]

If the statute of limitations were classified as substantive, a prohibition against revival would mold a consistent, though improper, train

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209. *Id.* at 311-12.
210. *Id.* at 314.
211. *Id.*
212. *Id.*
213. 115 U.S. 620 (1885).
214. *Id.* at 628.
215. *Id.* at 629.
216. *Id.* The court noted that the phrase "vested rights" is not found in the Constitution. *Id.* at 628. The Court's opinion suggests that the *ex post facto* prohibition was designed principally to protect constitutionally guaranteed rights. *Id.* at 629.
217. *Id.*
218. *See supra* note 172.
219. *See supra* notes 120 through 170 and accompanying text.
220. *See Ex Post Facto Limitations*, *supra* note 196, at 1512 n.78.
221. *Id.*
222. *Id.*

of logic. If the statute of limitations is initially substantive, then the *ex post facto* prohibition should prevent retroactive application, and revival is impossible from the onset. However, as noted, classification of the statute of limitations as substantive is arbitrary and decidedly improper.

The majority of jurisdictions classify the statute of limitations as procedural.[223] However, magically, courts hold that, upon expiration of the right to prosecute, the statute of limitations vests the defendant with a substantive right. How can a purely procedural device suddenly bestow upon the defendant a substantive right? An example will expose the inconsistent and illogical nature of the reasoning. Assume the existence of a two year statute of limitations. X commits a crime on December 30, 1984. Y commits a crime on January 1, 1985. On December 31, 1986, the legislature abolishes the statute of limitations and decrees retroactive application. The time-barred theory would hold that X could not be prosecuted while Y could.[224] Why should X have a substantive right to avoid prosecution while Y does not, when within a two day time span, both committed the same offense? Either the statute of limitations is procedural or substantive, but it is no chameleon! Weak justifications couched in terms of offending "our instinctive feelings of justice and fair play"[225] explain little and do not justify the transformation.

If the courts are attempting to protect the defendant's reliance on the statute of limitations which existed at the time the crime was committed, then the *ex post facto* prohibition should prohibit not only revival, but extension as well. In *Kring v. Missouri*,[226] the Supreme Court concluded that the *ex post facto* prohibition should apply to all changes enhancing the position of the state in criminal trials at the expense of the defendant.[227] However, in *Thompson v. Utah*,[228] the Supreme Court narrowed the application of the *Kring*, concluding that changes in criminal procedure could be, but are not necessarily, *ex post facto*.[229] The Court held that the defendant had a right to a twelve person jury trial at the time of his offense and that right could not be taken from him at a second trial.[230] The logical implication of the decision is that rights vest

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223. *See supra* note 172.

224. The substantive rights theory would hold that the revised statute could not apply retroactively.

225. *See* Falter v. United States, 23 F.2d 420, 426 (2d Cir.), *cert. denied*, 277 U.S. 590 (1928).

226. 107 U.S. 221 (1882).

227. *Id.* at 232.

228. 170 U.S. 343 (1898).

229. *Id.* at 352.

230. *Id.*

in the defendant upon the commission of the offense. However, subsequent Supreme Court decisions suggest that the decision in *Thompson* did not limit the power of the legislature to make changes in "non-constitutional" procedural rights.[231] The determination whether a non-constitutional right could be a "substantial right" was left unresolved.[232]

If, as suggested by the *Thompson* decision, the *ex post facto* prohibition is designed to protect constitutional rights and not non-constitutional rights,[233] then clearly the defendant's right to avoid prosecution cannot rise to the level of a constitutionally guaranteed right. Assuming the *ex post facto* prohibition is designed to protect the defendant's reliance interest, the defendant is in effect alleging he acted on the premise that the prosecution would face certain obstacles which were subsequently removed. Thus, the interest the defendant wants elevated to the level of a constitutionally guaranteed right is a dubious interest in avoiding prosecution after committing a criminal offense.[234]

Revival of a cause of action is an extreme exercise of legislative power[235] and should be done only in rare circumstances. Some procedural rules should not be applied retroactively.[236] Ideally, a court should balance the state's public policy and interest in prosecution against the defendant's right to a technical defense. Rather than a prophylactic rule against retroactive application, revival should be permitted unless the rule was widely relied upon, the revised rule cannot serve its purpose if retroactively applied, or a vindictive legislative motive pervades.[237]

In *Liebig v. Superior Court of Napa County*,[238] the California Court of Appeals permitted the revival of plaintiff's time-barred tort action for sexual molestation against her grandfather.[239] Holding that "vested

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231. *See, e.g.*, Beazell v. Ohio, 269 U.S. 167 (1925) (upholding change permitting judicial discretion in granting separate trials); Mallett v. North Carolina, 181 U.S. 589 (1901) (upheld statute permitting state to appeal grant of new trial); Thompson v. Missouri, 171 U.S. 380 (1898) (defendant had no vested right in rule of evidence prior to passage of Missouri statute).

232. *Beazell*, 269 U.S. at 171. The court noted that "[j]ust what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree." *Id.*

233. For example, the prohibition may protect constitutionally guaranteed rights such as the right to a jury trial in a criminal proceeding.

234. *Ex Post Facto Limitations*, *supra* note 149, at 1513.

235. People v. Robinson, 140 Ill. App. 3d 29, _____, 487 N.E.2d 1264, 1266 (1986); Hopkins v. Lincoln Trust Co., 233 N.Y. 213, 213, 135 N.E. 267, 267 (1922).

236. For example, those rules upon which the defendant may reasonably rely, and which directly shape his conduct. For example, the interspousal testimonial privilege.

237. *See Ex Post Facto Limitations*, *supra* note 149, at 1513-16.

238. 208 Cal. App. 3d 828, 257 Cal. Rptr. 574 (1989).

239. *Id.* at _____, 257 Cal. Rptr. at 578.

rights'' are not immune from retroactive laws where an important state interest is at stake, the court found that maximizing, for as expansive a period of time as possible, the sexual abuse claims of minor plaintiffs was an overriding state interest.[240] Similarly, in the criminal context, the state's interest in prosecuting and punishing child sexual abusers overrides defendant's interest in freedom from prosecution and permits the revival of time-barred actions. In *Chase Securities Corp. v. Donaldson*,[241] the Supreme Court noted that a multitude of cases have recognized the power of the legislature to call a liability into being where there was none before, if the circumstances were such as to appeal with some strength to the prevailing views of justice and if the obstacle in the way of the creation seemed small.[242] Thus, where the state interest is great, the legislature may revive a time-barred action. However, revival should not be presumed and should only be permitted where the legislature expressly prescribes such application.

Courts frequently rely on the Fourteenth Amendment of the United States Constitution[243] to forbid revival of a time barred claim.[244] However, the Supreme Court in both *Campbell v. Holt*,[245] and *Chase Securities Corp. v. Donaldson*[246] determined that revival of an action not vesting a real or personal property right does not offend the fourteenth amendment. How can an alleged defendant obtain a vested right to be free from prosecution when he commits an act criminal at the time of performance? To justify this conclusion for the reason that the defendant's act could not have been punished but for the statute ignores logic, escapes reason and is but an exercise in semantic circumlocution. The state's interest in prosecuting child sex abusers overrides any ''vested substantial right'' the defendant may have acquired.

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240. *Id.*

241. 325 U.S. 304 (1945).

242. *Id.* at 315.

243. The amendment provides in pertinent part that, ''nor shall any State deprive any person of life, liberty, or property, without due process of law. . .'' U.S. CONST. amend. XIV, § 1.

244. *See, e.g.*, Board of Education v. Blodgett, 155 Ill. 441, 40 N.E. 1025 (1895); Sanchez v. Access. Associates, 179 Ill. App. 3d 961, 535 N.E.2d 27 (1989); Markley v. Kavanagh, 140 Ill. App. 3d 737, 489 N.E.2d 384 (1986).

245. 115 U.S. 620 (1885).

246. 325 U.S. 304 (1945).

V. Conclusion

Children have been described as the largest indigent class on earth.[247] Children are uniquely unable to protect their own rights.[248] Given this inability to protect their own rights, it is imperative that we, as a society, endeavor to protect those who are unable to protect themselves. It is the mark of a civilized society. Statutes of limitations safeguard the accused against stale claims by discouraging victims from sleeping on their rights. Although child sex abuse victims may have a moral obligation to report the offense in a timely manner, the public derives no benefit by shielding the offender from prosecution while simultaneously penalizing the victim for his or her inability to report the offense. The offender should not be permitted to control his destiny by allowing him to manipulate the victim, impeding reporting and preventing prosecution. Certainly, neither logic nor public policy require that society maintain a helpless, silent vigil, permitting the child sexual abuser to avoid prosecution by unlawfully detaining his victim, thus preventing the victim's report and the state's prosecution of the offense. Yet, stringent application of the statute of limitations inflicts a similar injustice upon the child sex abuse victim.

The child victim, subject to unique reporting impediments, deserves an opportunity for legal redress. Child sexual abusers must be deterred and punished. Retroactive application of legislatively enlarged statutes of limitations accomplishes each of these desirable objectives. The mere extension of the limitations period, when mated with legislative purpose, supports a presumption for retroactive application. Given the minor's decided disadvantage in knowledge, power and resources, fairness demands that the child victim be given every opportunity for legal redress. Thus, absent manifest legislative intent to the contrary, the needs of society and the child sexual abuse victim are best served by retroactive application of the enlarged limitations period, and where expressly decreed, the revised limitations period may be applied to revive a time-barred claim.

Thomas G. Burroughs

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247. Bross & Munson, *Alternative Models of Legal Representation for Children*, 5 Okla. City U.L. Rev. 561, 565 (1989).

248. For example, many states provide that children under the age of ten are presumptively incompetent to testify. States also vary as to the threshold below which a child is deemed automatically incompetent to testify. *See e.g.*, Kellum v. State, 396 A.2d 166 (Del. 1978) (3 years old); State v. Thrasher, 223 Kan. 1016, 666 P.2d 772 (1983) (4 years old).

"A Modest Proposal"—The Prohibition of All-Adult Communities by the Fair Housing Amendments Act of 1988

I. Introduction

The traditional American dream of owning a home is slowly fading. Zoning regulations and other local ordinances complicate new housing construction and convey an "anti-growth" attitude which discourages building.[1] This trend, combined with an increase in two-career families and a decrease in the number of families having children or having children later in life,[2] increases the demand for the available rental housing.[3] As the demand for rental housing intensifies, new legal issues emerge. One issue which has received a great amount of attention in recent years is familial discrimination. This discrimination occurs when apartment complex owners entirely exclude children (the "all-adult" apartment communities) or they only accept children with limitations.[4]

Familial discrimination appeals to apartment complex owners for many reasons. Many adults who choose not to have children, or wait longer to have children, wish to live in a child-free environment. Therefore, apartment complex owners can charge higher prices for all-adult communities. Lower insurance and maintenance costs for all-adult communities also induce owners to exclude children.[5]

Severe rental housing shortages faced by families with children in some areas of the country[6] have prompted judicial decisions[7] or legislation[8]

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1. R. Goetze, Rescuing the American Dream 41 (1983). In many of the older urban areas, the occupants of two out of three households reside in rental housing.

2. *Id.*

3. *See generally* A. Downs, Rental Housing in the 1980's 1-4 (1983).

4. R. Marans & M. Colten, Measuring Restrictive Rental Practices Affecting Families with Children: A National Survey 22 (1980). Restrictions on children include limits on the age of children allowed in rental units (*e.g.*, excluding children under the age of 12), and on the number or location of children (*e.g.*, only one child per apartment or children restricted to specific buildings). *Id.*

5. *Id.* at 54-67.

6. *See* D. Ashford & P. Eston, The Extent and Effects of Discrimination Against Children in Rental Housing: A Study of Five California Cities 6 (1979) (This study showed 53 percent of the apartment complexes in Fresno, California, 65 percent in San Diego, California, and 70 percent in San Jose, California excluded children. Note these statistics were compiled before California passed legislation prohibiting familial discrimination); *Landlord Discrimination Against Children: Possible Solutions to a Housing Crisis*, 11 Loy. L.A.L. Rev. 609, 612 (1978) (Statistics indicate 60-80 percent of the apartment units in Los Angeles, California exclude children while the vacancy rate was

prohibiting familial discrimination as the basis for denying rental housing occupancy. However, familial rights advocates criticize the various state nondiscrimination provisions for allowing limited familial discrimination, for being poorly drafted, and for providing only limited administrative remedies.[9] Familial rights advocates assert judicial decisions are inadequate due to the time and expense required to maintain a private cause of action.[10]

A few plaintiffs have sought federal protection from child-exclusionary policies under the Fair Housing Act[11] or under constitutional protection of the right to privacy or equal protection.[12] However, it is difficult for a plaintiff to maintain a cause of action under the Fair Housing Act[13] because the plaintiff must show the child-exclusionary policies have a "racially-disparate impact"[14] or that there has been state action, a prerequisite for litigation alleging violations of the constitutional

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2.5 to 3.5 percent); *Sixty Minutes* (CBS television broadcast, January 22, 1978) (Dan Rather stated that families with children in southern California experienced the greatest hardship locating rental housing. Dora Ashford reported only 20 percent of the apartment complexes in Santa Monica, California did not exclude children).

7. *See generally* Marina Point, Ltd. v. Wolfson, 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496 (1982) (Richardson, J., dissenting), *cert. denied*, 459 U.S. 858 (1982).

8. *See generally* N.J. STAT. ANN. § 2A: 42-101 (West 1952 & Supp. 1987). This section provides:

> No person, firm or corporation or any agent, officer or employee thereof shall refuse to rent or lease any house or apartment to another person because his family includes children under 14 years of age or shall make an agreement, rental or lease of any house or apartment which provides that the agreement, rental or lease shall be rendered null and void upon the birth of a child. This section shall not apply to any State or Federally financed or assisted housing project constructed for occupancy by senior citizens or to any property located in a retirement subdivision as defined in the "Retirement Community Full Disclosure Act" (P.L. 1969, c.215; C.45:22A-1) or to any owner-occupied house containing not more than two dwelling units.

9. *Fair Housing Amendments Act, 1987: Hearings on H.R. 1158 Before the Subcomm. on Civil and Constitutional Rights of the House of Representatives Comm. on the Judiciary*, 100th Cong., 1st Sess. 398-99 (1987) [hereinafter *Hearings*] (statement of James B. Morales, Staff Atty., Nat'l Center for Youth Law). Some statutes allow discrimination against children over the age of 14. *Id.* Others are poorly drafted because they may allow subtle forms of discrimination by charging high security deposits for families with children or by placing familial discrimination statutes in sections apart from the civil rights areas, and not providing victims with all the remedies available for civil rights violations. *Id.*

10. Walsh, *The Necessity for Shelter: States Must Prohibit Discrimination Against Children in Housing*, 15 FORDHAM URB. L. J. 481, 518 (1987).

11. Betsey v. Turtle Creek Assoc., 736 F.2d 983 (4th Cir. 1984).

12. Halet v. Wend Inv. Co., 672 F.2d 1305 (9th Cir. 1982).

13. 42 U.S.C. § 3608 (1982).

14. *Betsey*, at 986.

rights to privacy or Equal Protection.[15] These contentions are difficult to prove because they require statistics reflecting a greater impact on minorities or that the action was performed under color of state law.[16]

In response to the assertion that "[f]amilies with children are facing a housing crisis,"[17] President Reagan signed the Fair Housing Amendments Act of 1988[18] into law on September 13 of that year. This Act amends the Civil Rights Act of 1968[19] by expanding the classes receiving protection[20] and revising the procedures for enforcement of fair housing practices.[21] The 1988 Amendments[22] prohibit discrimination in the sale

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15. *Hearings*, *supra* note 9, at 402 (testimony of James B. Morales, Staff Atty., Nat'l Center for Youth Law).

16. *Id.*

17. *Hearings*, *supra* note 9, at 680 (testimony of Hon. Don Edwards, Chairman, Subcomm. on Civil and Constitutional Rights, Comm. on the Judiciary).

18. Pub. L. No. 100-430, 102 Stat. 1619-1636 (1988).

19. 42 U.S.C. §§ 3601-3619 (1982).

20. 42 U.S.C. § 3604 (1982) provides protection for persons discriminated against on the basis of race, color, religion, sex or national origin. The Fair Housing Act as amended by Pub. L. No. 100-430, 102 Stat. 1622 (1988) now provides in pertinent part:

> It shall be unlawful-
>
> (a) To refuse to sell or rent, after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, handicap, familial status, or national origin.
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, handicap, familial status, or national origin.
>
> (c) To make, print, or publish or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.
>
> (d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.
>
> (e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status or national origin.

21. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1625-35 (1988). This amends the enforcement procedure by allowing hearings before administrative law judges, or for a cause of action to be filed by the Attorney General or by a private person.

22. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1622 (1988).

or rental of a dwelling based on familial status[23] unless the dwelling is located in a retirement community.[24] The retirement community exception recognizes the fact that elderly persons have a greater need to live in a child-free environment.[25]

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23. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1622 (1988) provides in pertinent part:

> "Familial Status" means one or more individuals (who have not attained the age of 18 years) being domiciled with -
> (1) a parent or another person having legal custody of such individual or individuals; or
> (2) the designee of such parent or other person having such custody, with the written permission of such parent or other person.
> The protections afforded against discrimination on the basis of familial status shall apply to any person who is pregnant or is in the process of securing legal custody of any individual who has not attained the age of 18 years.

24. Fair Housing Amendments Act of 1988, Pub. L. 100-430, 102 Stat. 1623 (1988) provides:

> (b)(1) Nothing in this title limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Nor does any provision in this title regarding familial status apply with respect to housing for older persons.
> (2) As used in this section, "housing for older persons" means housing -
> (A) provided under any State or Federal program that the Secretary determines is specifically designed and operated to assist elderly persons (as defined in the State or Federal program); or
> (B) intended for, and solely occupied by, persons 62 years of age or older; or
> (C) intended and operated for occupancy by at least one person 55 years of age or older per unit. In determining whether housing qualifies as housing for older persons under this subsection, the Secretary shall develop regulations which require at least the following factors:
> (i) the existence of significant facilities and services specifically designed to meet the physical or social needs of older persons, or if the provision of such facilities and services is not practicable, that such housing is necessary to provide important housing opportunities for older persons; and
> (ii) that at least 80 percent of the units are occupied by at least one person 55 years of age or older per unit; and
> (iii) the publication of, and adherence to, policies and procedures which demonstrate an intent by the owner or manager to provide housing for persons 55 years of age or older.
> (3) Housing shall not fail to meet the requirements for housing for older persons by reason of:
> (A) persons residing in such housing as of the date of enactment of this Act who do not meet the age requirements of subsection 2(B) or (C): *Provided*, That new occupants of such housing meet the age requirements of subsections 2(B) or (C); or
> (B) unoccupied units: *Provided*, That such units are reserved for occupancy by persons who meet the age requirements of subsections (2)(B) or (C).

25. *Fair Housing Amendments Act: Hearings on H.R. 4119 Before the Subcomm. on Civil and Constitutional Rights of the House of Representatives Comm. on the Judiciary*, 99th Cong., 2nd Sess. 62 (1986) (testimony of Hon. Hamilton Fish, Jr.).

Familial discrimination has not been limited to apartment complexes. It has also surfaced in mobile home parks[26] and condominiums.[27] However, this Note will focus on familial discrimination in apartment complexes because this constitutes the majority of familial discrimination occurrences.[28] The Note will examine the scope of the problems resulting from familial discrimination through available statistics, state legislation, and judicial decisions. Further, this Note will discuss the impact of the 1988 Act and address valid arguments against such broad sweeping legislation and the relief, or lack thereof, the Act will provide to families with children.

Finally, this Note will suggest alternatives to the broad sweeping policies of the Act. These alternatives would provide relief from extensive child-exclusionary policies which plague some areas of the country without totally prohibiting all-adult apartment communities.

II. Background

Familial rights advocates have denounced child-exclusionary policies as causing rental housing shortages for families with children.[29] These policies generated such a controversy that President Reagan signed legislation prohibiting all-adult apartment communities, unless they are designated as retirement communities, on September 13, 1988.[30] However, no statistics demonstrating the actual number of families with children affected by exclusionary policies exist to support this drastic measure.[31]

A. Changes in Rental Housing

The 1980's witnessed an increased inability to purchase homes.[32] This is due to higher real capital costs,[33] higher interest rates,[34] and a decrease in the construction of new homes due to high financing costs,[35] labor

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26. *See* Schmidt v. Superior Court, 43 Cal. 3d 1060, 742 P.2d 209, 240 Cal. Rptr. 160 (1987).

27. *See* Ritchey v. Villa Neuva Condo. Ass'n, 81 Cal. App. 3d 688, 146 Cal. Rptr. 695 (1978); White Egret Condo, Inc. v. Franklin, 379 So. 2d 346 (Fla. 1980).

28. *Exclusion of Families With Children From Housing*, 18 J.L. Reform 1121, 1122 (1985).

29. *See Hearings*, *supra* note 9.

30. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619-36 (1988).

31. The study completed by the University of Michigan Institute for Social Research is the only comprehensive study available.

32. A. Downs, *supra* note 3, at 60-61.

33. *Id.*

34. *Id.*

35. R. Goetze, *supra* note 1, at 36.

regulations,[36] zoning constraints,[37] and complex permit requirements.[38] Therefore, a greater number of people will be residing in rental housing.[39]

Yet, the supply of available rental units will not be able to meet this demand. The 1988 Statistical Abstract of the United States reported an overall vacancy rate of 5.0 percent for 1981; this rate increased gradually to 6.5 percent in 1985 and 7.2 percent in 1986.[40] However, in certain areas of the country, the problem is more intense. For example, there are serious housing shortages in some urban areas (e.g., Chicago and Manhattan)[41] and in the nation's sunbelt areas.[42] Part of this problem results from the fact that California, Texas and Florida (the sunbelt areas) together accounted for 53 percent of the population growth between 1980 and 1986.[43]

The inability of the supply of rental housing to meet the demand is attributable to many factors. Rental receipts are inadequate to meet construction and operating costs, making new apartment construction economically impractical.[44] Between 1970 and 1973 construction began on 871,000 multifamily units; this number decreased to 458,000 units annually from 1974 to 1980.[45] Additionally, many apartments are converted to condominiums each year so the owner can escape continued operating costs and receive a more immediate return on his investment.[46]

The proportion of households consisting of a married couple with children under the age of eighteen has decreased by thirteen percent since 1970.[47] Many of the adults who choose not to have children wish to live in a child-free environment and willingly pay extra for this luxury.[48]

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36. *Id.*

37. *Id.*

38. *Id.*

39. Between 1970 and 1979 the number of persons occupying rental housing increased by approximately 3.5 million persons. A. Downs, *supra* note 3, at 73 n.1. It is noted that the 1980's will see an increase of 4.2 million rental households. This translates to an increase of 424,000 rental households per year. *Id.* at 7.

40. U.S. Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States, 165 (108 ed. 1988).

41. A. Downs, *supra* note 3, at 42 n.34.

42. *See* D. Ashford & P. Eston, *supra* note 6; R. Goetze, *supra* note 1, at ix.

43. U.S. Dept. of Commerce, Bureau of the Census, State Population and Household Estimates, With Age, Sex, and Components of Change 1981-86 1 (Series P. 25, No. 1010, 1987).

44. A. Downs, *supra* note 3, at 40.

45. *Id.*

46. *Id.* at 40-41, n.30. The conversion of rental housing into condominiums has a lesser effect on rental supply and demand because many persons purchasing condominium units are former tenants.

47. U.S. Dept. of Commerce, Bureau of the Census, Household and Family Characteristics: March 1987 1 (Series P-20, No. 424. 1988).

48. *See generally* R. Marans & M. Colten, *supra* note 4.

Families without children are generally two-career couples who, because they do not have to bear the expense of raising a family, can afford to spend a greater portion of their income on rent. Landlords who saw a way to exclude children (whom they perceive as costlier tenants), and possibly to charge a premium for such rental housing, introduced the concept of all-adult or restricted apartment communities.[49] All-adult apartment communities totally prohibit anyone under the age of eighteen from living in the rental units.[50] Restricted communities accept children with limitations on possibly one of the following: age, the number of children, or the location of children within the complex.[51] Recent public outcry from familial rights advocates concerning child-exclusionary policies resulted in the passage of the Fair Housing Amendments Act of 1988,[52] which prohibits familial discrimination in the rental housing market.[53]

B. Problems Generated by Child-Exclusionary Policies

No comprehensive statistics exist which reflect the actual number of families affected nationwide by familial discrimination. The University of Michigan Institute for Social Research (the ISR Study) completed the most comprehensive study on the subject.[54] However, the authors of the study noted that it did not constitute a complete measure of the problem:

> These studies were prepared in growing communities where the rental housing market was tight and the problems for families with children particularly noticeable and salient. While the data strongly suggest that exclusionary policies may be an obstacle for many families with children in specific locations, no data are available on the extent to which this is a nationwide phenomenon.[55]

Thus, one needs to examine available statistics, case law, and legislative actions to put child-exclusionary policies into perspective.

