

# BEHIND THE LOCKED DOOR OF AN AMERICAN GRAND JURY: ITS HISTORY, ITS SECRECY, AND ITS PROCESS

MARK KADISH\*

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## I. INTRODUCTION

The purpose of our Constitution is to create a government that protects people from each other.<sup>1</sup> The purpose of our Bill of Rights is to protect each of us from our government.<sup>2</sup> Fundamental in any ordered system of government is an understanding that the people have the right to be free from crime. But, even more important, the people have a right to be free from a government that takes life, liberty, and property without due process of law.

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\* Associate Professor of Law, Georgia State University. B.A., Lafayette College, 1964; LL.B., New York University, 1967. I am indebted to my colleagues Professor Kathryn Urbonya and Associate Professor Ellen Podgor for their insightful comments. A special thanks goes to my research assistants Rhonda Byers and Paul Vignos for their commitment to this project.

1. See generally THOMAS HOBBS, *LEVIATHAN* (Cambridge Univ. Press 1991) (1651) (asserting that freedom requires relinquishment of power to avoid pitting each person against the other).

2. See e.g., Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 870-73 (1960); Loren A. Smith, *Introduction To Symposium On Regulatory Takings*, 46 S.C. L. REV. 525, 526 (1995) (stating that the very purpose of the Bill of Rights is to protect citizens from government).

This Article focuses on whether the development, interpretation, and administration of federal grand jury secrecy provisions has adhered to due process strictures. It suggests that due process concerns have yielded to goals of government efficiency in federal law enforcement. The Article offers a solution that protects historical grand jury secrecy while encompassing the concerns of efficient and effective federal law enforcement. This easily executed solution has eluded the U.S. Supreme Court, Congress, and commentators over the last fifty years. Only one U.S. Court of Appeals decision, *Maryland & Virginia Milk Producers Ass'n v. United States*,<sup>3</sup> has recognized the simplicity and fairness of this solution to both the people and the government. The Supreme Court, however, has never even discussed this critical 1957 D.C. Circuit decision, propounded by the Secretary to the 1946 Advisory Committee on the Federal Rules of Criminal Procedure,<sup>4</sup> in its later, seminal decisions on grand jury secrecy.<sup>5</sup> This simple, unnoticed, one-page panel order balanced the interest of the government in efficient and cost-effective civil regulatory investigations against the interests in grand jury secrecy by allowing disclosure of grand jury materials for subsequent civil proceedings only to the extent that they would have been discoverable by government civil investigative devices. To implement this solution, the Supreme Court and Congress should revisit the federal grand jury secrecy rule.

Part II of this Article is an historical analysis. It examines the grand jury system as it originated in England and developed in colonial America. Part II also focuses on the evolution of the grand jury's function from a powerful tool for the monarch to a shield protecting citizens from the king's abuses.

Part III addresses the critical role secrecy has played in the evolution of the grand jury system in America. It examines secrecy interests in the context of the purpose for disclosure, suggesting that when disclosure is sought by the government for use in civil regulatory actions, the courts must consider the defendant's interest in a fair civil trial process.

Part IV focuses on the 1946 codification of the common law rule of grand jury secrecy into Federal Rule of Criminal Proce-

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3. 250 F.2d 425 (D.C. Cir. 1957).

4. See *Maryland & Virginia Milk Producers Ass'n v. United States*, 151 F. Supp. 438, 440 (D.D.C. 1956). U.S. District Judge Alexander Holtzoff, the author of the lower court opinion that proposed the approach, was also Secretary to the 1946 Advisory Committee on the Federal Rules of Criminal Procedure.

5. See *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958); *United States v. Baggot*, 463 U.S. 476 (1983); *United States v. Sells Eng'g, Inc.*, 463 U.S. 418 (1983).

dures 6(e).<sup>6</sup> A detailed analysis of the rule's drafting history reveals congressional concerns over illegal or unauthorized use of grand jury information in government civil proceedings and a legislative intent that grand jury materials only be disclosed to government attorneys handling criminal prosecutions.

Part V discusses the different approaches taken by the lower courts in permitting disclosure of grand jury materials in government civil litigation after the codification of Rule 6(e). The most significant of these is the fair process approach taken by *Maryland & Virginia Milk Producers Ass'n.* This rather simple, common-sense concept forms the bedrock for the thesis of this article.

Part VI discusses the Supreme Court's decision in *United States v. Procter & Gamble Co.*,<sup>7</sup> the Court's first opportunity to address grand jury secrecy in terms of civil disclosure. Analysis of *Procter & Gamble* exposes the problems inherent in parallel civil and criminal investigations. Part VI also examines the nine-year discovery battle between the United States and *Procter & Gamble*, revealing that disclosure of grand jury material to government civil attorneys provides an incentive for abuse of the grand jury system and can create a substantial imbalance in civil discovery.

Part VII discusses the emerging concern over civil use of grand jury materials in the context of federal administrative agency access to such information. Enabling legislation that created agencies with substantial civil and criminal enforcement powers presented significant grand jury secrecy issues parallel to those examined in *Procter & Gamble*. Questions also arose concerning the extent to which agency personnel could gain access to grand jury materials by assisting the prosecutor with the grand jury investigation. Part VII also traces case law that eventually prompted legislative action amending Rule 6(e).

Part VIII analyzes the legislative history of the 1977 amendment to Rule 6(e),<sup>8</sup> which demonstrates congressional efforts to limit civil regulatory use of grand jury material,<sup>9</sup> and the 1981 proposed amendment that clarified Congress's intent.<sup>10</sup> The 1977 amendment expanded Rule 6(e) disclosure exceptions and

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6. FED. R. CRIM. P. 6(e); see also *infra* text accompanying note 160-62.

7. 356 U.S. 677 (1958).

8. Act of July 30, 1977, Pub. L. No. 95-78, 91 Stat. 319 (1977) (codified as amended at 18 U.S.C. app. (1994)).

9. See *infra* note 300.

10. See Preliminary Draft of Proposed Amendments to The Federal Rules of Criminal Procedure, 91 F.R.D. 289, 301-05 (1981).

authorized disclosure of grand jury materials to government personnel to assist prosecutors in their duties.<sup>11</sup> The 1981 proposed amendment, ultimately tabled in committee, would have expressly limited the term "attorney for the government" to permit automatic disclosure of grand jury materials only to government prosecutors conducting criminal investigations.<sup>12</sup>

Part IX reviews *United States v. Sells Engineering Corp.*<sup>13</sup> and *United States v. Baggot*,<sup>14</sup> the seminal Supreme Court decisions that interpreted the 1977 amendment to Rule 6(e). *Sells* and *Baggot* clearly held that government civil attorneys are not permitted automatic access to grand jury materials to aid in civil proceedings. Part IX also focuses on the Court's concerns over grand jury abuse and the disparity in civil discovery when government attorneys use grand jury materials in subsequent civil proceedings.<sup>15</sup> Although these cases provided a prophylactic bright-line rule that protects the individual, they failed to adequately balance that interest against the cost to the government of duplicate investigations. As in *Procter & Gamble*, the Supreme Court failed to consider the fair approach taken in *Maryland & Virginia Milk Producers Ass'n*.

Parts X, XI, and XII trace the evolution of the grand jury secrecy rule since *Sells* and *Baggot*, pointing out the ever-competing interests in efficient civil investigations and the need for grand jury secrecy. These sections reveal that grand jury secrecy is being eroded to avoid the extensive costs and delays that occur when governmental agencies must duplicate grand jury investigations for subsequent civil proceedings.

This Article is also a response to Professor Graham Hughes' recent *Vanderbilt Law Review* article,<sup>16</sup> which proposed coordinating federal compulsory process and modifying the federal grand jury secrecy rule.<sup>17</sup> Professor Hughes thoroughly explored the difficulties and inefficiencies inherent in parallel criminal and civil investigations in light of modern practice and suggested that separation of the two processes is artificial.<sup>18</sup> Professor Hughes

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11. S. REP. NO. 354, 95th Cong., 1st Sess. 7 (1977), reprinted in 1977 U.S.C.C.A.N. 527, 531.

12. Preliminary Draft of Proposed Amendments, 91 F.R.D. at 302.

13. 463 U.S. 418 (1983).

14. 463 U.S. 476 (1983).

15. See *Sells*, 463 U.S. at 434.

16. Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process*, 47 VAND. L. REV. 573 (1994).

17. See generally *id.*

18. *Id.* at 610-11.

recommended eliminating the requirement that disclosure of grand jury materials to the government be made only “preliminarily to a ‘judicial proceeding,’” thus allowing disclosure for civil regulatory investigations.<sup>19</sup> He also proposed lowering the standard required for federal civil attorneys to gain access to grand jury materials from a “particularized need” to a “substantial need.”<sup>20</sup> While this Article acknowledges the difficulties surrounding parallel investigations, and agrees modification of Rule 6(e) is necessary, it rejects Professor Hughes’ solution as not affording citizens the requisite fair process.

Finally, part XIV concludes that the all-or-nothing approach taken by the courts, Congress, and commentators can be avoided by adopting the solution proposed in *Maryland & Virginia Milk Producers Ass’n*, which equitably balanced the interest in cost-effective civil regulatory investigations against the interest in protecting the secrecy of the grand jury process, thus providing fair process to the individual.

## II. THE HISTORY OF THE ENGLISH AND COLONIAL GRAND JURIES

The U.S. Supreme Court has stated that “our constitutional grand jury was intended to operate substantially like its English progenitor.”<sup>21</sup> An historical analysis of the grand jury thus helps to assess the role secrecy plays in the modern American grand jury system. This analysis reveals that grand jury secrecy serves two competing functions, which courts should enforce in a manner that equitably balances both roles.

### A. The Grand Jury in England

The earliest progenitor of our grand jury had two main functions: to accuse criminals<sup>22</sup> and to extend the central government throughout England.<sup>23</sup> In twelfth-century England, criminal

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19. *Id.* at 657-63.

20. *Id.*

21. *Costello v. United States*, 350 U.S. 359, 362 (1956).

22. SARA SUN BEALE & WILLIAM C. BRYSON, *GRAND JURY L. & PRAC.* § 1:02 (1986): Although the English grand jury was praised in later years as an important safeguard of individual liberty, its original purposes were to increase the number of criminal prosecutions, to enhance the king’s authority, and indirectly to raise revenue for the Crown, which received the property forfeited by persons convicted of crimes.

23. See Helene E. Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 *AM. CRIM. L. REV.* 701, 703 (1972) (“[T]he ancestor of our modern grand jury is generally conceded to be the body which was formally made part of the English judicial machinery

charges were prosecuted essentially by individuals,<sup>24</sup> with the king acting as “a super-privileged individual.”<sup>25</sup> The king was thus personally involved in the medieval criminal justice system. With the promulgation of the Assize of Clarendon in 1166,<sup>26</sup> King Henry II established a system of local informers<sup>27</sup> (twelve men from every hundred<sup>28</sup> or four men from every vill<sup>29</sup>) to tell him who was suspected of “murder, robbery, larceny, or harbouring criminals.”<sup>30</sup> The king’s system, which superseded baronial and ecclesiastical jurisdiction,<sup>31</sup> made the king the beneficiary of the fines and forfeitures that attended the accusations.<sup>32</sup> The system required the twelve men to report all suspects<sup>33</sup> and fined them if they failed to indict any suspect<sup>34</sup> or even if they failed to indict an acceptable number of suspects.<sup>35</sup> The twelve men secretly named violators to give the sheriff a chance to seize those who were indicted.<sup>36</sup> Those whom the twelve men accused were tried

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during the reign of Henry II, as a direct result of that monarch’s attempt to assert his dominance over the ecclesiastical and feudal realms.”).

24. Susan M. Schiappa, *Preserving the Autonomy and Function of the Grand Jury: United States v. Williams*, 43 CATH. U. L. REV. 311, 324 (1993).

25. Julius Goebel, Jr., *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555, 560 (1938).

26. Helene Schwartz identifies the Constitutions of Clarendon, announced in 1164, as an earlier documented forerunner. See Schwartz, *supra* note 23, at 705-07.

27. Presenting evidence against wrongdoers seems to have been recognized before the twelfth century. The Saxon method of bringing offenders to justice included a semi-annual tour by the sheriff through all the towns to punish offenders. GEORGE J. EDWARDS, JR., *THE GRAND JURY* 5 (1906). In the interim, all citizens were made sureties for the good behavior of each other through the system of frank-pledge. *Id.* When the sheriff arrived, the people were required to tell him whom to punish. *Id.* at 5, 8. The Norman kings of England required answers from representatives of local government and also enforced communal responsibility for criminal acts. *United States v. Smyth*, 104 F. Supp. 283, 288 (N.D. Cal. 1952).

28. A hundred is a subdivision of the shire. BEALE & BRYSON, *supra* note 22, § 1:02. Each hundred had a court; and, in 1234, by ordinance of Henry II, these courts met every three weeks, and were visited by the king’s sheriff twice a year to enforce the frank-pledge system and obtain accusations. SIR FREDERICK POLLOCK & FREDERIC MAITLAND, *THE HISTORY OF ENGLISH LAW* 557-59 (2d ed. 1952).

29. POLLOCK & MAITLAND, *supra* note 28, at 560. The vill of the thirteenth century was the civil parish of the nineteenth century, which was originally a purely ecclesiastical district. *Id.*

30. *Id.* at 152. Ten years later, forgery and arson were added to this list of crimes. *Id.*

31. Schiappa, *supra* note 24, at 326 nn.74 & 76; Schwartz, *supra* note 23, at 708-09; EDWARDS, *supra* note 27, at 7.

32. Schiappa, *supra* note 24, at 326 n.76; Schwartz, *supra* note 23 at 709.

33. BEALE & BRYSON, *supra* note 22, § 1:02.

34. Although fining of jurors ended in 1667, Schwartz, *supra* note 23, at 709 n.41., the practice continued for at least another 100 years in the State of Connecticut. EDWARDS, *supra* note 27, at 12 n.62. See also BEALE & BRYSON, *supra* note 22, § 1:02 n.29 (noting that earliest imposition of fines may have been in 1194).

35. Schiappa, *supra* note 24, at 326 n.76; Schwartz, *supra* note 23, at 709.

36. EDWARDS, *supra* note 27, at 20-21. The initial secrecy provisions were thus not for the protection of any interest other than that of bringing the accused to trial.

by ordeal, which forced the suspects to prove their innocence by overcoming the laws of nature.<sup>37</sup> Since the “trial” was punishing, if not actually fatal, the accusation by the king’s twelve men was the beginning and end of fundamental fairness in the twelfth-century.

The twelve men were also empowered to conduct other business of the monarchy.<sup>38</sup> For example, in 1188, the twelve men became tax assessors for the Saladin Tithe.<sup>39</sup> Shortly after the reign of Henry III ended in 1272, the twelve men were looking into the condition and maintenance of public works, including highways, bridges, and jails.<sup>40</sup> During this same time period, the twelve men were sworn to secrecy.<sup>41</sup> Nevertheless, the twelve men turned the information gathered from their inquiries over to itinerant justices sent by the monarchy.<sup>42</sup> These justices had the power to interrogate each of the twelve men to determine how they arrived at their findings.<sup>43</sup>

Significantly, in 1215, King John was forced by his barons to sign the Magna Carta, which delineated individual protections of life, liberty, and property by order of law.<sup>44</sup> This revered document did not specifically address the issue of grand jury secrecy. It did, however, introduce the concept of due process against which any procedural practice must be measured.<sup>45</sup>

37. Schwartz, *supra* note 23, at 708. For example, the ordeal of the boiling water required the accused to grab a rock out of a cauldron of boiling water without getting burned; or if burned, by healing within three days. Another ordeal proved innocence if the accused sank in a pool of water with both hands tied together under the knees; but if the accused sank, the accused usually drowned to death. See generally THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 113-15 (5th ed. 1956); H. LEA, *SUPERSTITION AND FORCE*, 222-61 (2d ed. 1958); ROBERT BARTLETT, *TRIAL BY FIRE AND WATER: THE MEDIEVAL JUDICIAL ORDEAL* (1986).

38. Schwartz, *supra* note 23, at 709.

39. *Id.* The Saladin Tithe was a levy for financing the Third Crusade against the Moslem general Saladin. The tithe fell particularly heavily upon the Jewish community, who were forced to contribute 60,000 pounds (which represented one quarter of all the property they owned in England and which was held, ultimately, on the king’s behalf). See Judith A. Shapiro, Note, *The Shetar’s Effect on English Law—A Law of the Jews Becomes the Law of the Land*, 71 *GEO. L.J.* 1179, 1188 n.82 (1983).

40. EDWARDS, *supra* note 27, at 25.

41. The oath stated “that they will lawful presentment make of such chapters as shall be delivered to them in writing and in this they will not fail for any love, hatred, fear, reward, or promise, and that they will conceal the secrets, so help them God and the Saints.” *Id.* (citation omitted) (emphasis added).

42. *Id.* at 24-25.

43. *Id.* at 27.

44. “The ancestry of the due process clause is universally traced to chapter 39 of the Magna Carta . . .” Robert E. Riggs, *Substantive Due Process in 1791*, 1990 *WIS. L. REV.* 941, 948. Chapters 39 and 40 were combined and renumbered as chapter 29 in the Magna Carta published in 1225. *Id.* at 949 n.30.

45. *Id.* at 951.

During the reign of Edward III (1312-1377), the twelve men were superseded by twenty-four knights chosen by the county sheriff, who had authority for beginning a prosecution.<sup>46</sup> The knights were called “le grande inquest.”<sup>47</sup> Their jurisdiction over the indictment process had no statutory authorization, but rather developed as part of the common law.<sup>48</sup> Meanwhile, the twelve men, having lost their original inquisitorial jurisdiction, became known as the petit jury,<sup>49</sup> which had responsibility for rendering a verdict of innocent or guilty in capital crimes. Therefore, by the fourteenth century, the developing criminal common law included two salient procedural devices: an indicting grand jury and an adjudicating petit jury.

In 1642, the English legal philosopher Edward Coke<sup>50</sup> interpreted the Magna Carta provision “Nullus liber homo capiatur, aut imprisonetur” as preserving life, liberty, and property subject to the “law of the land.”<sup>51</sup> William Blackstone interpreted Coke’s “law of the land” to require a two-tier process before a person could be deprived of (at least) life.<sup>52</sup> The vote by the grand jury in the first proceeding determined whether there was probable cause to believe that the individual accused was guilty of the crime charged; the vote by the petit jury in the second proceeding determined whether there was enough evidence to convict.<sup>53</sup> The petit jury provided little protection to the innocent accused, however, because the king often fined or imprisoned jurors who re-

46. EDWARDS, *supra* note 27, at 26.

47. *Id.*

48. *Id.*

49. *Id.*

50. Edward Coke, author of the *Institutes*, was widely recognized as an authority on law by both the English and Americans during the eighteenth century. See, e.g., Chase J. Sanders, *Ninth Life: An Interpretive Theory of the Ninth Amendment*, 69 *IND. L.J.* 759, 800 (1994) (observing that Coke, along with William Blackstone and John Locke, was called a legal philosopher).

51. 2 EDWARD COKE, *INSTITUTES OF THE LAWS OF ENGLAND* \*46.

52. 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*132-39. The Supreme Court later stated that Coke’s interpretation of the Magna Carta was misunderstood:

It was not intended to assert that an indictment or presentment of a grand jury was essential to the idea of due process of law in the prosecution and punishment of crimes, but was only mentioned as an example and illustration of due process of law as it actually existed in cases in which it was customarily used.

*Hurtado v. California*, 110 U.S. 516, 552 (1984). A process that afforded additional due process safeguards beyond those provided by the grand jury, such as the probable cause hearing, in which the defendant had an opportunity to present exculpatory evidence and cross examine prosecution witnesses, was considered a constitutionally acceptable method instigating a prosecution. See *id.*

53. 4 BLACKSTONE, *supra* note 52, at \*306. The two-trial procedure was in place 40 years before Bracton published his legal treatise in the period 1220-1257. See EDWARDS, *supra* note 27, at 25.



fused to convict.<sup>54</sup> Reacting to this monarchical abuse, the grand juries began to shift their focus away from mere accusation to considerations of fairness for the individual accused.<sup>55</sup>

Two celebrated cases became the catalyst for writers to define the rights and powers of English grand juries.<sup>56</sup> When pro-Protestant grand juries in London refused to indict Catholic King Charles II's enemies, Lord Shaftesbury and Stephen Colledge,<sup>57</sup> the grand jury became an institution "capable of being a real safeguard for the liberties of the subject."<sup>58</sup> For the first time, grand juries were positively identified as something other than enforcement agencies of central government; they also existed for the protection of the accused.<sup>59</sup>

### B. The Grand Jury in Colonial America

The American colonies were slow to import the grand jury from England. It was not until 1635 that the first regular grand jury was established.<sup>60</sup> Before grand juries, the colonies used

54. See Lisa H. Wallach, Note, Prosecutorial Misconduct in the Grand Jury: Dismissal of Indictments Pursuant to the Federal Supervisory Power, 56 *FORDHAM L. REV.* 129, 131 n.15 (1987).

55. *Id.*

56. The writings of Sir John Hawles (*The Englishman's Rights* (1680)), John Somers (Lord Chancellor of England, *The Security of English-Mens Lives, or the Trust, Power, and Duty of the Grand Jurys of England* (1682)), and Henry Care (*English Liberties or Free Born Subject's Inheritance* (1698)) were printed several times in the colonies. See RICHARD D. YOUNGER, *THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941* 21 (1963): "When the American colonists clashed with absentee trustees or with representatives of royal authority, they too began to see the grand jury in a different light. Instead of a routine, burdensome institution it became the bulwark of their rights and privileges." *Id.* For a similar conclusion, see BEALE & BRYSON, *supra* note 22, § 1:02.

57. For a detailed narrative of the Shaftesbury and Colledge cases, see Schwartz, *supra* note 23, at 710-20.

58. LESTER B. ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 141 (1947) (quoting Letter from Professor William S. Holdsworth (July 13, 1933) (defending English grand jury shortly before it was drastically curtailed and finally abandoned in England)).

59. JOHN SOMERS, *THE SECURITY OF ENGLISH-MENS LIVES, OR THE TRUST, POWER, AND DUTY OF THE GRAND JURYS OF ENGLAND* 12 (London, Benjamin Alsop 1682):

It was absolutely necessary for the support of the Government, and the safety of every Mans life and interest, that some should be trusted to inquire after all such as by Treasons, Felonies, or lesser Crimes, disturbed the peace, that they might be prosecuted, and brought to condign punishment; and it was no less needful for every mans quiet and safety, that the truth of such inquisitions should be put into the hands of Persons of understanding, and integrity, indifferent, and impartial, that might suffer no man to be falsely accused, or defamed, nor the lives of any to be put in jeopardy, by the malicious conspiracies of great or small, or the Perjuries of any profligate wretches: For these necessary honest ends was the institution of Grand Juries.

See also *Costello v. United States*, 350 U.S. 359, 362 (1956) ("The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes.").

60. YOUNGER, *supra* note 56, at 6.

“assistants,” whom the English monarchy authorized to make the laws, accuse suspects, and sit in judgment of criminals.<sup>61</sup> Having no checks or balances, the assistants were too powerful and abusive. In response to this abuse, one of the first American grand juries charged several of the assistants themselves with violations of the criminal law.<sup>62</sup> Thus, decidedly unlike its English progenitor, the American grand jury originally began, not as an arm of the executive, but as a defense against monarchy. It established a screen between accusations and convictions and initiated prosecutions of corrupt agents of the government. Therefore, the English progenitor upon which the American grand jury was modeled was the more enlightened protective grand jury of the 1600s.

In the early American experience, the grand jury also became more a part of local government than it had apparently been in England.<sup>63</sup> For example, in the early development of the Massachusetts grand jury, town officials were presented<sup>64</sup> for neglecting to repair the stocks<sup>65</sup> and for failing to repair the highway.<sup>66</sup> The Virginia grand juries became part of the county court system in 1662 and met twice a year to levy taxes, oversee spending, supervise public works, appoint local officials, and consider criminal accusations.<sup>67</sup> By the middle of the 1700s, the Connecticut grand jury was helping to levy taxes and conduct other local government work while a public prosecutor took primary responsibility for investigating crime.<sup>68</sup> In the Carolinas,<sup>69</sup> Georgia,<sup>70</sup> Maryland,<sup>71</sup> New Jersey,<sup>72</sup> and Pennsylvania,<sup>73</sup> the pattern was similar: in addition to screening criminal accusations, American grand

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61. *Id.*

62. *Id.*

63. “In the absence of other governmental bodies, the [colonial] grand juries took over a wide range of administrative tasks and operated with a substantial degree of independence.” BEALE & BRYSON, *supra* note 22, § 1:03.

64. Presentment is “an accusation, initiated by the grand jury itself, and in effect an instruction that an indictment be drawn.” BLACK’S LAW DICTIONARY 1184 (6th ed. 1990). For a cogent argument of both the present and historical merits of grand jury presentment powers and a comment on the Rocky Flats grand jury investigation that terminated before indictment, see Renee B. Lettow, Note, Reviving Federal Grand Jury Presentments, 103 YALE L.J. 1333 (1994).

65. YOUNGER, *supra* note 56, at 7.

66. *Id.*

67. *Id.* at 10-11.

68. *Id.* at 9.

69. *Id.* at 16.

70. *Id.* at 16-17.

71. *Id.* at 12.

72. *Id.* at 13.

73. *Id.* at 15-16.

juries took an active role in local government and had sufficient independence to announce dissatisfaction with government.<sup>74</sup>

As the colonies moved closer to revolution, the grand jury took on a third role: outright resistance to the monarchy.<sup>75</sup> Three successive grand juries refused to indict John Peter Zenger, whose newspaper criticized the withdrawal of jury trials and the royal control of New York.<sup>76</sup> While the King was withdrawing the right to trial by jury<sup>77</sup> and attempting to initiate prosecutions by informations,<sup>78</sup> colonial grand juries responded by making “stinging denunciations of Great Britain and stirring defenses of their rights as Englishmen.”<sup>79</sup> Newspapers often republished these criticisms.<sup>80</sup>

After the Revolution, the centralized government was created without a federal grand jury. The Constitution created three separate branches of government and delineated the powers of each, but did not establish grand juries.<sup>81</sup> Nor were grand juries established in the Judiciary Act of 1789,<sup>82</sup> which set up the fed-

74. For a more detailed discussion of the early grand juries in America, see *id.* at 6-26.

75. *Id.* at 27.

76. Zenger was then charged by information, imprisoned for eight months under an impossibly high bond, and tried for seditious libel under a law which held that the greater the truth the greater the libel. Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 871-73 (1994).

77. Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1, 14 (1993):

[The king] issued mandates to colonial governors, who then attempted to circumvent the right to trial by jury by expanding admiralty jurisdiction . . . [in which cases were tried by judges who were] appointed and removed by royal governors, who insisted on verdicts they favored in order for the judge to remain on the bench.

78. YOUNGER, *supra* note 56, at 27.

79. *Id.* at 34.

80. *Id.*

81. That omission prompted at least Massachusetts, New Hampshire, and New York to call for an amendment to the Constitution preventing federal prosecutions except by indictment before a grand jury. Schiappa, *supra* note 24, at 329-30; Lettow, *supra* note 64, at 1338 n.20 (citing 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 677, 761, 855 (Bernard Schwartz ed., 1971)); YOUNGER, *supra* note 56, at 45-46. The Fifth Amendment, ratified in 1791—only two years after the Constitution—closely tracks an amendment drafted by John Hancock and forwarded to Congress by the Massachusetts convention. BEALE & BRYSON, *supra* note 22, § 1:04. The amendment drafted by Hancock provided “[t]hat no person shall be tried for any Crime by which he may incur an infamous punishment or loss of life until he be first indicted by a Grand Jury, except in such cases as may arise in the Government & regulation of Land & Naval forces.” *Id.* The Fifth Amendment provides: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.” U.S. CONST. amend. V.

82. 1 Stat. 73 (1789).

eral court system.<sup>83</sup> However, after passing the Judiciary Act, Congress approved twelve constitutional amendments<sup>84</sup> for ratification by the states. In 1791, the Fifth Amendment was adopted as part of the Bill of Rights, with its Grand Jury Clause insuring that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .”<sup>85</sup> The Grand Jury Clause protected the people against arbitrary and overzealous government by protecting “against hasty, malicious and oppressive prosecution.”<sup>86</sup> Secrecy in grand jury proceedings played a role in that protection.

### III. THE ROLE OF GRAND JURY SECRECY

#### A. The Beginnings of Grand Jury Secrecy

In the beginning, the grand jurors’ oath established the secrecy requirement. When grand juries were simply the monarch’s

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83. “It was decided by Chief Justice Marshall, in [United States] v. Hill [Case No. 15,364], in 1809, that neither the 29th section of the [J]udiciary [A]ct of 1789 (1 Stat. 88), nor the [A]ct of May 13th, 1800 (2 Stat. 82), applied to grand juries in the federal courts.” *United States v. Reed*, 27 F. Cas. 727 (N.D.N.Y. 1852) (No. 16,134). But see YOUNGER, *supra* note 56, at 46 (“The Judiciary Act of 1789 provided that grand juries were to attend each session of the circuit and district courts.”).

In fact, Congress has never passed a comprehensive act establishing the scope and powers of the federal grand jury. The next act to mention grand juries, the Act for the Punishment of Certain Crimes against the United States, enacted on April 30, 1790, required the government to furnish a copy of the indictment and list of witnesses and jurors at least three days before trial to a person accused of treason and two days before trial to a person accused of other capital offenses. Ch. 9, § 29, 1 Stat. 112, 118 (1790). The Act also established a three-year statute of limitations on indictments for treason or other capital offenses, except for willful murder or forgery. *Id.* § 32, at 119. The Act does not include any definition of the grand jury to which it refers. Similarly, the Act for Regulating Processes in the Courts of the United States, and providing Compensations for the Officers of the said Courts, and for Jurors and Witnesses, enacted on May 8, 1792, assumes the existence of a grand jury and pays three dollars to the United States Marshall who summons a grand jury, and fifty cents to each grand juror for attending in court plus five cents per mile for travel. Ch. 36, § 3, 1 Stat. 275, 276-77 (1792). In 1826, Congress passed an Act to Regulate the Summoning of Grand Jurors, in the District Courts, which reserved to the district judges the authority to order the impaneling of grand juries. Ch. 86, § 1, 4 Stat. 188, 188-89 (1826). In 1895, Congress first established the size of federal grand juries and the necessity for the concurrence of at least twelve grand jurors to find an indictment or presentment. Act Regulating Proceedings in Criminal Cases and for Other Purpose, ch. 86, § 1, 13 Stat. 500, 500 (1865). Congress first began considering omnibus grand jury legislation in 1973, but could not develop a strong enough consensus to enact a general bill; the last omnibus reform proposal was the ABA Bill that disappeared in the markup process in 1986. See ABA CRIMINAL JUSTICE, ABA GRAND JURY POLICY AND MODEL ACT (1977-82) (2d ed. 1982).

84. Ten amendments were ratified and adopted as the Bill of Rights in 1791.

85. U.S. CONST. amend. V.

86. *Wood v. Georgia*, 370 U.S. 375, 390 (1962).

investigatory bodies,<sup>87</sup> the grand jury oath did not include secrecy.<sup>88</sup> Secrecy was part of the grand jury process to prevent escape by suspected criminals.<sup>89</sup> By the fourteenth century, however, secrecy was a part of the grand jurors' oath.<sup>90</sup> With the shroud of secrecy came independence from the king. By 1681, the monarch's justices could no longer oversee jury deliberations,<sup>91</sup> even though some justices still claimed the authority to conduct the inquiry in public if the king so desired.<sup>92</sup> At this time, the

87. PLUCKNETT, *A CONCISE HISTORY OF ENGLISH LAW* 112 (5th ed. 1956) (observing that inquisition established by Clarendon Assize was an effective way of getting information out of an unwilling populace).

88. Bracton, writing in the period 1220-1257, gives the oath sworn to by the twelve men who informed the king of serious crimes:

Hear this, ye justices, that I will speak the truth as to that on which you shall question me on the lord king's behalf, and I will faithfully do that which you shall command me on the lord king's behalf, and for nothing will I fail so to do to the utmost of my power, so help me God and these holy relics.

HENRY BRACTON, 2 *ON THE LAWS AND CUSTOMS OF ENGLAND* 329 (George E. Woodbine ed. & Samuel E. Thorne trans., Belknap Press 1968).

89. See EDWARDS, *supra* note 27, at 20-21. According to Bracton, the twelve men who informed the king were

told in private that if anyone in their hundred or wapentake is suspected of some crime they are to arrest him at once if they can. If they cannot, let them give his name, and the names of all those who are under suspicion, privately to the justices in a schedule and the sheriff will be ordered to arrest them at once and bring them under arrest before the justices, that the latter may do justice upon them.

BRACTON, *supra* note 88, at 329 (citations omitted).

90. Writing during the reign of Edward I, Britton stated that the grand jurors were required to swear "that they will lawful presentment make of such chapters as shall be delivered to them in writing, and that in this they will not fail for any love, hatred, fear, reward, or promise, and that they will conceal the secrets, so help them God, and the Saints." 1 BRITTON 22 (Francis M. Nichols trans., Gaunt & Sons 1983) (1865).

91. At Lord Shaftesbury's indictment hearings before the grand jury, the Lord Chief Justice Pemberton stated to the jury foreman:

I will tell you, I take the Reason of that use for Grand Juries to examine the Witnesses privately and out of Court, to comply with the Conveniencies of the Court. . . . Therefore Gentlemen, there can be no kind of Reason why this Evidence should not be given in Court. What you say concerning keeping your Counsels, that is quite of another Nature, that is, your Debates, and those things, there you shall be in private for to consider of what you hear publickly.

Proceedings against Anthony Earl of Shaftesbury, 33 Car. 2 (1681), in 2 *STATE-TRIALS* 828, 830-31 (Timothy Goodwin et al., London 1719).

92. See *id.* at 833:

At the Grand Jury called to indict Lord Shaftesbury, the Lord Chief Justice Pemberton said to one of the Grand Jurors: as to your Counsels, that is, your Debates, you are bound to conceal them: As to the King's secrets, so long as he will have them kept secret, you are bound to keep them so too; but it doth not deprive the King of the Benefit of having it publick, if he have a Desire for it; you don't break your Oath, if the King will make it publick; you do not make it publick; 'tis the King does it.

But see SOMERS, *supra* note 59, at 79 (arguing that oath of secrecy allowed jurors, "sifting out all the Circumstances which the Law requires," to prevent false accusations, especially when judges censured jurors' questions, calling them "trifles, impertinent, and unfit for the Witnesses to speak to").

grand jurors' oath<sup>93</sup> resembled the basic form administered to grand jurors in 1946, when the Federal Rules of Criminal Procedure were first established.<sup>94</sup>

The purpose of the secrecy requirement was, in the earliest days, interpolated primarily by legal scholars. Of the legal scholars writing about the grand jury in the late seventeenth century, John Somers is not only representative,<sup>95</sup> but eminent,<sup>96</sup> having been read in both England and the colonies.<sup>97</sup> In his monograph on the grand jury, Somers described how grand jurors were sworn not to disclose the subjects of the inquiry, the witnesses, or any of the evidence.<sup>98</sup> In addition, grand jurors were sworn not to reveal

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93. Compare the 1649 oath given in England, "Ye shall truly inquire, and due presentment make of all such things as you are charged withall on the Queen's behalf, the Queen's counsell, your owne, and your fellowes, you shall well and truly keep; and in all other things the truth present, so help you God, and by the contents of this Booke," EDWARDS, *supra* note 27, at 99 (quoting BOOK OF OATHS (London, 1649)) (emphasis added), and the English oath in 1682,

You shall diligently enquire, and true Presentment make of all such Articles, matters and things as shall be given you in charge: And of all other matters and things as shall come to your own knowledge, touching this present Service. The Kings Council, your Fellowes, and your own, you shall keep Secret: You shall present no person for Hatred or Malice; neither shall you leave anyone unpresented for Favour, or Affection, for Love, or Gain, or any hopes thereof; but in all things you shall present the Truth, the whole Truth, and nothing but the Truth to the best of your knowledge; so help you God,

SOMERS, *supra* note 59, at 25-26 (emphasis added), and the 1908 oath that required in part that "[t]he United States' counsel, your fellowes', and your own you shall keep secret," *Awell v. United States*, 162 F. 97, 98 (1908), with the 1945 oath given to the federal grand jury attached to the District Court for the Middle District of Pennsylvania,

You, as foreman of this inquest, for the body of the Middle District of Pennsylvania, do swear, that you will diligently inquire, and true presentment make, of such articles, matters, and things as shall be given you in charge or otherwise come to your knowledge, touching the present service; the Government's counsel, your fellowes' and your own you shall keep secret; you shall present no one for envy, hatred or malice; neither shall you leave any one unpresented for fear, favor or affection, hope of reward or gain, but shall present all things truly as they come to your knowledge, according to the best of your understanding, so help you God,

Hon. Albert Williams Johnson, Charge to Grand Jury, 4 F.R.D. 243, 245 (1945) (emphasis added).

94. See discussion *infra* part IV.

95. See *supra* note 56.

96. John Somers was appointed attorney-general in 1692, a member of the Privy Council and Lord Keeper of the Great Seal of England in 1693, Lord Chancellor in 1697, and in that same year was created Baron of Evesham. 4 LORD CAMPBELL, LIVES OF THE LORD CHANCELLORS AND KEEPERS OF THE GREAT SEAL OF ENGLAND 499, 501 (7th ed. 1885); 5 *id.* at 22.

97. 5 *id.* at 22

98. SOMERS, *supra* note 59, at 43:

[T]he Kings Counsel, which by the Oath of the Grand Inquest is to be kept secret, includeth all the persons offered to them to be indicted, and all the matters brought in Evidence before them, all circumstances whatsoever whereof they are informed, which may any way conduce to the discovery of Offences; all intimations given them of Abbettors and Encouragers of Treasons, Felonies, or

their own personal knowledge, the knowledge of their fellow jurors, their investigative plans, or their deliberations.<sup>99</sup> The reasons, according to Somers, were first, to prevent the flight of criminals;<sup>100</sup> second, to find out whether witnesses were biased;<sup>101</sup> third, to be free from judicial oversight;<sup>102</sup> fourth, to catch witnesses in their lies;<sup>103</sup> and fifth, to permit the full development of evidence for a possible indictment some time in the future.<sup>104</sup> According to Somers, all of these secrecy interests accrued to the king.<sup>105</sup> However, according to Somers, the interests which benefited the king protected his subjects because the grand jury existed

Perjuries and Conspiracies, or of the Receivers, Harbourers, Nourishers, and Concealers of such Criminals.

99. *Id.*:

Likewise the Oath which enjoins the Council of their Fellows, and their own to be kept, implies that they shall not reveal any of their personal knowledge concerning Offences or Offenders; nor their intentions to indict any man thereupon; nor any of the Proposals and Advices amongst them of ways to enquire into the truth of any matter before them, either about the Crimes themselves, or the accusers and Witnesses, or the party accused, nor the debates . . .

100. *Id.* at 46: “[S]o it was necessary to prevent the Flight of Criminals; if the Evidence against one that is accused should be publicly known, . . . his Confederates and Accomplices might easily have notice of their danger, and take opportunity to escape from Justice.”

101. *Id.* at 46-47:

Yet the reason will be still more manifest for keeping secret the accusations and the Evidence by the Grand Inquest, if it be well considered, how useful and necessary it is for discovering truth in the Examinations of Witnesses in many, if not in most cases that may come before them; when if by this Privacy Witnesses may be examined in such manner and Order, as prudence and occasion direct; and no one of them be suffered to know who hath been examined before him, nor what questions have been asked him, nor what answers he hath given, it may probably be found out whether a witness hath been biased in his testimony by malice or Revenge, or the fear or favour of men in Power, or the love or hopes of Lucre and gain in present or future, or Promises of impunity for some enormous Crime.

102. *Id.* at 48-49:

Yet further, their private Examinations may discover truth out of some disagreement of the Witnesses, when separately interrogated, and every of the Grand Inquest ask them Questions for his own satisfaction about the matters which have come to his particular knowledge, and this freely without Awe or Control of Judges, or distrust of his own parts, or fear to be checked for asking impertinent questions.

103. *Id.* at 52:

[S]o that the Witness could not guess what they should be asked first, or last, nor one conjecture what the other had said, . . . and then compare all their several answers together, they might possibly discern marks enough of falsehood, to show that their Testimonies ought not to be depended upon, where life is in question.

See also *supra* note 102.

104. *Id.* at 48-49:

Yet the same secrecy of Kings Council is no less necessary to reserve the guilty for punishment; when the Evidence against any party accused is not manifest and full, it may be kept without Prejudice under Secrecy until further Enquiry; and if sufficient proof can afterwards be made of the Offence, an Indictment may be found by a Grand Inquest, and the party brought to answer for it . . .

105. “From hence may certainly be concluded that Secrecy in the Examinations and Enquiries of Gr. Juries is in all respects for the Interest and advantage of the King.”*Id.* at 54.

to protect the innocent accused<sup>106</sup> just as much as the innocent victims of crime.<sup>107</sup> Secrecy made possible the discovery of truth<sup>108</sup> and protected individuals from malicious or hateful prosecution.<sup>109</sup> In sum, neither the king, the general public, nor the individual accused could benefit by making public the proceedings of a grand jury.

### B. Grand Jury Secrecy in Early American Jurisprudence

The Grand Jury Clause of the Fifth Amendment<sup>110</sup> made grand jury secrecy an implicit part of American criminal procedure. The first challenges to the rule of secrecy were made by criminal defendants seeking to set aside their indictments based upon insufficiency of evidence<sup>111</sup> or prosecutorial misconduct before the grand jury.<sup>112</sup> Secrecy, hailed as the protector against monarchical abuse, was, ironically, being challenged as a shield for that abuse.

In one of the first reported secrecy cases, *United States v. Smith*,<sup>113</sup> decided fifteen years after the Bill of Rights was ratified, a federal district court in New York indicated that an accused could attack the veil of secrecy. In *Smith*, the defendant

106. *Id.* at 63-64:

The Prosecutors themselves, notwithstanding their big words, and assuming to themselves to be for the King, if their Prosecution shall be proved to be malicious, or by Conspiracy against the Life or Fortune of the Accused, they are therein against the King . . . 'Tis esteemed in the Law one of the most odious Offences against the King, to attempt in his name to destroy the Innocent, for whose Protection he himself was ordained.

107. "[T]he King's only benefits in finding out and punishing Offenders by Courts of Justice are the preservation and support of the Government, the protection of the Innocent, revenging their wrongs, and preventing further mischiefs by the terrors of exemplary punishments." *Id.* at 57.

108. *Id.* at 48; see also *supra* note 103.

109. SOMERS, *supra* note 59, at 47-48:

And the Falseness, Malice or ill Design of another, may be justly suspected from his studiousness and difficulty in answering, his Artifice and cunning in what he relates, not agreeable to his way of breeding and parts, his reserved, indirect, and evasive Replies to easie Questions, his pretences of doubtfulness and want of remembering things of such short dates, or such Notoriety, that 'tis not credible he could be ignormant or forgetful of them.

110. U.S. CONST. amend. V.

111. See, e.g., *United States v. Smith*, 27 F. Cas. 1186 (C.C.D.N.Y. 1806) (challenging indictment based upon illegal evidence); *United States v. Farrington*, 5 F. 343 (N.D.N.Y. 1881) (motioning to quash indictment because of insufficiency of evidence); *United States v. Kilpatrick*, 16 F. 765 (W.D.N.C. 1883) (motioning to quash indictment because of illegal evidence); *United States v. Cobban*, 127 F. 713 (D. Minn. 1904) (plea in abatement challenging sufficiency of evidence upon which indictment was based).

112. See, e.g., *United States v. Wells*, 163 F. 313 (D. Idaho 1908) (plea in abatement based upon misconduct of the prosecutor before grand juror); *United States v. Rintelen*, 235 F. 787 (S.D.N.Y. 1916) (plea in abatement based upon allegation that district attorney expressed to grand jury his opinion on questions of law and fact involved).

113. 27 F. Cas. 1186 (C.C.D.N.Y. 1806).



filed a plea in abatement challenging an indictment alleged to be based upon illegal evidence.<sup>114</sup> The prosecution argued against lifting the veil of secrecy, claiming a plea in abatement could not be made against grand jury actions because secrecy made grand juries “independent and irresponsible.”<sup>115</sup> The defense argued fair process and contended that secrecy should not shield an improper indictment.<sup>116</sup> The court concluded that a challenge to the indictment could be made,<sup>117</sup> implicitly accepting the defense argument that the rule of grand jury secrecy protected the individual accused and, consequently, could be lifted where secrecy defeated that purpose.<sup>118</sup>

As courts continued to adjudicate defendants’ motions for access to grand jury material, two interests—other than the defendant’s interest in fairness—emerged. First, there was a concern that tampering with grand jurors might occur, eroding public confidence in the grand jury institution.<sup>119</sup> Second, blocking a defendant’s access to grand jury materials would allow trials to be free from perjury.<sup>120</sup> The balance between the need for secrecy and the need for disclosure<sup>121</sup> began to tip against the defendant. The majority of these early cases determined that the interests of

114. *Id.* at 1191.

115. *Id.* at 1187. Citing Lord Hale for the classification of pleas in abatement, the prosecution argued, without authority, that the only remedy for grand jury abuse was petit jury adjudication. *Id.*

116. *Id.* at 1188.

117. *Id.* The court eventually denied the plea on the merits. *Id.* at 1191.

118. *Id.* at 1191; see also *United States v. Farrington*, 5 F. 343, 346 (N.D.N.Y. 1881): [A]uthorities . . . assert the right and duty of the court to exercise a salutary supervision over the proceedings of a grand jury. It is only practicable to do this by removing the veil of secrecy whenever evidence of what has transpired before them becomes necessary to protect public or private rights.

See also *United States v. Kilpatrick*, 16 F. 765, 768, 777 (W.D.N.C. 1883):

As the grand jury is an informing and accusing body, which makes its investigations and holds its deliberations in secret, and is irresponsible for its official action upon matters of fact, except before the tribunal of public opinion, it is very important that its powers, duties, and methods of procedure should be well understood, and be strictly confined within the conservative and salutary limits imposed by law, which experience has shown to be necessary to subserve the public good, and to accomplish a just and impartial administration of the criminal law.

119. *United States v. Terry*, 39 F. 355, 357 (N.D. Cal. 1889) (allowing inquiry into sufficiency of evidence before grand jury “would afford opportunity to tamper with the jury; and . . . lessen the respect due to the forms and solemnities of judicial proceedings”).

120. *United States v. Cobban*, 127 F. 713, 718 (D. Minn. 1904) (“A more serious objection [than one to the traditional secrecy of grand jury investigations] is that a defendant may thus learn what testimony exists against him, and be prepared to overcome it upon the trial by perjury.”).

121. *Accord In re Special 1952 Grand Jury*, 22 F.R.D. 102, 106 (E.D. Pa. 1958) (“In every case the court is called upon to balance two policies, the one requiring secrecy, the other disclosure.”).

law enforcement, which favored secrecy, outweighed the defendant's need for disclosure.<sup>122</sup> These decisions were not surprising in the context of the state of criminal law and procedure in the 150 years after the adoption of the Bill of Rights. They were in keeping with the limited rules of criminal discovery<sup>123</sup> and the recognition that a trial by jury should safeguard the defendant.<sup>124</sup>

The issue of grand jury secrecy arose later in a First Amendment context. In 1917, a Rhode Island federal district court addressed the issue of widespread public disclosure of grand jury proceedings in *United States v. Providence Tribune Co.*<sup>125</sup> The court cited the newspaper for contempt for printing an article divulging information from a grand jury probe.<sup>126</sup> Deciding that the fair administration of justice required a finding of fact that the newspaper was in contempt for making the secret grand jury sessions public,<sup>127</sup> the court held that the mere publication of the article about the continuing grand jury probe was an obstruction of justice.<sup>128</sup> The court analyzed the historical justifications for

122. See *McKinney v. United States*, 199 F. 25 (8th Cir. 1912) (and sources cited therein); *Cox v. Vaught*, 52 F.2d 562 (10th Cir. 1931) (and sources cited therein).

123. See *United States v. Garrison*, 291 F. 646, 649 (S.D.N.Y. 1923):

Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. No doubt grand juries err and indictments are calamities to honest men, but we must work with human beings and we can correct such errors only at too large a price. Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.

See also *In re Atwell*, 140 F. 368, 376 (W.D.N.C. 1905), rev'd on other grounds, 162 F. 97 (4th Cir. 1908):

The defendant in a criminal action is no more entitled as a matter of right to know the evidence of the prosecution until it is disclosed on the trial than is the prosecution to be put in possession of the evidence which the defendant has in mind to offer in his defense.

124. See *United States v. Bolles*, 209 F. 682 (W.D. Mo. 1913) (comparing grand jury function to function of petit jury); see also *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).

125. 241 F. 524 (D.R.I. 1917).

126. The article was entitled "Prominent Physicians Involved in Federal War on Cocaine Dealers." *Id.* at 525. The story named three people who had been arrested as a result of the grand jury investigation, and reported that two of them might become prosecution witnesses and that other prominent citizens would probably be arrested in the future. *Id.*

127. *Id.*

128. *Id.* at 528: "That a person may have observed some act done by officials of the law, which he was not sworn to keep secret, does not justify him in publishing it at large. It is

grand jury secrecy and, perhaps influenced by John Somers' treatise,<sup>129</sup> listed six interests in secrecy: (1) preventing the escape of offenders; (2) preventing the destruction of evidence; (3) preventing tampering with witnesses; (4) preserving the reputations of innocent persons whose conduct comes under the grand jury's investigation; (5) encouraging witnesses to disclose their full knowledge of possible wrongdoing; and (6) preventing undue prejudice of the public jury pool.<sup>130</sup> The interests in secrecy that accrued to the government, the accused, and the grand jury were weighed against the newspaper's First Amendment interest in publishing the grand jury information.<sup>131</sup> The court found that all of the historical interests weighed in favor of secrecy for the fair administration of justice.<sup>132</sup> In this context, no one would benefit from the disclosure, except perhaps the newspaper through increased sales. Thus, the decision fairly protected both the interest in law enforcement and the individuals involved.

In the early 1930s, in *United States v. Amazon Industrial Chemical Corp.*,<sup>133</sup> a criminal case, and *In re Grand Jury Proceedings*,<sup>134</sup> a civil regulatory case, the courts addressed problems that did not involve the defendant's access to grand jury matters. In *Amazon*, the defendant challenged an indictment because a stenographer had been present during the grand jury proceedings and had transcribed the proceedings in violation of the secrecy rule.<sup>135</sup> The defendant claimed that the possibility of improper influence upon the grand jury had violated his constitutional rights.<sup>136</sup> Although it agreed that the opportunity for improper influence was a real threat, the Maryland federal district court nonetheless concluded that a defendant must prove actual prejudice to have an indictment dismissed.<sup>137</sup> The court acknowledged that the grand jury was adopted as a protection against oppressive governmental action. It stated, however, that "[i]n this country, from the popular character of our institutions, there has seldom been any contest between the government and the citizen which required the existence of the grand jury as a protection

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the duty of a citizen to assist, and not to frustrate, the work of the administration of justice."

129. See *supra* notes 98-104 and accompanying text.

130. *Providence Tribune*, 241 F. at 526.

131. *Id.*

132. See *supra* notes 98-104 and accompanying text.

133. 55 F.2d 254 (D. Md. 1931).

134. 4 F. Supp. 283 (E.D. Pa. 1933).

135. *Amazon*, 55 F.2d at 258.

136. *Id.* at 261.

137. *Id.* at 263-64.

against oppressive action of the government.”<sup>138</sup> Evaluating the reasons for grand jury secrecy set forth in *Providence Tribune*, the Amazon court concluded that these reasons were for the protection of the grand jury itself as an independent representative of the public for finding truth, and that none were based upon constitutional guarantees for the criminally accused.<sup>139</sup> The court cloaked grand jury proceedings with a presumption of regularity,<sup>140</sup> which inherently placed the fairness of the proceeding in the discretion of a prosecutor, the representative of the executive branch.<sup>141</sup>

The Amazon court’s analysis of the purposes for secrecy seemingly contradicts its conclusion that secrecy has no basis in

138. *Id.* at 263. The court’s conclusory statement that oppressive government action is too rare to require the protective procedure of a grand jury is contrary to the concerns of the founders and certainly dubious in times of crisis. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (using “pressing public necessity” to seize property of all persons of Japanese ancestry in certain West Coast areas and intern owners in concentration camps). For a discussion of the abuse of the grand jury for “political crimes” prosecutions, see generally *Federal Grand Jury: Hearings on H.R.J. Res. 46 and H.R. 1277 Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary, 94th Cong., 2d Sess. (1976)* (investigating reform after allegations of abuse). The hearing included a report that analyzed certain cases where grand jury abuse allegedly occurred. *Id.* at 730-35. For information on abuse of the grand jury by the Federal Bureau of Investigation, see *Right to Privacy Proposals Of The Privacy Protection Study Commission: Hearings on H.R. 10076 Before Subcomm. of the House Comm. on Government Operations, 95th Cong., 2d Sess., 18-31 (1978)*. Whether the grand jury fulfills its function is beyond the scope of this Article, but for an interesting comment on that issue, see Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 *CORNELL L. REV.* 260 (1995).

139. *Amazon*, 55 F.2d at 261. See also Leipold, *supra* note 138, at 261:

It is obvious that the basis of all but the last of these reasons for secrecy is protection of the grand jury itself, as the direct independent representative of the public as a whole, rather than of those brought before the grand jury. Of course, these latter are intended directly to share in the benefits from this rule of secrecy, but it is to be noted that none of the reasons for it are founded upon an inherent right in the individual who is being investigated to the same constitutional safeguards that are unquestionably his when he is brought to trial for a given crime.

140. *Amazon*, 55 F.2d at 262-64; accord *United States v. Olmstead*, 7 F.2d 756, 759 (W.D. Wa. 1925) (and sources cited therein).

141. A presumption of regularity is difficult to rebut without access to the grand jury transcripts. See *United States v. American Medical Ass’n*, 26 F. Supp. 429, 431 (D.D.C. 1939). The defendants in *American Medical Ass’n* filed a plea in abatement alleging prosecutorial misconduct before the grand jury, but did not have the requisite proof. *Id.* The court, in refusing to grant the plea, stated:

[t]he defendants complain that with the lips of jurors sealed and the transcript closed to them they cannot obtain the true facts except by aid of the court. But it must be remembered that sound reasons of public policy in the administration of justice lie back of the rules which forbid free access to these channels of information.

*Id.* Not only is the presumption difficult to rebut, but one commentator concludes that jurors defer to prosecutors’ judgments on the critical issue they are asked to decide, whether or not an indictment should issue. See Leipold, *supra* note 138, at 264.

the constitutional rights protecting the criminally accused. Secrecy protects the ultimate truth-finding function of the grand jury.<sup>142</sup> This truth-finding function, however, is intended to protect the individual against unfounded prosecutions. Moreover, the Fifth Amendment guarantees that no person shall be held to answer for a crime unless on an indictment of a grand jury. This constitutional protection also was established to protect the individual against unfounded prosecutions.<sup>143</sup> Therefore, secrecy is arguably based upon the Fifth Amendment right of the individual to be free from unfounded prosecutions.

Like many early decisions, Amazon distinguished between the grand jury process and the stringent due process requirements of a criminal trial.<sup>144</sup> This analysis, when viewed in the context of the unpredictable “secrecy” jurisprudence of that era, erroneously emphasizes that the criminal trial process should serve as a screen against unfounded prosecutions caused by failure of the grand jury process. That error is compounded when the analysis is applied to the civil arena.

The issue of disclosing grand jury materials for use in a civil action was first addressed two years later, in *In re Grand Jury Proceedings*.<sup>145</sup> In that case, the government initiated regulatory proceedings to revoke Union City Brewing Company’s beer license.<sup>146</sup> Prior to these proceedings, prosecutors had conducted a grand jury investigation into possible violations of the National Prohibition Act.<sup>147</sup> The grand jury elicited information relevant to the revocation hearing, and the supervising court, upon the agency’s motion, allowed disclosure of the grand jury materials for use in that hearing.<sup>148</sup> The court, citing criminal cases,<sup>149</sup> claimed authority for disclosing grand jury materials to the government agency in the name of justice.<sup>150</sup> The court, almost echoing Amazon, stated:

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142. See *supra* notes 108-09 and accompanying text.

143. *Wood v. Georgia*, 370 U.S. 375, 390 (1962).

144. See sources cited *supra* note 124.

145. 4 F. Supp. 283 (E.D. Pa. 1933).

146. *Id.* at 284.

147. *Id.* at 283.

148. *Id.*

149. *Id.* at 284 (citing *United States v. Farrington*, 5 F. 343 (N.D.N.Y. 1881) (granting disclosure to the defendant to quash the indictment); *Atwell v. United States*, 162 F. 97 (4th Cir. 1908) (refusing to hold a grand juror in contempt for disclosing information to defense counsel upon which to base a Motion to Quash the indictment); *United States v. Perlman*, 247 F. 158 (S.D.N.Y. 1917) (granting disclosure for use in perjury trial against a grand jury witness); *Metzler v. United States*, 64 F.2d 203 (9th Cir. 1933) (allowing disclosure of grand jury testimony in a criminal trial)).

150. “It is sufficient to say that the rule of [grand jury] secrecy has long since been relaxed by permitting disclosure whenever the interest of justice requires. . . . It is my con-

The rule of secrecy, it will be noted, was designed for the protection of the witnesses who appear and for the purpose of allowing a wider and freer scope to the grand jury itself, and was never intended as a safeguard for the interests of the accused or of any third person.<sup>151</sup>

Therefore, the court refused to accept the contention that a fundamental purpose in protecting the grand jury's "wider and freer scope" of investigation was ultimately to protect the accused against oppressive prosecutions.<sup>152</sup>

The early case law thus began to point out different secrecy considerations in criminal and civil cases, as well as the competing interests of law enforcement and the protection of the individual. When a government attorney seeks access to grand jury materials for use in a civil regulatory proceeding, the central interest from a defendant's point of view is not protection of the investigative role of the grand jury; rather, the interest is whether grand jury information may be used against an individual to initiate a civil enforcement action, where the burden of proof on the government is a preponderance of the evidence rather than proof beyond a reasonable doubt.<sup>153</sup> An examination of this important question presents due process considerations relating to the fundamental fairness of disclosure of grand jury materials for use in civil proceedings.<sup>154</sup> Congress first began to address these secrecy issues in 1946.

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sidered judgment that the ends of justice can be furthered by permitting the disclosure of this testimony." *Id.*

151. *Id.* at 284-85.

152. *Id.* at 284: "The inquisitorial power of the grand jury is the most valuable function which it possesses to-day and, far more than any supposed protection which it gives to the accused, justifies its survival as an institution."

153. In John Somers' seventeenth-century explanation of the grand jury, secrecy protected the grand jury's capacity for finding the truth. See SOMERS, *supra* note 59, at 46-47; see also *supra* note 101. Each enumerated secrecy interest served that purpose regardless of whether the particular interested party was the monarch, the institution, or the people called before the grand jury. See *supra* notes 99-109 and accompanying text. The common rationale driving each enumerated secrecy interest showed that any relaxation of the secrecy rule would hinder the truth-seeking function of the grand jury. See *supra* notes 100-03 and accompanying text. It follows then, that any practice which might stifle that ultimate function is a legitimate interest in grand jury secrecy. Exercise of the grand jury powers to elicit testimony, which may be used in a proceeding with lesser safeguards than that which screens the grand jury's actions, thus becomes a primary interest in secrecy because such a practice would encourage misuse of those powers.

154. In *Hurtado v. California*, 110 U.S. 516 (1884), the court determined that the Due Process Clause of the Fourteenth Amendment did not require states to initiate criminal proceedings by the grand jury process, yet it did not address the issue of fundamental fairness presented by parallel proceedings. *Id.* at 534-35.

Similarly, cases in which the courts provided no due process safeguards in the grand jury process did not present the unique issues that arise when the extraordinarily broad powers of the grand jury are used to gain evidence for a civil proceeding. See, e.g., *McKin-*

#### IV. 1946 CODIFICATION OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

The Supreme Court created the Federal Rules of Criminal Procedure, which became effective on March 21, 1946.<sup>155</sup> The purpose of the Rules, as stated in Rule 2, was “to provide for the just determination of every criminal proceeding . . . to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.”<sup>156</sup> The Rules balanced the need for enforcing laws against the necessity of safeguarding fundamental rights of the accused.<sup>157</sup> The Department of Justice be-

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ney v. United States, 199 F. 25, 28-29 (8th Cir. 1912) (finding that “[d]ue process of law within the meaning of the Constitution does not even embrace such an important safeguard as exemption from compulsory self-incrimination, much less mere rules of procedure like those pertaining to evidence before grand juries”); *United States v. Mandujano*, 425 U.S. 564, 581 (1976) (stating that neither target nor witness has a right to have counsel present in grand jury room); *United States v. Calandra*, 414 U.S. 338, 351-52 (1974) (stating that Fourth Amendment exclusionary rule does not apply to grand juries); *United States v. Washington*, 431 U.S. 181, 189 (1977) (finding no requirement that target be informed of status as target); *United States v. Williams*, 504 U.S. 36, 50-51 (1992) (stating that prosecutor is under no obligation to present exculpatory evidence to grand jury).

One of the more alarming concerns in this context is the potential use of compelled, immunized, and self-incriminating grand jury testimony in a civil trial. See, e.g., *Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983) (finding that immunized grand jury testimony did not possess immunity in subsequent civil trial, even where grand jury transcript formed basis for civil deposition questions; defendant must be granted new immunity by federal prosecutor for civil trial or invoke Fifth Amendment right against self-incrimination); Helene Schwartz, Note, Recent Development: Disclosure and Civil Use of Immunized Testimony, 35 VAND. L. REV. 1211 (1982).

Other concerns include the potential use of biased and untested testimony, see *Mandujano*, 425 U.S. at 581 (finding that neither target nor witness has right to have counsel present in grand jury room), and the potential use of illegally seized evidence to form the basis of civil discovery, see *Calandra*, 414 U.S. at 351-52 (stating that Fourth Amendment exclusionary rule does not apply to grand juries).

155. In 1940, Congress authorized the Supreme Court to develop rules to regulate criminal procedure in the federal courts. Act of June 29, 1940, 54 Stat. 688 (codified as amended at 28 U.S.C. §§ 2071-72 (1994)). In 1941, the Court appointed the “Advisory Committee on Rules of Criminal Procedure, Supreme Court of the United States,” which included “eighteen representative members of the Bar including defense counsel, district attorneys, prosecutors, judges, former judges, and law professors.” MADELEINE J. WILKEN & NICHOLAS TRIFFIN, *DRAFTING HISTORY OF THE FEDERAL RULES OF CRIMINAL PROCEDURE* xi (1991). The Advisory Committee worked in cooperation with city and state bar committees, as well as circuit and district court committees. *Id.* at xii. The Committee submitted two preliminary drafts and a final reported draft to the Supreme Court, which prescribed the “truly final” version of the Rules on December 26, 1944. *Id.* at xii-xv. The Attorney General then reported the Court’s final version to Congress on January 3, 1945. *Id.* at xv. The Rules became effective on March 21, 1946. *Id.*

156. FED. R. CRIM. P. 2; see also Hon. Harold Judson, Assistant Solicitor General of the United States, *Improvement in Criminal Procedure From the Viewpoint of The Department of Justice*, 5 F.R.D. 39, 42 (1945).

157. Alexander Holtzoff, Special Assistant to the Attorney General of the United States; Secretary of the Advisory Committee on Federal Rules of Criminal Procedure, *Reform of Federal Criminal Procedure*, 3 F.R.D. 445, 446 (1944):

lieved such a balance was obtained under the new Rules.<sup>158</sup> To achieve this balance, however, a great deal of preexisting common law criminal procedure was simplified, and some outmoded technical rules were completely eliminated.<sup>159</sup> Significantly, the rule of grand jury secrecy was made into positive law in subsections (d) and (e) of Rule 6.<sup>160</sup>

As adopted, Rule 6 included two grand jury secrecy provisions. The first provision limited who could be present during grand jury sessions,<sup>161</sup> while the second imposed a general rule of se-

The formulation and regulation of criminal procedure has broad implications and wide ramifications. It involves more than merely the manner of drawing pleadings and details of practice. In a larger sense, it must necessarily crystallize a philosophy of administration of criminal justice. It must arrive at a nice and well-balanced adjustment between two basic factors. On the one hand, it must be conducive to a simple, effective, and expeditious prosecution of crimes. Perpetrators of crimes must be detected, apprehended and punished. The conviction of the guilty must not be unduly delayed. Criminals should not go unwhipped of justice because of technicalities having no connection with the merits of the accusation. The protection of the law-abiding citizen from the ravages of the criminal is one of the principal functions of government. Any form of criminal procedure that unnecessarily hampers and unduly hinders the successful fulfillment of this duty must be discarded or radically changed. On the other hand, the converse factor consists in the necessity of preserving and safeguarding the fundamental rights of the accused. These rights, which are derived from the basic Anglo-Saxon principles of fair play and are in part embodied in the Constitution of the United States, are intended, first, to protect the innocent against an erroneous conviction, and, second, to assure the use of civilized standards in dealing even with the guilty. No system of criminal procedure may be deemed successful unless it properly balances these two opposing forces.

158. Improvement in Criminal Procedure, 5 F.R.D. at 42-43:

The purpose of any rules of criminal procedure should be to see that any individual accused of crime is given a fair and speedy hearing. There are two interests to be served in criminal proceedings: (1) the interest of the individual accused, and (2) the interest of the public which has been harmed. A fair criminal procedure will insure that neither interest suffers at the expense of the other. . . . The advantages which [the new Rules] offer in achieving simply and efficiently the ends of justice, while carefully protecting and preserving the fundamental rights of defendants under our system of jurisprudence, should impress themselves inevitably upon lawyers throughout the country.

When the new Rules were substantially completed, the former Attorney General praised them and advocated approval. Hon. Homer Cummings, *The Third Great Adventure*, 3 F.R.D. 283, 284 (1943).

159. Reform of Federal Criminal Procedure, 3 F.R.D. at 447:

The simplification of procedure has been accomplished, however, without sacrifice of any safeguards that properly surround a defendant in a criminal case. In fact, in some respects the new rules have cemented and strengthened the protection accorded the defendant.

160. FED. R. CRIM. P. 6(d)-(e).

161. 18 U.S.C. § 687 (1946) (current version at 18 U.S.C. app. (1994)):

Who May be Present. Attorneys for the government, the witness under examination, interpreters when needed, and, for the purpose of taking the evidence, a stenographer may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.



crecy with specific and limited exceptions.<sup>162</sup> Civil adjudication and administrative regulation aided by the grand jury process were not widespread common law practices and were not contemplated in the new procedural grand jury rule.<sup>163</sup>

It was even unclear whether the common law permitted prosecuting attorneys in grand jury proceedings when the Constitution was adopted,<sup>164</sup> but the practice had become widespread by 1946.<sup>165</sup> Consequently, Rule 6 contained an exception that allowed automatic disclosure of "matters occurring before the grand jury, other than its deliberations and the vote of any juror"<sup>166</sup> to "attorneys for the government."<sup>167</sup> A second exception allowed witnesses to disclose their own testimony in the interests of justice.<sup>168</sup> The third exception allowed disclosure as directed by the

For an early analysis of cases construing Rule 6(d), see Lester B. Orfield, *The Federal Grand Jury*, 22 F.R.D. 343, 378-82, 423-25 (undated). For a more recent analysis, see Andrea G. Nadel, Annotation, Presence of Persons Not Authorized by Rule 6(d) of Federal Rules of Criminal Procedure During Session of Grand Jury as Warranting Dismissal of Indictment, 68 A.L.R. FED. 798 (1984).

162. 18 U.S.C. § 3771 (1953) (including Rule 6(e)) (current version at 18 U.S.C. app. (1994)):

Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminary to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

163. When the drafting committee was preparing the original 1946 Federal Rules of Criminal Procedure, it did not occur to them to make provisions for the civil use of grand jury materials, and nothing in the drafting history shows a common law interest in the civil use of the grand jury process. See 7 WILKEN & TRIFFIN, *supra* note 155, at 241-43.

164. See *United States v. Huston*, 28 F.2d 451, 452 (N.D. Ohio 1928) (allowing prosecution to assist with presentation of evidence but finding that its participation in deliberation or vote-taking by the members of the grand jury was not allowed at time of adoption of Fifth Amendment). But cf. *United States v. Wells*, 163 F. 313, 324 (D. Idaho 1908): "The rights of the defendants are to be measured by the grand jury system as it existed and was understood at the time of its adoption. At the common law the prosecutor had no right to attend the sessions." Note, however, that Wells cited as authority George J. Edwards, Jr.'s *The Grand Jury*, which suggested that the common law never guaranteed the power of a prosecutor to present an indictment before a grand jury. EDWARDS, *supra* note 24, at 114-17. See also Richard M. Calkins, *Grand Jury Secrecy*, 63 MICH. L. REV. 455, 457 (1965) (observing that grand juries commonly received evidence outside presence of prosecutor).

165. "It has become the practice for the United States Attorney to attend grand jury hearings . . ." Orfield, *supra* note 161, at 346 (referring to history of enactment of Federal Rule of Criminal Procedure 6(e)).

166. 18 U.S.C. § 3771 (1953) (including Rule 6) (current version at 18 U.S.C. app. (1994)).

167. *Id.* "Government attorneys are entitled to disclosure of grand jury proceedings, other than the deliberations and the votes of the jurors, inasmuch as they may be present in the grand jury room during the presentation of evidence. The rule continues this practice." FED. R. CRIM. P. 6(e) advisory committee's note.

168. FED. R. CRIM. P. 6(e) advisory committee's note.

supervising court “preliminarily to or in connection with a judicial proceeding.”<sup>169</sup> The fourth and final exception, no doubt influenced by the conflict in earlier case law, allowed disclosure to a defendant for the purpose of dismissing an invalid indictment.<sup>170</sup>

When criminal grand jury investigations overlap with civil regulatory inquiries, the government has both procedural and cost-saving incentives to seek grand jury discovery in parallel civil or administrative proceedings.<sup>171</sup> The first and third exceptions allowing disclosure to “attorneys for the government” and “preliminarily to or in connection with a judicial proceeding” have therefore resulted in prolific litigation seeking broad judicial construction of the phrases.<sup>172</sup> The drafting history of Rule 6(e) shows how the secrecy requirement was intended to limit grand jury access by Department of Justice civil attorneys and other federal agency attorneys.

The preliminary draft of Rule 6(e) was proposed as Rule 7(e).<sup>173</sup> As distributed to the bench and bar, preliminary Rule 7(e) provided in part that:

A juror, attorney, interpreter, clerk, or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with another judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury, and in that case disclosure may also be made to the attorney for the government.<sup>174</sup>

Government attorneys and judges were concerned about this language,<sup>175</sup> which seemed to preclude the U.S. Attorney present-

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169. “The necessity for disclosure of grand jury proceedings is left to the discretion of the judge in those situations where disclosure is permitted by the terms of the rule.” 4 WILKEN & TRIFFIN, *supra* note 155, at 21 (citing Note to Subdivision 6(e), Notes of Advisory Committee on Rules, second preliminary draft).

170. 18 U.S.C. § 3771 (1953) (codified as amended 18 U.S.C. app. (1994)).

171. BEALE & BRYSON, *supra* note 22, § 8:01.

172. See Richard Neumeg, Annotation, Who Are “Government Personnel” Within Meaning of Rule 6(e)(3)(A)(ii) of the Federal Rules of Criminal Procedure to Whom Matters Occurring Before Grand Jury May Be Disclosed, 54 A.L.R. FED 805 (1981); see also Bruce I. McDaniel, Annotation, What Is “What Is Judicial Proceeding” Within Rule 6(e)(3)(C)(i) of the Federal Rules of Criminal Procedure Permitting Disclosure of Matters Occurring Before Grand Jury When So Directed by Court Preliminarily to or in Connection with Such Proceeding, 52 A.L.R. FED. 411 (1981).

173. Rule 7 became Rule 6 in the Second Preliminary Draft distributed in 1944. See generally WILKEN & TRIFFIN, *supra* note 155 (contrasting Rule 7(e) in volumes 1-3 with Rule 6(e) in volume 4); see also *United States v. Sells* 463 U.S. 418, 468 (1983) (Burger, J., dissenting).

174. See 1 WILKEN & TRIFFIN, *supra* note 155, at 20-21.

175. See generally 2 *id.* at 58-61; 3 *id.* at 352-57.

ing a criminal case to the grand jury from obtaining grand jury transcripts without a court order.<sup>176</sup> Also, when Congress enacted the Rules, the courts were already experiencing the phenomenon of parallel criminal and civil (or administrative) proceedings arising from a common factual nexus.<sup>177</sup> Written comments submitted to the drafters focused attention on the potential use of criminal grand jury information in civil and administrative agency investigations and litigation.<sup>178</sup> In fact, one prescient U.S.

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176. "As the proposed rule now reads, it would prevent the United States Attorney [from] obtaining a transcript from his own reporter, consulting with his Assistants, or conferring with agents of the F.B.I. and the like. Will that further the administration of justice?" 2 *id.* at 59 (quoting Letter from Joseph T. Votava, U.S. Attorney for the District of Nebraska, to Alexander Holtzoff, Secretary, Advisory Committee on the Federal Rules of Criminal Procedure (July 22, 1943)). See also 3 *id.* at 353 (quoting Letter from Hon. Orrie L. Phillips, U.S. Circuit Judge for the Tenth Circuit, to the ABA Institute on Rules of Criminal Procedure (Aug. 24, 1943)); 3 *id.* at 354 (quoting Letter from Robert S. Rubin, Special Counsel, Securities and Exchange Commission, to Alexander Holtzoff, Secretary, Advisory Committee on the Federal Rules of Criminal Procedure (Sept. 14, 1943)) ("Nor is it clear whether the United States Attorney has to obtain an order of court before he can get a copy of the transcript of the grand jury proceedings."); 3 *id.* at 355 (quoting Letter from Hon. Joseph F. Deeb, U.S. Attorney for the Western District of Michigan, to Alexander Holtzoff, Secretary, Advisory Committee on the Federal Rules of Criminal Procedure (Sept. 10, 1943)) ("[S]ome exception should be made because as the rule now stands, the stenographer may be precluded from giving, without an order of the Court, a transcript of his notes to the United States Attorney."); 3 *id.* (quoting Letter from Hon. Paul J. McCormick, U.S. District Judge for the Southern District of California, to the Judicial Conference for the Ninth Circuit (Sept. 9, 1943)) ("If the rule contemplates a restriction on the United States Attorney's use of the transcript, I believe that he should be excepted from the provision requiring the permission of the court.")

177. See, e.g., *In Re Grand Jury Proceedings*, 4 F. Supp. 283 (E.D. Pa. 1933); see also Breck P. McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 *HARV. L. REV.* 27 (1950) (describing three large antitrust actions that began in 1944 and 1947); Urban A. Lavery, *The Administrative Process: Factual Analysis of the "Report of Attorney General's Committee on Administrative Procedure"*, 1 *F.R.D.* 651, 653-54 (undated) (listing 51 administrative agencies and federal departments in existence that have been exercising administrative powers since 1789).

178. Securities Exchange Commission Special Counsel Robert S. Rubin wrote: "I believe that the clause 'preliminarily to or in connection with another judicial proceeding' (lines 64-66), may cause considerable difficulty in application. For example, is it intended that judicial proceedings should include civil actions? I think such use of grand jury proceedings would be most inappropriate." 3 *WILKEN & TRIFFIN*, *supra* note 155, at 354 (quoting Letter from Robert S. Rubin, Special Counsel, Securities and Exchange Commission, to Alexander Holtzoff, Secretary, Advisory Committee on the Federal Rules of Criminal Procedure (Sept. 14, 1943)). Rubin noted that:

The Commission has specifically directed me to request the amendment of proposed Rule 7(d) in order to permit attendance before the grand jury of representatives of the government agency which investigated the case to assist the United States Attorney or other attorney for the government. Such a change certainly would be of immeasurable aid both to the United States Attorney and the grand jury.

3 *id.* at 352. U.S. District Judge Paul J. McCormick wrote that "Rule 7, subdivision (e), provides that an attorney may disclose matters occurring before the grand jury only when so directed by the court. As a matter of common practice the United States Attorney uses the grand jury transcript rather freely with investigators and attorneys for the various governmental agencies." 3 *id.* at 355 (quoting Letter from Hon. Paul J. McCormick, U.S.

Attorney specifically recommended tightening the language to preclude the possibility that any attorney associated with the government, whether presenting a criminal case or not, might lift the shroud of secrecy and gain access to grand jury materials for civil enforcement purposes.<sup>179</sup> The Advisory Committee ultimately changed the language of the draft.<sup>180</sup> As rewritten, the second preliminary draft of what is now Rule 6(e) included a new first sentence that opened the grand jury proceedings to the “attorneys for the government.”<sup>181</sup>

As finally adopted, the Rule specified that grand jury materials could be disclosed to attorneys for the government “for use in the performance of their duties.”<sup>182</sup> By way of guidance, the Advisory Committee’s notes<sup>183</sup> stated: “Government attorneys are entitled to disclosure of grand jury proceedings, other than the deliberations and the votes of the jurors, inasmuch as they may be

District Judge for the Southern District of California, to the Judicial Conference for the Ninth Circuit (Sept. 9, 1943)).

179. “This proposal should be clarified so it will not be construed to mean that any attorney working for the Government can appear before a Grand Jury, by adding the words ‘any attorney authorized to prosecute criminal cases.’” 3*id.* at 355 (quoting Letter from Victor E. Anderson, U.S. Attorney for the District of Minnesota, to Alexander Holtzoff, Secretary, Advisory Committee on the Federal Rules of Criminal Procedure (Aug. 20, 1943)).

180. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

4 *id.* at 15-16 (quoting 2d Preliminary Draft of Rule 6(e), formerly Rule 7(e)).

181. “Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties.” 4 *id.* (quoting 2d Preliminary Draft of Rule 6(e), formerly Rule 7(e)). Consequently, the drafters dropped the earlier draft language that permitted access to the grand jury by the attorney for the government to rebut a claim by a defendant seeking to quash an indictment. Because the new language broadened the government attorney’s access for all criminal law purposes, it no longer needed to address the individual limited exceptions allowing access.

182. 18 U.S.C. § 687 (1946) (current version at 18 U.S.C. app. (1994)).

183. The notes to the Federal Rules of Criminal Procedure were the last project on which the Advisory Committee worked. The Committee intended them “to indicate . . . which provisions of the Rules are restatements of existing law, to define the extent of any changes, and to the extent that any of these Rules, involve innovations, to ascertain their background and source.” 1 WILKEN & TRIFFIN, *supra* note 155, at xv-xvi (citation omitted). As Wilken and Triffen point out, “[t]he [Advisory Committee’s] Introductory Statement . . . also makes very clear that the Supreme Court had no hand in supervising or revising the preparation of the Notes and did not approve or sponsor them.” 1*id.* at xvi.

present in the grand jury room during the presentation of evidence.”<sup>184</sup> Otherwise, the Rule required secrecy except under court-supervised disclosure.<sup>185</sup> Given the concerns the Advisory Committee addressed<sup>186</sup>—as well as the underlying purpose of the Federal Rules of Criminal Procedure,<sup>187</sup> the arguably defendant-oriented purpose behind the witness exception,<sup>188</sup> and the lack of a civil enforcement agency exception<sup>189</sup>—the Committee intended the language adopted in Rule 6(e) to allow automatic grand jury disclosure to government attorneys only for criminal prosecutions on which they were working.<sup>190</sup>

## V. INTERPRETATIONS OF THE 1946 SECRECY RULE

In the 1940s, the creation of many administrative agencies with overlapping criminal and civil enforcement powers exacerbated the potential use of grand jury information by civil gov-

184. FED. R. CRIM. P. 6(e) advisory committee’s note.

185. The first sentence of the 1946 version of Rule 6(e) provided for automatic disclosure to attorneys for the government, while the second sentence of the 1946 version of Rule 6(e) provided for court-ordered disclosure. Rules of Criminal Procedure for the District Courts of the United States (1946), reprinted in 7 WILKEN & TRIFFIN, *supra* note 155, at 139-40.

186. See *supra* notes 176, 174-75.

187. See *supra* note 157 and accompanying text; see also *supra* note 158.

188. See William W. Barron, Proceedings of the Institute on Federal Rules of Criminal Procedure, 5 F.R.D. 150, 151 (1945):

Rule 6(e) . . . imposes no obligation of secrecy on a witness. . . .

This is a step forward. Inexperienced prosecutors have been known to caution witnesses not to talk to anybody about the case. Defense counsel have sometimes omitted proper preparation for trial because of doubt of their right to examine witnesses before trial or because of the refusal of witnesses on advice of the prosecutor to talk. Certainly defense counsel in his investigation of the facts of the offense charged against his client, has every right to talk to every witness who can shed light on those facts. This right should be protected and enforced by the court whenever necessary for the due and seemly administration of justice.

189. The Advisory Committee was specifically requested to create such an exception: “I would like to urge the Committee to change the present Rule 6(e) so as to permit disclosure of such matters in connection with federal administrative proceedings.” 6 WILKEN & TRIFFIN, *supra* note 155, at 12 (quoting Letter from Robert S. Rubin, Special Counsel, Securities and Exchange Commission, to Alexander Holtzoff, Secretary, Advisory Committee on the Federal Rules of Criminal Procedure (May 24, 1944)).

190. Under Federal Rule of Criminal Procedure 54(c), an “[a]ttorney for the government” includes “the Attorney General, an authorized assistant of the Attorney General, a United States Attorney, [and] an authorized assistant of a United States Attorney.” FED. R. CRIM. P. 54(c). To justify a broader construction of Rule 6(e), the Department of Justice eventually combined Rule 6(e) with Rule 54(c), as well as 5 U.S.C. § 310, which gave discretion to the Attorney General to structuring the Department of Justice:

It should be noted that, until the enunciation of the . . . principles of law by our highest court in [United States v. Procter & Gamble Co., 356 U.S. 677 (1958)], the United States Department of Justice had held the view that the . . . Government had the legal right to use the Grand Jury simply to elicit evidence in and for a civil case.

United States v. Procter & Gamble Co., 187 F. Supp. 55, 56 (D.N.J. 1960).

ernment attorneys.<sup>191</sup> Two issues emerged: first, whether Congress intended Department of Justice civil attorneys and other administrative agency attorneys to have access to grand jury materials for preparation of civil cases (and if so, whether they were to have automatic access as an “attorney for the government”); and second, by what standard would a private party be allowed access to grand jury information. The lower courts disagreed over whether to permit access to grand jury materials, regardless of whether the party seeking disclosure was public<sup>192</sup> or private.<sup>193</sup>

In *In re April 1956 Term Grand Jury*,<sup>194</sup> the Seventh Circuit vigorously protected grand jury secrecy in a case that continued for almost eight years. The litigation involved criminal and civil investigations of alleged tax evasion.<sup>195</sup> The Department of Justice had appointed Treasury Department agents who were actively involved in both inquiries as “assistants” to the grand jury.<sup>196</sup> The grand jury subpoenaed documents—many of which

191. John C. Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into “Speculative Unrealities,”* 64 B.U. L. REV. 737, 758-59 (1984) (citing KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 1.3 (2d ed. 1978)).

192. Compare *In re April 1956 Term Grand Jury*, 239 F.2d 263, 272 (7th Cir. 1956) (“The safeguard of secrecy, in the interest of the public, continues even after the grand jury has completed its efforts and therefore forbids any use in civil proceedings of information derived by or through an examination of records and documents made under the authority of the grand jury.”) and *United States v. Crolich*, 101 F. Supp. 782, 784 (S.D. Ala. 1952) (refusing to disclose grand jury materials to Mobile County Board of Commissioners for investigation of alleged election corruption because county administrative proceedings were not ‘judicial proceedings’ within meaning of Rule 6(e)) with *Doe v. Rosenberg*, 255 F.2d 118, 120 (2d Cir. 1958) (“We cannot agree that the Rule should be limited to criminal proceedings; on the contrary we hold that, prima facie, the term ‘judicial proceeding’ includes any proceeding determinable by a court, having for its object the compliance of any person, subject to judicial control, with standards imposed upon his conduct in the public interest, even though such compliance is enforced without the procedure applicable to the punishment of crime.”). See also *Application of Kelly*, 19 F.R.D. 269, 270 (S.D.N.Y. 1956) (allowing disclosure when federal prosecutor represented that only his staff, FBI agents, and IRS agents would access materials obtained pursuant to grand jury subpoena duces tecum); *In re Bullock*, 103 F. Supp. 639, 643 (D.D.C. 1952) (allowing limited disclosure of grand jury transcript to D.C. Board of Commissioners to investigate police corruption).

193. Compare *United States v. General Motors Corp.*, 15 F.R.D. 486, 488 (D. Del. 1954) (denying civil disclosure of grand jury transcripts for impeachment because defendant had other discovery tools available that would not jeopardize effective grand jury inquiry and deliberation) and *United States v. Radio Corp. of Am.*, 21 F.R.D. 103, 104 (E.D. Pa. 1957) (denying access to grand jury witness statements because defendant had list of witnesses and could depose them) with *United States v. Ben Grunstein & Sons Co.*, 137 F. Supp. 197, 200 (D.N.J. 1955) (granting defendant’s motion for civil discovery of trial witness transcripts because government already had access; “[l]ooking at the parties themselves, the ends of justice would clearly call for a discovery of what plaintiff knows of this relevant testimony, to defendant, in order that the parties may be placed on a parity”).

194. 239 F.2d 263 (7th Cir. 1956).

195. *Id.* at 265.

196. *Id.* at 265-67. The Treasury Department had begun an investigation into alleged tax evasion. *Id.* at 265. The target “furnished to treasury agents its records and suitable

the Treasury Department had originally requested—turned the documents over to the agent assistants, and then recessed for a week.<sup>197</sup> The targets of the investigation petitioned the federal district court to examine the grand jury minutes, question the grand jurors concerning the conduct of the agents, and hold in contempt any Treasury agents that had perused grand jury materials outside the scope of the grand jury investigation. The district court dismissed the petition, and the targets appealed, claiming that such misuse of grand jury powers violated their Fourth and Fifth Amendment Rights.<sup>198</sup> The Seventh Circuit agreed, holding that opening the envelope of grand jury secrecy to government agents becomes a constitutional violation of Fourth and Fifth Amendment protections the moment that the otherwise-protected grand jury matters are used “in any manner for the purposes” of a civil proceeding.<sup>199</sup> Although the court would not condone interference with the grand jury’s actions in making

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accommodations for the agents at its offices, and expended about \$20,000 in making the services of its auditors available to said agents . . .”*Id.* The target was indicted, tried, and convicted, but the conviction was reversed because of the admission of illegal evidence.*Id.* The Treasury Department then began a new investigation.*Id.* Again, the target provided all information requested (approximately a van load).*Id.* at 265-66. When the Treasury Department issued more subpoenas that sought much of the information reviewed during the first investigation, the target challenged them as unreasonable harassment, an unreasonable search and seizure, and a denial of due process of law.*Id.* at 266. While the Treasury Department did not attempt to enforce the subpoenas, it did recommend that the Department of Justice begin a grand jury investigation.*Id.* The Department of Justice then appointed two Treasury Department agents as special assistants to conduct a grand jury investigation. *Id.* at 266-67.

197. *Id.* at 267.

198. *Id.* at 268.

199. *Id.* at 271-73:

If . . . efforts are directed toward the procuring of evidence for civil proceedings now or hereafter pending against petitioners, and that purpose is accomplished, then the secrecy of the grand jury has been breached. We find nothing in the history of the grand jury to justify the perversion of its functions or machinery by third persons for the purposes of a civil proceeding. The Fifth Amendment’s adoption of the grand jury for use in the United States was for the historic purpose of initiating prosecutions for serious crimes. With the grand jury came its time-honored policy of secrecy. The idea that information obtained from the perusal of material in the possession of a grand jury may be used for the purpose of a civil proceeding is in direct conflict with the policy of secrecy of grand jury proceedings.

. . . The application of secrecy to [the grand jury’s] proceedings is a safeguard for the grand jury itself, because it tends to prevent it from being used as an instrument for explorations in aid of civil proceedings. . . .

....

. . . [W]e think it is now apparent that, as far as civil proceedings are concerned, the production of these records and documents pursuant to a grand jury subpoena, if followed by their use in any manner for the purposes of such a civil proceeding against petitioners, violates their constitutional rights under . . . provisions of the Fourth and Fifth Amendments.

the disclosures to the Treasury Department, it did determine that the targets of the investigation could invoke the court's supervisory powers to protect their constitutional rights.<sup>200</sup>

On the other hand, in *In re Petroleum Industry Investigation*,<sup>201</sup> a Virginia federal district court adopted the policy urged by the government. The court held that the government should be able to use information gained by grand jury criminal process for civil litigation.<sup>202</sup> The court also found that the absence of other means of gathering the evidence was irrelevant to the court's determination of whether to allow penetration of the grand jury.<sup>203</sup>

The D.C. Circuit articulated a third approach to the secrecy issue in *Maryland & Virginia Milk Producers Ass'n v. United States*.<sup>204</sup> The court adopted a well-balanced solution: it allowed government attorneys to retain and use grand jury materials for subsequent civil proceedings, but only to the extent that those materials would have been discoverable through civil discovery devices.<sup>205</sup> The precise procedure outlined by the court placed the onus on the government to give the defendants notice of its intention to use grand jury materials sixty days before the civil proceeding occurred.<sup>206</sup> Thus, the procedure provided defendants the

200. *Id.* at 272.

201. 152 F. Supp. 646, 647 (E.D. Va. 1957).

202. *Id.*:

[I]f books and papers coming to the knowledge of the Government's attorneys in a grand jury investigation develop a demand, and an adequacy of proof, for resort to civil litigation in the public interest, it is certainly proper, indeed incumbent upon them, to use for that purpose the information in their hands.

Accord *United States v. Procter & Gamble Co.*, 14 F.R.D. 230, 233 (D.N.J. 1953) (finding no authority for Procter & Gamble's contention that civil use of grand jury process was illegal and refusing to accept the Procter & Gamble contention as the rule).

203. *In re Petroleum Indus. Investigation*, 152 F. Supp. at 647. "This is nonetheless true though no process available in a civil action has the competency to discover this data beforehand." *Id.*

204. 250 F.2d 425 (D.C. Cir. 1957). For the district court's analysis proposing the approach taken in the circuit court, see *Maryland & Virginia Milk Producers Ass'n v. United States*, 151 F. Supp. 438, 440 (D.D.C. 1956). Judge Holtzoff, the author of the district court opinion, was Secretary to the Advisory Committee on the Federal Rules of Criminal Procedure. See also *supra* notes 155, 157.

205. *Maryland & Virginia Milk Producers Ass'n*, 250 F.2d at 425-26.

206. *Id.*

[T]he United States may use in the trial of any future civil action against the Association only such of the [grand jury] documents, of which it has retained copies, as it could obtain through discovery processes available to civil actions and only such as are enumerated by it as those upon which it will or possibly may rely . . . .

*Id.* at 426.

This approach is infinitely more equitable than granting automatic disclosure because the defendant will at least have an opportunity to challenge the disclosure before it occurs. "The fundamental requisite of due process of law is the opportunity to be heard. . . . The



same opportunity to challenge the requested disclosure that they would have if the government had utilized civil investigatory devices.<sup>207</sup> This procedure fairly weighed the government's interest in civil law enforcement against the interest in protecting individuals from the abusive use of grand jury powers for civil discovery.

In its one-page panel order,<sup>208</sup> the D.C. Circuit provided the linchpin for a fair grand jury process. Although few courts have adopted the language and wisdom of Maryland & Virginia Milk Producers Ass'n,<sup>209</sup> its importance to grand jury jurisprudence cannot be overemphasized. The order provided an equitable solution to problematic discovery issues in parallel proceedings. Thus, the court's analysis should profoundly affect the next revisitation of this issue by the Supreme Court's and any lower courts.

Having no guidance from the Supreme Court on this problematic and perplexing issue, however, courts often lifted the veil of grand jury secrecy for civil use in the decade following promulgation of Rule 6(e) by applying a standard that questioned whether "the ends of justice" demanded such disclosure.<sup>210</sup> The government often sought and received disclosure of grand jury materials for preparation of civil cases; consequently, civil defendants often requested reciprocal disclosure to prepare a defense. Many of the decisions granting civil defendants reciprocal access to grand jury materials in the 1940s and 1950s expressed concern for funda-

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hearing must be 'at a meaningful time and in a meaningful manner.'" *Goldberg v. Kelly*, 397 U.S. 254, 267 nn.11-12 (1970) (citations omitted).

207. See generally *infra* notes 264-67 (explaining that civil agency subpoenas may be challenged prior to compliance and appealed).

208. The order in its entirety is contained in the Appendix to this Article. See also *Maryland & Virginia Milk Producers Ass'n*, 151 F. Supp. at 438 (underlying district court opinion).

209. Two district court cases adopted the approach taken in *Maryland & Virginia Milk Producers Ass'n*. See *United States v. General Elec. Co.*, 211 F. Supp. 641, 643 (E.D. Pa. 1962); *United States v. Moore*, 423 F. Supp. 858, 859 (S.D. W. Va. 1976).

210. Because the courts had no guidance on the emerging civil use of grand jury materials, they borrowed heavily from the criminal context. The "ends of justice" standard came from *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 233-34 (1940), a criminal case in which the Supreme Court stated: "Grand jury testimony is ordinarily confidential. . . . [b]ut after the grand jury's functions are ended, disclosure is wholly proper where the ends of justice require it." *Id.* at 233-34 (citations omitted); see also *United States v. Ben Grunstein & Sons Co.*, 137 F. Supp. 197, 200 (D.N.J. 1955) (reviewing a False Claims Act case in which "the ends of justice would clearly call for a discovery of what plaintiff knows of this relevant [trial witness] testimony, to defendant, in order that the parties may be placed on a parity"); *Herman Schwabe, Inc. v. United Shoe Mach. Corp.*, 194 F. Supp. 763, 765 (D. Mass. 1958) (granting Sherman Act defendant's civil subpoena duces tecum served on Attorney General to produce plaintiff's ten-year-old grand jury testimony against defendant in original criminal investigation and concluding that "no evidence which is calculated to do justice should be suppressed by either side"); *In re Special 1952 Grand Jury*, 22 F.R.D. 102, 108 (E.D. Pa. 1958) ("[A]s a matter of justice the defendant has a right to discovery of testimony necessary to enable it to prepare its defense.").

mental fairness of process and parity between the parties.<sup>211</sup> But these decisions were inconsistent, confusing, and provided no clear guidance to government counsel or defendants. The Supreme Court was slow to address this critical aspect of Rule 6(e).

## VI. PROCTER & GAMBLE: A MISSED OPPORTUNITY<sup>212</sup>

In 1956, twelve years after promulgation of Rule 6(e), the Supreme Court first addressed the civil use of grand jury materials in *United States v. Procter & Gamble Co.*<sup>213</sup> Procter & Gamble was a classic “big case”<sup>214</sup> under the Sherman Antitrust Act.<sup>215</sup> Like all “big cases,” this case involved possible criminal and civil liabilities<sup>216</sup> and engendered both criminal and civil investigations. The clash between the civil and criminal rules of procedure and the need for a definitive ruling on the use of grand jury materials in civil litigation compelled the Supreme Court to grant certiorari.

Procter & Gamble began with an eighteen-month-long grand jury investigation into possible criminal violations of the Antitrust Act by the corporation.<sup>217</sup> The grand jury’s term expired without an indictment.<sup>218</sup> The United States then filed a civil enforcement action under section 4 of the Sherman Act.<sup>219</sup> Thereafter, the government sought and received from the district court a civil discovery order compelling Procter & Gamble to produce approximately 800 documents.<sup>220</sup> These same documents had been subpoenaed by the grand jury.<sup>221</sup> The government’s civil discovery motion, in fact, identified the documents by the very exhibit

211. See sources cited *supra* note 210.

212. The Supreme Court’s first opportunity to address the government’s use of grand jury materials for civil actions failed to even consider the balanced approach presented by *Maryland & Virginia Milk Producers Ass’n*. Although the precise issue was not on appeal, the Court did address it in dictum and left the lower courts as confused as before. See *infra* notes 244-48 and accompanying text.

213. 356 U.S. 677 (1958).

214. *United States v. Procter & Gamble Co.*, 19 F.R.D. 122, 128-29 (D.N.J. 1956); see also Breck P. McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 *HARV. L. REV.* 27 (1950).

215. 15 U.S.C. §§ 1-7 (1994). The case began as a civil action under § 4 of the Act, with the prosecution alleging criminal conspiracies in violation of §§ 1 and 2 as the basis for the claim. *Procter & Gamble*, 19 F.R.D. at 123 n.1.

216. *Procter & Gamble*, 19 F.R.D. at 130.

217. *Id.* at 123.

218. *Id.* In fact, the grand jury was never asked to return an indictment. *United States v. Procter & Gamble Co.*, 187 F. Supp. 55, 57 (D.N.J. 1960).

219. See *Procter & Gamble*, 19 F.R.D. at 123 n.1.

220. *United States v. Procter & Gamble Co.*, 14 F.R.D. 230, 233 (D.N.J. 1953).

221. *Id.*

numbers placed upon them when they were produced for the grand jury.<sup>222</sup> Procter & Gamble produced the documents and then, to prepare for trial, moved for disclosure of the entire grand jury transcript under Rule 34 of the Federal Rules of Civil Procedure.<sup>223</sup>

Procter & Gamble claimed that the ends of justice required reciprocal access because the United States had used and would continue to use grand jury materials in its civil enforcement action.<sup>224</sup> The Department of Justice, arguing against reciprocal disclosure, admitted that the grand jury had been convened to investigate both criminal and civil violations of the Sherman Act,<sup>225</sup> and claimed a right and a duty to use grand jury materials for the preparation of related governmental civil actions.<sup>226</sup> The district court, while acknowledging that the government's use of grand jury materials in the civil case was not at issue,<sup>227</sup> took the government's nonreciprocal use of grand jury material into consideration to determine whether disclosure of the entire transcript to Procter & Gamble was warranted.

Aligning itself with earlier decisions that focused on the "ends of justice" standard in granting reciprocal access,<sup>228</sup> the district court ordered disclosure of the requested grand jury minutes to establish parity in trial preparation.<sup>229</sup> While the government's prior and continuing nonreciprocal use of grand jury transcripts was "perhaps sufficient" in and of itself to justify granting the defendant's discovery request,<sup>230</sup> the discovery benefit in this case,

222. *Id.*

223. *United States v. Procter & Gamble Co.*, 1955 Trade Cases (CCH) ¶ 68,228 (D.N.J. 1955); see also *Procter & Gamble*, 19 F.R.D. at 123. The then-current version of Federal Rule of Civil Procedure 34 provided in part:

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents . . . not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control . . . .

*Fed. R. Civ. P. 34* (1957).

224. *Procter & Gamble*, 19 F.R.D. at 124-25.

225. *Id.* at 125.

226. *Id.* at 124.

227. *Id.* at 124-25.

228. See sources cited *supra* note 210. Although recognizing the need for equity in civil discovery, the court failed to recognize the simple method for achieving that equity presented in *Maryland & Virginia Milk Producers Ass'n*. See *supra* text accompanying notes 204-09; see also discussion *infra* part XIII.

229. *Procter & Gamble*, 19 F.R.D. at 128.

230. *Id.* at 125. Although not cited in the district court opinion, the "ends of justice" rationale had already been put forward in a criminal context by the Supreme Court: "Grand jury testimony is ordinarily confidential. . . . But after the grand jury's functions

where the government had not even identified the issues for trial,<sup>231</sup> was of primary importance to the court's decision to lift the grand jury veil of secrecy.<sup>232</sup>

The government appealed to the Supreme Court on one issue: whether a private defendant could gain access to grand jury transcripts under Federal Rule of Civil Procedure 34.<sup>233</sup> The Supreme Court, like the district court, weighed the fair trial objectives of civil discovery against the "long established policy that maintains the secrecy of the grand jury proceedings . . . ."<sup>234</sup> The Court, while acknowledging that the United States was subject to the rules of civil discovery,<sup>235</sup> determined that Procter & Gamble had not met the "good cause" requirement of Rule 34.<sup>236</sup> The Court concluded that the "good cause" necessary to justify grand jury disclosure required a showing of "compelling necessity" without which "a defense would be greatly prejudiced or that without reference to it an injustice would be done."<sup>237</sup> The Court also noted that this necessity "must be shown with particularity,"<sup>238</sup> thus establishing a "particularized need" standard for disclosure. Applying the criteria, the Court held that Procter & Gamble would not be prejudiced merely because use of ordinary civil discovery rules would involve delay and substantial costs.<sup>239</sup>

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are ended, disclosure is wholly proper where the ends of justice require it." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 233-34 (1940) (citations omitted).

231. See *Procter & Gamble*, 19 F.R.D. at 133.

232. *Id.* at 128:

The court concludes that since plaintiff is using the transcripts containing relevant information, the ends of justice require the court to order plaintiff to produce and permit the inspection and copying by defendants of the transcripts; equal use of the transcripts by defendants will give them the fullest possible knowledge of the facts before trial; none of the reasons for the rule of secrecy applies.

233. See *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 434 n.19 (1983) ("The Court [in *Procter & Gamble*] did not address . . . the conditions under which . . . civil use by the Government could be permitted, since the issue in the case was only whether private parties could obtain access [to grand jury materials].").

234. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958) (citations omitted).

235. *Id.*

236. *Id.*; see also *United States v. Procter & Gamble Co.*, 1955 Trade Cases (CCH) ¶ 68,228 (D.N.J. 1955); *Procter & Gamble*, 19 F.R.D. at 123.

237. *Procter & Gamble*, 356 U.S. at 682.

238. *Id.* In *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211 (1979), the Supreme Court revisited this standard in a purely civil case. The Court clarified the standard that was required for particularized necessity: "Parties . . . must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that their request is structured to cover only material so needed." *Id.* at 222 (citation omitted).

239. *Procter & Gamble*, 356 U.S. at 682.

While the government's use of grand jury transcripts was not directly at issue in the appeal, the Court, recognizing that the district court's decision rested heavily upon that question, noted in dictum that there had been no finding of fact that the government had used the grand jury process solely to elicit evidence for the civil proceeding.<sup>240</sup> The Court also noted, however, that "[i]f the prosecution were using that device, it would be flouting the policy of the law,"<sup>241</sup> and "wholesale discovery" to the defendant would then be an appropriate remedy.<sup>242</sup> Nevertheless, the Court did not find that the government's mere use of grand jury materials in Procter & Gamble presented the same concerns;<sup>243</sup> and, in the final analysis, the case failed to address the real issue of grand jury secrecy.

The holding of Procter & Gamble placed a heavy burden upon civil defendants seeking to gain access to grand jury materials: they either must show particularized need for the material or must prove that the prosecutor subverted the grand jury process. Moreover, the majority provided no standard for assessing either government subversion or the need for access to grand jury materials. Procter & Gamble created a substantial imbalance in civil discovery and left the lower courts in the same state of confusion as before.

Agreeing with the majority that there was no finding by the district court that the government had used the grand jury investigation for a civil purpose, Justice Whittaker, in a concurring opinion, recognized that the Department of Justice probably impaneled grand juries for precisely that purpose in similar cases.<sup>244</sup> Condoning this breach of the secrecy rule would, in his opinion, encourage government attorneys to abuse the grand jury process.<sup>245</sup> Therefore, he concluded that fundamental fairness and concerns of grand jury abuse justified requiring government attorneys to show the same particularized need for access to grand jury materials as any private litigant.<sup>246</sup>

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240. *Id.* at 683.

241. *Id.*

242. *Id.* at 684: "It is only when the criminal procedure is subverted that 'good cause' for wholesale discovery and production of a grand jury transcript would be warranted."

243. *Id.* Without any discussion of grand jury secrecy or a standard to justify disclosure, the Court stated: "The fact that a criminal case failed does not mean that the evidence obtained could not be used in a civil case." *Id.*

244. *Id.* at 684 (Whittaker, J., concurring).

245. *Id.* at 685.

246. In order to maintain the secrecy of grand jury proceedings; to eliminate the temptation to conduct grand jury investigations as a means of ex parte procurement of direct or derivative evidence for use in a contemplated civil suit; and to

The Procter & Gamble Court missed the opportunity to directly address the critical secrecy issue. The decision foreclosed trial courts from granting reciprocal disclosure to defendants for the purpose of insuring parity in discovery. Consequently, the focus of grand jury disclosure litigation inevitably shifted to the propriety of governmental breaches of the secrecy rule.

Immediately after the Supreme Court's decision, the parties resumed battle in the district court. Procter & Gamble attempted to establish a "finding of fact" that grand jury abuse had occurred.<sup>247</sup> For the next two years, the trial court rendered decisions that interpreted and applied the Supreme Court's guidelines to ever-expanding discovery issues.<sup>248</sup> The trial court first determined that proof of subversion of the grand jury process at some point during the grand jury proceeding only warranted discovery of the minutes transcribed after that time.<sup>249</sup> The point at which the subversion occurred identified the breach of grand jury secrecy; therefore,

[t]he critical question . . . is, when this case first became only "a civil case." From that time on, our highest court has said that using the Grand Jury to elicit evidence in that case would flout the law, would subvert criminal procedure, would require that any advantage thus obtained improperly by the Government be wiped out, by giving the opposing party the use of so much of the Grand Jury transcript as was thus obtained by a criminal procedure in a purely civil case.<sup>250</sup>

The court further concluded that a defendant had the right to discover government information that would prove the point at

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eliminate, so far as possible, fundamental unfairness and inequality by permitting the Government's attorneys, agents and investigators to possess and use such materials while denying like possession and use by attorneys for the defendants in such a case, I would adopt a rule requiring that the grand jury minutes and transcripts and all copies thereof and memoranda made therefrom, in cases where a "no true bill" has been voted, be promptly upon return sealed and impounded with the clerk of the court, subject to inspection . . . only upon order of the court . . . upon a showing of such exceptional and particularized need as is necessary to establish "good cause" . . . under Rule 34.

Id.

247. See *United States v. Procter & Gamble Co.*, 174 F. Supp. 233, 234 (D.N.J. 1959).

248. See *id.*; *United States v. Procter & Gamble Co.*, 175 F. Supp. 198 (D.N.J. 1959); *United States v. Procter & Gamble Co.*, 180 F. Supp. 195 (D.N.J. 1959); *United States v. Procter & Gamble Co.*, 25 F.R.D. 485 (D.N.J. 1960); *United States v. Procter & Gamble Co.*, 187 F. Supp. 55 (D.N.J. 1960).

249. *Procter & Gamble*, 174 F. Supp. at 235.

250. *Id.* at 235-36.

which subversion of the grand jury began,<sup>251</sup> holding that no presumption of regularity<sup>252</sup> or privilege<sup>253</sup> would bar such discovery.

After discovery compliance by the government revealed evidence of at least partial abuse of the grand jury proceeding, the district court made a “finding of fact” that abuse had indeed occurred.<sup>254</sup> Procter & Gamble immediately moved to suppress or impound all evidence gained through the breach of secrecy.<sup>255</sup> Finding that the Supreme Court had indicated that reciprocal access was the appropriate remedy, the court denied the motion.<sup>256</sup>

251. The court granted the defendant’s motion to compel discovery from Department of Justice officials concerning the progression of their investigation and their determination to pursue the case as a civil action, stating:

It is the lack of proof in this cause as to what such authoritative determination by the Government was, and when it was made, that made our highest court in Procter & Gamble say that “there is no finding that the grand jury proceeding was used as a short cut to goals otherwise barred or more difficult to reach.” But that Court has also held that the use of “criminal procedures to elicit evidence in a civil case . . . would be flouting the policy of the law,” and a subversion of criminal procedure, and that this would call for “wholesale discovery” by clear inference of all of the Grand Jury proceedings which were taken after the Government had determined not to proceed criminally. Thus it now becomes necessary, in order to do justice, to determine when the Government did finally determine to proceed against the present defendants solely by the present civil complaint, as it obviously did at some time.

Id. at 240.

252. As for the Government’s objection that a presumption of regularity in the conduct of governmental affairs should be deemed to exist, it should be noted, first, that previous to the decision in Procter & Gamble, the Department of Justice had regularly considered it the proper thing to do, when the occasion arose, to use the Grand Jury to make even a solely civil case under the anti-trust laws. Thus the question here is not whether the Government did the regular thing in fact, but whether this regular thing which it did was in fact lawful, in the light of the rule for the first time laid down by our highest court in Procter & Gamble.

Id. at 237 (citation omitted).

253. [W]here the Executive Department of the Government has voluntarily sought the aid of the Judicial Department of the Government to enforce the law of the land, as here, and the United States Supreme Court has declared that the law of the land requires a certain “finding,” in order to do justice between the parties in that judicial proceeding, it would not seem that the Executive Department could rely on a mere “housekeeping” privilege of its own, to refuse to abide by the law of the land and give evidence as to such “finding.”

Id. at 238.

The executive privilege is discussed more fully in *United States v. Procter & Gamble Co.*, 25 F.R.D. 485 (D.N.J. 1960). As explained in that case, the issue was whether “an executive privilege exists to engage in full discussion and deliberation with subordinates as well as Department heads without disclosing same, ‘in order to form a proper judgment’ as that judgment affects not only the Government’s rights but those of opposing parties in the course of litigation.” Id. at 489 (citation omitted).

254. *United States v. Procter & Gamble Co.*, 175 F. Supp. 198, 199-200 (D.N.J. 1959).

255. *United States v. Procter & Gamble Co.*, 180 F. Supp. 195, 200 (D.N.J. 1959).

256. In so doing, the court addressed the very real and unique problems faced by the Department of Justice when pursuing cases that involve both criminal and civil liabilities. The court noted that the Sherman Antitrust Act is primarily a criminal statute. See Proc-

Therefore, the court granted Procter & Gamble disclosure of grand jury testimony to the extent it had proven grand jury abuse.<sup>257</sup> To do otherwise, the court reasoned, would “put an end to the Government’s case” and make it impossible for the Department of Justice to enforce antitrust laws.<sup>258</sup>

Dissatisfied with this decision, Procter & Gamble set out to prove that the government had subverted the entire grand jury proceeding. Through civil discovery, it obtained proof that the Department of Justice had convened the grand jury knowing an indictment was improbable; in fact, the government had always planned to seek a civil remedy.<sup>259</sup> Faced with this clear evidence, the district court granted full disclosure of grand jury transcripts to Procter & Gamble.<sup>260</sup> Nine years of litigation finally ended with proof of grand jury secrecy abuse that required reciprocal access in the name of fairness.

The potential for abuse of grand jury secrecy, while not the focal point of the Supreme Court’s decision in Procter & Gamble, at least established such abuse as a critical concern in the context of such epic civil antitrust litigation. However, given the example of Procter & Gamble, the administration of justice would be better served by the equitable approach adopted in Maryland & Virginia Milk Producers Ass’n.<sup>261</sup> This approach would serve the needs of civil law enforcement yet still protect the due process rights of the individual by discouraging grand jury abuse.

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ter & Gamble, 180 F. Supp. at 203. Section 4 of the Act also provides a civil equitable remedy for the same conduct, however. 15 U.S.C. § 4 (1994). Thus, an investigation would certainly involve conduct that could be construed as either criminal or civil. The choice of remedy is left in the discretion of the prosecutor. The critical question becomes the timing of that choice. To use the criminal grand jury process solely to develop a civil case is, according to the Supreme Court, to flout the policy of law. *United States v. Procter & Gamble*, 356 U.S. 677, 683 (1958).

257. *Procter & Gamble*, 180 F. Supp. at 206-07.

258. *Id.* at 200. While the district court recognized the unique difficulties involved in investigating civil antitrust violations, it failed to recognize that a solution existed that would allow for governmental use of grand jury materials while still protecting the rights of the individual. If the court had applied the rationale of *Maryland & Virginia Milk Producers Ass’n*, this nine-year battle could have been avoided.

259. Procter & Gamble obtained numerous internal Department of Justice memoranda, many of which noted that the original intent of the investigation against Procter & Gamble was to file a civil suit. *United States v. Procter & Gamble Co.*, 187 F. Supp. 55, 59-60 (D.N.J. 1960).

260. *Id.* at 58.

261. See *supra* notes 204-09 and accompanying text; see also discussion *infra* part XIII.



## VII. EMERGING CONCERNS OVER ADMINISTRATIVE AGENCY ACCESS TO GRAND JURY MATERIALS

Issues pertaining to the propriety of the Department of Justice's use of grand jury materials for civil litigation were not the only concerns arising from the 1946 codification of Rule 6(e). A similar question about administrative agency access to grand jury materials quickly surfaced.<sup>262</sup> The investigative powers of federal administrative agencies are more limited than those which a grand jury may employ in criminal investigations,<sup>263</sup> and agency actions are statutorily subject to judicial review.<sup>264</sup> Although certain federal statutes grant administrative agencies subpoena powers when they are necessary to carry out the agencies' investigative and adjudicatory functions,<sup>265</sup> gathering information in this manner often proves more costly and frustrating than obtaining the materials from the grand jury.<sup>266</sup> Thus, administrative agencies, like the Department of Justice's own civil attorneys, have attempted to seek information from a particular grand jury to circumvent their more restrictive investigation scheme. This has resulted in Rule 6(e) disclosure litigation.<sup>267</sup>

The Advisory Committee was aware of the agencies' role in law enforcement while drafting the Federal Rules of Criminal Procedure.<sup>268</sup> Indeed, Congress enacted the Administrative Proce-

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262. See sources cited *supra* notes 178-80.

263. For a comprehensive overview of administrative agency powers of investigation, see generally KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* (2d ed. 1978). For a more detailed look at the enforcement programs of selected federal agencies, see NEIL A. KAPLAN ET AL., *PARALLEL GRAND JURY AND ADMINISTRATIVE AGENCY INVESTIGATIONS* 27-59 (1981).

264. See Administrative Procedure Act, 5 U.S.C. § 702 (1994); see also Urban A. Lavery, *The Administrative Process: Factual Analysis of the Report of Attorney General's Committee on Administrative Procedure*, 1 F.R.D. 651, 672-73 (1940):

In the whole field of Administrative Law, the functions that can be performed by judicial review are fairly limited. Its objective, broadly speaking, is to serve as a check on the administrative branch of the government. Judicial review is rarely available, theoretically or practically, to compel effective enforcement of the law by administrators. It is adapted chiefly to curbing excess of power, not toward compelling its exercise.

265. See, e.g., 15 U.S.C. § 49 (1994) (granting subpoena powers to Federal Trade Commission); 15 U.S.C. § 78(u) (1994) (granting subpoena powers to the Securities and Exchange Commission); 26 U.S.C. §§ 7602, 7609 (1994) (granting subpoena powers to Internal Revenue Service); 47 U.S.C. § 409(e) (1994) (granting subpoena powers to Federal Communication Commission).

266. See, e.g., *Petition for Certiorari at 12a, United States v. Sells Eng'g, Inc.*, 463 U.S. 418 (1983) (No. 81-1032) ("In fact, frustration over limitations on civil discovery may have prompted the government to convene the grand jury here.").

Agency subpoenas must be enforced in federal district court and an enforcement order may be appealed. See, e.g., I.R.C. § 7604 (1994).

267. See e.g., *In re April 1956 Term Grand Jury*, 239 F.2d 263, 271 (7th Cir. 1956).

268. In 1939, Congress appointed a committee to investigate administrative procedures and to suggest improvements. The result of the committee's work was the Federal

cedure Act concurrently with the completion of the Rules.<sup>269</sup> Congress created the Act to establish uniform procedures for all federal agencies and to serve as a “check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices.”<sup>270</sup> Additionally, the Advisory Committee was asked specifically to resolve the issue of administrative agency access to grand jury materials.<sup>271</sup> Unfortunately, Rule 6(e), as finally adopted, did not do so. Thus, trial and appellate court decisions concerning disclosure to federal agencies were far from uniform.<sup>272</sup>

The first and leading appellate case dealing with the disclosure of grand jury material to federal agencies was *Doe v. Rosenberg*,<sup>273</sup> decided the same year as *Procter & Gamble*. In *Rosenberg*, a federal grand jury had been investigating a New York attorney’s alleged criminal activity.<sup>274</sup> While the grand jury did not return an indictment, it did refer information concerning the attorney’s activities to the New York Bar Association’s Grievance Committee.<sup>275</sup> The Committee then sought and obtained a court order for disclosure of grand jury transcripts under Rule 6(e).<sup>276</sup> The attorney challenged the order on the grounds the investigation was not conducted “preliminarily to . . . a judicial proceeding” within the meaning of Rule 6(e).<sup>277</sup> A court cannot grant an order for disclosure, even where particularized need exists, if this

Administrative Procedure Act. The Chairman of the Advisory Committee on the Federal Rules of Criminal Procedure, Arthur T. Vanderbilt, also was a member of the Attorney General’s Committee on Administrative Procedure. Compare Attorney General’s Committee on Administrative Procedure, 1 F.R.D. 259 (1941) (appointing Arthur T. Vanderbilt as member), with 7 WILKEN & TRIFFIN, *supra* note 155, at xi-xii (quoting Letter of Transmittal submitted by Arthur T. Vanderbilt, Chairman, Advisory Committee on the Federal Rules of Criminal Procedure (July 1944)). See also Urban A. Lavery, *The Administrative Process: Factual Analysis of the Report of Attorney General’s Committee on Administrative Procedure*, 1 F.R.D. 651 (1940) (listing all federal administrative agencies and federal departments created before 1940 that were exercising administrative powers).

269. 5 U.S.C. § 1009(a) (1946) (current version at 5 U.S.C. § 702 (1994)); see also Urban A. Lavery, *The Practicing Lawyer and the New Federal Administrative Procedure Act*, 6 F.R.D. 51 (1946).

270. *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950).

271. See 3 WILKEN & TRIFFIN, *supra* note 178, at 352.

272. See generally David E. Brodsky & Nicholas M. De Feis, Note, *Facilitating Administrative Agency Access to Grand Jury Material*, 91 YALE L.J. 1614 (1982) (analyzing inconsistent and contradictory decisions interpreting Rule 6(e) in context of federal agency access to grand jury materials).

273. 255 F.2d 118 (2d Cir. 1958). See also Brodsky & De Feis, *supra* note 272, at 1627 n.49 (stating that *Rosenberg* was the first appellate decision concerning administrative agency access to grand jury materials under Rule 6(e)).

274. *Rosenberg*, 255 F.2d at 119.

275. *Id.*

276. *Id.*

277. See *id.*

threshold criterion is not met.<sup>278</sup> The decision in *Rosenberry*, therefore, turned upon the meaning of “preliminarily to.”

In assessing whether disclosure was appropriate, the court employed a two-prong test: first, whether any hearing before the grievance committee was “preliminary to” any charges of unprofessional conduct that might take the matter into court; and second, whether any court proceeding was a “judicial proceeding” under the Rule.<sup>279</sup> The court defined a “judicial proceeding” broadly to include “any proceeding determinable by a court, having for its object the compliance of any person, subject to judicial control, with standards imposed upon his conduct in the public interest, even though such compliance is enforced without the procedure applicable to the punishment of crime.”<sup>280</sup> Finding that the two-prong test had been met, the court upheld the disclosure order<sup>281</sup> but never addressed what standard of need was required before disclosure would be allowed. The court posited a test that balanced the public interest in maintaining the integrity of the bar against the appellant’s interest in grand jury secrecy.<sup>282</sup>

Procter & Gamble, however, did set forth the standards of need for private parties seeking disclosure.<sup>283</sup> Whether those same standards applied to federal agencies became the subject of litigation. Initial decisions held that federal agency attorneys were not allowed automatic access as “attorney[s] for the government” under Rule 6(e)<sup>284</sup> and that the “particularized need” standard set forth in *Procter & Gamble* applied to federal agencies seeking court-ordered disclosure.<sup>285</sup> Some courts were not as certain that they should interpret Rule 6(e) so narrowly, however, especially where a U.S. Attorney sought a disclosure order to ac-

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278. *Id.*

279. *Id.* at 120.

280. *Id.*

281. *Id.*

282. See *id.*; see also *In re Bullock*, 103 F. Supp. 639 (D.D.C. 1952) (finding that public interest in preserving integrity of police department outweighed interest in secrecy).

283. See *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958). In 1979, the Supreme Court revisited this question in *Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211 (1979), where it expanded the scope of this standard by creating a three-part test a private litigant must meet to gain disclosure. *Id.* at 222.

284. *In re Grand Jury Proceedings*, 309 F.2d 440, 443 (3rd Cir. 1962):

The term “attorneys for the government” is restrictive in its application and does not include the attorneys for the administrative agencies. If it had been intended that the attorneys for the administrative agencies were to have free access to matters occurring before a grand jury, the rule would have so provided.

285. A federal agency “stands in no higher degree of privilege than a private litigant” seeking access to grand jury materials. *In re Grand Jury Proceedings*, 29 F.R.D. 151, 154 (E.D. Pa. 1961), *aff’d*, 309 F.2d 440 (3d Cir. 1962).

quire assistance from a federal agency attorney on a criminal case being investigated by a grand jury. One case in particular that raised this issue and eventually prompted congressional action was *In re William H. Pflaumer & Sons, Inc.*<sup>286</sup>

In *Pflaumer*, the federal district court was confronted with the overlapping enforcement duties of the Internal Revenue Service's criminal and civil investigation divisions<sup>287</sup> in a racketeering and tax case against *Pflaumer & Sons'* beer distributing company.<sup>288</sup> Surveying the limited case law,<sup>289</sup> Judge Becker found that courts uniformly refused to condone automatic exceptions to grand jury secrecy for the IRS, the Federal Trade Commission, and the Tennessee Valley Authority.<sup>290</sup> However, citing the Advisory Committee's notes for Rules 6(e) and 54(c), the court found no guidance on what the drafters meant by "attorneys for the government."<sup>291</sup> Judge Becker, therefore, decided to grant automatic disclosure to government agency personnel under an "aegis" theory.<sup>292</sup> The

286. 53 F.R.D. 464 (E.D. Pa. 1971).

287. "An intelligence division agent within the Internal Revenue Service is responsible for criminal investigations; a separate kind of agent—a revenue agent—is responsible for civil investigations." Grand Jury Reform: Hearings on H.R. 94 Before the Subcomm. on Immigration, Citizenship, and International Law, House Comm. on the Judiciary, 95th Cong., 1st Sess. 765 (1977) (statement of Benjamin R. Civiletti, Ass't Att'y Gen., Crim. Div., U.S. Dep't of Justice).

288. *Pflaumer*, 53 F.R.D. at 466.

289. *Id.* at 470.

290. *Id.* at 473-76.

291. *Id.* at 476 n.31. Judge Becker's quotation from the Advisory Committee's notes used an ellipsis to stop short of the explanation for granting automatic disclosure to attorneys for the government "inasmuch as they may be present in the grand jury room during the presentation of evidence." FED R. CRIM. P 6(e) advisory committee's note. Contrary to Judge Becker's conclusion, there is very little historical support for the assertion that Department of Justice attorneys not directly involved in the grand jury presentation should have automatic access to grand jury material.

292. *Pflaumer*, 53 F.R.D. at 476. The "aegis" theory was developed under the district court's supervisory power to oversee who was having a look at grand jury materials, when, and for how long. Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 34-37 (1977) (statement of Hon. Edward R. Becker, U.S. District Judge, Eastern District of Pennsylvania) [hereinafter Becker Statement]. The acting prosecutor guiding the grand jury proceeding was charged with ensuring that materials disclosed for the criminal case were not leaked or otherwise made available to parties outside of the potential prosecution. *Id.*

In practice when a citizen turns over his cartons of papers to the grand jury they will be examined by the government personnel assisting the attorneys for the government in the offices of their own agency. We must remember, in that context, that access to these records was made possible because they were subpoenaed to a secret grand jury. We must also note that grand jury material will often be examined pursuant to Rule 6(e) by government and administrative agencies, and yet: (1) the powers of federal administrative agencies are tightly circumscribed by the statutes creating them; (2) federal agencies (including IRS) are not permitted to launch general investigations which do not concentrate on a specific target; (3) agency subpoenas are subjected to greater scrutiny.

disclosure, however, was automatic only for use in the criminal case before the grand jury.<sup>293</sup> In expanding the terms of Rule 6(e), Judge Becker suggested that the rule needed clarification.<sup>294</sup> Apart from Judge Becker's recommendation, there was no apparent urgency behind the resulting proposal to amend the Rule,<sup>295</sup> particularly in light of the work that had already begun on plenary grand jury reform legislation.<sup>296</sup>

## VIII. CONGRESSIONAL ACTION

### A. The 1977 Amendment

The Advisory Committee prepared five amendments<sup>297</sup> to the Federal Rules of Criminal Procedure in late 1972.<sup>298</sup> However, the

tiny than grand jury subpoenas; (4) the agencies are not usually subject to the direct supervision of the courts; and (5) their activities, unlike those of the United States Attorney in connection with a given prosecution, are ongoing, so that vindication at trial does not serve as a meaningful protection in cases of abuse.

Congress has thus determined not to give administrative agencies powers comparable to the grand jury. Yet the danger exists that the execution may accede to the grand jury's extraordinary powers via Rule 6(e).

Id. at 49-50.

293. See Pflaumer, 53 F.R.D. at 475.

294. Id. at 468. Judge Becker made the specific suggestion to reevaluate and clarify the phrase "attorneys for the government" to resolve "how far the 'Attorney for the government' exception to the secrecy principle may extend in view of the myriad situations in which the United States Attorney works with and through other government agencies in developing factual material for civil and criminal actions." Id. He personally suggested clarification to Judge Maris, with whom he worked in the U.S. Courthouse in Philadelphia, and who was then chairman of the Supreme Court Rules Committee. Becker Statement, *supra* note 292, at 28. One day, Judge Becker said to Judge Maris, "I wrote this Pflaumer] opinion, and [R]ule 6(e) ought to be clarified." Id. Judge Becker testified that Judge Maris replied, "Send it to me." Id.

295. Such was the case even six years later: "[P]articularly since there has been no demonstration or suggestion of any apparent urgency for the proposed amendment, the subject of disclosure of grand jury proceedings and grand jury secrecy should be considered as a whole together with the other legislation." Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 150-51 (1977) (statement of Bernard J. Nussbaum, Esq., Chicago) [hereinafter Nussbaum Statement].

296. "The questions concerning grand jury secrecy presented by the proposed substantive change are basic to the function and operation of the grand jury. . . . The issues surrounding Rule 6(e) and the proposed substantive change will be taken up by [the Subcommittee on Immigration, Citizenship, and International Law] during its work on the grand jury reform legislation." H.R. REP. NO. 195, 95th Cong., 1st Sess. 5 (1977), reprinted in Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 275 (1977) (Appendix 6).

297. Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 1 (1977).

amendment proposing to clarify the first sentence of Rule 6(e)<sup>299</sup> was not reported to Congress until April 26, 1976.<sup>300</sup> It was soon

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298. *Id.* at 84 (statement of Prof. Wayne LaFave, University of Illinois, reporter to the Advisory Committee) [hereinafter LaFave Statement].

299. The 1976 proposal to amend Rule 6(e) stated:

(e) **SECRECY OF PROCEEDINGS AND DISCLOSURE.**—Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. For purposes of this subdivision, “attorneys for the government” includes those enumerated in Rule 54(c); it also includes such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person, except in accordance with this rule . . . .

SUBCOMM. ON CRIMINAL JUSTICE OF THE HOUSE COMM. ON THE JUDICIARY, 95TH CONG., 1ST SESS., AMENDMENTS, FEDERAL RULES OF CRIMINAL PROCEDURE 7 (Comm. Print 1977) (new language underlined).

300. H.R. REP. NO. 195, 95th Cong., 1st Sess. 2 (1977) reprinted in Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 272 (1977) (Appendix 6).

There are at least three explanations for the four-year drafting period. First, the proposals were first printed in the federal reporters during the summer of 1973 while 5,000 copies of the proposed amendments were circulated to the bench and bar for comments to be received back by February 1974. Those comments led to revisions. LaFave Statement, *supra* note 298, at 84. Second, Congress was involved with the Federal Rules of Evidence and during that period did not consider the amendments to the Federal Rules of Criminal Procedure. Becker Statement, *supra* note 292, at 46. Third, the Nixon administration's abuse of the grand jury process to harass its political opponents triggered a series of grand jury reform proposals that overlapped the grand jury provisions of Federal Rule of Criminal Procedure 6. In his June 10, 1976, opening remarks to the first ever congressional hearings on grand jury reform, Joshua Eilberg said,

In recent years . . . increasing evidence has been presented that the historic function of the grand jury has been perverted and that its historic purpose has been disregarded.

It has been almost 3 years since this subcommittee began its study of alleged abuses in the Federal grand jury system.

In March of 1973, we received testimony regarding the so-called Fort Worth Five controversy and listened to witnesses describe the use of grand juries to investigate “political crimes”; the locating of grand jury inquiries, often for political purposes, far from the site of an alleged offense; the use of grants of immunity to elicit testimony; and the use of the court's contempt power to coerce it.

Federal Grand Jury: Hearings on H.J. Res. 46, H.R. 1277 and Related Bills Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary, 94th Cong., 2nd Sess. 2 (1976) (statement of Hon. Joshua Eilberg, Chairman of the Subcommittee). See also generally Reform of the Grand Jury System: Hearings on S. 3274, H.R. 1277, H.R. 6006, H.R. 6207, H.R. 10947, H.R. 11660, H.R. 11870, H.R. 14146, and H.J. 46 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 94th Cong., 2nd Sess. (1976); Grand Jury Reform: Hearings Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary, 95th Cong., 1st Sess. (1977).

afterwards that the Advisory Committee began deliberations to clarify the Rule 6(e) grand jury secrecy exceptions that had caused confusion and that were addressed by the proposed amendment. The primary focus was whether automatic disclosure of grand jury materials could be made to federal agency personnel in furtherance of the grand jury proceeding. If adopted as proposed in 1976, the Rule, it was argued, could have expanded the automatic exception to grand jury secrecy to include any employee within the federal government.<sup>301</sup> According to Acting Deputy Attorney General Richard Thornburgh, grand jury investigations were a team effort that required limited secrecy breaches.<sup>302</sup> It was common practice for agency lawyers to be appointed as Assistant U.S. Attorneys<sup>303</sup> and expert witnesses, to explain evidence to the grand jury.<sup>304</sup> To the Department of Justice, the 1976 proposal was simply intended to make all the grand jury evidence available to every legitimate member of the team,<sup>305</sup> thus, the executive and judicial branches did not view Rule 6(e) as foreclosing unauthorized and automatic disclosure of grand jury material to agents of the government at the sole discretion of the prosecuting attorney conducting the grand jury investigation.<sup>306</sup>

Nonreciprocal disclosure of grand jury materials to government agents would have created an unacceptable imbalance between the government and defendants in subsequent civil regula-

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301. Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 19-20 (1977) (statement of Terry Philip Segal, Boston attorney and former Assistant U.S. Attorney for Massachusetts and the District of Columbia).

302. Proposed Amendments to the Federal Rules of Criminal Procedure, Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 66-67 (1977) (testimony of Richard L. Thornburgh) [hereinafter Thornburgh Statement]. See also Nussbaum Statement, *supra* note 295, at 149 ("No one is left out, not even Members of Congress or the military.").

303. See generally Annotation, Propriety of Appointing an Attorney for a Federal Agency as Special Assistant U.S. Attorney for Grand Jury Proceedings in Which the Agency Is Interested, 58 A.L.R. FED. 696 (1982).

304. See *In re William H. Pflaumer & Sons, Inc.*, 53 F.R.D. 464, 475-76 (E.D. Pa. 1971).

305. Thornburgh Statement, *supra* note 302, at 66-67.

306. See, e.g., *Robert Hawthorne, Inc. v. Director of IRS*, 406 F. Supp. 1098, 1120 n.38 (E.D. Pa. 1976) (granting Rule 6(e) disclosure but expressing doubts that court order was required for IRS agent access to books, records, and transcripts presented before grand jury). In at least one other jurisdiction, automatic disclosure seemed appropriate without court supervision even after the potential misuse of grand jury material was challenged. See *Pflaumer*, 53 F.R.D. at 473. In *In re Kelly*, 19 F.R.D. 269 (S.D.N.Y. 1956), a federal prosecutor represented to the court that only his staff, the FBI, and the IRS would examine union records acquired through a grand jury subpoena *duces tecum*. *Id.* at 270. Such cases are rare, possibly because the issue of automatic disclosure only arises for review when a grand jury target files a motion for a protective order—as *Kelly* did. See *id.*

tory proceedings.<sup>307</sup> The 1976 proposal attracted substantial criticism.<sup>308</sup> It was, however, apparent that Rule 6(e) needed congressional attention.<sup>309</sup>

The well-documented abuses of the grand jury process by the executive branch under President Nixon made the legislative branch skeptical of the judicial branch and unlikely to rubber stamp judicial promulgations of new grand jury rules.<sup>310</sup> Conse-

307. "[T]here is a significant imbalance in favor of the government attorneys in preparation for trial of a criminal antitrust case, and the proposed amendment would increase that imbalance." Proposed Amendments to the Federal Rules of Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 79 (1977) (statement of John F. McClatchey, Member of the Ohio Bar).

The American Bar Association requested that Congress make an explicit statement "to insure that the grand jury information disseminated to [government] experts is not used in violation of any constitutional rights, in unrelated criminal cases, or in any civil proceedings." Proposed Amendments to the Federal Rules of Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 111 (1977) (statement of David Epstein, A.B.A. Crim. Just. Section).

308. "It is past history at this point that the Supreme Court proposal attracted substantial criticism, which seemed to stem more from the lack of precision in defining, and consequent confusion and uncertainty concerning, the intended scope of the proposed change than from a fundamental disagreement with the objective." S. REP. NO. 354, 95th Cong., 1st Sess. 6 (1977), reprinted in 1977 U.S.C.C.A.N. 527, 529 (citing hearings that took place in the House of Representatives on February 23 and 24, and March 2, 1977).