1. Statistical Analysis of Familial Discrimination Practices.—The 1980 Census reported that 68 million people reside in rental housing.[56] Of

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49. *Id.*
50. *Id.*
51. *Id.*
52. Pub. L. No. 100-430, 102 Stat. 1619-1636 (1988).
53. *Id.*
54. R. MARANS & M. COLTEN, *supra* note 4.
55. *Id.* at 3.
56. U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS, 1980 CENSUS OF HOUSING, CHARACTERISTICS OF HOUSING UNITS, GENERAL HOUSING CHARACTERISTICS, PART A 1-59 (1983).

the rental units, over two-thirds, 67.6 percent, have no residents under the age of eighteen;[57] over one-half of these renters are under age thirty-five.[58]

The study conducted by the Institute for Social Research found that approximately one in four rental units nationwide are located in all-adult communities.[59] However, when the figures are adjusted to reflect exceptions made by apartment managers, the number of apartments excluding children falls to one in five.[60] The study further found that 50 percent of the units analyzed accepted children with limitations.[61] These limitations included policies limiting the number of children allowed depending on the size of the unit, policies limiting the children over or under a specific age, restrictions on children of the opposite sex sharing bedrooms, and policies separating families with children from those without children, either by floor or by building.[62]

At first glance, 75 percent of apartment units nationwide appear to either totally exclude children or accept them with limitations.[63] However, the figures must be put into perspective. First, some managers of apartment complexes reported exclusionary policies, but stated they had exceptions;[64] therefore, the proportion of exclusionary or restrictive policies is actually lower. Additionally, efficiencies which do not have a separate bedroom and one-bedroom apartments comprise the largest percentage of units which have exclusionary policies.[65] Alternatively, only 2.1 percent of three or more bedroom units have policies excluding children.[66]

2. Effect of Familial Discrimination on Minorities and Low Income Families.—If familial discriminatory policies are merely a smoke screen to enforce what is truly a racial discrimination policy, the excluded tenants have a cause of action under the Fair Housing Act of 1968.[67] A 1980 study suggests child-exclusionary policies are actually racially discriminatory policies reporting:

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57. R. Marans & M. Colten, *supra* note 4, at 12, Table III-1.

58. *Id.* at 5. This statistic shows that these renters do not qualify for residence in retirement communities. *Id.*

59. *Id.* at ES-2.

60. *Id.*

61. *Id.* at 27, Table IV-3.

62. *Id.* at nn.3-6.

63. *Id.* at Table IV-3.

64. *Id.* at 70.

65. *Id.* at 27, Table IV-5. 35.5 percent of efficiencies have exclusionary policies; 41.5 percent of one-bedroom apartments exclude children. *Id.*

66. *Id.* Two bedroom apartments do comprise the largest percentage of the various sized units which place restrictions on the children who are accepted. These restrictions usually limit the number of children allowed (56 percent) or do not allow children of the opposite sex to occupy the same bedroom (24.9 percent). *Id.*

67. 42 U.S.C. § 3604(a), (b) (1982).

> Even when controlling for income, there is a statistically significant difference between the percentage of minorities, who experienced serious housing problems due to no-children policies, and the percentage among their white counterparts. Undoubtedly this difference is due in part to racial discrimination, which housing studies have found to exist in the rental market. What is not known is the extent to which no-children policies are used as a smoke screen for racial discrimination.[68]

Alternatively, the ISR study states: "Among those who rent, female-headed households and minority groups are no more likely to suffer from no-children policies in the rental market than other groups."[69] The discrepancies between the two surveys can be explained in part by differing methodology.[70] Additionally, the ISR study reflected that the higher percentage of minorities reporting problems relating to child-exclusionary policies can be explained in part by the fact that minority group tenants are more likely to have children in the household than their white counterparts.[71] This study further suggested that the problems experienced by minority tenants correlate to the price of housing which is available in the various units to which they normally have access.[72]

Further, both studies discovered lower income families feel the effect of child-exclusionary policies to a much greater extent than do middle to higher income families.[73] The ISR study reports low income families with children experience more frustration when attempting to locate

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68. J. GREENE & G. BLAKE, HOW RESTRICTIVE RENTAL PRACTICES AFFECT FAMILIES WITH CHILDREN 30-31 (1980).

69. R. MARANS & M. COLTEN, *supra* note 4, at ES-2.

70. The Greene study and the ISR study utilized very different methods of obtaining their respective sampling groups. The Greene Study aired public service announcements on television and radio stations in six metropolitan areas. These announcements invited persons who had experienced or were experiencing difficulties in finding rental housing to call and tell of their experiences. The study reached only those persons who had experienced difficulties and was concentrated in urban areas where the problems are more intense. Nor did the Greene Study survey people who had not experienced difficulties to have an unbiased comparison group. J. GREENE & G. BLAKE, *supra* note 68, at 1. On the other hand, the ISR study was conducted by the use of randomly generated telephone numbers to gather a sample of tenants, the sample of managers was obtained by questioning the tenants who were part of the survey. R. MARANS & M. COLTEN, *supra* note 4, at 5.

71. R. MARANS & M. COLTEN, *supra* note 4, at 12, Table II-I.

72. *Id.* at 5.

73. J. GREENE & G. BLAKE, *supra* note 68, at 10, Table II. The study found 65.4 percent of the respondents reporting income fell below the $15,000 annual income level. The number of respondents above the $30,000 annual income level was 4 percent. The highest percentage group (26.2 percent) fell between an annual income level of $5,000 and $9,999. *Id.*

rental housing and were more likely to settle for housing below their expected standard.[74] This study further stated:

> While there is no discernible relationship between monthly rents and the presence or absence of no-children policies, the higher rent units are more likely to be found in buildings or complexes which limit children by age and location. . . . The likelihood of age and location limitations occurring increases as the monthly rent increases. Moreover, the likelihood that two bedroom rentals in apartment buildings or complexes renting for more than $200 prohibit families with children is roughly twice as great as comparably-sized units renting for $200 or less.[75]

Part of the reason low income families cannot find rental housing can be attributed to rent escalation rather than child-exclusionary policies. Although rental prices did not rise as quickly as the consumer price index from 1960 to 1981,[76] this trend has reversed and from July 1981 to December 1982, the consumer price index showed that the component for residential rent rose faster than the overall index.[77] Rental prices reportedly are now increasing at a faster rate than tenant income.[78] Therefore, the majority of nonsubsidized housing is merely beyond the reach of low income families with children.

In summary, no one has undertaken a comprehensive study which presents an accurate portrayal of the problems caused by familial dis-

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74. R. MARANS & M. COLTEN, *supra* note 4, at 72. The group experiencing the most difficult problems were those families who have at least three children and fall into the lower income range. *Id.*

75. *Id.* at 40.

76. A. DOWNS, *supra* note 3, at 3-4 (1983).

> [R]esidential rents did not increase as fast as consumer income, operating costs, or construction costs. This was true even after correction for substantial underestimation of rental costs by the consumer price index. The best available estimate is that real rent levels *fell* about 8.4 percent from 1960 to 1981, or roughly 4.2 percent each decade.

Id.

77. *Id.* at 133 n.3. In addition, beginning in about 1961 the Federal Government instituted programs designed to attract private developers into the low income housing market. The private developers were required to make a twenty or forty year commitment to the project. The developers are able to take low income housing off the market or convert it into high rental housing if they defaulted or prepaid their mortgage after their commitment period expired. Many developers have either defaulted or have prepaid their mortgage and, therefore, have removed their property from the low income market. The number of low income units removed from the low income housing market is projected to peak in the 1990's. NATIONAL LOW INCOME HOUSING PRESERVATION COMMISSION, PREVENTING THE DISAPPEARANCE OF LOW INCOME HOUSING, 1-6 (1988).

78. *Why Johnny Can't Rent-An Examination of Laws Prohibiting Discrimination Against Families in Rental Housing*, 94 HARV. L. REV. 1829, 1832 n.7 (1981).

crimination. The statistics which are available show that serious problems exist in the urban and sunbelt areas of the nation where there is a need for antidiscrimination measures.[79] There is no comprehensive data available for the less densely populated areas of the nation. Data shows that lower income families with children are more adversely affected by exclusionary policies. However, this can only be due to the unavailability of low income housing, and raising of rental rates which put many rental units beyond the reach of low income families with children regardless of child-exclusionary policies. However, when the national picture of problems arising from familial discriminatory policies is put into perspective, the Fair Housing Amendments Act of 1988[80] is much too broad and will not provide relief for those who need it most: lower income families with children.

3. Judicial Decisions.—Tenants denied rental housing or evicted from rental housing because of their race, color, religion, sex, or national origin have been provided protection under the Fair Housing Act[81] since 1968. Prior to the 1988 Amendments, tenants showing denial or eviction premised on familial discrimination, but related to a protected class, had a cause of action under the Fair Housing Act.

This was accomplished in *Betsey v. Turtle Creek Assoc.*[82] In *Betsey*, the apartment owner instituted an all-adult policy in a complex which housed mainly black families with children.[83] The tenants filed suit alleging violation of the Fair Housing Act[84] and presented statistics showing the conversion would have an immediate "disproportionate impact on the black tenants."[85] The Fourth Circuit held that a plaintiff presents a *prima facie* case of racial discrimination under the Fair Housing Amendments Act of 1968 if he can show that the denial of or eviction from rental housing "was motivated by a racially discriminating purpose or because it is shown to have a disproportionate adverse impact on minorities."[86] The court found both elements present and stated a "continuing disproportionate impact" on blacks was not required.[87]

Betsey represents the first case striking down racial discrimination disguised as familial discrimination and was the first case of its type decided under the Fair Housing Act. Although this case sets favorable

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79. *See supra* note 6 and accompanying text.
80. Pub. L. No. 100-430, 102 Stat. 1619-36 (1988).
81. 42 U.S.C. § 3604 (1982).
82. 736 F.2d 983 (4th Cir. 1984).
83. *Id.*
84. 42 U.S.C. § 3604 (1982).
85. *Betsey*, 736 F.2d at 986.
86. *Id.* at 987.
87. *Id.* at 986.

precedent for minority families with children who can show a disparate impact against them as minorities, it offers little or no relief for caucasian families with children who experience discrimination in the rental housing market.

Another case in which the plaintiff sought relief from child-exclusionary policies under the Fair Housing Act is the 1982 case of *Halet v. Wend Investment Co.*[88] The caucasian plaintiff in *Halet* was denied rental housing because he had a child who would be living in the unit. Although the district court dismissed the case on other grounds, the Ninth Circuit held the plaintiff had standing to challenge racial discrimination under the Fair Housing Act. The court stated:

> The Supreme Court . . . held that a plaintiff who has suffered an actual injury is permitted to prove that the rights of another are infringed. Here, Halet claims that he was denied an apartment because of a policy that allegedly infringes on the rights of Blacks and Hispanics. Under *Gladstone* this is sufficient to support Halet's standing under the Act.[89]

Although the Fair Housing Act *may* provide relief to victims of familial discrimination, plaintiffs often have difficulty proving the requisite discriminatory intent. In *Metropolitan Housing Development Corp. v. Village of Arlington Heights*,[90] the Seventh Circuit stated:

> [A] requirement that the plaintiff prove discriminatory intent before relief can be granted under the statute is often a burden that is impossible to satisfy. . . . [A] strict focus on intent permits racial discrimination to go unpunished in the absence of evidence of overt bigotry.[91]

In addition to invoking the Fair Housing Act, plaintiffs have sought protection under the fourteenth amendment which provides that every United States citizen is entitled to equal protection and due process of the laws[92] or under Section 1983 of the Civil Rights Act.[93] Only recently

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88. 672 F.2d 1305 (9th Cir. 1982).
89. *Id.* at 1309 (citation omitted).
90. 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).
91. *Id.* at 1285.
92. U.S. CONST. amend. XIV, § 1. The Due Process Clause 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 or immunities of citizens of the United States; nor shall any State deprive any

have cases alleging familial discrimination met with any success under the latter of these two federal provisions.[94]

The fourteenth amendment of the Constitution sets forth that no person shall be denied equal protection of the law by any state.[95] The Equal Protection Clause "governs all governmental actions which classify individuals for different benefits or burdens under the law,"[96] and requires that "individuals be treated in a manner similar to others as an independent constitutional guarantee."[97] The Equal Protection Clause does not invalidate the government's ability to classify people, "but it does guarantee that those classifications will not be based upon impermissible criteria or arbitrarily used to burden a group of individuals."[98]

There are three standards of review which the Court may utilize when analyzing equal protection issues.[99] If the class involved is one that the Supreme Court has termed an "insular minority" or a "suspect class," the case is subject to strict scrutiny.[100] If a case involves a suspect class, the practice involved will be invalidated unless it can be shown "that it is pursuing a 'compelling' or 'overriding' end—one whose value is so great that it justifies the limitations of fundamental constitutional

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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.

93. 42 U.S.C. § 1983 (1982). Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

94. *See* Halet v. Wend Inv. Co., 672 F.2d 1305 (9th Cir. 1982).

95. U.S. CONST. amend. XIV, § 1.

96. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 14.1 (3d ed. 1986). *See also* Lehr v. Robertson, 463 U.S. 250 (1983); Harris v. McRae, 448 U.S. 297, *reh'g denied*, 448 U.S. 917 (1980).

97. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 96, at § 14.1.

98. *Id.*

99. *Id.* at § 14.3.

100. *Id. See also* United States v. Carolene Products Co., 304 U.S. 144 (1938); Yick Wo v. Hopkins, 118 U.S. 356 (1886). The other types of review are the rational relationship test and the intermediate test. Under the rational relationship test, the court only looks to determine if the classification involved "bears a rational relationship to an end of government which is not prohibited by the Constitution." J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 96, at § 14.3. The intermediate test falls between the strict scrutiny and the rational relationship test. The intermediate test does not invoke the strong presumption of constitutionality present under the rational relationship test but allows the government to utilize the classification if it is a reasonable way to achieve a substantial government end and not an arbitrary classification. The intermediate test has been used with gender-based classes and illegitimacy cases. *Id.*

values."[101] To date, the suspect classes do not include one based on familial status.[102] Since families with children are not a suspect class, a familial discrimination cause of action will not be successful under the Equal Protection Clause of the fourteenth amendment[103] unless it can be shown the discriminatory practice involved is racial discrimination disguised as familial discrimination. A plaintiff may be better able to assert a cause of action under the Due Process Clause of the fourteenth amendment. In *Moore v. City of East Cleveland*,[104] the Supreme Court struck down an ordinance prohibiting extended family members from living together.[105] The Court, quoting *Cleveland Board of Education v. Lafleur*,[106] stated "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[107] The *Moore* case can be distinguished from familial discrimination cases because the ordinance involved did not merely ban the family in question from the rental unit, it completely prohibited the family from living together and subjected them to criminal penalties if they did.[108] However, the *Halet* court adopted this view and held:

> Family life, in particular the right of family members to live together, is part of the fundamental right of privacy. . . . The ordinance in *Moore* prohibited a household from including certain extended family members. The policy in this case prohibits a household from including immediate family members—that is children. A fundamental right is even more clearly involved here because the rental policy infringes the choice of parents to live with their children rather than the choice of more distant relations. . . . A fundamental right to be free from state intrusion in decisions concerning family relationships in the nuclear family has been clearly recognized.[109]

Under this theory, the court reversed the dismissal of Halet's claim and remanded it to the district court to determine whether a "genuinely

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101. J. Nowak, R. Rotunda & J. Young, *supra* note 96, § 14.3.

102. *See, e.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (alienage is a suspect class); Loving v. Virginia, 388 U.S. 1 (1967) (race is a protected class); Hernandez v. State, 347 U.S. 475 (1954) (national origin is a suspect class).

103. Halet v. Wend Inv. Co., 672 F.2d 1305, 1309 (1982).

104. 431 U.S. 494 (1987).

105. *Id.*

106. 414 U.S. 632 (1974).

107. Moore v. City of E. Cleveland, 431 U.S. at 499 (quoting Cleveland Bd. of Educ. v. Lafleur, 414 U.S. 632, 639-40 (1974)).

108. *Id.*

109. Halet v. Wend Inv. Co., 672 F.2d 1305, 1311 (1982).

significant deprivation"[110] of a fundamental right had taken place, and if so whether the child-exclusionary policy could stand up to the strict scrutiny test.[111] These same arguments sustained Halet's claim of deprivation of rights under Section 1983 of the Civil Rights Act.[112]

Although a plaintiff alleging familial discrimination may show a Section 1983 or fourteenth amendment deprivation of rights, there is yet another obstacle to overcome. To maintain a Section 1983 action, the plaintiff must show the injury was rendered under color of state law.[113] A plaintiff must show state involvement to have a successful fourteenth amendment due process cause of action.[114] Essentially, an action under color of state law and state action are the same.[115] Halet alleged he could present evidence of sufficient state action in his particular case and, therefore, the court directed the district court to grant Halet leave to amend his complaint to include such allegations.[116] On remand the district court found for Halet, awarding him attorney fees and costs.[117]

However, many plaintiffs will not be able to show such state involvement because most apartment complex owners have little contact with the state. This was the result in *Langley v. Monumental Corp.*,[118] where the district court held that there was not sufficient state action when a county ordinance permits familial discrimination.[119] The court

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110. *Id.* (quoting Hawaii Boating Ass'n v. Water Transp. Facilities Div., 651 F.2d 661, 664-65 (9th Cir. 1981)).

111. *Halet*, 672 F.2d at 1311.

112. *Id.* at 1309.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 1310. Specifically, Mr. Halet alleged the following state involvement:

(1) the County owns the land leased to Wend [landlord] for the apartment complex;
(2) the County acquired and prepared the land using federal and state funds and used federal services in dredging the harbor in the redevelopment area;
(3) the purchase of land was part of a large redevelopment program;
(4) the County leased the land to Wend for the benefit of the public in providing housing;
(5) the lease prohibits race or religious discrimination;
(6) the County oversees the development of the area and the design of the buildings and had final approval of all plans;
(7) the County controls the use and purpose of the apartment and the rent charged;
(8) Wend pays a percentage of the rentals to the County; and
(9) Wend must abide by all the conditions of the lease.

Id.

117. *Familial Discrimination in Rental Housing: The Halet Decision*, 28 St. Louis U.L.J. 1085, 1090 n.36 (1984).

118. 496 F. Supp. 1144 (D. Md. 1980).

119. *Id.* at 1150.

further stated that invocation of judicial eviction proceedings by the apartment owner would be sufficient to sustain the state action requirement.[120] Thus, the *Halet* decision offers only a small portion of familial discrimination victims relief under the fourteenth amendment Due Process Clause[121] or under Section 1983 of the Civil Rights Act.[122]

Many plaintiffs seeking relief from child-exclusionary polices have pursued a cause of action at the state level.[123] One of the earliest state cases involving familial discrimination is the 1946 case of *Lamont Building Co. v. Court*.[124] In *Lamont*, the tenants rented an apartment with full knowledge of the adults-only policy and with full knowledge that the wife was pregnant. When the child was born and began residing in the apartment, the apartment owner advised the tenants the child must be removed from the apartment or the family would have to vacate the premises. Upon the tenants' refusal to leave, the owner filed an action in forcible entry and detainer.[125] The Ohio Supreme Court enforced the adults-only provision stating the owner of the realty may impose conditions on its occupancy so long as the conditions do not contravene public policy.[126] The court further held the child-exclusionary policy was not injurious to the public.[127]

A California Court of Appeals reached a similar result in *Flowers v. John Burnham & Co.*[128] In *Flowers*, the court upheld the validity of a landlord's policy limiting child tenants to girls of all ages and boys under five, finding the policy was not unconstitutionally discriminatory and, therefore, it did not violate California's Unruh Act which guarantees equal protection.[129] The Court found the Unruh Act prevents arbitrary discrimination; however, the court held the policy in question was not

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120. *Id.* at 1150-51.

121. U.S. CONST. amend. XIV, § 1.

122. 42 U.S.C. § 3604 (1982).

123. *See generally* Marina Point, Ltd. v. Wolfson, 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496 (Richardson, J., dissenting), *cert. denied*, 459 U.S. 858 (1982); Flowers v. John Burnham & Co., 21 Cal. App. 3d 700, 98 Cal. Rptr. 644 (1972).

124. 147 Ohio St. 183, 70 N.E.2d 447 (1946) (Bell, J., dissenting).

125. *Id.*

126. *Id.* at 183, 70 N.E.2d at 448.

127. *Id.*

128. 21 Cal. App. 3d 700, 98 Cal. Rptr. 644 (1972).

129. CAL. CIV. CODE §§ 51, 52 (West 1970). Section 51 provided in part:

> All persons within the jurisdiction of this State are free and equal, and no matter what their race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in business establishments of every kind whatsoever.

Section 52 specified the damages for violation of § 51. *Flowers*, 21 Cal. App. 3d at 702, 98 Cal. Rptr. at 644-45.

arbitrary "[b]ecause the independence, mischievousness, boisterousness, and rowdyism of children vary by age and sex."[130]

Approximately ten years after the *Flowers* decision, the California Supreme Court decided the landmark case of *Marina Point, Ltd. v. Wolfson*,[131] which effectively overruled *Flowers*. In *Marina Point*, an apartment complex owner altered his policy to ultimately exclude children after plaintiffs had assumed residency. The owner allowed the children who were present when the policy took effect to remain there. Plaintiffs had their first child after the policy was instituted. The owner sought to evict plaintiffs who asserted the no-children policy violated the California Unruh Act.[132] The court invalidated the policy stating "the Unruh Act does not permit a business enterprise to exclude an *entire class* of individuals on the basis of a generalized prediction that the class 'as a whole' is more likely to commit misconduct than some other class of the public."[133]

In its discussion, the court stated that if owners could exclude children from rental housing under the Unruh Act, then all business owners could technically exclude children from their enterprises.[134] The court distinguished familial discrimination from the validity of age discrimination retirement communities noting housing for the elderly meets a specialized social need. In its conclusion, the court made a very strong statement against familial discrimination:

> A society that sanctions wholesale discrimination against its children in obtaining housing engages in suspect activity. Even the most primitive society fosters the protection of its young; such a society would hardly discriminate against children in their need for shelter. . . . To permit such discrimination is to approve of widespread, and potentially universal, exclusion of children from housing. Neither statute nor interpretation of statute, however, sanctions the sacrifice of the well-being of children on the alter [sic] of a landlord's profit, or possibly some tenant's convenience.[135]

The dissent, however, noted the policy was not designed to provide "wholesale discrimination against children" but to recognize there are two conflicting interests involved.[136] Children should be protected from

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130. *Flowers* at 703, 98 Cal. Rptr. at 645.

131. 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496 (Richardson, J., dissenting), *cert. denied*, 459 U.S. 858 (1982).

132. *Id.* at 724, 640 P.2d at 118, 180 Cal. Rptr. at 499-500.

133. *Id.* at 744, 640 P.2d at 125, 180 Cal. Rptr. at 507.

134. *Id.* at 739, 640 P.2d at 126, 180 Cal. Rptr. at 508.

135. *Id.* at 744, 640 P.2d at 129, 180 Cal. Rptr. at 510.

136. *Id.* at 745, 640 P.2d at 130, 180 Cal. Rptr. at 511.

widespread housing discrimination, yet adults may have a legitimate desire to live in a child-free environment.[137] The dissent stated that a "just society and its law courts" should attempt to accommodate both groups.[138] However, the *Marina Point* decision effectively prohibited familial discrimination policies in all apartment complexes in California.[139]

Although some plaintiffs alleging familial discrimination have received relief through judicial decisions, there are many who will be unable to obtain such relief. It is very expensive and time consuming to initiate legal action. Many victims of familial discrimination will not be able to finance a lawsuit and, therefore, cannot receive judicial relief. The Fair Housing Act[140] provides that the Secretary of Housing and Urban Development (HUD) will investigate allegations of housing discrimination, and also provides proper enforcement mechanisms.[141] However, HUD receives complaints concerning less than one percent of the instances of discrimination and of those presented, HUD attempts to resolve only one-third.[142]

4. State Legislative Action.—At the present time, seventeen states and the District of Columbia have legislation prohibiting or limiting familial discriminatory practices.[143] These statutes vary in the classes they protect and the exceptions they allow. They do not provide adequate relief in the areas of the country where families with children face a serious plight.

Many of the statutes prohibit familial discrimination, but provide many exceptions.[144] For example, the Virginia statute provides in part: "It shall be an unlawful discriminatory housing practice because of . . .

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137. *Id.*

138. *Id.*

139. *See* San Jose Country Club Apartments v. County, 137 Cal. App. 3d 951, 187 Cal. Rptr. 493 (1982).

140. 42 U.S.C. §§ 3610-3611 (1982).

141. *Id.* at §§ 3608, 3610.

142. *The Necessity for Shelter*, *supra* note 10, at 510 n.179. The remaining two-thirds of the complaints received are diverted to local agencies.

143. ALASKA STAT. § 18.80.240 (1986); ARIZ. REV. STAT. ANN. § 33-1315 (1974); CAL. CIV. CODE § 51.2 (West 1982 & Supp. 1988); CONN. GEN. STAT. ANN. § 46a-64 (West 1958 & Supp. 1988); DEL. CODE ANN. tit. 25, § 6503 (1974 & Supp. 1986); D.C. CODE ANN. § 1-2511 (1987); ILL. ANN. STAT. ch. 68, para. 3-104 (Smith-Hurd 1959 & Supp. 1988); ME. REV. STAT. ANN. tit. 14, § 6027 (1964 & Supp. 1987); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 1982 & Supp. 1988); MICH. COMP. LAWS ANN. § 37.2502 (West 1985); MINN. STAT. ANN. § 363.03 (West 1982 & Supp. 1988); MONT. CODE ANN. § 49-2-305 (1987); N.H. REV. STAT. ANN. § 354-A:8 (1984); N.J. STAT. ANN. § 2A:42-101 (West 1952 & Supp. '1987-88); N.Y. EXEC. LAW § 296 (McKinney 1982 & Supp. 1988); R.I. GEN. LAWS § 34-27.4 (1984 & Supp. 1988); VT. STAT. ANN. tit. 9 § 4505 (1984 & Supp. 1987); VA. CODE ANN. § 36-88 (1984 & Supp. 1988).