309. As pointed out during the House Subcommittee hearings, "at least one bill introduced during the 94th Congress expressly recognized the necessary and appropriate primacy of the legislative—not the rulemaking—function in this important policy area." Nussbaum Statement, *supra* note 295, at 150 (citing H.R. 6207, 94th Cong., 1st Sess. (1975)).

310. On Tuesday, September 25, 1976, the Chairman of the Senate Subcommittee on Constitutional Rights opened hearings on grand jury reform:

This morning's hearing marks the first time the U.S. Senate has examined the grand jury system since the grand jury's inclusion in the Bill of Rights some 185 years ago. This long-overdue examination is a logical extension of the hearings on "The Causes of Popular Dissatisfaction with the Administration of Justice" that this author conducted this summer.

Continuing revelation of Government lawlessness has led to a breakdown in public trust in the integrity of our institutions. The Federal grand jury has not escaped this skepticism.

....

... [C]onfronted by instance after instance of grand jury abuse, the courts have repeatedly failed to exercise their supervisory responsibilities over the grand jury process.

Reform of the Grand Jury System: Hearing before the Subcomm. on Constitutional Rights, Senate Comm. on the Judiciary, 94th Cong., 2nd Sess. 2 (1976) (opening statement of Sen. John V. Tunney). The hearing began consideration of four omnibus grand jury reform bills introduced in the House, four House bills with grand jury reform provisions, and a Senate bill to reform the grand jury. *Id.* at 1.

Introducing the Senate Grand Jury Reform Bill, Senator Abourezk stated that "the Nixon administration used the grand jury as a tool of political repression in its effort to silence the anti-war movement." Reform of the Grand Jury System, Hearing before the Subcomm. on Constitutional Rights, Senate Comm. on the Judiciary, 94th Cong., 2nd Sess. 4 (1976) (statement of Sen. James Abourezk). See also *Federal Grand Jury: Hearings before the Subcomm. on Immigration, Citizenship, and International Law, House Comm. on the Judiciary, 94th Cong., 2nd Sess. 730-35 (1976)* (providing synopses of selected cases alleged to have been examples of grand jury abuse, including the Leslie Bacon case, the



quently, a year later, on April 11, 1977, the House Committee on the Judiciary formally disapproved the substantive amendment<sup>311</sup> to Rule 6(e).<sup>312</sup> The Senate Committee redrafted the Rule.<sup>313</sup> Eschewing the House plan to consider the exceptions to secrecy as part of an overall reform bill,<sup>314</sup> the Senate recommended passage, and Congress finally adopted the proposed amendment, as modified, on July 30, 1977.<sup>315</sup> It parsed Rule 6(e) into enumerated paragraphs,<sup>316</sup> beginning with the general rule of secrecy and de-

Patty Hearst case, the Daniel Ellsberg/Pentagon Papers case, the Harrisburg 7 case, the John Fuerst case, the Tallahassee 23/Vietnam Veterans Against the War case, and the Camden 28 case); Michael Deutsch, *The Improper Use of the Federal Grand Jury: An Instrument for the Internment of Political Activists*, 75 J. CRIM. L. & CRIMINOLOGY 1159, 1179-83 (1984).

311. Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 272 (1977). The amendment to Rule 6(e) also included a technical change to make the Rule "consistent with other provisions in the Rules and in the Bail Reform Act of 1966." *Id.* at 274.

312. "Present Rule 6(e) does not clearly spell out when, under what circumstances, and to whom grand jury information can be disclosed. It ought to be rewritten entirely." H.R. REP. NO. 195, 95th Cong., 1st Sess. 5 (1977), reprinted in Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 275 (1977) (Appendix 6) (citation omitted).

313. S. REP. NO. 354, 95th Cong., 1st Sess. 7-8 (1977), reprinted in 1977 U.S.C.C.A.N. 527, 530-31.

314. H.R. REP. NO. 195, 95th Cong., 1st Sess. 5 (1977), reprinted in Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 275 (1977) (Appendix 6).

315. Act of July 30, 1977, Pub. L. No. 95-78, 91 Stat. 319 (1977) (codified as amended at 18 U.S.C. app. (1994)).

316. S. REP. NO. 354, 95th Cong., 1st Sess. 7 (1977), reprinted in 1977 U.S.C.C.A.N. 527, 530-31. The Rule, as adopted, read as follows:

(1) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (2)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(2) Exceptions.—

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law. An attorney for the government

limiting exceptions to that general rule.<sup>317</sup> As explained in the Senate Report recommending passage, subparagraph (A) defined “automatic” but expressly limited disclosure exceptions to “an attorney for the government” and those personnel necessary to assist that attorney in the enforcement of criminal law.<sup>318</sup> The Advisory Committee’s notes to the 1977 amendment are in accord with the Senate Report and show an intention to limit disclosure, but only for the criminal case under consideration.<sup>319</sup> To strengthen court supervision and resolve potential claims of improper automatic disclosure, the Senate substitute also added to subparagraph (B) new language that required a record of the personnel obtaining automatic access to grand jury material under subparagraph (A).<sup>320</sup> Thus, the new language of Rule 6(e), con-

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shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminary to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

(3) SEALED INDICTMENTS—The Federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

Act of July 30, 1977, Pub. L. No. 95-78, §§ 1-3, 91 Stat. 319, 319-21 (1977) (codified as amended at 18 U.S.C. app. (1994)).

317. In 1979, Rule 6(e) was again amended to require recording of proceedings. The requirement caused the paragraphs to be renumbered so that the 1977 paragraph 1 became paragraph 2 and the 1977 paragraph 2 became paragraph 3, which is how the rule reads now in 1996. See FED. R. CRIM. P. 6(e).

318. S. REP. NO. 354, 95th Cong., 1st Sess. 7 (1977), reprinted in 1977 U.S.C.C.A.N. 527, 531. The language of the report states that disclosure otherwise prohibited “may be made to an attorney for the government for use in the performance of his duty and to such personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such an attorney’s duty to enforce Federal criminal law.” *Id.* Note that the singular form chosen by the Senate Report—“an attorney”—echoes the 1945 Advisory Committee’s note.

319. Although the case law is limited, the trend seems to be in the direction of allowing disclosure to government personnel who assist attorneys for the government in situations where their expertise is required. This is subject to the qualification that the matters disclosed be used only for the purposes of the grand jury investigation. *Id.* at 6 (citation omitted).

320. S. REP. NO. 354, 95th Cong., 1st Sess. 7-8 (1977), reprinted in 1977 U.S.C.C.A.N. 527, 530-31. Subparagraph (B) added the specificity requirement that enables court supervision of personnel allowed access to grand jury materials but does not connect the personnel to the specific material disclosed, as suggested by Judge Becker in *Hawthorne v.*

gressional intent, and the Advisory Committee's position demonstrate that disclosure is automatic only when the material is sought to aid criminal prosecutions. The 1977 amendment did not affect the court-order exception by which access could be gained for civil use.<sup>321</sup> As part of the inevitable congressional compromise, however, the Senate Report included language that seemingly encouraged court-ordered disclosure for civil or regulatory purposes.<sup>322</sup> Thus, the resolution of the 1977 Rule 6 amendment, which reflected the never-ending dichotomy between law enforcement and the rights of the accused, presented questions for further litigation. The language of the amendment was ambiguous enough to leave open an argument that the criminal law limitation applied only to personnel assisting the grand jury and did not foreclose automatic disclosure to civil attorneys for civil use.<sup>323</sup> Hence, the 1977 Amendment still failed to resolve the questions of civil use that emerged even prior to the 1946 codification.

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Director of Internal Revenue Service, 406 F. Supp. 1098, 1127 (1975), and Judge Hufstедler in *In re J.R. Simplot Co.*, 77-1 U.S. Tax Cases (CCH) ¶ 9146 (1976).

321. What had been the second sentence of the 1946 codification became subparagraph (C) and remained unchanged.

322. The Rule, as redrafted, is designed to accommodate the belief on the one hand that Federal prosecutors should be able, without the time-consuming requirement of prior judicial interposition, to make such disclosures of grand jury information to other government personnel as they deem necessary to facilitate the performance of their duties relating to criminal law enforcement. On the other hand, the Rule seeks to allay the concerns of those who fear that such prosecutorial power will lead to misuse of the grand jury to enforce non-criminal Federal laws by (1) providing a clear prohibition, subject to the penalty of contempt and (2) requiring that a court order under paragraph (C) be obtained to authorize such a disclosure. There is, however, no intent to preclude the use of grand jury-developed evidence for civil law enforcement purposes. On the contrary, there is no reason why such use is improper, assuming that the grand jury was utilized for the legitimate purpose of a criminal investigation. Accordingly, the Committee believes and intends that the basis for a court's refusal to issue an order made under paragraph (C) to enable the government to disclose grand jury information in a non-criminal proceeding should be no more restrictive than is the case today under prevailing court decisions. [See *United States v. Procter & Gamble Co.*, 356 U.S. 677, 683-85 (1958); *Robert Hawthorne, Inc. v. Director of IRS*, 406 F. Supp. 1098 (E.D. Pa. 1976)] It is contemplated that the judicial hearing in connection with an application for a court order by the government under subparagraph (3)(C)(i) should be ex parte so as to preserve, to the maximum extent possible, grand jury secrecy. But see *In re J.R. Simplot Co.*, 77-1 U.S. Tax Cases (CCH) ¶ 9146 (1976)].

S. REP. NO. 354, 95th Cong., 1st Sess. 8 (1977), reprinted in 1977 U.S.C.C.A.N. 527, 531.

323. See *In re Grand Jury*, 583 F.2d 128, 130 (5th Cir. 1978).

### B. 1981 Amendment Proposal

In October 1981, the Standing Committee on Rules of Practice and Procedure circulated a thoroughly amended preliminary draft of Rule 6(e) to the bench, bar, and media.<sup>324</sup> The secrecy revisions included:

- (1) a definition of "matters occurring" in 6(e)(2);<sup>325</sup>
- (2) an express provision limiting disclosure only to an "attorney for the government" for criminal enforcement purposes in 6(e)(3)(A)(i);<sup>326</sup>
- (3) an additional exception under 6(e)(3)(C) allowing disclosure when a party in another proceeding has an independent basis for subpoenaing grand jury evidence;<sup>327</sup>
- (4) an additional exception under 6(e)(3)(C) allowing disclosure to another federal grand jury;<sup>328</sup>
- (5) a new section 6(e)(3)(D) establishing venue for disclosure petitions and affording interested parties notice of the petitions plus an opportunity to be heard;<sup>329</sup>
- (6) guidelines in a new section 6(e)(3)(E) for transferring grand jury materials to another federal district;<sup>330</sup>
- (7) a new section 6(e)(5) providing for closed hearings on matters relating to grand jury proceedings in order to keep secret past and pending or continuing grand jury proceedings;<sup>331</sup> and
- (8) a new section 6(e)(6) requiring grand jury records, orders, and subpoenas to be kept under seal.<sup>332</sup>

Two years later, the Supreme Court transmitted slightly modified versions of proposals four through eight to Congress for adoption.<sup>333</sup> The amendments strengthened the shroud of secrecy surrounding grand jury proceedings but ultimately did not address the civil access issues that have persisted since Procter & Gamble.

The first and third proposals were a response to the confusion over what constituted "matters occurring."<sup>334</sup> The two proposals

324. Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, 91 F.R.D. 289 (1981).

325. *Id.* at 301.

326. *Id.* at 302.

327. *Id.* at 302-03.

328. *Id.* at 303.

329. *Id.* at 303-04.

330. *Id.* at 304.

331. *Id.* at 304-05.

332. *Id.* at 305.

333. *In re Proposed Amendments to Federal Rules of Criminal Procedure*, 97 F.R.D. 245 (1983).

334. Preliminary Draft, 91 F.R.D. at 305-06.

were withdrawn because, according to the Advisory Committee chairman, they were unnecessary.<sup>335</sup> An examination of the next ten years of reported cases leads to the opposite conclusion, however.<sup>336</sup> Clarifying the definition in the rule would have extended the shroud of secrecy over all the material subpoenaed by a grand jury and would have avoided litigation on the technicalities of how a grand jury uses books, papers, and documents. Instead, litigation over “matters occurring” proliferated, and the resulting decisions have not been uniform.<sup>337</sup>

The second proposal, which would have explicitly limited disclosure to government attorneys “to enforce federal criminal law,” was withdrawn by the Advisory Committee because the Supreme Court granted certiorari<sup>338</sup> to decide whether the automatic disclosure exception for “attorneys for the government” extended to government civil attorneys.

## IX. SELLS AND BAGGOT

In 1983, the United States Supreme Court finally and directly addressed the government’s civil use of grand jury materials in *United States v. Sells Engineering, Inc.*<sup>339</sup> and *United States v. Baggot*.<sup>340</sup> *Sells* dealt with the Department of Justice’s use of grand jury material for civil litigation, while *Baggot* addressed the issue of federal administrative agency access.<sup>341</sup> Both cases, perhaps influenced by the proposed 1982 amendment, and certainly influenced by concerns of fundamental fairness addressed

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335. Proposed Amendments, 97 F.R.D. at 260 (citing Letter of Transmittal from Walter E. Hoffman, Chairman of the Advisory Committee on Criminal Rules).

336. For in depth analysis of “matters occurring” case law, see Andrea M. Nervi, Comment, FRCrP 6(e) and the Disclosure of Documents Reviewed by a Grand Jury, 57 U. CHI. L. REV. 221 (1990).

337. See *id.* (proposing—not unlike 1981 Preliminary Draft proposal—a principled test of “matters occurring,” framed without reference to grand jury and limited to those documents created independently of any grand jury investigation). While this Article does not focus on the problematic issue of what constitutes a “matter occurring,” the author notes that the procedure proposed in *Maryland & Virginia Milk Producers Ass’n* would be an equitable means of determining whether documents could be disclosed. See *supra* notes 204-09 and accompanying text; see also *infra* discussion part XIII. Use of such a procedure would eliminate the resort to fictional definitions of “matters occurring” to allow disclosure of documents that would have been readily available through civil discovery.

338. *United States v. Sells Eng’g, Inc.*, 456 U.S. 960 (1982).

339. 463 U.S. 418 (1983).

340. 463 U.S. 476 (1983).

341. A third case was decided with *Baggot* and *Sells*. This case, *Illinois v. Abbott & Associates*, 460 U.S. 557 (1983), dealt with a state’s access to federal grand jury materials for use in prosecuting state criminal laws. The Supreme Court determined that a state, just like any other private litigant, must meet the “particularized need” standard first set forth in *Procter & Gamble*. *Id.* at 567.

in lower court opinions, tightened the restrictions on civil use of grand jury material.

A. *United States v. Sells Engineering, Inc.*

In *Sells*, the Supreme Court revisited the issues presented in *Procter & Gamble*, which Congress had consistently failed to clarify. The *Sells* Court definitively determined the standards by which Department of Justice attorneys could gain access to grand jury materials for use in civil actions.

*Sells*, like *Procter & Gamble*, involved parallel criminal and civil investigations<sup>342</sup> and consequently raised the issue of misuse of the grand jury process.<sup>343</sup> The case began as an IRS administrative audit of *Sells Engineering, Inc.* and related parties.<sup>344</sup> The IRS, seeking the production of records in the investigation, issued administrative summonses, many of which the affected parties challenged.<sup>345</sup> The federal district court ordered enforcement of all of the summonses except those pertaining to one partnership.<sup>346</sup> Enforcement of the summonses was stayed pending an appeal of the decision.<sup>347</sup> During the wait, the IRS referred the case to the Department of Justice for investigation into possible criminal charges of fraud and income tax evasion.<sup>348</sup> The Justice Department convened a grand jury, which issued subpoenas<sup>349</sup> that requested essentially the same materials sought by the IRS summonses.<sup>350</sup> The documents were produced for the grand jury and, consequently, the IRS did not pursue enforcement of the administrative summonses.<sup>351</sup>

As a result of its investigation, the grand jury indicted *Sells Engineering* and two of its officers, Peter Sells and Fred Witte,

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342. *Sells*, 463 U.S. at 421.

343. *Id.* at 422.

344. Respondent's Brief at 1. While the case involved *Sells Engineering* and several related business entities, the challenge upon which the decision was based came from *Sells Engineering, Inc.*

345. *Id.* at 2.

346. *Id.*

347. *Id.*

348. *Id.* The IRS requested the Department of Justice to begin an open-ended grand jury investigation. *Id.* According to the IRS manual in effect at that time, an open-ended grand jury proceeding referred to an exploratory investigation under the powers of the grand jury which could be sought by the IRS agents if the administrative proceedings were stymied. *Id.* at 2 n.4.

349. Whether the grand jury had any control over these subpoenas at all was a matter of dispute. Attorneys for *Sells* argue that some grand jury subpoenas were issued at a time when no grand jury was even in session. See *id.* at 28.

350. See *id.* at 7 n.7.

351. See *id.* at 3.

for conspiracy to defraud the government and for tax evasion. The defendants filed motions to dismiss the indictments, claiming abuse of the grand jury's function.<sup>352</sup> However, late in the evening of the day before the motion was scheduled to be heard, the parties reached agreement on a favorable plea bargain (particularly as to sentencing), and the defendants entered guilty pleas.<sup>353</sup> The defendants also withdrew their complaints of grand jury misuse.<sup>354</sup>

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352. See *id.* at 11. In summarizing the allegations of abuse in the Respondent's Brief, counsel for Sells wrote:

It was the IRS in this case that initiated the open-ended grand jury investigation after being "stymied" in the courts in its administrative proceedings. . . . In this case the same IRS agents participated in the grand jury investigation as were conducting the prior administrative investigation. . . . In this case no 6(e) orders were obtained for the assistance of [the IRS agents] though they were enlisted to assist the grand jury over one year before Rule 6(e) was amended. . . . The very first grand jury subpoenas issued were for the very same records that the IRS had been judicially "stymied" in obtaining under its administrative summons. . . . In this case virtually all of the witnesses subpoenaed were diverted to 'voluntary' interrogation by a Special Agent of the IRS and did not testify before the grand jury. . . . [S]everal of these same witnesses were intimidated by use of the subpoena power into 'voluntarily' waiving their fifth amendment rights in testifying before a special agent, rather than the grand jury, and in signing affidavits prepared by the special agent in a form acceptable to him. . . . In this case subpoenas appear to have been issued when no grand jury was assembled to investigate this case and for the purpose of diverting witnesses before a Special Agent of the IRS. . . . No 6(e) orders were obtained for the use of private stenographers to take down the "voluntary" interrogations by IRS [agents] conducted under grand jury subpoena. . . . The IRS made the real decision to prosecute at its District and Regional offices based on its own review of the evidence. . . . The only testimony presented to the grand jury to obtain the indictment was the hearsay testimony of government agents summarizing their view of the evidence and of the testimony of all the "witnesses." . . . The grand jury had no real evaluation of the evidence and facts but were essentially directed by the predetermination of the IRS and its selective presentation. . . . As a plea bargain condition, defendants were required to execute a very detailed and itemized Agreed Statement of Facts scheduling and explaining every false deduction from which their exact tax liability could be calculated—prepared by the IRS directly from grand jury materials without any 6(e) order. . .

*Id.* at 28-29.

353. See *id.* at 10 n.20:

The Disposition Agreement was negotiated and entered into in a late night negotiation session directly with U.S. Attorney . . . and finalized only hours before the calendared hearing on respondents' comprehensive grand jury abuse motion seeking among other things, an evidentiary proceeding on the abuse issues. . . . It was the concern as to what would be developed in an evidentiary hearing that respondents believe persuaded the U.S. Attorneys office to enter into the late night Disposition Agreement, including an agreed limitation on sentencing.

354. *Id.* at 11: "On Friday, December 15, 1978, respondents Sells and Witte entered guilty pleas to one count of conspiracy tax fraud. This mooted the grand jury abuse issue to be heard that day in the criminal case resulting in the motion being withdrawn and not argued in that case as originally calendared."

After the pleas were entered, the government moved for disclosure of the grand jury materials to attorneys in the civil fraud division of the Department of Justice for use in a possible civil suit. The district court granted this request on the grounds that the civil division attorneys had automatic access as attorneys for the government under Rule 6(e)(A)(i). On appeal, the Ninth Circuit reversed, holding that civil attorneys only could gain access by meeting the standard originally set forth in *Procter & Gamble*.<sup>355</sup> The Supreme Court granted certiorari.<sup>356</sup>

Writing for the Court, Justice Brennan focused on the general reasons for grand jury secrecy, the limited policy reasons for granting government attorneys access to grand jury materials in criminal cases, and the legislative history of Federal Rule of Criminal Procedure Rule 6(e).<sup>357</sup> Analyzing the historical perspective behind grand jury secrecy,<sup>358</sup> the Court revived the forgotten notion that the secret grand jury process was created to protect the individual from unfair and unfounded accusations.<sup>359</sup> Justice Brennan also recognized the grand jury's broad investigatory powers (without which it would be unable to decide whether to indict<sup>360</sup>) as well as its need for secrecy to gather the information necessary to determine whether probable cause existed to indict.<sup>361</sup>

The majority then analyzed the legislative history of Rule 6(e) and concluded that the Justice Department's own representative,<sup>362</sup> as well as the Advisory Committee's notes,<sup>363</sup> demon-

355. *United States v. Sells Eng'g, Inc.*, 642 F.2d 1184, 1186 (9th Cir. 1981).

356. *United States v. Sells Eng'g, Inc.*, 456 U.S. 960 (1982).

357. *United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 426 (1983).

358. *Id.* at 424.

359. *Id.* ("Grand jury secrecy, then, is 'as important for the protection of the innocent as for the pursuit of the guilty.'"). The Court viewed the historical purpose of the grand jury as "[a] dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions." *Id.* at 423.

360. *Id.* at 423-24:

These broad powers are necessary to permit the grand jury to carry out both parts of its dual function. Without thorough and effective investigation, the grand jury would be unable either to ferret out crimes deserving of prosecution, or to screen out charges not warranting prosecution.

361. "We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." *Id.* at 424.

362. Admitting that it would be a bad idea to allow agency personnel to have automatic use of grand jury materials for civil purposes, Acting Deputy Attorney General Richard Thornburgh had stated:

The cleanest example I can think of where a 6(e) order is clearly required is where a criminal fraud investigation before a grand jury fails to produce enough legally admissible evidence to prove beyond a reasonable doubt that criminal fraud ensued. It would be the practice of the Department at that time to



strated that Congress had never intended disclosure for civil purposes and that Congress would have to make clear its intention to bypass the important rule of secrecy.<sup>364</sup>

Examining the limited policy reasons for granting government attorneys access to grand jury materials, Justice Brennan questioned the wisdom of giving access at all, even to prosecutors.<sup>365</sup> However, he recognized that a modern grand jury would be severely limited without the assistance of an attorney for the government to present evidence and explain the law; moreover, the prosecutor would have difficulty determining whether to prosecute a case if not informed of the evidence going before the grand jury.<sup>366</sup> Nevertheless, Justice Brennan saw no similar policy reasons for extending disclosure to government civil attorneys.<sup>367</sup> In fact, he noted several reasons to preclude civil attorneys from gaining access to grand jury materials.

seek a 6(e) order from the court in order that evidence could be made available for whatever civil consequences might ensue.

Id. at 439 (emphasis added). Ironically, although Sells was precisely the type of case to which Thornburgh had referred, the Department of Justice was now arguing for automatic access.

363. Citing the Advisory Committee's notes to the 1977 Amendment, the Court stated:

This paragraph reflects the distinction the Senate Committee had in mind: "Federal prosecutors" are given a free hand concerning use of grand jury materials, at least pursuant to their "duties relating to criminal law enforcement"; but disclosure of "grand jury-developed evidence for civil law enforcement purposes" requires a (c)(i) court order.

Id. at 441-42.

364. Id. at 425.

365. Id. at 428 ("Given the strong historic policy of preserving grand jury secrecy, one might wonder why Government attorneys are given any automatic access at all.").

366. Id. at 430:

[A] modern grand jury would be much less effective without the assistance of the prosecutor's office and the investigative resources it commands. The prosecutor ordinarily brings matters to the attention of the grand jury and gathers the evidence required for the jury's consideration. Although the grand jury may itself decide to investigate a matter or to seek certain evidence, it depends largely on the prosecutor's office to secure the evidence or witness it requires. The prosecutor also advises the lay jury on the applicable law. The prosecutor in turn needs to know what transpires before the grand jury in order to perform his own duty properly. If he considers that the law and the admissible evidence will not support a conviction, he can be expected to advise the grand jury not to indict. He must also examine indictments, and the basis for their issuance, to determine whether it is in the interests of justice to proceed with prosecution.

367. Id. at 431:

None of these considerations, however, provides any support for breaching grand jury secrecy in favor of government attorneys other than prosecutors—either by allowing them into the grand jury room, or by granting them uncontrolled access to grand jury materials. An attorney with only civil duties lacks both the prosecutor's special role in supporting the grand jury, and the prosecutor's own crucial need to know what occurs before the grand jury.

First, disclosure increased the number of people having information and thus inherently increased the risk of illegal leaks.<sup>368</sup> Second, disclosure posed a threat to the functioning of the grand jury by raising the possibility an attorney would use a witness's statements against the witness in a later civil forum.<sup>369</sup> Third, disclosure threatened the integrity of the grand jury itself: if prosecutors knew that grand jury information might be helpful to their civil colleagues, they would be tempted to elicit evidence for that purpose.<sup>370</sup> Such misconduct not only would subvert the grand jury process, but also would be difficult to prove if it did occur.<sup>371</sup> Fourth, Justice Brennan found that use of grand jury material for civil purposes would subvert the civil discovery process as well.<sup>372</sup> Discussing this fourth reason, he explained:

To allow these agencies to circumvent their usual methods of discovery would not only subvert the limitations and procedural requirements built into those methods, but would grant to the Government a virtual *ex parte* form of discovery, from which its civil litigation opponents are excluded unless they make a strong showing of particularized need.<sup>373</sup>

Implicit in this analysis is Justice Brennan's recognition of the fundamental fairness issues presented by the discovery proceedings attacked in *Sells*. Thus, the Court determined that use of the grand jury process to aid agency civil lawsuits must not undermine grand jury secrecy.

Observing that the primary interest of the government civil attorney was to save time and expense through access to the grand jury investigation,<sup>374</sup> Justice Brennan stated that "[w]e have consistently rejected the argument that such savings can justify a

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368. *Id.* at 432.

369. *Id.*

370. *Id.*:

If prosecutors in a given case knew their colleagues would be free to use the materials generated by the grand jury for a civil case, they might be tempted to manipulate the grand jury's powerful investigative tools to root out additional evidence useful in the civil suit, or even to start or continue a grand jury inquiry where no criminal prosecution seemed likely.

371. *Id.* at 432; see also *supra* text accompanying notes 217-60.

372. *Sells*, 463 U.S. at 433.

373. *Id.* at 433-34.

374. *Id.* at 431:

Of course, it would be of substantial help to a Justice Department civil attorney if he had free access to a storehouse of evidence compiled by a grand jury; but that is of a different order from the prosecutor's need for access. The civil lawyer's need is ordinarily nothing more than a matter of saving time and expense.

breach of grand jury secrecy.”<sup>375</sup> Consequently, the Court held that government civil attorneys must obtain a court order to obtain disclosure of grand jury materials for civil use.<sup>376</sup>

The Sells Court based much of its decision on its apparent acceptance of the Ninth Circuit’s premise that automatic disclosure encouraged abuse of the grand jury process.<sup>377</sup> Interestingly, the Department of Justice argued that denial of automatic disclosure to civil attorneys exacerbated the potential for grand jury abuse because Rule 6(e) did not preclude assigning responsibility for both criminal and civil liability to a single attorney.<sup>378</sup> Strict enforcement against disclosure, it contended, would therefore “foster grand jury abuse by encouraging such dual assignments.”<sup>379</sup> The Supreme Court left that argument unanswered.<sup>380</sup>

After concluding that a court order was necessary for disclosure, the Court then addressed the standard of need the government had to meet. Finding that the government attorneys must show the same particularized compelling need as private litigants,<sup>381</sup> the Court indicated that the balancing test could take

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375. *Id.*

376. *Id.* at 442. Although providing a prophylactic rule to eliminate grand jury abuse, Sells placed a heavy burden upon the government in investigating and initiating civil suits. Duplicating grand jury investigations is extremely costly and time consuming. The Sells rule seems to insulate grand jury materials that would have been discoverable through use of government civil investigative devices simply because the information went before the grand jury. The procedure presented in *Maryland & Virginia Milk Producers Ass’n*, which, like Sells, does not allow automatic disclosure, balances the government’s need for the information against the need to guard against grand jury abuse. See *supra* notes 204-09 and accompanying text; see also discussion *infra* part XIII.

377. *In re Grand Jury Investigation No. 78-184*, 642 F.2d 1184, 1190 (9th Cir. 1981) (“To grant the government an absolute right of access to grand jury materials for civil use might irresistibly encourage use of the grand jury as a tool of civil discovery. It would also severely limit court review of any such abuse.”).

378. See Petition for Certiorari at 13:

The rule clearly permits attorneys who become privy to grand jury material by assisting a grand jury employ that material for civil litigation purposes, and it does not prohibit the Attorney General from assigning criminal and civil litigation responsibilities arising from a common nucleus of operative facts to a single attorney. Indeed, if it were true, as the court of appeals apparently supposed, that the temptation to abuse the grand jury process is irresistible, and that there are no other adequate safeguards against such abuse, one could only conclude that the court of appeals’ interpretation of Rule 6(e)(3) would foster grand jury abuse encouraging such dual assignments.

379. See *id.* at 17-18 n.11. Similarly, Associate Deputy Attorney General Jay Stephens, testifying before the Senate Judiciary Committee on a bill that would have permitted congressional access to grand jury information on a showing of “substantial need,” emphasized that congressional oversight of grand jury investigations would compromise the Justice Department’s conduct of a criminal investigation by injecting congressional influence into the proceedings. Senate Committee Urged Not to Give Congress Access to Grand Jury Data, *DAILY REP. FOR EXECUTIVES*, Nov. 25, 1985, at A5.

380. *Sells*, 463 U.S. at 431 n.15.

381. *Id.* at 444.

into consideration the “public interest” in disclosure to the government, as well as any alternative discovery tools available to obtain such information.<sup>382</sup> Thus, Sells, relying upon the importance of grand jury secrecy, foreclosed automatic disclosure of grand jury materials to government attorneys for use in civil proceedings. The Sells balancing test, which takes alternative discovery devices into consideration, comes close to the test this author advocates;<sup>383</sup> unlike the method proposed in *Maryland & Virginia Milk Producers Ass’n*, however, the Sells test fails to set forth a workable method for weighing these interests. Further, one primary distinction between Sells and the proposed test is that *Maryland & Virginia Milk Producers Ass’n* precludes disclosure for civil purposes of information that government attorneys could not obtain through the government’s civil investigative devices. This would ensure that evidence obtainable through use of the grand jury’s extraordinarily broad powers but not through civil discovery—such as immunized, self-incriminating testimony—would never form the basis of a civil lawsuit.

### B. *United States v. Baggot*

Having decided in Sells that disclosure to the Civil Division of the Department of Justice required a court order, the Supreme Court turned to interpreting Rule 6(e) as it applied to federal administrative agencies.<sup>384</sup> *United States v. Baggot*<sup>385</sup> involved a large-scale investigation into possible criminal violations of the Commodities Exchange Act and the Internal Revenue Code.<sup>386</sup> The investigation spanned two grand jury terms and targeted James Baggot.<sup>387</sup> As a result of plea negotiations, Baggot was not indicted but pled guilty to two misdemeanor violations of the Commodities Exchange Act.<sup>388</sup> Part of the plea bargain required Baggot to read to the grand jury a government-prepared state-

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382. *Id.* at 445.

383. See *supra* notes 204-09 and accompanying text; see also discussion *infra* part XIII.

384. Rule 6(e)(3)(C)(i) provides:

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding.

FED. R. CRIM. P. 6(e)(3)(C)(i).

385. 463 U.S. 476 (1983).

386. Petitioner’s Brief at 3.

387. Respondent’s Brief Opposing Petition for Certiorari at 2.

388. Petitioner’s Brief at 4.

ment based upon his confession during the plea negotiations.<sup>389</sup> The Department of Justice then filed a motion for disclosure of the grand jury transcripts to the Internal Revenue Service for use in a tax audit against Baggot.<sup>390</sup>

The government contended that the historical precedent of disclosing grand jury material to the IRS justified its continuation, arguing that the 1977 legislative history showed congressional awareness of the practice.<sup>391</sup> The Baggot Court faced the same issues that arose in *Doe v. Rosenberry*.<sup>392</sup> The threshold question was thus “whether the IRS’s civil tax audit is ‘preliminar[y] to or in connection with a judicial proceeding’ under (C)(i).”<sup>393</sup> The Court concluded that it was not.<sup>394</sup>

Writing again for the majority in this long-awaited and definitive ruling, Justice Brennan stated that the language of Rule 6(e)(3)(C)(i) “contemplate[d] only uses related fairly directly to some identifiable litigation, pending or anticipated,”<sup>395</sup> stressing that the focus of this exception was on the actual use to be made of the requested materials.<sup>396</sup> The Court found that this language reflected “a judgment that not every beneficial purpose, or even every valid governmental purpose, is an appropriate reason for breaching grand jury secrecy.”<sup>397</sup> The Court also noted that because the IRS’s tax assessments were self-executing, no necessity existed for a judicial proceeding.<sup>398</sup> Allowing disclosure in this circumstance, where the primary use of the grand jury materials was for an extrajudicial proceeding,<sup>399</sup> would have abrogated the rule.<sup>400</sup> While the Court’s decision left unanswered many ques-

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389. *Id.*

390. “The substance of Baggot’s crime was a scheme to use sham commodities transactions to create paper losses, which he deducted on his tax returns. A fraction of the ‘losses’ was then recovered in cash kickbacks which were not reported as income.” Baggot, 463 U.S. at 477.

391. Supreme Court: Grand Jury Disclosure to IRS Debated, *DAILY REP. FOR EXECUTIVES*, Mar. 4, 1983, at G6.

392. 255 F.2d 118 (2d Cir. 1958). See also *supra* text accompanying notes 273-76.

393. Baggot, 463 U.S. at 478.

394. *Id.* at 479.

395. *Id.* at 480.

396. *Id.*

397. *Id.*

398. *Id.* at 481.

399. *Id.*

400. *Id.* at 479-82.

The provision in (c)(i) that disclosure may be made ‘preliminarily to or in connection with a judicial proceeding’ is, on its face, an affirmative limitation on the availability of court-ordered disclosure of grand jury materials. . . . Where an agency’s action does not require resort to litigation to accomplish the agency’s present goal, the action is not preliminary to a judicial proceeding for purposes of (C)(i).

tions regarding administrative agency access,<sup>401</sup> and apparently was confined to consideration of IRS procedures, it effectively closed the door on agency use of grand jury materials for purely administrative purposes.<sup>402</sup>

As a result of *Baggot and Sells*, government attorneys who sought access to grand jury materials for civil or administrative use clearly would have to obtain them through a court order. Although these cases provided a prophylactic bright-line rule that protected the individual against government abuse, they did so at the expense of government efficiency. Controversy over these rulings arose immediately.

#### X. 1985 AMENDMENT TO RULE 6(E)

In 1985, the Supreme Court again strengthened the secrecy language of Rule 6(e) by requiring attorneys for the government to certify to the supervising court that they had expressly advised persons obtaining automatic access to grand jury information under subsection (A)(ii) of their obligation to keep grand jury information secret.<sup>403</sup> In addition to this amendment, Rule 6(e) was at the same time expanded to permit disclosure of information to enhance state criminal prosecutions.<sup>404</sup> This expansion of Rule 6(e) to aid state prosecutions marked the beginning of an executive branch effort to dilute the protective role of the grand jury.

The Department of Justice acknowledged the limitations placed upon their civil investigatory process by *Sells and Baggot*.

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Id. at 482.

401. Id. at 482-83 n.6. The Court did not decide whether the rule would be different for agencies that did have to resort to a court for enforcement of their rules: "We decline in this case to address how firm the agency's decision to litigate must be before its investigation can be characterized as 'preliminar[y] to a judicial proceeding,' or whether it can ever be so regarded before the conclusion of a formal preliminary administrative investigation." Id.

402. Id. at 483 (comparing court-approved disclosure granted in *In re Grand Jury Proceedings* (Miller Brewing Co.), 687 F.2d 1079 (7th Cir. 1982), where court recourse was clearly anticipated, with case at bar and stating that "[i]n such a case, the Government's primary purpose is plainly to use the materials sought to defend the Tax Court litigation, rather than to conduct the administrative inquiry that preceded it").

403. Supreme Court of the United States, Federal Rules of Criminal Procedure, 105 F.R.D. 179, 180-81 (1985).

404. Id. A new paragraph was added to Rule 6(e) allowing access "when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law." FED. R. CRIM. P. 6(e)(3)(C)(iv). This amendment overcame the particularized need standard that the Supreme Court imposed upon states seeking to obtain federal grand jury information in *Illinois v. Abbott & Associates*, 460 U.S. 557 (1983). While the amendment did expand the disclosure exceptions, disclosure under this section is only allowed for state criminal law purposes.

The current Department of Justice Manual, citing Sells, clearly instructs that “[d]isclosure to government attorneys and their assistants for use in a civil suit is permissible only with a court order under Rule 6(e)(3)(C)(i).”<sup>405</sup> The Manual further concedes that “it is clear that Rule 6(e) does not authorize disclosure to attorneys for other federal government agencies.”<sup>406</sup> The Manual outlines the procedure and standard by which a federal agency may obtain grand jury materials, explaining that “[a] failure to demonstrate sufficient need can result in the denial of a request for otherwise permissible disclosure.”<sup>407</sup> While the Department of Justice outwardly indicated its reluctant compliance with the mandates of Sells and Baggot, the Manual also clearly enunciates the Department’s “position that the particularized need requirement is inapplicable when grand jury materials are sought for federal law enforcement purposes.”<sup>408</sup>

Notwithstanding the certification and state enhancement amendments, a congressional stalemate developed between members who favored strengthening the enforcement/investigative role of the grand jury and those who favored strengthening its protective/investigative role. This clash was epitomized by two diametrically opposed grand jury measures introduced in 1985.

From May 1985 until August 1986, hearings were held in the House of Representatives on Representative John Conyer’s Model Grand Jury Act.<sup>409</sup> The purpose of the proposed Act was to inject comprehensive due process safeguards into grand jury proceedings and insure their protective role.<sup>410</sup> The proposal died in

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405. See U.S. DEP’T OF JUSTICE MANUAL § 9-11.250 (1992 Supp.).

406. *Id.*

407. *Id.* at § 9-11.252.

408. *Id.*

409. H.R. 1407, 99th Cong., 1st Sess. (1985). Representative Conyers introduced H.R. 1407 on March 8, 1985. The Bill was referred to committee on May 8, 1985. Hearings were held. The last mention of the bill was when it was scheduled for markup on August 7, 1986. The bill then vanished from the Congressional Record.

410. The proposal would have (1) authorized the presence of a witness’s attorney in the grand jury room; (2) provided transactional immunity to a witness who is compelled to give self-incriminating testimony; (3) required that the target of an investigation be permitted to testify before the grand jury if the target wished to do so; (4) precluded the use of evidence seized in violation of the constitutional rights of the target; and (5) required that the government present exculpatory evidence to the grand jury. *Id.* In proposing the bill, Representative Conyers stated:

The time is long overdue for Congress to bring the Federal grand jury out of the dark ages and into the 20th century with realistic reform. If enacted, my legislation will return the Federal grand jury to its historical role as a people’s watchdog against overzealous prosecutors and governmental corruption.

131 CONG. REC. 4564 (1985).

committee<sup>411</sup> and was the last major effort by Congress at federal grand jury reform.<sup>412</sup>

The first major legislative effort to undermine the protective role of Rule 6(e) began soon thereafter. On September 18, 1985, Representative George Gekas introduced House Bill 3340, the Grand Jury Disclosure Amendments Act.<sup>413</sup> Two days later, Senator Strom Thurmond introduced virtually the same bill<sup>414</sup> as part of the Reagan Administration's legislative initiative aimed at

411. See *supra* note 410.

412. Grand jury reform bills continue to be offered in the Congress, but, since 1986, they have been much more narrowly drawn. See, e.g., S. 284, 99th Cong., 1st Sess. (1985) (allowing witness's counsel into grand jury proceedings); H.R. 5367, 99th Cong., 2nd Sess. (1986) (requiring dismissal of indictment following prosecutorial abuse).

413. H.R. 3340, 99th Cong., 1st Sess. (1985); see also 131 CONG. REC. 11,875 (1985).

414. S. 1676, 99th Cong., 1st Sess. (1985) [hereinafter Disclosure Amendments Act]. Senator Thurmond's amendment to Rule 6(e) was as follows:

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) any attorney for the government for use in the performance of an attorney for the government's duty to enforce federal criminal or civil law; and

(ii) such government personnel (including personnel of a State or subdivision of a State) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting an attorney for the government in the performance of such attorney's duty to enforce federal criminal or civil law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule.

(C) Disclosure otherwise prohibited under this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court, upon a showing of particularized need, preliminarily to or in connection with a judicial proceeding;

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury;

(iii) when the disclosure is made by an attorney for the government to another federal grand jury;

(iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of State criminal law, to an appropriate official of a State of [sic] subdivision of a State for the purpose of enforcing such law; or

(v) at the request of an attorney for the government, and when so permitted by a court upon a showing of substantial need, to personnel of any department or agency of the United States—

(I) when such personnel are deemed necessary to provide assistance to an attorney for the Government in the performance of such attorney's duty to enforce Federal civil law, or

(II) for use in relation to any matter within the jurisdiction of such department or agency.



fraud in government procurement.<sup>415</sup> The Department of Justice initiated the Grand Jury Disclosure Amendments Act<sup>416</sup> to overcome the “impediments” created by Sells and Baggot.<sup>417</sup> The proposed legislation also purported to answer the question left open in Sells by permitting the same federal prosecutor to use grand jury materials in a companion civil case.<sup>418</sup> During the congressional debate over these proposed amendments the Supreme Court granted certiorari in *United States v. John Doe, Inc.*<sup>419</sup>

#### XI. UNITED STATES V. JOHN DOE, INC.

*United States v. John Doe, Inc.*<sup>420</sup> was a case in which the Department of Justice convened a grand jury as part of a criminal antitrust investigation against several American corporations for price-fixing in tallow sales to foreign countries.<sup>421</sup> Although the targeted corporation challenged jurisdiction under the Sherman Act,<sup>422</sup> the grand jury investigation continued for two years, after which time the Department of Justice “tentatively concluded”

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415. 131 CONG. REC. 11,875 (1985) (statement of Sen. Thurmond).

416. “The Department of Justice and the Attorney General are to be commended for initiating this legislative effort.” *Id.*

Little nuances in the section-by-section analysis also indicate that the Department of Justice drafted the legislation. For example, note 1 of the section-by-section analysis reads: “We have included in our proposed statute the amendments to Rule 6(d) . . . .” *Id.* at 11,879. Further on, the analysis states: “This provision will provide the only available method of disclosure for private parties. It can also be used by government agencies when the Justice Department exercises its discretion. . . . [G]overnment agencies with independent litigating authority would thus be able, over our objection, to gain access to grand jury material . . . .” *Id.* at 11,875 (Bills and Brief Accompanying Materials appended to Sen. Thurmond’s remarks).

417. [T]his proposal contains amendments to Rule 6(e) designed to overcome the impediments caused by Sells and Baggot to the government’s ability to pursue important non-criminal remedies.

. . . .

. . . [T]o whatever extent Sells precludes or minimizes a court’s consideration of the government’s saving time or increasing efficiency in its disclosure determinations, Sells no longer applies. . . .

This amendment would overrule Baggot . . . .

*Id.* at 11,875.

418. *Id.* (“The amendment also answers the ‘same attorney’ question left undecided in Sells by allowing the criminal prosecutor to use grand jury materials in a companion civil case.”); see also Sells, 463 U.S. at 431 n.15.

419. 476 U.S. 1140 (1986).

420. 481 U.S. 102 (1987).

421. *Doe*, 481 U.S. at 104.

422. Although no sales were being made in the United States, the Justice Department pursued an investigation into possible violations of the Sherman Act. Respondent’s Brief at 1 (“The theory of the grand jury investigation was that Sherman Act jurisdiction existed for sales of drummed tallow, even though that commodity is not sold within the United States, because foreign countries sometimes use some funds appropriated for their use by Congress to pay for the commodity.”).

that the companies had violated the Sherman Act but that it would not seek indictments.<sup>423</sup> After the grand jury's dismissal, the Department of Justice immediately began civil proceedings with the same attorneys who had conducted the criminal investigation.<sup>424</sup> The attorneys issued to the companies Civil Investigative Demands that were "essentially copies of earlier grand jury subpoenas."<sup>425</sup> Two of the companies refused to comply with the Civil Investigative Demands.<sup>426</sup> As a result of the civil investigation, the Antitrust Division of the Justice Department concluded that the companies had violated the Sherman Act and possibly the False Claims Act as well.<sup>427</sup> The Antitrust Division attorneys then requested and received a Rule 6(e) order allowing disclosure of grand jury materials for consultation with the Justice Department's Civil Division attorneys.<sup>428</sup> The "John Doe" corporation moved to vacate the order and requested that the government be enjoined from using grand jury materials in the civil suit.<sup>429</sup> The government attorneys admitted using grand jury materials to prepare for the civil action.<sup>430</sup> The Second Circuit held that the Justice Department's Criminal Division attorneys could not continue to use grand jury materials in the subsequent civil proceeding.<sup>431</sup>

The Supreme Court granted certiorari to answer the question left open in *Sells*: whether government attorneys who conducted a criminal investigation could continue to use grand jury material for preparation of a civil suit.<sup>432</sup> The second issue on appeal was whether disclosure could be made to the Justice Department's Civil Division attorney's for consultation on the False Claims Act suit.<sup>433</sup> Consequently, the case also presented an opportunity for

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423. *Id.* at 4.

424. *Doe*, 481 U.S. at 105.

425. "The Civil Investigative Demands were accompanied by a letter advising each recipient that the CID could be complied with by certifying that all documents sought had been produced to the grand jury." Respondent's Brief at 2.

426. *Doe*, 481 U.S. at 105.

427. *Id.*

428. *Id.* at 105-06.

429. *Id.* at 106.

430. "[T]he Antitrust Division conceded to the District Court that at least 90 percent of the material on which the civil case is based was grand jury material." Respondent's Brief at 3 (citation omitted).

431. *In re Grand Jury Investigation*, 774 F.2d 34, 42 (2d Cir. 1985), rev'd, 481 U.S. 102 (1987).

432. *Doe*, 481 U.S. at 104.

433. *Id.* "Although the Antitrust Division is authorized to prosecute False Claims Act suits when the conduct in question also violates the antitrust laws, the primary responsibility for the enforcement of that statute rests with the Civil Division of the Department of Justice." Petitioner's Brief at 5.

the Court to apply the “particularized need” test to a request by the government for disclosure.<sup>434</sup>

Addressing the first issue, the Court focused on “the plain meaning” of the term “disclosure” under Rule 6(e)<sup>435</sup> and determined that no “disclosure” occurred where an attorney, who legitimately obtained information from a grand jury, reviewed that information in preparing a civil suit.<sup>436</sup> However, the Court specifically narrowed this ruling to allow only “refamiliariz[ation]” of grand jury material by the attorney who conducted the grand jury proceeding.<sup>437</sup> The Court forbade any use of the materials in the pleadings or proceeding that might disclose the information to any other parties.<sup>438</sup> Although its holding on this issue was narrowly drawn to allow only refamiliarization, the Court, in taking this “plain meaning” approach, ignored the Sells analysis of potential grand jury abuse and concerns of fundamental fairness of process.<sup>439</sup>

Turning to the second issue, and confirming that the government was subject to the “particularized need” test as first set forth in *Procter & Gamble*,<sup>440</sup> the Court concluded that the test could be more easily met by the government than a private party.<sup>441</sup> Balancing “the public benefits of the disclosure” against

434. *Doe*, 481 U.S. at 111; see also *supra* text accompanying notes 234-39.

435. Unlike our previous decisions in this area, which have primarily involved exceptions to the general rule [of secrecy], this case involves a more preliminary question: what constitutes disclosure?

....

Because we decide this case based on our reading of the Rule’s plain language, there is no need to address the parties’ arguments about the extent to which continued use threatens some of the values of grand jury privacy identified in our cases and catalogued in *Sells Engineering*.

*Doe*, 481 U.S. at 109 (citations omitted).

436. *Id.* at 108.

437. *Id.* at 111.

438. *Id.* at 110.

[I]t is important to emphasize that the issue before us is only whether an attorney who was involved in a grand jury investigation (and is therefore presumably familiar with the “matters occurring before the grand jury”) may later review that information in a manner that does not involve any further disclosure to others. Without addressing the very different matter of an attorney’s disclosing grand jury information to others, inadvertently or purposefully, in the course of a civil proceeding, we hold that Rule 6(e) does not require the attorney to obtain a court order before refamiliarizing himself or herself with the details of a grand jury investigation.

*Id.* at 111.

439. See *supra* text accompanying notes 357-73.

440. See *supra* text accompanying notes 237-39.

441. “[T]he concerns that underlie the policy of grand jury secrecy are implicated to a much lesser extent when the disclosure merely involves Government attorneys.” *Doe*, 481 U.S. at 112.

“the dangers created by the limited disclosure requested,”<sup>442</sup> the Court identified a public interest in the efficient, effective, and evenhanded enforcement of federal statutes, and focused primarily on avoidance of the costs and delays involved in duplicating grand jury investigations.<sup>443</sup> Balanced against those interests were the concerns of fair process expressed in *Sells*.<sup>444</sup> The Doe Court concluded that the benefit of avoiding the cost and delay of reproducing grand jury material outweighed the interests in grand jury secrecy, and granted disclosure to the Civil Division attorneys.<sup>445</sup>

The Doe Court’s reliance upon the law enforcement interest undercut the holding of *Sells*. It also partially achieved the Department of Justice’s goal of overcoming the protective “impediments” of *Sells*.<sup>446</sup> Justice Brennan, dissenting in *Doe*, criticized the majority by observing that the focus in *Sells* was on the “actual use” of grand jury information.<sup>447</sup> The Doe Court, focusing on who accessed the information rather than the purpose of such access, bypassed the very real concerns of grand jury abuse and fundamental fairness of process raised in *Sells*, as well as the Department of Justice’s own admission that the practice of granting dual assignments to one attorney would “foster” such

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442. *Doe*, 481 U.S. at 113. Cf. *United States v. Sells Eng’g, Inc.*, 463 U.S. 418, 443 (1983) (citation omitted) (“It is clear . . . that disclosure is appropriate only in those cases where the need for it outweighs the public interest in secrecy . . .”).

443. *Doe*, 481 U.S. at 113.

444. See *Sells*, 463 U.S. at 418.

445. *Doe*, 481 U.S. at 116. In its analysis, the Court reasoned that disclosure would not increase the risk of inadvertent or illegal leaks to others. *Id.* at 114. The Court found that the limited use sought by the Department of Justice did not pose the same threat as the widespread disclosure requested in *Sells*. *Id.* Such disclosure, the Court said, would also have little effect on a future witness’s willingness to testify fully and frankly because disclosure would not result in a witness’s testimony being used against him in a civil proceeding. *Id.* The Court then addressed the issue of manipulating the grand jury to gain information for a civil proceeding. *Id.* The Court concluded that this risk was not likely to occur where a court order must be obtained for disclosure, thereby giving the defendant an opportunity to raise the issue of abuse. *Id.* at 114-15. Finally, the Court considered whether the government would be able to subvert limitations on civil discovery rules by using disclosed grand jury materials. *Id.* at 115. The Court summarily concluded that this was “not seriously implicated when the Government simply wishes to use the material for consultation,” claiming that no per se rule had ever been established to deny disclosure even though the materials sought could be obtained through civil discovery procedures. *Id.* at 115-16.

446. See *supra* note 417 and accompanying text. Because the scope of the civil attorney’s use of grand jury materials under the *Doe* analysis is purely for “refamiliarization,” however, any use which might further disclose the information must still pass the test set forth in *Sells*.

447. “The crucial fact is that the use to which that attorney [who conducted the grand jury hearing] would put this information is in no way in aid of the grand jury.” *Doe*, 481 U.S. at 118 (Brennan, J., dissenting).

abuse.<sup>448</sup> Further, Doe ignored the Sells Court's concern that abuse, if it occurred, would be virtually impossible to show,<sup>449</sup> particularly where the defendant may be unable to obtain the grand jury transcripts necessary to prove abuse.<sup>450</sup> This unfairness demonstrates the reality that individuals caught in the Doe vice cannot adequately test the merits of the government's theory of liability. In fact, as early as *Procter & Gamble*, litigants recognized that civil enforcement interests might subvert the grand jury into a civil discovery tool.<sup>451</sup> Moreover, in *Sells*, Justice Brennan recognized that the exercise of the grand jury's extraordinary powers solely for civil investigations gave an unfair advantage to the government as a civil plaintiff<sup>452</sup> and left the defendant with an extremely difficult case to defend. Consequently, Doe gave the Department of Justice access to grand jury information through the backdoor in a manner clearly prohibited by the Court's prior ruling in *Sells*.

Perhaps more damaging to the Sells notion of fairness in the civil arena is the Doe Court's conclusion that cost and delay may be sufficient to prove "particularized need" for government access.<sup>453</sup> *Procter & Gamble* explicitly rejected this justification when a civil defendant sought access to prepare for trial against the government,<sup>454</sup> while Sells rejected cost and delay as a sole justification for government access.<sup>455</sup> As a result of this retreat from Sells, information that may be critical for trial preparation can be granted to the government but denied to the defendant. This imbalance goes directly against the purpose behind the Federal Rules of Civil Procedure<sup>456</sup> and the concept of fundamental fairness. At a time when civil sanctions can be as punishing, if not more so, than some criminal penalties,<sup>457</sup> one must question

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448. See *supra* note 379 and accompanying text.

449. See *Sells*, 463 U.S. at 432.

450. This poignant problem is exemplified by the *Procter & Gamble* parties' successful proof of grand jury abuse, which took nine years and twelve published opinions before the parties could define the issues for actual litigation. See *supra* notes 217-60 and accompanying text.

451. *Procter & Gamble*, 356 U.S. at 681-84.

452. See *Sells*, 463 U.S. at 433-34.

453. See *Doe*, 481 U.S. at 116.

454. *Procter & Gamble*, 356 U.S. at 682-83.

455. See *Sells*, 463 U.S. at 431.

456. See *Hickman v. Taylor*, 329 U.S. 495, 501 (1947).

457. See, e.g., *E.F. Hutton Mail and Wire Fraud Case*, Part 1 and 2: Hearings Before the Subcomm. on Crime of the House Comm. of the Judiciary, 99th Cong., 1st Sess. (1985). The grand jury investigation of the E.F. Hutton Company's illegal use of bank floats and interest-free loans was settled before trial with acceptance by Hutton of a maximum fine of \$2 million, restitution of lost opportunity profits totaling approximately \$264 million, and an unprecedented reimbursal of the Justice Department's costs of investigation. *Id.* at 1-2.

whether issues of cost and delay alone should outweigh the interests in a fair trial process.

This Article's proposed solution, the Maryland & Virginia Milk Producers Ass'n procedure, would take into consideration the cost and delay to the government of duplicating grand jury investigations for a subsequent civil action. Unlike the Doe decision, however, the procedure would require a showing by the government prior to disclosure that it could have obtained the materials through civil investigatory devices. Further, the defendant would receive notice of the potential disclosure, which would enable him or her to challenge the disclosure and raise the issue of grand jury abuse. This process eliminates duplication of investigations to the extent that civil attorneys could have obtained the material, while also eliminating disclosure of those materials that the civil attorneys could not have obtained. Unlike the Doe solution, the method provides no incentive to misuse the grand jury process because civil attorneys will gain no information they could not have gained through their own civil investigatory devices. Also, because materials sought from the grand jury become exposed to the defendant at the disclosure hearing and prior to filing of the civil complaint, the Maryland & Virginia Milk Producers Ass'n solution provides more incentive for the government to utilize civil investigatory tools. Further, because the materials are obtainable through civil discovery, the defendant will always gain reciprocal access to fully prepare for trial. The solution would eliminate the imbalance of discovery Doe and Procter & Gamble engendered.

## XII. GRAND JURY SECRECY AFTER DOE.

Congress never passed the Reagan Administration bills that were proposed in 1985 to overcome the "impediments" of Sells and Baggot.<sup>458</sup> They did not disappear, however, and surfaced again in a new form in the Senate version of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA).<sup>459</sup> Section 918 of the Senate version included language

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See also *United States v. Halper*, 490 U.S. 435, 448-49, 451 (1989) (finding that civil sanction is "punishment" for double jeopardy purposes if it is based on same offense as criminal prosecution and is imposed in separate proceeding).

458. See *supra* note 417 and accompanying text.

459. FIRREA was introduced as S. 413 by Senators Donald E. Riegle and Jake Garn on February 22, 1989. 135 CONG. REC. S1513 (daily ed. Feb. 22, 1989). Representative Henry R. Gonzales introduced the House version, H.R. 1278, on March 6, 1989. On April 13, 1989, Senator Riegle introduced S. 774 as original legislation that included the same § 918

virtually identical to that proposed in the Grand Jury Disclosure Amendments Act of 1985.<sup>460</sup> When the House and Senate joined in conference, however, they discarded section 918.<sup>461</sup> What survived was an amendment<sup>462</sup> authorizing automatic disclosure of grand jury information concerning a banking law violation to the Resolution Trust Corporation attorney responsible for investigating such violations.<sup>463</sup> The decision to grant automatic access is now in the discretion of the Department of Justice attorney handling the grand jury investigation.<sup>464</sup> Additionally, the FIRREA amendment reduced the Rule 6(e) standard for court-ordered disclosure of banking law violations from “particularized need” to “substantial need” in situations where the Department of Justice declines to grant automatic disclosure.<sup>465</sup> This provision, which runs afoul of Rule 6(e) as interpreted by Sells and Baggot, has not yet been tested in the courts.<sup>466</sup>

The Bush Administration also attempted to get specific disclosure for securities law violations by seeking to include a disclosure provision in The Securities Law Enforcement Act of 1990.<sup>467</sup>

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as S. 413 of the Federal Savings and Loan Reform Act. S. REP. NO. 19, 101st Cong., 1st Sess. (1989). S. 774 superseded S. 413.

460. 135 CONG. REC. S1550 (daily ed. Feb. 22, 1989). Compare Disclosure Amendments Act, *supra* note 414, with S. 774, 101 Cong., 1st Sess. § 918 (1989) (striking through language proposed in the 1985 amendment and omitted in the 1989 amendment and underlining new language):

(A) Disclosure otherwise prohibited . . . may be made to—

(i) any attorney of the government for use in the performance ~~of~~ by an attorney ~~for~~ of the government's duty to enforce federal criminal or civil law; and

(ii) . . . to enforce federal criminal law.

(B) Any person . . . shall not utilize that grand jury material for any purpose other than assisting ~~the~~ an attorney for the government . . .

(C) Disclosure otherwise prohibited ~~under~~ by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court upon a showing of particularized need ~~preliminary~~ preliminarily to or in connection with a judicial proceeding.

461. H.R. REP. NO. 209, 101st Cong., 1st Sess. (1989).

462. Act of Aug. 9, 1989, Pub. L. No. 101-73, 103 Stat. 505 (codified at 18 U.S.C. § 3322 (1994)).

463. 18 U.S.C. § 3322(a) (1994)

464. *Id.*

465. *Id.* § 3322(b)(2). The Department of Justice might choose to decline automatic access in cases where the criminal investigation is on-going and disclosure might interfere with the investigation.

466. The author's research has revealed no case law interpreting this particular FIRREA provision, although it was enacted in 1989.

467. H.R. 975, 101st Cong., 2nd Sess. (1990).

I am submitting a proposed revised version of H.R. 975, the “Securities Law Enforcement Remedies Act of 1989 . . .” [T]he proposal would amend the Federal Criminal Code to authorize a court to issue an order permitting disclosure to the Commission of grand jury information concerning potential securities law violations . . . just as Congress provided such authority for the banking agencies in [FIRREA].

The disclosure provision was made a part of the Senate version of the bill but the House did not approve it.<sup>468</sup> In 1994, both the House and the Senate drafted health insurance acts that included FIRREA-like amendments.<sup>469</sup> At the close of 1995, a FIRREA-like amendment to fight fraudulent Medicare practices was included in the Medicare Preservation Act of 1995.<sup>470</sup> Perhaps the most subversive legislative exception to Rule 6(e) secrecy is the International Antitrust Enforcement Assistance Act of 1994 (IAEAA).<sup>471</sup> President Clinton signed the IAEAA into law on November 2, 1994.<sup>472</sup> This remarkable act, which represents a radical departure from the accepted practice of legislative drafting,<sup>473</sup> penetrates the grand jury secrecy protections of Rule 6(e) by expanding the definition of a "state" under 6(e)(3)(C)(iv)<sup>474</sup> to include foreign countries, and by defining a "state criminal law" as "a foreign antitrust law" and "an appropriate official" as "a foreign antitrust authority."<sup>475</sup> Given the proliferation of legislation

H.R. REP. NO. 616, 101st Cong., 2d Sess. 39 (1990), reprinted in 1990 U.S.C.C.A.N. 1379, 1406 (quoting Letter from Daniel L. Goelzer, Office of the General Counsel of the Securities and Exchange Commission, to Rep. John D. Dingell (Feb. 9, 1990)). H.R. 975 which was ultimately incorporated into H.R. 5325.

468. 136 CONG. REC. S14069 (daily ed. Sept. 27, 1990) (statement of Sen. Riegle).

469. H.R. 3600, 103d Cong., 2d Sess. (1994) (Health Security Act); S. 2357, 103d Cong., 2d Sess. (1994) (Universal Health Insurance Coverage Act); S. 2296, 103d Cong., 2d Sess. (1994) (Individual and Family Health Security Act).

470. H.R. 2425, 104th Cong., 1st Sess. (1995); see also H.R. REP. NO. 276, 104th Cong., 1st Sess. (1995).

471. Pub. L. No. 103-438, 108 Stat. 4597 (1994) (codified at 15 U.S.C. § 6204 (1994)).

472. H.R. REP. NO. 883, 103rd Cong., 2d Sess. 130 (1995).

473. "[Y]ou shouldn't define a word in a sense significantly different from the way it is normally understood by the persons to whom the legislation is primarily addressed. This is a fundamental principle of communication and it is one of the shames of the legal profession that draftsmen so flagrantly violate it." Reed Dickerson, *How to Write a Law*, 31 NOTRE DAME LAW. 14, 25 (1955)).

474. Federal Rule of Criminal Procedure 6 states in pertinent part:

Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

...

(iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law.

FED. R. CRIM. P. 6(e)(3)(C)(iv).

475. 15 U.S.C. § 6204(2)(A)-(B) (1994):

(2) Antitrust evidence that is matter occurring before a grand jury and with respect to which disclosure is prevented by Federal law, except that for the purpose of applying Rule 6(e)(3)(C)(iv) of the Federal Rules of Criminal Procedure with respect to this section—

(A) a foreign antitrust authority with respect to which a particularized need for such antitrust evidence is shown shall be considered to be an appropriate official of any of the several States, and

(B) a foreign antitrust law administered or enforced by the foreign antitrust authority shall be considered to be a State criminal law.



granting specific rights of automatic disclosure for federal agencies' civil use, it seems clear that such legislation is also circumventing the "impediments" and teachings of Baggot.

In his recent article, Professor Graham Hughes questioned whether FIRREA might be the "crack that will eventually cause the collapse of the whole dam" in grand jury secrecy.<sup>476</sup> In light of the recent legislation incorporating disclosure clauses, the answer, unfortunately, appears to be yes. While the legislative provisions have not been constitutionally tested, efforts to enact greater executive branch use of the grand jury process for civil purposes apparently will continue,<sup>477</sup> although not all of them have met with success.<sup>478</sup> The movement toward the erosion of Rule 6(e) hopefully will yield to a more reasoned analysis along the lines of the proposal in Maryland & Virginia Milk Producers Ass'n, which would preserve to the greatest extent possible the historical importance of grand jury secrecy.

### XIII. THE MARYLAND & VIRGINIA MILK PRODUCERS ASS'N SOLUTION

This Article envisions the use in parallel criminal and civil regulatory investigations of a process that would eliminate the all-or-nothing approach of prior court decisions. This process reaches a compromise between the competing interests of government efficiency and the need to protect individuals from an overreaching executive branch.

If the Procter & Gamble Court had applied the Maryland & Virginia Milk Producers Ass'n procedure, it would have eliminated nine years of litigation. Government prosecutors would have been required to notify Procter & Gamble of their intent to disclose grand jury materials to civil attorneys. Having notice,<sup>479</sup> Procter & Gamble would then have had the opportunity to challenge the disclosure at a hearing, where prosecutors would have borne the burden of proving to the court that all information to be disclosed would be discoverable to the government civil attorneys

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476. Hughes, *supra* note 16, at 656 (advocating unification of federal criminal and civil compulsory processes).

477. The Balanced Budget Act of 1995 included House and Senate provisions for disclosure of health care offenses discovered during grand jury proceedings, but both provisions were dropped in conference. H.R. REP. NO. 350, 104th Cong., 1st Sess. (1995).

478. See *supra* text accompanying notes 467-68.

479. "Notice and opportunity to be heard are indispensable to a fair trial whether the case be criminal or civil." *Joint Anti-Fascist Refuge Comm. v. McGrath*, 341 U.S. 123, 178 (1951) (Douglas, J., concurring) (citations omitted).

through civil investigative devices. At this hearing, Procter & Gamble would have been given the opportunity to challenge that proof, just as they would have if the government had used civil investigatory devices. All materials the court deemed subject to disclosure at the hearing would likewise have been discoverable to Procter & Gamble under the Federal Rules of Civil Procedure once the complaint was filed.<sup>480</sup> Materials the court found were not subject to disclosure at the hearing could not have been used in the subsequent civil proceeding.<sup>481</sup> Any information the government gained without the aid of the grand jury would not have been exposed prior to filing of the complaint.<sup>482</sup> This process would save the cost of duplicate investigations while eliminating the temptation to use the grand jury process as a civil discovery device<sup>483</sup> and would maintain the balance of civil discovery.

Further, the D.C. Circuit's solution would result in a more expeditious determination of civil actions. If both parties knew from the case's inception that evidence is nondiscoverable through either grand jury access or civil investigatory devices, they would be able to gauge the probable trial outcome. Thus, this process would achieve the goals of the Federal Rules of Civil Procedure and further law enforcement objectives without sacrificing the integrity of the grand jury system.

#### XIV. CONCLUSION

"The history of American freedom is, in no small measure, the history of procedure."<sup>484</sup> The Grand Jury Clause of the Fifth Amendment protects individuals against oppression by the government. The procedural rule governing grand jury secrecy is a substantial part of that protection, yet it has been the subject of extensive litigation where parallel civil and criminal government investigations threaten to compromise that secrecy. When the

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480. FED. R. CIV. P. 26.

481. Such materials, generally speaking, would include information gained through grants of immunity or derived through illegal search and seizures.

482. *United States v. Markwood*, 48 F.3d 969, 984 (6th Cir. 1995).

483. We think the concern [of grand jury abuse] is far less worrisome when the attorneys seeking disclosure [of grand jury material for civil use] must go before a court and demonstrate a particularized need prior to any disclosure, and when, as part of that inquiry, the district court may properly consider whether the circumstances disclose any evidence of grand jury abuse.

*United States v. John Doe, Inc.*, 481 U.S. 102, 114-15 (1987). It would, inherently, also be far less worrisome if the government attorneys knew that the only information they could obtain from the grand jury could be gained through civil channels anyway and that their conduct would be open to scrutiny in a disclosure hearing.

484. *Malinski v. New York*, 324 U.S. 401, 414 (1945).

government seeks to penetrate secrecy to aid civil regulatory actions, courts should balance the interests advanced by the parties against the standard of fairness implicit in constitutional due process. Courts must balance consideration of the costs and delay in compelling the government to duplicate grand jury investigations in parallel or subsequent civil actions against the civil defendant's concern for the secrecy of grand jury proceedings. Use of the grand jury's extraordinary powers will give prosecutors incredible pretrial and trial advantages over future civil targets, especially where those powers are otherwise unavailable through authorized civil discovery tools.

While cost-effective civil law enforcement is a crucial issue in this era of alarming governmental deficits, coalescing the civil and criminal processes in the manner recommended by Professor Hughes is not the most equitable alternative in terms of fair process to the individual. Our justice system has survived on principles that preserve individual civil liberties and due process. From the perspective of those who founded a country by revolution against an overreaching and tyrannical government, arguing for efficiency at the cost of fair process is equivalent to advocating a return to the monarchy.<sup>485</sup>

Application of Federal Rule of Criminal Procedure 6(e) must balance the need for enforcing laws against the necessity of safeguarding fundamental rights. Maryland & Virginia Milk Producers Ass'n presented a common-sense solution to the issue of grand jury secrecy in the environment of parallel proceedings. On this fiftieth anniversary of the Federal Rules of Criminal Procedure, the Supreme Court and Congress should revisit the issue and decisively establish this equitable principle as an amendment to Rule 6(e). The following would modify Rule 6(e)(C)(i) in an appropriate manner:

- (C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—
  - (i) when so directed by a court preliminary to or in connection with a judicial proceeding upon the following showing:

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485. "Of course, efficiency and promptness can never be substituted for due process and adherence to the Constitution. Is not a dictatorship the most 'efficient' form of government?" *United States v. Ross*, 456 U.S. 798, 842 n.13 (1982) (Marshall, J., dissenting). See also *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 356 (1987) (Brennan, J., dissenting):

The Constitution was not adopted as a means of enhancing the efficiency with which government officials conduct their affairs, nor as a blueprint for ensuring sufficient reliance on administrative expertise. Rather, it was meant to provide a bulwark against infringements that might otherwise be justified as necessary expedients of governing.

(a) In civil regulatory proceedings involving the government, the government must prove grand jury matters sought to be used by the government in the civil proceeding would be obtainable through civil investigatory devices. Where the government obtains disclosure under such showing, the private opponent may discover these grand jury materials under the Federal Rules of Civil Procedure.

(b) Where the government seeks disclosure of grand jury materials for use in a civil proceeding pursuant to subsection (a), notice must be given to the opponent and an adversarial hearing open only to the prosecutor and potential civil defendant and counsel must be conducted prior to disclosure.

(c) In civil proceedings involving private parties, compelling particularized need for grand jury matter must be shown although the material may be discoverable under the Federal Rules of Civil Procedure.

(d) Disclosure determinations for private litigants pursuant to subsection (c) may be ex parte.

## APPENDIX

“ORDER”<sup>486</sup>

During the grand jury proceedings which preceded these criminal cases, the United States obtained and copied thousands of documents from the files of the Maryland and Virginia Milk Producers Association. After the cases had terminated favorably to the Association, the Government returned to it the original documents but refused to return the copies, claiming them as its own property and saying it will or possibly may rely upon some of them in the trial of a civil action now pending in the United States District Court for the District of Columbia.

The Association moved the District Court to require the return of the copies. The motion was denied, the trial judge holding that, as the documents could be reached by the Government through discovery process in the civil action, it would be vain to order the copies delivered to the Association. This appeal is from the denial of the motion.

We hold the United States may retain the copies of the documents in question, subject to the following limitations:

1. That it may use in the trial of the pending civil action only such of the documents, of which it has retained copies, as it could obtain through discovery processes applicable to civil actions, and only such as are enumerated by it as those upon which it will or possibly may rely, in a list to be served upon the Association on or before March 1, 1958, and in no event less than 60 days prior to the commencement of such trial;

2. That the United States may use in the trial of any future civil action against the Association only such of the documents, of which it has retained copies, as it could obtain through discovery processes available to civil actions and only such as are enumerated by it as those upon which it will or possibly may rely, in a list to served upon the Association not less than 60 days prior to the commencement of the trial of any such future civil action;

3. That in the lists the documents intended to be relied upon shall be described and referred to by the identification numbers placed thereon by the Association at the time of their submission.

The order appealed from should be modified to include the foregoing provisions.

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486. *Maryland & Virginia Milk Producers' Ass'n v. United States*, 250 F.2d 425, 425-26 (D.C. Cir. 1957) (citations omitted).

PREACHING TO THE PUBLIC SCHOOL CHOIR:  
THE ESTABLISHMENT CLAUSE, RACHEL  
BAUCHMAN, AND THE SEARCH FOR THE  
ELUSIVE BRIGHT LINE

JULIAN R. KOSSOW\*

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I. INTRODUCTION

The U.S. Supreme Court has a long tradition of protecting religious freedom in this country.<sup>1</sup> Yet for those who are most anxious about the separation of church and state, a dark specter has begun to haunt America. Religious freedom and the First Amendment principles<sup>2</sup> that helped make this country great are

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\* Visiting Associate Professor of Law, Stetson University. B.A., University of Pennsylvania, 1955; J.D., Georgetown University, 1967. The author is indebted to George Boras and Sam Zietz for their research assistance in the preparation of this Article.

1. See, e.g., Reynolds v. United States, 98 U.S. 145, 163 (1878) (“[T]o suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty.”); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . religion or other matters or force citizens to confess by word or act their faith therein.”) (emphasis added). See generally Sherbert v. Verner, 374 U.S. 398 (1963) (holding that state could not deny employment benefits to plaintiff because she refused to work on Sabbath day of her faith); Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that Free Exercise Clause entitled Amish to exemption from general school attendance law).

2. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .” U.S. CONST. amend. I.

The [First] Amendment’s purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and perma-

being threatened.<sup>3</sup> A hue and cry has arisen. The religious right has repeatedly expressed its desire to make America a "Christian nation."<sup>4</sup> A majority of American citizens now want to return prayer to public schools.<sup>5</sup>

After the Republicans' sweeping victory in the 1994 congressional elections, "Religious Equality"<sup>6</sup> and "Religious Liberties"<sup>7</sup> amendments to the Constitution were introduced in the House of

ment separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.

*Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 217 (1963) (citation omitted).

Mr. Jefferson, in reply to an address to him by a committee of the Danbury Baptist Association, took occasion to say: "Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions, . . . I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and state."

*Reynolds*, 98 U.S. at 164 (emphasis added) (citation omitted) (quoting Letter from Thomas Jefferson to Danbury Baptist Ass'n (Jan. 1, 1820)). See also Stephanie E. Russell, *Sorting Through the Establishment Tests, Looking Past the Lemon*, 60 MO. L. REV. 653, 658 n.43 (1995); 16 THE WRITINGS OF THOMAS JEFFERSON 281, 281-82 (Andrew A. Lipscomb ed., 1903).

3. See *infra* notes 6-7.

4. See Nat Hentoff, *A Christian Nation?*, WASH. POST, Feb. 17, 1996, at A25 (quoting Focus on the Family founder Dr. James Dobson's remark that "[t]he Constitution was designed to perpetuate a Christian order"); Jann Rennert, *Christian Soldiers March Onward, over Passive Electorate*, ARIZ. REPUBLIC, Oct. 15, 1995, at F1 (reporting that Christian Coalition conference attendees "were told they are 'persecuted' right here in their 'Christian nation'"). Such sentiments are not limited to extremist elements. The Oklahoma Republican Party adopted a platform at its 1996 convention declaring that the United States was founded as a Christian nation and that all law should be based upon Christian values. Tom Teeppen, *If Republicans Get Their Way, Pray for the Children*, ATLANTA J. & CONST., July 21, 1996, at 2F.

5. See Bill Broadway, *Schism Over School Prayer: Two GOP-Proposed Constitutional Amendments Reflect Split in Conservative Thinking*, WASH. POST., Dec. 2, 1995, at B7.

6. H.R.J. Res. 121, 104th Cong., 1st Sess. (1995). Rep. Henry J. Hyde (R. Ill.) introduced the amendment on November 15, 1995. It provides: "Neither the United States nor any State shall deny benefits to or otherwise discriminate against any private person or group on account of religious expression, belief, or identity; nor shall the prohibition on laws respecting an establishment of religion be construed to require such discrimination." *Id.* Rep. Hyde consulted with famed accommodationist Professor Michael McConnell to help draft this new amendment, which would allow for government funding of religious organizations. Broadway, *supra* note 5, at B7.

7. H.R.J. Res. 127, 104th Cong., 1st Sess. (1995). Rep. Ernest J. Istook, Jr. (R. Okla.) introduced the amendment less than two weeks after the introduction of the Religious Equality Amendment. The Religious Liberties Amendment provides:

To secure the people's right to acknowledge God according to the dictates of conscience: Nothing in this Constitution shall prohibit acknowledgments of the religious heritage, beliefs, or traditions of the people, or prohibit student-sponsored prayer in public schools. Neither the United States nor any State shall compose any official prayer or compel joining in prayer, or discriminate against religious expression or belief.

*Id.*

Representatives. A number of commentators have viewed the proposed amendments as a direct attack on the Establishment Clause.<sup>8</sup> Moreover, even though the traditional test of Establishment Clause boundaries set out by the U.S. Supreme Court in *Lemon v. Kurtzman*<sup>9</sup> has proven more than adequate to maintain the separation of church and state, several Supreme Court justices have advocated abolishing the test.<sup>10</sup> Commentators such as Professor Michael McConnell have written of the deserved death of “secular liberalism.”<sup>11</sup> Separation of church and state is under siege. “Accommodation” is the new “correct” path.<sup>12</sup>

Not all of the roiling is unhealthy or improper by any means. Buttressed by First Amendment rights of free exercise and free speech, religion is still a powerful force in our cultural, political, and social endeavors.<sup>13</sup> This is appropriate for a country founded upon the principle of religious liberty. History, however, remains an omnipresent warning of potentially horrifying abuse.<sup>14</sup> Free-

8. Constitutional scholars, including Douglas Laycock, have warned that the Religious Equality Amendment is only a “‘school prayer’ amendment in disguise.” Janan Hanna, Proposal Seeks ‘Religious Equality’; 1st Amendment Would Be Redefined, *CHI. TRIB.*, Dec. 10, 1995, at C1. The Religious Liberties Amendment, on the other hand, shuns any such disguise; its explicit goal is to restore prayer in schools. Katharine Q. Seelye, Proposed Prayer Amendment Splits the Right, *N.Y. TIMES*, Nov. 22, 1995, at D18. A spokesman for Americans United for Separation of Church and State has described the Religious Liberties Amendment as “essentially repeal[ing] the First Amendment’s Establishment Clause.” *Id.*

9. 403 U.S. 602 (1971). *Lemon* laid out a three-part test: “First, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’” *Id.* at 612-13 (citations omitted). See generally *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970).

10. Justices O’Connor, Scalia, Kennedy, Thomas, and Chief Justice Rehnquist have all expressed dissatisfaction with the *Lemon* test. See, e.g., *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481 (1994) (Scalia, J., dissenting) (remarking that “in many applications [the *Lemon* test] has been utterly meaningless”); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 656 (1989) (Kennedy, J., concurring in part and dissenting in part) (stating that *Lemon* test should not be Court’s “primary guide” in its Establishment Clause jurisprudence); *id.* at 623 (O’Connor, J., concurring) (preferring “endorsement test” over *Lemon* test); *Wallace v. Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting) (stating that *Lemon* “has no basis in the history of the amendment it seeks to interpret”). See also discussion *infra* part IV.

11. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 *U. CHI. L. REV.* 115, 134 (1992) (“The ideology of secular liberalism, while still strong among the American elite, has lost its position of unquestioned dominance.”).

12. Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 *U. CHI. L. REV.* 195, 203 (1992) (observing that while recent U.S. Supreme Court decisions have tolerated some official sponsorship of religion, “even this much accommodation of religion in public life is not enough, however, for some members of the Court”).

13. *Id.* at 195-96; McConnell, *supra* note 11, at 134-35.

14. The Supreme Court has voiced the very same concern:

By the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State. These people knew, some of them from bitter personal ex-



dom of religion means freedom of conscience for all religions or for none, not just freedom of conscience for the majority's creed.<sup>15</sup> The founders of this country were keenly aware of that.<sup>16</sup> Thus, the First Amendment mandates that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>17</sup> Equilibrium is the key: as the right to freely exercise one's religion expands, the right to be free of an established religion diminishes, and vice versa. Therein lies the genius of the system; it allows religion to flourish while maintaining a vibrant church-state separation that permits breathing room for all. Historically, the Establishment Clause has been a success.<sup>18</sup>

Many of the Establishment Clause cases decided by the Supreme Court during the past thirty years have been nibbles at the margin of constitutional protection, not thrusts at the heart.<sup>19</sup> The Rehnquist Court, by accentuating accommodation, has shifted the fulcrum that balances the Free Exercise Clause with the Establishment Clause.<sup>20</sup> The seesaw now tilts decidedly in favor of the Free Exercise Clause, leaving the Establishment Clause up in the air.<sup>21</sup> The direction taken by the Court raises the distant early warning of history's tragic lessons.

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perience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular . . . form of religious services.

Engel v. Vitale, 370 U.S. 421, 429 (1962). In addition to obvious abuses, such as those which took place in Nazi Germany from 1933 to 1945 and during the Spanish Inquisition in the late fifteenth century, the events in Bosnia-Herzegovina are a more recent example of such horrors. See John F. Burns, 500 Muslims Driven by Serbs Through a Gauntlet of Terror, N.Y. TIMES, Oct. 2, 1992, at A1.

15. "While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs." *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 226 (1963).

16. "Our Founders were no more willing to let the content of their prayers and their privilege of praying whenever they pleased be influenced by the ballot box than they were to let these vital matters of personal conscience depend upon the succession of monarchs." Engel, 370 U.S. at 429.

17. U.S. CONST. amend. I.

18. The Establishment Clause has been used to prevent many types of entanglements between church and state. See *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971) (finding allocation of state funds to religion-affiliated schools for secular subjects unconstitutional due to excessive entanglement); *Schempp*, 374 U.S. at 223 (deciding that daily Bible reading and reciting of the Lord's Prayer in public schools is unconstitutional); Engel, 370 U.S. at 424 (holding official school prayer unconstitutional as a government-sponsored religious activity).

19. Russell, *supra* note 2, at 659 n.45.

20. *Id.* at 660 n.53.

21. See *Rosenberger v. Rector of the Univ. of Virginia*, 115 S. Ct. 2510, 2525 (1995); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993); *Lamb's Chapel v. Center*

One of the central Establishment Clause issues has been the need to ascertain the allowable proportion of religion in public schools.<sup>22</sup> Because children are susceptible to authority and may not have the defenses necessary to screen out improper suggestions, the Court has heard numerous cases that deal with this issue.<sup>23</sup> Part II of this Article examines the Rachel Bauchman case.<sup>24</sup> Currently on appeal in the Tenth Circuit, this case involves the question of whether a fifteen-year-old Jewish girl's Establishment Clause rights were violated by the use of overtly Christian religious music and by the actions of the director of the public school choir of which she was a member.<sup>25</sup> Part III of this Article analyzes significant Establishment Clause decisions in the Warren and Burger Courts, exploring in particular the parentage and progeny of the Lemon test.<sup>26</sup> Part IV analyzes notable Establishment Clause opinions in the Rehnquist Court and illustrates how these decisions are systematically dismantling the protection of the Establishment Clause. Part V articulates both a response to the accommodationist trend of the Rehnquist Court and a suggested answer to the Rachel Bauchman case. Finally, part VI proposes a return to a rigorous application of the Lemon

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Moriches Union Free Sch. Dist., 508 U.S. 384, 391 (1993); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 623 (1989).

22. The cases have ranged from activities that have entailed heavy involvement, such as direct readings from the Bible, see *Schempp*, 374 U.S. at 223, and use of a state-created school prayer, see *Engel*, 370 U.S. at 424, to activities with a lesser degree of involvement. For example, in *Lamb's Chapel*, the Court held that the use of public school facilities to show a religious film was constitutional. 508 U.S. at 395. The Court also has found unconstitutional the use of public funds to help build colleges and universities with religious affiliations because such use did not primarily advance religion and had a secular purpose. *Roemer v. Board of Public Works*, 426 U.S. 736, 762-66 (1976).

23. See *Lee v. Weisman*, 505 U.S. 577, 595-97 (1992). The potential influence in a school environment is much greater because of the amount of control faculty members and administrators exert upon the students, as well as the ability to limit the movement of students during religious exercises. *Id.* at 597. The *Lee* Court compared this to an invocation offered at the opening of a state legislative session, where the participants were adults who were free to come and go with little comment. *Id.* (citing *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)).

24. See *Bauchman ex rel. Bauchman v. West High Sch.*, 906 F. Supp. 1483 (D. Utah 1995) (*Bauchman III*); *Bauchman ex rel. Bauchman v. West High Sch.*, 900 F. Supp. 254 (D. Utah 1995) (*Bauchman II*); *Bauchman ex rel. Bauchman v. West High Sch.*, 900 F. Supp. 248 (D. Utah 1995) (*Bauchman I*).

25. *Bauchman II*, 900 F. Supp. at 261.

26. See *Walz v. Tax Comm'n*, 397 U.S. 664 (1970); *Board of Educ. v. Allen*, 392 U.S. 236 (1968); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Everson v. Board of Educ.*, 330 U.S. 10 (1947); see also *Sease v. School District*, 811 F. Supp. 183 (E.D. Pa. 1993); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Florey v. Sioux Falls Sch. Dist.* 49-5, 619 F.2d 1311 (8th Cir. 1980);

test<sup>27</sup> as the most suitable bright line for separating church and state in public school cases.

## II. THE CASE OF RACHEL BAUCHMAN

In 1994, Rachel Bauchman, a fifteen-year-old Jewish girl, transferred to West High School, a public school in Salt Lake City, Utah.<sup>28</sup> During the 1994-95 academic year, Rachel, a tenth-grade honor student, auditioned for and became a member of the school's A'Cappella Choir, an elective course that the school offered for credit.<sup>29</sup> Rachel had been singing soprano in choruses since the first grade and was thus familiar with a variety of choral music.<sup>30</sup> This choir's repertoire, however, which consisted mainly of contemporary Christian devotionals, was quite different from the repertoire of any of the choirs in which she had previously sung.<sup>31</sup> Because of her religious convictions, Rachel did not feel she could, in good conscience, sing these particular songs, every one of which praised Jesus Christ.<sup>32</sup> Nevertheless, the choir class curriculum mandated that the choir practice and perform these songs.<sup>33</sup> As part of the curriculum, the choir director, Richard Torgerson, required Rachel and the other choir members to sing at public sites.<sup>34</sup> Many of these performances, especially the ones that were part of a series of "Christmas concerts," took place in Christian churches.<sup>35</sup> In addition, Torgerson's former students described him as a deeply religious man who pressed his religious

27. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

28. *Bauchman I*, 900 F. Supp. at 249-50 (D. Utah 1995).

29. *Id.* at 249; Andrea Stone, *Jewish Teen Stands Against Utah Choir's Christian Tone*, USA TODAY, Nov. 2, 1995, at A4.

30. Stone, *supra* note 29, at A4.

31. The A'Cappella choir repertoire consisted of such Christian devotionals as "Friends," "The Lord Bless You and Keep You," and "Advent Gift." *Bauchman ex rel. Bauchman v. West High Sch.*, 900 F. Supp. 254, 259-61 (D. Utah 1995); Stone, *supra* note 29, at A4.

32. For example, the lyrics of "Advent Gift" are:

Lord, come to the manger, I wait for your birth;  
Now come Savior Jesus and bless all the earth;  
The heavens rejoice for your coming is nigh;  
All glory and honor to You, Lord most high.

Stone, *supra* note 29, at A4. Another lyric proclaims, "We glorify thee, God of Hosts. We love thee and exalt thee." *Bauchman II*, 900 F. Supp. at 260.

33. *Bauchman II*, 900 F. Supp. at 260.

34. *Id.*

35. *Id.* For example, performances were held in The Church of the Madeleine (Roman Catholic), the First Presbyterian Church, and Temple Square (The Church of Jesus Christ of Latter-Day Saints).

beliefs upon his students and even encouraged them to visualize "Jesus dying for our sins."<sup>36</sup>

Rachel asked her father to write a letter to Torgerson requesting that he balance the choir's repertoire by adding nonsectarian songs and music of other faiths.<sup>37</sup> She also asked that some of the performances be held at nonreligious sites.<sup>38</sup> Torgerson refused both requests.<sup>39</sup> Subsequently, he offered Rachel the choice of continuing with the choir's scheduled practices and performances or sitting in the library for the duration of the Christmas concerts, for which she would earn an "A" for the course.<sup>40</sup> Rachel's religious convictions prevented her from accepting the first of Torgerson's offers; her sense of honor required her to decline the second.<sup>41</sup>

The situation worsened during the spring semester. Traditionally, the choir conducted a "spring tour" during which it performed religious and devotional music.<sup>42</sup> The choir frequently participated as a group in Christian church services.<sup>43</sup> During class, Torgerson explicitly criticized Rachel's opposition to the content and locations of the spring tour.<sup>44</sup> Subsequently, Torgerson canceled the tour and indicated to the class that Rachel was the cause.<sup>45</sup> He chastised her in class for asserting her First Amendment rights, repeatedly mentioning Judaism in such a way as to differentiate her from her classmates.<sup>46</sup> Rachel alleged that "following the lectures she was exposed to public ridicule and humiliation, and was the subject of racial and religious epithets spoken by her fellow students."<sup>47</sup> For the remainder of the school year, Rachel was subjected to hostility, anti-Semitic remarks, a locker defaced by swastikas, and other hostile actions by West High School students.<sup>48</sup>

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36. William Raspberry, *Avoidable Ugliness*, WASH. POST, Nov. 8, 1995, at A17; see also Samuel A. Autman, *Bauchman Refiles West High Civil Rights Suit; It Includes Statements from Ex-Students on Actions of Choirmaster*, SALT LAKE CITY TRIB., Sept. 27, 1995, at D2.

37. Stone, *supra* note 29, at A4.

38. *Bauchman II*, 900 F. Supp. at 260.

39. *Id.*

40. *Id.*

41. See *Bauchman ex rel. Bauchman v. West High Sch.*, 900 F. Supp. 248, 249 (D. Utah 1995).

42. *Bauchman II*, 900 F. Supp. at 260.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 260-61.

47. *Id.* at 261.

48. Stone, *supra* at 29, at A4. "She was called 'Dirty Jew' by other students. She was told to 'go back to Israel.' Swastikas and 'Jew Bitch' were scrawled on her student govern-

Rachel's father wrote a private letter to Torgerson regarding his daughter's situation.<sup>49</sup> Torgerson released the letter to Preston Naylor, the father of another student in the choir.<sup>50</sup> Naylor then circulated the letter to all of the parents of the students in the choir.<sup>51</sup> Rachel alleged that the release and circulation of her father's letter increased her public humiliation and the hostility directed against her.<sup>52</sup> Torgerson stated in class that he would not stop his activities "no matter what"—even if Rachel believed they were unconstitutional.<sup>53</sup>

The situation culminated at the high school graduation on June 7, 1995. Attendance was compulsory for all students.<sup>54</sup> The A'Cappella Choir was slated to perform two songs: "Friends" and "The Lord Bless You and Keep You."<sup>55</sup> The lyrics in both songs explicitly referred to "the Lord" and to other words with clear religious connotations.<sup>56</sup> Rachel sued, seeking a temporary restraining order, which was denied by U.S. District Court Judge J. Thomas Greene.<sup>57</sup> That denial was immediately overruled by the U.S. Court of Appeals for the Tenth Circuit.<sup>58</sup> The Tenth Circuit enjoined the choir from singing, and also enjoined public school officials from allowing the singing of those two particular songs at the graduation.<sup>59</sup> Notwithstanding the injunction, a large majority of the students and parents in attendance sang "Friends."<sup>60</sup>

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ment campaign posters. Now she is afraid to walk the hallways alone."Id.; see also Kristen Moulton, Choir's Christian Tunes Sound a Note of Discord in Salt Lake City Rights: Despite Injunction, Class Sang Religious Song at Graduation, L.A. TIMES, Aug. 20, 1995, at 4.

49. Bauchman II, 900 F. Supp. at 261.

50. Id.

51. Id.

52. Id.

53. Id.

54. Laurie Goodstein, School Prayer Directive May Not Settle All Cases: Many Religious Disputes Fall in Gray Zone, WASH. POST., July 15, 1995, at A1.

55. Raspberry, *supra* note 36, at A17.

56. Bauchman II, 900 F. Supp. at 261; see also Cal Thomas, Graduates Get Lesson in Absurdity, DAYTON DAILY NEWS, June 14, 1995, at 11A:

The lyrics of "Friends" are, "Friends are friends forever if the Lord's the Lord of them." "May the Lord Bless You and Keep You," although deriving from the Jewish Old Testament, carries with it a Christian connotation in its arrangement and its frequent usage in Christian services. The lyrics are, "The Lord lift up the light of the his countenance upon you and give you peace. . . . Amen."

57. Bauchman *ex rel.* Bauchman v. West High Sch., 900 F. Supp. 248, 254 (D. Utah 1995).

58. Bauchman v. West High Sch., No. 95-4084 (10th Cir. Aug. 18, 1995).

59. Id.

60. Bauchman II, 900 F. Supp. at 261-62. It should be noted that Judge Greene ruled against Rachel in her civil contempt action that claimed Torgerson and other public school officials violated the injunction. Bauchman *ex rel.* Bauchman v. West High Sch., 900 F. Supp. 1483, 1494 (D. Utah 1995). That decision currently is on appeal in the Tenth Cir-

Following this episode, Rachel brought suit in federal district court against West High School, Torgerson, various public school officials, and the Salt Lake City School District, alleging, among other things, violations of her First Amendment rights.<sup>61</sup> The district court dismissed the suit, first in an oral opinion by Judge Greene, and later, following supplemental pleadings, in a written opinion.<sup>62</sup> Remarkably, Greene ruled that Rachel had failed to state a claim for which relief could be granted, even though the Tenth Circuit had earlier decided, based upon essentially the same pleadings, that an injunction was appropriate.<sup>63</sup>

The point of this Article is not to debate the wisdom of Judge Greene's dismissal of Rachel's suit. It does seem clear, however, that Judge Greene will be reversed again on appeal. The Tenth Circuit has stated that a dismissal for failure to state a claim is proper "only when it appears 'clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" <sup>64</sup> Rachel will undoubtedly get her day in court.

### III. THE ESTABLISHMENT CLAUSE IN THE WARREN AND BURGER COURT ERAS

Had Rachel's claim arisen in the Warren Court era, or even in the Burger Court era, contemporaneous constitutional jurisprudence would have revealed a clear violation of her First Amendment rights. *Engel v. Vitale*<sup>65</sup> and *Abington School District v. Schempp*<sup>66</sup> were the constitutional soil in which the Warren Court rooted its perception of the separation of church and state. Both *Engel* and *Schempp* focused on the issue of state-sponsored religious prayer in public schools.

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cuit. See Jennifer Skordas, Ruling: Teachers Are Not to Blame Judge; West High Teachers Not to Blame for Singing, School Officials Tried to Stop Religious Song, Ruled Not in Contempt, *SALT LAKE TRIB.*, Nov. 28, 1995, at B1.

61. *Bauchman II*, 900 F. Supp. at 262. In addition to alleging violations of her rights under the Establishment, Free Exercise, and Free Speech Clauses of the First Amendment, Rachel also brought a claim under 42 U.S.C. § 1983 for violation of the same First Amendment rights, as well as claims under the Religious Freedom and Restoration Act, 42 U.S.C. § 2000bb (1994), and the Utah Constitution. 900 F. Supp. at 262.

62. *Id.*

63. See *id.* at 271-72.

64. *Barett v. Tallon*, 30 F.3d 1296, 1299 (10th Cir. 1994) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

65. 370 U.S. 421 (1962).

66. 374 U.S. 203 (1963).

## A. Engel v. Vitale

Decided in 1962, Engel involved a New Hyde Park, New York, school district directive that required every class in the district to recite a state-created prayer in the presence of a teacher at the beginning of each school day.<sup>67</sup> The New York State Board of Regents had recommended the nondenominational prayer as part of its “Statement on Moral and Spiritual Training in the Schools.”<sup>68</sup> School district policy allowed those students who wished not to participate the option of being excused upon the written request of a parent or guardian.<sup>69</sup> Furthermore, teachers could not mandate any specific dress code, language, or posture during the prayer session.<sup>70</sup> Parents of ten students brought suit against the school district, alleging that the prayer was contrary to their beliefs and violated the Establishment Clause.<sup>71</sup> Finding that no student was compelled to participate in the prayer, the New York Court of Appeals upheld the constitutionality of the policy.<sup>72</sup>

In a decision written by Justice Black, the Supreme Court held that the nondenominational prayer was unequivocally a religious activity.<sup>73</sup> Recognizing that state policy is unconstitutional when it creates a government program furthering religion, the Court found that the Establishment Clause “must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.”<sup>74</sup> The Court went on to explain that although a prayer may be denominationally neutral and participation in its utterance voluntary, it is still an inappropriate advancement of religious goals by the state and thus violates the Establishment Clause.<sup>75</sup>

The Establishment Clause is premised upon the “belief that a union of government and religion tends to destroy government and to degrade religion.”<sup>76</sup> The Board of Regents’ policy was therefore in direct conflict with the both the language and purpose of the Establishment Clause. The government violates the

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67. Engel, 370 U.S. at 422. The prayer read: “Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.” Id.

68. Id. at 423.

69. Id. at 438 (Douglas, J., concurring).

70. Id.

71. Id. at 423.

72. Id.

73. Id. at 424-25.

74. Id. at 425.

75. Id. at 430.

76. Id. at 431.

First Amendment not just when it promotes one religion over another, but also when it infringes upon religious freedom, even to a small degree.<sup>77</sup>

### B. Abington School District v. Schempp

The following year, in *Abington School District v. Schempp*,<sup>78</sup> the Supreme Court addressed the emotional and vexatious issue of Judeo-Christian prayer in public schools. *Schempp* involved a Pennsylvania statute that required the reading of ten verses from the Bible at the beginning of each school day.<sup>79</sup> As originally enacted, the statute did not have a provision for excusing students.<sup>80</sup> The statute was amended, allowing students with parental permission to be excused from the recitation and prayer sessions.<sup>81</sup>

The school day at Abington High School began with a reading over the intercom system of a student-selected passage from the Bible.<sup>82</sup> A recitation of the Lord's Prayer followed the reading.<sup>83</sup> The Schempps, who were Unitarians, sued the school district because they believed that other children would view the family's religious difference as "atheism," which the Schempps felt would stigmatize their children.<sup>84</sup> The federal district court held that the statute violated the Establishment Clause.<sup>85</sup> In affirming, the Supreme Court noted that the Bible reading inherently possessed a "devotional and religious character and constitute[d] in effect a

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77. *Id.* at 436. James Madison, the author of the First Amendment, stated:

[I]t is proper to take alarm at the first experiment on our liberties. . . . Who does not see . . . [t]hat the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

*Id.* (quoting James Madison, Memorial and Remonstrance Against Religious Assessments, in 2 WRITINGS OF MADISON 183, 185-186 (Gaillard Hunt ed., 1900)).

78. 374 U.S. 203 (1963).

79. *Id.* at 205.

80. *Id.* at 206 n.1.

81. *Id.*

82. Readings came from many versions of the Bible, and the Jewish Holy Scriptures. The school only offered the King James version of the Bible, which it gave to every teacher in the district. *Id.* at 207.

83. *Id.* The Lord's Prayer is:

Our Father which art in heaven, Hallowed be thy name.

Thy kingdom come, Thy will be done in earth, as it is in heaven.

Give us this day our daily bread.

And forgive us our debts, as we forgive our debtors.

And lead us not into temptation, but deliver us from evil: For thine is the kingdom, and the power, and the glory, for ever. Amen.

Matthew 6:9-13 (King James).

84. *Schempp*, 374 U.S. at 208 n.3.

85. *Id.* at 206.



religious observance.”<sup>86</sup> Furthermore, the fact that prayers were said daily in a public school building under the supervision of school personnel constituted an impermissible advancement of religion by the state.<sup>87</sup>

The purpose of the Establishment Clause, declared the Court, quoting Justice Rutledge’s seminal dissent in *Everson v. Board of Education*,<sup>88</sup> “ ‘was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.’ ”<sup>89</sup> Emphasizing the need for neutrality, the Schempp Court stated that “while [the government] protects all, it prefers none, and it disparages none.”<sup>90</sup> This is the intent of the Establishment Clause. If the purpose and primary effect of a statute advances or inhibits religion, then it is constitutionally infirm.

While the Abington Township School District contended that the program had secular purposes and was voluntary, the Schempp Court found that the pervasive religious character of the exercises outweighed the school district’s arguments.<sup>91</sup> The Court understood that the seesaw effect of competing interests within the First Amendment prohibits the use of government power to deny the free exercise of religion to anyone. By the same token, the First Amendment “has never meant that a majority could use the machinery of the State to practice its beliefs.”<sup>92</sup>

### C. *Lemon v. Kurtzman*

The Warren Court sowed the seeds of contemporary Establishment Clause jurisprudence in *Engel* and *Schempp*. The Burger Court reaped the harvest of church-state separation in 1971 when it created the bright line test that is synonymous with the holding of *Lemon v. Kurtzman*.<sup>93</sup> To pass muster under the *Lemon* test, a government practice must (1) reflect a clearly secular purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) avoid excessive government entan-

86. *Id.* at 210.

87. *Id.*

88. 330 U.S. 1 (1946).

89. *Schempp*, 374 U.S. at 217 (quoting *Everson*, 330 U.S. at 31-32 (Rutledge, J., dissenting)).

90. 374 U.S. at 215 (citation omitted).

91. *Id.* at 224.

92. *Id.* at 226.

93. 403 U.S. 602 (1971).

gument with religion.<sup>94</sup> The Lemon test is the direct offspring of *Board of Education v. Allen*<sup>95</sup> and *Walz v. Tax Commission*.<sup>96</sup> The Court obtained the first two prongs of the Lemon test from *Allen*, in which the Court emphasized secular purpose and primary effect.<sup>97</sup> The third prong, excessive government entanglement with religion, derived from *Walz*.<sup>98</sup>

Lemon involved statutes enacted in Rhode Island<sup>99</sup> and Pennsylvania.<sup>100</sup> Each statute provided for public funding of secular education in parochial schools. In Rhode Island, public funds went to supplement the salaries of school teachers who taught secular subjects in religious schools.<sup>101</sup> In Pennsylvania, the statute authorized the state to purchase secular education classes from religious schools through payment of public funds to those schools for salaries and textbooks.<sup>102</sup> Writing for the Court, Chief Justice Burger analyzed the First Amendment's use of the word "respecting" and determined that the proper interpretation of this word required the Court to strike down laws that are merely the first step toward establishment of a state religion.<sup>103</sup> Lemon turned out to be the high water mark of separation of church and state jurisprudence. Until recent years, the Lemon test was Establishment Clause gospel.<sup>104</sup>

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94. *Id.* at 612.

95. 392 U.S. 236 (1968). In *Allen*, the Supreme Court upheld a New York statute that required school districts to purchase and loan school textbooks, free of charge, to all students in grades seven through twelve, including parochial, public, and private school attendees. *Id.* at 238. Writing for the majority, Justice White concluded that the statute was constitutional because it was not a "law respecting an establishment of religion or prohibiting the free exercise thereof." *Id.* at 238.

96. 397 U.S. 664 (1970). In *Walz*, a property owner sought to enjoin the New York Tax Commission from giving tax exemptions on real property wholly owned and used by religious organizations. *Id.* at 666. The Supreme Court, in an opinion by Justice Burger, found that the statute did not attempt to establish, sponsor, or support religion. *Id.* at 673-74.

97. *Lemon*, 403 U.S. at 612 (citing *Allen*, 392 U.S. at 243).

98. *Id.* at 613.

99. *Id.* at 615 (citing R.I. GEN. LAWS § 16-51-1 (1970)).

100. *Lemon*, 403 U.S. at 620 (citing PA. STAT. ANN., tit. 24, §§ 5601-5609 (1971)).

101. *Id.* at 607-08.

102. *Id.* at 609.

103. *Id.* at 612. Lemon actually turned upon the excessive entanglement prong derived from *Walz*. See *id.* at 615.

104. See *Jimmy Swaggart Ministries v. Board of Equalization of Cal.*, 493 U.S. 378, 392 (1990); *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481, 490 (1986); *Larson v. Valente*, 456 U.S. 228, 235 (1982).

## D. Lower Court Application of the Lemon Test

*Florey v. Sioux Falls School District 49-5*<sup>105</sup> is one of *Lemon*'s most significant progeny. The facts of *Florey* required the Eighth Circuit to apply the *Lemon* test in its entirety to the question of public school observance of religious holidays.<sup>106</sup> In 1977, a kindergarten class in Sioux Falls, South Dakota, held a Christmas program.<sup>107</sup> The program contained many Christian religious references, including the now well-known "Beginners' Christmas Quiz."<sup>108</sup> Complaints from parents prompted the school board to set up a citizens' committee with members from a cross-section of the community.<sup>109</sup> The committee's purpose was to study the relationship between church and state and determine what was appropriate for school functions.<sup>110</sup>

Several months of deliberations resulted in the creation of a set of rules and a policy statement explaining the rules.<sup>111</sup> Generally, the rules limited observances to those holidays that had both a religious and secular basis. Holidays with only a religious basis would not be observed.<sup>112</sup> Rule 3 allowed music, art, literature, and drama with a religious theme or basis to be included in the curriculum if presented "in a prudent and objective manner and as a traditional part of the cultural and religious heritage of the particular holiday."<sup>113</sup> Rule 4 permitted the use of religious symbols in teaching only if they were used as an "example of the cultural and religious heritage of the holiday and [were] temporary in nature."<sup>114</sup>

The district court held that the rules, "if properly administered and narrowly construed," would not violate the First Amend-

105. 619 F.2d 1311 (8th Cir. 1980).

106. *Id.* at 1314.

107. *Id.*

108. *Id.* at 1317. The "Christmas Quiz" contained many direct references to Christian religious beliefs:

Teacher: Of whom did heavenly angels sing [a]nd news about His birthday bring?

Class: Jesus.

....

Teacher: What is the day we celebrate [a]s birthday of this One so great?

Class: Christmas.

*Id.* at 1318.

109. *Id.* at 1313. The committee consisted of parents, teachers, clergy of various religions, the school district's music director, and an attorney. *Id.* at 1313 n.1.

110. *Id.* at 1313.

111. *Id.*

112. *Id.* at 1314.

113. *Id.*

114. *Id.*

ment.<sup>115</sup> The Eighth Circuit applied the Lemon test to determine whether the rules promulgated by the school board violated the Establishment Clause.<sup>116</sup> Using a step-by-step approach, the Florey court analyzed each Lemon prong in detail. The court considered the first imperative—that “the [activity] must have a secular purpose”<sup>117</sup>—in light of the school prayer cases.<sup>118</sup> These cases involved a state-created system that advanced religion.<sup>119</sup> By contrast, the rules in Florey tried “to delineate the scope of permissible activity.”<sup>120</sup>

The Florey court emphasized that the “purpose and effect” of the rules was clearly secular.<sup>121</sup> The school board policy attempted to minimize the impact of religious holidays while trying to preserve their cultural heritage.<sup>122</sup> Even though a particular holiday may have had a religious connotation, the rules promoted a secular version of the holiday.<sup>123</sup>

Next, the Florey court applied the second Lemon prong to the rules, asking whether they had a “‘principal or primary effect . . . that neither advances nor inhibits religion.’”<sup>124</sup> Again, the court found no invalidity.<sup>125</sup> The rules mandated that religious materials, including art, music, and literature, be presented in the context of the teaching of cultural history.<sup>126</sup>

The final prong was never really an issue because the facts in Florey did not even approach “excessive government entanglement with religion.”<sup>127</sup> The court found that there was no meaningful relationship between the school district’s policies and any religious authority.<sup>128</sup> Thus, Florey stands for the proposition that the First Amendment does not insulate public schools from all religious teaching.

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115. *Id.* at 1313.

116. *Id.*

117. *Id.* at 1314 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)).

118. See *supra* discussion part III.A-B.

119. “[W]hen a state intentionally sets up a system that by its essential nature serves a religious function, one can only conclude that the advancement of religion is the desired goal.” Florey, 619 F.2d at 1315.

120. *Id.*

121. *Id.*

122. *Id.* at 1317.

123. *Id.*

124. *Id.* (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)).

125. *Id.*

126. *Id.*

127. *Id.* at 1318.

128. *Id.*

### E. The Burger Court's Move Toward Accommodation

Toward the end of the Burger era, the Supreme Court began to retreat from strict adherence to separation of church and state. In terms of values, accommodation moved to the forefront.<sup>129</sup> The Court's 1984 decision in *Lynch v. Donnelly*<sup>130</sup> exemplified this shift. *Lynch* involved an annual Christmas display in a park in Pawtucket, Rhode Island.<sup>131</sup> Included in the display for the previous forty years were a Nativity scene, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cut-out figures such as a clown, an elephant, and a teddy bear, hundreds of colored lights, and a banner reading "Seasons Greetings," among other things.<sup>132</sup> In an opinion written by Chief Justice Burger, the Court held that the use of the Nativity scene in the context of a Christmas display did not violate the Establishment Clause because the government did not intend to aid any particular religion or faith.<sup>133</sup> The Court emphasized the importance of viewing the government's action in relation to the circumstances.<sup>134</sup> In this case, the city had a secular purpose for including the Nativity scene in its Christmas display.<sup>135</sup> In the context of the Christmas holiday, the Nativity scene neither advanced a religious cause nor created an excessive entanglement between religion and government.<sup>136</sup> The Court further stated that any benefit received by a particular religion or faith was "indirect, remote, and incidental."<sup>137</sup> The Court found that rather than requiring complete separation of church and state, the Constitution allowed for accommodation of all religions and prevented hostility towards any. The Court went out of its way to point out that "[a]nything less would require the 'callous indifference' . . . that was never intended by the Establishment Clause."<sup>138</sup>

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129. This fundamental change in policy is a direct reflection of Republican appointments to the Court. See Linda Greenhouse, *The Year the Court Turned to the Right*, N.Y. TIMES, July 7, 1989, at A1.

130. 465 U.S. 668 (1984).

131. *Id.* at 671.

132. *Id.* at 671.

133. *Id.* at 685.

134. *Id.* at 680.

135. *Id.* at 681.

136. *Id.* at 681-82.

137. *Id.* at 683.

138. *Id.* at 673 (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)). The Court also reasoned that "[t]o forbid the use of this one passive symbol at the very time hymns and carols are sung and played in public places including schools, and while Congress and state legislatures open public sessions with prayers, would be an overreaction contrary to our history and to our holdings." *Id.* at 686.

## IV. THE ESTABLISHMENT CLAUSE IN THE REHNQUIST COURT

## A. Dismantling the Wall

If the trend away from the separation of church and state was a drizzle at the end of the Burger Court, it became a torrent in the Rehnquist reign. Even in the most clear-cut cases, Chief Justice Rehnquist and Justice Scalia revealed that their personal agenda was to emphasize the Free Exercise Clause at the expense of the Establishment Clause. For example, in the 1987 case *Edwards v. Aguillard*,<sup>139</sup> Justices Rehnquist and Scalia were the dissenters in the seven-to-two decision.<sup>140</sup> *Edwards* involved a Louisiana law which forbade the teaching of evolution in public schools unless accompanied by instruction in the theory of "creation science."<sup>141</sup> In an opinion written by Justice Brennan, the Court held that the law served no identifiable secular purpose and that its primary effect was the promotion of a particular religious belief, both of which violated the Establishment Clause.<sup>142</sup> The Court reasoned that references to religion may be valid as long as they do not have the purpose or effect of advancing religious goals.<sup>143</sup> The Court also noted that younger students require even more protection because the danger of influencing the beliefs of public grade school and high school children is so great.<sup>144</sup> Fortunately, Justices Rehnquist and Scalia stood alone. Had they carried the day in *Edwards*, there would have been little, if any, protection left under the Establishment Clause.

The Rehnquist Court's desire to dismantle the Establishment Clause's wall of separation between church and state became clear in *Bowen v. Kendrick*.<sup>145</sup> *Bowen* involved the constitutionality of the Adolescent Family Life Act (AFLA), which authorized federal grants to secular and sectarian organizations for counseling and research in the areas of premarital adolescent relations and teen pregnancy.<sup>146</sup> Chief Justice Rehnquist, writing for the Court in a five-to-four decision, ostensibly applied the Lemon test

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139. 482 U.S. 578 (1987).

140. *Id.* at 610 (Rehnquist, C.J., dissenting)

141. *Id.* at 581.

142. *Id.* at 594.

143. *Id.* at 584. A few examples of valid references would be the teaching of religion to provide historical perspective, to illustrate comparative religious beliefs, or to highlight religion in literature. *Id.* at 594.

144. *Id.* at 584 n.5.

145. 487 U.S. 589 (1988).

146. *Id.* at 593.

in holding that, on its face, AFLA did not have the “primary effect of advancing religion.”<sup>147</sup>

Justice Blackmun, in a compelling dissent, asserted that

AFLA, unlike any statute this Court has upheld, pays for teachers and counselors, employed by and subject to the direction of religious authorities, to educate impressionable young minds on issues of religious moment. Time and again we have recognized the difficulties inherent in asking even the best-intentioned individuals in such positions to make a total separation between secular teaching and religious doctrine.<sup>148</sup>

Continuing his assault on the majority’s form-over-substance approach, Justice Blackmun declared:

Whatever Congress had in mind, however, it enacted a statute that facilitated and, indeed, encouraged the use of public funds for such instruction, by giving religious groups a central pedagogical and counseling role without imposing any restraints on the sectarian quality of the participation. As the record develops thus far in this litigation makes all too clear, federal tax dollars appropriated for AFLA purposes have been used, with government approval, to support religious teaching.<sup>149</sup>

## B. Allegheny County: Accommodation Moves to the Forefront

The conservative ideology of accommodation, implicit in earlier decisions,<sup>150</sup> became explicit in *County of Allegheny v. American*

147. Bowen, 487 U.S. at 602 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)).

148. *Id.* at 638 (Blackmun, J., dissenting). *Accord* *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 388 (1985); *Wolman v. Walter*, 433 U.S. 229, 254 (1977); *Roemer v. Maryland Pub. Works Bd.*, 426 U.S. 736, 749 (1976) (plurality opinion); *Meek v. Pittenger*, 421 U.S. 349, 370 (1975); *Levitt v. Committee for Pub. Educ. and Religious Liberty*, 413 U.S. 472, 481 (1973).

149. Bowen, 487 U.S. at 626 (Blackmun, J., dissenting). For example, public funds were used to pay for the following counseling:

You want to know the church teachings on sexuality. . . . You are the church. You people sitting here are the body of Christ. The teachings of you and the things you value are, in fact, the values of the Catholic Church.

. . . .

The Church has always taught that the marriage act, or intercourse, seals the union of husband and wife, (and is a representation of their union on all levels.) Christ commits Himself to us when we come to ask for the sacrament of marriage. We ask Him to be active in our life. God is love. We ask Him to share His love in ours, and God procreates with us, He enters into our physical union with Him, and we begin new life.

*Id.* at 625 (Blackmun, J., dissenting) (quoting Appendix to Petitioner’s Brief at 226, 372).

150. See *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985); (Rehnquist, J., dissenting); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

Civil Liberties Union.<sup>151</sup> This case involved the constitutionality of two holiday displays in downtown Pittsburgh. The first display was a Nativity scene placed inside the county courthouse.<sup>152</sup> The second was an eighteen-foot menorah placed outside the City-County Building next to a forty-five-foot Christmas tree.<sup>153</sup>

This case was unusual in that four justices found that neither display violated the Establishment Clause,<sup>154</sup> three justices found that both displays violated the Establishment Clause,<sup>155</sup> and two justices found that the Nativity scene was unconstitutional while the menorah, in its context, was constitutional.<sup>156</sup> The majority distinguished the two displays by indicating that the Nativity scene conveyed a religious message.<sup>157</sup> The Court held that while “[t]he government may acknowledge Christmas as a cultural phenomenon . . . it may not observe it as a Christian holy day by suggesting that people praise God for the birth of Jesus.”<sup>158</sup> Although the menorah is the traditional symbol of Chanukah, the Court reasoned that its placement next to a Christmas tree created an “overall holiday setting” that mitigated the menorah’s original nature, making it a symbol of the winter holiday season and not a religious message of the Jewish faith.<sup>159</sup>

Justice Kennedy articulated the conservative view of accommodation in Allegheny County.<sup>160</sup> With respect to the Nativity scene, Justice Kennedy objected to the majority’s application of the Lemon test; however, he purported to follow it himself.<sup>161</sup>

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151. 492 U.S. 573 (1989).

152. *Id.* at 578.

153. *Id.* at 587.

154. *Id.* at 655 (Kennedy, J., concurring in part and dissenting in part). Chief Justice Rehnquist and Justices White and Scalia joined in Justice Kennedy’s opinion. See *id.*

155. *Id.* at 637 (Brennan, J., concurring in part and dissenting in part). Justices Marshall and Stevens joined in Justice Brennan’s opinion. See *id.* Justice Stevens also wrote an opinion concurring in part and dissenting in part, in which Justices Brennan and Marshall joined. See *id.* at 646.

156. *Id.* at 621. Only Justice O’Connor joined part VII of Justice Blackmun’s opinion. See *id.* at 578.

157. *Id.* at 600.

158. *Id.* at 601.

159. *Id.* at 614.

160. *Id.* at 655 (Kennedy, J., concurring in part and dissenting in part). “The Religion Clauses do not require government to acknowledge these holidays or their religious component; but our strong tradition of government accommodation and acknowledgment permits government to do so.” *Id.* at 664.

161. *Id.* at 655-56:

I am content for present purposes to remain within the Lemon framework, but do not wish to be seen as advocating, let alone adopting, that test as our primary guide in this difficult area. . . . [But] even the Lemon test, when applied with proper sensitivity to our traditions and our case law, supports the conclusion that both the crèche and the menorah are permissible displays in the context of the holiday season.



Ironically, his application of the Lemon test would have severely weakened the separation of church and state with the very standard that has most effectively maintained its preservation during the past twenty years.

The real thrust of Justice Kennedy's opinion, however, lay in his use of the coercive effect test,<sup>162</sup> which Justice O'Connor criticized in her concurrence:

An Establishment Clause standard that prohibits only "coercive" practices or overt efforts at government proselytization . . . but fails to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others, would not, in my view, adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community. Thus, this Court has never relied on coercion alone as the touchstone of Establishment Clause analysis.<sup>163</sup>

Drawing upon her concurrence in *Lynch v. Donnelly*,<sup>164</sup> Justice O'Connor's proposed solution was the endorsement test.<sup>165</sup> In *Lynch*, Justice O'Connor had described the Establishment Clause's protections as prohibiting the government from "making adherence to a religion relevant in any way to a person's standing in the political community."<sup>166</sup> The government violated this prohibition when it endorsed a particular religion: "Endorsement sends a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."<sup>167</sup> Justice O'Connor's thesis in *Lynch* was that the relevant inquiry was not "whether secular objectives for the legislation existed, but rather, whether the government intend[ed] to convey a message of endorsement or disapproval of religion or whether the message had such effect."<sup>168</sup> In *Allegheny County*, Justice O'Connor explained that the test was the most appropriate to apply in Establishment Clause cases because, "[a]s a theoretical matter, [it] captures the essential command of the Establishment Clause, namely, that government must not make

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162. "[G]overnment may not coerce anyone to support or participate in any religion or its exercise." *Id.* at 659.

163. *Id.* at 627-28 (O'Connor, J., concurring) (citations omitted).

164. 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

165. *Allegheny County*, 492 U.S. at 623 (O'Connor, J., concurring).

166. *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring).

167. *Id.* at 688.

168. *Id.* at 670-72.

a person's religious beliefs relevant to his or her standing in the political community by conveying a message 'that religion or a particular religious belief is favored or preferred.'<sup>169</sup>

Thus, when the Allegheny County dust had settled, three separate Establishment Clause tests remained: the Lemon test, the coercive effect test, and the endorsement test.<sup>170</sup> In the context of our country's diversity and pluralism, in which constitutional protections are so vital, the existence of three tests was a harbinger of trouble.

### C. Establishment Clause Jurisprudence Fractured

*Lee v. Weisman*<sup>171</sup> involved a Providence, Rhode Island, school district that invited a rabbi to give the invocation and benediction at a graduation ceremony.<sup>172</sup> It had been the long-standing policy of the school district to invite members of the clergy to give such addresses, as long as they followed the school district's guidelines and gave assurances that the prayers would be nonsectarian.<sup>173</sup> Justice Kennedy, writing for the majority, used the coercive effect test in holding that state-sponsored and directed religious exercise amounted to an impermissible involvement of government with religion.<sup>174</sup> The Court reasoned that because the school district provided the rabbi with a pamphlet on school policy and instructed him to deliver a nonsectarian message, they were in effect controlling the prayer's content.<sup>175</sup> The Court declared that not only are actions or practices that coerce people to support or participate in religious activities invalid, but those that even pose the danger of doing so are likewise impermissible in light of the Establishment Clause.<sup>176</sup> Again, Justices Scalia, White, and Thomas, and Chief Justice Rehnquist dissented because of their belief that the facts of *Lee* fit comfortably within the concept of ac-

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169. *Allegheny County*, 492 U.S. at 627 (O'Connor, J., concurring) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring)).

170. Arguably, there was a fourth test: nonpreferential treatment. In his dissenting opinion in *Wallace*, then-Justice Rehnquist found that the establishment of a national religion or the preference of a religious sect was forbidden by the Establishment Clause. 472 U.S. at 106 (Rehnquist, J., dissenting). However, he also found that programs that benefit or prefer one religion without hindering another were constitutional. *Id.* (Rehnquist, J., dissenting).

171. 505 U.S. 577 (1992).

172. *Id.* at 581.

173. *Id.*

174. *Id.* at 587.

175. *Id.* at 588.

176. See *id.* at 592.

commodation of religion by government.<sup>177</sup> In retrospect, it is not surprising that because of their accommodationist agenda these four justices refused to concur in even the weakest of church-state separation standards, the coercive effect test.<sup>178</sup>

The Rehnquist Court continued its expansion of the Free Exercise Clause in *Zobrest v. Catalina Foothills School District*.<sup>179</sup> *Zobrest* concerned a hearing-impaired student who was attending a private Roman Catholic school.<sup>180</sup> *Zobrest* asked the school district to furnish him with a sign language interpreter, but the school district refused.<sup>181</sup> In a five-to-four opinion, Chief Justice Rehnquist wrote that “[g]overnment programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also re-

177. “[T]he Establishment Clause must be construed in light of the ‘[g]overnment policies of accommodation, acknowledgment, and support for religion [that] are an accepted part of our political and cultural heritage.’” *Id.* at 631 (Scalia, J., dissenting) (quoting *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in part and dissenting in part)).

178. Even Professor Michael McConnell, an ardent supporter of accommodation and free exercise, takes a very dim view of the Court’s current trend:

Until recently, the Free Exercise Clause was interpreted in a manner favorable to accommodation, while the Establishment Clause was interpreted to create obstacles to accommodation. . . . The current trend in the Court is the reverse: The Free Exercise Clause no longer is interpreted to require accommodation in most instances, but the Establishment Clause no longer is interpreted to interfere with them, in most instances. This leads to a jurisprudence in which legislative discretion is maximized and the Clauses, since they are rarely applied, rarely conflict.

Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 *GEO. WASH. L. REV.* 685, 695-96 (1992).

179. 509 U.S. 1 (1993). The Rehnquist camp pressed strenuously to expand the Free Exercise Clause in two later cases, *Lamb’s Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), and *Board of Education of Kiryas Joel Village School District v. Grumet*, 114 S. Ct. 2481 (1994).

In *Lamb’s Chapel*, a school board denied a religious congregation the opportunity to use school property for the viewing of a film because of the film’s religious nature. 508 U.S. at 386-87. The Court held that granting equal access to government property would not have violated the Establishment Clause test under *Lemon* because the activity would not have occurred during school hours, would not have been sponsored by the school, and would have been open to the public. *Id.* at 395.

At issue in *Kiryas Joel* was a state law creating a separate school district for a community of Orthodox Jews. 114 S. Ct. at 2484. The Court held that it was not the fact that the school district was comprised of solely one religious sect that violated the First Amendment, but rather that the legislature had intentionally set the school district lines in such a way as to accommodate one religious group. *Id.* at 2487. Notwithstanding the blatant Establishment Clause violation, Chief Justice Rehnquist and Justices Scalia and Thomas dissented, finding no constitutional infirmity. *Id.* at 2505 (Scalia, J., dissenting).

180. *Zobrest*, 509 U.S. at 3.

181. *Id.* at 4.

ceive an attenuated financial benefit.”<sup>182</sup> The Court reasoned that any aid the secular school received was indirect because the aid attached to the individual child, and the parents had the choice to send him to any school they wished.<sup>183</sup>

Again, Justice Blackmun wrote a dissenting opinion. “‘Although Establishment Clause jurisprudence is characterized by few absolutes,’ at a minimum ‘the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith.’”<sup>184</sup> Thus, in its rush to restrict the protections of the Establishment Clause, the Rehnquist majority in *Zobrest* embarked upon the dangerous path of political decisionmaking.<sup>185</sup> There was no need for the Court to decide *Zobrest* on constitutional grounds. There were two other, nonconstitutional grounds on which the Court properly could have decided the case.<sup>186</sup>

The Court’s compulsion to expand the Free Exercise Clause found its most recent expression in a five-to-four decision, *Rosenberger v. Rector of the University of Virginia*.<sup>187</sup> In *Rosenberger*, the Court upheld the payment of public funds to an evangelical student organization devoted to religious proselytization.<sup>188</sup> Writing for the majority, Justice Kennedy stated that

[t]hough our Establishment Clause jurisprudence is in hopeless disarray, this case provides an opportunity to reaffirm one basic principle that has enjoyed an uncharacteristic degree of consensus: The Clause does not compel the exclusion of religious groups from government benefits programs that are generally available to a broad class of participants.<sup>189</sup>

In a cogent dissent, Justice Souter asserted “[t]he Court today, for the first time, approves direct funding of core religious activities by an arm of the State.”<sup>190</sup> Justices Souter, Stevens, Ginsburg, and Breyer viewed this as a clear violation of the Establishment Clause. Concluding his dissent with a reference to his

182. *Id.* at 8.

183. *Id.* at 12.

184. *Id.* at 21 (Blackmun, J., dissenting) (quoting *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 385 (1985)).

185. See generally Julian R. Kossow, *Dolan v. City of Tigard Takings Law and the Supreme Court: Throwing the Baby out with the Floodwater*, 14 *STAN. ENV. L. J.* 215 (1995).

186. *Zobrest*, 508 U.S. at 15 (Blackmun, J., dissenting) (“This Court could easily refrain from deciding the constitutional claim by vacating and remanding the case for consideration of the statutory and regulatory issues.”).

187. 115 S. Ct 2510 (1995).

188. *Id.* at 2525.

189. *Id.* at 2532.

190. *Id.* at 2533.

own apprehension about the future,<sup>191</sup> Justice Souter recalled Chief Justice Burger's prophetic warning in *Lemon*: "[I]n constitutional adjudication some steps, which when taken were thought to approach "the verge" have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a "downhill thrust" easily set in motion but difficult to retard or stop."<sup>192</sup>

## V. THE NEED TO RETURN TO THE LEMON BRIGHT LINE

To advocate a return to strict *Lemon* test adherence in the context of a case involving lyrics in public high school choir songs may appear to many readers to be "distant" and "early" rather than a "warning."<sup>193</sup> However, the most delicate sensitivities are involved in issues of separation of church and state.<sup>194</sup> Perhaps Rachel Bauchman will establish at trial that Torgerson's activities amounted to outright proselytizing. If so, I trust that all members of the present Court would find such conduct offensive to the Constitution. Indeed, past cases have so held.<sup>195</sup>

The more difficult question arises when a plaintiff cannot show proselytizing by public school teachers and the legal focus narrows solely to the lyrics of choir songs and their places of performance. A strong argument can be made that cultural, historic, and artistic aspects inherent in music outweigh, in a constitutional sense, the music's explicit religious content. However, this argument would only be persuasive if the music itself were part of a nonsectarian curriculum of public education presented in the same way that algebra or any other course were taught.<sup>196</sup> Thus, Rachel's case brings us to the precise intersection of the *Lemon* test and the Establishment Clause. Taking into account the totality of Torgerson's actions, three questions need to be asked: first, did the government's practice reflect a clearly secular purpose?<sup>197</sup> Second, did the government's practice have a primary effect that neither advanced nor inhibited religion?<sup>198</sup> Finally, did the gov-

191. *Id.* at 2550.

192. *Id.* at 2551 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 624 (1971)).

193. See *supra* note 14 and accompanying text.

194. See *supra* note 23 and accompanying text.

195. See *Lee v. Weisman*, 505 U.S. 577, 598 (1992); *Lemon*, 403 U.S. at 625; *Abington School Dist. v. Schempp*, 374 U.S. 203, 303 (1963); *Engel v. Vitale*, 370 U.S. 421, 444 (1962).

196. See *Doe v. Duncanville Ind. Sch. Dist.*, 70 F.3d 402, 407 (1995).

197. *Lemon*, 403 U.S. at 612.

198. *Id.*

ernment's practice avoid excessive entanglement with religion?<sup>199</sup> My answers are no, no, and no.

A recent Fifth Circuit decision, *Doe v. Duncanville Independent School District*,<sup>200</sup> not only sheds light on the answers but also bears a striking similarity to the *Rachel Bauchman* case.<sup>201</sup> *Duncanville* involved a twelve-year-old girl who had qualified to play on the school's basketball team.<sup>202</sup> She was part of a physical education class specifically designed for members of the basketball team.<sup>203</sup> In addition to the basketball team, Doe also joined the choir. She received academic credit for both activities.<sup>204</sup>

The basketball team activities that were of questionable religious character included the coach's recitation of the Lord's Prayer at practices, games, and on the bus traveling to away games.<sup>205</sup> While Doe was a member of the choral program, she was required to sing the choir's theme songs, "The Lord Bless You and Keep You" and "Go Ye Now in Peace."<sup>206</sup> Not wanting to single herself out, Doe took part in these programs.<sup>207</sup> However, after discussing it with her father, she realized that she was not required to participate and opted out of the prayers.<sup>208</sup> Unfortunately, her non-participation drew attention from spectators and her fellow students, who singled her out and questioned her beliefs.<sup>209</sup>

The Fifth Circuit held that the school district's practice of allowing its employees to participate in and/or supervise student prayers during basketball practices and games violated the Establishment Clause.<sup>210</sup> However, the court found that the school district's practice of allowing the choir to use Christian religious songs as its theme songs did not violate the Establishment Clause.<sup>211</sup> The court acknowledged that "the principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause."<sup>212</sup> In holding that the prayers at basketball practices and games violated the Establishment Clause, the court stated:

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199. *Id.*

200. 70 F.3d 402 (1995).

201. See discussion *supra* part II.

202. *Duncanville*, 70 F.3d at 404.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 406-07.

211. *Id.* at 408.

212. *Id.* at 406.

This is particularly true in the instant context of basketball practices and games. The challenged prayers take place during school-controlled, curriculum-related activities that members of the basketball team are required to attend. During these activities DISD coaches and other school employees are present as representatives of the school and their actions are representative of DISD policies.<sup>213</sup>

As for the choir's theme songs, the court held that "[r]eligious songs may be sung, however, for their artistic and historic qualities if presented objectively as part of a secular program of education."<sup>214</sup> Thus, *Duncanville* turns on the objective presentation of the choir's songs.<sup>215</sup>

The facts of Rachel's case appear to demand a different result. Torgerson's actions violated the first prong of the Lemon test because they did not clearly reflect a secular purpose. The choir's repertoire consisted solely of Christian songs, and Torgerson refused any attempt to balance the choir's program.<sup>216</sup> Furthermore, this was not an isolated incident. Many of Torgerson's former students voiced concerns similar to those expressed by Rachel.<sup>217</sup> In addition, the choir performed concerts at various community churches, where it participated in Christian religious services.<sup>218</sup>

As to the second part of the Lemon test, the primary effect of Torgerson's directing of the choir was a blend of music for music's sake and an advancement of the teacher's own religion, as well as an inhibition of Rachel's religion. During his choir class, Torgerson repeatedly pressed his religious beliefs on his students, preaching that "Jesus d[ied] for our sins."<sup>219</sup> He also publicly emphasized Rachel's religious beliefs, stimulating anti-Semitic responses from her peers.<sup>220</sup> The totality of these circumstances fails to satisfy the second requirement of the Lemon test.

With respect to the third prong of the Lemon test, the whole process reflected an excessive entanglement with religion. The choir's extensive religious repertoire, its participation in religious services, and the choir director's steadfast stance against any secularization of the curriculum so entangled this public school

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213. *Id.*

214. *Id.*

215. *Id.*

216. *Bauchman ex rel. Bauchman v. West High Sch.*, 900 F. Supp. 254, 260 (D. Utah 1995).

217. *Raspberry*, *supra* note 36, at A17.

218. *Bauchman II*, 900 F. Supp. at 260.

219. *Raspberry*, *supra* note 36, at A17; see also *Autman*, *supra* note 36, at D2.

220. *Bauchman II*, 900 F. Supp. at 260-61.

with religion as to pressure Rachel's minority beliefs. Such actions threaten suffocation of the concept of religious freedom.

## VI. CONCLUSION

A rigorous application of the Lemon test would show that Rachel's First Amendment rights have been violated. From a policy perspective, this finding would be an appropriate result. Separation of church and state must once again become a judicial priority. The Rehnquist Court's thrust toward accommodation of religion is simply too threatening to the millions of Americans who do not follow the majority's creed.<sup>221</sup> The wall of separation envisioned by our founders and made explicit in the Establishment Clause<sup>222</sup> may crumble under the weight of too many decisions like *Bowen*,<sup>223</sup> *Zobrest*,<sup>224</sup> and *Rosenberger*.<sup>225</sup> The majority of Americans, including the orthodox and the fundamentalist, are free—truly free—to practice their beliefs, but those beliefs should not be foisted upon Americans of a different faith or of no faith. Only the Supreme Court's interpretation of the First Amendment stands in the way.