144. ALASKA STAT. § 18.80.240 (1986); VA. CODE § 36-88 (1984 & Supp. 1988).

parenthood . . . [t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling."[145] At first glance, it appears the statute totally prohibits familial discrimination. However, the statute continues and states: "Notwithstanding the foregoing provisions, it shall not be an unlawful discriminatory housing practice to operate an all-adult or all-elderly community. . . ."[146] In effect, a landlord may establish an all-adult community if it is specified as such. If, however, the community is not classified as an all-adult or all-elderly community, it is unlawful to practice familial discrimination.[147]

Some of the state statutes do not place the prohibition of familial discrimination within their fair housing law section.[148] This limits the remedies which are available to victims of child-exclusionary policies.[149] Other statutes place familial discrimination within the civil rights section, but in sections separate from the main text where other protected classes (*e.g.*, race, religion, sex) are located.[150] The Illinois statute dealing with familial discrimination provides protection only for children under the age of fourteen;[151] New Hampshire exempts communities where all residents are at least forty-five while Michigan sets the age at fifty.[152]

A few of these statutes allow familial discriminatory policies in a portion of the buildings of a large community.[153] For example, in Massachusetts, if the complex contains one hundred or more buildings,

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145. VA. CODE ANN. § 36-88 (1984 & Supp. 1988).

146. *Id.*

147. ALASKA STAT. § 18.80.240 (1986); VA. CODE ANN. § 36-88 (1984 & Supp. 1988).

148. ALASKA STAT. § 18.80.240 (1986); ARIZ. REV. STAT. ANN. § 33-1315 (1974); CAL. CIV. CODE § 51.2 (West 1982 & Supp. 1988); DEL. CODE ANN. tit. 25 § 6503 (1974 & Supp. 1986); ME. REV. STAT. ANN. tit. 14 § 6027 (1964 & Supp. 1987); N.J. STAT. ANN. § 2A:42-101 (West 1952 & Supp. 1987-88); N.Y. EXEC. LAW § 296 (McKinney 1982 & Supp. 1987).

149. *Hearings*, *supra* note 9, at 398 stimony of James B. Morales, Staff Atty., Nat'l Center for Youth Law].

150. ARIZ. REV. STAT. ANN. § 33-1315 (1974); CAL. CIV. CODE § 51.2 (West 1982 & Supp. 1988); DEL. CODE ANN. tit. 25 § 6503 (1974 & Supp. 1986); ILL. ANN. STAT. ch. 68, para. 3-104 (Smith-Hurd 1959 & Supp. 1988); ME. REV. STAT. ANN. tit. 14, § 6027 (1964 & Supp. 1987); MASS. GEN. LAWS ANN. ch. 151B § 4 (West 1982 & Supp. 1987).

151. ILL. ANN. STAT. ch. 68, para. 3-104 (Smith-Hurd 1959 & Supp. 1988).

152. MICH. COMP. LAWS ANN. § 37-2502 (West 1985); N.H. REV. STAT. ANN. § 354-A:8 (1984).

153. MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 1982 & Supp. 1988). *See also* MINN. STAT. ANN. § 363.03 (West 1966 & Supp. 1988) (which permits familial discrimination policies in one-third of a complex's buildings); ME. REV. STAT. ANN. tit. 14 § 6027 (1964 & Supp. 1987) (which permits discriminatory practices in 25 percent of the units within a complex).

children may be excluded from one-half.[154] While allowing a portion of the complex to restrict children attempts to recognize the needs and desires of families with children and those adults who wish to live in a child-free environment, these methods are criticized as providing a "major loophole" which promotes familial discrimination.[155]

Some familial rights advocates criticize the state statutes alleging the statutes provide weak enforcement procedures.[156] The majority of these laws provide a private cause of action which may be too expensive and time-consuming for the injured party to pursue.[157] The relief available to the plaintiff is inadequate and often allows the discriminatory policies to continue, and worse, the plaintiff and family may still be without housing. Many states have established administrative agencies to handle the complaints and enforcement of their fair housing statutes.[158] This alleviates the necessity of the plaintiff financing a lawsuit, but it may not be effective. For example, California passed its statute prohibiting familial discrimination in 1982, but the administrative agency directed to handle these matters refused to take action for over two years.[159]

In addition to the civil penalties, some state statutes impose criminal penalties for violations.[160] These may be the least effective way of achieving enforcement as the prosecuting attorneys may be reluctant to prosecute a landlord, and this type of case will not demand their time when compared to more serious crimes.[161]

To summarize, state legislative schemes provide haphazard protection for families with children who face discrimination in rental housing. Some allow apartment complexes to be registered as all-adult communities, and state it is only discrimination if communities not registered as such exclude children.[162] Others only prohibit discrimination against children under a certain age, provide exemptions down to the age of forty-five, or allow a certain percentage of buildings within a complex

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154. MASS. GEN. LAWS ANN. ch. 151B § 4 (West 1982 & Supp. 1988).

155. *Hearings*, *supra* note 9, at 396-97.

156. *Id.*

157. *See, e.g.*, CAL. CIV. CODE § 51.2 (West 1982 & Supp. 1988); MICH. COMP. LAWS ANN. § 37:2502 (West 1985); N.Y. EXEC. LAW § 296 (McKinney 1982 & Supp. 1987); VA. CODE ANN. § 36-88 (1984 & Supp. 1988).

158. *See generally* CAL. CIV. CODE § 51.2 (West 1982 & Supp. 1988); CONN. GEN. STAT. ANN. § 46a-64 (West 1958 & Supp. 1988); MONT. CODE ANN. § 49-2-305 (1987).

159. *Hearings*, *supra* note 9, at 400-01 n.57. The administrative agency claimed they did not have adequate resources or lacked legal authority to handle familial discrimination complaints. They began handling such complaints after receiving political pressure and familial discrimination complaints constituted 30 percent of the housing complaints received.

160. *Id.* at 396-97.

161. *Id.*

162. *See supra* note 147 and accompanying text.

to be designated as adults-only. Often, the enforcement procedures do not provide adequate relief.

III. The Fair Housing Amendments Act of 1988

The Amendments to the Fair Housing Act which was passed on September 13, 1988, added families with children to the list of protected groups.[163] The Amendments also modified enforcement procedures to make them more effective. The purpose of the Amendments was to alleviate the problems families with children face in finding adequate rental housing.[164] However, the problems faced by low income families with children will not be alleviated by the Amendments.

A. Modified Procedures

Prior to the 1988 Amendments, all discriminatory housing complaints referred to HUD or private civil actions had to commence within 180 days.[165] Under the terms of the Amendments, a complaint about an apartment owner may be filed with HUD within one year of the alleged discriminatory act.[166] This allows the aggrieved person to take care of the immediate problem of locating housing before proceeding with the complaint, and alleviates the problems associated with a short statute of limitations. The new Act shortens the amount of time HUD has to investigate a complaint after its receipt from thirty to ten days. The Act still provides the accused apartment owner an opportunity to file an answer, but the owner must now file an answer within ten days of receiving notification of the complaint.[167] The Amendments further provide HUD must complete all investigations within 100 days.[168]

Under both the prior law and the Amendments, HUD officials may engage in conciliatory actions to the extent feasible.[169] The conciliation agreement may provide for binding arbitration of the dispute.[170] If HUD or the aggrieved person can show that the owner has breached the conciliation agreement, the Attorney General may commence a civil action

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163. Fair Housing Amendments Act of 1988, Pub. L. No. 101-430, 102 Stat. 1622 (1988).

164. *See Hearings*, *supra* note 9.

165. 42 U.S.C. §§ 3610, 3612 (1982).

166. Fair Housing Amendments Act of 1988, Pub. L. No. 101-430, 102 Stat. 1624-25 (1988).

167. *Id.*

168. *Id.* If HUD cannot complete the investigation within the requisite 100 days, the appropriate HUD official must notify both parties in writing. *Id.*

169. *Id.* at 1626.

170. *Id.*

within 90 days of the alleged breach.[171] The Amendments further provide in emergency situations HUD may initiate a civil action seeking temporary relief for the aggrieved person immediately after the filing of the complaint.[172] If HUD believes no conciliatory agreement will be reached, and HUD finds reasonable cause to believe the owner has discriminated, HUD officials are to turn their investigate results over to the Attorney General who will commence civil action against the owner.[173] These modifications take the burden of financing a lawsuit off of the tenant and provide immediate remedial measures if the aggrieved person is unable to locate rental housing.

In addition, unless an election otherwise is made, an administrative law judge appointed pursuant to federal regulations presides over the hearing.[174] This hearing must be held within 120 days of the filing of the charge.[175] The judge must report a decision within 60 days of completion of the hearing.[176] If the administrative law judge finds an apartment owner has or is about to engage in discriminatory activity, the judge "shall promptly issue an order for such relief as may be appropriate, which may include actual damages suffered by the aggrieved person and injunctive or equitable relief. Such order may, to vindicate the public interest, assess a civil penalty against the respondent. . . ."[177] If no discriminatory action took place or was about to take place, the action will be dismissed. However, the lawsuit will injure the owner to the extent he had to finance his defense. This will provide a deterrent against the temptation of engaging in discriminatory practices.

Any party to the final order of the administrative law judge may obtain judicial review of the order pursuant to the federal regulations governing the appellate process.[178] Jurisdiction for judicial review is in the judicial circuit where the alleged discriminatory activity occurred.[179] If HUD officials do not enforce the administrative law judge's findings, nor seek judicial review of the findings, the party entitled to relief may seek a decree enforcing the order from the Court of Appeals in the

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171. *Id.*

172. *Id.*

173. *Id.*

174. 5 U.S.C. § 3105 (1982).

175. Fair Housing Amendments Act of 1988, Pub. L. No. 101-430, 102 Stat. 1625, 1630 (1988).

176. *Id.*

177. *Id.* The civil penalties begin at $10,000 and range to $50,000, the amount assessed increasing if the owner has been adjudicated as having practiced discriminatory housing policies within the recent past. *Id.*

178. 28 U.S.C. § 158 (1982).

179. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1625, 1631 (1988).

circuit where the violation occurred.[180] Again, the court from which judicial review is sought may issue temporary orders to alleviate any pressing problems faced by the aggrieved party.[181] The Amendments further provide that an aggrieved person may commence a civil action in a district court without utilizing HUD services or they may initiate such an action on their own for the breach of a conciliation agreement.[182] The tenant must finance the lawsuit when he initiates it. The aggrieved party must initiate the action within two years of the occurrence of either the discriminatory practice or the breach of the conciliation agreement.[183] However, if HUD obtained a conciliation agreement or an administrative law hearing has begun, the tenant cannot commence a civil action in a court of law.[184] Under both the Fair Housing Act and the Amendments, there is a provision that a private person may have the court appoint an attorney for him if the requisite need can be shown.[185] The same relief is available to a private person who commences a civil action as there is for a person who proceeds through HUD.[186]

There are advantages and disadvantages with a tenant utilizing HUD's services and with a tenant filing a private action. Allowing HUD to investigate, attempt conciliation, or the Attorney General to file an action against the apartment owner removes the expense of financing a lawsuit from a tenant's shoulders. This provides a way for many low income persons to be heard. The advantage of filing a private action is that the plaintiff is able to maintain more control over the suit. For most tenants, the decision will rest on the amount of money necessary to maintain a cause of action.

The Amendments provide that the Attorney General may commence a civil action in district court when he believes discriminatory practices prohibited by the Fair Housing Act are taking place or have taken place.[187] The Attorney General may also intervene in an action initiated by a private person if "the case is of general public importance."[188] In a civil action maintained privately or by the Attorney General, the court may order injunctive or other preventive relief, award monetary damages and access civil penalties.[189]

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180. *Id.* at 1632.
181. *Id.*
182. *Id.* at 1633. In all matters commenced under the Fair Housing Act, the amount in controversy requirement is waived. *Id.*
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* at 1626.
188. *Id.* at 1633.
189. *Id.* at 1636. The Amendments provide that the Court:

The overall purpose behind the 1988 Amendments is to include families with children in the list of classes protected from housing discrimination and to increase the ease and effectiveness of the enforcement measures.[190] This has been accomplished by lengthening the time in which to file the action and decreasing the time in which HUD has to respond. Under the terms of the Amendments, the parties may agree to submit to binding arbitration or the matters may be heard by administrative law judges with a provision for judicial review. Civil action may be commenced upon the breach of a conciliation agreement, by a private person who chooses to proceed without HUD's services, or by the Attorney General if there is reasonable cause to believe discriminatory practices are taking place. The Amendments provide for immediate relief, when necessary, injunctive relief, equitable relief, monetary damages and civil penalties, the amount of which may increase if the owner has violated the Fair Housing Act in recent years.

B. Shortcomings of the Fair Housing Amendments Act of 1988

As has been established previously, there are areas of the country where families with children face serious problems in locating adequate rental housing.[191] The 1988 Amendments[192] to the Fair Housing Act[193] totally prohibit child-exclusionary policies nationwide.[194] However, such broad-sweeping legislation is not necessary nor is it appropriate. Initially, one must realize that child-exclusionary policies have not arisen out of hatred. Familial rights advocates have placed familial discrimination on the same level as racial discrimination. For example, the majority in *Marina Point* stated, "[t]o permit such discrimination is to approve of widespread, and potentially universal, exclusion of children from housing. Neither statute nor interpretation of statute, however, sanctions the

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(A) may award such preventive relief, including a permanent or temporary injunction, restraining order, or other order against the person responsible for a violation of this title as is necessary to assure the full enjoyment of the rights granted by this title,

(B) may award such other relief as the court deems appropriate, including monetary damages to persons aggrieved, and

(C) may to vindicate the public interest, assess a civil penalty against the respondent -

(i) in an amount not exceeding $50,000 for a first violation; and

(ii) in an amount not exceeding $100,000 for any subsequent violation.

190. *Id.* at 1624-36.

191. *See supra* note 6 and accompanying text.

192. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619-1636 (1988).

193. 42 U.S.C. § 3601-3631 (1982).

194. Pub. L. No. 100-340, 102 Stat. 1625 (1988).

sacrifice of the well-being of children on the alter [sic] of a landlord's profit, or possibly some tenants' convenience."[195]

Alternatively, the *Marina Point* dissenting opinion recognizes there are two sides to every issue, and that if the question were phrased differently, the response would not be the same.[196] Additionally, the dissent states there should be an attempt to accommodate both families with children and those wanting to live in an all-adult community. The dissent in *Marina Point* notes that rather than asking if we should approve "whole sale discrimination against children,"[197] the question could be phrased "do our middle aged or older citizens, having worked long and hard, having raised their own children, having paid both their taxes and their dues to society retain a right to spend their remaining years in a relatively quiet, peaceful and tranquil environment of their own choice?"[198] The dissent indicates a compromise between the two extremes would be more appropriate.

Under the Amendments, retirement communities may continue to exclude children.[199] However, the Amendments ignore the rights and needs of young and middle-aged adults without children. Statistics show that adults without children occupy over two-thirds of the rental units[200] and that persons under age thirty-five occupy over one-half of these households.[201] This Note does not dispute the necessity for legislation limiting the number of apartment units which exclude children; what the Note disputes is its total prohibition of all-adult apartment communities. This total prohibition is too broad when adults without children occupy 67.6 percent of the rental units and there is no substantial data measuring the extent of familial discrimination nationwide.[202]

Studies have documented that the families with children facing the greatest problem in locating rental housing are low income families.[203] The California Supreme Court stated that landlords have instituted familial discriminatory policies so that they may charge a premium for their rental units.[204] However, the latter proposition is not an accurate assessment. The ISR study completed in 1980 stated:

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195. Marina Point, Ltd. v. Wolfson, 30 Cal. 3d 745, 745, 640 P.2d 115, 129, 180 Cal. Rptr. 496, 511 (Richardson, J., dissenting), *cert. denied*, 459 U.S. 858 (1982).

196. *Id.* at 745, 640 P.2d at 130, 180 Cal. Rptr. at 511 (Richardson, J., dissenting).

197. *Id.*

198. *Id.*

199. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619-1636 (1988).

200. *See supra* note 57 and accompanying text.

201. *See supra* note 58 and accompanying text.

202. *See supra* note 55 and accompanying text.

203. *See supra* notes 73-75 and accompanying text. *See also Hearings*, *supra* note 9, at 373 stimony of James B. Morales, Staff Atty, Nat'l Center for Youth Law].

204. Marina Point, Ltd. v. Wolfson, 30 Cal. 3d 271, 744, 640 P.2d 115, 129, 180 Cal. Rptr. 496, 511 (Richardson, J., dissenting), *cert. denied*, 459 U.S. 858 (1982).

> Families with children pay a significantly higher monthly rent than families without children, primarily because they tend to occupy larger units. When the number of bedrooms and the occupancy per unit are held constant no significant differences are found between the monthly rents of the two groups. The higher cost of rental housing for families with children is attributable to the greater number of persons in the household and the size of the unit rented.[205]

The all-adult units which command such high prices often offer extra facilities. Adult communities are often equipped with attractive nuisances such as saunas, whirlpools, exercise facilities and swimming pools, which account for the increased rental price.[206] Even when these apartments can no longer exclude children, the rental price will not decrease enough to be within the affordable price range for low income families. Until owners build more low and moderately priced rental housing, low income families will be unable to locate adequate housing.

Additionally, at least one study stated that minority groups and households headed by women feel the greatest impact of exclusionary policies.[207] However, the ISR study concluded this is not the case.[208] Logic explains the differing results. Minorities and female head of household families tend to fall within the lower income brackets, and when the study accounts for those variables, the disparities between minorities, women and the general rental population come close to disappearing.[209]

The drafters of the Amendments failed to realize that many apartment complexes have been designed and built for adults-only and, therefore, are inherently dangerous to children. The dissent in *Marina* recognized this danger stating:

> The evidence before the trial court established, in substance, that Marina Point was designed and constructed for the purpose of providing all-adult rental housing, and that as such its facilities were ill-adapted for use by children. . . . [T]he use of existing facilities at Marina Point by children when playing results in substantial danger both to themselves and to adult tenants alike.[210]

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205. R. Marans & M. Colten, *supra* note 4, at 72.

206. *Marina Point, Ltd.*, at 744, 640 P.2d at 130, 180 Cal. Rptr. at 511 (Richardson, J., dissenting).

207. J. Greene & G. Blake, *supra* note 68, at 72.

208. R. Marans & M. Colten, *supra* note 4, at 72.

209. *See id.*

210. *Marina Point, Ltd.*, at 746, 640 P.2d at 130-31, 180 Cal. Rptr. at 512 (Richardson, J., dissenting).

Although all the dangers faced by children can never be eliminated, those apartment complexes designed exclusively for adults should remain just that, all-adult communities.

The 1988 Amendments could be the impetus for apartment owners to withdraw or remain out of the rental market. From 1970 to 1976, owners removed approximately 250,000 rental units which were constructed before 1965 from the market each year.[211] This phenomenon, combined with the decreased number of multifamily units on which construction has begun,[212] causes increased problems for potential tenants. If developers and landlords perceive children as a problem to avoid, and they realize they cannot avoid children, they will remove their units from the rental market or forego construction.

In parts of the country, there is a severe problem confronting families with children who are attempting to locate rental housing.[213] However, no statistics measure the extent of the problem nationwide. Lower income families face the gravest difficulty in locating adequate rental housing. The 1988 Amendments to the Fair Housing Act in part eliminate familial discrimination.[214] They will not, however, eliminate the problems faced by low income families since it will not significantly lower rental costs. In addition, the drafters of the Amendments failed to recognize the needs and desires of the greatest portion of the rental population—adults without children. Finally, the drafters of the Amendments did not consider the inherent dangers children may face when they occupy apartments which have been designed and built for an all-adult clientele.

IV. Shortcomings of Total Prohibition of All Adult Apartment Communities

Familial discrimination, unlike racial discrimination, is not based on hatred. There are legitimate reasons why adults desire to live in a child-free environment and why apartment owners want to restrict their rental units to adults-only. Rather than assuming such desires are based on hatred or greed, Congress and the courts should look at both sides of the issue.

A. The Rights of Adults to Live in a Child-Free Environment

The New Jersey Supreme Court stated that "[t]here cannot be the slightest doubt that shelter, along with food, are the most basic human

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211. A. Downs, *supra* note 3, at 40.

212. *See supra* notes 44-45 and accompanying text.

213. *See supra* note 6 and accompanying text.

214. Fair Housing Amendments of 1988, Pub. L. No. 100-430, 102 Stat. 1619-36 (1988).

needs. . . . It is plain beyond dispute the proper provision for adequate housing of all categories of people is certainly an absolute essential in promotion of the general welfare. . . ."[215] The supporters of all-adult communities are not attempting to deny families with children a place to live, but are asserting that they also have rights, one of which is to live in a child-free environment if they so desire.

Over two-thirds of the occupied rental units have no residents under the age of eighteen,[216] yet the majority of the rental population are not allowed to choose their living environment under terms of the 1988 Amendments. In 1972, the California Supreme Court stated that children are more independent, boisterous, and rowdy.[217] This is only one reason adults without children choose to live in an all-adult community.

In addition, it may be much easier to find amenities such as saunas, whirlpools, swimming pools, and exercise facilities in all-adult communities. These amenities become attractive nuisances when children are present. If children are allowed to become residents of apartment complexes with such facilities, owners may limit the hours of availability or eliminate such facilities.

Furthermore, the Department of Commerce has documented that certain crimes associated with residences are highly likely to be committed by minors.[218] Specifically, 1988 statistics show that 32 percent of all thefts, 35.9 percent of all burglaries, 40.4 percent of all arsons, and 42.8 percent of all vandalism is committed by persons under the age of eighteen.[219]

In *Halet v. Wend Investment Co.*,[220] the Ninth Circuit held that "the right of family members to live together is part of the fundamental right to privacy."[221] However, adults without children have a similar right to privacy when deciding where to live their lives and a similar right to equal protection under the fourteenth amendment of the Constitution. The Supreme Court in *Eisenstadt v. Baird*[222] held that single people cannot be treated differently than married people as far as the distribution of contraceptives is concerned.[223] The Court held:

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215. Southern Burlington County NAACP v. Mount Laurel, 336 A.2d 713, 727 (N.J.), *cert. denied*, 423 U.S. 808 (1975).

216. *See supra* note 57 and accompanying text.

217. Flowers v. John Burnham & Co., 21 Cal. App. 3d 700, 98 Cal. Rptr. 644 (1972).

218. U.S. DEPT. OF COMMERCE, BUREAU OF THE CENSUS. STATISTICAL ABSTRACT OF THE UNITED STATES, 165, 278 (108 ed. 1988).

219. *Id.*

220. 672 F.2d 1305 (9th Cir. 1982).

221. *Id.* at 1311.

222. 405 U.S. 438 (1972).

223. *Id.*

> If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. . . . [I]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwanted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[224]

Similarly, single people should not be treated differently than families with children and should be granted the fundamental right to privacy and, therefore, the ability to decide where and in what manner they will live.

Tenants raised the right to privacy and equal protection arguments in *San Jose Country Club Apartments v. County of Santa Clara*.[225] The court rejected both arguments stating the cause of action involved no fundamental right.[226] However, in *Halet*,[227] the Ninth Circuit held that "[f]amily life, in particular the right of family members to live together, is part of the fundamental right of privacy."[228] Therefore, the right to privacy and the equal protection argument of adults without children merit discussion.

The Court of Appeals for the District of Columbia stated "[l]iberty under law extends to the full range of conduct which the individual is free to pursue."[229] Thus, liberty extends to one's right to decide how and where he will live. In *Shelton v. Tucker*,[230] the Supreme Court held:

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.[231]

The 1988 Amendments constitute a total ban on all-adult apartment communities with an exception for retirement communities.[232] Studies

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224. *Id.* at 453.

225. 137 Cal. App. 3d 948, 198 Cal. Rptr. 493 (1982). This case was decided shortly after *Marina Point, Ltd.*

226. *Id.* at 954, 198 Cal. Rptr. at 496.

227. 672 F.2d 1305 (1982).

228. *Id.* at 1311.

229. Ricks v. District of Columbia, 414 F.2d 1097, 1101 (D.C. Cir. 1968) (quoting Bolling v. Sharpe, 347 U.S. 497 (1954)).

230. Shelton v. Tucker, 364 U.S. 479 (1960).

231. *Id.* at 488 (footnotes omitted).

232. Fair Housing Amendment of 1988, Pub. L. No. 100-340, 102 Stat. 1619-36 (1988).

have not documented that families with children face serious problems finding adequate rental housing nationwide.[233] However, studies have documented that 67.6 percent of all rental households have no residents under the age of eighteen[234] and low income families with children face a serious problem locating adequate rental housing.[235] Therefore, the Fair Housing Amendments Act of 1988 stifles liberty, a fundamental right.

The one exception to the ban on child-exclusionary policies is retirement communities.[236] In *Taxpayers Association of Weymouth Township, Inc. v. Weymouth Township*,[237] the New Jersey Supreme Court recognized that the elderly were a class deserving special treatment.[238] The court noted that the elderly have specialized housing needs because they have fixed and limited incomes.[239] Although familial rights advocates state that child-exclusionary policies are the reason so many families cannot locate adequate housing, the real cause of the problem is limited income.[240] Rather than prohibiting all-adult apartment communities and adversely affecting the rights of over two-thirds of the rental households, the legislation should turn its efforts toward providing adequate rental housing within the economic means of low income families.

B. Apartment Owners and the Free Enterprise System

In America's capitalistic society, supply increases to meet demand.[241] Therefore, if all-adult communities eventually become too widespread, and families with children cannot locate housing due to exclusionary policies, apartment owners will invest in apartment complexes which welcome children. The supply will fit itself to the needs of the demand. However, it will take time to achieve the balance. In some areas of the country, families with children face severe problems and the requisite time is not available. Thus, some form of legislation is necessary, but it need not be as prohibitive as the 1988 Amendments.

The court in *Marina Point* characterized landlords who exclude children as being greedy,[242] and the connotation was that these landlords

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233. *See* R. MARANS & M. COLTEN, *supra* note 4.

234. *See supra* note 57 and accompanying text.

235. *See supra* note 203 and accompanying text.

236. Fair Housing Amendment of 1988, Pub. L. No. 100-430, 102 Stat. 1619-36 (1988).

237. 71 N.J. 249, 364 A.2d 1016 (1976), *cert. denied*, 430 U.S. 977 (1977).

238. *Id.*

239. *Id.* at 267-68, 364 A.2d at 1026.