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221. Professor Nadine Strossen, president of the American Civil Liberties Union, stated in a recent symposium on the topic of religion in schools:

By the same token, for those who are non-religious, or who follow different religious traditions from those assertedly embraced in school-sponsored prayer, the exercise is equally problematic, because, as Justice O'Connor stated . . . it signals to them that they are only second-class citizens. . . . The adverse impact of government-endorsed religious exercises upon those who do not share the beliefs advanced is not just a matter of abstract constitutional theory. Its tangible damage is demonstrated by Deborah Weisman's experience. The most common question she got about her case . . . is: "Why make such a big deal out of a small prayer?" Here is Deborah's answer to that question, speaking from her own experience as a public school student: "I don't think a little prayer is a small thing. It excludes. They forced me to pray to someone else's God. That is a big deal . . . When I am forced to participate in a ritual . . . it's an attempt to make me different from what I am—to change my identity, to make me conform."

Nadine Strossen, *How Much God in the Schools? A Discussion of Religion's Role in the Classroom*, 4 WM. & MARY BILL RTS. J. 607, 623 (1995) (quoting telephone interview with Deborah Weisman (Sept. 6, 1995)).

222. See *supra* note 2.

223. 487 U.S. 589 (1988).

224. 505 U.S. 577 (1992).

225. 115 S. Ct. 2510 (1995).



## FRED RODELL'S CASE AGAINST THE LAW

KEN VINSON\*

The society of lawyers is doing quite well, thank you, what with a great many of this country's 900,000 lawyers paying their country club dues out of petty cash. Yet, for these proud toilers in the billable-hours trade—one attorney at law for every 300 Americans—and for the 50,000 new attorneys entering the legal profession annually, there's a lining not so silvery. Anti-lawyer elements, agitated by the mumbo jumbo that lawyers use to lord it over the common herd, are raising lawyer-bashing to record heights. Bombarded by these negative reviews, a nervous lawyer is surely tempted of late to do a Richard Nixon and announce: "I am not a shyster."

Lawyer-bashing has so numbed the legal-eagle clan that reform groups such as HALT (originally known as Help Abolish Legal Tyranny) are even winning a few battles to force lawyers to use plain English in writing deeds and contracts. And then there's the unpleasantness down in Little Rock, otherwise known as Hillary Clinton's Rose Law Firm, which all by itself is an argument for banning lawyers from holding high government office, a ban that would decimate Congress and leave the White House shy of a President and most of his Cabinet. A recent Reebok ad goes even further in seeking a "final solution" to the lawyer problem, concluding in lawyer-joke fashion that the perfect planet is a planet free of lawyers.

Law schools today are full of aspiring juris doctors made anxious (law school applications are down) by Reebok ads and movies depicting lawyers as sleazeballs. Law professors must put on rose-colored glasses and soberly assure legal neophytes that, despite the flak the bar gets, the law is still a noble profession—and not the school of sharks selling dirty tricks that so many think it is. Since lawyers are so unloved, perhaps law schools should offer a formal course preparing lawyer wannabees for the anti-lawyers' slings and arrows. The course title might be, with thanks to Carl Sandburg, "Why Does a Hearse Horse Snicker Hauling a Lawyer Away?"<sup>1</sup> The hearse horse's snicker, if the whole truth be told, would be a study in ancient history.

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\* Professor of Law, Florida State University. LL.B., University of Texas, 1959; LL.M., Yale University, 1964.

1. Carl Sandburg, *The Lawyers Know Too Much*, in *THE COMPLETE POEMS OF CARL SANDBURG* 189 (1950).

But students of the case to be made against the legal crowd needn't look to mouldy history to uncover the bar's toughest critic ever, the iconoclastic Fred Rodell (1907-1980). This champion foe of legalism was, moreover, a legal insider, a law professor who for four decades aimed his pot shots at lawyers and their overblown rhetoric from the hallowed confines of the Yale Law School. Committed to knocking the legal elite off their high perches, Rodell incurred the enmity of the legal tribe, including the law teaching fraternity, with witty, biting, accessible books and popular magazine articles (*Fortune*, *Harper's*, *Life*, *Look*, *American Mercury*, *The Progressive*, *New York Times Magazine*, *The Saturday Review of Literature*) exposing the "pretentious poppycock" that, a pull-no-punches Rodell informed lay readers, the legally learned peddle under the name of "The Law."

Yale's Rodell published at age thirty-two his most famous book, *Woe Unto You, Lawyers!*<sup>2</sup> Here's a sample of how the essential emptiness of legaldom's abstruse language is laid bare in *Woe*, a 1939 critique of legal culture still in print:

Learning the lawyers' talk and the lawyers' way of thinking—learning to discuss the pros and cons of, say, pure food laws in terms of "affection with a public interest" as against "interference with freedom of contract"—is very much like learning to work cryptograms or play bridge. It requires concentration and memory and some analytic ability, and for those who become proficient it can be a stimulating intellectual game. Yet those who work cryptograms or play bridge never pretend that their mental efforts, however difficult and involved, have any significance beyond the game they are playing. Whereas those who play the legal game not only pretend but insist that their intricate ratiocinations in the realm of pure thought have a necessary relation to the solution of practical problems. It is through the medium of their weird and wordy mental gymnastics that the lawyers lay down the rules under which we live. And it is only because the average man cannot play their game, and so cannot see for himself how intrinsically empty-of-meaning their playthings are, that the lawyers continue to get away with it.<sup>3</sup>

*Woe Unto You, Lawyers!* is to lawspeak what Woodward and Bernstein's reporting was to the (lawyer-ridden) Watergate cover-up. Should a national movement to demystify legalism develop, *Woe* would be the natural choice for the movement Bible. Another

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2. FRED RODELL, *Woe Unto You, Lawyers!* (2d ed. 1957).

3. *Id.* at 15-16.

of Rodell's books still in print, *Nine Men*,<sup>4</sup> brings down to earth the high politics and constitutional lingo of U.S. Supreme Court justices. As a self-appointed watchdog over the legal politics practiced by the High Court, Rodell followed up *Nine Men* with scores of magazine articles detailing the annual sins, and occasional virtues, of the justices who, during the Warren Court era, rode herd over the Living Constitution.

In 1957, when I was halfway through law school, *Woe Unto You, Lawyers!* was reprinted for the first time. A family friend who lumped lawyers with the Antichrist handed me Professor Rodell's classic indictment of *The Law*. Woe's heretical trashing of legal gobbledegook would, my benefactor hoped, protect me from the brainwashing of goose-stepping professors of legal orthodoxy.

Even pre-Woe, I had an inkling that beneath the surface of law school's fancy word-play something phony lurked. But what did a novice law student like me know? So what if the shadowy common law seems to fall short of the "sum total of all human wisdom" preached by English legal priests in Blackstone's day. Still, it was hard to believe that legal science was other than a subject worthy of my (and Abe Lincoln's) attention. Yet, I couldn't shake off the unease that came with legal studies. It was as if the law school basement—whose dark recesses hide, or so law students imagine, the true rules that enigmatic professors refuse to reveal—concealed another mystery, this one monstrous, one that could besmirch hard-earned legal learning.

Then, I read the contraband *Woe*, and the basement monster revealed itself. *Woe* disclosed, in chapters such as "Modern Medicine-Men," the legal system shorn of its wordy, nice-guy camouflage. Instead of a legal science, *Woe* reduced *The Law* to a rather slipshod alien code full of fairy tales; *The Law* unmasked was merely a foreign language noteworthy for elasticity and the ease with which the legally adept bend it to support an argument that a horse chestnut is, well, a chestnut horse. Rodell opens *Woe* by setting the theme for his long-running case against *The Law*:

In tribal times, there were the medicine-men. In the Middle Ages, there were the priests. Today there are the lawyers. For every age, a group of bright boys, learned in their trade and jealous of their learning, who blend technical competence with plain and fancy hocus-pocus to make themselves masters of their fellow men. For every age, a pseudo-intellectual autocracy,

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4. FRED RODELL, *NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955* (1955).

guarding the tricks of its trade from the uninitiated, and running, after its own pattern, the civilization of its day.<sup>5</sup>

Woe Unto You, Lawyers! teaches that legal elites practice word-magic to curry favor with the rich and powerful. The ignorant, the trusting, the fearful must beware the rule of lawyers, warns Rodell. The legal trade, sums up the left-leaning, rakish, irreverent legal heretic (who insisted students call him “Fred”), is “nothing but a high-class racket.”<sup>6</sup> Rodell, a Philadelphia native temperamentally unsuited to being a “Philadelphia lawyer,” who after excelling as a law student at Yale refused to join the bar so he could remain free to call a pettifogger a pettifogger, lays out in Woe how legal concepts delight in chasing their tails around in a circle, and how legal palaver smacks of nothing so much as a “brand of professional pig Latin.”<sup>7</sup> Nonlawyers, concludes Rodell, should wrest “civilization out of the hands of those modern purveyors of streamlined voodoo and chromium-plated theology, the lawyers.”<sup>8</sup>

Fred Rodell’s words of Woe are very much in tune with the anti-lawyer sentiment of the 1990s. What made Rodell at mid-century maybe the nation’s best-known law professor was the novelty of a well-placed insider daring to blow the whistle—with clear, entertaining prose yet—on The Law’s slippery personality. In Rodell Revisited,<sup>9</sup> a 1994 reprinting of Rodell’s most memorable pieces, the “high-class racket” takes its final Rodellian lumps. As usual, Rodell from the grave ignores the usual niceties with which legal insiders soften any grudging admissions as to The Law’s less-than-perfect nature.

In a biographical introduction to Rodell Revisited, Loren Ghiglione suggests some of the roots of Rodell’s anti-lawyerism, including a strong aversion to bullshit, legal and otherwise. Personal biography aside, Rodell no doubt shared in the general suspicions about lawyers that go back to The Law’s theological period when legalistic reasoning was the hallmark of hair-splitting priests aiming to massage church text to produce—chestnut horses. From this priestly hair-splitting came, in time, the bar’s irritating mumbo jumbo, a professional jargon that contributes to the bad press given lawyers. Good lawyers after all are expert devils at complicating simple matters, at creating

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5. RODELL, *supra* note 2, at 7.

6. *Id.* at 16.

7. *Id.* at 11.

8. *Id.* at 19.

9. RODELL REVISITED: SELECTED WRITINGS OF FRED RODELL (Loren Ghiglione et al. eds., 1994).

muddy texts and technical roadblocks, all of which promote legal fog and lay resentment. In the midst of this fog sits the American Bar Association, laboring mightily to upgrade the lawyer's image as an independent selfless, honorable officer of the court who seeks after the public interest. ABA officials also preach the virtues of the lawyer-built adversary system. Yet courtroom battles, from the public's point of view, are all too often tedious, expensive, muddled affairs in which lawyers robed and otherwise manage to frustrate the truth. Opposing trial lawyers are seen to promote perverted versions of both factual history and legal precedent—and may the cleverer deceiver win the nod of judge and jury.

Lawyers, indispensable in a legalistic society where omnipresent codes written by lawyer-politicians and lawyer-administrators must be decoded, are therefore, like dentists, a necessary evil. As Rodell reminds, ours is “a government of lawyers, not of men”<sup>10</sup> and “[i]t is the lawyers who run our civilization for us—our governments, our business, our private lives.”<sup>11</sup> If pressed to name a political elite in this country, no group fits better into that category than those learned in The Law. And what better objects of resentment than those who use their clever way with words to run the big political show. So it is that even middle-class parents with little affection for the legal clan struggle with whether to send their offspring to law school, afraid that otherwise they are sending their young out into the world defenseless.

Lawyerly greed and arrogance rank high as well on the list of legal sins. Moreover, there is the specter of widespread incompetence among practitioners. Ironically, among victims of this era's litigious rush to personal injury court must be numbered the lawyers themselves. Legal malpractice suits have so proliferated that some trial lawyers do little else but sue or defend other lawyers. Finally, there are the headlines that make it ever more difficult to keep the semi-good name of The Law out of the mud.

The malodorous Rose Law Firm, for example, shares billing with John Grisham's *The Firm* (set in Memphis just a few miles from Little Rock on the opposite side of the Mississippi River) as the law firm least likely to name as a partner an independent, selfless, honorable, modern-day Abe Lincoln. In addition, reverberations from Richard Nixon's Watergate cover-up, with its cast

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10. RODELL, *supra* note 2, at 8.

11. *Id.* at 7.

of justice-obstructing, law-degree-toting characters, continue to taint the law trade. Then in the 1980s, the blue-chip legal talent lurking behind the savings and loan scandals reminded that have-gun-will-travel lawyering is par for the course. Today, well-fed trial lawyers spend millions lobbying legislators to keep hands off lucrative personal injury practices, a torts lottery, by the way, in which half of all accident victims recover no damages at all, and the other maimed half receive less than fifty cents on the liability insurance dollar. Meanwhile, over in the Wall Street section of the bar, high-flying corporate mouthpieces mastermind dog-eat-dog takeovers—and to hell with the job lay-offs and the junk bond fallout from such raiding tactics. Finally, there's the legal circus billed as the O.J. Simpson trial. As Clarence Darrow said, "The trouble with law is lawyers."<sup>12</sup>

Fred Rodell's successors in blowing the whistle on legal sinners have produced a constant stream of articles and books, and the occasional TV show, detailing the current failings of the legal community. Anti-lawyer titles of late include *The Screwing Of The Average Man: How Your Lawyer Does It*, *The Trouble With Lawyers*, *America's Lawyers: A Sick Profession?*, *A Plague Of Lawyers*, *The High Cost Of Lawyers*, and *First, Kill All The Lawyers*. Such Rodellian blasts suggest a role for lawyers far removed from the beneficent "leading part in the political society"<sup>13</sup> that an admiring Alexis de Tocqueville once forecast for what he termed the nineteenth-century linchpin for democracy, the American lawyer.

The author of *The Screwing Of The Average Man*, by the way, is Charles Peters, editor-in-chief of *The Washington Monthly* and a former lawyer with a Rodellian flare for exposing the warts on linchpins for democracy. Peters takes frequent and robust swipes against lawyers in his *Monthly* column, *Tilting at Windmills*, with examples of lawyerly money lust, obfuscations, and taxpayer-subsidized skiing vacations written off as attendance at continuing legal education conferences.

Even such a mild critic of legaldom as Harvard law professor Mary Ann Glendon is dismayed at what the competition for legal business has done to professional ideals of public service and independence from clients. Glendon, in her recent book, *A Nation*

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12. A DICTIONARY OF LEGAL QUOTATIONS 103 (Simon James & Chantal Stebbings eds., 1987) (quoting Clarence Darrow).

13. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 243 (J.P. Mayer & Max Lerner eds. & George Lawrence trans., 1966) (1835).

Under *Lawyers*,<sup>14</sup> laments the big-firm tendency toward unquestioningly carrying out a client's' desires. Professor Glendon longs for a return to the legal world of former lawyer-statesman Elihu Root, who reportedly said "About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop."<sup>15</sup> Legal insider Glendon, however, is the flip side of insider Rodell. She would cure the ills of the legal profession by placing *The Law*—that Rodell so cavalierly disemboweled—back on a heavenly pedestal. In *A Nation Under Lawyers*, Glendon decries the demystification of legalism and argues that more not less faith in the rule of law is the answer.

Another piece of the anti-lawyer picture is the lawyer joke. Jokes with lawyers as the butt are countless as sharks in the sea—sharks that, as the joke goes, refrain from devouring the lawyer cast overboard out of professional courtesy. Even the World Wide Web stores collections of anti-lawyer jokes. The hostility toward lawyers that generates the jokes is the same hostility that in the movie *Jurassic Park* prompts the hungry dinosaur, when it does lunch, to gobble up the lawyer, naturally. Humor in the way the legally untutored view lawyers no doubt dates way back to when priests-turned-lawyers split their first hairs and produced the convoluted lawyer-speak that leads so many to view lawyers as a sort of people whose profession it is to disguise matters.

So it was that Mohammed (says a tradition) was convinced that at least two out of three judges would go to hell. In the New Testament Gospel of Luke, it's three out of three: "Woe unto you, lawyers! for ye have taken away the key of knowledge: ye entered not in yourselves, and them that were entering in ye hindered."<sup>16</sup> Plato spoke of the lawyers' "small and unrighteous" souls,<sup>17</sup> and Keats, who guessed what lurks in the legal basement, said "I think we may class the lawyer in the natural history of monsters."<sup>18</sup>

That modern lawyers are a tad too money-mad is born out by a billable-hour corporate law firm culture that led in one extreme instance to an associate's billing a client for a "legitimate" twenty-seven-hour day. It seems the associate-soon-to-be-partner worked twenty-four hours around the (East Coast) clock, then hopped a flight from New York to California and billed for an ex-

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14. MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994).

15. *Id.* at 37 (quoting Elihu Root).

16. Luke 11:52.

17. Those #\*X/ !!! Lawyers, *TIME*, Apr. 10, 1978, at 56 (quoting Plato).

18. *Id.* (quoting John Keats).

tra three hours of in-flight paperwork.<sup>19</sup> Of course, being high-flying legal monopolists whose high fees close the door to legal services for most Americans is no way to win friends or rise in the polls. Shakespeare was not alone in thinking that lawyers use their magic with language to help the powerful stay in power, and that to “kill all the lawyers”<sup>20</sup> is a logical if impolite way to alter an inconvenient status quo. Law students in their first year of study are shocked to learn that The Law is not so much holy writ as it is an obscure alien tongue useful in shaping legal arguments in a form suitable for selling to either side in a lawsuit. Legal novices are taken aback by The Law’s ambiguity and adaptable nature even though there has been fair warning by, among others, Charles Dickens.

Charles Dickens’s place alongside Rodell on the honor roll of legal critics is secured by his fictional lawsuit in *Bleak House*.<sup>21</sup> *Bleak House*’s case of Jarndyce against Jarndyce is an English probate dispute of such interminable length and complexity “that no man alive knows what it means.”<sup>22</sup> Dickens surrounds his less than honorable English barristers and judges with a thick London fog that is unmistakably the legalists’ natural element. (I believe it was New York Times columnist Russell Baker who, perhaps taking his cue from *Bleak House*, once noted that any blow against fog is a blow against lawyers.)

In *Bleak House*, the annual fees extracted from the Jarndyce estate have become, for the English bar, veritable mother’s milk. Whole generations of lawyers and judges die out of and are born into Jarndyce against Jarndyce. Dickens’ treatment of English law is, of course, a burlesque. Yet lawyer-readers surely grow nervous and hear the hearse horse’s snicker when, at Temple Bar where “the dense fog is densest,” the nineteen Jarndyce barristers in attendance upon the Lord High Chancellor, who sits amidst crimson cloth and curtains “at the very heart of the fog . . . with a foggy glory round his head,”<sup>23</sup> proceed to nit-pick and further complicate the obscure points of the Jarndyce probate. As the legal nit-picking coagulates into ever-tighter legal knots tying up the diminishing resources of the Jarndyce estate, the fog enveloping the legal establishment becomes thicker and thicker.

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19. Stephanie B. Goldberg, *Then and Now: 75 Years of Change*, A.B.A. J., Jan. 1990, at 56, 60.

20. WILLIAM SHAKESPEARE, *THE SECOND PART OF KING HENRY THE SIXTH* act 4, sc. 2.

21. CHARLES DICKENS, *BLEAK HOUSE* (Doubleday 1953) (1853).

22. *Id.* at 3.

23. *Id.* at 1.



It was also Charles Dickens who gave us the immortal, “‘If the law supposes that,’ said Mr. Bumble, . . . ‘the law is a ass—a idiot.’”<sup>24</sup> And, in an earlier century, Dramatist Charles Macklin opined that “the law is a sort of hocus-pocus science.”<sup>25</sup> Yet, despite these and all the other pot shots aimed at lawyers and their hocus-pocus reasoning, and despite the record dearth of current law job openings, law school applications are down only slightly. It seems that neither famine, depression, war, nor hungry dinosaurs can impede the hatching out annually of fresh batches of juris doctors “skilled,” as the caustic Ambrose Bierce wrote, “in the circumvention of the law.”<sup>26</sup>

So why a roll of honor for anti-lawyer warriors? Does Fred Rodell deserve praise or condemnation for so wickedly thrashing The Law and its keepers? Surely lawyers, and the legal regime they administer, are here to stay. The rule of law, flawed though it may be by maxims full of weasel words and legalists full of hot air, is better than the rule of guns. Law is the civilized remedy for social chaos. Even if the rule of law is at bottom the rule of lawyers, the question is not whether to scrap law and lawyers. The question is whether the forked tongue of lawyers and judges can be transformed into an instrument of plainer English, and whether the legal system with its business regulations and probate procedures and tax laws that we can't live without can be improved upon. Rodell didn't really wish to rid the planet of lawyers. Rodell condemned using The Law as a smokescreen for medicine men to work their establishment magic, but in so doing he sought through his law teaching and writings, despite the fierceness of his rhetoric, to spur the legal community to use The Law to straightforwardly promote a wider sharing of wealth and power.

Critics such as Fred Rodell are a valuable public resource. Just as the press aspires to expose the failings of our governors and thereby guard the political health of the county, so do those who track and reveal The Law's semi-hidden operations aspire to keep legal people, well, semi-honest and semi-public-spirited. Lawyers, like all us sinners, need all the help they can get in rising above avarice, vanity, and hypocrisy. Lawyers, remember, must deal with clients anxious to escape their fair share of taxes, to soak McDonald's for selling scalding-hot coffee, to avoid alimony and child support, to win an acquittal for crime, to gain an advantage

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24. CHARLES DICKENS, *OLIVER TWIST* 399 (Oxford Univ. Press 1987) (1837).

25. *THE QUOTABLE LAWYER* 169 (David S. Shrager & Elizabeth Frost eds., 1986) (quoting Charles Macklin).

26. AMBROSE BIERCE, *THE DEVIL'S DICTIONARY* 187 (Stemmer House 1978) (1911).

by cleverly worded contract, and to delay justice by clogging the courts with pettifoggery. If clients were angels, perhaps lawyers could wear halos too.

Very likely the current increase in anti-lawyer feelings is due in part to the rise in negative attitudes toward government in general. Certainly the vigor with which Rodell in the 1930s attacked the pretensions of legal formalism had much to do with the legal politics surrounding the Great Depression. Rodell came of age professionally just as the nation experienced a loss of faith in (a pre-New Deal) government, especially judicial government. The legal establishment back then stood for the idea that government intervention was an inappropriate response to the human suffering brought on by economic collapse.

Following law school graduation in 1931, Rodell worked two years as legal advisor to progressive Pennsylvania Governor Gifford Pinchot, promoting a pre-FDR New Deal. As the New Deal in Washington got under way, and Rodell moved on to Yale to teach law, the legal establishment, from its base on Wall Street and on the Supreme Court, was stiffening its opposition to progressive New Deal programs. A conservative Supreme Court, throughout the 1920s and most of the 1930s, hid behind the vague formalisms of The Law to do its dirty work, as Rodell and other liberals saw it; pre-New Deal justices sought to derail liberal inroads on laissez-faire capitalism by declaring unconstitutional much of the progressive state and federal legislation that shocked the consciences of good conservatives.

As a youthful Rodell prepared to do battle, in the muckraking fashion common to the Depression era, with the dark (conservative) forces of legal formalism, this playful iconoclast suffered from no lack of confidence. He had excelled as an undergraduate at Haverford College, studied at the University of London, and then earned high honors as a Yale law student and staffer on the school's law journal. At Yale, Rodell was the student of law professors such as Justice-to-be William O. Douglas and Leon Green, realists who laid bare the gobbledegook content of legal language and revealed the judges to be political actors, a role judges cannot, despite all their wordy protestations, escape.

During Rodell's third year of law school, Yale Dean Charles Clark arranged to have a four-hour legal aptitude test given to faculty, law journal staffers, and first-year students with A averages. The Dean scored a seventy-six. The next highest grade was a seventy-nine. Except for Rodell's. He took only two hours to finish a test that took the others twice that time, and scored a

ninety-four.<sup>27</sup> Rodell's high school classmates were right to elect young Fred to the Octogenarian Society decades prematurely because "he was so abnormally bright."<sup>28</sup>

Ghiglione, writing in *Rodell Revisited* of Rodell's role as a "clever, sometimes curmudgeonly, critic of the American legal system," notes that Rodell not only wrote with the clarity of a journalist but also saw himself, in part, "as a Front Page reporter—irreverent, independent and, though not always apparent, idealistic."<sup>29</sup> At Yale, Rodell taught a writing course aimed at helping advanced law students drop their legalese and substitute plain English to get legal stuff across to lay readers (disclosure: as a graduate law student, I took Fred's legalese cure in 1964). Legalese is the disease that forces a lawyer to write, quipped Will Rogers, "so that endless others of his craft can make a living out of trying to figure out what he said."<sup>30</sup> As a prelude to writing *Woe Unto You, Lawyers!*, Rodell authored a law review article still famous, or infamous, around law schools. Called *Goodbye To Law Reviews*,<sup>31</sup> the article attacks the footnote-obsessed writing of legal academics. Such so-called writing, Rodell wrote, is composed for the most part in an "antediluvian or mock-heroic style"<sup>32</sup> and amounts in sum to "turgid, legaldegooky garbage."<sup>33</sup> Rodell begins *Goodbye* by noting that there are only two things wrong with legal writing: "One is its style. The other is its content. That, I think, about covers the ground."<sup>34</sup>

Anyone who is not a paid toady in The Law's keep will understand what Rodell means when he writes,

[I]t is in the law reviews that a pennyworth of content is most frequently concealed beneath a pound of so-called style. The average law review writer is peculiarly able to say nothing with an air of great importance. When I used to read law reviews, I used constantly to be reminded of an elephant trying to swat a fly.<sup>35</sup>

Fred Rodell didn't get by with his swatting-a-fly barbs without paying for it. Legal academics retaliated by pretending that Woe's

27. RODELL REVISITED, *supra* note 9, at xxv. Loren Ghiglione's biographical introduction to *Rodell Revisited* is the source of much of this Essay's detail concerning Rodell's background. See *id.* at xv-xli.

28. *Id.* at xxv.

29. *Id.* at xxv-xxvi.

30. Will Rogers, *The Lawyers Talking*, in 6 WILL ROGERS' WEEKLY ARTICLES 243, 244 (Steven K. Gragert ed. 1982).

31. Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936).

32. *Id.* at 38.

33. Fred Rodell, *Goodbye to Law Reviews—Revisited*, 48 VA. L. REV. 279, 288 (1962).

34. *Id.*

35. *Id.*

creator didn't exist, and to this day omit references from the law reviews' evermore copious footnotes to Rodell's unconventional writings on *The Law and the Supreme Court*. There is some justice here since Rodell abhorred the academic's love affair with footnotes, calling them the "Phi Beta Kappa keys of legal writing."<sup>36</sup> Once Rodell quit for life using footnotes, as he promised in *Goodbye To Law Reviews*, his writings, according to the snobbish academic code, could be labeled unscholarly and thus unworthy of professorial notice.

The Yale Law School, moreover, had by mid-century become a less than hospitable place for legal mavericks of a Rodellian stripe. The Yale faculty, which once proudly included on its roster such famous legal mavericks as, in addition to Douglas and Green, Thurman Arnold and Jerome Frank, had taken a turn toward orthodoxy, preferring that faculty criticism of *The Law*, if such were necessary, be couched in polite terms. Rodell in mid-career was passed over at Yale, as he put it, "like a left-handed third baseman, ten times in a row, while those ultimate academic accolades, charmingly called 'chairs,' were awarded his junior colleagues."<sup>37</sup> New Haven barber Joe Capasso, who appreciated Rodell's gift for composing limericks, believed that his poetic customer "had gotten a raw deal from Yale." Capasso named the No. 1 chair at his barbershop after Rodell, the plaque reading, "The Fred Rodell Chair of Law and Limericks."<sup>38</sup>

Yet some of Rodell's best friends were not only lawyers, but lawyers who sat on the highest court in the land. Justice William O. Douglas, for example, was a regular camping buddy. Justice Hugo Black and Rodell played tennis together. Rodell gave Justice William J. Brennan his first lessons in fly casting. Justices Byron R. White and Potter Stewart were friends as well as former students of Rodell. The fact is, when it came to *The Law* as created, manipulated, and applied by a liberal Warren Court, Rodell backed off considerably from his "nothing but a high-class racket" posture.

*The Law* as perceived by Chief Justice Earl Warren and his social-engineering colleagues was right up Rodell's political alley, and so escaped Rodell's hostile review. Rodell saved his big, caustic guns for juicier prey, such as the Harvard Law School, which in the 1920s and 1930s differed from the Yale Law School in the way that Protestant fundamentalism differs from liberal Christian theology. Once, when Harvard Law compiled a list of

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36. *Id.* at 40.

37. Rodell, *supra* note 33, at 288.

38. *RODELL REVISITED*, *supra* note 9, at xxxviii.

100 books for prospective law students to read, Rodell noted the list's penchant for the dull, the old-fashioned, the authoritarian, and opined "that if any potential law student should be lured to the law by reading these books or should prepare for the law by reading these books, I hope he goes to the Harvard Law School too."<sup>39</sup>

Fred Rodell's case against *The Law*, right or wrong or somewhere in between, was all Fred Rodell, no pussyfooting around with mealy-mouthed conventions. He stalked the truth by going his own way, damn the torpedoes. And he didn't stalk just the truth. Rodell's godson recalls that in 1980 on his last bedside visit to a dying, thrice-married, seventy-three-year-old Rodell, his godfather "pinched the girl I was with in the ass."<sup>40</sup>

University of Texas law professor Charles Alan Wright says Rodell was "a powerful and influential force for improvement in the law."<sup>41</sup> But even a friend such as Charley Wright admits to room for disagreement. One such dissenter is an English law teacher who in 1991 published a 12,000-word essay castigating Rodell's battle against legal legerdemain: "(Rodell) was generally regarded as an embittered nihilist who wished only to carp, having nothing constructive to say."<sup>42</sup> Others believe that Fred Rodell wasted his immense potential. I, who as a law teacher inject ample bits of Rodellian realism into *The Law* I teach, say Wright's right. Rodell helps us keep *The Law* in perspective, to see it not only as a sort of secular gospel, but also, in anthropological terms, as the quaint machinations of an odd sort of native people fond of hiding behind words.

In any event, the last word belongs to Fred, who late in life returned to his alma mater to deliver the commencement address. Fred's Haverford College address, given entirely in verse form, included this advice:

Not, then, for riches from your labors  
 Nor to keep face with faceless neighbors,  
     Employ your talents  
 For work—but none the less for play.  
 Why make, and never roll in, hay?

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39. Fred Rodell, *A List of Books for Prospective Law Students Now in Service Prepared by a Committee of the Faculty of the Harvard Law School* by Zechariah Chafee, Jr. and John M. Maguire, 54 *YALE L.J.* 897, 897-98 (1945).

40. *RODELL REVISITED*, *supra* note 9, at xxxix.

41. Charles Alan Wright, *Goodbye to Fred Rodell*, 89 *YALE L.J.* 1455, 1456 (1980).

42. Neil Duxbury, *In the Twilight of Legal Realism: Fred Rodell and the Limits of Legal Critique*, 11 *OXFORD J. LEGAL STUD.* 354, 358 (1991).

The point is—balance.<sup>43</sup>

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43. Fred Rodell, Haverford Commencement Address, 71 YALE L.J. No. 8, at vii (1962).

## PRESIDENT CLINTON AND THE FEDERAL JUDICIARY

CARL TOBIAS\*

Four years ago, I examined the crucial duty to appoint federal judges that the Constitution imposes upon the President of the United States.<sup>1</sup> I observed that the Chief Executive nominates and, with the Senate's advice and consent, appoints these officers who serve for life and resolve controversies that involve Americans' most essential liberties. Because 1992 was an election year, I assessed the judicial selection record that President George Bush had compiled during his four years in office.

I found that the Bush Administration had named 182 lawyers to the federal bench. Nearly nineteen percent of those appointees were women and five and one-half percent were African-Americans. I observed that President Bush's judicial selection record surpassed that of President Ronald Reagan and was comparable to the record of President Jimmy Carter. I admonished that there was considerably more to choosing judges than simply counting the percentages of women and minorities named. For instance, some evidence indicated that the Bush Administration's female and minority appointees had political and philosophical viewpoints and judicial temperaments that closely resembled those of the judges whom they joined on the federal bench.

Now that another presidential election year has commenced, it is important to evaluate the record of choosing judges that President Bill Clinton has compiled. Moreover, the Clinton Administration's judicial selection record can be profitably compared with the campaign promises regarding judicial selection that Candidate Clinton made when he was running for the presidency and with the records of his predecessors.

Four years ago, the Democratic nominee pledged to name women and men who were highly intelligent, had balanced judicial temperament, and were committed to protecting individual rights in the Constitution while increasing gender and racial diversity on the bench.<sup>2</sup> During President Clinton's initial three

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\* Professor of Law, University of Montana. B.A., 1968, Duke University; LL.B., 1972, University of Virginia.

1. See Carl Tobias, *The President and the Federal Bench*, 1992 WIS. L. REV. 1329.

2. See, e.g., Bill Clinton, *Judiciary Suffers Racial, Sexual Lack of Balance*, NAT'L L.J., Nov. 2, 1992, at 15-16; *Bush v. Clinton: The Candidates on Legal Issues*, A.B.A. J., Oct. 1992, at 57-58; see also Stephen Labaton, *Clinton May Use Diversity Pledge to Remake Courts*, N.Y. TIMES, Mar. 8, 1993, at A1.

years in office, he has appointed 182 lawyers to the federal courts. Fifty-seven (thirty-one percent) of those judges are women and fifty-two (twenty-nine percent) are minorities.<sup>3</sup>

President Clinton's appointees have compiled the highest rankings for excellence by the American Bar Association since the ABA began rating candidates' qualifications more than four decades ago.<sup>4</sup> Nearly all of the appointees appeared to be extremely competent and to possess the requisite independence, intelligence, industriousness, and balanced judicial temperament that are critical to excellent service on the bench. For example, Judge Guido Calabresi served as Dean of the Yale Law School before his appointment to the Second Circuit, while Judge Diane Wood served as Deputy Assistant Attorney General in the Antitrust Division of the Justice Department before being named to the Seventh Circuit.

A significant percentage of the appointees had previously served as judicial officers either in the federal or state systems. For instance, Judge Pierre Leval was widely regarded as one of the preeminent federal district court judges before his elevation to the Second Circuit, while Judge Martha Daughtrey served with distinction on the Tennessee state courts before her appointment to the Sixth Circuit.

Competence seems to be the hallmark of the vast majority of judges whom President Clinton has named. Indeed, some observers have criticized the Chief Executive for failing to appoint attorneys whom they perceived to be more politically partisan, particularly as a counterbalance to the express intent of Presidents Reagan and Bush to make the courts more conservative by naming lawyers with explicit doctrinaire views.<sup>5</sup>

President Clinton has kept his campaign promise to name highly qualified jurists to the federal bench, although his ap-

3. See Carl Tobias, *Filling the Federal Courts in an Election Year*, 49 *SMU L. REV.* 309, 314 (1996); Carl Tobias, *Increasing Balance on the Federal Bench*, 32 *HOUS. L. REV.* 137, 145 (1995); Carl Tobias, *Keeping the Covenant on the Federal Courts*, 47 *SMU L. REV.* 1861, 1866 (1994); see also Telephone Interview with Deborah Lewis, Alliance for Justice, Washington, D.C. (Mar. 7, 1995).

4. See Henry J. Reske, *Judicial Vacancies Declining*, *A.B.A. J.*, Jan. 1994, at 24; DEPARTMENT OF JUSTICE, *CLINTON ADMINISTRATION JUDICIAL RECORD, ANALYSIS OF JUDICIAL NOMINATIONS* (1994) (copy on file with author).

5. See, e.g., Ted Gest, *Disorder in the Courts? Left and Right Both Gripe About Clinton's Taste in Judges*, *U.S. NEWS & WORLD REP.*, Feb. 12, 1996, at 40; Joan Biskupic, *Clinton Avoids Activists in Judicial Selections*, *WASH. POST*, Oct. 24, 1995, at A1; see also Sheldon Goldman, *Reagan's Judicial Appointments at Mid-Term: Shaping the Bench in His Own Image*, 66 *JUDICATURE* 335, 337 (1982) (affording Reagan intent); Neil A. Lewis, *Bush Picking the Kind of Judges Reagan Favored*, *N.Y. TIMES*, Apr. 10, 1990, at A1 (affording Bush intent). See generally Sheldon Goldman, *Judicial Selection Under Clinton: A Mid-term Examination*, 78 *JUDICATURE* 276 (1995).



pointees have been judges for an insufficient period to ascertain exactly what type of judicial service they will ultimately render. The Clinton Administration has implemented a systematic, effective process for selecting nominees who have earned the highest ratings ever assigned by the ABA. The Chief Executive has dramatically enhanced gender and racial diversity on the federal courts and has apparently increased political balance. When members of the American public cast their votes for president in November, voters should remember the critical responsibility that presidents have for selecting Article III Judges.

# THE POWER LINE DILEMMA: COMPENSATION FOR DIMINISHED PROPERTY VALUE CAUSED BY FEAR OF ELECTROMAGNETIC FIELDS\*

ANDREW JAMES SCHUTT\*\*

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## I. INTRODUCTION

Electromagnetic field (EMF)<sup>1</sup> litigation is fast becoming the “asbestos of the 90s”<sup>2</sup> as concern over the potential adverse health

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\*\* Associate, Arnall Golden & Gregory, Atlanta, Georgia. B.S., University of Florida, 1990; J.D., Florida State University, 1996. The author thanks Professor Larry Garvin, Florida State University College of Law, for his insight and contributions.

1. Electricity produces an electric field and a magnetic field, which together are called an electromagnetic field. NATIONAL INST. OF ENVTL. HEALTH SCIENCES & U.S. DEP’T OF ENERGY, QUESTIONS AND ANSWERS ABOUT EMF, ELECTRIC AND MAGNETIC FIELDS ASSOCIATED WITH THE USE OF ELECTRIC POWER 5 (1995) [hereinafter QUESTIONS ABOUT EMF]. EMFs are generated by power lines, electrical wiring, and such common household items as radios, televisions, microwaves, and hair dryers. *Id.*; EDWIN F. FROELICH ET AL., EMF, ELECTROMAGNETIC FIELDS, SCIENTIFIC AND LEGAL ASPECTS 2 (1993). The strength of

effects from EMF has spawned extensive litigation.<sup>3</sup> With claims arising in many forms, especially in the areas of property damage and personal injury, a potential plaintiff has an array of legal theories from which to choose.<sup>4</sup> In fact, EMF litigation could become more common than asbestos litigation because the prevalence of EMF could lead to a higher number of potential plaintiffs.<sup>5</sup>

EMFs are generated not only from power lines, with which most people associate EMF, but also from such devices as microwave ovens, hair dryers, and cellular telephones.<sup>6</sup> Whether EMF causes cancer continues to be a hotly debated question.<sup>7</sup> Indeed, in 1992, Congress authorized the expenditure of sixty-five million

electric and magnetic fields decreases as one moves away from the source. *QUESTIONS ABOUT EMF*, supra, at 5. However, only the electric field can be eliminated by shielding in dense objects such as walls or houses. *Id.* This is important because the present health concerns about EMF revolve around the magnetic field. *Id.* at 6.

Most of the electricity generated by common household appliances is alternating current (AC), meaning the flow of the current reverses periodically—in the U.S., at a frequency of 60 Hz. *Id.* at 5, 7. The higher the frequency, the more energy there is in the field. *Id.* at 7. For example, an X-ray has a very high frequency and can cause ionization, which damages genetic material. *Id.* The EMFs generated by power lines do not cause ionization, but do create weak currents in people and animals. *Id.* at 9.

2. George Brandon, *Defending Against EMF Property Devaluation Cases*, *PUB. UTIL. REP.*, Feb. 1, 1995, at 43. In the 1970s and 1980s, the United States saw a large amount of litigation involving asbestos, with asbestos manufacturers and their insurers incurring costs in the billions of dollars. See generally BARRY L. CASTLEMAN, *ASBESTOS: MEDICAL AND LEGAL ASPECTS* 666-676 (3d ed. 1990) (summarizing costs of asbestos litigation to manufacturers and insurance industry).

3. FROELICH ET AL., supra note 1, at 2.

4. See FROELICH ET AL., supra note 1, at 24-25 (summarizing EMF litigation theories and noting that both property damage and personal injury claims take many forms, including "trespass, conversion, nuisance, and undue burden upon the easements granted for the routing of lines" among the former and "negligence, product liability, and ultrahazardous activity" among the latter).

5. See Tom Watson & Curtis S. Renner, *The Scientific and Legal Bases for Litigating EMF Property Cases*, in *CURRENT CONDEMNATION LAW* 126 (Alan T. Ackerman ed., 1994) ("[T]he potential impact from EMF property damage claims could 'dwarf' the impact seen from asbestos litigation."); Roy W. Krieger, *On the Line*, *A.B.A. J.*, Jan. 1994, at 40 ("We live surrounded by electromagnetic fields. Some say they are deadly. With these fields all around us, the litigation potential could dwarf the asbestos claims of the past decade.").

6. FROELICH ET AL., supra note 1, at 2.

7. Compare William J. Broad, *Cancer Fear is Unfounded*, *Physicists Say*, *N.Y. TIMES*, May 14, 1995, at 19 (discussing study by the American Physical Society which stated that "it [could] find no evidence that the electromagnetic fields that radiate from power lines cause cancer") and *Amicus Brief* at 4, *San Diego Gas & Elec. Co. v. Orange Co. Superior Court*, 895 P.2d 56 (Cal. 1995) (No. S045854) (stating that studies do not "demonstrate a causal association between electromagnetic fields and cancer") with Nancy Wertheimer & Ed Leeper, *Electrical Wiring Configurations and Childhood Cancer*, 109 *AM. J. EPIDEMIOLOGY* 2273-84 (1979) (arguing that there is an increase in the rate of childhood leukemia in homes located near power lines). See also *QUESTIONS ABOUT EMF*, supra note 1, at 57-63 (listing studies of the potential health effects caused by EMF); Mhammad Harunuzzaman & Govindarajan Iyyuni, *Electromagnetic Fields and Human Health: Revisiting the Issue*, 16 *NAT'L REG. Q. BULL.* 181, 182-88 (1995) (same).

dollars over a five-year period for an EMF research and public information program.<sup>8</sup> However, many in the scientific community only agree that “there may be a connection between EMF exposure and some forms of cancer.”<sup>9</sup>

An issue of significant litigation, especially in recent years, is whether property owners may be compensated for the diminution in value of their land caused by the public’s fear of EMF emanating from power lines.<sup>10</sup> This issue arises most often in condemnation proceedings brought by power companies seeking to install new power lines over a portion of property owners’ land.<sup>11</sup> The property owners claim that the land has been partially “taken”<sup>12</sup>

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8. See Energy Policy Act of 1992, Pub. L. 102-486, 102 Stat. 2776 (codified at 42 U.S.C.A. § 13478 (1994)). This Act created the Electric and Magnetic Fields Research and Public Information Dissemination (EMF RAPID) program. QUESTIONS ABOUT EMF, *supra* note 1, at 64. The EMF RAPID program’s central purpose is determining whether EMF causes cancer and providing the public with information about EMF. *Id.* at 1, 65. QUESTIONS ABOUT EMF was prepared for the EMF RAPID program and provides answers to questions about EMF. *Id.* at 1. A copy can be purchased from the Superintendent of Documents, U.S. Government Printing Office, Washington DC 20402. The EMF RAPID program also provides a toll-free number to answer EMF-related questions: 1-800-363-2383.

9. Robert D. Chesler & Peter E. Nahmias, *The Next Wave? EMF Regulation and Litigation*, MEALEY’S LIT. REP. (TOXIC TORTS), Oct. 21, 1994, at 23 (emphasis added).

10. This Comment focuses on the EMF issue in terms of the fear of power lines and subsequent land value diminution caused by that fear. This is the context in which fear-based land value diminution arises most often and presumably will continue to arise, especially in light of increased public awareness and fear of EMF. Pipeline cases are the second most common scenario under which public fear may create a land value diminution. See James W. Springer & David G. Mawn, *Condemnation Law: Can a Landowner Recover for Damages Due to the Improvement?*, 22 REAL EST. L.J. 281, 287-88 (1994); see, e.g., *Willsey v. Kansas City Power & Light Co.*, 631 P.2d 268, 273-75 (Kan. Ct. App. 1981) (power line condemnation suit; summary of case law); *All Am. Pipeline Co. v. Ammerman*, 814 S.W.2d 249 (Tex. Ct. App. 1991) (pipeline condemnation suit). Public fear causing value diminution arises in other situations, however. For example, in *City of Santa Fe v. Komis*, 845 P.2d 753 (N.M. 1992), the New Mexico Supreme Court analyzed the issue in reference to a condemnation proceeding brought for the construction of a highway to transport nuclear waste. The landowner in *Komis* attempted to recover for diminution of the property’s value caused by the public’s fear of potential dangers from the nuclear waste. *Id.* at 755; see also *infra* note 96 (discussing *Komis*); *Department of Agric. & Consumer Serv. v. Polk*, 568 So. 2d 35, 41 (Fla. 1990) (noting that evidence of diminution in market value caused by public’s fear of orange trees from infected nursery was relevant in determining damages in inverse condemnation suit); *Horsch v. Terminix Int’l Co., Ltd. Partnership*, 865 P.2d 1044, 1049 (Kan. Ct. App. 1993) (involving civil action by private homeowner against termite company; homeowner was entitled to damages for reduction in market value caused by public’s fear of houses with prior termite damage). Thus, while this Comment focuses on power lines, its analysis and conclusions are meant to apply to most factual scenarios in which public fear creates a diminution in value.

11. See *Florida Power & Light Co. v. Jennings*, 518 So. 2d 895, 896 (Fla. 1987) (involving utility company condemnation of portion of property owner’s land, of which owner retained some use); *Selective Resources v. Superior Court*, 700 P.2d 849, 850 (Ariz. Ct. App. 1984) (noting that pertinent valuation determination in easement condemnation proceeding was value of land taken for power line and power line’s effect on market value of remaining land).

12. Eminent domain provides that if the government takes private property for a public use, the landowner must be justly compensated. U.S. CONST. amend. V (“[N]or shall

and assert that the public's fear that power lines cause cancer has decreased the remaining property's market value.<sup>13</sup> It is also conceivable that adjacent property owners could have a claim, albeit a less direct one.<sup>14</sup> While the former owner can seek compensation in a condemnation proceeding for the value lost,<sup>15</sup> the latter owner could file claims of inverse condemnation, nuisance, trespass, strict liability, or ultrahazardous activities.<sup>16</sup> In either situation, a court must decide whether a diminution in the property's value caused by the public's fear is compensable.

The jurisdictions that have addressed the issue of compensability for damages caused by the public's fear have followed three approaches.<sup>17</sup> The first, labeled the minority view,<sup>18</sup> holds that damages caused by the public's fear are never compensable.<sup>19</sup> The second, labeled the intermediate view,<sup>20</sup> holds that damages caused by the public's reasonable fear may be compensable.<sup>21</sup> Fi-

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private property be taken for public use, without just compensation."). State legislatures allow power companies to utilize the power of eminent domain for the erection of power lines. See, e.g., FLA. STAT. § 361.01 (1995); IND. CODE § 8-1-8-1 (1995). If a power company or other governmental agency wants to implement eminent domain proceedings, the entity must seek to have the property condemned. See WILLIAM B. STOEBCUK, NONTRESPASSORY TAKINGS IN EMINENT DOMAIN 4 (1977). Every state except North Carolina has a similar provision in its constitution. *Id.* at 5-6. However, North Carolina provides for eminent domain proceedings through its supreme court. *Id.* at 6. In condemnation proceedings, landowners are usually awarded damages for the property taken and consequential damages for the diminished value of the remaining property. *Id.* at 18-19.

13. See, e.g., Gary A. Thorton, *Litigation Involving High-Power Electrical Transmission Line Cases*, in *CURRENT CONDEMNATION LAW* 118-19 (Alan T. Ackerman ed., 1994) ("In the past, people viewed electricity and the high-power lines that supplied it as a blessing. The opposite viewpoint is more common today. High-power lines are now more often seen as an eyesore at best and, at worst, as potentially dangerous, cancer-causing, or posing latent health risks."). This fear has developed in part because of the publicity surrounding studies that purport to show a correlation between EMF and cancer. See Chesler & Nahmias, *supra* note 9, at 20-21; Margo R. Stoffel, *Comment, Electromagnetic Fields and Cancer: A Legitimate Cause of Action or a Result of Media-Influenced Fear?*, 21 OHIO N.U. L. REV. 551, 587-90 (1994) (summarizing media's role in shaping public perception by encouraging fear of power lines).

14. See, e.g., *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715 (Mich. 1992) (involving nuisance claim for property value depreciation caused by public concern about contamination emanating from defendant's property); see also *infra* note 74 (discussing *Adkins*).

15. See *Jennings*, 518 So. 2d at 895; see also *Selective Resources*, 700 P.2d at 850.

16. See, e.g., *Adkins*, 487 N.W.2d at 717. See also Chesler & Nahmias, *supra* note 9, at 24 ("The nature of EMF lends itself to recovery under theories of nuisance, trespass and inverse condemnation."); Todd D. Brown, *The Power Line Plaintiff & the Inverse Condemnation Alternative*, 19 B.C. ENVTL. AFF. L. REV. 655, 681-90 (1992) (discussing possible claims for EMF exposure and suggesting that inverse condemnation suit on various theories, such as nuisance or airspace easement, might result in compensation for lost market value caused by public's fear).

17. See Chesler & Nahmias, *supra* note 9, at 24.

18. *Willsey v. Kansas City Power*, 631 P.2d 268, 273 (Kan. Ct. App. 1981).

19. See *infra* notes 32-56 and accompanying text.

20. *Willsey*, 631 P.2d at 273.

21. See *infra* notes 57-83 and accompanying text.

nally, the third approach, labeled the majority view,<sup>22</sup> holds that damages caused by the public's fear are always compensable.<sup>23</sup>

This area of law is confusing and unsettled.<sup>24</sup> There is no uniform approach to the issue, and there are variations of the three main approaches.<sup>25</sup> Moreover, in recent years, several courts have either reversed precedent and switched views, or cast doubt upon the state of law in their respective jurisdictions. The Florida Supreme Court reversed years of precedent by switching from the minority view to the majority view.<sup>26</sup> New York and Kansas switched from the intermediate view to the majority view.<sup>27</sup> Virginia's highest court recently decided a case that casts doubt upon that state's position.<sup>28</sup> This lack of consistency, coupled with the array of views on this issue, is a legal quagmire, with no end to the confusion in sight.<sup>29</sup> Courts<sup>30</sup> and commentators<sup>31</sup> offer many different justifications for why a particular view is superior.

Part II of this Comment attempts to summarize the current state of the law on the issue of fear-based land value diminution by examining relevant case law. Part III argues that the majority view is superior to the minority and intermediate views. This part demonstrates that the majority view is essentially a strict li-

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22. Willsey, 631 P.2d at 273.

23. See *infra* notes 84-136 and accompanying text.

24. See *infra* note 61 (discussing further the confusion in this area).

25. For example, Arizona follows the intermediate view, but has modified the analysis. See *Selective Resources v. Superior Court*, 700 P.2d 849 (Ariz. Ct. App. 1984); see also *infra* note 75 (discussing *Selective Resources*).

26. See *infra* notes 102-09 and accompanying text.

27. See *infra* notes 110-28 and accompanying text.

28. It is now unclear whether Virginia has moved from the majority view to the intermediate view. See *infra* notes 129-36 and accompanying text.

29. See, e.g., *Florida Power & Light Co. v. Jennings*, 518 So. 2d 895 (Fla. 1987) (reversing *Casey v. Florida Power Corp.*, 157 So. 2d 168 (Fla. 2d DCA 1963)); *Criscuola v. Power Auth. of N.Y.*, 621 N.E.2d 1195 (N.Y. 1993) (reversing *Zappavigna v. New York*, 588 N.Y.S.2d 585 (N.Y. App. Div. 1992)); *Ryan v. Kansas Power & Light Co.*, 815 P.2d 528 (Kan. 1991) (explicitly adopting majority view, yet citing earlier court of appeals decision for proposition that Kansas followed intermediate view); *Chappell v. Virginia Elec. & Power Co.*, 458 S.E.2d 282 (Va. 1995) (casting doubt upon whether Virginia courts should follow majority or intermediate view). See also *infra* note 61 (discussing further the confusion in this area).

30. See *Jennings*, 518 So. 2d at 895 (discussing majority view arguments); *Heddin v. Delhi Gas Pipeline Co.*, 522 S.W.2d 886 (Tex. 1975) (discussing intermediate view arguments); *Pappas v. Alabama Power Co.*, 119 So. 2d 899 (Ala. 1960) (discussing minority view arguments).

31. See Linda J. Orel, *Perceived Risks of EMFs and Landowner Compensation*, 6 RISK: HEALTH SAFETY & ENV'T 79 (1995); Stoffel, *supra* note 13, at 582; Philip S. McCune, Note, *The Power Line Health Controversy: Legal Problems and Proposals for Reform*, 24 U. MICH. J.L. REF. 429 (1991); David Z. Kaufman, Comment, *Efficient Compensation for Lost Market Value Due to Fear of Electric Transmission Lines*, 12 GEO. MASON U. L. REV. 711 (1990).

ability approach, and suggests that the justifications for imposing strict liability upon an actor also support imposing upon power companies the cost of compensating property owners for losses caused by the public's fear of EMF health hazards. Part IV notes that in situations where the majority view may be inappropriate, courts or legislatures can create exceptions. Finally, Part V concludes that the majority view is the superior approach to determining damages caused by fear of EMF.

## II. THE THREE APPROACHES

### A. The Minority View: Fear Can Never Be an Element of Damages

#### 1. In General

The minority view holds that because fear is inherently subjective, damages are inappropriate even if the public's fear causes a reduction in the property's market value.<sup>32</sup> Only three jurisdictions follow this view: Alabama,<sup>33</sup> Illinois,<sup>34</sup> and West Virginia.<sup>35</sup>

#### 2. The Minority View Applied: *Alabama Power Co. v. Keystone Lime Co.*

In 1914, the Alabama Supreme Court first addressed the issue of compensation for damages caused by fear in *Alabama Power Co. v. Keystone Lime Co.*<sup>36</sup> The court held that compensation for diminution of property value in a condemnation proceeding is not permissible when the public's fear causes the diminution.<sup>37</sup> The property owner in *Keystone Lime* argued that people would be afraid to farm or work the land adjacent to the power line,<sup>38</sup> and thus this fear devalued the land because it would be difficult to find a willing buyer.<sup>39</sup> The court noted that many people were unaccustomed to power lines and afraid of them, and therefore would not purchase the property.<sup>40</sup> The court did not allow an award of damages for the diminution, however, noting that it was

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32. See, e.g., *Alabama Power Co. v. Keystone Lime Co.*, 67 So. 833, 835 (Ala. 1914).

33. See *id.* at 833; see also Pappas, 119 So. 2d at 899.

34. See *Central Ill. Light Co. v. Nierstheimer*, 185 N.E.2d 841 (Ill. 1962).

35. See *Chesapeake & Potomac Tel. Co. v. Red Jacket Consol. Coal & Coke Co.*, 121 S.E. 278 (W. Va. Ct. App. 1924).

36. 67 So. 833 (Ala. 1914) (concerning condemnation proceeding for erection of power line).

37. *Id.* at 835.

38. See *id.* at 833-34.

39. *Id.* at 834-35, 837.

40. *Id.* at 837.

caused by “the mere fears of some of the people, which are founded in reality upon their lack of knowledge of the real effect of the line, and which human experience shows is not justified by the facts.”<sup>41</sup> The court’s reason for denying the property owner compensation for this loss centered around the irrationality of the public’s fear.<sup>42</sup> The court found that electricity was of great social value and possessed a risk no greater than that of other technologies:

Having no actual knowledge of the practical operation and effect of such lines, [the public] may, as some of the testimony tends to show, be afraid of the property on which the lines are situated. A large percentage of the agencies which now conserve human effort are, when negligently controlled, dangerous to human life, and many things now daily used upon our streets and upon our public highways were, when they were first introduced, objects of terror to those who knew nothing about them. When the automobile was first introduced, especially in our towns, villages, and country neighborhoods, the driver . . . was known to be in possession of a dangerous instrument.<sup>43</sup>

The court concluded that it could not regard land value diminution created by fear as resting upon any substantial basis.<sup>44</sup>

The Alabama Supreme Court revisited the issue forty-six years later in *Pappas v. Alabama Power Co.*<sup>45</sup> In determining the damages award, the Pappas court similarly held that the property owner could not recover damages caused by the public’s fear of the power lines.<sup>46</sup> The court stated: “The reasoning of [Keystone Lime] is sound and probably even more necessary in this modern age of scientific and industrial expansion.”<sup>47</sup>

The Alabama Supreme Court has consistently reaffirmed *Keystone Lime*.<sup>48</sup> For example, in *Alabama Electric Cooperative, Inc. v. Faust*,<sup>49</sup> the Alabama Supreme Court responded to a property

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41. *Id.* The court placed great emphasis on testimony offered to show that power lines are safe to humans and the environment. *Id.* at 833-34.

42. *Id.* at 837.

43. *Id.*

44. *Id.* at 835, 837.

45. 119 So. 2d 899 (Ala. 1960). Pappas was another condemnation proceeding brought by the Alabama Power Co. to erect power lines upon a property owner’s land. See *id.* at 902.

46. *Id.* at 905.

47. *Id.*

48. See *Alabama Elec. Coop., Inc. v. Faust*, 574 So. 2d 734, 735 (Ala. 1990); *Deramus v. Alabama Power Co.*, 265 So. 2d 609, 614 (Ala. 1972); *Southern Elec. Generating Co. v. Howard*, 156 So. 2d 359, 362 (Ala. 1963).

49. 574 So. 2d 734 (Ala. 1990).



owner's request to expand the *Keystone Lime* rule by stating: "We decline so to do, for such a modification would materially change the established rule of damages relating to eminent domain cases. Although this Court is receptive to change where compelling reasons are advanced for making a change, we find no rational basis for changing the rule here challenged."<sup>50</sup> Other jurisdictions have not been as inclined to follow precedent, and have not hesitated to change years (or even decades) of established case law.<sup>51</sup>

Both Illinois and West Virginia follow the minority view.<sup>52</sup> Illinois applies a different rationale than that of Alabama, relying upon its supreme court's state constitutional analysis limiting the just compensation rule to property taken.<sup>53</sup> The Illinois court reasoned that there must be direct physical disturbance of a right, and thus "depreciation in market value will not, alone, sustain a claim for damages. The depreciation must be from a cause which the law regards as a basis for damages."<sup>54</sup>

Illinois appears to be moving away from the minority view, however. Illinois courts used to cite the above reasoning in refusing to allow landowners to recover for lost market value caused

50. *Id.* at 736.

51. See, e.g., *Florida Power & Light Co. v. Jennings*, 518 So. 2d 895 (Fla. 1987) (changing rule in Florida from minority view, established in 1963, to majority view).

52. See *Central Ill. Light Co. v. Nierstheimer*, 185 N.E.2d 841, 843 (Ill. 1962) (summarizing Illinois law on issue of proper elements of damages and noting that "imagined sources of danger . . . [are] so remote and speculative and uncertain as to afford no basis for the allowance of damages"); *Chesapeake & Potomac Tel. Co. v. Red Jacket Consol. Coal & Coke Co.*, 121 S.E. 278, 280 (W. Va. Ct. App. 1924) ("[D]angers which lessen the value of [property] may be considered in the ascertainment of damages; but . . . such dangers must be real, imminent and reasonably to be apprehended,—not remote or merely possible.").

Florida also followed the minority view until its supreme court reversed precedent and decided to follow the majority view. See *infra* notes 102-09 and accompanying text. Before the Florida Supreme Court's adoption of the majority view, Florida courts cited *Casey v. Florida Power Corp.*, 157 So. 2d 168, 170 (Fla. 2d DCA 1963), as the seminal case in Florida. The Casey court, in deciding to follow what it misstated as the majority view but what was actually the minority view, reasoned:

That a prospective purchaser of the land . . . will be so timid or so ignorant that he either will not buy at all or will offer less than the true value because of the transmission lines and towers is too highly speculative . . . to be taken into consideration. This court, like the majority of other courts, recognizes the owners' right to full and just compensation; but when a jury must base its award upon ignorance and fear, we must draw the line; such a basis cannot possibly result in fair and just compensation.

*Id.* at 170-71. The Florida Supreme Court subsequently reversed the Casey decision in *Jennings*, 518 So. 2d at 897. The Jennings court stated that the minority view ignored the key issue in eminent domain and condemnation proceedings, i.e., compensation to the landowner for the lost market value caused by the taking.*Id.*

53. *Illinois Power & Light Co. v. Talbott*, 152 N.E. 486, 489 (Ill. 1926).

54. *Id.* at 490.

by the unsightliness of power lines.<sup>55</sup> The Illinois Supreme Court has since receded from this view and now allows landowners to recover for this loss.<sup>56</sup> Whether the Illinois court will expand its approach and allow landowners to recover for the lost market value caused by the public's fear of power lines is still unclear.

## B. The Intermediate View: Award Permissible Where Fear Depresses Value, As Long as Fear is Reasonable

### 1. In General

Jurisdictions following the intermediate view hold that as long as the public's fear is reasonable, or at least not completely unreasonable, a damages award is permissible when the fear depresses market value.<sup>57</sup> These jurisdictions usually require expert testimony from a real estate appraiser or similar expert; the landowner cannot personally testify as to his or her own fears.<sup>58</sup> For example, a landowner cannot testify that he or she is afraid of power lines and thinks that a purchaser of his or her land would feel the same way.<sup>59</sup>

The U.S. Court of Appeals for the Ninth Circuit<sup>60</sup> and twelve states follow the intermediate view.<sup>61</sup> Those states are: Arkan-

55. *Iowa-Illinois Gas & Elec. Co. v. Hoffman*, 468 N.E.2d 977, 980 (Ill. App. Ct. 1984).

56. *Central Ill. Pub. Serv. Co. v. Westervelt*, 367 N.E.2d 661, 663 (Ill. 1977). See also *Hoffman*, 468 N.E.2d at 980 (agreeing with Illinois Supreme Court's move away from policy of not allowing compensation for unsightliness and noting that earlier policy was probably "based upon a conclusion that such damage was speculative and largely unquantifiable.")

57. *Heddin v. Delhi Gas Pipeline Co.*, 522 S.W.2d 886, 888 (Tex. 1975). The reasoning of the intermediate view was enunciated in *Olson v. United States*, 292 U.S. 246 (1934). In *Olson*, the U.S. Supreme Court held that elements in a condemnation proceeding "that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable should be excluded from consideration for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value . . ." *Id.* at 257.

58. See, e.g., *Gulledge v. Texas Gas Transmission Corp.*, 256 S.W.2d 349, 353 (Ky. Ct. App. 1952).

59. *Id.*

60. *United States v. 760.807 Acres of Land*, 731 F.2d 1443, 1447 (9th Cir. 1984) (applying federal common law). The argument could be made that the Ninth Circuit follows the majority view. Specifically, the 760.807 Acres court stated: "[I]f fear of a hazard would affect the price a knowledgeable and prudent buyer would pay to a similarly well-informed seller, diminution in value caused by that fear may be recoverable as part of just compensation." *Id.* at 1447. The court went on to note, however, that damages for fears based wholly upon speculation are impermissible: "[F]ears must be 'reasonable' or 'founded on practical experience' in order to be compensable." *Id.*

61. In addition to the diverse number of approaches to the issue of whether property owners may be compensated for diminution due to fear, courts and commentators also disagree as to which states follow the majority or intermediate views. Compare *Willsey v. Kansas City Power & Light Co.*, 631 P.2d 268, 273-75 (Kan. Ct. App. 1981) (asserting that

sas,<sup>62</sup> Connecticut,<sup>63</sup> Indiana,<sup>64</sup> Kentucky,<sup>65</sup> Nebraska,<sup>66</sup> New Jersey,<sup>67</sup> North Carolina,<sup>68</sup> Oklahoma,<sup>69</sup> Tennessee,<sup>70</sup> Texas,<sup>71</sup> Utah,<sup>72</sup> and Wyoming.<sup>73</sup> The Michigan Supreme Court appears willing to

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Arkansas, Indiana, North Carolina, Oklahoma, and Virginia adopted majority view)with McCune, *supra* note 31, at 434-35 nn.25-26 (asserting that those states adopted intermediate view). The Willsey court asserted that those states adopted the majority view because the courts in those states assumed the reasonableness of the fear of power lines. McCune, *supra* note 31, at 434 n.25. Those courts still required a showing of reasonableness, however. See *id.* Therefore, this Comment includes all but Virginia among states taking the intermediate view. Virginia is listed as a majority-view state because language in the case cited by Willsey, see *Appalachian Power Co. v. Johnson*, 119 S.E. 253 (Va. 1923), was read for the proposition that property owners could recover for diminution caused by the public's fear in a subsequent Virginia Supreme Court decision, see *Chappell v. Virginia Elec. & Power Co.*, 458 S.E.2d 282 (Va. 1995). In that same decision, however, Virginia called that language dictum and appeared to be willing to adopt the intermediate view. See *infra* notes 129-36 and accompanying text.

The confusion in this area of law is heightened by courts mislabeling views. E.g., *Casey v. Florida Power Corp.*, 157 So. 2d 168, 170-71 (Fla. 2d DCA 1963) (incorrectly labeling approach that damages caused by public fear are never compensable as "majority view"); *Ryan v. Kansas Power & Light Co.*, 815 P.2d 528, 533-34 (Kan. 1991) (same).

62. See *Arkansas Power & Light Co. v. Haskins*, 528 S.W.2d 407, 409 (Ark. 1975) ("Apprehension of danger [from power lines] is very reasonable.").

63. See *Northeastern Gas Transmission Co. v. Tersana Acres, Inc.*, 134 A.2d 253 (Conn. 1957).

64. See *Southern Ind. Gas and Elec. Co. v. Gerhardt*, 172 N.E.2d 204, 206 (Ind. 1961) (holding that jury may consider effect upon market value of fears caused by possibility that power lines may break or fall during storms, "[i]f such possibilities exist").

65. See *Gulledge v. Texas Gas Transmission Corp.*, 256 S.W.2d 349 (Ky. 1959).

66. See *Dunlap v. Loup River Pub. Power Dist.*, 284 N.W. 742 (Neb. 1939).

67. See *Tennessee Gas Transmission Co. v. Maze*, 133 A.2d 28 (N.J. Super. Ct. App. Div. 1957).

68. See *Colvard v. Natahala Power & Light Co.*, 167 S.E. 472, 475 (N.C. 1933) (property owner may recover for lost market value caused by fear of power lines where such fear "sensibly impairs its value") (quoting *Carolina & Yadkin River R.R. v. Armfield*, 83 S.E. 809, 811 (N.C. 1914)) (emphasis added).