240. *See supra* notes 56-61 and accompanying text.

241. R. MCKENZIE, ECONOMICS 44-66 (1986).

242. Marina Point, Ltd. v. Wolfson, 30 Cal. 3d 721, 745, 640 P.2d 115, 129, 180 Cal. Rptr. 496, 511 (Richardson, J., dissenting), *cert. denied*, 459 U.S. 858 (1982).

are evil.[243] However, there are legitimate reasons why landlords want to restrict their apartments to all adults. Initially, familial rights advocates must recognize that landlords are first and foremost business persons who provide rental housing to make a profit, a reasonable endeavor.

With the decline in the number of women who have children, and the increase in the number of two-career families,[244] landlords saw an increased demand for all-adult communities. Landlords and land developers responded by providing apartment communities which restricted or excluded children.[245] The owners designed and developed many of these complexes for adults-only.[246] Apartment owners realize that they are held to a higher standard of care in negligence actions when children are present because accidents concerning children are foreseeable and, therefore, have a legitimate interest in excluding or restricting children.[247] Thus, a landlord's interest in excluding children from rental units is a legitimate economic one not solely motivated by greed.

There are no statistics reflecting whether or not the presence of children leads to increased maintenance costs and increased insurance costs. However, the ISR study reflects that 81 percent of the landlords surveyed felt that higher maintenance costs were a problem associated with child tenants and 38 percent felt higher insurance costs were a similar problem.[248] When one combines these factors with rents which are inadequate to meet construction and operating costs,[249] landlords face an economically infeasible situation. If their operating costs increase,

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243. *Id.*

244. *See supra* note 49 and accompanying text.

245. *See id.*

246. *See supra* note 206 and accompanying text.

247. *See generally* D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on Torts 200-01 (5th ed. 1984) ("The question comes down essentially to one of whether the foreseeable risk outweighs the utility of the actor's conduct.") *Id.* Kopera v. Moschella, 400 F. Supp. 131 (S.D. Miss. 1975) (complex owners were negligent in failing to have a lifeguard on duty at the pool, to fence the area and secure it with a gate, to cover the pool during time when the weather was not conducive to its use and to maintain rescue equipment in the area of the pool; their negligence was the proximate cause of death); Lidster v. Jones, 176 Ga. App. 392, 336 S.E.2d 287 (1985) (landlord held liable for dog biting tenant when he knew of dog's vicious propensities but did nothing to keep dog out of complex's common areas); Acosta v. Irdank Realty Corp., 38 Misc. 2d 859, 238 N.Y.S.2d 713 (1963) (landlord held liable for child eating lead paint chips).

248. R. Marans & M. Colten, *supra* note 4 at 64-65, Table VI-I. Additionally, this author conducted a telephone survey of insurance agencies in Indianapolis, Indiana, who provide liability insurance for apartment complex owners. Of the 18 who stated they take the presence of children into account, the policy price was an average of 14 percent less expensive when children were excluded. Six other companies reported they turned the information over to their underwriters who determine the policy price. The underwriters take into consideration the presence of children and attractive nuisances.

249. *See supra* note 44 and accompanying text.

and they are held to a higher standard of care due to the presence of children, they will convert the units into condominiums or remove them from the rental market. The trend has been toward an increase in the number of units being removed from the rental market in recent years.[250]

Further, it is unrealistic to believe that the prohibition of child-exclusionary policies will increase the number of rental units which are within the economic means of low income families. Landlords and developers must be able to charge prices which will meet their operating costs and generate a profit. Studies have shown that when occupancy per unit and the number of bedrooms per unit are held constant, there is no significant difference in the monthly rent charged for families with children and those without children.[251] Thus, prohibiting familial discrimination will not change the composition of the rental market, rental prices will not decrease significantly, and low income families will still experience problems locating adequate rental housing.

To summarize, the free enterprise system would eventually solve the problem as apartment owners would change the nature of their supply to meet the current demand. However, in some areas of the country, this process would be too time consuming. Genuine economic interest, not greed, generates the increased instances of familial discrimination. Increased restrictions on landlords and higher prices associated with child tenants will prompt some landlords to take their rental units off the market and may discourage developers from entering the market. In addition, the Amendments will not result in lowering rental prices to a level within the economic means of low income families.

V. Alternatives to the 1988 Amendments

Rather than a total prohibition of familial discrimination, the government should institute a less restrictive provision which would recognize both factors. An alternative is to allow a percentage of all-adult communities based on the population of a given area. Alcoholic beverage commissions work on this type of quota system. This Note will utilize the Indiana Alcoholic Beverage Laws.[252] The Indiana Code provides for issuance of five types of alcoholic beverage permits.[253] The number of each type of permit issued is based on the population figures of the county, city, or town in question.[254] For example, "the commission may issue only one [1] package liquor store dealer's permit in an incorporated

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250. *See supra* note 211 and accompanying text.
251. *See supra* note 205 and accompanying text.
252. Ind. Code § 7.1-3-22 (1988).
253. Ind. Code §§ 7.1-3-22-1 to -5 (1988).
254. *Id.*

city or town for each five thousand [5,000] persons, or fraction thereof, within the incorporated city or town."[255] The commission bases the population figures on reports issued by the federal government.[256]

There have been few suits filed in this area,[257] suggesting the quota method is an effective means of limiting permits. In *Smock v. Coots*,[258] the Indiana Court of Appeals upheld the commission's denial of a package store permit recognizing that the quota statute set the upper, not the lower limits, on the number of permits which could be issued.[259] This allows for flexibility in the system so that area-specific problems can be addressed.

The legislature could establish a system similar to Indiana's alcoholic beverage permit quota system to regulate the number of all-adult apartment complexes allowed. The statute would require an applicant receiving a permit to pay fees established by the statute.[260] Those obtaining such a permit could redeem the cost through lower maintenance costs, lower insurance costs, or they could pass the cost on to tenants willing to pay more to live in a child-free environment. In those areas where the number of apartment owners desiring such a permit would exceed the number of authorized permits, HUD could hold an auction,[261] or the apartment

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255. IND. CODE § 7.1-3-22-5 (1988).

256. IND. CODE § 7.1-3-22-1.5 (1988) (approved March 5, 1988). The decennial census is reported by the federal government and is adjusted by corrected population counts which may be issued periodically after the decennial census.

257. Research uncovered two cases challenging the denial of an alcoholic beverage permit since the quota system took effect in 1973. *See* Indiana Alcoholic Beverage Comm'n v. State *ex rel.* Harmon, 269 Ind. 48, 379 N.E.2d 140 (1978); Smock v. Coots, 165 Ind. App. 474, 333 N.E.2d 119, *reh'g denied* (1975).

Research uncovered four cases dealing with the renewal of a liquor permit. *See* Pettit v. Indiana Alcoholic Beverage Comm'n, 511 N.E.2d 312 (Ind. App. 1989); Indiana Alcoholic Beverage Comm'n v. Johnson, 158 Ind. App. 467, 303 N.E.2d 64 (1973); Indiana Alcoholic Beverage Comm'n v. Lake Superior Court, 259 Ind. 123, 284 N.E.2d 746 (1972); Indiana Alcoholic Beverage Comm'n v. Lamb, 256 Ind. 65, 267 N.E.2d 161 (1971). In O'Banion v. State *ex rel.* Shively, 146 Ind. App. 223, 253 N.E.2d 739 (1969), plaintiff sought to enjoin defendant from selling alcoholic beverages until the defendant received authority from the Zoning Board to carry on the business at its particular location.

258. 165 Ind. App. 474, 333 N.E.2d 119, *reh'g denied* (1975).

259. *Id.*

260. *See generally* IND. CODE § 7.1-3-24-10 (1988).

261. *See generally* IND. CODE § 7.1-3-22-9 (1988). This section provides in pertinent part:

> (a) This section applies to any permit that is subject to the quota provisions of this chapter unless that permit is obtained by sale, assignment or transfer under I.C. 7.1-3.2-4.
>
> (b) Whenever a permit to which this chapter applies becomes available, the commission shall offer an opportunity to bid for that permit to all persons who are qualified to receive that permit and who have indicated a desire to obtain

complexes having the policy in existence longer could be given the first option of a permit.

Opponents may argue that such a permit system would be difficult and expensive to administer. However, the alcoholic beverage permit quota systems have been operational for some time.[262] In addition, part of HUD's duties is to investigate the effectiveness of the blanket ban on exclusionary policies.[263] These investigations are time consuming and expensive. If these resources are applied to the administration of a quota system which accounts for the needs of both groups, the cost may well even out. In addition, the all-adult permits would generate fees which could be applied toward the cost of providing subsidized housing, or to provide incentives for developers to build familial units or low income housing.

Providing incentives for the construction of low income housing may be more effective than a ban on all-adult communities because it will lure future building into the precise area where it is needed.[264] Direct subsidies may not be seen as desirable, because there are other more pressing needs for those federal funds.[265] Other options are available and are discussed below.

One incentive to promote the development of low income housing is tax exempt bonds. If developers perceive the rental market as a losing proposition, they will not invest their capital. However, tax exempt bonds may provide the necessary incentive to promote building. Further, tax exempt bonds could be offered only to those whose rental units will be offered at a price within the range of low income families.

In addition, incentives could be offered to the owners of existing units so they will not be removed from the market. Grants, low interest loans,[266] or tax exempt bonds could be offered for the rehabilitation of rental units targeted to be removed from the market. A condition

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that permit. The commission shall receive bids at an auction that it conducts. The highest bidder at the commission's auction who is qualified to receive the permit in all respects (including a determination by the local board that the person is of good moral character and good repute in the community in which that person resides) is entitled to receive the permit. This bidder shall pay the amount of the bid at the time the permit is issued as a special fee for initial issuance of the permit.

262. The Indiana Alcoholic Beverage System has been operational since 1973. 1973 Ind. Acts 55.

263. 42 U.S.C. § 3604 (1982). Some of this investigation is accomplished through the use of testers. A person or couple with and without a child would be sent to inquire about the availability of rental housing to see if patterns of discrimination can be detected.

264. *See supra* note 78, at 1846-47.

265. A. Downs, *supra* note 3, at 9.

266. *Id.*

precedent for the receipt of such funds could be the provision of low income rental housing for families.

There are also tax advantages which may be offered to developers willing to invest in low income housing.[267] First, the federal government could allow those people willing to invest in such rental housing the opportunity to write off the interest and property taxes during construction rather than capitalizing them.[268] This program would need established guidelines and limitations to avoid allowing only wealthy investors to take advantage of the incentives.[269]

There is one disadvantage with the tax incentives discussed above. The Tax Reform Act of 1986[270] repealed these incentives, and it is unlikely they will be reinstated. However, the reform enacted section 42 which provides a tax credit for qualified low income housing.[271] Section 42(h) limits the amount of new low income housing credits issued annually per state.[272] Owners of qualified low income housing are entitled to a credit in each of ten years.[273] The income tax credit equals the applicable percentage for the building multiplied by the qualified basis allocable to low income rental units in each qualified building.[274] The existence

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267. *Id.* at 10.

268. *Id.* at 165.

269. *Id.*

270. Pub. L. No. 99-514, 100 Stat. 2189 (1986).

271. I.R.C. § 42 (1986). This section provides in pertinent part:

> I.R.C. § 42(g)(1) defines a qualified low-income housing project as any residential rental project where either 20% or more of the residential units in such property are both rent restricted and occupied by individuals whose income is 50% or less of the area's median gross income, or 40% or more of the residential units in such projects are both rent restricted and occupied by individuals whose income is 60% or less of the area's median gross income. The owner must irrevocably elect to comply with either of the minimum set-aside requirements at the time the project is placed in service.

R. MADDEN, TAXATION OF REAL ESTATE TRANSACTIONS-AN OVERVIEW, 480-2nd Tax Mgmt. (BNA) A-66-68 (1987) (footnotes omitted).

272. I.R.C. § 42 (1986). This section provides in pertinent part:

> A taxpayer who is otherwise eligible to take the low-income housing credit must still obtain an allocation of credit authority from the state or local credit agency in whose jurisdiction the qualifying low-income housing project is located, unless the taxpayer finances it with the proceeds of a tax-exempt bond which received an allocation pursuant to the private activity bond limitation added by the 1986 TRA. There is no state volume limitation for projects financed by such tax exempt bonds and the taxpayer does not need to obtain any credit authority. . . . Each state is allocated an annual credit authority equal to $1.25 for every resident of the state.

R. MADDEN, *supra* note 271 (footnotes omitted).

273. I.R.C. § 42(f)(1) (1986).

274. I.R.C. § 42(a)(b) (1986). This section provides in pertinent part:

of the low income housing tax credit indicates the legislature's awareness of the need for low income housing and willingness to provide a tax incentive for apartment owners and developers. Because the current credits allowed are not sufficient to provide an adequate supply of low income housing, the logical way to promote further development of low income housing is to increase the present 4 and 9 percent credit amounts and increase the number of credits allowed by the Code.

In response to the problem Congress has established Housing Voucher and Certificate Programs which provide tenant-based assistance (assistance that follows the family if it moves) so that the eligible family can afford standard housing.[275] Under the terms of both programs, the families receiving certificates or vouchers are responsible for finding suitable housing which meets eligibility requirements established by HUD.[276] The two programs share a common waiting list,[277] and both programs require that a family contribute the greater of 30 percent of their adjusted monthly income or 10 percent of their monthly income toward the rental payment, with HUD paying the balance directly to the apartment owner.[278]

> The credit is equal to the applicable credit percentage for the project, multiplied by the qualified basis allocable to low-income units in each qualified low-income building. § 42(a).
>
> For projects placed in service in 1987, the applicable credit percentage is 9% for non-federally subsidized newly constructed or rehabilitated low-income units (provided that rehabilitation expenditures average $2,000 or more per low-income unit), 4% for newly constructed or rehabilitated low-income units where the construction or rehabilitation is financed with tax-exempt bonds or similar subsidies (provided that rehabilitation expenditures average $2,000 or more per low-income unit), and 4% for the acquisition of existing low-income units provided that the property is acquired at least 10 years after the latter of the date the property was last placed in service or the date of the most recent unqualified substantial improvement. . . . For projects placed in service after 1987, credit rates are to be issued by the IRS on a monthly basis. . . . For newly constructed or rehabilitated units without federal subsidies, the credit rates are to be computed so that the present value of the 10 annual credit amounts at the beginning of the 10-year period equals 70% of the qualified basis on the low-income units.

R. MADDEN, *supra* note 271 (footnotes omitted).

275. Section 8 Housing Vouchers, 53 Fed. Reg. 34,371, 34,374-75 (1988) (to be codified at 24 C.F.R. § 511).

276. *Id.* at 34,398; 24 C.F.R. § 882.103 (1988). In general, the housing must be sanitary, it must contain adequate toilet facilities, kitchen facilities, hot and cold running water, a living room, bedroom, safe heating and/or cooling system, and adequate lighting. Although this list is not exhaustive, it does cover the basic requirements. *Id.*

277. *Id.* at 34,393. The family may refuse the offer of a housing voucher if they prefer to wait for the availability of a certificate and vice versa. If, however, a family refuses the offer of both, they may be removed from the waiting list. *Id.*

278. *Id.* at 34,403, 24 C.F.R. §§ 813.107, 882.102. HUD provides the following simple example for the computation of the requisite tenant payment:

The main difference between the programs is that with a certificate, the rent charged by the owner cannot exceed ceilings set by HUD,[279] while the voucher program allows the rent to exceed HUD's ceilings, but the family is required to make up the difference.[280] The primary shortcomings of the housing voucher and the certificate programs are the long waiting lists, and the fact elderly and handicapped persons are granted preference for the receipt of a voucher or certificate over low income families.[281]

Hence, there are many less restrictive programs the legislature could implement. The best approach is a quota system combined with an increase in the low income housing credit.[282] This would account for the needs and desires of both families with children and those who wish to live in a child-free environment. It would generate revenues which could be used to finance programs designed to provide incentives to developers to enter the low income rental market and for existing owners to remain in the market.

VI. Conclusion

There are areas of the country facing a severe rental housing shortage with an inordinate number of all-adult apartment communities. However, the areas of the country reflecting the most serious problems account for 53 percent of the population increase nationwide.[283] The supply of

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> [I]f a family qualifies for a four-bedroom housing voucher under the PHA occupancy standards and has monthly adjusted income of $500, and the payment standard amount for a four-bedroom housing voucher is $600, the housing assistance payment for the family is the payment standard amount ($600) minus 30 percent of the family's monthly adjusted income ($150) which is $450.

Id. at 34,403. Monthly adjusted income is 1/2 of a family's annual income less allowances for each dependent, elderly family members, handicapped assistance expenses, and child care expenses. 24 C.F.R. § 813.102 (1988).

279. 24 C.F.R. § 882.104 (1988). Under the certificate program a certificate will not be issued if the fair market rent for the apartment exceeds HUD's set ceilings. *Id.*

280. 53 Fed. Reg. § 887.209 (1988). The voucher program allows the rent charged to exceed the fair market rent by approximately $20 to $50, but the participating family must account for the difference. Telephone interview with Pat Beeler, Clerk for Program Manager of the Indiana Department of Human Services (March 1, 1989).

281. As of March 1989, the public housing authority for Marion County, Indiana ceased accepting applications. There are approximately 5,000 families currently on the waiting list, and a family has to wait approximately three years before receiving a voucher or certificate. Elderly and handicapped persons are granted preference and may receive a voucher or certificate in about six months. Additionally, the landlord may not decide to rent the apartment in compliance with the program requirements. Therefore, the unit is not devoted to low-income housing for a long period of time. Telephone interview with Pat Beeler, Clerk for Program Manager of the Indiana Department of Human Services (March 1, 1989).

282. I.R.C. § 42 (1986).

283. *See supra* note 43 and accompanying text.

rental housing is not meeting the demand as there is an increase in the number of rental units removed from the market annually, and a decrease in the construction of new units.[284]

HUD's previous enforcement policies under the Fair Housing Act were not effective.[285] The 1988 Amendments provide much more effective enforcement procedures. The Amendments put the burden of preparing and financing a legal action on the government, allowing more victims to take advantage of the protection provided. It further provides for conciliation agreements and binding arbitration which may alleviate the necessity of going to court.

Remedial legislation is definitely needed, but it should not consist of a complete prohibition of child-exclusionary policies. The statistics do not call for such broad-sweeping legislation. Adults without children occupy the great majority of rental units.[286] The segment of the population facing the greatest housing problems is low income families with children, but statistics suggest inadequate income, not familial discrimination prompts this problem.[287] Obviously, the legislature must place a limit on the amount of familial discriminatory policies allowed in a given case, but statistics do not call for a total prohibition of such policies.

Families with children have a fundamental right to privacy to live as a nuclear family.[288] However, the other 67.6 percent[289] of the rental market has a corresponding right to privacy which should be recognized and respected. This right to privacy includes the right to live in an environment of their choice.[290]

Apartment owners also have legitimate reasons to exclude or restrict children. The legislature must remember that apartment complex owners entered the rental market to generate a profit. Apartment owners face increasing difficulties in receiving rental receipts which exceed operating costs.[291] Furthermore, many developers designed and built complexes with added features specifically for adults. These amenities become attractive nuisances to children and, therefore, apartment owners may be held to a higher standard of care in negligence actions when children are present.[292] These costs may appear insurmountable and may prompt landlords to get out of the rental market. Furthermore, these costs are a barrier to

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284. *See supra* note 45 and accompanying text.
285. *See supra* note 142 and accompanying text.
286. *See supra* note 57 and accompanying text.
287. *See supra* note 73 and accompanying text.
288. *See supra* notes 221-31 and accompanying text.
289. *See supra* note 57 and accompanying text.
290. *See supra* notes 221-31 and accompanying text.
291. *See supra* note 44 and accompanying text.
292. *See supra* notes 246-48 and accompanying text.

developers who are considering investments in the rental market.

There are less restrictive measures to control familial discrimination than total prohibition. These consist of a quota system which would allow a certain number of all-adult apartment communities in each town or city. This system has the advantage of flexibility lacking in the Fair Housing Amendments Act of 1988.[293] The quota system would generate revenue which the government could use to offset revenue lost through an increased percentage for the low income housing tax credit. This program has the advantage of directly targeting the problem areas and increasing the availability of adequate rental housing for low income families with children. The same cannot be said of the 1988 Amendments to the Fair Housing Act,[294] which are far too sweeping and which will hinder provision of adequate rental housing to the low income rental market.

MARY KAY FLEMING

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293. Pub. L. No. 100-430, 102 Stat. 1619-36 (1988).
294. *Id.*

The Fraud-on-the-Market Theory: A "Basic"ally Good Idea Whose Time Has Arrived, *Basic, Inc. v. Levinson*

I. Introduction

The stock market has been shaken once again. Black Monday, October 19, 1987 has replaced Black Tuesday of October 1929.[1] Wall Street stories of mergers and acquisitions,[2] high yield junk bonds, insider trading,[3] market manipulations,[4] the Drexel Burnham Lambert settlement,[5] and leveraged buyouts of a proportion, magnitude, and number never dreamed of just five years ago[6] have filled the newspapers and news magazines.

For many years the stock market was stable in the sense that prices rose and fell with the conditions of the day. The underlying assumptions of investment risk were not seriously questioned even though efforts were made to maintain quality control.[7] The nation was confident that nothing like the Great Depression and the market crash of 1929 would ever be repeated.[8] Congress enacted the Securities Act of 1933[9] and the Securities Exchange Act of 1934[10] in an effort to ensure the safety of

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1. *The Crash of '87*, Wall Street Journal, December 11, 1987, at 1, col. 6.

2. N.Y. Times, October 21, 1988, at 1, col. 3 (A partnership led by the Wall Street firm of Shearson Lehman Hutton Inc. is reportedly planning to offer about $17 billion for RJR Nabisco, Inc).

3. N.Y. Times, December 19, 1987, at 1, col. 1 (Ivan F. Boesky is sentenced to three years in prison in insider trading scandal).

4. Wall Street Journal, October 14, 1987, § A, at 6, col. 1 (At least two investigations are under way into possible illegal self-dealing involving private charitable foundations funded and controlled by Drexel Burnham's junk bond chief, Michael Milken, his brother Lowell and others).

5. The National Law Journal, Oct. 31, 1988, at 9, col. 1 (Drexel waits for next shoe to drop: criminal charges anticipated).

6. N.Y. Times, October 21, 1988, at 1, col. 3.

7. *See Securities and Exchange Commission Authorization Act of 1987, Securities Laws and Corporate Disclosure Regulations: Hearing Before the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, House of Representatives,* 97th Cong., 2nd Sess. (1982) *The Securities Acts Amendments of 1975.* (Congress enacted the 1975 Amendments after the crisis of 1969 and 1970 which caused the failure of many broker-dealers, including several of the oldest and largest Wall Street firms).

8. N.Y. Times, October 21, 1987, §IV at 15, col. 3 (Old jokes, that were formed during Great Depression, are being revived and updated during current stock market crisis). It is not suggested that the causal factors of the market decline in 1987 are the same as those present in 1929. *See, The October 1987 Market Break*, Fed. Sec. L. Rep. (CCH) No. 1271 (Feb. 9, 1988).

9. 15 U.S.C. §§ 77a - 77aa (1982).

10. 15 U.S.C. §§ 78a - 78kk (1982).

the American economy.[11] Individuals bought and sold securities and made or lost money feeling secure that illegality or fraud had not affected the risk. Attorneys advised their clients candidly and responsibly of the client's obligations to disclose information as required by the SEC laws. If fraud was involved in the market prices or conditions, laws were available with which to prosecute the perpetrators.[12] In particular, Rule 10b-5[13] provided broad language with which to carry out the purpose of protecting market investors from the types of activities, namely fraud and manipulation, that nearly brought the country to the brink of economic disaster during the last years of the 1920's.

Until 1975, the Supreme Court applied broadly the SEC regulations in finding a 10b-5 fraud action.[14] With the *Blue Chip Stamps v. Manor Drug Stores* case,[15] however, the Court began to interpret more narrowly aspects of the fraud action.[16] Justice Rehnquist, writing the majority

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11. *See infra* notes 12-13, 24-27 and accompanying text.

12. Sections 11 and 12(2) of the Securities Act of 1933, 15 U.S.C. 77k, 77l(2) (1982), provide express causes of action by defrauded or misled buyers of securities, but the remedies are limited. Section 11 of the Securities Act prohibits material misstatements and omissions in registration statements. Section 12(2) imposes liability on a seller of registered or unregistered securities for material misstatements or omissions in any communication through which the securities are offered or sold. The Securities Exchange Act of 1934 provides antifraud provisions in sections 10(b) and 16(b), 15 U.S.C. 78j(b), 78p(b) (1982). An implied cause of action for violation of section 10(b) was accepted in Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946). Section 10(b) applies to all securities but section 16(b) applies to equity securities of registered companies and only to directors, officers, and ten percent or more shareholders.

13. 15 U.S.C. § 78j(b), and the Rule promulgated thereunder, 17 C.F.R. 240.10b-5 states:

> It shall be unlawful for any person, directly or indirectly, by use of any means or instrumentality or interstate commerce, or of the mails or of any facility of any nation securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

14. Phillips, *An Essay: The Competing Currents of Rule 10b-5 Jurisprudence*, 21 IND. L. REV. 625 (1988).

15. 421 U.S. 723 (1975). The Court limited 10b-5 actions to actual purchasers or sellers of securities. *Id.* at 725.

16. *See* Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977) (manipulative or deceptive conduct is required for 10b-5 actions); Dirks v. SEC, 463 U.S. 646 (1983) (a tippee is not under a duty to disclose or refrain from trading unless the tip is a breach of her fiduciary duty); Chiarella v. United States, 445 U.S. 222 (1980) (no duty to disclose mere possession of nonpublic insider information); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (scienter, i.e., intent to deceive, manipulate, or defraud, on the part of the defendant is necessary).

opinion in *Blue Chip*, argued that there was "widespread recognition" that the problem of vexatious litigation under Rule 10b-5 cases needed to be circumscribed.[17]

If, indeed, the Court has sought to refine the scope of securities fraud actions during the past 14 years, it has made a major shift toward a broader interpretation with *Basic Inc. v. Levinson*[18]. In the *Basic* case, the Court supported the fraud-on-the-market theory.[19] Fraud-on-the-market is a theory which recognizes that a materially false statement or omission, made available to the general public, may be relied upon by stock market professionals in the process of valuing shares.[20] This process of valuing the shares, affected by false statements or omissions, causes the price of the stock to deviate from what its intrinsic value should be. As a result, investors are hurt by false statements or omissions even if they do not personally value the stock on the misstatements or omissions. Additionally, the fraud-on-the-market theory serves as an entree for plaintiff class actions because individual direct reliance need not be proven.[21] The theory is used to support a presumption of reliance in Rule 10b-5 securities fraud actions.[22]

The Supreme Court, with the *Basic* decision, has renewed interest in the fraud-on-the-market theory.[23] This Note examines the background and application of the fraud-on-the-market theory. An analysis of the *Basic* majority and dissenting opinions follows. Finally, it will be shown that the positive aspects of the *Basic* decision for investors, namely a presumption of reliance which functions to remove a difficult evidentiary burden and which provides for easier class action certification, should be weighed against the uncertainty that corporations and their counsel now face because of the Court's unrestricted announcement that the fraud-on-the-market theory is acceptable in Rule 10b-5 actions. The favoring of the investor by the United States Supreme Court will be

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17. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 739 (1975). The Court was concerned with strike suits, that is, those cases without merit but which have a settlement value because the defendant can be forced to engage in costly discovery. *Id.* at 740-41.

18. 108 S. Ct. 978 (1988).

19. *See generally* Black, *Fraud-on-the-Market: A Criticism of Dispensing With Reliance Requirements in Certain Open Market Transactions*, 62 N.C.L. Rev. 435 (1984); Note, *The Fraud-on-the-Market Theory*, 95 Harv. L. Rev. 1143 (1982).

20. *See supra* n.19.

21. *Basic*, 108 S. Ct. 978, 990-91 (1988).

22. *See* Black, *supra* note 19; Note, *supra* note 19.

23. *Basic*, 108 S. Ct. at 998. The *Basic* court determined the materiality standard for violation of § 10(b) of the Securities Exchange Act of 1934 in the context of corporate preliminary merger negotiations statements in addition to approving the fraud-on-the-market theory. *Id.* at 983.

seen by many as welcome and long overdue. However, it is not without a cost. With the *Basic* decision, the Court may have given investors the impression that they no longer must act with caution and care when dealing with stock market risk. At the same time, the Court seems ready to impose a greater burden on those who make the disclosure to those who are careless.

II. Background

The purpose of the Securities Act of 1933 and the Securities Exchange Act of 1934, and specifically Rule 10b-5, was to protect investors against manipulation of stock prices,[24] to promote fair equitable practices,[25] and to insure fairness in securities transactions.[26] Principles of basic tort law were incorporated into the 1933 and 1934 Acts as means of accomplishing the Acts' ends.[27]

The 10b-5 cause of action has been based on traditional common law fraud.[28] Misrepresentations, as the basis of a fraud action, had to be relied upon in order to be actionable.[29] If applied to securities fraud cases, the plaintiffs would be required to show that they had relied on the prospectus or other publicly disclosed information, in addition to the other elements of fraud, in order to recover damages.[30] The Second,[31] Third,[32] Fifth,[33] Ninth[34], Tenth[35], and Eleventh[36] Circuits now recognize

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24. S. Rep. No. 792, 73d Cong., 2d Sess. 1-5 (1934). Rule 10b-5 was adopted in 1942.

25. 3 L. Loss, Securities Regulation 1455-56 (2d ed. 1961). *See also*, Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 476-77 (1977) (*quoting* SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963)).

26. Scott, *Insider Trading: Rule 10b-5, Disclosure and Corporate Privacy*, 9 J. Legal Stud. 801, 804 (1980).

27. *See* Restatement (Second) of Torts §§ 525-530 (1977); W. Prosser, Handbook of the Law of Torts § 108 (4th ed. 1971).

28. The elements for common law fraud include: a misrepresentation of a material fact, reliance, causation and intent or scienter. Restatement (Second) of Torts §§ 525-530 (1977).

29. *See* W. Prosser, *supra* note 27.

30. *Id.*

31. Panzirer v. Wolf, 663 F.2d 365 (2d Cir. 1981), *vacated as moot sub nom.* Price Waterhouse v. Panzirer, 459 U.S. 1027 (1982).

32. Peil v. Speiser, 806 F.2d 1154 (3d Cir. 1986).

33. Shores v. Sklar, 647 F.2d 462 (5th Cir. 1981) (en banc), *cert. denied*, 103 S. Ct. 772 (1983).

34. Blackie V. Barrack, 524 F.2d 891 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976).

35. T.J. Raney & Sons v. Fort Cobb, Okla. Irr. Fuel Auth., 717 F.2d 1330 (10th Cir.), *cert. denied*, 104 S. Ct. 1285 (1983).

36. Lipton v. Documation, Inc., 734 F.2d 740 (11th Cir. 1984).

that the securities market functions in response to all information fed into it whether or not investors read and use the information.[37] The reliance element is demonstrated by showing both that the misstatements or omissions affected the market and that the purchase or sale of a security caused the plaintiff's injury. A misrepresentation is "impounded in the market price, and the person who buys without knowledge of the prospectus is acting on false information to the same extent as those who buy with knowledge."[38]

Some courts have distinguished between omissions and false and misleading statements,[39] noting that proof of reliance for omissions is a particularly difficult problem because of the need to show how the plaintiff would have acted had the information been disclosed.[40] However, a presumption of reliance is now employed in both misstatement and omission cases.[41]

The primary purpose of the reliance presumption in a Rule 10b-5 cause of action is to allow the investor to rely on the expectation that the securities markets are fraud-free,[42] prices are set validly,[43] and the market has not been manipulated.[44] In an open market the investor is able to assume that a security is priced accurately, that is, that the market price is in fact the equivalent of the intrinsic value.[45]

A secondary, but no less important, purpose for allowing a presumption of reliance is to maintain a class action.[46] The procedural concerns of class actions under the Federal Rules of Civil Procedure,[47] namely, the need for each plaintiff to show individual reliance, are eliminated; therefore, the potential for more plaintiffs and larger recoveries exists.[48] Additionally, as the majority in *Basic* pointed out, the

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37. The Fifth Circuit pointed out in *Shores* that the Supreme Court "did not eliminate reliance as an element of a 10b-5 omission case; it merely established a presumption that made it possible for the plaintiffs to meet their burden." *Id.* 647 F.2d at 468.

38. R. Posner, Economic Analysis of Law 423 (3d ed. 1986).

39. *See* cases cited *infra* note 71.

40. Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128 (1972). The Supreme Court held that in a face-to-face transaction where the defendant failed to state material facts, the plaintiff's reliance could be presumed from the materiality of the facts. The defendant would then have an opportunity to prove that the plaintiff had not relied on the material omissions. *Id.* at 153-54.

41. *See* cases cited *infra* note 71.

42. Blackie v. Barrack, 524 F.2d 891, 907 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976).

43. *Id.*

44. *Id.*

45. Note, *The Fraud-on-the-Market Theory*, 95 Harv. L. Rev. 1143 (1982).

46. Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970).

47. Fed. R. Civ. P. 23.

48. *See generally* Comment, *Class Actions, Typicality, and Rule 10b-5: Will the*

fraud-on-the-market theory removes an unrealistic evidentiary burden from the plaintiff.[49]

III. The Efficient Capital Market Hypothesis and The Fraud-On-The-Market Theory

The notion that the investor expects the market to provide an accurate reflection of the value of a stock is based on the efficient capital market hypothesis.[50] The premise of the efficient capital market hypothesis is that in pricing a stock the market anticipates events and, consequently, a stock's price is the best estimate of its intrinsic value.[51] The hypothesis developed from the random walk model,[52] that is, that market prices will fluctuate randomly and be independent of prior changes.[53] The efficient market hypothesis, as it has evolved, suggests that the market reacts, completely and immediately, to information about the shares being traded.[54] As such, the market, using all publicly available information, sets a price which reflects the actual value of the stock.[55]

There are three forms of the efficient capital market hypothesis: the weak form which measures whether historical price data is fully reflected; the semi-strong which measures whether all publicly available information is reflected; and the strong form which measures whether all information, including information not publicly available, is fully reflected.[56] The semi-strong form of the efficient market hypothesis is the recognized basis of the fraud-on-the-market theory.[57]

Typical Representative Please Stand Up?, 36 Emory L.J. 649 (1987); Note, *The Fraud-on-the-Market Theory*, 95 Harv. L. Rev. 1143, 1159 (1982).

49. *Basic*, 108 S. Ct. at 990.

50. *See generally*, Fischel, *Use of Modern Finance Theory in Securities Fraud Cases Involving Actively Traded Securities*, 38 Bus. Law. 1 (1982); Pickholz & Horahan, *The SEC's Version of the Efficient Market Theory and its Impact on Securities Law Liabilities*, 39 Wash. & Lee L. Rev. 943 (1982); Note, *Broker Investment Recommendations and the Efficient Capital Market Hypothesis: A Proposed Cautionary Legend*, 29 Stan. L. Rev. 1077 (1977).

51. *See* 8 Economics of Corporation Law and Securities Regulation 438 (R. Posner & K. Scott, eds. 1980). *See also*, A. Bromberg & L. Lowenfels, Security Fraud and Commodities Fraud, (1982).

52. J. Lorie, P. Dodd & M. Kimpton, The Stock Market: Theories and Evidence 55 (1985) [hereinafter cited as J. Lorie].

53. *Id.* at 77.

54. *Id.* at 76.

55. *Id.* at 77. *See also* Black, *Fraud-on-the-Market: A Criticism of Dispensing with Reliance Requirements in Certain Open Market Transactions*, 62 N.C.L. Rev. 435, 449.

56. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. Fin. 383 (1970).

57. *See* J. Lorie, *supra* note 52, at 77.

The efficient market hypothesis has been problematic because randomness would seem to imply a lack of meaning to stock pricing.[58] Also there is the obvious paradox of investor activity.[59] In an efficient market when information is available, the share price will approach its intrinsic value because of investor competition. At the same time, investors trade stock because they believe stocks are under- or overvalued, that is, that the market prices do not reflect their true value. Many investors purchase or sell stocks because they believe the price reflects the corporation's worth inaccurately.[60] However, "[u]nder conditions of efficiency, no investor, using only information also generally available to other investors, can systematically identify and acquire undervalued (or overvalued) securities."[61] It has been pointed out by economists[62] and courts [63] that the efficient market theory has some difficulties beyond this paradox. The stock market is not only to receive information but to interpret the information and transform the information into a price. The information is supposedly factual. However, projections, conjectures, and speculations, which are of questionable sufficent factual basis, are incorporated into the mix of information to be interpreted and such "information" is filtered regularly into the market place.[64]

The fraud-on-the-market theory, based on the efficient market hypothesis, is used to say that a buyer or seller of securities can presume an efficient market. The Third Circuit Court in *Peil v. Speiser*[65] stated that "in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business."[66] An investor may rely on the "supposition that the market price is validly set and that no unsuspected manipulation has artificially inflated the price."[67] It is the investor's

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58. *See* Wang, *Some Arguments That the Stock Market Is Not Efficient*, 19 U.C.D. L. Rev. 341 (1986). Wang has stated that if the "semi-strong [form of the efficient market] hypothesis were correct, one would have to conclude that the market for investment research was extremely inefficent." *Id.* at 375. *See also*, Tobin, *On the Efficiency of the Financial System*, 153 Lloyds Bank Rev. 1 (1984).

59. *See* J. Lorie, *supra* note 52, at 77.

60. *See* Black, *supra* note 19, at 455.

61. Note, *The Efficient Capital Market Hypothesis, Economic Theory and the Regulation of the Securities Industry*, 29 Stan. L. Rev. 1031, 1035 (1977).

62. *See generally supra* notes 50-52.

63. *Basic*, 108 S. Ct. at 998 (White, J., dissenting).

64. *See* Hiler, *The SEC and the Courts' Approach to Disclosure of Earnings Projections, Asset Appraisals, and Other Soft Information: Old Problems, Changing View*, 46 Md. L. Rev. 1114 (1987).

65. 806 F.2d 1154 (3d Cir. 1986).

66. *Id.* at 1160.

67. Blackie v. Barrack, 524 F.2d 891, 907 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976).

reliance on the market and not on the information disclosed by the corporation that is presumed. Therefore, reliance is still a vital part of the 10b-5 cause of action, even though the focus of the investor's reliance has shifted to the market. Consequently, misleading statements could defraud traders in securities even if the investors did not rely directly on the misstatements. The misstatements or omissions can affect the price by either inflating or deflating it artificially, which could defraud investors who rely on the price as a reflection of the value of the share.[68]

A potential problem with the fraud-on-the-market theory is the conflict between the national policy of full and fair disclosure of material information to the investing public and the public's failure to rely on that information because the market is supposedly efficient. As the district court in *In re LTV Securities Litigation*[69] stated in 1980:

> [t]he market is performing a substantial part of the valuation process performed by the investor in a face-to-face transaction. The market is acting as the unpaid agent of the investor, informing him that given all the information available to *it*, the value of the stock is worth the market price.[70]

If indeed the market is functioning as an informer/agent of the investor, full disclosure to investors is not necessary and is, in fact, superfluous.

IV. Fraud-On-The-Market Theory Applied

The various federal circuit courts have applied the fraud-on-the-market theory in securities fraud actions brought under Rule 10b-5.[71] The Second, Ninth, and Eleventh Circuits have applied the presumption of reliance only to existing securities on developed markets,[72] but the Fifth and Tenth Circuits have applied the theory to newly issued shares on undeveloped markets.[73]

The first Supreme Court case to dispense with proof of actual reliance in establishing causation in non-disclosure cases was *Affiliated Ute Cit-*

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68. Note, *The Fraud-on-the-Market Theory*, 95 Harv. L. Rev. 1143, 1154-56 (1982).

69. 88 F.R.D. 134 (N.D. Tex. 1980).

70. *Id.* at 143 (cited with approval in *Basic*, 108 S. Ct. at 990).

71. *See*, Peil v. Speiser, 806 F.2d 1154 (3d Cir. 1986), Lipton v. Documation, Inc., 734 F.2d 740 (11th Cir. 1984), *cert. denied*, 105 S. Ct. 814 (1985); T.J. Raney & Sons v. Fort Cobb, Okla. Irr. Fuel Auth., 717 F.2d 1330 (10th Cir. 1983), *cert. denied* 104 S. Ct. 1285 (1983); Panzirer v. Wolf, 663 F.2d 365 (2d Cir. 1981), *vacated as moot sub nom.* Price Waterhouse v. Panzirer, 459 U.S. 1027 (1982); Shores v. Sklar, 647 F.2d 462 (5th Cir. 1981) (en banc), *cert. denied*, 103 S. Ct. 772 (1983); Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976).

72. *Blackie*, 524 F.2d at 895; *Panzirer*, 663 F.2d at 367-68; *Documation*, 734 F.2d at 745.

73. *Shores*, 647 F.2d at 468; *T.J. Raney*, 717 F.2d at 1333.

izens v. United States.[74] In *Affiliated Ute*, members of a large class of shareholders alleged that they had relied, in the context of a face-to-face transaction, on the advice of two bank employees in selling their stock.[75] The bank employees failed to disclose the stock's true value and that they were market makers in the stock.[76] The Supreme Court held:

> Under the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision. This obligation to disclose and this withholding of a material fact establish the requisite element of causation in fact.[77]

Since 1972 and the *Affiliated Ute* decision, the circuits have approached the fraud-on-the-market theory with inconsistent results.[78] In *Blackie v. Barrack*,[79] the Ninth Circuit expanded the *Affiliated Ute* decision by extending the reliance presumption to a material misrepresentation case.[80] As the court noted:

> Here, we eliminate the requirement that plaintiffs prove reliance directly in this context because the requirement imposes an unreasonable and irrelevant evidentiary burden. . . . Requiring direct proof from each purchaser that he relied on a particular representation when purchasing would defeat recovery by those whose reliance was indirect, despite the fact that the causational chain is broken only if the purchaser would have purchased the stock even had he known of the misrepresentation. We decline to leave such open market purchasers unprotected.[81]

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74. 406 U.S. 128 (1972). With *Affiliated Ute* the Supreme Court established a rebuttable presumption of reliance in non-disclosure cases but did not discuss whether reliance could be presumed in affirmative misrepresentation cases. *Id.* at 153.

75. *Id.*

76. *Id.*

77. *Id.* at 153-54 (citations omitted).

78. *See* cases cited *infra* notes 79-95.

79. 524 F.2d 891 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976).

80. The *Blackie* plaintiffs claimed that they purchased shares of Ampex Corporation stock between the release of two annual reports which contained misrepresentations of the corporation's financial position. The court found that the misrepresentations had influenced the stock's price in the market. Causation in the market place was established by proof of purchase and proof of the materiality of the misrepresentation even though there was no proof of direct reliance. *Blackie*, 524 F.2d at 906.

81. *Id.* at 907.

Consequently, the plaintiff need only establish that the fraud adversely affected the market price in order for the presumption to apply.

Defendants can prove that the misstatements are immaterial. Defendants may disprove causation by showing that an insufficient number of shares were purchased or sold on the misrepresentation to affect the price or that the plaintiff knew of the misrepresentation or would have purchased the shares even though she knew of the misrepresentation.[82] The court in *Blackie* did not address the problem that the defendant's proof is the functional equivalent of the plaintiff's proof, that is, proof of a speculative negative.[83] *Blackie* also suggests that the purpose of a reliance element is to show causation.[84] If reliance is equated with causation, the presumption is nonrebuttable. If the material misrepresentation caused the plaintiff's injury, the defendant has violated Rule 10b-5. The Ninth Circuit Court did not go this far; however, other courts have.[85]

In *Panzirer v. Wolf*,[86] the plaintiff did not rely on the market price to decide to purchase shares of a corporation. Rather, she relied on a newspaper article which was favorable to the corporation. The plaintiff's reliance was not on the integrity of the market price as it had been in *Blackie*.[87] Instead, reliance was eliminated as an element of the Rule 10b-5 action because the plaintiff could show a causal connection between the material misrepresentation in the corporation's annual report and her financial loss.[88] Consequently, in the *Panzirer* case, the presumption of reliance is nonrebuttable.

The fraud-on-the-market theory was extended to new securities on an undeveloped market in *Shores v. Sklar*.[89] The plaintiff had purchased municipal bonds but not in reliance on the offering circular. The bonds

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82. *Id.* at 906. *See* Black, *Fraud on the Market: A Criticism of Dispensing with Reliance Requirements in Certain Open Market Transactions*, 62 N.C.L. REV. 435, 448 (1984).

83. *Blackie*, 524 F.2d at 908. The court in *Blackie* stated that "[d]irect proof would inevitably be somewhat proforma, and impose a difficult evidentiary burden, because addressed to a speculative possibility in an area where motivations are complex and difficult to determine." *Id.*

84. *Id.* at 906.

85. *See* Fausett v. American Resources Management Corp., 542 F. Supp. 1234 (D. Utah 1982); Pellman v. Cinerama, Inc., 89 F.R.D. 386 (S.D.N.Y. 1981); In re LTV Sec. Litig., 88 F.R.D. 134, 143 n.4 (N.D. Tex. 1980); Arthur Young & Co. v. United States Dist. Ct., 549 F.2d 686, 694-95 (9th Cir. 1977), *cert. denied*, 434 U.S. 829 (1977).

86. 663 F.2d 365 (1981), *cert. denied*, 458 U.S. 1107 (1982).

87. *Blackie*, 524 F.2d at 906.

88. *Panzirer*, 663 F.2d at 366.

89. 647 F.2d 462 (5th Cir. 1981) (*en banc*), *cert. denied*, 459 U.S. 1102 (1983), *rev'd sub nom.* (in part) FED. SEC. L. REP. (CCH) ¶ 92,874, *appeal dismissed*, 844 F.2d 1485, *vacated*, *reh'g granted*, 855 F.2d 722 (11th Cir. 1988) (*en banc*).

soon lost their value.[90] The bonds were new securities issued on an undeveloped market,[91] in contrast to both *Blackie*[92] and *Panzirer*.[93] In *Shores*, the Fifth Circuit found that the newly issued securities were unmarketable.[94] The plaintiff, by proving that he was willing to take a marketable risk, demonstrated that he relied on the "integrity of the offerings of the securities market."[95] This showing of reliance suggests that causation was shown by offering bonds which were not marketable.

The broad application of the fraud-on-the-market theory by many of the circuit courts may represent a growing consideration for investors' vulnerabilities. As early as 1975 with the *Blue Chip* case,[96] the Supreme Court recognized that reliance, an essential element in common law tort misrepresentation cases, was perhaps not as critical in Rule 10b-5 actions even though this was the case that began the circumscription of the scope of the fraud action. As the *Blue Chip* court stated: "[T]he typical fact situation in which the classic tort of misrepresentation and deceit evolved was light years away from the world of commercial transactions to which Rule 10b-5 is applicable."[97] Investors willing to accept the usual risks of trading on the securities market should not be subject to schemes that are not only meant to defraud individual investors but the market in general. Material misstatements cause the market to react in a manner that causes, in turn, investors a financial harm. The courts should not neglect investors' indirect reliance on the integrity of the market place without providing an alternative solution which would redress the injury suffered.

The availability of class action certification is greatly enlarged when the burden of showing individual reliance is relaxed.[98] Investors with relatively small losses would not go forward with their claims unless a class action could be maintained. Where individual reliance on the misstatements was required, class actions could be denied. The Advisory

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90. *Shores*, 647 F.2d at 463-64.
91. *Id.*
92. *Blackie*, 524 F.2d at 908.
93. *Panzirer*, 663 F.2d at 366.
94. *Shores*, 647 F.2d at 467.
95. *Id.* at 469.
96. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).
97. *Id.* at 744-45.
98. FED. R. CIV. P. 23. Prerequisites for a class action include: numerosity, common questions of law or fact, typicality of claims, and fair and adequate protection of the interests of the class. In addition, one of the three subdivisions of Rule 23(b) must apply. Usually securities fraud class actions attempt to meet Rule 23(b)(3): "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Id.*

Committee on Rule 23 suggests that class actions could be an appropriate vehicle for fraud actions:

> Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results. . . . [A] fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class. On the other hand . . . a fraud case may be unsuited for treatment as a class action if there was [sic] material variations in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed.[99]

In applying the fraud-on-the-market theory, misrepresentations are not made to or relied upon by individuals but rather to and by the market place. Therefore, it is appropriate to say that the market participants are an ideal class[100] because there is no variation in representation and yet defendants may rebut the presumption where the plaintiff placed no reliance on the market in those courts where reliance is not equated with causation and is still a necessary element of Rule 10b-5 actions.

V. The *Basic* Case

Basic, Inc. merged with Combustion Engineering after 14 months of merger negotiations.[101] Basic expressly made three public statements denying that merger negotiations were taking place or that it knew of corporate developments that would account for heavy trading activity in its stock.[102] A class action was instituted against Basic and some of the directors on behalf of former Basic stockholders who sold their stock between Basic's first denial of merger activity in October, 1977 and the suspension of trading in Basic stock just prior to the merger announcement.[103] The former shareholders claimed that Basic's statements had been misleading or false in violation of the Securities Exchange Act of 1934 section 10(b) and Rule 10b-5,[104] and that they were injured by

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99. Fed. R. Civ. P. 23(b)(3) advisory committee note.
100. *See supra* note 31.
101. *Basic*, 108 S. Ct. at 981.
102. *Id.*
103. *Id.*
104. *See supra* note 13.

selling their shares at prices artificially depressed by those statements.[105]

The United States District Court for the Northern District of Ohio certified a class action but granted a summary judgment on the merits for Basic.[106] The district court determined that the misstatements were immaterial as a matter of law.[107] The United States Court of Appeals for the Sixth Circuit affirmed the class certification by agreeing that under a fraud-on-the-market theory, the former shareholders' reliance on the company's misrepresentations could be presumed. However, the appellate court reversed the summary judgment and remanded.[108] The Court of Appeals held that discussions that might not otherwise be material can become so "by virtue of the statement denying their existence."[109]

The United States Supreme Court granted certiorari[110] in order to "resolve the split" among the Courts of Appeal as to the materiality standard applicable to preliminary merger negotiations[111] and to determine whether the presumption of reliance used to certify the class was properly applied.[112]

The materiality standard of *TSC Industries, Inc. v. Northway, Inc.*[113] was expressly adopted for merger negotiations under Section 10(b) and Rule 10b-5.[114] Additionally, the Court in *Basic* accepted the application of the fraud-on-the-market theory as proper, not only in the fact pattern of the *Basic* case but seemingly in all 10b-5 class actions.[115]

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105. *Basic*, 108 S. Ct. at 981.

106. Levinson v Basic, Inc., Fed. Sec. L. Rep. (CCH) ¶ 91,801 (Aug. 3, 1984).

107. The district court found that there were no negotiations at the time of the first statement. Negotiations were being conducted when the second and third statements were made; however, the district court applied an agreement-in-principle test and found that the negotiations were not "destined, with reasonable certainty, to become a merger agreement in principle." App. to Pet. for Cert. 103a.

108. 786 F.2d 741, 751 (1986). The Sixth Circuit rejected the agreement-in-principle test of materiality in merger and acquisition negotiations and held that "once a statement is made denying the existence of any discussions, even discussions that might not have been material in absence of the denial are material because they make the statement made untrue." *Id.* at 749. The court stated that statements become material "by virtue of the statement denying their existence." *Id.* at 748.