69. See *Oklahoma Gas & Elec. Co. v. Kelly*, 58 P.2d 328, 329 (Okla. 1936) (holding that it is proper to consider things that "sensibly" impair value in determining condemnation proceeding damages). There is room in *Kelly* to allow a future Oklahoma court to adopt the majority view. The *Kelly* court noted that while it would not allow recovery solely on speculative matters such as potential danger from power lines, it would "allow such hazards to be taken into consideration as affecting the market value of the land." *Id.*

70. See *Hodge v. Southern Cities Power Co.*, 8 Tenn. App. 636 (1928); see also *Alloway v. Nashville*, 13 S.W. 123 (Tenn. 1890).

71. See *Delhi Gas Pipeline Co. v. Reid*, 488 S.W.2d 612 (Tex. Ct. App. 1972); see also *Heddin v. Delhi Gas Pipeline Co.*, 522 S.W.2d 886 (Tex. 1975).

72. See *Telluride Power Co. v. Bruneau*, 125 P. 399 (Utah 1912).

73. See *Canyon View Ranch v. Basin Elec. Power Corp.*, 628 P.2d 530 (Wyo. 1981). *Canyon View Ranch* involved an appeal by several property owners from damages awards made to them in a condemnation proceeding brought for the erection of a power line. *Id.* at 531. The Wyoming Supreme Court endorsed the trial court's instruction to the jury that in determining damages to the property, "any factors which you consider must be direct and certain and may not be remote, imaginary, or speculative." *Id.* at 534, 541. The supreme court went on to hold that there was no error in refusing to allow the property owners to introduce into evidence magazine articles about the hazards of power lines. *Id.* at 536-37. The property owners had offered the articles to show that the property was further devalued because prospective purchasers, aware of the information within the articles, would find the property less desirable. *Id.* at 535-36. The court reasoned that because the prop-

follow the intermediate view,<sup>74</sup> and Arizona follows a modified version of this rule.<sup>75</sup> Moreover, after a recent decision by its supreme court, Virginia appears to be leaning toward the intermediate view.<sup>76</sup>

## 2. The Intermediate View Applied: *Dunlap v. Loup River Public Power District*

*Dunlap v. Loup River Public Power District*<sup>77</sup> illustrates the intermediate view. In *Dunlap*, the plaintiff's expert witness testified to the dangers inherent in power lines, including the dangers to individuals coming within the general vicinity of the power lines.<sup>78</sup> The Loup River Public Power District objected to the trial judge's jury instructions, which allowed consideration of the possible dangers of power lines.<sup>79</sup>

The Nebraska Supreme Court affirmed the lower court's award of damages to the landowner.<sup>80</sup> The court reasoned that while general fears should not be compensable, if there is a basis in experience for the fears, and the fears are reasonable and affect the price a purchaser of land is willing to pay, the loss should be compensable.<sup>81</sup> The court, however, reduced the damages

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erty owner made no effort to prove the credibility of the information in the articles, the evidence was speculative. *Id.* at 537.

74. See *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715, 721 (Mich. 1992). In *Adkins*, the Michigan Supreme Court held that landowners could not recover in nuisance for property value diminution that was caused by the public's fear that contamination on the defendant's land might reach the landowners' property. *Id.* The majority specifically disagreed with the dissent. *Id.* at 726. The dissent would have held that the landowners could have recovered solely because their property had been devalued. *Id.* at 744-45. The majority held that "unfounded fears" could not be a basis for recovery. *Id.* at 726. The majority also noted that the case came to the court "singularly on the issue whether plaintiffs may proceed with their nuisance in fact claims solely on the basis of property depreciation due to public concern about contaminants in the general area." *Id.* n.34. The majority then held that the plaintiffs could not proceed. *Id.*

75. See *Selective Resources v. Superior Court*, 700 P.2d 849 (Ariz. Ct. App. 1984). *Selective Resources* held that proof of actual knowledge of the effect of power lines on the part of the buying public is not needed. *Id.* at 852. Instead, a landowner can recover based upon the theory of a hypothetical buyer, who is assumed to know all facts relevant to the purchase. *Id.*

76. See *infra* notes 129-36 and accompanying text.

77. 284 N.W. 742 (Neb. 1939). *Dunlap* involved the Loup River Public Power District's application for an easement to construct a power line over the landowner's dairy farm. *Id.* at 743.

78. *Id.* at 744-45. The plaintiff's expert testified that "a man on a load of hay would be partially grounded, and if he had a pitchfork in his hand he could receive a shock that might endanger his life." *Id.* at 744.

79. *Id.* at 745. "It is insisted by the power district that it is not an insurer against the dangers arising from [power lines]." *Id.* at 746.

80. *Id.* at 746.

81. *Id.* at 745.

award,<sup>82</sup> reasoning that it was necessary to curb over-imaginative speculation about dangers from power lines in condemnation proceedings.<sup>83</sup>

### C. The Majority View: Reasonableness of Fear is Irrelevant—Award Permissible Where Fear Depresses Value

#### 1. In General

Jurisdictions following the majority view hold that the reasonableness of the public's fear is irrelevant: if the public's fear depresses market value, the loss is compensable.<sup>84</sup> This view is premised upon the argument that the issue in eminent domain proceedings is full compensation.<sup>85</sup> Thus, if fear of power lines causes a loss of market value, that loss should be compensated.<sup>86</sup>

The U. S. Courts of Appeals for the Fifth<sup>87</sup> and Sixth<sup>88</sup> Circuits follow the majority view, as do thirteen states: California,<sup>89</sup> Florida,<sup>90</sup> Georgia,<sup>91</sup> Iowa,<sup>92</sup> Kansas,<sup>93</sup> Louisiana,<sup>94</sup> Mis-

82. *Id.* at 746.

83. *Id.*

84. *Florida Power & Light Co. v. Jennings*, 518 So. 2d 895, 899 (Fla. 1987).

85. *Id.* Of course, not all takings result in full compensation or any compensation at all. For example, with regulatory takings, value is taken away from property by some action of the government, but the landowner is not necessarily awarded compensation. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). The standard is whether the regulation has eliminated either all economically viable use of the property or the property owner's investment-backed expectations. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992).

86. *Jennings*, 518 So. 2d at 899.

87. See *United States ex rel. TVA v. Robertson*, 354 F.2d 877 (5th Cir. 1966) (applying 16 U.S.C. § 831).

88. See *United States ex rel. TVA v. Easement and Right of Way*, 405 F.2d 305 (6th Cir. 1968) (applying 16 U.S.C. § 831).

89. See *Pacific Gas & Elec. Co. v. W.H. Hunt Estate Co.*, 319 P.2d 1044 (Cal. 1957); see also *San Diego Gas & Elec. Co. v. Daley*, 253 Cal. Rptr. 144 (Cal. Ct. App. 1988).

90. See *Jennings*, 518 So. 2d at 895.

91. See *Georgia Power Co. v. Sinclair*, 176 S.E.2d 639, 642 (Ga. Ct. App. 1970) (holding that "[p]otential danger of an electric power line . . . necessarily has a material connection with the market value of the adjacent land and is an item to be considered by the jury . . .").

92. See *Evans v. Iowa S. Utils. Co.*, 218 N.W. 66, 69 (Iowa 1928) (holding that it was proper for expert to consider as one of the damage elements in a condemnation proceeding "the fear prospective purchasers might have by reason of the high voltage line being on the premises."). But see *Iowa Power & Light Co. v. Stortenbecker*, 334 N.W.2d 326 (Iowa App. 1983) (holding that trial court improperly allowed expert testimony offered to illustrate effects fear of health hazards from power lines might have upon market value of property "because insufficient data existed for [the expert] to reach a conclusion that a reasonable probability of hazards to human health is created by the [power line].").

93. See *Ryan v. Kansas Power & Light Co.*, 815 P.2d 528 (Kan. 1991).

94. See *Claiborne Elec. Coop., Inc. v. Garrett*, 357 So. 2d 1251 (La. Ct. App. 1978), writ denied, 359 So. 2d 1306 (La. 1978).

souri,<sup>95</sup> New Mexico,<sup>96</sup> New York,<sup>97</sup> Ohio,<sup>98</sup> South Dakota,<sup>99</sup> Virginia,<sup>100</sup> and Washington.<sup>101</sup>

## 2. Florida's Reversal: Florida Power & Light Co. v. Jennings

The Florida Supreme Court reversed twenty-four years of precedent in *Florida Power & Light Co. v. Jennings*<sup>102</sup> by overruling *Casey v. Florida Power Corp.*<sup>103</sup> In *Casey*, the Florida Second District Court of Appeal announced that it would follow the majority view; however, it actually meant the minority view.<sup>104</sup> In *Jennings*, the Florida Supreme Court declined to follow *Casey*, noting that the issue in eminent domain proceedings should be to determine the true market value of the land taken.<sup>105</sup> Evidence "extremely relevant to the central issue of what is full compensation to the landowner," such as the impact of a potential buyer's fears on the land's value, should not be excluded.<sup>106</sup> The court also

95. For a number of years, Missouri was thought to adhere to the intermediate view. See *Willsey v. Kansas City Power*, 631 P.2d 268, 275 (Kan. Ct. App. 1981) (citing *Phillips Pipe Line Co. v. Ashley*, 605 S.W.2d 514, 517-18 (Mo. Ct. App. 1980)). However, the Missouri Supreme Court subsequently adopted the majority view, even though it did not explicitly overrule *Phillips Pipe Line*. See *Missouri Pub. Serv. Co. v. Juergens*, 760 S.W.2d 105, 106-07 (Mo. 1988) (en banc). In *Juergens*, the court held that "depreciation in market value due to a risk of harm is recoverable in a condemnation hearing. . . . '[I]t is the fear caused by the risk which actually depreciates the value of the remaining tract, rather than the risk itself.'" *Id.* (quoting *Phillips Pipe Line*, 605 S.W.2d at 518). Interestingly, the *Juergens* court relied upon *Phillips Pipe Line*, but only cited language from that opinion that supported the majority view. *Id.*; see also *Missouri Highway & Transp. Comm'n v. Horine*, 776 S.W.2d 6, 12 (Mo. 1989) (en banc) (adhering to same reasoning and holding as *Juergens* court).

96. See *City of Santa Fe v. Komis*, 845 P.2d 753 (N.M. 1992) (action to recover for diminution of property value caused by construction of highway to transport nuclear waste). After reviewing this case of first impression, the New Mexico Supreme Court considered the three primary viewpoints and adopted the majority view, reasoning that "[the] objective in a condemnation case is to compensate the landowner for damages actually suffered. . . . [I]f loss of value can be proven, it should be compensable regardless of its source." *Id.* at 756.

97. See *Criscuola v. Power Auth. of N.Y.*, 621 N.E.2d 1195 (N.Y. 1993); see also *infra* notes 110-14 and accompanying text (discussing *Criscuola*).

98. See *Ohio Pub. Serv. Co. v. Dehring*, 172 N.E. 448 (Ohio Ct. App. 1929).

99. See *Basin Elec. Power Coop., Inc. v. Cutler*, 217 N.W.2d 798, 800 (S.D. 1974) (holding that qualified witnesses in eminent domain proceeding can opine "as to [the property's] value and to also state the factors they considered in arriving at a depreciation in value even though some of those factors were in the nature of conjecture").

100. See *Appalachian Power Co. v. Johnson*, 119 S.E. 253 (Va. 1923). But see *infra* notes 129-36 and accompanying text.

101. See *State v. Evans*, 612 P.2d 442 (Wash. Ct. App. 1980), *rev'd* on other grounds, 634 P.2d 845 (Wash. 1981), *modified*, 649 P.2d 633 (Wash. 1982).

102. 518 So. 2d 895 (Fla. 1987).

103. 157 So. 2d 168 (Fla. 2d DCA 1963).

104. *Id.* at 170-71; see also *supra* note 52 (discussing *Casey* court's rationale for following minority view).

105. *Jennings*, 518 So. 2d at 897. But see *supra* note 85.

106. *Jennings*, 518 So. 2d at 897.

rejected the intermediate view, which the lower court had adopted.<sup>107</sup>

The Jennings court thus adopted the majority view: "We join the majority of jurisdictions who have considered this issue and hold that the impact of public fear on the market value of the property is admissible without independent proof of the reasonableness of the fear."<sup>108</sup> The court stated that the reasonableness of the public's fear either should be assumed or considered irrelevant.<sup>109</sup>

### 3. New York's Reversal: *Criscuola v. Power Authority of New York*

New York adopted the majority view in 1993, when its highest court overruled a lower court decision that had endorsed the intermediate view. In *Criscuola v. Power Authority of New York*,<sup>110</sup> the New York Court of Appeals decided whether landowners in a condemnation suit have to prove the reasonableness of the public's fear of power lines "as a separate, additional component of diminished market value."<sup>111</sup> The lower courts had ruled against the claimants, holding that they "had not met their burden of proving that the 'cancerphobia' was reasonable."<sup>112</sup>

The *Criscuola* court held that the landowners need not prove the reasonableness of the public's fear. The court noted:

The issue in a just compensation proceeding is whether or not the market value has been adversely affected. This consequence may be present even if the public's fear is unreasonable. Whether the danger is a scientifically genuine or verifiable fact should be irrelevant to the central issue of its market value impact. Genuineness and proportionate dollar effects are relevant factors, to be sure, but in the usual evidentiary framework.

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107. *Id.*

108. *Id.* at 898.

109. *Id.* at 899. The court made reasonableness a matter of fact instead of a matter of law. See *id.* The court stated that the jury is capable of determining the reasonableness of an expert's testimony and noted: "[W]e believe that a jury could also determine the reasonableness of a valuation opinion which explains the devaluation of such adjacent property on the grounds that, e.g., the buying public is fearful that transmission lines attract alien being[s] in flying saucers." *Id.* The court opined that whether an expert's opinion is reasonable can be determined by the jury without additional experts testifying as to the reasonableness of a particular fear. *Id.*; see also *Missouri Pub. Serv. Co. v. Juergens*, 760 S.W.2d 105, 106 (Mo. 1988) (en banc) (holding that "[t]he weight to be given evidence which is remote or speculative is a task for the jury with proper instructions.").

110. 621 N.E.2d 1195 (N.Y. 1993) (reversing *Zappavigna v. New York*, 588 N.Y.S.2d 585 (App. Div. 1992)).

111. *Id.*

112. *Id.* at 1196.

Such factors should be left to the contest between the parties' market value experts, not magnified and escalated by a whole new battery of electromagnetic power engineers, scientists or medical experts.<sup>113</sup>

The court did state, however, that the plaintiffs must offer evidence of "some prevalent perception of a danger emanating from the objectionable condition" and establish that this perception diminishes market value.<sup>114</sup>

#### 4. Kansas's Move to the Majority View: *Willsey v. Kansas City Power & Light Co.* and *Ryan v. Kansas Power & Light Co.*

In 1991, the Kansas Supreme Court, applying the reasoning of the Kansas Court of Appeals in *Willsey v. Kansas City Power & Light Co.*,<sup>115</sup> adopted the majority view.<sup>116</sup> In *Willsey*, Kansas City Power appealed from a judgment in favor of the landowners in an easement condemnation proceeding.<sup>117</sup> Kansas City Power argued that the trial court had erred in allowing the jury to consider expert testimony regarding the impact that public fear of power lines had on the market value of the Willseys' home.<sup>118</sup> In considering compensation, the court examined the reasonableness of the

113. *Criscuola*, 621 N.E.2d at 1196 (citations omitted).

114. *Id.* at 1197; see also Richard A. Reed, *Fear and Lowering Property Values in New York: Proof of Consequential Damages from "Cancerphobia" in the Wake of Criscuola v. Power Authority of the State of New York*, 66 N.Y. ST. B.J. 30, 34 (1994) (discussing *Criscuola* and its impact upon condemnation actions in New York).

115. 631 P.2d 268 (Kan. Ct. App. 1981).

116. *Ryan v. Kansas Power & Light Co.*, 815 P.2d 528, 533 (Kan. 1991).

117. *Willsey*, 631 P.2d at 270.

118. *Id.* Kansas City Power specifically objected to the Willseys' expert witness—a market analyst, realtor, and appraiser—regarding his answers to questions about the potential for loss to the home's market value caused by buyer aversion to power lines. *Id.* at 270-71. The witness testified that:

[P]eople don't like the unsightliness of it, and then, of course, there is a latent fear.

....

... There is a latent fear on the part of buyers due to this high voltage power line. This is due in part to some people, it may be imagined, and it may be due to what they see in the papers, on T.V. and hear on the radio.

....

Q. Mr. Vickers, have you personally seen advertisements in the news media concerning danger of power lines, and proximity to power lines?

A. Well, the Kansas City Power and Light Company itself is probably the one who propagates or who informs the public of the danger of getting in contact or close proximity to power lines.

....

Q. Mr. Vickers, have you in your experience as a real estate broker in talking to actual buyers in the pit, have those buyers expressed concerns to what you are relating to right now, to you as a realtor?

A. Absolutely.

*Id.* at 271.



public's fear of power lines and noted that "[a] certain amount of fear and a healthy wariness in the presence of high voltage lines strikes us as eminently reasonable."<sup>119</sup> The court concluded that as long as fear is not unreasonable as a matter of law, reasonableness is a question of fact for the jury to decide.<sup>120</sup> The court ultimately held that the property owner's evidence was "persuasive" and affirmed the damages award.<sup>121</sup>

The Willsey court left itself the option to move from the intermediate view to the majority view. While the court in one sentence used the rationale applied by courts that follow the intermediate view,<sup>122</sup> in the next sentence the court used the rationale applied by courts that follow the majority view.<sup>123</sup> The court explained that it preferred the majority view,<sup>124</sup> but because the facts of the case satisfied the intermediate view, the court chose to remain with that approach.<sup>125</sup> The court stated that "the evidence in this case makes it unnecessary for us to choose [between the intermediate view and the majority view]."<sup>126</sup> In fact, several years later, the Kansas Supreme Court officially chose the majority view in *Ryan v. Kansas Power & Light Co.*<sup>127</sup> The *Ryan* court stated:

We submit that in effect the Court of Appeals adopted the [majority rule] in Kansas in Willsey and we agree with its rationale therein. Accordingly, in a condemnation action to acquire an easement for installation of a high voltage electrical line we find evidence of fear in the marketplace is admissible with respect to the value of property taken without proof of the

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119. *Id.* at 279.

120. *Id.*

121. *Id.* at 279-80.

122. *Id.* at 277. The court noted that "[r]emote, speculative and conjectural damages are not to be considered; the owner cannot recover today for an injury to his child which he fears will happen tomorrow." *Id.*

123. *Id.* at 277-78. The court stated that:

Logic and fairness, however, dictate that any loss of market value proven with a reasonable degree of probability should be compensable, regardless of its source. If no one will buy a residential lot because it has a high voltage line across it, the lot is a total loss even though the owner has the legal right to build a house on it.

124. *Id.*

125. *Id.*

126. *Id.* at 279.

127. 815 P.2d 528, 533 (Kan. 1991). The Kansas Supreme Court perpetuated the mislabeling of the majority view as the minority view, a trend initiated by the Florida Second District Court of Appeal in *Casey v. Florida Power Corp.*, 157 So. 2d 168, 170-71 (Fla. 2d DCA 1963). The Kansas Supreme Court, while referring to the minority view throughout the opinion, intended to state the majority view. *Ryan*, 815 P.2d at 533-34.

reasonableness of the fear. . . . [F]ear of a high voltage line is reasonable.<sup>128</sup>

##### 5. Confusion in Virginia: Chappell v. Virginia Electric & Power Co.

Virginia's highest court recently issued a decision with ominous overtones for property owners attempting to recover for diminution in property value caused by public fear. In *Chappell v. Virginia Electric & Power Co.*,<sup>129</sup> the Virginia Supreme Court cast doubt upon the validity of *Appalachian Power Co. v. Johnson*,<sup>130</sup> the case cited for Virginia's adoption of the majority view since 1923.<sup>131</sup> In affirming the lower court's denial of damages, the court stated:

We do not agree that *Johnson* is controlling precedent. . . . [T]he language *Chappell* invokes is obiter dicta. Nevertheless, we need not decide whether a landowner in a proceeding to condemn an easement for an electric transmission line may be entitled to compensation for diminution in the market value of the remaining land attributable to the fears of prospective purchasers. . . . And, as [the landowner] acknowledged on brief, "[s]peculative matters should not be considered by commissioners in determining just compensation."<sup>132</sup>

This language should disturb property owners in Virginia who face the possibility of litigating a condemnation action. The court did not need to question *Johnson*. The landowner merely offered insubstantial proof that the public's fear had diminished the value of the property.<sup>133</sup> Proof that the public's fear causes a diminution in property value is necessary in jurisdictions adopting the majority view.<sup>134</sup> Therefore, the *Chappell* court need only have stated that the plaintiff offered insufficient proof.<sup>135</sup> The court characterized as mere dictum the language from *Johnson* cited by the landowner, however, and left open the question of the

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128. Ryan, 815 P.2d at 533. The court went on to conclude that "evidence of fear in the marketplace is admissible but no witness, whether expert or non-expert, may use his or her personal fear as a basis for testifying about fear in the marketplace." *Id.* at 533-34.

129. 458 S.E.2d 282 (Va. 1995).

130. 119 S.E. 253 (Va. 1923).

131. *Id.* at 258 ("[T]he commissioners could have properly taken into consideration the effect of the fear of the [power] line breaking down and injuring persons and property . . . if the liability [for] such injury in fact depreciated the market value of the property.").

132. *Chappell*, 458 S.E.2d at 284 (citations omitted).

133. *Id.* The plaintiff "failed to quantify any damage to the fair market value of the residue attributable to the alleged public fear of high voltage transmission lines." *Id.*

134. *E.g.*, *Criscuola v. Power Auth. of N.Y.*, 621 N.E.2d 1195, 1197 (N.Y. 1993).

135. *Id.*

proper view regarding compensability for damages caused by fear of power lines.<sup>136</sup> Thus, property owners in a condemnation action in Virginia should consider offering evidence of the reasonableness of the public's fear of power lines—as is required of property owners in jurisdictions following the intermediate view—or face the possibility of a Virginia appellate court reversing an award for damages.

### III. STRICT LIABILITY RATIONALES AS JUSTIFICATION FOR THE MAJORITY VIEW

The majority view is hard to ignore or reason away. Why should a purely innocent landowner, whose property has depreciated because of the erection of a power line over a portion of his or her property, have to suffer this loss? Courts following the majority view rationalize holding power companies liable for diminished value caused by fear by stating that the issue in a condemnation proceeding is full compensation.<sup>137</sup> Additionally, many courts find it easy to hold against power companies because power companies often advertise the dangers of power lines, and thus are at least partially responsible for causing the public's fear.<sup>138</sup> However, putting aside temporarily the power companies' part in causing the fear, the argument that power companies should always pay for a loss caused by fear begs the question: why should an equally innocent power company, which cannot necessarily control the general public's fear, be held responsible for this loss?<sup>139</sup> Strict liability rationales offer the answer to this question.

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136. Chappell, 458 S.E.2d at 284. The court actually stated that the issue was "whether a landowner in a proceeding to condemn an easement for an electric transmission line may be entitled to compensation for diminution in the market value of the remaining land attributable to the fears of prospective purchasers." *Id.*

137. Florida Power & Light Co. v. Jennings, 518 So. 2d 895, 897 (Fla. 1987). But see *supra* note 85 and accompanying text.

138. E.g., Willsey v. Kansas City Power & Light Co., 631 P.2d 268, 279 (Kan. Ct. App. 1981). For example, the Willsey court noted that:

The landowner's expert testified to the perceived basis for popular fear, and that was the warning campaigns conducted by electric utilities themselves. . . . Although not a factor in our decision, it seems highly inconsistent for a company to warn the public repeatedly of the danger with which an instrumentality is fraught, and then say that public fear of that instrumentality is groundless.

*Id.*

139. Some liken the current EMF scare to medieval witchcraft trials. See Bruce W. Radford, Lawyers, Witchcraft, and EMF, PUB. UTIL. REP., Sept. 15, 1994, at 6. For example, one attorney noted that "[i]n olden days, . . . judges were prone to admit 'spectral evidence'—testimony about visions, demons, or mysterious events known only to the witness, and therefore immune to cross-examination." *Id.* The attorney continued, observing that

### A. Strict Liability

The majority view holds that landowners should always be compensated for loss of market value caused by fears of the general public.<sup>140</sup> This view holds that power companies, even though they have arguably done nothing to cause the fear, still must pay for this loss.<sup>141</sup> Courts following the majority view essentially impose liability upon innocent power companies in a manner similar to how the doctrine of strict liability imposes liability upon innocent actors.<sup>142</sup>

Strict liability is defined as "liability without fault,"<sup>143</sup> with the analysis focusing on who should bear the loss.<sup>144</sup> Strict liability allows one party to be compensated for a loss caused by another party, even though the party paying for the loss has done nothing wrong, morally or otherwise.<sup>145</sup> There are several defenses to strict liability, including assumption of the risk,<sup>146</sup> contributory

EMF litigation involves claims such as "cancerphobia" and inverse condemnation, which "rely more on a 'community-based fear standard' than scientific analysis: If everyone shares the belief that EMF is dangerous, it doesn't matter whether that belief is correct." *Id.* To support this view, the attorney cited *Criscuola*, 621 N.E.2d at 1195, "in which the New York Court of Appeals found scientific fact 'irrelevant' to the EMF debate, as long as public perception actually drives down housing prices." *Id.*

140. See *supra* notes 84-86 and accompanying text.

141. *Id.* In contrast, the minority view asks, albeit indirectly, why an actor (here a power company), through absolutely no fault of its own, should be responsible for a loss caused by an ignorant public. Minority view courts answer by holding that such a party should not be liable for that loss. See *supra* note 32 and accompanying text.

142. The majority view is "liability without negligence," in that an inference of negligence may be refuted by a showing of proper care. See, e.g., *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring). Even if power companies offer evidence showing that EMF does not cause cancer—thus proving that there is no lack of proper care on their part and no reasonable basis for the public's fear—the majority view still places the loss caused by that fear upon power companies. See *supra* text accompanying notes 84-86.

143. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 75, at 534 (5th ed. 1984); see also *Spano v. Perini Corp.*, 250 N.E.2d 31, 33 (N.Y. 1969). Strict liability "means liability that is imposed on an actor apart from either (1) an intent to interfere with a legally protected interest without a legal justification for doing so, or (2) a breach of a duty to exercise reasonable care, i.e., actionable negligence." KEETON ET AL., *supra*, § 75, at 534. The case commonly cited as the seminal decision responsible for advancing notions of strict liability is *Rylands v. Fletcher*, 3 H.L. 330 (1868). See Francis H. Bohlen, *The Rule in Rylands v. Fletcher*, 59 U. PA. L. REV. 298 (1911). The Restatement (Second) of Torts later incorporated the *Rylands* holding. RESTATEMENT (SECOND) OF TORTS §§ 519, 520 (1964).

144. See KEETON ET AL., *supra* note 143, § 75, at 536; see also FRANK J. VANDALL, *STRICT LIABILITY: LEGAL AND ECONOMIC ANALYSIS* 46 (1989); *Escola*, 150 P.2d at 440-41 (Traynor, J., concurring); *Greenman v. Yuba Power Prod., Inc.*, 377 P.2d 897, 901 (Cal. 1963).

145. KEETON ET AL., *supra* note 143, § 75, at 536; VANDALL, *supra* note 144, at 46.

146. See RESTATEMENT (SECOND) OF TORTS § 523 (1964) ("The plaintiff's assumption of the risk of harm from an abnormally dangerous activity bars his recovery for the harm.")

In one suit against a power company, the property owner claimed that he had not been able to sell his house because nearby power lines scared off potential purchasers. *Conn.*

negligence,<sup>147</sup> and proximate cause.<sup>148</sup> Strict liability is used most often in tort claims relating to products liability and dangerous activities.<sup>149</sup> The scope of strict liability is expanding, however.<sup>150</sup> For example, strict liability has been applied in asbestos litigation.<sup>151</sup> Changing societal values, such as the desire to protect individuals from personal disaster, are one reason for this expansion.<sup>152</sup>

Applying strict liability rationales to the majority view does not require expanding the strict liability doctrine because the majority view essentially is a strict liability approach. This application is useful merely to illustrate the superiority of the majority view over the intermediate and minority views.

In applying strict liability rationales to the issue of compensability for fear-based market value diminution, one must illustrate why a negligence approach would not be preferable.<sup>153</sup> It is important to note that the majority view is not a negligence-based theory.<sup>154</sup>

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Homeowner Sues CL&P Saying EMF Concerns Have Lowered Property Value, UTIL. ENVTL. REP., Sept. 15, 1995, at 5. However, the power lines were installed years before the property owner purchased the house. *Id.* As a possible defense to this claim, the defendant power company might argue that the plaintiff "assumed the risk" of lost property value when he moved into the house.

147. "The plaintiff's contributory negligence in knowingly and unreasonably subjecting himself to the risk of harm from the activity is a defense to the strict liability." RESTATEMENT (SECOND) OF TORTS § 524(2) (1964).

148. VANDALL, *supra* note 144, at 56.

149. See generally *id.* (summarizing law of strict liability).

150. See generally *id.* at 95-105 (discussing scope of strict liability); see also Virginia E. Nolan & Edmund Ursin, *The Revitalization of Hazardous Activity Strict Liability*, 65 N.C. L. REV. 257, 288 (1987) ("[S]trict liability has expanded beyond manufacturers to include retailers, wholesalers, and even lessors of products. Since the adoption of strict products liability . . . various proposals for new areas of strict liability have appeared, and courts have rendered decisions that suggest such new applications."). Some argue that strict liability should be extended to professionals such as doctors and lawyers. VANDALL, *supra* note 144, at 107.

151. See *Borel v. Fibreboard Paper Prod. Corp.*, 493 F.2d 1076, 1081 (5th Cir. 1973); see also VANDALL, *supra* note 144, at 98 (noting that "[a]sbestos has been a fertile ground for the application of strict liability").

152. Nolan & Ursin, *supra* note 150, at 289-93 (discussing reasons for expansion of strict liability).

153. Cf. Richard A. Epstein, *Causation—In Context: An Afterword*, 63 CHI.-KENT L. REV. 653, 657 (1987) ("One of the most debated topics in the law of tort is surely the choice of either a negligence or a strict liability rule for accidental harms.").

154. Starting with the traditional definition of negligence, stated by Prosser and Keeton: "Negligence is a matter of risk . . . of recognizable danger of injury. It has been defined as 'conduct which involves an unreasonably great risk of causing damage,' or, more fully, conduct 'which falls below the standard established by law for the protection of others against unreasonable risk of harm.'" KEETON ET AL., *supra* note 143, § 31, at 169 (citations omitted); see also RESTATEMENT (SECOND) OF TORTS §§ 282, 291-93 (1964). Negligence occurs when there is a violation of the duty of care. See KEETON ET AL., *supra* note 143, § 30, at 164. Strict liability requires no proof of the defendant's negligence. See 1 STUART M.

The majority view imposes liability upon power companies once the landowner shows that the public's fear of power lines has caused a diminution in property value; there is no determination of a duty of care as there is with a negligence approach.<sup>155</sup> Additionally, unlike a negligence approach, the majority view does not require balancing the parties' interests.<sup>156</sup> The property owner simply must demonstrate that the public's fear has caused a diminution in property value.<sup>157</sup> The majority view court then strictly imposes liability upon the power company, which must compensate the landowner for the diminution.<sup>158</sup> Therefore, because the majority requires no proof of care or balancing of interests, the majority view cannot properly be called a negligence approach.

The principal rationales for strict liability are discussed in the following sections and illustrate why the majority view is superior to the minority and intermediate views.<sup>159</sup>

## B. Corrective Justice

Several commentators support strict liability with notions of corrective justice.<sup>160</sup> Corrective justice focuses on determining what is fair between the victim and defendant, rather than broader concerns about society as a whole.<sup>161</sup>

### 1. Causation

One corrective justice model centers upon fairness and suggests that the primary issue should be causation: whether A caused harm to B.<sup>162</sup> Under this model, the objective should be to

SPEISER ET AL., *THE AMERICAN LAW OF TORTS* § 18:30 (1983). Indeed, the doctrine of strict liability applies even if the defendant "has exercised all possible care." *RESTATEMENT (SECOND) OF TORTS* § 402A(2) (1964).

155. See *Florida Power & Light Co. v. Jennings*, 518 So. 2d 895 (Fla. 1987) (failing to make duty of care determination).

156. Negligence requires that a balancing test be applied, usually through the use of a risk-benefit form of analysis. See *KEETON ET AL.*, *supra* note 143, at 173 (citations omitted); see also *RESTATEMENT (SECOND) OF TORTS* §§ 282, 291-93 (1964).

157. E.g., *Criscuola v. Power Auth. of N.Y.*, 621 N.E.2d 1195, 1197 (N.Y. 1993).

158. *Id.*

159. Law and economics (economic analysis) and corrective justice are the two most powerful legal theories today, and both offer support for strict liability. Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 *UCLA L. REV.* 439, 439 (1990). This Comment justifies the majority view by concentrating analysis on these theories. See discussion *infra* part III.B-C.

160. See generally 1 *SPEISER ET AL.*, *supra* note 154, § 1:37.

161. G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 224 (1980). For a summary of corrective justice theories, see Susan Randall, *Corrective Justice and the Torts Process*, 27 *IND. L. REV.* 1, 2-3 (1993).

162. Richard A. Epstein, *A Theory of Strict Liability*, 2 *J. LEGAL STUD.* 151, 152, 166 (1973).

take "into account common sense notions of individual responsibility."<sup>163</sup> Individuals should be free from harm to either their personal bodily integrity or their property.<sup>164</sup> If a victim can show that a defendant's actions caused harm to the victim's bodily integrity or property, the victim should be able to recover, and any defenses the defendant might have should be narrowly applied.<sup>165</sup> After causation is established, a defendant can assert justifications or defenses, such as lack of causation or assumption of the risk.<sup>166</sup> The philosophy behind this theory and the reason causation is its focus is that allowing courts to decide cases involving individuals while considering society's needs at the same time delegates too much power to the judiciary to impose restrictions upon individual liberty.<sup>167</sup> Moreover, because individuals have a right not to be harmed, conduct causing harm cannot be justified by focusing on society's needs.<sup>168</sup> Therefore, the fairest standard is strict liability.<sup>169</sup>

When a power company erects a power line adjacent to an individual's property, and the public's fear of that power line causes an additional diminution in value to the land, the erection of the power line has harmed the landowner.<sup>170</sup> Before there will be liability, however, there must be damage, either to person or to property.<sup>171</sup> Under the corrective justice model, a *prima facie* case of liability is established if the landowner can show a causal link between the erection of the power line and the diminution in property value caused by the public's fear of the power line.<sup>172</sup>

The minority view does not permit recovery even in the face of evidence that the fear caused a diminution in market value.<sup>173</sup> The minority view appears to consider society's needs,<sup>174</sup> which is

163. *Id.* at 151.

164. *Id.* at 164; see also Richard A. Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391, 441 (1975).

165. Epstein, *supra* note 162, at 166, 204.

166. *Id.* at 204; Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165, 169, 170, 207-11 (1974).

167. WHITE, *supra* note 161, at 228.

168. 1 SPEISER ET AL., *supra* note 154, § 1:37, at 135.

169. *Id.*

170. See Epstein, *supra* note 162, at 166.

171. *Id.* The intermediate and majority views require a showing that the fear caused actual diminution in value to the property. See *supra* text accompanying notes 57, 84. As noted by Professor Richard Epstein, "the minimum condition of . . . liability is damage to the person or property of the plaintiff." Epstein, *supra* note 162, at 166.

172. See Epstein, *supra* note 162, at 168.

173. See *Alabama Power Co. v. Keystone Lime Co.*, 67 So. 833, 835 (Ala. 1914).

174. Cf. *Pappas v. Alabama Power Co.*, 119 So. 2d 899, 905 (Ala. 1960) (holding that the minority view "is sound and probably even more necessary in this modern age of scientific and industrial expansion.").

inappropriate in a corrective justice regime.<sup>175</sup> Thus, the minority view is inadequate because it imposes liability upon the harmed landowner.<sup>176</sup> The intermediate view also is flawed because it requires a showing of reasonableness,<sup>177</sup> when the main inquiry under the corrective justice model requires a showing of causation.<sup>178</sup> Because the requisite causation is present, liability should be imposed regardless of the reasonableness of the public's fear.<sup>179</sup>

The most forceful approach under a corrective justice regime is the majority view. The requisite causation is present: the erection of power lines caused a diminution in property value by creating a fear of contracting cancer in the buying public.<sup>180</sup> Thus, it is fair to impose this loss upon power companies rather than property owners.<sup>181</sup> The corrective justice model concludes that "the principles of strict liability say that the liberty of one person ends when he causes harm to another."<sup>182</sup>

## 2. Reciprocity and Reasonableness

Another theory advances notions of corrective justice and fairness, but notes that there are two paradigms, or models, of liability: the paradigm of reciprocity and the paradigm of reasonableness.<sup>183</sup> The basic premise of the paradigm of reciprocity is that, in determining liability, a court should examine the conduct of both the defendant and victim.<sup>184</sup> If the defendant and victim expose each other to an equal amount of risk, strict liability should not apply.<sup>185</sup> For example, "two airplanes flying in the same vicinity subject each other to reciprocal risks of a mid-air collision," and therefore strict liability should be precluded.<sup>186</sup> On the other hand, if the defendant's actions expose the victim to a unilateral, nonreciprocal risk, strict liability should apply.<sup>187</sup> For example, "a pilot or an airplane owner subjects those beneath the path of

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175. 1 SPEISER ET AL., *supra* note 154, § 1:37, at 135.

176. See Epstein, *supra* note 162, at 168.

177. See *supra* note 57 and accompanying text.

178. Epstein, *supra* note 162, at 165-66, 204.

179. See *id.*

180. See *id.* at 166.

181. See *id.* at 151. "The task is to develop a normative theory of torts that takes into account common sense notions of individual responsibility." *Id.*

182. *Id.* at 203-04.

183. George P. Fletcher, Fairness and Utility in Tort Theory, 85 HARV. L. REV. 537, 540 (1972).

184. 1 SPEISER ET AL., *supra* note 154, § 1:37, at 131.

185. Fletcher, *supra* note 183, at 542.

186. *Id.*

187. *Id.*



flight to nonreciprocal risks of harm,” and strict liability should apply.<sup>188</sup> If the victim’s injury results from a nonreciprocal risk of harm, the defendant is not always under a duty to pay.<sup>189</sup> Nonreciprocal risk-creation may be excused when it is unfair to require the defendant to pay.<sup>190</sup>

Power lines fall into “the set of cases in which a socially useful activity imposes nonreciprocal risks on those around it.”<sup>191</sup> When the presence of power lines causes a diminution in property value, however, a nonreciprocal risk is imposed upon an innocent landowner. Through no fault of the landowner, the property’s value decreases. Thus, the paradigm of reciprocity permits recovery for the landowner and supports the majority view.

One must point out, however, the second model of liability—the paradigm of reasonableness. The paradigm of reasonableness suggests that instead of focusing solely on the defendant and the victim, the issue of liability must be decided by considering the impact the decision will have upon society at large.<sup>192</sup> This paradigm determines who will bear the loss by focusing on the reasonableness of the risk:

Reasonableness is determined by a straightforward balancing of costs and benefits. If the risk yields a net social utility (benefit), the victim is not entitled to recover from the risk-creator; if the risk yields a net social disutility (cost), the victim is entitled to recover. The premises of this paradigm are that reasonableness provides a test of activities that ought to be encouraged and that tort judgments are an appropriate medium for encouraging them.<sup>193</sup>

One can argue that society suffers by allowing property owners to recover the loss in market value caused by the public’s fear.

188. *Id.*

189. *Id.* at 551.

190. *Id.* at 541, 551-556. For example, conduct may be excused in the case of unavoidable ignorance. *Id.* at 551-56. Professor Fletcher notes that the “issue of fairness is expressed by asking whether the defendant’s creating the relevant risk was excused on the ground . . . that the defendant could not have known of the risk latent in his conduct.” *Id.* at 541. Power companies must recognize that the erection of power lines will result in an additional diminution in property value because of the public’s fear of adverse health effects. Cf. *Iowa Power & Light Co. v. Stortenbecker*, 334 N.W.2d 326, 331 (Iowa Ct. App. 1983) (power company conceded that testimony offered to show effect fear of adverse health consequences from power lines might have upon property value could be relevant in that regard). Thus, this excuse should not be available to power companies.

191. Fletcher, *supra* note 183, at 569.

192. *Id.* at 556.

193. *Id.* at 542-43. The paradigm of reasonableness represents economic efficiency analysis, see discussion *infra* part III.C, as opposed to the paradigm of reciprocity, which represents corrective justice. Joseph M. Steiner, *Economics, Morality, and the Law of Torts*, 26 U. TORONTO L.J. 227, 247 (1976).

Appealing to the paradigm of reasonableness, one could assert that the activity is socially advantageous and warrants encouragement. The dilemma is whether to focus on the parties and their relationship or on society and its needs.<sup>194</sup> Courts following the minority view employ the latter dynamic, which favors the power company, perhaps because they fear that finding in favor of property owners will ultimately impede progress and, therefore, hurt society.<sup>195</sup>

At least as the issue relates to power companies, however, corrective justice requires that courts protect individual interests. Indeed, corrective justice advocates the paradigm of reciprocity and rejects the paradigm of reasonableness as a model for liability.<sup>196</sup> And under the paradigm of reciprocity, " 'justice' . . . should be equated with justice between the parties, not with broader conceptions of the welfare of the community."<sup>197</sup> Individual interests should be insulated against "community demands."<sup>198</sup> Thus, according to the paradigm of reciprocity, the majority view is superior.<sup>199</sup>

194. Fletcher, *supra* note 183, at 569.

195. See *supra* text accompanying note 43; cf. *Pappas v. Alabama Power Co.*, 119 So. 2d 899, 905 (Ala. 1960). For example, the *Pappas* decision, in reaffirming *Keystone Lime*, implied that if the court permitted recovery of damages, the public would eventually suffer because it would be too costly to support projects for the public good. *Id.*

196. WHITE, *supra* note 161, at 224; Fletcher, *supra* note 183, at 550-51.

197. WHITE, *supra* note 161, at 224; see also Fletcher, *supra* note 183, at 550.

198. Fletcher, *supra* note 183, at 569. "The burden should fall on the wealth-shifting mechanism of the tort system to insulate individual interests against community demands. By providing compensation for injuries exacted in the public interest, the tort system can protect individual autonomy by taxing, but not prohibiting, socially useful activities." *Id.*

199. But see discussion *infra* part IV (discussing situations in which societal interests may take precedence over interests of the individual). For criticisms of the causation and reciprocity corrective justice models, see Richard A. Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205, 215-221 (1973); Steiner, *supra* note 193, at 243-50; WHITE, *supra* note 161, at 224-30.

Jules Coleman advances another model centering on notions of corrective justice. See JULES COLEMAN, *RISKS AND WRONGS* 329 (1992). This model is quite different from his earlier writing on the subject. Interestingly, Coleman explicitly rejects his earlier views on corrective justice. See Jules L. Coleman, *Risks and Wrongs*, 15 HARV. J.L. & PUB. POL'Y 637, 644-45 (1992). The model has two components: wrongfulness and responsibility. See COLEMAN, *RISKS AND WRONGS*, *supra*, at 329. Corrective justice requires that an actor repair the wrongful losses for which he or she is responsible. *Id.* at 345. Indeed, corrective justice governs a loss only if the loss is wrongful. *Id.* at 361. An actor must repair wrongful losses that result from either wrongdoing (unjustified actions) or a wrong (an invasion of rights). *Id.* at 332, 361. The second category covers cases of strict liability.

In applying this model to strict liability, Coleman notes that:

Sometimes innocent or justifiable conduct can be contrary to the constraints imposed by the rights of others. If it is, justifiable or innocent conduct can constitute a wrong, and when it does, the losses that result are wrongful in the sense necessary to impose on the injurer a duty to repair.

### C. Economic Efficiency

Economic efficiency is the notion that rules of law should promote efficient resource allocation.<sup>200</sup> Strict liability is one means of attaining efficient resource allocation.<sup>201</sup> Theories of economic efficiency that support strict liability also support the majority view; most notable among these theories are the reduction of transaction costs, the cheapest cost avoider rationale, and the enterprise model.<sup>202</sup>

#### 1. Reduction of Transaction Costs

A liability rule is economically efficient if it reduces transaction costs.<sup>203</sup> Transaction costs include the cost of litigation.<sup>204</sup> Indeed, a liability rule that simplifies the proof necessary to establish liability is preferable to a rule that imposes more of a burden upon litigants.<sup>205</sup>

Under this view, strict liability is efficient because it reduces the costs of litigation, and by analogy, the majority view is efficient.<sup>206</sup> Unlike the intermediate view, the majority view does not require litigation of the reasonableness of the public's fear; this

Id. at 371. Thus, by installing power lines, power companies have invaded the rights of property owners. Id. at 361. The installation of power lines has resulted in a loss to the property owner because of the additional diminution in property value caused by the public's fear. Id. Even though power companies are "innocent," in that they arguably have no control over the public's fear, they must still repair, or compensate, landowners for diminution caused by fear. Id. at 371.

200. Steiner, *supra* note 193, at 227-28.

201. E.g., Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 *YALE L.J.* 1055, 1060-64, 1084 (1972). But see Posner, *supra* note 199, at 221 (arguing that strict liability is not as efficient as negligence).

202. Cf. *Richman v. Charter Arms Corp.*, 571 F. Supp. 192, 203-04 (E.D. La. 1983) (finding that "economic efficiency" requires strict liability), modified, 762 F.2d 1250 (5th Cir. 1985).

203. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *HARV. L. REV.* 1089, 1096-97 (1972).

204. See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 225-26 (1970). As noted by one commentator:

[An] efficiency objective traditionally considered relevant in determining liability standards is the reduction of transaction costs, which include the costs of operating the accident reparation system. Holding other factors constant, liability standards that reduce these costs, by simplifying the proof necessary to establish liability, for example, are preferable to standards that are more costly to administer.

James A. Henderson, Jr., *Judicial Reliance on Public Policy: An Empirical Analysis of Products Liability Decisions*, 59 *GEO. WASH. L. REV.* 1570, 1579 (1991).

205. See Henderson, *supra* note 204, at 1579.

206. See CALABRESI, *supra* note 204, at 225-26; Henderson, *supra* note 204, at 1579. See also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* §§ 6.5, 21.6 (1992) (debating whether strict liability is more efficient than negligence). The minority view achieves the same result, but, for other reasons, the majority view on balance is superior. See discussion *infra* part V (summarizing majority view's superiority).

simplifies "the proof necessary to establish liability."<sup>207</sup> The majority view also leads to certainty because litigators know the diminution caused by the public's fear is compensable.<sup>208</sup> Thus, the court's time and the client's money need not be wasted on a barrage of expert testimony about possible adverse health effects.<sup>209</sup>

In contrast, the intermediate view leads to economic inefficiency because courts must litigate the reasonableness of the public's fear.<sup>210</sup> Courts therefore end up hearing additional expert testimony as to whether, for example, power lines cause cancer.<sup>211</sup> Moreover, in many cases (but not all), the intermediate view leads to the same result as the majority view, with the majority view avoiding needless costs.<sup>212</sup> Indeed, many courts have held that the public's fear is reasonable and have therefore permitted a damages award.<sup>213</sup> Thus, from an efficiency standpoint, the intermediate view needlessly wastes resources by forcing parties to litigate the reasonableness of the public's fear.

## 2. Cost Avoidance

The "cheapest cost avoider" rationale suggests that if actors are held strictly liable, they will attempt to avoid suits by exercising a higher degree of care.<sup>214</sup> Under this rationale, losses should

207. See Henderson, *supra* note 204, at 1579.

208. See *Florida Power & Light Co. v. Jennings*, 518 So. 2d 895, 899 (Fla. 1987) ("[Under the majority rule,] the reasonableness of fear is either assumed or is considered irrelevant."). Conversely, if a jurisdiction follows the minority view, litigators know that the diminution is not compensable. See *Alabama Power Co. v. Keystone Lime Co.*, 67 So. 833, 835 (Ala. 1914).

209. See Henderson, *supra* note 204, at 1579.

210. See *Heddin v. Delhi Gas Pipeline Co.*, 522 S.W.2d 886, 888-89 (Tex. 1975) ("To establish that there is a basis in reason or experience for the fear, it is incumbent upon the landowners to show either an [a]ctual danger forming the basis of such fear or that the fear is reasonable . . ."); see also *supra* note 204 and accompanying text.

211. *Jennings*, 518 So. 2d at 899 ("The experts' scientific testimony introduced below was irrelevant to any fact at issue. . . . Instead, the scientific testimony altered the focus of the trial and confused the issue to be determined."); see also *Criscuola v. Power Auth. of N.Y.*, 621 N.E.2d 1195, 1196 (N.Y. 1993) ("[Valuation] factors should be left to the contest between the parties' market value experts, not magnified and escalated by a whole new battery of electromagnetic power engineers, scientists or medical experts.").

212. See, e.g., John Weiss, Note, *The Power Line Controversy: Legal Responses to Potential Electromagnetic Field Health Hazards*, 15 COLUM. J. ENVTL. L. 359, 373 (1990) ("This review of case law standards regarding power line electromagnetic fields has shown that most jurisdictions (courts following both the majority and intermediate standards) allow the public's fear of power line electromagnetic fields to be considered in awarding compensation.").

213. See, e.g., *Arkansas Power & Light Co. v. Haskins*, 528 S.W.2d 407 (Ark. 1975); *Northeastern Gas Transmission Co. v. Tersana Acres, Inc.*, 134 A.2d 253, 256 (Conn. 1957); *Colvard v. Natchala Power & Light Co.*, 167 S.E. 472 (N.C. 1933); *Delhi Gas Pipeline Co. v. Reid*, 488 S.W.2d 612, 614 (Tex. Ct. App. 1972).

214. See CALABRESI, *supra* note 204, at 26; *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 440-41 (Cal. 1944) (Traynor, J., concurring); *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 118 (La. 1986).

be allocated to those who can most inexpensively reduce the risk of “accidents,” or, for our purposes, reduce the risk of diminution of property value.<sup>215</sup>

Under the cheapest cost avoider rationale, the minority view imposes the cost of avoiding diminution in market value upon the landowner,<sup>216</sup> a party not suited to manage the risks and perceptions associated with EMF.<sup>217</sup> Therefore, the minority view is inappropriate. The intermediate view is less objectionable because the landowner may recover once fear is established as reasonable.<sup>218</sup> If, however, the fear is unreasonable, the loss is again imposed upon the ill-suited landowner.<sup>219</sup> Therefore, the intermediate view is similarly inappropriate.

The majority view is superior because power companies are the cheapest cost avoiders. Power companies have more capital to invest in eliminating the risks associated with EMF, including continued scientific exploration of the relationship, if any, between EMF and cancer.<sup>220</sup> Research indicating EMF does not cause cancer can alleviate the general public’s fear of power lines, and thus could eliminate the diminution in property value caused by that fear. Moreover, power companies can practice “prudent avoidance,” the practice of minimizing the effects of EMF by taking reasonable steps to reduce the public’s exposure to EMF.<sup>221</sup> Indeed, several jurisdictions already have adopted the policy of prudent avoidance.<sup>222</sup> Therefore, because power companies are the cheapest cost avoiders, the majority view is superior.

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215. See *Escola*, 150 P.2d at 441 (Traynor, J., concurring).

216. See *supra* note 32 and accompanying text.

217. See CALABRESI, *supra* note 204, at 26.

218. See *supra* notes 57 and accompanying text.

219. See CALABRESI, *supra* note 204, at 26.

220. *Id.*; see also Lisa Bogardus, *Recovery and Allocation of Electromagnetic Field Mitigation Costs in Electric Utility Rates*, 62 *FORDHAM L. REV.* 1705, 1705-06 (1994) (“[E]lectric utilities are spending significant sums of money on research, education programs, design changes, and litigation fees.”).

221. See *QUESTIONS ABOUT EMF*, *supra* note 1, at 51-52; Bogardus, *supra* note 220, at 1711-17; Harunuzzaman & Iyyuni, *supra* note 7, at 188-94 (summarizing state legislative action to EMF health effects issues). But see Edward Gerjuoy, *Electromagnetic Fields: Physics, Biology and Law*, 35 *JURIMETRICS J.* 55, 73-75 (1994) (arguing against policy of prudent avoidance).

222. Bogardus, *supra* note 220, at 1711-17; Harunuzzaman & Iyyuni, *supra* note 7, at 188-94.

### 3. The Enterprise Model

#### a. Loss Shifting

Under the so-called "enterprise model,"<sup>223</sup> strict liability is an appropriate response because the actor who caused the loss should bear the loss.<sup>224</sup> The rationale is that the seller is in a better position to absorb the damages than the consumer.<sup>225</sup> Thus, the loss is shifted to the manufacturer, who can then spread the loss among all consumers of the product by raising the price.<sup>226</sup> A commonly cited example of a judge applying this justification is Justice Traynor's concurring opinion in *Escola v. Coca-Cola Bottling Co. of Fresno*.<sup>227</sup> Justice Traynor noted that loss shifting focuses on public policy: "[t]he cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by

223. See generally 1 SPEISER ET AL., *supra* note 154, § 1:30 (summarizing enterprise model).

224. See *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 440-41 (Cal. 1944) (Traynor, J., concurring); see also FOWLER V. HARPER ET AL., *THE LAW OF TORTS* 195, 195-96 (2d ed. 1986); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *YALE L.J.* 499, 500-01 (1961).

225. *Wright v. Newman*, 735 F.2d 1073, 1077 (8th Cir. 1984); *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 118-19 (La. 1986); Calabresi, *supra* note 224, at 500-01; see also KEETON ET AL., *supra* note 143, § 75, at 537:

The courts have tended to lay stress upon the fact that the defendant is acting for his own purposes, and is seeking a benefit or a profit from such activities, and that he is in a better position to administer the unusual risk by passing it on to the public than is the innocent victim. The problem is dealt with as one of allocating a more or less inevitable loss to be charged against a complex and dangerous civilization, and liability is imposed upon the party best able to shoulder it.

226. *Wright*, 735 F.2d at 1077; *Becker v. IRM Corp.*, 698 P.2d 116, 123 (Cal. 1985); *Halphen*, 484 So. 2d at 118-19; Calabresi, *supra* note 224, at 500-01. But see RICHARD A. POSNER, *TORT LAW (CASES AND ECONOMIC ANALYSIS)* 517-18 (1982) (challenging loss shifting as an adequate rationale for strict liability). A similar concept is the "deep pockets" rationale, which holds that "losses can be reduced most by placing them on the categories of people least likely to suffer substantial social or economic dislocations as a result of bearing them, usually thought to be the wealthy." CALABRESI, *supra* note 204, at 40. Power companies would be likely candidates for liability under a deep pockets rationale as well because power companies are generally wealthier than individual property owners.

227. 150 P.2d 436, 440-46 (Cal. 1944) (Traynor, J. concurring). In *Escola*, a waitress in a restaurant was injured when a Coca Cola bottle exploded in her hand. *Id.* at 437-38. The majority upheld an award of damages based upon *res ipsa loquitur*, holding that "the thing speaks for itself": only a defective Coca Cola bottle will explode. *Id.* at 440. Concurring, Justice Traynor agreed with the result, but opined that a theory of strict liability was more appropriate:

I believe the manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover in cases like the present one. In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings.

*Id.* (Traynor, J., concurring); see also ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 431-33 (1988) (discussing Justice Traynor's concurrence in *Escola*).

the manufacturer and distributed among the public as a cost of doing business.”<sup>228</sup> In adopting Justice Traynor’s loss shifting rationale in *Greenman v. Yuba Power Prod., Inc.*,<sup>229</sup> the California Supreme Court noted that “[t]he purpose [of strict liability] is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.”<sup>230</sup>

#### b. Internalization of Costs

Loss shifting essentially requires that profit-motivated actors pay for all losses their activities generate.<sup>231</sup> Losses that the actor should bear include “externalities.”<sup>232</sup> An externality is a “spillover effect” from an activity that is not considered by the actor at the time the actor decides the manner in which the activity will be accomplished.<sup>233</sup> The most common example of an externality is pollution.<sup>234</sup> Suppose a factory emits smoke that damages a neighboring farm’s crops. This damage is an externality in that it is external to the factory’s operation.<sup>235</sup> Stated another way, the damage caused by the smoke falls upon someone other than the factory.

Regardless of the social value of an actor’s activity, the actor should internalize the loss if the activity exposes others to the loss.<sup>236</sup> The actor can internalize losses by raising the cost of the service or product, thus spreading the loss among consumers.<sup>237</sup> Externalities are inefficient; therefore, by requiring actors to internalize losses, society benefits.<sup>238</sup>

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228. *Escola*, 150 P.2d at 441 (Traynor, J., concurring).

229. 377 P.2d 897 (Cal. 1963).

230. *Id.* at 901; see also HARPER ET AL., *supra* note 224, at 195.

231. See A. POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 98-99 (1983); see also Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1 (1980); *Wright v. Newman*, 735 F.2d 1073, 1077 (8th Cir. 1984); *Langan v. Valicopters, Inc.*, 567 P.2d 218, 222 (Wash. 1977); *Atlas Chemical Indus., Inc. v. Anderson*, 514 S.W.2d 309, 315-16 (Tex. Civ. App. 1974), *aff’d in part and rev’d in part*, 524 S.W.2d 681 (Tex. 1975).

232. COOTER & ULEN, *supra* note 227, at 169.

233. Steiner, *supra* note 193, at 229; see also COOTER & ULEN, *supra* note 227, at 169 (defining externalities as “a cost or benefit that the voluntary actions of one or more people impose or confer on a third party or parties without their consent”). The concept of externalities is discussed at length in Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

234. See, e.g., COOTER & ULEN, *supra* note 227, at 170.

235. See *id.*

236. See Calabresi, *supra* note 224, at 500-01.

237. See *id.*

238. “Efficiency can be restored by getting the externality-generator to internalize these external effects.” COOTER & ULEN, *supra* note 227, at 170.

c. Application of the Enterprise Model

Applying the principles of the enterprise model (loss shifting and internalization of costs) to the three principal views addressing compensability for diminution in market value caused by the public's fear, the majority view emerges as superior. First, the minority view is contrary to the rationales behind the enterprise model. The minority view imposes the loss in all cases upon the injured person,<sup>239</sup> who is unable to spread the risk.<sup>240</sup> Moreover, the minority view perpetuates an externality: it allows power companies to expose landowners to a loss (the diminution in market value caused by the public's fear) yet does not require power companies to compensate landowners for the loss.<sup>241</sup> The minority view denies compensation to landowners even if the public's fear causes a reduction in market value.<sup>242</sup> Allowing power companies to escape liability for this loss allows them to externalize the loss.<sup>243</sup>

The intermediate view fails to incorporate fully the enterprise model because the view does not always impose the loss upon the responsible actor.<sup>244</sup> The intermediate view, however, is a move toward the enterprise model. Once a landowner establishes the reasonableness of the fear, the court imposes liability upon the power company, not the individual.<sup>245</sup> The intermediate view merely imposes an additional burden upon the landowner, the burden of proving the reasonableness of the fear.<sup>246</sup>

Of the three views, the majority view most adequately advances the goals of the enterprise model. The majority view holds that if the landowner establishes that the public's fear has depressed the market value of the land, then the loss is imposed upon the power company in all cases.<sup>247</sup> This is the best and most fair result because power companies are better equipped to bear the loss than innocent property owners.<sup>248</sup> Also, because most

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239. *Alabama Power Co. v. Keystone Lime Co.*, 67 So. 833, 835 (Ala. 1914).

240. *Greenman v. Yuba Power Prod., Inc.*, 377 P.2d 897, 901 (Cal. 1963); *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 118-19 (La. 1986).

241. See, e.g., *Keystone Lime*, 67 So. at 837.

242. *Id.* at 835.

243. See COOTER & ULEN, *supra* note 227, at 170.

244. See Calabresi, *supra* note 224, at 500-01.

245. *Willsey v. Kansas City Power & Light Co.*, 631 P.2d 268, 279 (Kan. Ct. App. 1981).

246. *Id.* at 279.

247. See *Florida Power & Light Co. v. Jennings*, 518 So. 2d 895, 899 (Fla. 1987).

248. See *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 118-19 (La. 1986).



power companies are motivated by profit,<sup>249</sup> they should pay for all losses their activities generate.<sup>250</sup> The majority view incorporates this philosophy and rightly imposes the risk of market devaluation upon power companies, who, like manufacturers, can distribute the loss among the public as a business cost.<sup>251</sup>

Indeed, courts following the intermediate and majority views have used loss shifting rationales in holding for landowners. For example, the Willsey court opined that “[i]f [loss caused by the public’s fear] is proven to the satisfaction of the jury we see no reason why the landowner should bear the loss rather than the customers for whose benefit the loss is inflicted.”<sup>252</sup> Courts following the majority view also have used loss shifting rationales.<sup>253</sup>

Importantly, society experiences a net gain when power companies are required to internalize the problems associated with EMF because power companies will continue to research the effects of EMF, educate the public about EMF, and practice prudent avoidance.<sup>254</sup> If power companies are not held responsible for this loss, it is less likely that they will continue to engage in such beneficial activities.

#### IV. BALANCING INTERESTS

One must distinguish, however, power companies from actors who are either unable to avoid costs, spread the loss, or who provide significant societal benefits when measured against the landowner’s interests, and who thus should not be required to compensate a private landowner. For example, it may be inappropriate to require compensation where homeless shelters, homes for maladjusted teens, or AIDS hospices have caused a

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249. Power companies are regulated by the government, but profit does play a part in the decisionmaking process. Bogardus, *supra* note 220, at 1738-39.

250. See VANDALL, *supra* note 144, at 21; Bogardus, *supra* note 220, at 1721-24 (discussing processes involving ratemaking and assurances of reasonable profit).

251. See *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring); *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 118-19 (La. 1986). In fact, power companies frequently reflect the costs of litigating EMF claims, including tort damage awards, in utility rates, thus illustrating loss shifting in action. See Bogardus, *supra* note 220, at 1725; see also *In re Public Serv. Co. of Ind., Inc.*, 112 Pub. Util. Rep. (PUR) 4th 94, 124 (Ind. Util. Regulatory Comm’n 1990); *In re South Carolina Elec. & Gas Co.*, 37 Pub. Util. Rep. (PUR) 4th 441, 463 (S.C. Pub. Serv. Comm’n 1980).

252. *Willsey v. Kansas City Power & Light Co.*, 631 P.2d 268, 278 (Kan. Ct. App. 1981). For a discussion of Kansas’s move to the majority view, see *supra* part II.C.4.

253. E.g., *San Diego Gas & Elec. Co. v. Daley*, 253 Cal. Rptr. 144, 151 (Ct. App. 1988) (citing *Willsey*, 631 P.2d at 278).

254. Cf. Bogardus, *supra* note 220, at 1705-06 (noting the significant amount of money power companies are spending on research and education).

diminution in an individual's property value. The intermediate view would probably hold that fear of these activities is unreasonable, and thus noncompensable.<sup>255</sup> The minority view would not allow recovery even if the fear were reasonable.<sup>256</sup>

There is the possibility, however, that even in majority view jurisdictions, courts could make a policy judgment and hold against the landowner. As an analogy, in *Davis v. Dinkins*,<sup>257</sup> homeowners near a privately owned hotel sought to enjoin the hotel from being used as a shelter for homeless families.<sup>258</sup> The homeowners claimed that the presence of the shelter had caused a diminution in their property values.<sup>259</sup> The court declined to issue the injunction on public policy grounds, noting that "the granting of such relief is inappropriate under the circumstances now existing in New York City. The indisputable compelling need to provide temporary housing for homeless families clearly makes it an abuse of discretion to preclude the use of a hotel which is already housing these families."<sup>260</sup> It is apparent that even if the homeowners could have demonstrated that the shelter had caused a diminution in property value, the court still would have denied the injunction because of the important societal interest in providing shelter for the homeless.<sup>261</sup> Another court, facing the same issue, reached a similar conclusion, noting that "a balancing of the equities lies decidedly in favor of defendants' continued operation of this homeless shelter."<sup>262</sup>

If court-made policy is objectionable, the legislature could make a policy judgment that the doctrine of strict liability is inappropriate in a specific instance. The legislature might decide that a particular societal need outweighs the interests of an individual. For example, there may come a time when a property owner attempts to recover for a diminution in property value

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255. See discussion *supra* part II.B.

256. See discussion *supra* part II.A.

257. 585 N.Y.S.2d 978 (Sup. Ct. 1992), *aff'd* in part and *rev'd* in part, 613 N.Y.S.2d 933 (App. Div. 1994).

258. *Id.* at 981.

259. *Id.* at 982.

260. *Id.*

261. *Id.*; see also *Sunderland Family Treatment Serv. v. City of Pasco*, 903 P.2d 986, 993 (Wash. 1995) (*en banc*) (holding that denial of special use permit for group home crisis center on grounds that fear of home's clientele reduced area property values "would be based on unsubstantiated fears" and "is not competent nor substantial evidence").

262. *Greentree at Murray Hill Condominium v. Good Shepherd Episcopal Church*, 550 N.Y.S.2d 981, 989 (N.Y. Sup. Ct. 1989). But see *Steadham v. Board of Zoning Adjustment*, 629 So. 2d 647 (Ala. 1993) (finding a challenge to a zoning variance permitting the facility for juvenile offenders permissible because there was evidence that the proposed use could result in diminished property value).

when an entity attempts to establish a home for AIDS victims in a residential neighborhood. A property owner might argue that his or her land has been devalued because some potential purchasers might be afraid of contracting this deadly disease.<sup>263</sup> Legislatures may decide that in such situations a property owner will not be permitted to recover for this loss, even if a governmental agency is in charge of the home.<sup>264</sup> The legislature might reason that allowing a damages award in this situation would have the adverse effect of eliminating a great social value, especially if the service did not have either the resources to litigate the claim or the ability to spread the loss. Thus, in this situation, the balance may tip in favor of the AIDS hospice.<sup>265</sup>

Indeed, legislatures have acted to prevent imposition of strict liability when the balance has favored protection of a certain activity. For example, in an effort to promote the health and welfare of the community by protecting the societal value hospitals and blood banks provide, legislatures in most states have decided to shield those institutions from strict liability claims by plaintiffs who contract AIDS from blood transfusions.<sup>266</sup> The legisla-

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263. Cf. *Association of Relatives & Friends of AIDS Patients (A.F.A.P.S.) v. Regulations & Permits Admin. or Administracion de Reglamentos y Permisos (A.R.P.E.)*, 740 F. Supp. 95, 99 (D.P.R. 1990) (defendant opposed group's efforts to establish AIDS hospice in part because of fear the hospice might devalue surrounding property); *Poff v. Caro*, 549 A.2d 900, 902 (N.J. Super. Ct. Law Div. 1987) (landlord violated anti-discrimination laws by refusing to rent to homosexuals; landlord "feared that they might later acquire AIDS and thereby endanger his family").

264. A court could make this judgment as well. For example, in *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715 (Mich. 1992), the Michigan Supreme Court stated:

In short, we do not agree with the dissent's suggestion that wholly unfounded fears of third parties regarding the conduct of a lawful business satisfy the requirement for a legally cognizable injury as long as property values decline. Indeed, we would think it not only "odd," but anachronistic that a claim of nuisance in fact could be based on unfounded fears regarding persons with AIDS moving into a neighborhood, the establishment of otherwise lawful group homes for the disabled, or unrelated persons living together, merely because the fears experienced by third parties would cause a decline in property values.