109. *Id.* at 748.

110. 479 U.S. 1083 (1987).

111. *Basic*, 108 S. Ct. at 982.

112. *Id.*

113. 426 U.S. 438 (1976). "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *Id.* at 449. The *TSC* Court went on to state that "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Id.*

114. *Basic*, 108 S. Ct. at 983.

115. *Id.* at 989.

The majority opinion, written by Justice Blackmun, asserted that the Court was not assessing the validity of an economic theory,[116] namely, the fraud-on-the-market theory. Rather, the majority said that the Court was attempting to ascertain whether it was, and is, proper to apply a rebuttable presumption of reliance based on the fraud-on-the-market theory.[117]

The Court in *Basic* stated that reliance continues to be an element of a Rule 10b-5 cause of action.[118] Moreover, the Court reasoned that a presumption of reliance is proper in Rule 10b-5 class actions based on practical considerations consistent with the 1934 Act's full disclosure policy and "considerations of fairness, public policy, and probability, as well as judicial economy . . . for allocating the burdens of proof between parties."[119] The majority noted that the Congressional policy expressed in the 1934 Act is supported by the presumption device.[120]

Referring to the district court's finding, that the presumption of reliance provided "a practical resolution to the problem of balancing the substantive requirement of proof of reliance in securities cases against the procedural requisites of [Fed. Rule Civ. Proc.] 23,"[121] the Supreme Court concluded that a presumption of reliance removes an unrealistic evidentiary burden from the plaintiff in securities fraud cases.[122]

Modern securities markets differ significantly from face-to-face transactions. Where the market is performing a valuation of shares, a function ordinarily performed by the investor in private transactions, to say that the worth of the stock is equivalent to the market price, the investor looks to the securities market with the confidence usually reserved for expert appraisal, be it her own or that of other professionals based on knowledge and experience.[123] The fraud-on-the-market theory is clearly reflected in this idea.[124]

The Court in *Basic* found no inconsistency with the 1934 Act's purpose of promoting full and fair disclosure of information and the fraud-on-the-market theory even though many commentators[125] and the

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116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 990.
120. *Id.* at 990-91.
121. *Id.* at 989.
122. *Id.* at 990.
123. In re LTV Securities Litigation, 88 F.R.D. 134, 143 (N.D. Tex. 1980).
124. *See supra* text accompanying notes 50-55, 64-66.
125. *See*, R. KARMEL, REGULATION BY PROSECUTION: THE SECURITIES AND EXCHANGE COMMISSION VS. CORPORATE AMERICA (1982); H. KRIPKE, THE SEC AND CORPORATE DISCLOSURE: REGULATION IN SEARCH OF A PURPOSE (1979); S. PHILLIPS & J. ZECHER, THE SEC AND THE PUBLIC INTEREST (1981); Jarrell, *The Economic Effects of Federal Regulation*

dissentors in *Basic* have disagreed.[126] The *Basic* majority's underlying rationale is that even though an individual investor has not chosen to rely on the disclosed information, the market has relied on the information. The information is necessary for the market to react. It is the market which must receive material information in order to perform the task of valuation that gives rise to the buying and selling of a security at a given time.

Since 1975,[127] the Supreme Court has taken care to limit the scope of 10b-5 actions.[128] However, the decision in *Basic* will facilitate investors bringing class actions for securities fraud. What has prompted the Court to relax the plaintiff class burden and to place an equally unrealistic evidentiary burden on the defendant? Perhaps the conduct of the *Basic* defendants was so egregious that no other solution was plausible. Perhaps, given the shaken faith of investors in the wake of the October 1987 crash, the Court wanted to act quickly and confidently to calm the fears of investors and return to a more idealistic approach.[129]

The facts of the *Basic* case are atypical.[130] The plaintiffs were sellers rather than purchasers of shares, the time between the misstatements and the decision to sell the shares was eleven months, and the plaintiffs all made money on their sale of *Basic* stock.[131] As such, this case should not have been the basis of a potentially far reaching decision and one that is tantamount to the Court's endorsement of a complex economic theory. There is no evidence to date that the decision has had an impact

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of the Market for New Securities Issues, 24 J. LAW & ECON. 613 (1981); Scott, *Insider Trading: Rule 10b-5, Disclosure and Corporate Privacy*, 9 J. LEGAL STUD. 801 (1980); Wolfson, *A Critique of the Securities and Exchange Commission*, 30 EMORY L.J. 119 (1981).

126. *Basic*, 108 S. Ct. at 997-98. *See also*, Black, *supra* note 19.

127. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).

128. *See* cases cited *supra* note 16.

129. *See* Phillips, *supra* note 14, at 662-665.

130. Justice White in his dissent states:

> None of the Court of Appeals cases the Court cites as endorsing the fraud-on-the-market theory, ante, at 991 n. 24, 99 L.Ed. 2d 218, involved seller-plaintiffs. Rather, all of these cases were brought by purchasers who bought securities in a short period following some material misstatement (or similar act) by an issuer, which was alleged to have falsely inflated a stock's price.
>
> Even if the fraud-on-the-market theory provides a permissible link between such a misstatement and a decision to purchase a security shortly thereafter, surely that link is far more attenuated between misstatements made in October 1977, and a decision to sell a stock the following September, 11 months later. The fact that the plaintiff-class is one of sellers, and that the class period so long, distinguish this case from *any other* cited in the Court's opinion, and make it an even poorer candidate for the fraud-on-the-market presumption.

Basic, 108 S. Ct. at 998 n.9 (White, J., dissenting) (citation omitted).

131. *Id.* at 998-99 (White, J., dissenting).

on corporate behavior. Likewise, its effect on plaintiff class actions has yet to be observed.

VI. The *Basic* Dissent

Justice White, writing for the dissent in *Basic*,[132] was most concerned with the the majority's uncritical acceptance of the fraud-on-the-market theory.[133] The dissent focused on the role of Congress in shaping economic policy[134] and on the problem of assessing damages in this type of action.[135]

The fraud-on-the-market theory is a recent economic theory although the economic community and the legal system have accepted it with vigor.[136] However, as the dissent pointed out, it is a theory, neither fact nor a "mature legal doctrine:"[137]

> [W]hile the economists' theories which underpin the fraud-on-the-market presumption may have the appeal of mathematical exactitude and scientific certainty, they are — in the end—nothing more than theories which may or may not prove accurate upon further consideration. Even the most earnest advocates of economic analysis of the law recognize this.[138]

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132. Justice O'Connor joined in the dissent to Part IV of the *Basic* decision. Both Justices White and O'Connor concurred with the materiality standard set forth in TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, (1976) and specifically adopted in *Basic*. 108 S. Ct. at 993.

133. *Id.*

134. *Basic*, 108 S. Ct. at 996, 997. For an interesting analysis of the competing currents (idealism, traditionalism, economic behaviorism, paradigm case analysis, literalism, and textual structuralism) evident in recent Supreme Court decisions on securities actions, *see* Phillips, *supra* note 14.

135. *Basic*, 108 S. Ct. at 998.

136. *See* Gilson & Kraakman, *The Mechanisms of Market Efficiency*, 70 Va. L. Rev. 549 (1984).

> Of all recent developments in financial economics, the efficient market hypothesis . . . has achieved the widest acceptance by the legal culture. It now commonly informs the academic literature on a variety of topics; it is addressed by major law school casebooks and textbooks on business law; it structures debate over the future of securities regulation both within and without the Securities and Exchange Commission; it has served as the intellectual premise for a major revision of the disclosure system administered by the Commission; and it has even begun to influence judicial decisions and the actual practice of law. In short, the [efficient capital market hypothesis] is now the context in which serious discussion of the regulation of financial markets takes place.

Id. at 549-550.

137. *Basic*, 108 S. Ct. at 993 (White, J., dissenting).

138. *Id.* at 995. *See, e.g.*, Easterbrook, *Afterword: Knowledge and Answers*, 85 Colum. L. Rev. 1117, 1118 (1985).

Pointing out the problems associated with supplanting "traditional legal analysis . . . with economic theorization,"[139] the dissent looked to the legislative history of the Securities Exchange Act of 1934 and prudential judicial constraint in assessing the impact of the majority opinion.

As the dissent in *Basic* pointed out, if current economic theory concerning financial markets requires that established legal ideas of fraud be considered anew, it is Congress' role to do so.[140] The superior resources and expertise of the Congress in enacting legislation should be given great deference by the courts. Even though there is a paucity of legislative history concerning Rule 10b-5, there is sufficient history surrounding other portions of the Securities Exchange Act to glean the intent of Congress in proposing and passing legislation which would protect investors and stabilize the economy.[141]

The Seventy-Third Congress, passing Section 18 of the 1934 Act,[142] imposed an express reliance requirement.[143] Congress specifically rejected the notion that plaintiffs could have a cause of action based "solely on the fact that the price of the securities they bought or sold was *affected* by a misrepresentation [without reliance]: a theory closely akin to the [*Basic*] Court's holding . . . ."[144] Analyzing the majority opinion, the dissent viewed the acceptance of the fraud-on-the-market theory as "eviscerat[ing] the reliance rule in actions brought under Rule 10b-5, and negat[ing] congressional intent to the contrary expressed during adoption of the 1934 Act."[145]

The distinction between causation and reliance is blurred in the majority opinion. Causation "involves an analysis of the relationships

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139. *Basic*, 108 S. Ct. at 994.

140. *Id.* at 996-98.

141. *Id.* at 997. *See* S. 2693, 73d Cong, 2d Sess, § 17(a) (1934); 78 CONG REC. 7701 (1934).

142. Section 18(a) of the Act provides for civil liability for misleading statements concerning securities:

> Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this title or any rule or regulation thereunder, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, *in reliance upon such statement*, shall have purchased or sold a security at a price which was affected by such statement, for damages cause by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. (Emphasis added).

73d Congress, Session 2, Ch. 404 June 6, 1934 at 897,898.

143. *Id.*

144. *Basic*, 108 S. Ct. at 997 (White, J., dissenting).

145. *Id.*

between individuals and the impact of their actions on each other and third parties."[146] The defendant's conduct was a "cause in fact" of the injury, and thus it should be recognized as a legal cause on policy grounds.[147] Reliance is determined by whether the misrepresentation was a substantial factor in determining the course of conduct which resulted in the plaintiff's loss.[148] A plaintiff must do more than show that the defendant violated the rule; she must establish causation, and, according to the dissent, should also be required to show reliance in establishing causation. However, materiality can establish causation, at least in certain circumstances.[149]

Additionally, Congress' policy of full and fair disclosure is compromised when the disclosure is not directed to the purchaser or seller of a security. In 1981, the dissent of *Shores v. Sklar*[150] stated:

> [D]isclosure . . . is crucial to the way in which the federal securities laws function. . . . [T]he federal securities laws are intended to put investors into a position from which they can help themselves by relying upon disclosures that others are obligated to make. This system is not furthered by allowing monetary recovery to those who refuse to look out for themselves. If we say that a plaintiff may recover in some circumstances even though he did not read and rely on the defendants' public disclosures, then no one need pay attention to those disclosures and the method employed by Congress to achieve the objective of the 1934 Act is defeated.[151]

As the dissent in *Basic* noted, by removing individual reliance as an element in Rule 10b-5 actions, the Court is approaching an "investor

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146. Crane, *An Analysis of Causation Under Rule 10b-5*, 9 SEC. REG. L.J. 99, 100 (1981).

147. RESTATEMENT (SECOND) OF TORTS §§ 546 (causation in fact), 548A (legal cause) (1977). Causation in common law fraud actions required that the plaintiff had actually relied on the defendant's misrepresentation and was injured by the reliance. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 108, at 774-75 (4th ed. 1971).

148. RESTATEMENT (SECOND) OF TORTS § 546. *See generally* A. BROMBERG, SECURITIES FRAUD § 8.6(1), at 209 (Supp. 1970); L. Loss, *supra* note 25, at 1430-44; Note, *The Reliance Requirement in Private Actions Under SEC Rule 10b-5*, 88 HARV. L. REV. 584 (1975); Note, *Reasonable Reliance Under 10b-5: Is the "Reasonable Investor" Reasonable?*, 72 COLUM. L. REV. 562 (1972).

149. Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970); Affiliated Ute Citizens v. United States, 406 U.S. 128 (1970).

150. 647 F.2d 462 (5th Cir. 1981) (*en banc*), *cert. denied*, 103 S. Ct. 772 (1983).

151. *Id.* at 483 (Randall, J., dissenting) (*quoted in Basic*, 108 S. Ct. at 997-98 (White, J., dissenting)).

insurance scheme."[152] The Court should not overprotect investors from the ordinary risks involved in market transactions.[153]

It would be a mischaracterization of the majority opinion to say that it was providing investor insurance. Rather, the majority wanted to accomplish its goal of facilitating Rule 10b-5 litigation[154] in marked contrast with the post-1975 Supreme Court decisions in this area.[155] The Court in *Basic* did so with its acceptance of the idea of investor access to all information even when not relied upon directly, with its recognition that the public should be protected from material misrepresentations and with its appreciation for the deterrence factor in prosecution.

According to Justice White's dissent in *Basic*, the common law elements of fraud and deceit should remain in Rule 10b-5 actions: "[T]he case law developed in this Court with respect to § 10(b) and Rule 10b-5 has been based on doctrines which we, as judges, are familiar: common-law doctrines of fraud and deceit."[156] In approaching the Rule 10b-5 action from this perspective, the dissent is attempting to restrain the scope of the action much as the Court had done in 1975 with the *Blue Chip* case and subsequent cases until the *Basic* decision.[157]

VII. Effects of the *Basic* Case

Prior to the *Basic* decision, the circuit courts were divided in their application of the fraud-on-the-market theory[158] to secondary markets and/or to newly issued securities on undeveloped markets.[159] This situation has not been remedied by the decision in *Basic*.

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152. *Basic*, 108 S. Ct. at 996.

153. *See* Easterbrook & Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 Va. L. Rev. 669 (1984); Note, *Causation in Fraud-on-the-Market Actions—Investors' Insurance in the Second Circuit?*, 49 Brooklyn L. Rev. 1291 (1983).

154. *Basic*, 108 S. Ct. at 990.

155. Justice Blackmun has written several dissents expressing his view on the Court's post 1975 decisions. In Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975) (Blackmun, J., dissenting), Justice Blackmun stated: "[T]he Court exhibits a preternatural solicitousness for corporate well-being and a seeming callousness toward the investing public quite out of keeping, it seems to me, with our own traditions and the intent of the securities laws." *Id.* In his dissent to Dirks v. SEC, 463 U.S. 646 (1983), Justice Blackmun remarked that "[t]he Court today takes still another step to limit the protections provided investors by § 10(b) of the Securities Exchange Act of 1934." *Id.*

156. *Basic*, 108 S. Ct. at 994. *See*, Sachs, *The Relevance of Tort Law Doctrines to Rule 10b-5: Should Careless Plaintiffs Be Denied Recovery?*, 71 Cornell L. Rev. 96 (1985).

157. *Blue Chip Stamps*, 421 U.S. 723 (1975). *See supra* notes 15-17 and accompanying text.

158. *See supra* note 72.

159. *See supra* note 73.

The majority opinion has not limited specifically application of the theory to secondary markets.[160] Lower courts have noted that the fraud-on-the-market theory is based on the idea that there is a "nearly perfect market in information"[161], and that the price of a security is a reflection of its intrinsic value.[162] This assumption of a "perfect market in information" may not be applicable to newly issued stock on undeveloped markets. The "efficiency" of these markets must be determined before the fraud-on-the-market presumption is applied.[163] Therefore, the fraud-on-the-market theory should be limited to secondary market transactions or those cases where the undeveloped market has been proven to be efficient.[164] Where the market is inefficent, the plaintiff should have to prove reliance on material misrepresentations. However, at least one court has applied the fraud-on-the-market theory to newly issued securities since the *Basic* opinion.[165]

Additionally, once a material misrepresentation is proven, the reliance issue can be viewed in at least two ways, either as a complete elimination of the reliance element or as a reduction in the plaintiff's burden of establishing direct reliance by providing a presumption of indirect reliance. The Court in *Basic* specifically did not eliminate the reliance element.[166] However, because the *Basic* Court did not distinguished the fraud-on-the-market theory of reliance from a causation theory, the dissent is correct when it states that the majority has moved dangerously close to removing the reliance element altogether.[167] Under a causation approach, the only question is whether the material misstatement or omission caused the plaintiff's injury.[168] Once a causation approach is adopted, the presumption becomes nonrebuttable.[169]

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160. *Basic*, 108 S. Ct. at 991. "Indeed, nearly every court that has considered the proposition has concluded that where materially misleading statements have been disseminated into an impersonal, well-developed market for securities, the reliance of individual plaintiffs of the integrity of the market price may be presumed." *Id.*

161. *Peil*, 806 F.2d 1154, 1161 n.10.

162. *Id.*

163. Wemple & Westover, *Rule 10b-5 Securities Fraud: Regulating the Application of the Fraud-on-the-Market Theory of Liability*, 18 J. MAR. L. REV. 733, 745-748 (1985).

164. *See id.*; Black, *Fraud-on-the-Market: A Criticism of Dispensing with Reliance Requirements in Certain Open Market Transactions*, 62 N.C.L. REV. 435 (1984).

165. Shores v. Sklar, 647 F.2d 462 (5th Cir. 1981) (*en banc*), *cert. denied*, 459 U.S. 1102 (1983), *rev'd sub nom.* (in part) FED. SEC. L. REP. (CCH) ¶ 92,874, *appeal dismissed*, 844 F.2d 1485, *vacated, reh'g granted*, 855 F.2d 722 (11th Cir. 1988) (*en banc*).

166. *Basic*, 108 S. Ct. at 989.

167. *Id.* at 997 (White, J., dissenting).

168. *See* Panzirer v. Wolf, 663 F.2d 365 (2d Cir. 1981), *vacated as moot*, 463 U.S. 646 (1982).

169. Blackie v. Barrack, 524 F.2d 891, 906-07, n.22. Justice White notes:

[I]n practice the Court must realize, as other courts applying the fraud-on-the-

The Court in *Basic* did not address the computation of damages in a Rule 10b-5 cause of action,[170] but as Justice White noted, "the proper measure of damages in a fraud-on-the-market case [is] essential for proper implementation of the fraud-on-the-market presumption."[171] The measure of damages under Rule 10b-5 is beyond the scope of this Note;[172] however, until the Court or Congress speaks to this issue, uncertainty and a diversity of decisions will continue.

One implication of the *Basic* case is that an investor might be well advised not to read disclosure documents corporations provide. This is an interesting turn of events because providing disclosures to the public to enable investors to make reasonable and informed decisions concerning the risk they are undertaking is at the heart of the securities regulations. As a result of no longer requiring proof of direct reliance, the protection of the securities regulations is afforded to those who have acted irresponsibly for failing to inform themselves with readily available information. However, it must be noted that because of their complexity, few investors, even those with a relatively high level of sophistication, read disclosure statements.[173] In addition, if the efficient market hypothesis is correct, anything that has been disclosed publicly will have affected the market place fully and instantaneously thereby precluding the individual investor from outperforming the market.[174] An investor should not have to rely directly on disclosure documents that are not useful. The investor has relied on the disclosure, albeit indirectly, by looking to the market to perform the function of interpreting and accurately pricing the securities based on the disclosures. Therefore, the appparent inconsistency between the policy of full disclosure and investor

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> market theory have, that such rebuttal is virtually impossible in all but the most extraordinary case. . . . [T]he majority's implicit rejection of the 'pure causation' fraud-on-the-market theory rings hollow. In most cases, the Court's theory will operate just as the causation theory would, creating a non-rebuttable presumption of 'reliance' in future 10b-5 actions.

Basic, 108 S. Ct. at 996 n.7 (White, J., dissenting).

170. *Basic*, 108 S. Ct. at 995 n.5 (White, J., dissenting). Justice White quotes R. Posner, Economic Analysis of Law §15.8, 423-24 (3d ed. 1986).

171. *Basic*, 108 S. Ct. at 995 n.5.

172. Note, *The Measure of Damages Under Section 10(b) and Rule 10b-5*, 46 Md. L. Rev. 1266 (1987). *See generally* D. Dobbs, Handbook on the Law of Remedies § 9.3 (1973); A. Jacobs, Litigation and Practice Under Rule 10b-5 § 260.03 (2d ed. 1983); Thompson, *The Measure of Recovery Under Rule 10b-5: A Restitution Alternative to Tort Damages*, 37 Vand. L. Rev. 349 (1984); Recent Development, *Damages for Insider Trading in the Open Market: A New Limitation on Recovery Under Rule 10b-5*, 34 Vand. L. Rev. 797 (1981).

173. Kripke, *The Myth of the Informed Layman*, 28 Bus. Law. 631 (1973).

174. H. Kripke, The SEC and Corporate Disclosure 86-87 (1979). *See* Black, *supra* note 19, at 458.

failure to read investment information is not as great as it may at first appear.

The decision in *Basic* will have a great impact potentially on corporations and their counsel. The issue of corporate disclosure of information is perceived to be fraught with difficulties.[175] Corporations must provide sufficient disclosure so that the market can set a value to the corporate securities, that is, price shares at their intrinsic worth, and yet not jeopardize shareholders' best interests.[176] Until recently, the Securities Exchange Commission prohibited the inclusion in filings of most "soft information" such as earnings projections and asset appraisals.[177] As the SEC broadens its policy to include this type of information as part of disclosure requirements and as the courts renew efforts to protect investors and deter corporate behavior characterized as unethical, if not fraudulent, counsel must consider carefully the ramifications of any corporate statement. Attorneys in the corporate legal community will perceive this responsibility as beyond the traditional prudent standard of care required of them.

VIII. Conclusion

The Supreme Court, with the *Basic* case, had the opportunity to establish the limits of the fraud-on-the-market theory. For example, the

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175. *See* Bagby & Ruhnka, *The Predictability of Materiality in Merger Negotiations Following Basic*, 16 Sec. Reg. L.J. 245 (1988) [hereinafter cited as *Predictability*]. In addition to the fraud-on-the-market theory, the *Basic* Court determined the materiality standard to be applied to preliminary merger or acquisition negotiations.

> Th[e] disclosure dilemma is complicated by several conflicting public policy and private policy interests. On the one hand, the SEC usually urges 'prompt' disclosure . . . to enhance the market's efficiency. . . . By contrast, corporate managers have long argued that 'premature' announcement of merger or acquisition negotiations will cause a run up in the target company's stock price, possibly jeopardizing negotiations to the detriment of shareholders. . . . This duty and the regulatory trend in disclosure toward 'stopwatch jurisprudence' can present conflicting legal obligations that produce a 'damned if you do—damned if you don't' potential for liability. *Predictability*, at 246.

See Ruhnka & Bagby, *Disclosure: Dammed If You Do, Dammed If You Don't*, 64 Harv. Bus. Rev. 34 (September-October 1986).

176. *See Predictability, supra* note 176, at 246.

177. Hiller, *The SEC and the Courts' Approach to Disclosure of Earnings Projections, Asset Appraisals, and Other Soft Information: Old Problems, Changing View*, 46 Md. L. Rev. 1114 (1987). The SEC's policy on soft information disclosure has undergone significant revision during the past ten years. Neither outdated policy concerns which prohibited disclosure of soft information nor concern for corporate liability can excuse misleading disclosure. Investors must receive full disclosure in order to assess risk competently. *Id.* at 1195-96. *See generally Symposium: Affirmative Disclosure Obligations Under the Securities Laws*, 46 Md. L. Rev. 907 (1987).

fraud-on-the-market theory, dependent as it is on the efficient market hypothesis, should be applied only to those situations where the market is developed or proven to be efficient. Instead, the Court approved the fraud-on-the-market theory without limitation.

Furthermore, the Court in *Basic* had the opportunity to analyze the distinction between reliance and causation. Even though the Court states that reliance is not eliminated as an element in a Rule 10b-5 action,[178] the practical effect of the Court's decision is to create a reliance-causation equivalency. In doing so, the presumption becomes non-rebuttable. Although the Court gives examples of how the presumption of reliance can be rebutted,[179] the defendant is put in the position of proving a speculative negative, for instance that the plaintiff disbelieved corporate misstatements or would have traded despite knowing the statements were untrue. The Court has shifted the "unnecessarily unrealistic evidentiary burden"[180] from plaintiff to defendant. However, this allocation of the burden of proof between the parties may be reasonable in light of the plaintiff's required showing of a material misrepresentation by the defendant.

Because of inroads on the requirement of disclosure of seemingly "soft information,"[181] a fluid standard on the question of materiality,[182] and the suggestion that class action plaintiffs will not be dismissed easily,[183] corporate counsel may want to devise new strategies for advising disclosure practices among clients.

There is general discontent mixed with great interest in the "greed is good - greed works"[184] philosophy portrayed in the recent film *Wall Street*.[185] The local newspapers, as well as the national business journals, will continue to cover the various million and billion dollar insider trading, leveraged buyout, and junk bond stories. The investing public may feel some measure of vindication in knowing that they may successfully bring a Rule 10b-5 class action more easily after *Basic* even if their dollar figure is significantly smaller than the stories making the headlines. Perhaps that is all the Court wanted to accomplish.