*Id.* at 726 (citations omitted).

265. If there is no legislative action, a court also might hold that, on balance, it would not be appropriate to require the hospice to pay for this loss. See *Good Shepherd Episcopal Church*, 550 N.Y.S.2d at 989.

266. See *Roberts v. Suburban Hosp. Ass'n, Inc.*, 532 A.2d 1081, 1086 n.3 (Md. Ct. Spec. App. 1987) (listing 48 jurisdictions with statutes excluding strict liability as basis for holding blood banks and hospitals liable in suits by plaintiffs who contract AIDS from blood transfusions). At the time of the Roberts opinion, only New Jersey, the District of Columbia, and Vermont did not have a blood shield statute. *Id.* New Jersey and District of Columbia courts previously had concluded that blood banks were immune from strict liability. See *Brody v. Overlook Hosp.*, 317 A.2d 392, 398 (N.J. Super. Ct. App. Div. 1974), *aff'd*, 332 A.2d 596 (N.J. 1975); *Kozup v. Georgetown Univ.*, 663 F. Supp. 1048, 1060-1061 (D.D.C. 1987), *aff'd in part and vacated in part*, 851 F.2d 437 (D.C. Cir. 1988). Moreover, Vermont has since adopted a blood shield statute. VT. STAT. tit. 9A, § 2-108 (1995). See also Michael J. Miller, *Strict Liability, Negligence and the Standard of Care for Transfu-*

tures apparently fear requiring "providers to serve as insurers of the safety of these materials [because such a requirement] might impose such an overwhelming burden as to discourage the gathering and distribution of blood."<sup>267</sup>

Therefore, while the majority view, supported by strict liability rationales, encourages imposition of losses caused by the public's fear upon the actor most responsible for the fear, it does not preclude courts or legislatures from recognizing that the balance may tip against the landowner where overriding societal interests are at stake.<sup>268</sup>

## V. CONCLUSION

EMF litigation involving market devaluation of property caused by the public's fear is an area of the law fraught with uncertainty. It is unlikely that a single approach will be adopted by every jurisdiction. However, the recent defection of New York and Kansas to the majority view, New Mexico's adoption of the majority view in 1992, and the propensity of jurisdictions to reverse years of precedent by switching to the majority view (as did Florida) may indicate that significant change is on the horizon.<sup>269</sup>

A strict liability approach to compensability for diminished property value caused by the public's fear is preferable to other approaches, such as a negligence-based approach. At its core, the majority view is essentially strict liability. The rationales for strict liability support movement to the majority view and rejection of the intermediate and minority views. Corrective justice requires that the interests of the landowner take precedent. Moreover, not only does the majority view reduce transaction costs, power companies also are the cheapest cost avoider because they have more resources to reduce the risks of EMF. Finally, power companies are better able to internalize costs, including the recovery of EMF litigation costs, by spreading the loss among

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sion-Transmitted Disease, 36 ARIZ. L. REV. 473, 490 (1994) ("These states did not want to inhibit the exercise of sound medical judgment and restrict the availability of knowledge, skill and material by allowing recovery based on liability without fault.").

267. *Zichichi v. Middlesex Memorial Hosp.*, 528 A.2d 805, 810 (Conn. 1987); see also *Kozup*, 663 F. Supp. at 1059; *Garvey v. St. Elizabeth Hosp.*, 697 P.2d 248, 249 (Wash. 1985) ("The public policy represented by these statutes is not difficult to discern: blood transfusions are essential in the medical area . . .").

268. See, e.g., *Ryan v. Kansas Power & Light Co.*, 815 P.2d 528, 537 (Kan. 1991) ("A condemnation proceeding is a sober inquiry into values, designed to strike a just balance between the economic interests of the public and those of the landowner.").

269. See *Brandon*, supra note 2, at 43 (noting that defection of Florida and New York to majority view "is likely to influence the remaining courts across the country").

consumers.<sup>270</sup> Therefore, courts should adhere to the majority view and hold that as long as it is established that the public's fear diminishes property value, the loss is compensable. If situations arise where the balance tips against the property owner and in favor of great societal interests, courts or legislatures can create exceptions to the general rule. Thus, strict liability analysis demonstrates that between the innocent property owner and the better-equipped power company, courts should hold the latter responsible for market devaluation of property caused by the public's fear of power lines.

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270. The majority view is the correct result for another reason. It imposes the loss upon the general public, which not only receives the benefit of electricity from power lines, but also whose fear (unfounded or not) ultimately results in the devaluation of the landowner's property. Cf. *Willsey v. Kansas City Power & Light Co.*, 631 P.2d 268, 277-78 (Kan. Ct. App. 1981) (“[W]e see no reason why the landowner should bear the loss rather than the customers for whose benefit the loss is inflicted.”).

# SUMMARIZING PRIOR WITNESS TESTIMONY: ADMISSIBLE EVIDENCE, PEDAGOGICAL DEVICE, OR VIOLATION OF THE FEDERAL RULES OF EVIDENCE?

EMILIA A. QUESADA\*

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## I. INTRODUCTION

According to Federal Rule of Evidence 1006, the only summaries of evidence that may be introduced at trial are those that recapitulate the contents of voluminous writings, recordings, or photographs that cannot be conveniently examined in court.<sup>1</sup> Rule 1006, however, does not mention the admissibility of summaries of prior in-court testimony, nor does any other rule of evidence. Further, the notes of the Advisory Committee on the Federal Rules of Evidence do not address the admissibility of summary testimony.

Federal courts have nonetheless expanded Rule 611(a), which Congress drafted to restate the power and obligation of the common law judge, to include the admission of summary testimony. Court decisions have deemed summary testimony admissible during the prosecution’s case-in-chief, when a federal agent merely repeats the testimony of prior witnesses.<sup>2</sup> In effect, the courts have allowed the prosecution to put the credibility of prior witnesses at issue for a second time. This violates the Federal Rules of Evidence because of the extreme prejudice to the defendant. Although the U.S. Court of Appeals for the Sixth Circuit warned other federal courts in 1979 that such summary testi-

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\* Attorney General’s Honor Program attorney, U.S. Dep’t of Justice, Federal Bureau of Prisons, Southeast Regional Office, Atlanta, Georgia. B.S., Florida International University, 1992; J.D., Florida State University, 1996. The author thanks Professor Charles W. Ehrhardt, Florida State University College of Law, for his assistance.

1. FED. R. EVID. 1006.  
 2. United States v. Johnson, 54 F.3d 1150 (4th Cir.), cert. denied, 116 S. Ct. 266 (1995).

mony was problematic,<sup>3</sup> the Fourth Circuit allowed this type of testimony in violation of the Rules as recently as 1995.<sup>4</sup>

This Comment examines the federal courts' recent expansion of the use of summaries at trial. Part II explores the background and purpose of Federal Rule of Evidence 1006 and examines how federal courts have limited the use of the Rule with respect to summaries of in-court testimony. Part III discusses how the courts have expanded Federal Rule of Evidence 611(a), beginning with the Sixth Circuit's decision in *United States v. Scales*.<sup>5</sup> *Scales* was the first decision to recognize Rule 611(a) as a basis for the use of summaries under the Rule's "mode and order" language.<sup>6</sup> Part IV analyzes how federal courts have since progressively expanded the use of Rule 611(a), a process that culminated in the Fourth Circuit's recent application of the Rule in *United States v. Johnson*.<sup>7</sup> Finally, this Comment concludes that federal courts have violated the purpose of the Federal Rules of Evidence by expanding Rule 611(a) and proposes that the Advisory Committee on the Federal Rules of Evidence address the issue to clarify the scope and purpose of the Rule.

## II. FEDERAL RULE OF EVIDENCE 1006 AND ITS JUDICIALLY INTERPRETED LIMITATIONS

Entitled "Summaries," Federal Rule of Evidence 1006 provides:

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.<sup>8</sup>

Rule 1006 follows the common law tradition that recognized that parties could prove the contents of voluminous writings in the form of testimonial or written charts, summaries, or calculations when the writings, because of their voluminous contents, could not be examined in court without causing inconvenience or a waste of time.<sup>9</sup> The purpose of the Rule is simply "to allow the use

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3. *United States v. Scales*, 594 F.2d 558, 564 (6th Cir.), cert. denied, 441 U.S. 946 (1979).

4. *Johnson*, 54 F.3d at 1150.

5. *Scales*, 594 F.2d at 558.

6. *Id.* at 563.

7. 54 F.3d 1150 (4th Cir.), cert. denied, 116 S. Ct. 266 (1995).

8. FED. R. EVID. 1006.

9. 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE, ¶ 1006[01] (1996).

of summaries when the volume of documents being summarized is so large as to make their use impractical or impossible; summaries may also prove more meaningful to the judge and jury.”<sup>10</sup>

A proper foundation must be laid before a summary of voluminous writings, recordings, or photographs will qualify as admissible under Rule 1006.<sup>11</sup> There are four requirements for such a foundation: (1) the writings to be summarized must be too voluminous for convenient in-court examination;<sup>12</sup> (2) the documents underlying the summary must be admissible,<sup>13</sup> unless they were reasonably relied upon by an expert and used in his or her testimony;<sup>14</sup> (3) the original materials or duplicates must be made available to the other parties for examination at a reasonable place and time in advance of trial;<sup>15</sup> and (4) the summaries must accurately reflect the content of the original materials.<sup>16</sup>

10. *United States v. Johnson*, 594 F.2d 1253, 1255 (9th Cir.), cert. denied, 444 U.S. 964 (1979).

11. WEINSTEIN & BERGER, *supra* note 9, ¶ 1006[03].

12. “Contents of charts or summaries admitted as evidence under Rule 1006 must fairly represent and be taken from underlying documentary proof which is too voluminous for convenient in-court examination, and they must be accurate and nonprejudicial.” MICHAEL H. GRAHAM, *EVIDENCE: TEXT, RULES, ILLUSTRATIONS AND PROBLEMS* 332 (2nd ed. 1989) (citing *United States v. Scales*, 594 F.2d 558, 561-63 (6th Cir.), cert. denied, 441 U.S. 946 (1979)).

13. *Johnson*, 594 F.2d at 1256 (“[C]ommentators and other courts have agreed that Rule 1006 requires that the proponent of a summary establish that the underlying documents are admissible in evidence.”).

14. FED. R. EVID. 703:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

15. *United States v. Kim*, 595 F.2d 755, 764 (D.C. Cir. 1979) (“When the underlying documents are not subject to examination by the opposing parties, the summary should not be admitted into evidence.”); *Wright v. Southwest Bank*, 554 F.2d 661, 663 (5th Cir. 1977) (holding that summary is improper when opposing party is not provided with opportunity to examine original records).

Even though the original records need not be introduced into evidence, it is within the court’s discretion whether to require production of the documents in court. *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292, 300-01 (3d Cir. 1961) (“[I]t must be shown that the summation accurately summarizes the materials involved by not referring to information not contained in the original. . . . Usually the records or materials summarized must first be made accessible to the opposing party for inspection and for use in cross-examination.”); see also *In re Antibiotic Antitrust Actions*, 333 F. Supp. 278, 289 (S.D.N.Y. 1971) (explaining that because many important management decisions in the business world are made through intelligent application of statistical and computer techniques, defendants should be able to rely on the same techniques, including computer printouts, in litigation).

16. *White Indus., Inc. v. Cessna Aircraft Co.*, 611 F. Supp. 1049, 1070-71 (W.D. Mo. 1985) (excluding file summary where testimony showed that information in summary was not contained in files “summarized” or elsewhere in record, nor within witness’s personal knowledge).



Once a party has established a proper foundation, it may offer the summaries in written or oral form.<sup>17</sup> The person responsible for preparing the charts, summaries, or calculations is not specifically required to authenticate them on the witness stand.<sup>18</sup> This practice departs from the custom that enabled the opposing party to challenge the evidence by cross-examining the person who put the evidence together.<sup>19</sup> Instead, courts have allowed supervisory personnel to attest to the accuracy and authenticity of charts, summaries, and calculations, thus facilitating authentication of the evidence.<sup>20</sup>

Courts have interpreted Rule 1006 as applying only to summaries of voluminous writings deemed to be admissible evidence.<sup>21</sup> Courts have also held, however, that Rule 611(a) properly governs the use of summary charts and verbal summaries of prior in-court witness testimony.<sup>22</sup>

### III. JUDICIAL EXPANSION OF FEDERAL RULE OF EVIDENCE 611(A): SUMMARIES AS PEDAGOGICAL DEVICES

Federal Rule of Evidence 611(a) states that “[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.”<sup>23</sup>

According to the Advisory Committee’s note, item (1) of the Rule restates the power and obligation of the judge under common law principles.<sup>24</sup> In addition to addressing whether testimony should be in the form of free narrative responses to specific questions, item (1) covers such concerns as the order in which witnesses are called, the presentation of evidence, the use of demonstrative evidence, and many other questions that only a judge’s common sense and fairness can resolve.<sup>25</sup> Item (2) ad-

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17. See *Nichols v. Upjohn Co.*, 610 F.2d 293, 294 (5th Cir. 1980).

18. WEINSTEIN & BERGER, *supra* note 9, ¶ 1006[06].

19. *United States v. Nivica*, 887 F.2d 1110 (1st Cir. 1989), cert. denied, 494 U.S. 1005 (1990) (summary compiled from business records was properly admitted where FBI agent testified concerning summary’s source).

20. WEINSTEIN & BERGER, *supra* note 9, ¶ 1006[06].

21. PAUL R. RICE, *EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE* 856 (1987).

22. E.g., *United States v. Johnson*, 54 F.3d 1150, 1158 (4th Cir.), cert. denied, 116 S. Ct. 266 (1995).

23. FED. R. EVID. 611(a).

24. FED. R. EVID. 611 advisory committee’s note.

25. *Id.* (citations omitted).

dresses the needless consumption of time that is a trial court's daily concern.<sup>26</sup> Item (3) calls on judges, under certain circumstances, to use their discretion to avoid harassment and undue embarrassment during testimony.<sup>27</sup> Such circumstances include "the importance of the testimony, the nature of the inquiry, its relevance to credibility, waste of time, and confusion."<sup>28</sup>

Neither the text of Rule 611(a) nor the Advisory Committee's note address the admissibility of charts and statements summarizing prior in-court witness testimony. In fact, authority for allowing such summaries does not exist in the Federal Rules of Evidence at all; rather, it stems from the Sixth Circuit's decision in *United States v. Scales*.<sup>29</sup>

Appealing from a conviction of conspiracy and nine counts of unlawfully converting union assets to his personal use, the defendant in *Scales* claimed in part that the trial judge had committed reversible error by allowing Government Exhibit 145 into evidence under Federal Rule of Evidence 1006 and by allowing an FBI agent to testify concerning the exhibit.<sup>30</sup> The exhibit consisted of a series of charts, the first of which summarized all of the charges the indictment listed.<sup>31</sup> The court held that admission of the first chart was not prejudicial because it was clear that "the trial judge ha[d] discretion to submit the indictment to the jury . . . as long as limiting instructions [were] given to the effect that the indictment [was] not to be considered as evidence of the guilt of the accused."<sup>32</sup>

The remainder of Exhibit 145 consisted of a summary of objective proof that related to a number of the counts and overt acts with which the defendant had been charged, as well as written statements that union records did not contain certain information, primarily authorization for travel.<sup>33</sup> The FBI agent's testimony summarized and helped the jury organize the over 150 exhibits that had already been admitted.<sup>34</sup> The defendant claimed that the agent's testimony had prejudiced him because the agent was not an expert and had therefore not authenticated the charts.<sup>35</sup> The Sixth Circuit concluded that because the charts contained no

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26. *Id.*

27. *Id.*

28. *Id.*

29. 594 F.2d 558 (6th Cir.), cert. denied, 441 U.S. 946 (1979).

30. *Id.* at 559, 561.

31. *Id.*

32. *Id.* at 561-62.

33. *Id.* at 562.

34. *Id.* at 561-62.

35. *Id.* at 563.

misleading or conclusory references and appeared to present merely an organization of some of the undisputed objective evidence, the exhibit was admissible under Rule 1006.<sup>36</sup>

Although the court admitted Exhibit 145 as evidence under the guise of Rule 1006, it stated in dictum that, aside from Rule 1006, ample authority existed to support the admission of the exhibit under Rule 611(a) because of the “established tradition, both within this circuit and in other circuits, that permits a summary of evidence to be put before the jury with proper limiting instructions.”<sup>37</sup> The court cited several income tax cases that had allowed agents to testify to summary charts detailing clearly objective evidence compiled from voluminous documents and calculations.<sup>38</sup> None of the summary charts used in the income tax cases summarized prior in-court witness testimony. Finding that there had never been any formal distinction between the use of summaries in income tax cases and criminal cases, the Scales court concluded that such summaries did not come under the purview of Rule 1006, but rather were more properly admitted under Rule 611(a) to aid the jury in its examination of the evidence already before it.<sup>39</sup>

The court then went on, however, to state the dangers of permitting such summary presentations in criminal cases, including the possibility that a jury might either rely upon the alleged facts in the summary as if they had already been proven or use the summary as a substitute for assessing witness credibility.<sup>40</sup> The court resolved these dangers by requiring “guarding instructions” to explain that the chart itself is not evidence but, instead, is simply an aid in evaluating the evidence.<sup>41</sup> The Scales court concluded that because the facts summarized in the case were entirely objective—meaning that no issue of witness credibility was presented—the summaries did not undermine the defendant’s theory of the case and therefore were admissible.<sup>42</sup>

The Scales court admitted the chart summary because it reflected objective evidence already before the jury that did not include

36. *Id.* at 564.

37. *Id.* at 563.

38. *Id.* at 564 (citing *United States v. Conlin*, 551 F.2d 534 (2d Cir.), cert. denied, 434 U.S. 831 (1977); *United States v. Jalbert*, 504 F.2d 892 (1st Cir. 1974)). Both *Conlin* and *Jalbert* in turn cite *Gordon v. United States*, 438 F.2d 858 (5th Cir.), cert. denied, 404 U.S. 828 (1971), which involved misapplication of bank funds. See *Conlin*, 551 F.2d at 538; *Jalbert*, 504 F.2d at 894.

39. *Scales*, 594 F.2d at 563.

40. *Id.* at 564.

41. *Id.*

42. *Id.*

summaries of witness testimony.<sup>43</sup> The chart summary helped the jury organize the government's case, which had over 150 exhibits, and, most importantly, did not put the credibility of any prior witness at issue. The Scales standard has since been eroded by the federal courts, however. This erosion has continued to the point where summaries are being admitted that violate the purpose and scope of the Federal Rules of Evidence.<sup>44</sup> The Scales decision, which interpreted Rule 611(a) as permitting the admission of summaries under the Rule's "mode and order" language,<sup>45</sup> has been cited during the past seventeen years as the leading authority throughout the U.S. Courts of Appeals on the admission of summaries under Rule 611(a).<sup>46</sup>

The type of summary evidence at issue in *Scales* is known as a "pedagogical device," which is a method used to summarize testimony and emphasize certain points.<sup>47</sup> Judge Jack B. Weinstein's *Evidence*<sup>48</sup> is the leading authority cited by judges and by evidence authorities throughout the nation as the source of explanation for the use of summaries as pedagogical devices.<sup>49</sup> According to Judge Weinstein, these summaries should not be allowed into the jury room during deliberations without the consent of all parties because they are more akin to argument than evidence.<sup>50</sup>

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43. *Id.*

44. See, e.g., FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . .").

45. *Scales*, 594 F.2d at 563.

46. See, e.g., *United States v. Johnson*, 54 F.3d 1150, 1159 (4th Cir.), cert. denied, 116 S. Ct. 266 (1995); *United States v. Pinto*, 850 F.2d 927, 935 (2d Cir.), cert. denied, 488 U.S. 867 (1988); *United States v. Campbell*, 845 F.2d 1374, 1381 (6th Cir.), cert. denied, 488 U.S. 908 (1988); *United States v. Lemire*, 720 F.2d 1327, 1347-48 (D.C. Cir. 1983), cert. denied, 467 U.S. 1226 (1984); *United States v. Apodaca*, 666 F.2d 89, 95 (5th Cir.), cert. denied, 459 U.S. 823 (1982).

47. WEINSTEIN & BERGER, *supra* note 9, ¶ 1006[07]; RICE, *supra* note 21, at 860; 2 GREGORY P. JOSEPH AND STEPHEN A. SALTZBURG, *EVIDENCE IN AMERICA*, § 5 (1994); see also *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 431 (5th Cir. 1985) ("Exhibit 30 is clearly a pedagogical device which merely summarizes and organizes data already in evidence."); *United States v. Gardner*, 611 F.2d 770, 776 (9th Cir. 1980) ("The [government's] use of the chart . . . contributed to the clarity of the presentation to the jury, avoided needless consumption of time and was a reasonable method of presenting the evidence.")

48. WEINSTEIN & BERGER, *supra* note 9.

49. See *United States v. Baker*, 10 F.3d 1374, 1412 (9th Cir. 1993), cert. denied, 115 S. Ct. 330 (1994); *United States v. Paulino*, 935 F.2d 739, 753 (6th Cir.), cert. denied, 502 U.S. 914 (1991); *United States v. Winn*, 948 F.2d 145, 158 (5th Cir. 1991), cert. denied, 503 U.S. 976 (1992).

50. WEINSTEIN & BERGER, *supra* note 9, ¶ 1006[07]; see also *Gardner*, 611 F.2d at 776 n.3 (holding that while it is better practice not to submit to jury charts that summarize admitted evidence, no reversible error was committed). The circuits are split, however, as to whether summaries are pedagogical devices under Rule 611(a) or evidence under Rule 1006, and whether the summary charts can go into the jury room for deliberations. WEINSTEIN & BERGER, *supra* note 9, ¶ 1006[07]; see also *United States v. Paulino*, 935 F.2d 739 (6th Cir.), cert. denied, 502 U.S. 914 (1991) (summary witness testimony explaining

In addition, it is within the sound discretion of the trial court to admit the summaries.<sup>51</sup>

The problem, however, is not the Scales court's interpretation of summaries, which simply recognized objective evidence as admissible when guarding instructions are given, but rather the recent decisions that have expanded the language of Scales. As discussed in the following section, federal courts have overstepped their bounds by admitting summaries that violate the scope and purpose of the Federal Rules of Evidence and erode the protections that the Rules provide to each party at trial.

#### IV. FROM A PEDAGOGICAL DEVICE TO A VIOLATION OF THE FEDERAL RULES OF EVIDENCE: THE EFFECT OF UNITED STATES V. JOHNSON

The erosion of the Scales standard culminated in the Fourth Circuit's recent decision in *United States v. Johnson*.<sup>52</sup> This section will analyze the cases cited by Johnson as support for its reasoning, thus revealing the Johnson court's erroneous interpretation and application of Rule 611(a) case law.

The confusion in the U.S. Courts of Appeals as to the appropriate role that summaries play and how they should be admitted at trial began with the Second Circuit's decision in *United States v. Baccollo*.<sup>53</sup> The Baccollo court upheld the trial judge's decision to permit "the prosecution to introduce as evidence charts on which there was represented primary evidence."<sup>54</sup> The court reasoned

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organizational chart fell under Rule 611(a), not Rule 1006); *Gomez v. Great Lakes Steel Div., Nat'l Steel Corp.*, 803 F.2d 250, 257 (6th Cir. 1986) (concluding that summary charts, although used as a pedagogical device, were improperly admitted because court failed to give limiting instruction explaining exhibit's nature and purpose); *Gardner*, 611 F.2d at 776 (court had discretion under Rule 611(a) to admit chart that avoided needless consumption of time, contributed to the clarity of the presentation to the jury, and was reasonable method of presenting evidence); *United States v. Scales*, 594 F.2d 558, 563-64 (6th Cir.), cert. denied, 441 U.S. 946 (1979) (summaries are admissible pursuant to Rule 1006 and Rule 611(a)).

51. *Winn*, 948 F.2d at 159:

[S]ummary charts are, in the trial court's discretion, ordinarily admissible when: (1) the charts are based on competent evidence before the jury; (2) the primary evidence used to construct the charts is available to the other side for comparison in order that the correctness of the summary may be tested; (3) the person who prepared the charts is available for cross-examination; and (4) the jury is properly instructed concerning their consideration of the charts.

See also *United States v. Campbell*, 845 F.2d 1374, 1381 (6th Cir.), cert. denied, 488 U.S. 908 (1988); *Gomez*, 803 F.2d at 257; *United States v. Collins*, 596 F.2d 166, 169 (6th Cir. 1979).

52. 54 F.3d 1150 (4th Cir.), cert. denied, 116 S. Ct. 266 (1995).

53. 725 F.2d 170 (2d Cir. 1983).

54. *Id.* at 173 (emphasis added).

that the charts were properly admitted because the trial judge had explained to the jury how it should consider the charts.<sup>55</sup>

Although *Baccollo* held that the charts were admissible evidence, in contrast to the general consensus that a summary chart is not evidence but a pedagogical device, careful examination of the decision shows that the court did not mention whether the charts summarized testimony. Instead, the court's entire discussion of the issue only indicated that the charts reflected primary evidence offered by the prosecution.<sup>56</sup> The opinion discussed neither the type of evidence the chart reflected nor at which stage of the trial the chart was admitted into evidence, nor did it discuss the defendant's argument against the chart's admission.<sup>57</sup>

*Baccollo* should thus be given little or no weight by courts addressing the admission of summary testimony because of the *Baccollo* court's lack of discussion of the issue. Nevertheless, the *Johnson* court cited *Baccollo* and other cases<sup>58</sup> in support of its decision to allow the use of summary charts and summary testimony.<sup>59</sup>

The circuits are split as to whether a summary chart should be admitted and allowed into the jury room or whether it is just a pedagogical device that should be admitted to aid the jury in weighing the evidence that has already been presented.<sup>60</sup> The

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55. *Id.*

56. The court devoted two sentences to discussing the admission of summary testimony:

Defendant's third point with respect to the substantive counts is that the district judge permitted the prosecution to introduce as evidence charts on which there was represented primary evidence which was offered by the prosecution and admitted by the court. The admissibility of such charts, provided their function is explained to the jury, as it was in this case by Judge Mishler, has long been recognized.

*Id.*

57. The only discussion concerning the defendant's arguments came at the very end of the opinion, where the court reasoned that the evidence before the jury was adequate to permit the jury to infer that there was only one conspiracy. *Id.* at 174.

58. *United States v. Casamento*, 887 F.2d 1141, 1151 (2d Cir. 1989), cert. denied, 493 U.S. 1081 (1990) (jury is allowed to have charts in jury room during deliberations as long as judge properly instructs jury that it is not to consider charts as evidence); *United States v. Goldberg*, 401 F.2d 644, 647-48 (2d Cir. 1968), cert. denied, 393 U.S. 1099 (1969) (jury instructions not abuse of discretion where trial judge explained that charts were not independent evidence but rather only representations of other admitted evidence).

59. *United States v. Johnson*, 54 F.3d 1150, 1159 n.10, 1159-60 (4th Cir.), cert. denied, 116 S. Ct. 266 (1995).

60. Compare *United States v. Wood*, 943 F.2d 1048, 1053 (9th Cir. 1991) (pedagogical devices summarizing previously admitted testimony or documents "should not be admitted into evidence or otherwise be used by the jury during deliberations") and *United States v. Seelig*, 622 F.2d 207, 214 (6th Cir.), cert. denied, 449 U.S. 869 (1980) (holding that such summaries should be accompanied by limiting instruction that summary does not itself constitute evidence) with *United States v. Poschwatta*, 829 F.2d 1477, 1481 (9th Cir. 1987) (court did not abuse its discretion by admitting charts into evidence, although better practice is to admit

jury hears the testimony in both instances, with the difference being whether the document is admitted into the jury room as evidence in the case. Johnson reconciled this difference by holding that “the concern should not be so much with the formal admission of the summaries as it is with the manner in which the district court instructs the jury to consider the chart.”<sup>61</sup> The court reasoned that whether the chart was technically admitted into evidence was not as important as whether the jury “is taking a close look at the evidence upon which that chart is based” and not relying upon the chart as independent evidence.<sup>62</sup>

The Johnson court held that the trial judge’s instructions focusing the jury on the evidence rather than on the summary testimony were sufficient,<sup>63</sup> thereby allowing testimony that simply summarized that of prior witnesses and put the credibility of those witnesses at issue for a second time. The Scales court warned of this problem when it recognized that Rule 611(a) could be used instead of Rule 1006 to admit testimony summarizing objective evidence.<sup>64</sup>

One of main issues the Johnson defendant argued on appeal was that the district court had abused its discretion and committed reversible error when it admitted part of FBI Agent Richard Hudson’s summary testimony.<sup>65</sup> Agent Hudson testified about an organizational chart that reflected his compilation of the prior in-court testimony of thirty co-conspirators, and presented foundational testimony in support of the chart.<sup>66</sup> In addition, Agent Hudson verbally summarized the prior in-court testimony of the thirty co-conspirators in the light most favorable to the prosecution.<sup>67</sup> The Fourth Circuit held that under Rule 611(a), the district

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charts only as testimonial aid for jury). See also RICE, *supra* note 21, at 856. Rice states that courts disagree over the evidentiary status of summaries, with some courts improperly holding that summaries are not evidence and restricting their use to assisting the jury in understanding and using the underlying facts and data already in the record. *Id.* (citing *United States v. Atchley*, 699 F.2d 1055 (11th Cir. 1983); *United States v. Nathan*, 536 F.2d 988 (2d Cir. 1976)). Rice goes on to say that the correctly interpreted evidentiary status of summaries was spelled out in *United States v. Smyth*, 556 F.2d 1179 (5th Cir. 1977), which held that the lower court properly admitted certain FBI computer printouts into evidence. RICE, *supra* note 21, at 857 (citing *Smyth*, 556 F.2d at 1184). Rice reconciles these differences by claiming that the courts have erroneously interpreted summary evidence by failing to distinguish between its use as a substitute for primary evidence under Rule 1006 and its use as pedagogical device to aid the jury in evidence organization. *Id.* at 858.

61. *Johnson*, 54 F.3d at 1159.

62. *Id.*

63. *Id.* at 1160.

64. 594 F.2d at 564.

65. *Johnson*, 54 F.3d at 1156.

66. *Id.*

67. *Id.* at 1157.

court had not erred in admitting the summary chart, the foundational testimony for the chart, or the testimony summarizing that of the prior in-court witnesses.<sup>68</sup> The court based its conclusion upon the large number of witnesses and extensive evidence that the government had presented, as well as the district court's curative instructions to the jury.<sup>69</sup>

The court split its discussion of summary evidence, addressing first the admissibility of the summary chart and then discussing the admissibility of the summary testimony.<sup>70</sup> The court looked to the Second Circuit's decision in *United States v. Pinto*<sup>71</sup> as a good example of how a court should apply Rule 611(a) in admitting summary charts.<sup>72</sup>

#### A. Summary Charts as Admissible Evidence

*Pinto* involved the prosecution of several defendants for conspiracy to import cocaine.<sup>73</sup> The government introduced into evidence summary charts that reflected wiretaps, telephone calls, the names of individuals that participated in the telephone conversations, the telephone numbers used, and the addresses where the telephone calls were placed or received.<sup>74</sup> The *Pinto* court held that because the trial judge had determined that the charts would be helpful to the jury and were not cumulative, it had not committed reversible error by admitting the charts into evidence or allowing them into the jury room during deliberations.<sup>75</sup>

The *Johnson* court set forth two guiding principles that courts should use when reviewing a district court's admission of a summary chart into evidence under Rule 611(a). First, the court should determine whether the summary chart aids the jury in ascertaining the truth.<sup>76</sup> Second, the court should consider the possible

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68. *Id.*

69. *Id.* at 1162.

70. *Id.* at 1157, 1161.

71. 850 F.2d 927 (2d Cir.), cert. denied, 488 U.S. 867 (1988).

72. *Johnson*, 54 F.3d at 1158.

73. *Pinto*, 850 F.2d at 929.

74. *Id.* at 935. The opinion does not make clear whether all of the information summarized on the charts was already in evidence. The opinion does state, however, that during the ten-week trial, numerous witnesses and voluminous evidence were presented by the government, including references to 66 wiretaps of telephone calls placed to some 35 telephone numbers. *Id.*

75. *Id.*

76. The court cited *Pinto* and *Scales* in support of this prong of the two-part test. *Id.* at 1159 (citing *Pinto*, 850 F.2d at 935; *United States v. Scales*, 594 F.2d 558, 563 (6th Cir.), cert. denied, 441 U.S. 946 (1979)). The court listed several factors that a trial judge should employ when making this determination, such as the complexity of the case, the length of the trial, and any confusion that a large number of witnesses and exhibits may cause. *Id.*



prejudice to the defendant that would result if the summary chart were allowed into evidence.<sup>77</sup> The Johnson court described this second prong as “essentially an analysis under Rule 403 of the Federal Rules of Evidence.”<sup>78</sup>

The summary chart admitted into evidence in Johnson reflected the testimony of thirty prior witnesses called by the government during its case-in-chief, twenty-eight of whom were co-conspirators or had direct dealings with the drug conspiracy.<sup>79</sup> The government called Agent Hudson, who had prepared the chart after the witnesses had testified, to testify as to the organization and creation of the chart.<sup>80</sup> Agent Hudson also summarized the prior in-court testimony reflected in the chart while he discussed the chart’s organization.<sup>81</sup>

The admission of the summary violated the standard that the Scales court adopted when it recognized that Rule 611(a) could be used as authority to admit summaries as long as the summaries contained only objective evidence and not evidence that put witness credibility at issue.<sup>82</sup> The summary chart presented by Agent Hudson was not comprised of objective evidence because it reflected prior in-court witness testimony.<sup>83</sup> The Johnson court cited Pinto and Scales as leading cases that supported the admission of the summary chart into evidence.<sup>84</sup> Nevertheless, the court violated the Pinto and Scales standard that allows only summary charts reflecting objective evidence.<sup>85</sup>

Overlooking the prejudice to the defendant that resulted from the admission of the summary chart, the Johnson court found that the district court had taken all of the appropriate measures required under the second prong of Pinto to ensure that the jury was properly instructed as to the weight it was to give the chart.<sup>86</sup>

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77. *Id.*

78. *Id.* Rule 403 states: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” FED. R. EVID. 403.

79. Johnson, 54 F.3d at 1160.

80. *Id.* at 1156-58.

81. *Id.* at 1157.

82. See 594 F.2d at 564.

83. Note that the summary chart did not reflect objective evidence such as the certain number of wiretaps, addresses, or telephone numbers that the Pinto court admitted into evidence under Rule 611(a). See *United States v. Pinto*, 850 F.2d 927, 935 (2d Cir.), cert. denied, 488 U.S. 867 (1988).

84. *Id.* at 1158-59.

85. Scales, 594 F.2d at 564; Pinto, 850 F.2d at 935.

86. For example, one limiting instruction that the district court offered during Agent Hudson’s cross-examination was as follows:

Such limiting instructions, however, are clearly insufficient. The court should not have admitted the summary chart as evidence. In addition, the court should not have allowed the government to use such a summary chart because its use defeats the purpose of Federal Rule of Evidence 403.<sup>87</sup> The Rules were drafted to protect the integrity of the trial process by ensuring fairness to both sides by avoiding prejudice and ensuring judicial economy.<sup>88</sup>

What is even more surprising is the fact that the Johnson court used Rule 611(a) to admit the summary chart.<sup>89</sup> Because the chart was merely a repetition of prior in-court testimony, its admission violated one of the tenets that Rule 611(a) itself established—the avoidance of needless consumption of time.<sup>90</sup> Having Agent Hudson visually and verbally summarize the testimony of thirty witnesses through the use of an organizational chart was unquestionably a needless consumption of time.

In addition, the district court, using the same reasoning it had applied to admit the chart, allowed Agent Hudson to orally summarize the prior testimony of government witnesses as to particular events and persons.<sup>91</sup> The court found that Hudson's summary testimony likely aided the jury in ascertaining the truth, and held that the testimony was admissible because the defendant was allowed extensive cross-examination concerning the validity of Hudson's testimony.<sup>92</sup> The court cited two cases in support of its decision to admit the summary testimony, *United States v. Baker*<sup>93</sup> and *United States v. Paulino*.<sup>94</sup>

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The chart . . . is the Government's analysis of the evidence. It is the case as the Government sees it from the evidence which has been adduced here in the courtroom, and, of course, it is subject to such interpretation as you as a jury feel is appropriate to be given to it. In other words, it is presented to show what the Government contends has been proven in the case. That is the contention. It's up to you then as a jury to resolve any issues that may be in your mind concerning [the chart].

*Johnson*, 54 F.3d at 1160. The district court also charged the jury that "[g]overnment's Exhibit Number 19, that's the chart that was put up, that is simply a summary of what the Government contends that the evidence shows. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case." *Id.* at 1160-61.

87. The purpose of Federal Rule of Evidence 403 is to balance the admissibility of otherwise admissible evidence in regards to its probative value versus the danger of unfair prejudice to the defendant. FED. R. EVID. 403 advisory committee's note. If the court finds the danger of unfair prejudice outweighs the probative value, the judge may give a limiting instruction to the jury regarding the evidence, or the court may exclude the evidence in its entirety. *Id.*

88. See FED. R. EVID. 403, 611(a).

89. *Johnson*, 54 F.3d at 1157.

90. FED. R. EVID. 611(a).

91. *Johnson*, 54 F.3d at 1161.

92. *Id.* at 1162.

93. 10 F.3d 1374 (9th Cir. 1993), cert. denied, 115 S. Ct. 330 (1994).

94. 935 F.2d 739 (6th Cir.), cert. denied, 502 U.S. 914 (1991).

### B. Summary Testimony as Admissible Evidence

In *Baker*, twenty-four defendants were charged with conspiracy to manufacture, distribute, and possess with intent to distribute methamphetamines.<sup>95</sup> Four of the defendants were charged with conducting a continuing criminal enterprise.<sup>96</sup> The district court allowed the prosecution's final witness, FBI Special Agent Lee Besse, to attempt to establish the "substantial proceeds" element of the continuing criminal enterprise crime.<sup>97</sup> Though no witness testified as to the value of any particular transaction, Agent Besse projected values onto the transactions and events and totaled known expenditures based upon the price lists she had prepared from the testimony of prior witnesses.<sup>98</sup>

The trial judge instructed the jury that the summary testimony was not evidence, did not represent the prosecution's opinion as to the credibility of the witnesses, and should be disregarded where the jury found that it conflicted with previously admitted testimony and evidence.<sup>99</sup> On appeal, the Ninth Circuit held that the admission of the summary evidence was a "valid exercise of the district court's discretion under Rule 611(a)" and that the summary testimony was not unduly prejudicial under Rule 403.<sup>100</sup>

The *Johnson* court misconstrued *Baker* and incorrectly applied it as support for the prejudicial decision to admit Agent Hudson's summary testimony. Agent Besse's testimony in *Baker* did not rehash word-for-word the prior in-court testimony of witnesses, as Agent Hudson's summary testimony did in *Johnson*.<sup>101</sup> Rather, the prosecution introduced Agent Besse's testimony to tie its evidence together through the agent's calculations of what the prior witnesses did not say.<sup>102</sup> The testimony allowed the prosecution to present its case-in-chief in accordance with the "theme" of its case. Agent Besse's testimony was simply another piece in the puzzle the prosecutor put together before the jury. Her testimony did not present prior witness testimony to the jury for a second time, thus allowing a figure as authoritative as an F.B.I. agent to reiterate the testimony for the jury in the event it did not "get it"

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95. *Baker*, 10 F.3d at 1386.

96. *Id.*

97. *Id.* at 1411.

98. *Id.*

99. *Id.*

100. *Id.* at 1412.

101. *Johnson*, 54 F.3d at 1161.

102. *Baker*, 10 F.3d at 1411.

the first time. Rather than merely putting the prior witnesses' credibility at issue, Agent Besse's testimony instead presented another piece of the prosecution's puzzle before the jury to aid it in determining the credibility of Agent Besse's testimony itself.

The second case the Johnson court cited in support of the admitted summary testimony was *United States v. Paulino*.<sup>103</sup> The Paulino defendants appealed convictions for conspiring to possess and distribute cocaine and possessing cocaine with intent to distribute.<sup>104</sup> The defendants contended that the district court had committed reversible error when it allowed the prosecution to have a witness explain, through the use of summary charts, the various players and their roles in the conspiracy, as well as the cash generated from cocaine sales during a certain period of time.<sup>105</sup> The defendants claimed that the summary testimony was "prejudicial, inflammatory, and constituted impermissible argument."<sup>106</sup>

On appeal, the Sixth Circuit found that the summaries were admissible as pedagogical devices because they aided the jury in its examination of testimony and documents already admitted into evidence.<sup>107</sup> The court cited Rule 611(a) as authority for allowing such summaries, provided that a limiting instruction were given.<sup>108</sup> The court held that the district court properly allowed the summary testimony because the charts were not substantially inconsistent with the evidence.<sup>109</sup> Moreover, the court found that the trial judge had properly instructed the jury that the charts and summaries were not evidence.<sup>110</sup>

The Johnson court erred in citing *Paulino* as support for its holding that oral summaries of prior in-court witness testimony

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103. 935 F.2d 739 (6th Cir.), cert. denied, 502 U.S. 914 (1991).

102. *Id.* at 743.

105. *Id.* at 752.

106. *Id.* at 752-53.

107. *Id.* at 753.

108. *Id.*

109. *Id.* at 754.

110. *Id.* Although the trial judge failed to give a cautionary instruction prior to the summary witness' testimony, the court did give the following jury instruction concerning the nature of the summaries at the close of proofs:

The charts or summaries prepared by the United States and admitted in evidence received for the purposes of explaining facts disclosed by books, records and other documents which are in evidence in the case. Such charts or summaries are not in and of themselves evidence or proof of any facts. If such charts or summaries do not correctly reflect facts or figures shown by the evidence in the case, the jury should disregard them. In other words, such facts or summaries are used only as a matter of convenience. So, if and to the extent that you find they are not, in truth, summaries of facts or figures shown by the evidence in the case, you are to disregard them entirely.

*Id.*

are admissible.<sup>111</sup> The summary testimony the Paulino court approved summarized objective evidence, not evidence that put the credibility of prior witnesses at issue. The summary witness in Paulino testified about charts that summarized the amount of cash generated from cocaine sales and reflected the roles that various defendants played in the conspiracy.<sup>112</sup> Not once did the summary witness restate what prior witnesses had said in the courtroom.<sup>113</sup> As in Baker, the summary witness in Paulino simply put another piece of the prosecution's puzzle before the jury to allow it to determine whether the charts accurately depicted evidence already admitted.

The summary testimony that the Johnson court approved, however, gave the prosecution another chance to prove its case-in-chief. The prosecution was allowed to present the same piece of the puzzle a second time through the testimony of Agent Hudson.<sup>114</sup> Neither the Baker nor Paulino courts put the credibility of prior witnesses at stake a second time when they allowed summary testimony of objective evidence.

## V. CONCLUSION

By allowing Agent Hudson to testify about the summary charts and prior testimony, the Johnson court violated Federal Rule of Evidence 403 because the testimony unfairly prejudiced the defendant, misled the jury, and was a needless presentation of cumulative evidence that confused the jury. Further, the Johnson court exceeded its authority by expanding Rule 611(a). Earlier decisions have held that to be admitted under Rule 611(a), a summary must reflect objective evidence that does not put the credibility of witnesses at issue.<sup>115</sup> Moreover, the Johnson court disregarded the Advisory Committee's intent in drafting Federal Rule of Evidence 611(a).<sup>116</sup>

Federal courts should not adopt Johnson as authority for admitting summaries. In addition, the Advisory Committee on the Federal Rules of Evidence should address the conflict that exists among the circuits regarding Rule 611(a), clarify the scope and

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111. Johnson, 54 F.3d at 1162.

112. Paulino, 935 F.2d at 752-53.

113. Id.

114. Johnson, 54 F.3d at 1161.

115. See, e.g., *United States v. Baker*, 10 F.3d 1374 (9th Cir.), cert. denied, 115 S. Ct. 330 (1993); *United States v. Paulino*, 935 F.2d 739 (6th Cir.), cert. denied, 502 U.S. 914 (1991); *United States v. Pinto*, 850 F.2d 927 (2nd Cir.), cert. denied, 488 U.S. 867 and 488 U.S. 932 (1988); *United States v. Scales*, 594 F.2d 558 (6th Cir.), cert. denied, 441 U.S. 946 (1979).

116. See discussion *supra* part III.

purpose of Rule 611(a), and state once and for all whether summary evidence is admissible under Rule 611(a). Finally, if the Committee finds that summary evidence is admissible under Rule 611(a), it should address under what circumstances such evidence is to be admitted.

# TELECOMMUNICATIONS REFORM AND THE DEATH OF THE LOCAL EXCHANGE MONOPOLY\*

MILES W. HUGHES\*\*

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## I. INTRODUCTION

Telecommunications in the United States is a \$700 billion industry that comprises approximately one-sixth of our nation's economy.<sup>1</sup> A subset of this industry is the \$90 billion local telephone exchange market.<sup>2</sup> Until recently, this enormously profitable market operated as a natural monopoly<sup>3</sup> in which a small

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\*\* The author thanks Mr. Dubose Ausley for his financial support. This Comment is dedicated to the memory of the author's father, Dr. William O. Hughes.

1. Michael E. Kanell, *New Era of Telecommunications: Who'll Survive Storm of Competition?*, ATLANTA J. & CONST., Feb. 11, 1996, at F5.

2. Leo Rennert, *Clinton Dials in New Era, Signs Telecom Bill, Touts Services, Jobs*, SACRAMENTO BEE, Feb. 9, 1996, at A1.

3. A natural monopoly is "[o]ne which is created from circumstances over which the monopolist has no power. For example, a market for a particular product may be so limited

number of regional telephone companies provided local exchange services within exclusive territories.<sup>4</sup> The federal government and many states such as Florida endorsed this anti-competitive environment.<sup>5</sup> However, recent telecommunications reforms aim to dismantle the local exchange monopoly.<sup>6</sup> With the reforms, Congress and the Florida Legislature hope to create a competitive local exchange market in which hundreds of telecommunications companies provide consumers with a broad array of advanced telecommunications services at reasonable prices.<sup>7</sup> This Comment explores whether the telecommunications reforms will successfully achieve their goal.

This Comment provides the reader with a general understanding of the telecommunications industry and the regulation of the local exchange market. Part II describes the historical efforts of the federal government and the Florida Legislature to control the adverse effects of the local exchange monopoly. Part III depicts the developments within the telecommunications industry that influenced lawmakers to open the local exchange market to competition. Part IV summarizes those provisions of the Telecommunications Act of 1996 particular to the deregulation of the local exchange market. Part V outlines the provisions of the 1995 Florida telecommunications reform that relate to local exchanges and were not preempted by the federal Act. Part VI attempts to predict the likely impact the federal and state reforms will have on consumers, the telecommunications industry, and the local exchange market. Finally, part VII concludes that telecommunications reform will benefit consumers by bringing competition to the local exchange market.

## II. THE TRADITION OF REGULATING TELECOMMUNICATIONS MONOPOLY

### A. The History of Federal Regulation

On the national level, the history of the development of the telecommunications industry has been one of continual tension between monopoly and competitive market structures. For decades,

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that it is impossible to profitably produce such except by a single plant large enough to supply the whole demand." BLACK'S LAW DICTIONARY 1007 (6th ed. 1990).

4. See *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 141 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

5. See discussion *infra* part II.

6. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (to be codified in scattered sections of 47 U.S.C.); 1995 Fla. Laws ch. 95-403.

7. See sources cited *supra* note 6.



each of the three branches of the federal government has battled monopoly in the nationwide telecommunications industry. Congress, federal courts, the Department of Justice, and the Federal Communications Commission have participated in the campaign to break down anti-consumer behavior. The federal government's confrontation with monopoly in the telecommunications industry originated with the Communications Act of 1934.<sup>8</sup> The following section explores the federal regulation of telecommunications before the enactment of the 1996 Telecommunications Act.

### 1. The Communications Act of 1934

In 1934, Congress passed the Communications Act.<sup>9</sup> The purpose of the Act is to regulate interstate and international communications to ensure the universal provision of communications services.<sup>10</sup> To achieve this purpose, the Act created the Federal Communications Commission (FCC)<sup>11</sup> and vested it with the regulatory powers necessary to encourage uniform and constructive growth within the telecommunications industry.<sup>12</sup>

Congress intended the FCC to serve as an independent expert agency capable of regulating an increasingly complex and dynamic industry.<sup>13</sup> Accordingly, Congress granted the FCC broad jurisdiction and regulatory authority over telephone and telegraph companies, broadcasting, and telegraph communications.<sup>14</sup> The FCC's jurisdiction does not extend to the regulation of many intrastate communications services, however.<sup>15</sup> For example, the Communications Act explicitly reserves regulatory control over intrastate toll and local exchange telephone services to the states.<sup>16</sup>

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8. Ch. 652, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. §§ 151-613 (1994)).

9. *Id.*

10. 47 U.S.C. § 151 (1994).

11. *Id.*

12. See *Greater Fremont, Inc. v. City of Fremont*, 302 F. Supp. 652, 658 (D. Ohio 1968).

13. See *American Broadcasting Co. v. F.C.C.*, 191 F.2d 492, 498 (D.C. Cir. 1951).

14. 47 U.S.C. § 151 (1994); see also *United States v. Southwestern Cable Co.*, 392 U.S. 157, 167-68 (1968). The broad jurisdiction of the FCC resulted from the consolidation of various regulatory functions of the Interstate Commerce Commission, the Federal Radio Commission, and the Postmaster General. See Robert B. Friedrich, Note, *Regulatory and Antitrust Implications of Emerging Competition in Local Access Telecommunications: How Congress and the FCC Can Encourage Competition and Technological Progress in Telecommunications*, 80 CORNELL L. REV. 646, 648 (1995).

15. 47 U.S.C. § 152(b) (1994). Congress did not intend the Communications Act to preempt the field of state telecommunications regulations. *Ceracche Television Corp. v. Kelly*, 364 N.Y.S.2d 276, 280 (Sup. Ct. 1974), *aff'd*, 376 N.Y.S.2d 217 (App. Div. 1975).

16. 47 U.S.C. § 152(b) (1994).

## 2. The Federal Courts

Federal courts maintain a vital role in the regulation of the telecommunications industry. The courts' predominant purpose is to interpret telecommunications legislation and review the FCC's actions.<sup>17</sup> Additionally, the courts have jurisdiction to resolve antitrust disputes filed by the Department of Justice against telecommunications companies.<sup>18</sup> These disputes frequently result in the filing of consent decrees that require the courts to monitor the parties' compliance with the agreements.<sup>19</sup> The two telecommunications antitrust decisions of greatest impact are the 1956 Consent Decree and the Modified Final Judgment (MFJ); combined, they destroyed the largest monopoly the world has ever known, American Telephone & Telegraph (AT&T).<sup>20</sup>

### a. The 1956 Consent Decree

In 1949, the Department of Justice filed an antitrust action in federal district court in New Jersey against AT&T and its subsidiary, Western Electric,<sup>21</sup> for alleged violations of sections 1, 2, and 3 of the Sherman Antitrust Act.<sup>22</sup> The government alleged "that [AT&T and Western Electric] had monopolized and conspired to restrain trade in the manufacture, distribution, sale, and installation of telephones, telephone apparatus, equipment,

17. Patricia Diaz Dennis & Gary M. Epstein, Panel Discussion: The Future of Telecommunications, in PRACTICING LAW INST., 12TH ANNUAL INSTITUTE ON TELECOMMUNICATIONS: POLICY AND REGULATION 1994 (Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G4-3930) (Dec. 1994), available in WESTLAW, PLI Database, at \*93.

18. See *id.*; see also discussion *infra* parts II.A.2.a-b.

19. Friedrich, *supra* note 14, at 649.

20. *Id.* at 655. Before 1983, "[t]he combined operations of AT&T . . . exercised monopoly power over nearly every sector of the telecommunications industry within the United States." *Id.* In 1980, AT&T's operating revenues equalled approximately two percent of the country's gross national product. *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 152 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

21. At the time of the lawsuit, Western Electric manufactured telecommunications equipment exclusively for AT&T. *American Tel. & Tel. Co.*, 552 F. Supp. at 135 n.3.

22. *Id.* at 135-36 (citing 15 U.S.C. § 1-3). The purpose of the Sherman Antitrust Act of 1890 is to pursue unimpeded competition as a means of advancing consumer prosperity:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.

*Northern Pacific Ry. v. United States*, 356 U.S. 1, 4 (1958).

materials, and supplies.”<sup>23</sup> To combat the monopoly, the government sought structural relief by completely divesting Western Electric from AT&T.<sup>24</sup>

From 1949 to 1956, the case lay virtually dormant in the district court.<sup>25</sup> Meanwhile, AT&T exerted substantial influence in Washington, D.C., to bring the action to a favorable conclusion. AT&T enlisted the assistance of the Department of Defense to persuade the Justice Department to postpone prosecution of the suit and reduce the severity of the requested sanctions.<sup>26</sup> Officers from AT&T and the Defense Department repeatedly met with Justice Department officials, eventually securing the pledge of the Attorney General to conclude the case with no significant injury to AT&T.<sup>27</sup> By December 1955, the Justice Department and AT&T had arrived at an agreement.<sup>28</sup> The resulting consent decree did not include any of the structural changes to AT&T that the Justice Department had originally sought.<sup>29</sup> Most importantly, AT&T did not have to divest Western Electric.<sup>30</sup> Its monopoly escaped intact.

#### b. The Modification of Final Judgment

During the 1960s and 1970s, Microwave Communications, Inc. (MCI) and other companies attempted to compete with AT&T in the long-distance and other telecommunications markets.<sup>31</sup> Their

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23. American Tel. & Tel. Co., 552 F. Supp. at 135.

24. *Id.*

25. *Id.*

26. *Id.* at 136. A number of AT&T executives were involved with national defense projects and thus the Department of Defense assisted AT&T because it feared that prosecution of the case would impede the Korean War effort. *Id.* at 136 n.8.

27. *Id.* at 137. In 1959, the House of Representatives Committee on the Judiciary appointed the Antitrust Subcommittee to investigate the negotiation process that led to the 1956 Consent Decree. *Id.* at 136. The subcommittee reported that the willingness of the Attorney General to forego the original goals of the antitrust action demonstrated “partiality toward the defendants incompatible with the duties of his public office.” *Id.* at 137 n.11. The Antitrust Subcommittee also was dismayed by the unwillingness of the Justice Department to disclose information necessary for the investigation. The subcommittee reported that the Justice Department’s defiance was the result of its “desire to cover up those facts which the Department considered to be embarrassing.” *Id.* The Department’s obstinacy forced the subcommittee to obtain the needed information from other sources. *Id.* at 136-37.

28. *Id.* at 137.

29. *Id.* at 137-38. The consent decree imposed upon AT&T certain minimal line-of-business restrictions that permitted the company to provide only telecommunications services. *Id.* at 138.

30. *Id.* at 137. Through the district court’s ratification of the 1956 Consent Decree, AT&T agreed to engage in only common carrier communications services, and Western Electric agreed to manufacture equipment solely for use by AT&T. *Id.* at 138.

31. PUBLIC SERV. COMM’N, TELECOMMUNICATIONS POLICY: YESTERDAY AND TODAY 5-9 (1994) (on file with the Florida Public Service Commission).

efforts culminated in a series of antitrust lawsuits charging AT&T and its subsidiaries with unlawfully hindering competition.<sup>32</sup> Although they resulted in modest victories for the various petitioners, these actions never seriously threatened the core AT&T monopoly.<sup>33</sup>

By the early 1970s, the government concluded that the 1956 Consent Decree had failed to facilitate meaningful competition within the telecommunications industry.<sup>34</sup> As a result, on November 20, 1974, the Justice Department filed a second antitrust lawsuit against AT&T, Western Electric, and Bell Laboratories.<sup>35</sup> For the second time, the government alleged that the defendants had violated section 2 of the Sherman Antitrust Act through the monopolization of a broad spectrum of telecommunications services.<sup>36</sup> The government sought the total divestiture of the Bell Operating Companies (BOCs) from AT&T and the dissolution of Western Electric.<sup>37</sup>

After extensive pretrial proceedings, discovery, and failed settlement negotiations, the trial finally began on January 15, 1981, before U.S. District Court Judge Harold Greene in the District of Columbia.<sup>38</sup> In January 1982, a proposed consent decree between the parties was submitted to the court for its approval.<sup>39</sup> Following modification by Judge Greene, the consent decree was approved as a Modified Final Judgment (MFJ).<sup>40</sup> In sum, the plan of

32. *Id.* The antitrust actions included the "Above 890" decision of 1959, *Bendix Aviation Corp. v. FCC*, 272 F.2d 533 (D.C. Cir. 1959); the *Carterphone* decision of 1968, *Carterphone v. American Tel. & Tel. Co.*, 13 F.C.C.2d 571 (1968); the *Specialized Common Carrier* decision of 1971, *Establishment of Policies and Procedures for Consideration of Applications to Provide Specialized Common Carrier Servs.*, 24 F.C.C.2d 318 (1970); and the *Recunet* decision of 1975, *M.C.I. Telecommunications Corp. v. F.C.C.*, 561 F.2d 365 (D.C. Cir. 1977), cert. denied, 434 U.S. 1040 (1978). *PUBLIC SERV. COMM'N*, *supra* note 31, at 7-9.

33. *PUBLIC SERV. COMM'N*, *supra* note 31, at 5-11.

34. *American Tel. & Tel. Co.*, 552 F. Supp. at 139.

35. *See id.* at 131.

36. *Id.* at 139.

37. *Id.* The 22 BOCs were wholly-owned subsidiaries of AT&T that provided local telephone services throughout the United States. *Id.* at 139 n.19. By 1983, approximately 80 percent of the nation's telephone subscribers received local and long-distance services from AT&T and the BOCs. Marc W. Dunbar, Comment, *Telecommunications Competition in Florida: A Look at House Bill 1531*, 21 FLA. ST. U. L. REV. 663, 666-67 (1993).

38. *American Tel. & Tel. Co.*, 552 F. Supp. at 139-40. The scope of the trial proceedings was enormous. *Id.* at 140. The case was initially divided into 82 segments. *Id.* The government presented over 250 witnesses and many thousands of pages of documents in its case-in-chief. *Id.* The trial record contained over 24,000 pages of transcripts. *Id.*

39. *Id.* at 140.

40. *Id.* at 225. Judge Greene retained jurisdiction over the matter to enforce and modify the MFJ and plan of reorganization. *Id.* at 231. The MFJ was reviewed triennially to allow the regional Bell operating companies to seek entry into other telecommunications markets. Daniel F. Spulber, *Deregulating Telecommunications*, 12 YALE J. ON REG. 25, 27 (1995).

reorganization that implemented the MFJ divested the twenty-two BOCs from AT&T, prohibited AT&T from providing local exchange services, and banned the BOCs from specific lines of business, including equipment manufacturing, long-distance services, and information services.<sup>41</sup> Thus, the 1982 MFJ granted the relief the government had originally sought in 1949—structural changes to AT&T necessary to defeat the company's anti-competitive grip on the telephone industry.

Judge Greene recognized that AT&T's ability to monopolize the telecommunications market was primarily grounded in its exclusive control of local telephone services through the BOCs.<sup>42</sup> The BOC networks—comprised of enormously expensive wires, cables, switches, and transmission facilities—operated as “bottlenecks” for the interconnection of telephone subscribers.<sup>43</sup> The only means by which a telecommunications carrier could provide services to homes and businesses was through BOC network access, which AT&T controlled with a tight fist.<sup>44</sup>

Judge Greene wanted to terminate AT&T's exclusive control over access to the BOC networks, but he did not find competition in the local exchange market a viable alternative.<sup>45</sup> He thought that the enormous capital costs of constructing local exchange networks to compete with the existing BOC networks were a prohibitive barrier to market entry for any potential local exchange competitors.<sup>46</sup> Therefore, in lieu of competition, Judge Greene ordered the divestiture of AT&T to sever the economically unhealthy relationship between the monopolistic local exchange services provided by the BOCs and the more competitive long-distance services of AT&T.<sup>47</sup>

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41. American Tel. & Tel. Co., 552 F. Supp. at 222-32.

42. *Id.* at 223.

43. *Id.*; see also Friedrich, *supra* note 14, at 659.

44. American Tel. & Tel. Co., 552 F. Supp. at 223; see also Friedrich, *supra* note 14, at 659 (describing BOC networks as “natural monopolies” because of prohibitively high capital costs necessary for market entry and rapidly declining average costs of operating networks in long-term). AT&T provided its long-distance competitors with more inferior and costly connection to the BOCs than it saved for its subsidiaries. Spulber, *supra* note 40, at 29. This practice was known as “discriminatory access.” *Id.*

45. See American Tel. & Tel. Co., 552 F. Supp. at 223.

46. *Id.*

47. *Id.* The MFJ mandated that divestiture of the BOCs from AT&T was to occur through the following steps:

1. The transfer from AT&T and its affiliates to the BOCs . . . of sufficient facilities, personnel, systems, and rights to technical information to permit the BOCs to perform, independently of AT&T, exchange telecommunications and exchange access functions . . . ;
2. The separation within the BOCs of all facilities, personnel and books of account between those relating to the exchange telecommunications or exchange

The MFJ authorized AT&T to provide services and equipment in those telecommunications arenas Judge Greene found were competitive.<sup>48</sup> Accordingly, the MFJ eliminated the 1956 Consent Decree restrictions that limited AT&T solely to the provision of telecommunications services.<sup>49</sup> Judge Greene found that allowing a technologically advanced company like AT&T to compete in arenas such as the computer and information markets would further the public interest.<sup>50</sup>

Pursuant to the MFJ, the twenty-two BOCs were either dissolved or consolidated into seven Regional Bell Operating Companies (RBOCs)—Ameritech, BellSouth,<sup>51</sup> Bell Atlantic, NYNEX, Pacific Telesis, Southwestern Bell, and US West.<sup>52</sup> The territories of the RBOCs were geographically divided into 158 local access transport areas (LATAs).<sup>53</sup> LATAs defined the territory within which only one local exchange carrier (LEC) was authorized to operate.<sup>54</sup> Thus, no RBOC or other LEC could provide inter-LATA local exchange services.

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access functions and those relating to other functions . . . provided that there shall be no joint ownership of facilities, but appropriate provision may be made for sharing, through leasing or otherwise, of multifunction facilities so long as the separated portion of each BOC is ensured control over the exchange telecommunications and exchange access functions;

3. The termination of the License Contracts between AT&T and the BOCs . . . and the Standard Supply Contracts between Western Electric and the BOCs and other subsidiaries; and

4. The transfer of ownership of the separated portions of the BOCs providing local exchange and exchange access services from AT&T by means of a spin-off of stock of the separated BOCs to the shareholders of AT&T, or by other disposition . . .

Id. at 226-27.

48. Id. at 223. The MFJ sanctioned the broad provision of computer and information services and equipment by AT&T with one exception: AT&T was precluded from participating in electronic publishing until Judge Greene determined the field was competitive and incapable of monopolization. Id. Judge Greene feared that allowing AT&T to participate in both the transmission of information by providing telephone services and the generation of information by providing electronic publishing services could lead to a news media monopoly. Id. "Such a development would strike at a principle which lies at the heart of the First Amendment: that the American people are entitled to a diversity of sources of information." Id. at 223.

49. Id.

50. Id.

51. BellSouth, the nation's largest RBOC upon enactment of the Telecommunications Act of 1996, provides local exchange services to Florida telephone subscribers through its subsidiary, Southern Bell. Southern Bell provides service within seven LATAs. Fla. H.R. Comm. on Com., CS for SB 1554 (1995) Staff Analysis 2 (final May 18, 1995) (on file with comm.) [hereinafter Fla. H.R. Staff Analysis]; Kanell, *supra* note 1, at F5 (describing size of BellSouth).

52. Spulber, *supra* note 40, at 27.

53. See *United States v. Western Elec. Co., Inc.*, 569 F. Supp. 990, 1011, 1016, 1026-27, 1035, 1048-49 (D.D.C. 1983) (LATA Opinion).

54. See *id.* at 993-94; see also *United States v. Western Elec. Co., Inc.*, 969 F.2d 1231, 1233 (D.C. Cir. 1992), cert. denied sub nom. *Ameritech Corp. v. American Tel. & Tel. Co.*, 507 U.S. 951 (1993).

The MFJ also prohibited the new RBOCs from engaging in the telecommunications lines of business in which AT&T was authorized to compete, namely information services, long-distance services, and equipment manufacturing markets.<sup>55</sup> Judge Greene imposed these line-of-business restrictions because of the risk that the RBOCs would abuse the available competitive advantages previously used by AT&T to gain a monopoly over certain telecommunications services.<sup>56</sup> As a result, the MFJ confined the RBOCs to the provision of local exchange services, customer premises equipment, telephone directories containing paid advertisements, and other products and services related to their natural monopolies.<sup>57</sup>

### 3. The FCC Computer Inquiries

The FCC's most significant contributions toward the regulation of monopoly in the telecommunications industry came in the form of three "computer inquiries." The FCC initiated its inquiries to determine which of the emerging services arising from the combination of computer and telecommunication technologies should be subject to government antitrust regulations.<sup>58</sup> The continuing difficulty of deciding which of these combined services must be regulated eventually contributed to the nearly total deregulation of the telecommunications industry.<sup>59</sup>

The FCC inquiries pursued the policy goal of "structural separation," through which communications companies were not to avoid required regulation through the merger of regulated communications services with unregulated data processing services.<sup>60</sup> In *In re Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facil i-*

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55. *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 224 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

56. *Id.*

57. *Id.*; Dunbar, *supra* note 37, at 668.

58. See generally *In re Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, 28 F.C.C.2d 267 (1971), *aff'd in part and rev'd in part sub nom. GTE Serv. Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973) (First Computer Inquiry); *In re Amendment of Sections 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384 (1980); *In re Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 104 F.C.C.2d 958 (1986) (Third Computer Inquiry I); *In re Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 2 F.C.C.R. 3072 (1987) (Third Computer Inquiry II).

59. See Fla. S. Comm. on Com., CS for SB 1554 (1995) Staff Analysis 1 (Apr. 6, 1995) (on file with comm.) [hereinafter Florida Senate Staff Analysis].