ROSEMARY J. THOMAS

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178. *Basic*, 108 S. Ct. at 989.
179. *Id.* at 990.
180. *Id.* at 989.
181. *See supra* text accompanying note 177.
182. *See supra* text accompanying note 74.
183. *Basic*, 108 S. Ct. at 990-91.
184. *Wall Street*, Twentieth-Century Fox Film Corp. (1987).
185. *Id.*

Institutional Arrangements for Governing the Construction of Electric Generating Units: A Transaction Cost Analysis

I. Introduction

The total cost of providing this nation's electric utility service is in excess of $150 billion per year.[1] During the past decade, an increasing portion of that cost has resulted from the construction of generating plants which ultimately are either canceled or redundant.[2] Recent estimates indicate that some $50 billion have been spent on plants which were canceled before ever going into service, while billions more have been spent on plants which are redundant due to excess capacity in the system.[3] In most cases, the canceled or redundant plant was planned and constructed by utility investors in a good faith effort to provide ample electric power resources for robust economic growth.[4]

As electricity prices have spiraled ever higher, regulatory commissions have begun to disallow complete recovery of costs which are attributable to canceled or redundant plants.[5] For consumers, the immediate effect of these cost disallowances has been a significant reduction in utility bills relative to full-recovery levels.[6] For the utilities concerned, the most immediate effect has been financial hardship or bankruptcy.[7] The long term consequences to both consumers and investors may be less readily observable, but they are equally important. For example, some analysts

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1. Standard & Poor's, Utility Compustat II (1988).

2. Depending on jurisdiction, estimates go as high as 20%. *See e.g.*, Komanoff, *Assessing the High Costs of New Nuclear Power Plants*, Pub. Util. Fort., Oct. 11, 1984.

3. *Id.* at 33.

4. No cases have been found in which a utility was charged with intentionally constructing excess electric capacity.

5. States which have disallowed construction costs include Maine, New Hampshire, Vermont, Delaware, New York, Pennsylvania, Connecticut, Massachusetts, Ohio, Indiana, Michigan, Kentucky, Georgia, Illinois, Missouri, California, Washington, South Carolina, Alabama, Mississippi, Texas, Oregon and Idaho. *The Salomon Brothers 100 Electric Utilities - Company Summaries* (1987).

6. For example, in the recent case of Public Service Co. of Indiana, a 27% rate reduction was urged by intervenors based on the difference between emergency and cost-based rates. Indiana Utility Regulatory Commission, Cause No. 37414. In the case of Northern Indiana Public Service Co., the regulatory agency ultimately disallowed some $200 million in utility costs - resulting in an annual revenue reduction of approximately $40 million. Public Service Commission of Indiana, Cause No. 37023.

7. Among the investor-owned utilities which have faced threats of bankruptcy due to construction cost disallowances are Long Island Lighting Co., Middle South Utilities, Consumers Power Co., Gulf States Utilities, Public Service Co. of Indiana and Public Service Co. of New Hampshire.

have predicted that significant shortages in electricity supply will occur in the 1990's as investors become increasingly concerned that the construction of new generating facilities does not provide the opportunity for reward commensurate with the investment risk.[8] Even if shortages do not occur, it is anticipated that the increasing risk will manifest itself in higher costs of capital for utilities engaged in construction—and, ultimately, in higher rates for the consumers of electric power.[9]

In response to this and other problems, a variety of regulatory reforms have been proposed.[10] Those reforms are widely disparate and may be mutually exclusive.[11] While most of the reform proposals advocate introducing competition to utility markets, there is significant disagreement as to the appropriate nature or extent of that competition.[12] Due to the significant financial impact of any reform alternative, it is imperative that any alteration in current policy be a well-reasoned response aimed at minimizing total costs.[13]

This discussion evaluates potential institutional structures for governing transactions between utility investors and consumers by applying the theories of transaction cost analysis. Transaction cost analysis is a framework for evaluating contractual relations with an increased emphasis

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8. *See, e.g.*, *Power Supply Forecasts Grow Pessimistic*, Wall St. J., October 12, 1988 at A2, col. 2; P. NAVARRO, THE DIMMING OF AMERICA (1985); Studness, *Why a Shortage of Electric Generating Capacity is All But Inescapable*, PUB. UTIL. FORT., August 22, 1985, at p. 44.

9. Estimates by financial professionals included a 200 basis point risk premium in cost of equity calculations performed for Public Service Company of Indiana in a 1986 rate case following Indiana's disallowance of some $2.8 million of construction costs. Testimonies of Prof. Eugene Brigham, Ph.D., and John Curley, Morgan Stanley & Co., in Public Service Company of Indiana's rate case before the Indiana Utility Regulatory Commission, Cause No. 37414 (1985).

10. A good overview of specific proposals can be found in P. JOSKOW & R. SCHMALENSEE, MARKETS FOR POWER: AN ANALYSIS OF ELECTRIC UTILITY DEREGULATION (1983). Other proposals can be found in Plummer, *A Different Approach to Electricity Deregulation*, PUB. UTIL. FORT., July 7, 1983, at 16; Meyer, *A Modest Proposal for the Partial Deregulation of Electric Utilities*, PUB. UTIL. FORT., April 14, 1983, at 23; Dowd & Burton, *Deregulation is Not an Answer for Electric Utilities*, PUB. UTIL. FORT., September 16, 1982, at 21; Killian & Trout, *Alternatives for Electric Utility Deregulation*, PUB. UTIL. FORT., September 16, 1982, at 34; Butler, *A Social Compact to be Restored*, PUB. UTIL. FORT., December 26, 1985, at 17; Scranton, *Reforming and Improving Electric Utility Regulation*, PUB. UTIL. FORT., August 4, 1983, at 19; and the proposals discussed in *Re Pricing and Rate-making Treatment for New Electric Generating Facilities Which Are Not Qualifying Facilities*, 93 PUR 4th 313 (Mass. Dept. Pub. Util. 1988).

11. For example, the deregulation proposals are mutually exclusive with the approach taken in Massachusetts. *See infra* notes 105-07 and 133-43 and accompanying text.

12. This debate is articulated in the articles cited in note 10, above.

13. Total costs are defined to include the costs of producing electricity and the costs of negotiating, monitoring and enforcing the transaction.

on the economic and behavioral characteristics of the transaction and the actors involved.[14] It recognizes that a determination of the most efficient institutional arrangement for governing transactions must take into account the costs of negotiating, monitoring and enforcing the contract.[15] It also recognizes that characteristics such as the uncertainty, complexity and frequency of the transaction are central in predicting those costs, and that the potential for opportunistic behavior is an important factor in determining least-cost institutional structures.[16]

II. An Overview of the Industry

The electric utility industry encompasses the generation, transmission and distribution of electric power.[17] Generation is the production of electric power, typically from fossil fuels; transmission is the bulk transfer of power at high voltages from the generating unit to the local distribution grid; and distribution is the disbursement of low voltage power to end-users.[18] Although the physics of electricity require that the generation, transmission and distribution systems operate together as a coordinated whole,[19] there is no legal requirement that all of those services must be provided by a single company.[20] Economies of scale, however, have led to a large amount of vertical integration within the industry so that, in most cases, the generation, transmission and distribution functions are all accomplished by one corporate structure.[21]

Most companies in the electric utility industry are privately owned and operated.[22] There are, however, a large number of co-operative utilities, as well as some utilities which are governmentally owned.[23] All utilities are granted a legally enforceable monopoly franchise to provide service to some particular geographical area.[24] This monopoly franchise is granted in recognition of the economies of scale which can be realized by constructing only one transmission/distribution system.[25] The mo-

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14. Williamson, *Assessing Contract*, 1 J. Law, Econ. and Organ. 177, at 179 (1985).

15. P. Joskow & R. Schmalensee, *supra* note 10, at 109.

16. *Id.* at 111.

17. A good overview of the electric utility industry can be found in C. Phillips, The Regulation of Public Utilities (1985).

18. *See, e.g.*, P. Joskow & R. Schmalensee, *supra* note 10, at 25.

19. L. Hyman, America's Electric Utilities: Past, Present, and Future (1983).

20. P. Joskow & R. Schmalensee, *supra* note 10, at 11.

21. *Id.* at 11.

22. *Id.* at 12.

23. *Id.*

24. P. Joskow & R. Schmalensee, *supra* note 10, at 29-32. *See also* C. Phillips, *supra* note 17, at 38-41.

25. *Id.*

nopoly franchise is granted subject to limitations imposed by regulatory authorities who determine utility rates calculated to preclude monopoly profits.[26]

The sale of electricity is regulated by both state and federal regulatory agencies.[27] The Federal Energy Regulatory Commission (FERC) has jurisdiction over wholesale transactions between electric utilities based on the federal commerce power,[28] while state regulatory agencies generally have jurisdiction over sales between the utility and its retail customers.[29] State authority over utility rates and charges is limited when a state decision is inconsistent with some federal determination.[30]

The decisions of both state and federal regulatory agencies are framed within the parameters of statutes and case law.[31] Although the administrative agency ultimately determines the absolute level of rates and charges, the parameters of that decision are determined by statutes as interpreted by the courts. For example, in *Citizens Action Coalition of Indiana v. Northern Indiana Public Service Co.*,[32] the Indiana Supreme Court interpreted Indiana statutes to preclude a particular state commission determination. In the general rate case which spawned that litigation, the Indiana commission had determined the legal level of rates and charges based on the commission's determination of the value of NIPSCO's utility plant.[33] That net plant value included costs incurred during the partial construction of an electric generating unit which had ultimately been cancelled. The commission's decision was overturned by the Indiana Supreme Court which held that the commission's determination was contrary to Indiana law which allows only "used and useful" plants to be included in the calculation of utility rates and charges.[34] On remand, the regulatory commission recalculated plant value in accordance with the guidelines of the state court.[35]

III. The Construction of Electric Generating Capacity

Before evaluating the effect of institutional structure on the governance of any transaction, the characteristic features of that transaction

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26. C. Phillips, *supra* note 17, at 75-77.

27. P. Joskow & R. Schmalensee, *supra* note 10, at 117, 127.

28. *Id.* at 69-72.

29. *Id.* at 117.

30. *See, e.g.*, Mississippi Power & Light Co. v. Mississippi, 108 S. Ct. 2428 (1988); Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986).

31. Utility regulatory agencies, like all administrative agencies, must operate within the confines of law. Due to the significant public interest in public utilities, there is a significant amount of both statutory and judicial law on most issues. The development of public utility law can be found in C. Phillips, *supra* note 17, at 67-108.

32. 485 N.E.2d 610 (Ind. 1985), *aff'g* 472 N.E.2d 938 (Ind. Ct. App. 1984).

33. Public Service Commission of Indiana, Cause No. 37023.

34. Citizens Action Coalition of Indiana, 485 N.E.2d 610.

35. Public Service Commission of Indiana, Cause No. 37023.

must be clearly understood. This Note focuses on the transaction between utility investors and consumers in which investors agree to provide electric generating capacity while consumers agree to pay for that service. Among the distinguishing features of the transaction are the length of time required to complete the exchange and the high degree of idiosyncrasy of the physical asset.

The length of time required to construct a utility power plant ranges from five to ten years depending on such factors as size, type, location.[36] In addition, full recovery of the plant's value is not achieved until the completion of its useful life if the transaction is governed by traditional regulatory structures.[37] This pay-back period is longer than that of most other investments and subjects the transaction to a greater degree of uncertainty.[38] During construction, a variety of factors are subject to change, including: the cost of borrowed money, the cost of materials and supplies, the design standards for the unit, and the demand for the final output.[39] Because all of those factors can have a significant impact on costs and/or profits, the length of the construction period directly impacts the uncertainty of the transaction.[40]

The "idiosyncratic" characteristics of a utility plant are also significant.[41] Idiosyncratic investments are investments which are of value primarily to the original parties to the transaction; they cannot be marketed to third parties if the original transaction cannot be completed.[42] The presence of idiosyncratic investments creates the potential for opportunistic behavior by a party poised to take advantage of differences in ex post versus ex ante valuation.[43] An investment in electric generating

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36. Estimate of A. Chang. Ph.D., Assistant Chief-Technical Analysis, Indiana Utility Regulatory Commission.

37. Full recovery is accomplished by the collection of depreciation expense as an element of authorized rates and charges. Because depreciation expense is calculated and collected according to the useful life of the plant, full recovery is not complete until that period of time has expired. *See* FEDERAL REGULATORY ENERGY COMMISSION, UNIFORM SYSTEM OF ACCOUNTS (1983).

38. Teisberg, *Investment Cost Recovery and Incentive for Power Plant Construction*, PUB. UTIL. FORT. March 3, 1988, at 9.

39. Changes in design standards during construction have been cited as a primary reason for the high cost of nuclear power plant construction. *See, e.g.*, Komanoff, *supra* note 2.

40. Uncertainty here is defined to mean that probabilities cannot be assigned for potential outcomes. This is distinguished from risk which recognized that unfavorable outcomes may occur, but that they can be identified and quantified as to probability.

41. A more complete discussion of idiosyncrasy and its effects on transaction costs can be found in Williamson, *infra* note 49. *See also infra* notes 76-79.

42. *Id.* at 239-41.

43. *Ex ante* means before the transaction, *ex post* means after the transaction. Discussions of idiosyncrasy and opportunistic behavior can be found in Williamson, *supra* note 14, Williamson, *infra* note 49, and Pierce, *A Proposal to Deregulate the Market for Bulk Power*, 72 VA. L. R. 1183 (1986).

capacity is highly idiosyncratic for both physical and institutional reasons.[44] Physically, electric generating units cannot be moved and the power they produce cannot be "wheeled" long distances due to a variety of engineering constraints.[45] Institutionally, the unified ownership of generation and distribution facilities creates incentives for each utility to purchase power only from its own generating units so that full recovery of those construction costs can be realized.[46]

IV. Transaction Cost Analysis: A Law and Economics Approach

A variety of economic theories may be, and have been, applied to evaluate which institutional arrangements are most likely to lead to the efficient governance of contractual relationships.[47] This analysis applies "transaction cost" theories to determine which institutional arrangements are most likely to lead to the efficient governance of the contractual relationship between utility investors and consumers.[48] Although transaction cost theories were first described by Coase some 50 years ago, they have only recently been developed by a new school of institutional economists including Williamson, Klein, Joskow, Goldberg and others.[49]

In his 1937 paper "The Nature of the Firm," Ronald Coase argued that governance structures emerge to minimize the costs of making transactions.[50] The governance structures Coase considered included both internal (corporate) and external (market) structures. He recognized that the determination of whether an internal (intracorporate) or external (market exchange) framework governed an exchange between two or more parties depended on which institutional arrangement could most

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44. The institutional reasons for generating asset idiosyncrasy are described in Pierce, *supra* note 43.

45. Wheeling is moving electric power from one company's service territory to another's. *See, e.g.*, Casazza, *Understanding the Transmission Access and Wheeling Problem*, Pub. Util. Fort. October 31, 1985, at 35.

46. So long as the generation and distribution functions are owned by the same entity, joint profit maximization will require that the distributor purchase power from affiliated generating unit unless the difference in operating costs is unreasonable large.

47. Among the economic theories which have been applied to problems in contract are price theory and the theory of property rights. *See, e.g.*, Posner, *The Chicago School of Antitrust Analysis*, 127 Univ. Pa. L.R. 925-48 (1979).

48. Institutional arrangements to be discussed herein include free markets, regulatory control, binding arbitration and vertical integration.

49. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J. Law Econ. Organ. 233 (1979); Goldberg, *Regulation and Administered Contract*, 7 Bell J. Econ. 426 (1976); Klein, *Transaction Cost Determinants of "Unfair" Contractual Relations*, 70 Am. Econ. Rev. 356 (1980); Joskow, *Vertical Integration and Long-Term Contracts*, 1 J. Law Econ. & Organ. 33 (1985).

50. Coase, *The Nature of the Firm*, 4 Economica 386 (1937).

efficiently govern that transaction.[51] He further recognized that the total costs of a transaction include not only the cost of the goods or service to be exchanged, but also certain transaction costs associated with establishing and administering a business relationship.[52]

The transaction costs applicable to contracts in general, and to utility construction contracts in particular, include the costs of negotiating contractual terms, the costs of monitoring contractual performance, the costs of enforcing contractual provisions and the costs of breach of the agreement.[53] All of these costs are real economic costs which must be taken into account along with the traditional costs of production in determining the cost-minimizing structure of any legal/economic relationship.[54] Before evaluating transaction costs, however, we must understand not only their general nature, but also the specific characteristics which allow them to be used in a predictive way.[55]

Williamson in particular has focused on identifying the critical dimensions of transaction costs which indicate how and why transactions can be matched with governance structures in an efficient manner.[56] To date, he has identified three characteristics of transactions that affect the nature and magnitude of transaction costs, and thus the efficient governance structure.[57] Those characteristics are: (1) The complexity and uncertainty of the contemplated transaction; (2) The frequency with which the transaction is likely to recur; and (3) The extent to which one party must make transaction-specific (idiosyncratic) investment of time, money and labor.[58] These characteristics have subsequently been used by other authors in their applications of transaction cost theory.[59]

The complexity of the transaction is important because it increases the costs of bargaining, monitoring and enforcing the contract.[60] Complexity increases transaction costs directly by increasing the number of terms which must be negotiated, monitored and enforced.[61] Complexity may also increase transaction costs indirectly by making information

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51. *Id.*
52. *Id.*
53. Joskow, *supra* note 49, at 36.
54. *Id.* at 35.
55. Specific transaction characteristics are described in Williamson, *supra* note 49.
56. *Id.*
57. *Id.*
58. *Id.* at 239.
59. *See, e.g.*, P. Joskow & R. Schmalensee, *supra* note 10; Joskow, *supra* note 49, and Klein, *supra* note 49.
60. Williamson, *supra* note 14.
61. Complex transactions are defined here to include transactions which have a large number of terms, typically involving technical or specialized knowledge.

more costly and/or less reliable.[62] Finally, complexity generally increases uncertainty due to the constraints of imperfect information and increased transaction terms.[63]

The uncertainty of the transaction is also an important determinant of transaction costs.[64] When the future course of performance is uncertain, contractual gaps are apt to be larger and occasions for adaptation will increase in number and importance.[65] A more elaborate and costly governance structure is typically required, including provisions for arbitration when unanticipated contingencies arise.[66] Uncertainty also lowers the economic "utility" of any outcome for risk-adverse parties since all outcomes must be discounted by the likelihood of success.[67]

Another factor that has been shown to impact transaction costs is the frequency of the transaction.[68] When a transaction is frequently repeated, standard terms and conditions may become defined by past performance, reducing the costs of negotiating those terms independently for each transaction.[69] The frequency may also impact transaction costs by affecting the uncertainty of the transaction.[70] Transactions which are frequently repeated are apt to have a more certain set of potential outcomes since information is available concerning the outcomes of past transactions executed under similar circumstances.[71] Frequency of transactions may also impact transaction costs by affecting the behavior of the parties.[72] Parties who must deal frequently with each other are less apt to engage in opportunistic behavior that may adversely affect future transactions.[73] Personal ethical standards may also be higher when the same individuals must frequently interact, and those personal standards may replace the more opportunistic corporate ethic which operates when personal relationships have not developed between the contracting parties.[74]

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62. The relationship between information and transaction costs is described in Heckathorn & Masur, *Bargaining and the Sources of Transaction Costs: The Case of Government Regulation*, 3 J. Law, Econ. & Organ. 69 (1981).

63. *Id.*

64. Williamson, *supra* note 49, at 254.

65. *Id.* at 253-54.

66. Williamson, *supra* note 49, at 246-54.

67. Discussions of the effect of uncertainty on utility maximization can be found in many advanced texts in economics. *See, e.g.*, E. Malinvaud, Lectures on Microeconomic Theory (1972).

68. Williamson, *supra* note 49, at 248-54.

69. Heckathorn & Masur, *supra* note 62.

70. *Id.*

71. *Id.*

72. Williamson, *supra* note 14.

73. *Id.*

74. *Id.*

The idiosyncrasy of the investment impacts transaction costs by allowing one party to behave in an opportunistic manner.[75] Idiosyncratic goods are goods in which transaction-specific investments in either human or physical capital have been made.[76] Transaction-specific investments are those investments which are of value primarily to the intended purchaser under the contract.[77] These investments pose nonmarketability problems because the investor cannot readily recover costs by selling the investment to alternative buyers.[78] When idiosyncratic investments must be made, the relationship between buyer and seller is quickly transformed into one of bilateral monopoly, and transaction costs increase in direct proportion to the ability of one party to exploit that monopoly power.[79] Opportunistic behavior is behavior that involves the appropriation of wealth from one party to the other due to an unanticipated changes in circumstances.[80] As a general rule, opportunistic behavior does not maximize joint profits.[81] The potential for opportunistic behavior has been cited as a primary source of transaction costs due to its impact on transaction risk.[82] The recognition of idiosyncratic investment and its impact on opportunistic behavior is a distinguishing feature of transaction cost analysis.

V. Transaction Cost Analysis of the Traditional Structure

Transaction cost analysis is especially useful in evaluating transactions which involve high degrees of uncertainty and idiosyncrasy, and which occur only infrequently for any two contracting parties because it places greater emphasis on the behavioral characteristics of the parties. The transaction for the construction and cost-recovery of an electric generating unit is subject to a great degree of uncertainty due to the long time required to complete construction and recover costs.[83] The transaction is also highly complex due to the technical nature of the exchange and the long time period required to complete the project.[84] Due to the economies of scale in the construction and operation of generating units,

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75. Williamson, *supra* note 49, at 238-42.
76. *Id.* at 241.
77. *Id.* at 239-40.
78. *Id.* at 238-42.
79. *Id.* at 241. A bilateral monopoly occurs when both the buyer and the seller face a monopoly market; i.e., when there is only one buyer and one seller.
80. Joskow, *supra* note 49, at 37.
81. *Id.*
82. *See* Pierce, *supra* note 43, at 1199-1202.
83. Construction times range from five to ten years for most generating units. *See supra* note 35 and accompanying text.
84. Pierce, *supra* note 43.

construction transactions also take place infrequently for any one utility.[85] On average, a new unit is added every seven to ten years in most service territories.[86] Finally, the investment in electric generating plants may be highly idiosyncratic if the power cannot be sold to an alternative buyer once construction is complete.[87]

The institutional structure traditionally governing utility-consumer transactions is a command-and-control regulatory structure.[88] That structure imposes terms and conditions on the parties to the construction transaction by application of law.[89] With respect to the contract in question, statutes typically provide for rates which are "fair and reasonable."[90] Recovery of the costs of a generating unit are allowed if, and only if, the generating unit becomes "used and useful."[91] The used and useful standard evaluates the "price" term after the investment decision has been made.[92]

The traditional institutional structure allows for an ex post revision of the value of the generating plant since the used and useful determination cannot be made prior to project completion.[93] Because the investment is highly idiosyncratic, this presents an ideal environment for opportunistic behavior on the part of consumers acting through the state regulatory agency.[94] Thus, the ex ante expectations of the parties are frustrated and the seller is placed in the position of being forced to accept terms which have not been bargained for.[95] Ultimately, the opportunistic behavior increases transaction costs and, therefore, the costs of future transactions.[96]

As was noted earlier, one example of ex post revision of the parties' ex ante expectations can be found in the case of Northern Indiana Public

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85. Due to significant differences in demand growth across local jurisdictions, there is a wide variation in capacity plans for local generating companies. The economies of scale indicate that the optimal size for new generating capacity is approximately 1200 megawatts, so if demand grows at 200 megawatts per year, a six year interval between transactions would be implied.

86. Recent and forecast additions to generating capacity indicate that an average electric utility might be expected to add new generating capacity once every 5 to 7 years. *See* Northeast Area Reliability Council Report on Electric Power Capacity (1986).

87. *See supra* notes 44-46 and accompanying text.

88. Pierce, *supra* note 43, at 1191-97.

89. *Id.*

90. *See, e.g.*, IND. CODE § 8-1-2-4 (1988).

91. *See, e.g.*, Citizens Action Coalition v. Northern Indiana Public Service Co., 485 N.E.2d 610 (Ind. 1985), *aff'g* 472 N.E.2d 938 (Ind. Ct. App. 1984).

92. Pierce, *supra* note 43, at 1199-1202.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

Service Company (NIPSCO).[97] In that case, NIPSCO determined that the future electricity needs of its service territory would require the addition of significant new generating capacity. After construction was begun, the economic climate of the service territory changed and the capacity additions were no longer necessary.[98] In *Citizens Action Coalition of Indiana v. Northern Indiana Pub. Serv. Co.*,[99] the Indiana court refused to allow recovery of construction costs, regardless of their prudency, based on the statutory requirement that utility property must be used and useful before recovery is warranted.[100] That disallowance was later cited as a significant factor which had increased NIPSCO's cost of capital when construction was subsequently begun on additional NIPSCO capacity.[101]

VI. Alternative Institutional Arrangements

If the traditional institutional structure does not efficiently govern the utility construction transaction, it is important to determine what institutional structure would accomplish that goal. A variety of regulatory reforms have been proposed in response to this problem, although no alternative structure has been proposed as a transaction cost minimizing solution per se.[102] Many of those proposals have, however, explicitly recognized their economic consequences, normally characterizing themselves as efforts to either maximize "economic efficiency" or minimize "economic costs."[103]

This discussion addresses two general types of reforms- "deregulation" alternatives, and preapproved contract approaches. The deregulation reforms at issue here are those proposals which incorporate competitive bidding structures as alternatives to state and federal reg-

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97. *See supra* notes 33-35 and accompanying text.

98. Testimony of J. Neiting, representing Petitioner NIPSCO before the Public Service Commission of Indiana, Cause No. 37023.

99. 485 N.E.2d 610 (Ind. 1985), *aff'g* 472 N.E.2d 938 (Ind. Ct. App. 1984).

100. Citizens Action Coalition of Indiana v. Northern Indiana Public Service Co., 485 N.E.2d 610 (Ind. 1985), *aff'd*, 472 N.E.2d 938 (Ind. Ct. App. 1984).

101. Testimony of J. Langum in NIPSCO case before the Indiana Utility Regulatory Commission, Cause No. 38045.

102. Transaction cost analysis has been applied to utility regulatory problems in P. Joskow & R. Schmalensee, *supra* note 10, and Pierce, *supra* note 43.

103. *See, e.g.*, S. Breyer, Regulation and Its Reform (1982); Essay, *Efficiency and Competition in the Electric-Power Industry*, 88 Yale L.J. 1511 (1979); Fairman, *Transmission, Power Pools, and Competition in the Electric Utility Industry*, 28 Hastings L.J. 1159 (1977); Miller, *A Needed Reform of the Organization and Regulation of the Interstate Electric Power Industry*, 38 Fordham L.R. 635 (1970); and the articles cited in notes 10 and 42.

ulation.[104] The preapproved contract reforms take an alternative approach, requiring an increase in the amount of regulatory oversight.[105] Because the competitive bidding proposals rely on market-based governance, while the preapproved contract proposals rely on a regulatory structure to govern the contractual relationship, consideration of these two proposal types will provide a good comparison of institutional arrangements which are reasonably "opposite" in structure.

A. Competitive Bidding Proposals

Competitive bidding proposals typically involve the separation of ownership of generation and distribution facilities, the assurance of equal access to transmission facilities, and the deregulation of wholesale (bulk) power prices.[106] After bulk power prices are deregulated, the institutional structure governing transactions would be the competitive market rather than the regulatory governance structure which has traditionally controlled.[107] Because the deregulation of bulk power prices is the central focus of competitive bidding proposals, those proposals are also commonly referred to as "deregulation" proposals.[108] Although there are a variety of specific competitive bidding proposals, each of which is unique in one or more aspects, it is practical to consider them collectively as a proposal type which incorporates the essential characteristics described below.

The first characteristic of a competitive bidding proposal is the separation of ownership of generation and distribution facilities.[109] The traditional institutional structure reflects the transaction cost economies of vertical integration through the common ownership of generation and distribution facilities. One result of this diversified corporate structure is an economic incentive for the local distribution grid to utilize affiliated generating capacity regardless of whether there is an alternative, lower cost provider.[110] Competitive bidding alternatives, on the other hand, typically require that generating and distribution facilities be owned by

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104. Competitive bidding is accomplished in a free-market structure, as opposed to the traditional command-and-control regulatory structure.

105. *See, e.g.*, *Re Pricing and Rate-making Treatment for New Electric Generating Facilities Which Are Note Qualifying Facilities*, 93 PUR 4th 313 (Mass. Dept. Pub. Util. 1988).

106. One comprehensive example of a competitive bidding proposal is found in Pierce, *supra* note 43. *See also* Plummer, *supra* note 10; Meyer, *supra* note 10; and the articles listed in note 101.

107. *See, e.g.*, Pierce, *supra* note 43.

108. P. Joskow & R. Schmalensee, *supra* note 10.

109. *See, e.g.*, Pierce, *supra* note 43, at 1211.

110. P. Joskow and R. Schmalensee, *supra* note 10.

separate entities, thus eliminating any financial incentive for the distribution portion of the company to favor any particular generator.[111] Competitive bidding will lead to efficient market transactions only when there is no unity of interest between the buyer and the seller; otherwise there is an incentive for the purchaser to contract only with the related supplier.[112] When the local distributor has no financial interest in the success of particular generating facilities, the distributor will have no incentive to purchase from an inefficient supplier and will seek a competitive market-based transaction instead.[113]

Equal access to transmission facilities is the second characteristic of a successful competitive bidding program.[114] Equal access to transmission facilities involves assuring that any buyer and any seller of electricity may transport power over the transmission grid at a non-discriminatory price.[115] Because transmission facilities are required by the transaction as a physical means of exchange, equal access to transmission facilities is required by a competitive market so that buyers and sellers may be efficiently matched.[116] If equal access is not assured, purchasers (distribution companies) may face a monopoly market. Regardless of the number of potential suppliers, the generation market realistically includes only those suppliers who could actually deliver power.

Deregulation of bulk power sales is the final component of competitive bidding proposals.[117] The deregulation of bulk power sales is appropriate when a competitive market for those sales exists, because the competitive market, rather than the regulatory system, will provide the necessary governance structure.[118] If open access to transmission facilities is assured for both suppliers and end-users, a free market may be maintained and prices for generating capacity are determined on the basis of competitive bidding.[119] Competitive prices are driven toward cost and inefficient suppliers are driven from the market.[120]

Competitive bidding proposals would not affect the complexity or uncertainty of the transaction to build and pay for generating facilities.

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111. Pierce, *supra* note 10.
112. *Id.*
113. *Id.*
114. *See, e.g.*, Pierce, *supra* note 43, at 1215-18.
115. *Id.*
116. *Id.*
117. *See, e.g.*, Pierce, *supra* note 42, at 1218-21.
118. *Id.*
119. *Id.*
120. Inefficient suppliers are those suppliers who are unable to provide service at competitive market prices. *See, e.g.*, M. Crew & P. Kleindorfer, Public Utility Economics (1979); R. Millward, Public Sector Economics (1983); F. Scherer, Industrial Market Structure and Economic Performance (1980).

Construction times would not be shortened, nor would costs be more accurately estimated or controlled.[121] Estimating future demand would not be any more precise.[122]

The frequency of transactions would also not be affected by competitive bidding alternatives. The frequency of construction transactions is a function of the size of the generating units which are constructed, while the size of the units is a function of non-institutional factors such as the rate of anticipated demand growth and the construction and operating costs of the units.[123] There is no reason to believe that the frequency of electric generating plant construction would be affected by a competitive bidding governance structure.

The most important implication of competitive bidding proposals is their impact on the idiosyncrasy of the generating plants. Under the existing regulatory scheme each electric plant is "marketed" primarily to one distribution company.[124] Under competitive bidding proposals, each generating unit could be marketed to any distributor.[125] The conditions of bilateral monopoly would never arise and the potential for opportunistic behavior would be correspondingly reduced.[126] The elimination of opportunistic behavior would lower the costs of the transaction because investors will not bear the risk of having their investment appropriated by consumers.[127] The risk of opportunistic behavior has been cited as a primary source of transaction cost, so any governance structure which reduced that risk could more efficiently govern the transaction.[128]

Negotiation costs would, however, be significantly increased under a competitive bidding approach. The present regulatory structure requires only minimal negotiation and bargaining costs because the terms of the

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121. Dowd & Burton, *supra* note 10.

122. *Id.*

123. For a discussion of the determinants of optimal generating unit size, *see* EDISON POWER RESEARCH INSTITUTE, MOVING TOWARD INTEGRATED VALUE-BASED PLANNING (1988) (hereinafter EPRI).

124. The output from any generating station is used primarily to serve the generating company's own service territory. Sales are made to other territories, however, on both a short-term (economy power) and long-term (unit power) basis. The regulatory scheme does not specifically preclude extensive inter-jurisdictional, unit power sales; however, those sales remain the exception rather than the rule.

125. The output from each unit could be marketed on either a short-term or a long-term basis.

126. Pierce, *supra* note 43. Bilateral monopoly was defined in note 79.

127. *Id.*

128. *See, e.g.*, Pierce, *supra* note 43; Williamson, *supra* note 48; and Joskow, *supra* note 49.

transaction are largely defined by law.[129] Market transactions of this complexity would require extensive bargaining and contracting procedures—procedures which would raise transaction costs.[130] Monitoring and enforcement costs would be decreased, though, as market governance replaced much of the existing regulatory structure.[131]

The net impact of the competitive bidding proposals would be a more efficiently governed utility construction transaction if a competitive market can truly be established. Unfortunately, the engineering constraints on wheeling power long distances, as well as the institutional constraints of disintegrating the generation and distribution functions, may be too great to allow a market to form and survive.[132] If those difficulties can be overcome, the elimination of opportunistic behavior would reduce transaction costs making the governance of the transaction more efficient.

B. Preapproved Contract Approaches

As an alternative to competitive bidding proposals, some states have adopted a preapproved contract approach to governing the utility construction transaction.[133] Preapproved contract approaches typically require pre-construction (ex ante) approval of all construction plans, followed by a continuing re-evaluation of the need and cost of those capacity additions.[134] If the need or cost of construction changes, the approval for construction may be terminated at any time.[135] All costs incurred prior to the termination of regulatory approval are recoverable—regardless of whether the plant is ultimately completed.[136]

One benefit of this alternative is that it requires minimal change in the current structure of the industry and in the regulatory framework. Generating divisions would not have to be separated from the transmission and distribution functions—thus economies of scale could be main-

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129. The negotiation and bargaining costs are already "sunk" costs, having been expended as the statutes were written and the judicial cases were litigated. Little if any negotiation is now performed, due to the existence of legal requirements which may not be bargained away.

130. Dowd & Burton, *supra* note 10.

131. *See, e.g.*, Pierce, *supra* note 43; Miller, *supra* note 100; and Weiss, *Antitrust in the Electric Power Industry*, in PHILLIPS & ALMARIN, PROMOTING COMPETITION IN REGULATED MARKETS (1975).

132. *See supra* notes 45-46 and accompanying text.

133. States which have adopted some form of preapproved contract approach include California, Connecticut, Maine, Indiana, Massachusetts and Wisconsin.

134. *See, e.g.*, IND. CODE § 8-1-8.5-1 *et seq.* (1988).

135. *See, e.g.*, IND. CODE § 8-1-8.5-6 (1988).

136. *Id.*

tained.[137] Many, if not most, states currently have deemed forecasting components which are increasingly able to adequately review construction proposals.[138]

The frequency and uncertainty of the transaction would not be affected significantly by the preapproved contract approach. Non-institutional factors would continue to define optimal unit size and the uncertainties of cost and demand would not be affected.[139] The complexity of the transaction would be increased, however, as the parties are forced to evaluate and re-evaluate the prudency of the construction.[140]

Negotiation, monitoring and enforcement costs are high under a preapproved contract structure. The regulatory agency would acquire responsibility to approve the construction expenditures prior to construction, thereby increasing the costs of negotiation.[141] The regulatory agency would also be required to re-evaluate the construction program on an ongoing basis, increasing the costs of monitoring the transaction.[142] Although the regulatory structure required to perform these negotiation and monitoring functions is currently in place in many jurisdictions, the increase in workload that would accompany implementation of a preapproved contract alternative would most certainly increase negotiation and monitoring costs as construction programs are begun.[143]

The primary benefit of the preapproved contract approach is its powerful limit on opportunistic behavior. A preapproved contract creates a legal obligation on the part of the regulatory commission to allow

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137. Economies of scale are economic savings which are realized solely due to the size of the transaction. For example, many goods can be purchased at a lower price when many units are bought at once. Some economies of scale in management, purchasing, etc., would be present regardless of whether generation and distribution are separated or not. The magnitude of those economies, of course, would be greatest with a larger, integrated corporate structure.

138. States with some demand forecasting ability include California, Connecticut, Delaware, Florida, Indiana, Iowa, Maine, Maryland, Michigan, Nevada, New York, Ohio, Oklahoma, Pennsylvania, Texas, Virginia, Washington and Wisconsin. Berry, *Least-Cost Planning and Utility Regulation*, Pub. Util. Fort. March 17, 1988 at 9.

139. *See* EPRI, *supra* note 123.

140. The preapproved contract approach includes a continual re-evaluation of construction needs and costs. *See, e.g.*, Ind. Code § 8-1-8.5-1 to 8-1-8.5-7 (1988); and *Re Pricing and Rate-making Treatment for New Electric Generating Facilities Which Are Not Qualifying Facilities*, 93 PUR 4th 313 (Mass. Dept. Pub. Util. 1988).

141. *Id.*

142. *Id.*

143. Although several states have initiated preapproved contract provisions, or have created demand forecasting components within their utility regulatory agencies, no state has yet constructed a generating unit following that approach. The regulatory effort necessary to evaluate and monitor construction programs is significant indeed, and because the utilities must duplicate those efforts, the total negotiation and monitoring costs of the transaction would doubtless increase when compared to historical levels.

full recovery of all approved costs; there can be no ex post re-evaluation of the contract price.[144] Although the idiosyncrasy of the asset would remain high under this alternative, the statutory controls over the recovery of costs provide the necessary balance to avoid opportunistic behavior.[145]

Total transaction costs should be reduced from present levels under a preapproved contract approach.[146] Although the costs of negotiating and monitoring are high, reducing the potential for opportunistic behavior would more than compensate for that increase.[147] The preclusion of opportunistic behavior allows investment decisions to be based on economic value, and significantly reduces unnecessary transaction costs.[148]

VII. Development of Alternative Governance Structures

An understanding of transaction costs makes it possible not only to evaluate existing proposals, but also to devise additional institutional alternatives that might more efficiently govern the construction transaction.[149] This section will suggest two alternative governance structures and will discuss how those structures could lead to a more efficient utility construction transaction.

A. Binding Arbitration

In "Transaction-Cost Economics: The Governance of Contractual Relations," Oliver Williamson suggests efficient governance structures for a variety of transaction types.[150] Among those transaction types are "occasional" transactions which involve a high degree of uncertainty and idiosyncratic investment.[151] The governance structure identified by Williamson as most efficient for that transaction type is a "trilateral" governance structure whereby third party assistance (arbitration) is em-

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144. *See, e.g.*, Ind. Code § 8-1-8.5-6 (1988); and *Re Pricing and Rate-making Treatment for New Electric Generating Facilities Which Are Not Qualifying Facilities*, 98 PUR 4th 313 (Mass. Dept. Pub. Util. 1988).

145. Opportunistic behavior cannot occur when *ex post* revision is precluded by statute.

146. Recall that total transaction costs include the costs of production, plus the costs of negotiation, monitoring and enforcement.

147. There is no empirical data supporting this conclusion. The conclusion is based on the opinions of the commentators in *Re Pricing and Rate-making Treatment for New Electric Generating Facilities Which Are Not Qualifying Facilities*, 93 *PUR* 4th 313 (Mass. Dept. Pub. Util. 1988).

148. Pierce, *supra* note 43.

149. Efficient transaction governance is that governance which minimizes total transaction costs.

150. Williamson, *supra* note 49.

151. *Id.* at 249.

ployed to evaluate performance and resolve disputes.[152] One governance structure consistent with Prof. Williamson's suggestion could be achieved by providing for federal arbitration of state decisions concerning whether construction costs should be fully recovered.[153] For example, the Federal Energy Regulatory Commission could be given binding arbitration power over any state disallowances of construction costs, and, in addition, the freedom to apply federal prudency rules to that arbitration. The freedom to apply federal prudency rules is an important component of this proposal since the success of arbitration depends largely on the ability to allocate costs fairly.[154] An alternative that provided for federal arbitration yet required the arbitrator to use state "used and useful" rules would deprive the arbitrator of the flexibility necessary to achieve an efficient allocation.

Federal arbitration should have the effect of reducing opportunistic behavior. Although the federal commission is also theoretically subject to opportunistic pressures, the fact is that the FERC has never disallowed any utility investment as being imprudent or excessive.[155] The potential for federal disallowance of imprudent construction expense would preclude the utilities from constructing unnecessary plants except when the reasonable expectations of the parties are that the capacity will be required.[156] On the other hand, federal arbitration would preclude the states from appropriating the utility investment by eliminating ex post review of the transaction based on results which could not have been reasonably anticipated.[157] This elimination of opportunistic behavior reduces transaction costs by allowing the investment to be valued economically in a predictable manner.[158]

Negotiation and monitoring costs would be unaffected by binding arbitration alternatives since the existing regulatory framework would continue to operate unless disagreement as to cost recovery is encoun-

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152. *Id.* at 249-50.

153. Federal arbitration of state decision-making is an example of the trilateral governance structures described by Williamson.

154. Arbitration without flexibility is no more than administrative review of the application of set rules and procedures. Flexibility is typically necessary to find efficient solutions which are distinct from the proposals of the parties.

155. Teisberg, *supra* note 38.

156. No profit-maximizing firm will knowingly construct imprudent generating facilities if a procedure exists for regulatory disallowance of those imprudent costs. If there is a good faith expectation that the facilities will be needed, generating plants that are eventually unnecessary may be constructed.

157. The appropriation of utility investment occurs by the *ex post* revision of the mutual expectations of the parties. *See, e.g.*, Pierce, *supra* note 43.

158. *Id.*

tered.[159] The cost of enforcement would, however, be increased due to the inevitable cost of the arbitration structure.[160] This increase in enforcement costs would be minimal when compared with the reduction in transaction costs which accompanies the reduction in opportunistic behavior.[161]

A consideration of transaction costs implies that an institutional structure incorporating binding arbitration would more efficiently govern the utility construction transaction.[162] Although enforcement costs would increase, the potential for opportunistic behavior that pervades the existing institutional structure would be reduced significantly.

B. Public Ownership of Generating Facilities

Another alternative governance structure is suggested by Williamson's analysis if the utility construction transaction is determined to be recurrent, rather than infrequent.[163] When the frequency of the transaction is recurrent, a unified (vertically integrated) governance structure is implied.[164] Vertical integration exists when one firm both supplies and utilizes some factor of production such that the output from one portion of the company is the input for another portion.[165] For example, the current electric utility industry is vertically integrated since each utility company generates, transmits and distributes electric power.[166] The output from the generation portion of the company is the input of the transmission portion, and the output of the transmission portion is the input for the distribution function. The advantage of vertical integration is that adaptations can be made sequentially without the need to consult,

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159. Binding arbitration would not affect negotiation and monitoring costs in this case because those costs are determined by the existing regulatory structure. In some cases, binding arbitration would affect negotiating and monitoring costs depending on the confidence the parties have in the arbitration process. The less confidence the parties have in arbitration, the more likely they are to address all terms and conditions in the negotiation process.

160. A federal arbitration structure would be relatively inexpensive to establish and maintain because the federal institutional structure is already in place. It can be reasonably assumed that the FERC would seldom have to arbitrate specific disagreements since it is the threat of arbitration, rather than the arbitration itself, that will modify the parties' behavior.

161. Again, the costs of opportunistic behavior are believed to be significant in most jurisdictions. *See* Pierce, *supra* note 43.

162. Efficiency is achieved by minimizing transaction costs.

163. Williamson, *supra* note 49.

164. *Id.* at 253.

165. M. Crew & P. Kleindorfer, The Economics of Public Utility Regulation (1986).

166. P. Joskow & R. Schmalensee, *supra* note 10, at 11.

complete or revise interfirm agreements.[167] When a single ownership spans both sides of the transaction, joint profit maximization exists and price and quantity adjustments can be made with the frequency necessary to maximize joint profits.[168]

One example of an institutional structure which incorporates the principals of unified governance is the public ownership of generating facilities.[169] Although public ownership of generating facilities is not vertical integration per se, public ownership does provide for unified ownership on both sides of the transaction, thereby creating a unity of interest similar to vertical integration schemes.[170] With public ownership, the same party would be both buyer and seller, and opportunistic behavior would not occur since it has no ability to maximize joint profits.[171]

The complexity, uncertainty and frequency of the transaction is not affected by public ownership of generating capacity. As was the case with the competitive bidding scenario, construction times would remain long, while predicting costs and demand would remain highly complex and subject to error.[172] The frequency of the transactions should not be impacted so long as the optimal unit size is determined by non-institutional factors.[173] The significant cost of financing utility construction might, however, be an incentive for constructing smaller units.[174]

The idiosyncrasy of the investment may not be affected by a public ownership scenario since neither the asset nor its output need be transferable for public ownership to be in force.[175] If generating units are financed and owned by local consumers, and are to be used solely for their benefit, the physical and institutional constraints may continue to exist.[176] If the ownership of generating facilities is accomplished at the state or federal level the idiosyncrasy of the investment may be reduced as the output from any unit may be used to serve a variety of service

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167. Williamson, *supra* note 49, at 253.

168. *Id.*

169. Public ownership of generating facilities incorporates the principles of vertical integration, but it is not truly a vertical integration structure.

170. Public ownership is distinct from true vertical integration since individual consumers would still purchase the electricity. With true vertical integration assets are transferred intrafirm, without a market transaction.

171. Joint profits are the sum of the buyer's profits and the seller's profits. Joint profits are not necessarily achieved by maximizing the profits of each party separately.

172. Dowd & Burton, *supra* note 10.

173. *Id.*

174. If the economies of scale tending to make large units more economic are not significant it may be more efficient to build smaller units more frequently.

175. Public ownership per se does not require that a generating unit serve more than one service territory.

176. The physical and institutional constraints are described in notes 45-46 and accompanying text.

territories.[177] The impact of the idiosyncrasy would be eliminated because the unification of financial interest precludes opportunistic behavior.[178] Idiosyncrasy is only important due to its opportunistic impact so the idiosyncrasy of the investment is not of great concern when public ownership is accomplished.[179] Under public ownership, the consumers are at interest on both sides of the transaction so there is no potential for opportunistic gain by ex post revision of the contract.

The most persuasive factors against the public ownership proposal are political and financial. On the political level, there is a national aversion to public ownership.[180] The American economy is based on free enterprise and any proposal to eliminate private ownership of utility assets would undoubtedly meet substantial resistance. The significant cost of generating capacity would also create financial constraints.[181] While utility investors may voluntarily commit millions of dollars to a construction project, a public ownership scenario would make those investments mandatory for all consumers.[182] Many people do not have sufficient resources to prospectively pay for generating facilities which may not be used for several years.[183]

A transaction cost analysis of public ownership of generating facilities indicates that transaction costs could be significantly reduced through that alternative. The potential for opportunistic behavior would be eliminated, although bargaining and monitoring costs may be increased. Political and financial constraints may, however, preclude this alternative from extensive consideration.

VIII. Conclusion

Governance structures—the institutional framework within which transactions are negotiated and executed—vary with the nature of the

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177. When the output from a generating unit can be sold to a competitive market of potential purchasers the investment is no longer idiosyncratic. Idiosyncrasy requires that the asset be transaction-specific.

178. Opportunistic behavior is precluded since joint profit maximization is not achieved by uncooperative behavior for a unified firm.

179. Williamson, *supra* note 49, at 241.

180. The trend in the United States has been toward more private ownership rather than more public ownership.

181. Costs of new generating facilities range from $100 million to $5 billion. *See* Dept. of Energy, Projected Costs of Electricity from Nuclear and Coal-Fired Power Plants (1986).

182. It can be assumed that all taxpayers would participate in any public ownership of electric generating facilities since any plan involving optional participation would encounter "free-rider" problems.

183. The cost to consumers over time would remain the same as it currently is since the existing regulatory scheme provides for the "purchase" of generating facilities through the collection of depreciation expense. There would be an upfront cost, though, as existing plant were transferred from private to public ownership.

transaction. Transaction cost analysis evaluates the characteristics of a transaction to determine what institutional structure can most efficiently govern. In particular, the characteristics of complexity, uncertainty, frequency and idiosyncrasy are emphasized by transaction cost analysis. Transaction cost analysis recognizes that these characteristics affect the costs of negotiating, monitoring and enforcing the contract, and that these transaction costs are real costs which must be accounted for in determining the least-cost institutional structure.

The transaction at issue here is the transaction whereby utility investors finance and build an electric utility plant for consumers who subsequently compensate the investors for their costs. That transaction may be characterized as an infrequent transaction requiring significant amounts of transaction-specific investment to be made under conditions of great uncertainty. The transaction is infrequent because economies of scale dictate the addition of large generating units which are added every five to ten years. The transaction requires a large amount of transaction-specific (idiosyncratic) investment so long as physical and institutional factors preclude the wheeling of bulk power. The transaction is uncertain since the long time necessary to build the plant and complete the transaction makes the ultimate economic value of the plant difficult to predict.

The traditional regulatory governance structure is not an efficient way to govern the utility construction transaction because it allows the amount of construction expense which can be recovered through rates to be determined after the investment has been made. Because the investment is idiosyncratic (involves a high level of sunk costs), this ex post determination of asset value allows opportunistic behavior by consumers acting through the regulatory agency. The potential for opportunism is especially troublesome under this governance structure because of the great uncertainty caused by the long time necessary to build the plant and complete the transaction. The potential for opportunistic behavior by regulators increases the cost of the transaction by imposing significant risks on investors who may have their investment "appropriated" by an ex post determination of the asset's value.

Competitive bargaining proposals may reduce transaction costs by eliminating the generating asset's idiosyncrasy. Once the investment is not transaction-specific, the potential for opportunistic behavior is significantly lowered and the total cost of the transaction is correspondingly reduced. The risks and uncertainties of opportunistic behavior present significant costs to the transaction, and any institutional arrangement which reduces those costs should more efficiently govern. The costs of regulation (monitoring and enforcement) are also decreased significantly as a market governance structure accomplishes those duties at a lower cost. Competitive bidding proposals do require an increase in bargaining

costs, although the reduction in other transaction costs should more than compensate for that increase.

Preapproved contract approaches may also reduce transaction costs by limiting the potential for opportunistic behavior. In contrast to competitive bidding proposals, preapproved contract alternatives do not limit opportunistic behavior by reducing the investment's idiosyncrasy; instead, they utilize extensive regulatory monitoring coupled with the statutory preclusion of opportunistic behavior. Preapproved contract approaches will increase negotiation and monitoring costs, but the reduction in opportunistic behavior makes the total transaction cost low.

Institutional arrangements incorporating binding arbitration might also be a more efficient means of governance. Binding arbitration is a form of the trilateral governance structure that is especially efficient when investments are idiosyncratic and transactions are infrequent. Binding arbitration increases enforcement costs, but decreases the risk of asset appropriation and thereby lowers the cost of the construction transaction. Like preapproved contract alternatives, binding arbitration would require minimal change in the existing institutional structure.

The public ownership of generating facilities is another institutional structure which would decrease total transaction costs. When one party is both "seller" and "buyer" there is no incentive to shift costs onto another party by behaving in an opportunistic manner. Negotiation, monitoring and enforcement costs would also be reduced as those processes are internalized through vertical integration. In spite of the potential benefits, however, the political and financial constraints arising from the public ownership of private property would appear to preclude this option from gaining widespread acceptance.

The transaction cost literature has identified opportunistic behavior as a primary determinant of transaction costs, and of the efficiency of institutional structures which govern transactions. All of the proposals discussed reduce transaction costs by limiting opportunistic behavior when compared with traditional regulatory governance. Serious consideration of alternative institutional structures for governing the utility construction transaction is required if transaction costs are to be reduced and utility construction is to proceed at the levels necessary to support American economic growth.

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