60. PUBLIC SERV. COMM'N, *supra* note 31, at 9.

ties (First Computer Inquiry),<sup>61</sup> the FCC determined that if the “primary purpose” of a combined service was the provision of communications, the service would be regulated.<sup>62</sup> Fittingly, if the primary purpose of the combined service was to provide data processing, it would remain unregulated.<sup>63</sup>

In re Amendment of Sections 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)<sup>64</sup> and the two orders in In re Amendment of Sections 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry)<sup>65</sup> effectively abolished the ruling of First Computer Inquiry and pursued structural separation by classifying combined telecommunications and data processing services as either “basic” or “enhanced.”<sup>66</sup> The FCC regulated “basic services” because they concerned the simple communication of information.<sup>67</sup> For example, the FCC classified the “plain old telephone service” (POTS) common carriers traditionally provided as a basic service.<sup>68</sup> The FCC recognized that POTS and other basic services were not available in competitive markets and that regulation was necessary to control the adverse impacts of monopoly.<sup>69</sup> “Enhanced services” remained unregulated, however, because they primarily concerned the use of data processing applications available in competitive markets.<sup>70</sup> Because the FCC determined that there was no danger of monopoly, it did not restrict enhanced services; rather, the FCC authorized any telecommunications company, including AT&T and the RBOCs, to provide them.<sup>71</sup>

## B. The History of Florida Regulation

In 1913, the Florida Legislature vested the Florida Public Service Commission (PSC) with exclusive regulatory authority

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61. 28 F.C.C.2d 267 (1971), *aff’d* in part and *rev’d* in part sub nom. GTE Serv. Corp. v. FCC, 474 F.2d 724 (2d Cir. 1973).

62. *Id.* at 305.

63. *Id.*

64. 77 F.C.C.2d 384 (1980).

65. 104 F.C.C.2d 958 (1986); 2 F.C.C.R. 3072 (1987).

66. See Second Computer Inquiry, 77 F.C.C.2d at 387; Third Computer Inquiry I, 104 F.C.C.2d at 968; Third Computer Inquiry II, 2 F.C.C.R. at 3074. Second Computer Inquiry was decided before the MFJ, while Third Computer Inquiry I and Third Computer Inquiry II were decided after the MFJ.

67. See Second Computer Inquiry, 77 F.C.C.2d at 387; Third Computer Inquiry I, 104 F.C.C.2d at 968; Third Computer Inquiry II, 2 F.C.C.R. at 3074.

68. See Dunbar, *supra* note 37, at 670.

69. See *id.* at 671; PUBLIC SERV. COMM’N, *supra* note 31, at 9-10.

70. See *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 138 n.17 (D.D.C. 1982), *aff’d* sub nom. *Maryland v. United States*, 460 U.S. 1001 (1983).

71. See Second Computer Inquiry, 77 F.C.C.2d at 420.



over intrastate telecommunications services.<sup>72</sup> The statutory charge to the PSC is contained in chapter 364, Florida Statutes. The Florida Legislature dramatically amended the scope and purpose of chapter 364 during the 1995 Regular Session.<sup>73</sup>

Before 1995, the Florida Legislature controlled the adverse effects of the telecommunications monopoly through regulation rather than competition. To provide local exchange services, the Legislature authorized the PSC to grant virtual monopolies to certain telecommunications companies.<sup>74</sup> The companies awarded the monopolies are known as "incumbent" LECs.<sup>75</sup> Thirteen incumbent LECs essentially controlled the entire Florida local exchange market.<sup>76</sup> Florida law expressly prohibited cellular communication systems, radio communications systems, and cable television companies from providing local exchange services.<sup>77</sup> The statute allowed the PSC to certify a nominal amount of competition, however. Those "alternative" LECs authorized to compete with the incumbent LECs were shared tenant service providers,<sup>78</sup> alternative access vendors,<sup>79</sup> and pay telephone providers.<sup>80</sup>

Before its recent amendment, chapter 364 controlled the prices charged by the incumbent LEC monopolies through rate-of-return regulation.<sup>81</sup> The PSC established reasonable rates of return for each incumbent LEC and subsequently set rates at levels that enabled the companies to earn the targeted amounts.<sup>82</sup> The PSC

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72. 1914 Fla. Laws ch. 2, §§ 2829-2829z (codified as amended in scattered sections of FLA. STAT. ch. 364); see also *Florida Interexchange Carriers Ass'n v. Beard*, 624 So. 2d 248, 251 (Fla. 1993).

73. See 1995 Fla. Laws ch. 95-403. For a discussion of the 1995 revision of chapter 364, Florida Statutes, see *infra* part V.

74. See FLA. STAT. ch. 364.01 (1993) (amended 1995).

75. Florida H.R. Staff Analysis, *supra* note 51, at 2.

76. *Id.* Incumbent LECs come in "large" and "small" varieties. The four large incumbent LECs are Southern Bell, GTE, Sprint United, and Sprint Centel. The nine small incumbent LECs are ALLTEL, Florida, Gulf, Indiantown, Northeast, Quincy, St. Joseph, Southland, and Vista-United. *Id.* at 7.

77. FLA. STAT. § 364.02(7) (1993) (amended 1995).

78. *Id.* § 364.339 (amended 1995). STS providers were limited to offering services to commercial tenants located within a single building. *Id.*

79. *Id.* § 364.337(3) (amended 1995). AAVs were restricted to providing private line service between a facility and its other buildings at separate locations. *Id.* These private lines are colloquially known as "tie lines."

80. *Id.* § 364.3375 (amended 1995).

81. See *id.* §§ 364.03-.3381 (amended 1995).

82. See Fla. H.R. Staff Analysis, *supra* note 51, at 2, 3; Florida Senate Staff Analysis, *supra* note 59, at 2, 3; see also Charles W. Murphy, Public Service Commission Practice, 69 FLA. B.J. 30, 31 (1995) (describing required and recommended method of practice for utility appearing before PSC); *United Tel. Co. of Fla. v. Mayo*, 345 So. 2d 648, 653 (Fla. 1977) (holding that company's rate of return cannot be so low as to confiscate its property, nor so high as to be unreasonable).

examined the incumbent LECs' operating expenses and capital investments in computing the appropriate rates.<sup>83</sup> Once the PSC had promulgated the rates, the incumbent LECs could not change them without the express approval of the PSC.<sup>84</sup>

In 1990, in response to the national trend toward deregulating the telecommunications industry, the Legislature significantly amended chapter 364 to encourage competition within the local exchange market.<sup>85</sup> The Legislature instructed the PSC to "[e]ncourage cost-effective technological innovation and competition[,] . . . [e]nsure that all providers of telecommunications services are treated fairly, . . . [and] [r]ecognize the continuing emergence of a competitive telecommunications environment through the flexible regulatory treatment of competitive telecommunications services. . . ."<sup>86</sup> To empower the PSC to achieve its command, the Legislature delegated to the commission the authority to eliminate rate-of-return regulation and allow market conditions to control prices when the PSC determined that effective competition existed.<sup>87</sup> Unfortunately, the PSC seldom employed the alternative provisions and, despite the intent of the Legislature, the incumbent LEC monopolies continued to thrive.<sup>88</sup>

### III. THE CALL FOR REFORM

As discussed earlier, the MFJ's divestiture of the BOCs from AT&T was based upon the theory that a complete vertical severance of the companies' business relationship would prevent AT&T from monopolizing the various established and emerging telecommunications markets.<sup>89</sup> The MFJ allowed AT&T to compete for long-distance and other competitive services while the RBOCs and other LECs retained a monopoly over local exchange services.<sup>90</sup> However, a variety of post-divestiture developments rendered the MFJ's underlying logic hollow and raised the call for deregulation of the entire telecommunications industry. These developments included the notable success of competition in the long-distance market, the erosion of the RBOCs' line-of-business

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83. FLA. STAT. § 364.05 (1995).

84. FLA. STAT. § 364.035 (1993) (amended 1995).

85. See 1990 Fla. Laws ch. 90-244.

86. FLA. STAT. § 364.01(3)(c)-(e) (1993) (amended 1995).

87. *Id.* § 364.01 (amended 1995).

88. See Dunbar, *supra* note 37, at 682-91 (criticizing PSC's inaction as contributing to continued monopolization of local exchange services).

89. See discussion *supra* part II.A.2.b.

90. See *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 222-24 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

restrictions, advancements in telecommunications technology, the existence of potentially viable competition for local exchange services, and the ability of regulators to ensure universal service and consumer protection in a competitive local exchange environment.

#### A. The Competition for Long-Distance Services

At the time of the divestiture, two major corporations and a host of other telecommunications companies were primed to compete against AT&T in the long-distance market.<sup>91</sup> The ensuing battle between AT&T, MCI, Sprint Corporation, and nearly 500 other companies resulted in substantial benefits to consumers.<sup>92</sup> These benefits included a dramatic decline in long-distance rates and technological advancements in the telecommunications infrastructure.<sup>93</sup>

The most recognizable benefit to consumers attributable to competition was the initial decrease of approximately forty percent in long-distance rates in the decade following divestiture.<sup>94</sup> The fact that this decrease occurred concurrently with an increase in consumer long-distance calls underscores the significance of the statistic.<sup>95</sup> Since 1992, however, basic rates have slowly increased as AT&T, MCI, and Sprint have separated from the other long-distance companies to capture ninety percent of the market.<sup>96</sup> Therefore, following a period of competition between many companies, an effective oligopoly has come to dominate the long-distance market. Congress believes that the infusion of new competitors—namely the RBOCs and cable companies—into the

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91. Joseph A. Pantoja, *Desirable Economic Cooperation Among High-Technology Industries: A Look at Telephone and Cable*, 1994 COLUM. BUS. L. REV. 617, 651 (1994).

92. *Antitrust Issues in Telecommunications Legislation: Hearings Before the Subcomm. on Antitrust, Business Rights and Competition of the Senate Comm. on the Judiciary*, 104th Cong., 2d Sess. (1995) (statement of Howard H. Baker, U.S. Senator from Tennessee) [hereinafter Baker Statement].

93. Michael Schrage, *Let the Baby Bells Ring in Some Long-Distance Rivalry*, WASH. POST, Aug. 20, 1993, at B3 (describing decrease in long-distance basic rates); Dennis & Epstein, *supra* note 17, at \*44 (describing expensive advancements to telecommunications infrastructure).

94. Pantoja, *supra* note 91, at 651; Schrage, *supra* note 90, at B3. Senator Howard H. Baker said the decrease in long-distance rates following divestiture was almost 70 percent. Baker Statement, *supra* note 92.

95. See Schrage, *supra* note 93, at B3 (noting that “[p]eople are making more calls for less money”).

96. Gautam Naik, *Costs of Control: Long-Distance Rates, After Falling for Many Years, Have Started Heading Higher*, WALL ST. J., Mar. 20, 1995, at R10. AT&T’s share of the long-distance market is approximately 60 percent, MCI’s is about 20 percent, and Sprint’s is roughly 10 percent. *Id.*

long-distance market will again result in substantial benefits to consumers.<sup>97</sup>

Consumers also will benefit because competition results in exorbitantly expensive upgrades by the long-distance companies to their telecommunication infrastructures.<sup>98</sup> Indeed, the major companies have invested billions of dollars in the installation of all-digital and fiber-optic networks.<sup>99</sup> These advanced networks have the capacity to transmit voice, video, and data with amazing clarity and speed.<sup>100</sup> Consumers stand to benefit because these systems pave the way to an information superhighway without speed limits. Notably, consumer long-distance rates have continued to fall despite the remarkably high capital costs absorbed by the competing long-distance companies.<sup>101</sup>

Congress noticed the effect competition had in the long-distance market and wagered that the deregulation of the local exchange market would result in analogous consumer benefits.<sup>102</sup> As noted by Senator Howard W. Baker, “[t]here is a big lesson in the long-distance story—competition works and monopoly doesn’t.”<sup>103</sup>

#### B. The Erosion of the RBOC Line-of-Business Restrictions

As previously discussed, the MFJ imposed three line-of-business restrictions on the RBOCs.<sup>104</sup> It prohibited the RBOCs from providing long-distance services, manufacturing telecommunications equipment, and furnishing information services.<sup>105</sup> The restrictions were premised upon the belief that the provision of local exchange services was a natural monopoly, and that the RBOCs and other LECs, as possessors of the monopoly, should not be permitted to gain an unfair advantage in competitive markets by providing discriminatory access to the local networks.<sup>106</sup> Although Judge Greene sanctioned the LEC monopolies, he also recognized that, “over time, the Operating Companies will lose

97. See Baker Statement, *supra* note 92.

98. Dennis & Epstein, *supra* note 17, at \*44.

99. *Id.*

100. See KEVIN MANEY, MEGAMEDIA SHAKEOUT 108-09 (1995).

101. Basic rates for long-distance service decreased from 1983 to 1991, while AT&T began building fiber-optic networks in 1984. See Dennis & Epstein, *supra* note 17, at \*44-45 (discussing years of construction for advanced networks); Naik, *supra* note 96, at R10 (discussing years that long-distance rates began to increase).

102. See Baker Statement, *supra* note 92.

103. See *id.*

104. See discussion *supra* part II.A.2.b.

105. *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 224 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

106. *Id.*

the ability to leverage their monopoly power into the competitive markets from which they must now be barred."<sup>107</sup>

The MFJ required a triennial review during which the RBOCs could petition the court for modification of the line-of-business restrictions.<sup>108</sup> These reviews resulted in endless litigation as the RBOCs attempted to enter the restricted telecommunications markets.<sup>109</sup> Accordingly, the information services restriction gradually eroded as the RBOCs demonstrated that there was no substantial possibility they would or could use their monopoly power to impede competition.<sup>110</sup> During the first triennial review in 1987, Judge Greene modified the restriction on the provision of information services to allow the RBOCs to transmit information generated by non-RBOC sources.<sup>111</sup> In 1988, the court explained that the ruling of the previous year allowed the RBOCs to provide voice storage systems and the circuits needed for videotext systems such as WESTLAW and LEXIS.<sup>112</sup> Finally, in 1993, the court entirely abolished the information services restriction and authorized the RBOCs to provide such services on a fully competitive basis.<sup>113</sup>

The line-of-business restrictions regarding long-distance services and the manufacture of telecommunications equipment continued to survive.<sup>114</sup> However, commentators called for the elimination of these restrictions, arguing that advancements in technology and the emergence of viable competition for local exchange services were incongruous with the notion that the LECs were natural monopolies.<sup>115</sup> Eventually, the elimination of the information services restriction and the erosion of the natural monopoly rationale contributed to Congress's deregulation of local exchange services.<sup>116</sup>

### C. New Technologies and Viable Competition

The exclusive right to provide local exchange services given to the RBOCs and other LECs by the MFJ was based partially upon the theory that other telecommunications companies could not

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107. *Id.* at 194.

108. *Id.* at 231.

109. Spulber, *supra* note 40, at 27.

110. See *American Tel. & Tel. Co.*, 552 F. Supp. at 224-25.

111. *United States v. Western Elec. Co.*, 673 F. Supp. 525, 587 (D.D.C. 1987).

112. *United States v. Western Elec. Co.*, 714 F. Supp. 1, 22 (D.D.C. 1988).

113. *United States v. Western Elec. Co.*, 993 F.2d 1572, 1578 (D.C. Cir. 1993); see Spulber, *supra* note 40, at 227.

114. See Spulber, *supra* note 40, at 227.

115. See, e.g., *id.*; Friedrich, *supra* note 14, at 684-88; William J. Baumol & J. Gregory Sidak, *The Pricing of Inputs Sold to Competitors*, 11 *YALE J. ON REG.* 171 (1994).

116. See *The Telecommunications Agreement*, 104-8 CONG. Q. HOUSE ACTION REP. 3 (1996).

replicate the local networks.<sup>117</sup> Judge Greene theorized that the enormous costs necessary to construct the local networks were an all-powerful barrier to market entry for potential local exchange competitors.<sup>118</sup> Consequently, in lieu of competition, the MFJ sanctioned government regulation of the local exchange monopolies and authorized the LECs to charge fees to the various telecommunications companies desiring access to homes and businesses.<sup>119</sup>

The concept that local exchange network construction costs prohibited competition arose during a time when there was only one telecommunications technology.<sup>120</sup> The telecommunications systems of the early 1980s consisted of twisted pairs of copper wire for voice-grade transmissions, rudimentary central switching equipment, and basic customer premises equipment.<sup>121</sup> Today's technology has advanced to the point where there are numerous forms of telecommunications systems that can facilitate cost-effective competition for local exchange services.<sup>122</sup>

The copper wire networks used by the LECs for voice transmissions now appear completely incapable of meeting modern society's telecommunications demands.<sup>123</sup> Today's consumers require systems with the ability to rapidly send and receive voice, data, and video transmissions.<sup>124</sup> These needs can presently be satisfied through a variety of technologies, including coaxial cable, fiber-optic cable, microwave, satellite, and cellular communications networks.<sup>125</sup> Furthermore, modern digital switching equipment can efficiently serve consumers' interconnection needs to a much greater extent than the LECs' antiquated, centrally located switching equipment.<sup>126</sup>

The myriad technologies presently possessed by potential local exchange competitors offer a variety of means to avoid the LEC network bottleneck. Potential competitors can use coaxial and fi-

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117. See *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 223 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

118. *Id.*

119. See *id.* at 131.

120. Spulber, *supra* note 40, at 34-38.

121. *Id.* at 34-35.

122. See *infra* note 122 and accompanying text .

123. Spulber, *supra* note 40, at 35.

124. *Id.* at 35.

125. *Id.* The needs of modern consumers cannot be satisfied through a single best telecommunications technology, but instead require an array of technologies. *Id.* Thus, the competing telecommunications companies of the future will provide a variety of telecommunications services, as opposed to the traditional and rudimentary services of telephone, television, and data. *Id.* at 35-36.

126. *Id.* at 35.

ber-optic cable systems to "bypass" the local exchange networks.<sup>127</sup> As of 1993, approximately ninety-one million homes were wired with coaxial or fiber-optic cable lines as a means of receiving cable television.<sup>128</sup> In addition to basic voice-grade transmissions, these lines permit the rapid, high-quality, two-way transmission of data and video communications.<sup>129</sup> With the addition of modern switching equipment, cable operators such as Tele-Communications Inc. (TCI), Comcast, and Time Warner could effectively compete with the local exchange monopolies.<sup>130</sup> Although the required switching equipment is expensive,<sup>131</sup> cable companies should nevertheless be able to offset the costs with returns on their television services. Consequently, cable companies will be in a position to compete efficiently with the LECs.

Another type of bypass technology is the alternative local fiber-optic network employed by competitive access providers ("CAPs"). CAPs, such as Teleport Communications and Metropolitan Fiber Systems, construct their own local telephone infrastructures in regions where the LEC networks already exist.<sup>132</sup> The CAP networks allow consumers to avoid the LEC bottlenecks by connecting directly to the networks of long-distance and other telecommunications carriers.<sup>133</sup> Because of the high capital costs of building redundant local networks, CAPs achieve profits by serving commercial facilities with high-volume communications needs.<sup>134</sup>

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127. *Id.* at 39; Dunbar, *supra* note 37, at 675-77.

128. Spulber, *supra* note 40, at 38. Cable television companies were originally humble operations that were limited to providing community antenna television services (CATV). Eric T. Werner, *Something's Gotta Give: Antitrust Consequences of Telephone Companies' Entry into Cable Television*, 43 *FED. COMM. L.J.* 215, 217-18 (1991). In those early years, the FCC feared that predatory telephone companies had the ability to monopolize the emerging industry. *Id.* Accordingly, the FCC passed rules in the 1970s restricting telephone companies from entering the market. *Id.* Congress later codified most of the FCC rules as part of the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified in scattered sections of 47 U.S.C.).

129. Spulber, *supra* note 40, at 39. A coaxial cable modem hooked to a personal computer can transmit data at a rate up to 1,000 times faster than a phone line. MANEY, *supra* note 100, at 109.

130. Pantoja, *supra* note 91, at 650-57; Friedrich, *supra* note 14, at 674.

131. MANEY, *supra* note 100, at 108.

132. See Alexander C. Larson & Douglas R. Mudd, *Collocation and Telecommunications Policy: A Fostering of Competition on the Merits?*, 28 *CAL. W. L. REV.* 263, 265 n.5 (1993); Friedrich, *supra* note 14, at 675; Spulber, *supra* note 40, at 44; Dennis & Epstein, *supra* note 17, at \*46.

133. See Larson & Mudd, *supra* note 132; Friedrich, *supra* note 14, at 675; Spulber, *supra* note 40, at 44; Dennis & Epstein, *supra* note 17, at \*46.

134. Thus, the goal of the CAP is known as "cream skimming." Larson & Mudd, *supra* note 132, at 287-91.

Finally, a variety of wireless networks allow consumers to communicate directly with one another and avoid the wired LEC networks.<sup>135</sup> These wireless systems enjoy special advantages over not only the LEC systems, but all wire-based systems. One advantage of the wireless technologies (i.e., radio, cellular, microwave, and satellite telecommunications) is that they are cheaper because their providers are not required to construct and maintain extensive hard-wired systems.<sup>136</sup> Additionally, wireless technologies make communications portable.<sup>137</sup>

Two types of wireless technologies are cellular systems<sup>138</sup> and personal communications services (PCS).<sup>139</sup> These technologies provide mobile radio communications services that are not dependent upon hardwire technologies.<sup>140</sup> Both technologies compete with the various broadcasting media for portions of the radio frequency spectrum.<sup>141</sup> Until recently, the scarcity of radio frequencies allotted to the cellular and PCS networks by the FCC resulted in higher prices for such telecommunications services.<sup>142</sup> In 1993, however, the FCC set aside a larger portion of the radio spectrum for wireless services and began auctioning the frequencies.<sup>143</sup> Upon completion of the auctions, cellular and PCS networks

135. See Friedrich, *supra* note 14, at 667-78; Spulber, *supra* note 40, at 40-41.

136. See Friedrich, *supra* note 14, at 673; Dunbar, *supra* note 37, at 677 n.89.

137. MANEY, *supra* note 100, at 53. "Portability" refers to the capability of consumers to access telecommunications services anywhere and at all times, free from a wire-based system. *Id.* The most fantastic example of a portable wireless telephone system is Motorola's proposed Iridium satellite phone system, which will "allow calls to be made from absolutely anywhere in the world, even in the middle of the Sahara Desert." *Id.* This system will consist of 66 low-orbit satellites that possess the combined ability to convey a signal to any point on the globe. *Id.* Special antennae constructed around the earth will receive the satellites' signals. *Id.* Thus, to complete the Iridium venture, Motorola will need the consent and cooperation of the governments of hundreds of countries. Needless to say, "Iridium is an unbelievably huge undertaking." *Id.* at 294.

138. Cellular networks consist of a series of interlocking cells, each of which contains one radio transceiver for telecommunications transmissions. Friedrich, *supra* note 14, at 662. Central switching services link these transceivers to wired telephone systems. *Id.* at 663. Thus, cellular technology is an extension of wire-based technology. *Id.* at 663-64.

139. PCSs employ microcellular technology, which is less expensive than cellular technology but also less powerful. *Id.* at 671. PCS companies shoulder large capital costs to install their networks. *Id.* However, once a PCS network is in place, these capital costs rapidly decrease as the marginal costs of adding subscribers to a PCS network are significantly lower than the costs of adding subscribers to the traditional local exchange network. *Id.* at 672-73.

140. See Richard E. Wiley, *The Telecommunications Act of 1995?*, in PRACTICING LAW INST., COMMUNICATIONS LAW: 1995 (Patents, Copyrights, Trademarks, & Literary Property Course Handbook Series No. G4-3945) (Nov. 1995), available in WESTLAW, PLI Database, at \*50-53.

141. Friedrich, *supra* note 14, at 662-63.

142. *Id.*

143. *Id.* at 671.



will be able to provide telephone services to consumers at reduced rates and will thus effectively compete with the LECs.<sup>144</sup>

Many commentators think that the efficient and convenient wireless technologies will ultimately dominate telecommunications services as the hardwire networks find themselves unable to meet consumer demands.<sup>145</sup> Underscoring this belief is the fact that wireless communication services had 15 million subscribers in 1994, and are expected to have 80 million subscribers by 1997 and 145 million subscribers by 2002.<sup>146</sup> One confident observer believes that “[i]n the near future, wireless technology will be the clear choice for local communications.”<sup>147</sup>

#### D. Universal Service and Consumer Protection

The central purposes underlying the regulation of telecommunications historically have been the provision of universal communications services and the protection of consumers.<sup>148</sup> The universal service policy goal ensures that consumers receive a minimum level of telephone services at a reasonable price, regardless of their location.<sup>149</sup> Consumer protection policies guard against unjust and discriminatory practices within the telecommunications industry.<sup>150</sup> Mindful of the fundamental nature of each of these policies, Congress amended the Communications Act to require that any deregulation of the local exchange market preserve the provision of universal service and the protection of consumers.<sup>151</sup>

Before 1996, federal and state telecommunications regulations funded universal service by subsidizing the LEC services provided to rural and other economically undesirable areas.<sup>152</sup> In reforming the telecommunications laws, however, legislators

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144. *Id.*

145. See, e.g., Gail Garfield Schwartz & Jeffrey H. Hoagg, *Virtual Divestiture: Structural Reform of an RHC*, 44 *FED. COMM. L.J.* 285, 294 (1992); Spulber, *supra* note 40, at 38-40; Friedrich, *supra* note 14, at 669-74.

146. Spulber, *supra* note 40, at 40.

147. Friedrich, *supra* note 14, at 674.

148. See 47 U.S.C. §§ 151-613 (1994); see also *WOKO, Inc. v. FCC*, 109 F.2d 665, 671 (D.C. Cir. 1939) (holding that the policy of the Communications Act of 1934 is the public's protection).

149. Wiley, *supra* note 140, at \*12.

150. *MCI Comm. Corp. v. American Tel. and Tel. Co.*, 462 F. Supp. 1072, 1087 (D. Ill. 1978).

151. See H.R. CONF. REP. NO. 458, 104th Cong., 2d Sess. 130-34 (1996).

152. Dennis & Epstein, *supra* note 17, at \*59. These subsidies commonly came in two forms. First, the federal government allowed the LECs to charge fees the long-distance companies seeking access to the local exchange network. *Id.* at \*60. Second, state governments had the ability to allocate a portion of the costs of maintaining the local exchange network to the long-distance companies operating within the state. *Id.* at \*60-61.

faced the problem of how to continue universal service in an era of deregulation.<sup>153</sup> To harmonize the seemingly incompatible goals of deregulation and universal service, lawmakers proposed two mechanisms. First, the contributions of all local exchange service providers could create a "universal fund," with the proceeds delivered to those companies operating in locations that require subsidization.<sup>154</sup> Second, Congress could require the LECs to remain in rural areas as carriers of last resort and authorize them to charge other telecommunications companies with interconnection access fees.<sup>155</sup>

Before 1996, universal services consisted of single-line, voice-grade telephone services, long-distance carrier connections, and 911 access.<sup>156</sup> However, the advent of competition brings the technological ability to provide consumers with a wide array of telecommunications services.<sup>157</sup> Thus, a second problem faced by the lawmakers who desired to eliminate the LECs' monopoly was deciding what type of local exchange services must be provided universally.<sup>158</sup> One proposed solution was to allow the federal and/or state governments to continually assess which telecommunications services could be provided universally and then mandate the provision of such services.<sup>159</sup>

The deregulation of the local exchange market also prompted lawmakers to consider additional consumer protection measures. Some proposals placed disclosure requirements on the competing telecommunications companies to facilitate the informed selection of local exchange providers by consumers.<sup>160</sup> Other proposals mandated that companies supply to consumers general information concerning the deregulation of the local exchange market.<sup>161</sup> The latter measures were thought to be necessary because of the

153. Wiley, *supra* note 140, at \*12; Dennis & Epstein, *supra* note 17, at \*62.

154. Wiley, *supra* note 140, at \*13; FLA. S. COMM. ON COM. & ECON. OPP., A REVIEW OF TELECOMMUNICATIONS TECHNOLOGY AND REGULATION, 14-15 (1994) (on file with comm.) [hereinafter TELECOMMUNICATIONS TECHNOLOGY AND REGULATION].

155. TELECOMMUNICATIONS TECHNOLOGY AND REGULATION, *supra* note 154, at 14.

156. *Id.* at 15; Dennis & Epstein, *supra* note 17, at \*64-65.

157. Dennis & Epstein, *supra* note 17, at \*65.

158. For example, should public policy dictate that LECs provide all consumers the telecommunications technology necessary for the transmission of video, data, and interactive services? Wiley, *supra* note 140, at \*12.

159. *Id.* at \*13 (stating that congressional proposals divided the task between federal and state "joint boards"); TELECOMMUNICATIONS TECHNOLOGY AND REGULATION, *supra* note 154, at 15 (recommending that the task be performed by state commissions).

160. TELECOMMUNICATIONS TECHNOLOGY AND REGULATION, *supra* note 154, at 15.

161. *Id.*

considerable confusion among consumers following deregulation of the long-distance market in 1984.<sup>162</sup>

#### IV. CONGRESS REACTS: THE TELECOMMUNICATIONS ACT OF 1996

Today our world is being remade . . . by an information revolution, changing the way we work, the way we live, the way we relate to each other. Already the revolution is so profound that it is changing the dominant economic model of the age. And already, thanks to the scientific and entrepreneurial genius of American workers in this country, it has created vast, vast opportunities for us to grow and learn and enrich ourselves in body and in spirit.

. . . But this revolution has been held back by outdated laws, designed for a time when there was one phone company, three TV networks, no such thing as a personal computer. Today, with the stroke of a pen, our laws will catch up with our future. We will help to create an open marketplace where competition and innovation can move as quick as light.<sup>163</sup>

The call to reform telecommunications regulation resulted in the passage of the Telecommunications Act of 1996.<sup>164</sup> This legislation represents Congress's first comprehensive revision of telecommunications law since the passage of the Communications Act of 1934. Congress generally intended the 1996 Act to stimulate further competition and technological advancements in the telecommunications industry and to provide the public with a greater variety of telecommunications services.<sup>165</sup>

The scope of the legislation is enormous. The Act abolishes the legal obstructions that prevented the various telecommunications companies from competing in other markets.<sup>166</sup> It also eliminates

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162. *Id.*

163. President Bill Clinton, Remarks at the Signing Ceremony for the Telecommunications Act Conference Report of 1996 (Feb. 9, 1996). The signing ceremony was appropriately located at the Library of Congress. *Id.*

164. Pub. L. No. 104-104, 110 Stat. 56 (1996) (to be codified in scattered sections of 47 U.S.C.). The Act is the product of a conference agreement between the Senate and the House of Representatives. The Senate passed its bill (S. 652) in June 1995, by a vote of 81 to 18. Edmund L. Andrews, Senate Approves Far-Reaching Bill on Media Industry, *N.Y. TIMES*, June 15, 1995, at A1. The House passed its version of the measure (H.R. 1555) in August 1995, by a vote of 305 to 117. Mark Landler, House Passes Bill Curtailing Rules on Phones and TV, *N.Y. TIMES*, Aug. 4, 1995, at 1. President Clinton signed the resulting conference agreement into law on February 8, 1996. Edmund L. Andrews, Communications Bill Signed, And the Battles Begin Anew, *N.Y. TIMES*, Feb. 9, 1996, at A1.

165. See 142 CONG. REC. E204 (daily ed. Feb. 1, 1996) (statement of Rep. Forbes); 142 CONG. REC. S686, S686-87 (daily ed. Feb. 1, 1996) (statement of Sen. Pressler); 142 CONG. REC. S1172 (daily ed. Feb. 9, 1996) (statement of Sen. Lott).

166. See 47 U.S.C.A. §§ 251-61 (West Supp. 1996).

the remaining line-of-business restrictions that precluded RBOCs from providing long-distance services and manufacturing telecommunications equipment.<sup>167</sup> The legislation deregulates the cable television industry<sup>168</sup> and removes all restrictions relating to the ownership of television and radio stations.<sup>169</sup> It censors obscenity and violence on television and computer networks.<sup>170</sup> Furthermore, the Act abolishes all consent decrees regarding the regulation of telecommunications, including the MFJ.<sup>171</sup> Finally, the Act preempts all state and local laws that impede the congressional goal of competition in the telecommunications industry.<sup>172</sup>

This Comment explores only those provisions of the Act which implicate the breakdown of the local exchange monopolies. The Act generally seeks to foster local exchange competition by requiring the incumbent LECs to allow competing alternative LECs to use to their networks<sup>173</sup> and prohibiting state and local governments from inhibiting competition.<sup>174</sup> The following section will detail the Act's equal access requirements, the measures that ensure continued provision of universal service, the abolition of the MFJ, and the preemption of state and local regulations that operate as barriers to market entry.

#### A. Equal Access Requirements

To facilitate competition for all telecommunications services, the Act imposes a general duty of network interconnection upon telecommunications carriers.<sup>175</sup> Carriers must provide this network interconnection on a nondiscriminatory basis and may not impose features that would inhibit the seamless transmission of

167. *Id.* §§ 271-74. The line-of-business restrictions that bar the incumbent LECs from providing long-distance services and equipment manufacturing are continued until actual competition is present within the local exchange.*Id.*

168. *Id.* § 521-573.

169. Pub. L. No. 104-104, 110 Stat. 56, 110-112 (1996) (uncodified directive to FCC to amend their broadcasting regulations).

170. 47 U.S.C.A. §§ 223, 303. (West Supp. 1996). This Comment does not explore the Act's patent infringement upon the freedom of expression guaranteed by the First Amendment. See *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 883 (E.D. Pa. 1996) (preliminarily enjoining Department of Justice from enforcing sections 223(a)(1)(B), 223(a)(2), and 223(d)(1)-(2) of Act).

171. Pub. L. No. 104-104, 110 Stat. 56, 143-144 (1996) (uncodified elimination of various consent devices).

172. 47 U.S.C.A. § 253 (West Supp. 1996).

173. *Id.* § 251.

174. *Id.* § 253.

175. *Id.* § 251(a)(1). Essentially, "interconnect" refers to the interface of telecommunications systems.

information across networks.<sup>176</sup> The Act authorizes the FCC to promulgate rules to effectuate “coordinated network planning.”<sup>177</sup>

The Act also imposes certain pro-consumer requirements upon all LECs.<sup>178</sup> Coincident to the provision of telecommunications services, local carriers must ensure “number portability.”<sup>179</sup> Number portability refers to the ability of consumers to change their carrier while retaining their unique telecommunications identifier (i.e., telephone number).<sup>180</sup> The local carriers also must provide “dialing parity,” which ensures that the customers of competing alternative LECs are not required to dial more numbers to access other telecommunication networks than the customers of the incumbent LECs.<sup>181</sup>

Additionally, all LECs must meet certain minimum requirements designed to advance local exchange competition. First, local carriers must provide their services for “resale” to competing carriers.<sup>182</sup> This measure allows the competing carriers to purchase bundled or consolidated telephone services at wholesale prices and resell them to individual customers at retail rates.<sup>183</sup> The local carriers must provide equal access to competing carriers that need the use of the local carrier’s poles, ducts, conduits, and rights-of-way to connect with the existing local network.<sup>184</sup> Finally, the competing carriers must provide “reciprocal compensation” agreements with local carriers to ferry and terminate telecommunications traffic.<sup>185</sup>

The Act places additional requirements solely upon incumbent LECs. Congress designed these measures to prevent incumbent LECs from engaging in anti-competitive practices.<sup>186</sup> An incumbent LEC must allow the nondiscriminatory interconnection of an alternative LEC’s equipment and facilities to the existing local exchange network at reasonable rates.<sup>187</sup> Furthermore, an incum-

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176. *Id.* §§ 251(a)(2), 256(a).

177. *Id.* § 256(b).

178. *Id.* §§ 251(b)-(c).

179. *Id.* § 251(b)(2).

180. *Id.* § 153(30).

181. *Id.* §§ 251(b)(3), 153(15).

182. *Id.* § 251(b)(1).

183. See *id.* § 251(c)(4) (explaining analogous resale requirement placed specifically upon incumbent LECs). For example, an alternative LEC can purchase switching services from the incumbent LEC and resell those services to its customers. This facilitates competition by enabling the alternative LEC to provide switched-access services such as call-waiting without having to purchase multi-million dollar switching equipment.

184. *Id.* § 251(b)(4).

185. *Id.* § 251(b)(5).

186. See Wiley, *supra* note 140, at \*10-12.

187. 47 U.S.C.A. § 251(g) (West Supp. 1996).

bent LEC must permit an alternative LEC to physically "collocate" its equipment directly on the premises of the incumbent LEC's central office at a reasonable rate.<sup>188</sup> If physical collocation is not feasible, a state commission may authorize the "virtual" collocation of an alternative LEC's equipment at some other locale.<sup>189</sup> Finally, an incumbent LEC must offer an alternative LEC access to individual or "unbundled" telephone services on reasonable, nondiscriminatory terms and conditions.<sup>190</sup>

### B. Universal Services

As previously stated, the goal of universal service has historically been to ensure that consumers are not denied certain basic telephone services merely because they live in areas deemed by the telecommunications companies to be economically undesirable.<sup>191</sup> The deregulation of the telecommunications industry and the ostensible end of government mandates complicated the achievement of this policy goal.<sup>192</sup> Which services should be provided universally? How should Congress guarantee universal service in a deregulated environment? Who should pay for the provision of services to those locations where profits cannot be earned? Congress addressed these questions in section 254 of the 1996 Act.<sup>193</sup>

Recognizing the dynamic nature of the telecommunications industry, the Act defines universal service as "an evolving level of telecommunications services that the Commission shall establish periodically . . . taking into account advances in telecommunications and information technologies and services."<sup>194</sup> In delineating the services to be provided universally, the FCC must consider four factors beyond the widespread availability of basic telephone services: (1) the extent to which telecommunications services are integral to public education, health, or safety;<sup>195</sup> (2) the range of services that are provided to a majority of residential consum-

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188. *Id.* § 251(c)(6).

189. *Id.*

190. *Id.* § 251(c)(3).

191. See discussion *supra* part III.D.

192. *Id.*

193. 47 U.S.C.A. § 254 (West Supp. 1996).

194. *Id.* § 254(c)(1). FCC Commissioner Andrew Barrett suggested that the industry costs associated with such an expansive definition of universal service could be onerous. FCC Launches Universal Service Joint Board, Rulemaking Proceeding, COMM. TODAY, Mar. 11, 1996, available in WESTLAW, COMTD Database, at \*3.

195. 47 U.S.C.A. § 254(e)(1)(A) (West Supp. 1996).

ers;<sup>196</sup> (3) the range of services offered by the various telecommunications carriers;<sup>197</sup> and (4) the extent to which telecommunications services can serve society's interests, convenience, and needs.<sup>198</sup>

Instead of enacting express mandates to provide universal services, Congress created the "Federal-State Joint Board on Universal Service" (Joint Board) to work with the FCC in studying the attendant issues.<sup>199</sup> The Act charges the Joint Board with considering public comment on the implementation of the universal services goals and proposing recommendations to the FCC to promulgate by rule.<sup>200</sup> The Act also outlines various consumer protection principles that must be incorporated into the FCC's universal service rules.<sup>201</sup> These principles include the provision of services at reasonable rates,<sup>202</sup> nondiscriminatory universal access to advanced services in all locations,<sup>203</sup> and such other consumer protection principles as the Joint Board and FCC deem necessary.<sup>204</sup> In summing up the goals of the Joint Board, FCC Chairman Reed Hundt stated that success "will be measured by whether, five years from now, American citizens . . . have a greater choice of communications providers and services than ever before."<sup>205</sup>

### C. The Abolition of the AT&T Consent Decree

Statutory amendment could not, in itself, achieve true competition for local exchange services. It was necessary that any reforms also address enduring judicial pronouncements. Thus, to be successful, the reforms needed to effectively eliminate the MFJ maintained by the federal district court in the District of Columbia. This was a dangerous task. If Congress classified the MFJ as a final judgment, it would risk unconstitutionally encroaching upon the power of the judiciary if it eliminated the order's retro-

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196. *Id.* § 254(c)(1)(B).

197. *Id.* § 254(c)(1)(C).

198. *Id.* § 254(c)(1)(D).

199. *Id.* § 254(a).

200. *Id.*

201. *Id.* § 254(b).

202. *Id.* § 254(b)(1).

203. *Id.* § 254(b)(2)-(4).

204. *Id.* § 254(b)(7).

205. Hundt Seeks State Input on Universal Service Notice, WASH. TELECOM NEWS, Mar. 4, 1996, available in WESTLAW, ALLNEWS Database, at \*2.

active effect.<sup>206</sup> If Congress determined that the MFJ was a continuing injunction, however, it could constitutionally eliminate the order's prospective effect.<sup>207</sup>

Therefore, to prevent the MFJ from hindering the goals of telecommunications reform, Congress demonstrated its belief that the MFJ was an injunction rather than a final judgment by referring to it throughout the Act as the "AT&T Consent Decree."<sup>208</sup> As an injunction, Congress eliminated only the prospective impact of the MFJ, thus avoiding any potential constitutional problems.<sup>209</sup> Eventually, Judge Greene gladly abolished the retroactive impact of the MFJ upon motions by the Department of Justice and the seven RBOCs.<sup>210</sup>

#### D. Preemption

The final means by which Congress encouraged competition for local exchange services concern the express preemption of restrictive state laws.<sup>211</sup> Before passage of the Act, approximately half of the states maintained laws that strictly forbade any competition for local exchange services.<sup>212</sup> These obstructive laws are now preempted. The Act provides that no state or local law may prevent any entity from providing local telephone services.<sup>213</sup> However, the Act preserves the ability of states to enact laws that ensure, among other things, the provision of universal services, the protection of the public welfare, and the preservation of the quality of telecommunications services.<sup>214</sup> Additionally, state and local governments may continue to manage access and compensation issues related to public rights-of-way.<sup>215</sup>

206. H.R. CONF. REP. NO. 458, 104th Cong., 2d Sess. 198 (1996) (citing *Plaut v. Spenthrift Farm, Inc.*, 115 S. Ct. 1447 (1995)).

207. *Id.* (citing *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992)).

208. *Id.*

209. *Id.* at 91.

210. See DOJ and Bells Agree MFJ is Moot; Fight Over Documents Begins, COMM. TODAY, Mar. 1, 1996, available in WESTLAW, COMTD Database, at \*1. Judge Greene reportedly supports the federal Act and believes it will successfully bring competition to local exchange and long-distance markets. However, he fears that the recent avalanche of mergers and acquisitions in the telecommunications industry could result in a monopolistic concentration of ownership. Ma Bell Judge Backs Telecommunications Bill, NEWSDAY, Feb. 18, 1996, at 5.

211. Congress did not intend for the Act to preempt implicitly any federal, state, or local regulations. H.R. CONF. REP. NO. 458, 104th Cong., 2d Sess. 92 (1996).

212. See The Telecommunications Agreement, 104-8 CONG. Q. HOUSE ACTION REP. 8 (1996).

213. 47 U.S.C.A. § 253(a) (West Supp. 1996).

214. See *id.* § 253(b); see also *id.* § 254(f) (describing the ability of states to promulgate universal service regulations); *id.* § 253(b) (describing the ability of states to impose regulations concerning quality of service and consumer protection).

215. *Id.* § 253(c).



The Act does not specifically describe which types of state or local law risk preemption. Instead, Congress authorized the FCC to identify and suspend the enforcement of any state or local law that hinders competition for local exchange services.<sup>216</sup> Once identified, the FCC will afford state or local governments notice and an opportunity to respond before preemption.<sup>217</sup> However, some state officials are concerned that an aggressive use of the preemptive power delegated to the FCC could stifle the ability of states to facilitate competition and protect consumers.<sup>218</sup> To ease these concerns, FCC Chairman Reed Hundt assured the states that the FCC will use its preemptive authority with restraint and on a case-by-case basis.<sup>219</sup>

#### V. THE LEFTOVERS: NONPREEMPTED FLORIDA TELECOMMUNICATION REFORMS

Before Congress addressed the issue, the Florida Legislature had answered the call to reform the regulation of the local exchange market.<sup>220</sup> On June 17, 1995, a bill amending chapter 364, Florida Statutes, became law without the signature of Governor Lawton Chiles.<sup>221</sup> The legislative intent of the Florida Act is to encourage competition for local exchange services and streamline government regulation.<sup>222</sup> In general, the Florida Act seeks to achieve these goals by authorizing the PSC to certify alternative LECs to compete with incumbent LECs and allowing prices to be regulated by market forces rather than the government.<sup>223</sup>

As previously discussed, certain express provisions of the federal Act preempt state law with respect to the regulation of local exchange markets.<sup>224</sup> For example, the Florida Act provides that no alternative LEC may be certified by the PSC to compete with

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216. *Id.* § 253(d).

217. *Id.*

218. Preemption Concerns Remain, But States View FCC Outreach as Sincere, COMM. TODAY, Feb. 29, 1996, available in WESTLAW, COMTD Database, at \*1.

219. *Id.*

220. See discussion *supra* part III.

221. 1995 Fla. Laws ch. 95-403. This bill easily passed each house of the Florida Legislature. Vicki McCash, *New Law Opens the Lines to Local Phone Competitors*, FT. LAUD. SUN-SENT., June 18, 1995, at 11A. Governor Chiles opposed the bill, fearing that it did not contain enough consumer protection measures. *Id.* The Governor allowed the bill to become law without his signature, however, because he believed the Legislature would override his veto. *Id.*

222. Fla. H.R. Staff Analysis, *supra* note 51, at 2. Upon enactment, Florida became one of only nine states to open its local exchange market to competition. McCash, *supra* note 221, at 11A.

223. FLA. STAT. § 364.337 (1995) (alternative LEC certification section); *id.* § 364.051 (1995) (price regulation section).

224. See discussion *supra* part IV.D.

a “small” incumbent LEC until January 1, 2001, unless the small incumbent LEC elects price regulation or offers cable television services.<sup>225</sup> This provision is undoubtedly subject to preemption by the FCC because the Florida law has “the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”<sup>226</sup> Aside from such an obvious example, it unclear what other sections of the Florida Act may be subject to preemption by the federal Act.<sup>227</sup> The FCC will address the preemption of perceived obstructive state laws on a case-by-case basis.<sup>228</sup>

Should any provision of the Florida Act be preempted, a severability clause will prevent the invalidation of any nonpreempted provisions.<sup>229</sup> Moreover, the federal Act specifically states that certain pro-consumer state laws will not be preempted.<sup>230</sup> The following section will discuss the various nonpreempted, pro-consumer sections of the Florida Act.

#### A. Universal Service

Congress created the Joint Board to study universal service issues and make recommendations for the FCC to promulgate by rule.<sup>231</sup> In contrast, the Florida Legislature chose to codify specific measures designed to ensure universal service.<sup>232</sup> These measures will not be subject to preemption if they are perceived by the FCC to “preserve and advance universal service.”<sup>233</sup>

Like the federal Act, the Florida Act adopts a definition of universal service intended to evolve with technology and the extent of competition within the local exchange market.<sup>234</sup> Unlike the federal Act, the Florida Act defines the scope of the basic services to be provided universally. “Basic local telecommunications service[s]” means the voice-grade transmission of local exchange services, and access to long-distance services, emergency services operator assistance, directory assistance, and a telephone number directory.<sup>235</sup> The Florida Act requires all LECs to supply such ba-

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225. FLA. STAT. § 364.337(1) (1995).

226. 47 U.S.C.A. § 253(a) (West Supp. 1996).

227. See discussion *supra* part IV.D.

228. See *id.*

229. 1995 Fla. Laws ch. 95-403, § 37, at 3350.

230. See discussion *supra* part IV.D.

231. See discussion *supra* part IV.B.

232. FLA. STAT. § 364.025 (1995).

233. 47 U.S.C.A. § 253(b) (West Supp. 1996).

234. FLA. STAT. § 364.025(1) (1995).

235. *Id.* § 364.02(2).

sic services to any person within the LECs' service areas during the four years following enactment.<sup>236</sup>

The Florida Act authorizes the PSC to create a temporary mechanism to fund the provision of universal service for four years following enactment.<sup>237</sup> Before the end of this period, the Legislature will codify a permanent funding mechanism designed to reasonably and equitably guarantee the provision of basic local exchange services to the greatest number of consumers at a fair price.<sup>238</sup> Traditionally, consumers subsidized universal service.<sup>239</sup> Florida law now requires the PSC's temporary mechanism to ensure that alternative LECs contribute their "fair share" to this subsidization.<sup>240</sup> In creating a permanent funding mechanism, the Legislature may opt to avoid the use of subsidies.<sup>241</sup> If the Legislature deems subsidies to be necessary, however, telecommunications service providers will supply the funds.<sup>242</sup>

## B. Consumer Protection

Opponents of the Florida Act believe the Legislature has failed to adequately protect consumers from rapidly escalating rates and unscrupulous business practices.<sup>243</sup> The Legislature and other supporters of the law argue that the Act will lower consumer rates, improve customer service, and increase access to beneficial technology.<sup>244</sup> Accordingly, Representative Scott Clemons, chairman of the Florida House Committee on Telecommunications and Utili-

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236. Id. § 364.025(1).

237. Id. § 364.025(2).

238. Id. § 364.025(4).

239. Fla. H.R. Staff Analysis, *supra* note 51, at 10.

240. FLA. STAT. § 364.025(2) (1995).

241. Id. § 364.025(4)(a).

242. Id. § 364.025(4)(d).

243. Opponents to the Florida Act include Attorney General Robert A. Butterworth, the Public Service Commission, the Florida Consumer Action Network, the American Association of Retired Persons, and the Consumer Federation of America. See John Kennedy, *Phone Deregulation Rife with Uncertainty*, ORLANDO SENT., Nov. 20, 1995, at 10 [hereinafter Kennedy, *Phone Deregulation*]; John Kennedy, *Groups Oppose Phone Measure*, ORLANDO SENT., May 19, 1995, at C3 [hereinafter Kennedy, *Groups Oppose Phone Measure*]; Rene Stutzmand & Michael Griffin, *Communications Bill Gets a Pass—The Law is Expected to Give Floridians a Choice of Local Phone Service Providers, Better Service and Lower Bills*, ORLANDO SENT., June 17, 1995, at A10. Surprisingly, AT&T, soon to be an alternative LEC, also opposed the Florida Act. McCash, *supra* note 221, at 11A. AT&T believed the Act did not fully open the local exchange market to competition. Id. Their concern now appears to be unwarranted because the preemptive federal Act goes further in seeking a fully competitive market. See *id.*

244. See Kennedy, *Groups Oppose Phone Measure*, *supra* note 243, at 11A.

ties, stated, “[p]oint by point, we addressed [the opponents’] issues . . . [and] put in the strongest consumer protections of any state.”<sup>245</sup>

One method by which the Florida Act protects consumers is through the capitation of basic local exchange service rates until 1999.<sup>246</sup> The purpose of rate capitation is to protect consumers from rapidly escalating prices by allowing local exchange competition the time necessary to emerge and establish efficient rate levels.<sup>247</sup> The basic rates for incumbent LECs that elected to be subject to price regulation by January 1, 1996, are capped for three years at the rate levels in effect on July 1, 1995.<sup>248</sup> The incumbent LECs that elect to be subject to price regulation after January 1, 1996, will have the rates in place on that date frozen until January 1, 1999.<sup>249</sup> Finally, the rates of any incumbent LEC owning over three million local service access lines will be capped until January 1, 2001.<sup>250</sup> Southern Bell is the only incumbent LEC large enough to fall within the ambit of the last provision.<sup>251</sup>

The Florida Act instructs the PSC to analyze the extent to which competition exist in the local exchange markets.<sup>252</sup> Based upon its analysis, the PSC must present to the Legislature by December 1, 1997, an exchange-by-exchange recommendation on whether there is a need to continue the capitation of rates.<sup>253</sup> The Legislature may then extend the rate caps an additional two years or abolish them and impose an alternative means of ensuring reasonable and affordable rates.<sup>254</sup> Irrespective of this process, an LEC may petition the PSC for a rate increase if that provider believes a substantial change in circumstances justifies such an action.<sup>255</sup>

Because multiple companies offering local exchange services possibly may confuse the public,<sup>256</sup> a second consumer protection provision requires the PSC to establish a “consumer information program.”<sup>257</sup> This program appraises local exchange subscribers of the availability of alternative providers, the rights of consumers

245. McCash, *supra* note 221, at 11A.

246. FLA. STAT. § 364.051(2) (1995).

247. See Fla. H.R. Staff Analysis, *supra* note 51, at 9.

248. FLA. STAT. § 364.051(2)(a) (1995).

249. *Id.* § 364.051(2)(b).

250. *Id.* § 364.051(2)(a).

251. See Fla. H.R. Staff Analysis, *supra* note 51, at 9.

252. FLA. STAT. § 364.051(3)(b) (1995).

253. *Id.* § 364.051(3)(a).

254. *Id.* § 364.051(3)(c).

255. *Id.* § 364.051(5)(c).

256. See discussion *supra* part III.D.

257. 1995 Fla. Laws ch. 95-403, § 32, at 3348.

under the new law, the role of the PSC in regulating the provision of local exchange services, and any other relevant information.<sup>258</sup> The consumer information likely will be disseminated in the form of telephone bill inserts.<sup>259</sup>

The Florida Act offers an assortment of other consumer protections. Certain local exchange providers must provide a "Lifeline Assistance Plan" to eligible consumers.<sup>260</sup> Furthermore, no LEC employee may intentionally disclose customer information without customer authorization or a subpoena or court order requiring such disclosure.<sup>261</sup> Any employee who violates this provision commits a second-degree misdemeanor.<sup>262</sup> Finally, the Florida Act requires the PSC to submit annual reports to the Legislature describing whether consumers are receiving quality local exchange services at reasonable rates.<sup>263</sup>

## VI. THE FUTURE OF COMPETITION FOR LOCAL EXCHANGE SERVICES

The enactment of federal and Florida telecommunications reforms have spurred a nationwide debate over the acts' probable outcomes. Supporters proclaim that the reforms will create competitive markets, reduce prices for telecommunications services, generate economic growth, encourage technological advancements, and create high-wage jobs.<sup>264</sup> Opponents fear the acts were designed solely to benefit big business at the expense of consumer protection.<sup>265</sup>

The central issue in the debate concerns the probable impact upon consumers and the telecommunications industry of deregulating the local exchange monopolies.<sup>266</sup> Will consumers benefit

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258. *Id.*

259. *Id.*

260. FLA. STAT. § 364.10(2) (1995).

261. *Id.* § 364.24(2).

262. *Id.*

263. *Id.* § 364.386(1)(d).

264. *E.g.*, President Bill Clinton, Remarks at the Signing Ceremony for the Telecommunications Act of 1996 (Feb. 9, 1996); United States Representative Thomas J. Bliley, Jr., Remarks on the Occasion of the President's Signing of the Telecommunications Act of 1996 (Feb. 9, 1996); 142 CONG. REC. H1145-06, H1146 (daily ed. Feb. 1, 1996) (statement of Rep. Linder); 142 CONG. REC. S1172-01 (daily ed. Feb. 9, 1996) (statement of Sen. Lott).

265. *E.g.*, Robert W. McChesney, Telecommunications Law: Corrupt, Disastrous, CAP. TIMES, Feb. 12, 1996, at 1C; Eli M. Noam, Congress Sweeps it All Under One Big Top, L.A. TIMES, Feb. 15, 1996, at 9.

266. *See, e.g.*, Kanell, *supra* note 1, at F5; McChesney, *supra* note 265, at 1C; Noam, *supra* note 265, at 9; Robert Reno, Expect Some Potholes on the Road to Telecommunica-

from lower local exchange rates, an increased number of service providers, and advanced beneficial services? Will the reforms result in the death of the local exchange monopoly and the birth of true and sustained competition? Which companies will be the most successful competitors in the local exchange market? Will the federal and Florida acts require substantial amendment in the future? Although the dynamic nature of the telecommunications industry makes predictions very difficult, the following section analyzes these questions and attempts to provide answers.

### A. The Customer is King

The first noticeable impact of the federal and Florida telecommunications reforms will be a rush of competition by those companies with the near-current ability to provide local exchange services.<sup>267</sup> This competition will result in lower rates and impressive telecommunications packages as the various local exchange companies vie for subscribers.<sup>268</sup> Many commentators expect the "cutthroat" competition to result in rate reductions of twenty to fifty percent from 1996 to 1999.<sup>269</sup> In the event the competition does not result in rate reductions, the rate capitation measures within the Florida Act will prevent the incumbent LECs from raising prices until 1999.<sup>270</sup>

In addition to lowering their rates, competing companies will bundle various telecommunications services and provide subscribers with "one-stop shopping."<sup>271</sup> Consumers will have the ability to receive all their telecommunications needs—including local and long-distance telephone services, cellular services, cable television, Internet access, and other on-line services—from a single carrier.<sup>272</sup> Moreover, the competing companies will package

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tions Reform, MINN. STAR-TRIB., Feb. 19, 1996, at 12A; Edwin Yoder, Feeling Wary About Telecommunications Act; GREENSBORO NEWS & REC., Feb. 7, 1996, at A9.

267. See discussion *infra* part VI.B.

268. Neal Weinberg, Telco Managers Dial for Reform Dollars, COMPUTERWORLD, Feb. 5, 1996, at 1A; Katia Hetter, Dialing for Dollars Consumers Benefits, U.S. NEWS & WORLD REP., Feb. 12, 1996, at 51. The first consumers to experience these benefits will be corporations and individuals residing in areas of high subscriber concentration. Luther Turmelle, Law Gives AT&T Boost in Local Phone Market, COURIER-NEWS, Feb. 9, 1996, at A1 (describing which customers will be among the first to benefit from competition); Shannon Henry, Telecom Supercarriers Set to Battle for Your Business, WASH. TECH., Mar. 7, 1996, available in WESTLAW, WASHTECH Database, at \*4 (predicting that businesses will benefit the most from competition).

269. Weinberg, *supra* note 268, at 1A (quoting James Georgakis, assistant vice president of NatWest Bank); Hetter, *supra* note 268, at 51; Turmelle, *supra* note 268, at A1.

270. See FLA. STAT. § 364.051(2) (1995).

271. Henry, *supra* note 268, at \*1.

272. Hetter, *supra* note 268, at 51.

these services economically to attract consumers.<sup>273</sup> For example, AT&T recently offered a bundled package of Internet and telephone services, through which its current telephone subscribers received five hours of free access to its WorldNet Internet service.<sup>274</sup> The carrier's goal in offering such discounted bundled services will be to create customer loyalty.<sup>275</sup> One AT&T official stated that "[t]here will be a range of offerings this industry has never seen before . . . [a]s much or as little as the consumer wants."<sup>276</sup> Clearly, the valued customer will be king.

### B. Survival of the Fittest

The competing local exchange companies will include long-distance carriers, cable companies, and RBOCs willing to journey into the once-forbidden territories of other LECs. Within only one month of the enactment of the federal Act, AT&T submitted applications to all fifty state telecommunications commissions to provide local exchange services in their respective states.<sup>277</sup> Time Warner Communications applied to provide local exchange services throughout Ohio.<sup>278</sup> Comcast developed plans to offer local exchange services in Florida, California, and New Jersey.<sup>279</sup> BellSouth announced it will expand its operations in Orlando, Florida, to compete with Sprint United, an incumbent LEC.<sup>280</sup> These examples are only the beginning. Fostering competition for local exchange services was the cornerstone of the federal and Florida acts,<sup>281</sup> and the legislation initially will achieve the desired effect.

Once a company such as AT&T or Comcast has received authorization from a state commission to provide local telephone services, most of the new alternative LECs will negotiate with the incumbent LECs for interconnection and collocation with the

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273. Henry, *supra* note 268, at \*2.

274. *Id.*

275. *Id.*; Hetter, *supra* note 268, at 51.

276. Henry, *supra* note 268, at \*3.

277. AT&T Tries for Local Service, ARIZ. REP., Mar. 5, 1996, at C1. AT&T plans to offer local telephone services in some locations by as early as the summer of 1996.*Id.*

278. Alan Johnson, Ameritech Hits Ruling by PUCO, COLUMBUS DISPATCH, Mar. 2, 1996, at 1A.

279. Christopher Stern, Cable Has Uphill Road to Telco Entry, BROADCASTING & CABLE, Feb. 19, 1996, at 58.

280. BellSouth Files to Offer Local Service in Orlando, COMM. TODAY, March 5, 1996, available in WESTLAW, COMTD Database, at \*1.

281. See Noam, *supra* note 265, at 9.

existing local exchange network.<sup>282</sup> Interconnection and collocation negotiations between the incumbent LECs and their competitors promise to be highly contentious processes.<sup>283</sup> The recent legal reforms will not ameliorate the difficulty of these processes because the federal Act merely requires incumbent LECs to negotiate in "good faith."<sup>284</sup> Congress left the specific legal mandates to the FCC to promulgate by rule.<sup>285</sup> However, no matter how arduous the interconnection and collocation negotiations, they will not prevent the onslaught of local exchange competition.<sup>286</sup> Therefore, incumbent LECs are likely to successfully complete the negotiations because the federal Act does not permit them to enter the long-distance market until effective competition exists within their local exchange territory.<sup>287</sup>

With the advent of local exchange competition, the telecommunications industry should experience an incredible era of consolidation, resulting in the birth of multi-billion dollar "telecommunications supercarriers."<sup>288</sup> Two great rewards will prompt acquisitions and mergers among the telecommunications companies. First, consolidation will allow the supercarriers to offer consumers an attractive and diversified package of telecommunications services.<sup>289</sup> Second, the supercarriers will be able to provide their new packages to the combined subscriber populations of the previously independent companies.<sup>290</sup> Such rewards already have influenced a series of high profile, multi-billion dollar mergers. For example, US West, an RBOC, completed the purchase of the nation's third largest cable company, Continental Cablevision, for \$10.8 billion shortly after the federal Act was signed into law.<sup>291</sup> This acquisition gave US West the instant

282. See Stern, *supra* note 279, at 58. Of course, an alternative LEC has the option to construct its own highly expensive local infrastructure to provide local telephone services.

283. *Id.* (discussing difficult negotiation process cable companies will have with incumbent LECs). One jaded cable official predicted the incumbent LECs will only open their markets to competition after "[n]egotiation, regulation, [and] litigation."*Id.*

284. 47 U.S.C.A. § 251(c)(1) (West Supp. 1996).

285. *Id.*

286. See Stern, *supra* note 279, at 58.

287. See 47 U.S.C.A. § 271 (West Supp. 1996).

288. A.T. KEARNEY, AN ASSESSMENT OF THE TELECOMMUNICATIONS ACT OF 1996 AND ITS IMPACT ON COMPETITION AND THE CONVERGING COMMUNICATIONS, INFORMATION, AND ENTERTAINMENT INDUSTRIES 2 (1996) (predicting the Telecommunications Act of 1996 will result in "\$100 billion plus 'convergence companies'"); Henry, *supra* note 268, at \*2; Kanell, *supra* note 1, at F5; McChesney, *supra* note 265, at 1C.

289. See Henry, *supra* note 268, at \*2.

290. *Id.*

291. US West Pursues Cable Strategy with \$10.8 Billion Continental Cablevision, ELECTRONIC MARKETPLACE REP., Mar. 5, 1996, available in WESTLAW, ELMKTPR Data-



ability to provide a broad range of cable and telephone services to 13.9 million subscribers.<sup>292</sup>

Unfortunately, the deregulation of the local exchange market may eventually result in an oligopoly of a small number of telecommunications supercarriers.<sup>293</sup> The competition for local telephone subscribers will be so fierce, and the need to consolidate so strong, that a Darwinian world where only the strongest telecommunications entities survive may indeed become a reality.<sup>294</sup> The deregulation of the telecommunications industry could therefore mirror that of the deregulated airline, banking, and long-distance telephone industries.<sup>295</sup> For example, airline deregulation in the early 1980s eventually resulted in a major consolidation of the industry and the death of once-successful companies such as Eastern and Pan American Airlines.<sup>296</sup> Additionally, the deregulated long-distance market today is dominated by three long-distance giants.<sup>297</sup> This oligopoly will be the future of the local exchange market without effective regulation by the FCC and continuing oversight by Congress.<sup>298</sup> One congressman, mindful of his continuing duty, stated: "If instead of unleashing full blown competition, [telecommunications deregulation] starts us on the path of having seven monopolies dominate local and long-distance service, we must intervene."<sup>299</sup>

### C. Heirs to the Empire

The telecommunications companies that will emerge from the initial burst of competition to inherit the local exchange market

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base, at \*1; Henry, *supra* note 268, at \*5. Another huge consolidation in the industry occurred when SBC Communications Inc. purchased Pacific Telesis Group for approximately \$16 billion. SBC and PacTel Merge to Create Second Largest Telecom Company, *COMM. TODAY*, Apr. 2, 1996, available in WESTLAW, COMTD Database, at \*1-2. Upon the acquisition, SBC Communications became the second largest telecommunications company in the world, behind AT&T. *Id.* Other recent telecommunications consolidations include the Walt Disney Corporation's acquisition of Capital Cities/ABC and the Westinghouse Electric Corporation's acquisition of CBS Inc. *Telecom Mergers Feared*, *TULSA WORLD*, Sept. 14, 1995, at B6.

292. Henry, *supra* note 268, at \*5.

293. See Reno, *supra* note 266, at 12A; Kanell, *supra* note 1, at F5; McChesney, *supra* note 263, at 1C.

294. See Reno, *supra* note 266, at 12A; Kanell, *supra* note 1, at F5; McChesney, *supra* note 263, at 1C.

295. See Reno, *supra* note 266, at 12A.

296. *Id.*

297. See Naik, *supra* note 96, at R10.

298. See Reno, *supra* note 266, at 12A (observing that Congress and the FCC must carefully mind progress of telecommunications deregulation).

299. 142 CONG. REC. E204-02 (daily ed. Feb. 23, 1996) (statement of Rep. Forbes).

must possess certain competitive advantages over their rivals. First, the companies must have respected reputations and well-known names.<sup>300</sup> Brand names give new products and services legitimacy.<sup>301</sup> In an environment where competition had not previously existed, consumers will flock to companies they know and trust.<sup>302</sup> Second, each of the companies must have the ability to quickly secure a share of the local exchange market.<sup>303</sup> Thus, the more successful companies will be those with local networks already in place or the financial resources available to quickly access or build those networks.<sup>304</sup> Third, each of the companies must possess tremendous wealth.<sup>305</sup> Companies will require enormous amounts of investment capital to maintain the technology necessary to compete. The following sections briefly describes those companies with the qualities necessary to dominate the local exchange market.

### 1. AT&T

Shortly following the enactment of the Telecommunications Act of 1996, AT&T Chairman Robert Allen stated that the company expects to control at least thirty percent of the local exchange market within ten years.<sup>306</sup> This prediction is certain to prove true for a number of reasons. First, AT&T has the most extensive telecommunications network in the world.<sup>307</sup> Through this network, AT&T presently provides long-distance services to approximately sixty percent of the subscribers in the United States.<sup>308</sup> AT&T could quickly convert these subscribers to receive its local exchange services as well. Second, the company is incredibly rich. In 1994, AT&T had over \$70 billion in revenue, \$6 billion in operating income, and \$7 billion in cash flow.<sup>309</sup> Thus, AT&T can purchase everything it needs to effectively dominate the local exchange market.<sup>310</sup> Third, AT&T is ultra-competitive.<sup>311</sup>

300. MANEY, *supra* note 100, at 348-49; Henry, *supra* note 265, at \*4.

301. See MANEY, *supra* note 100, at 348 (describing Nextel Communications' association with MCI as a design to attract consumers).

302. *Id.* at 348.

303. Kanell, *supra* note 1, at F5 (predicting that the companies that will thrive in the local exchange market are those that currently have wires in subscribers' homes and businesses).

304. *Id.*

305. See Pantoja, *supra* note 91, at 660.

306. Turmelle, *supra* note 268, at A1.

307. MANEY, *supra* note 100, at 186.

308. Naik, *supra* note 96, at R10.

309. MANEY, *supra* note 100, at 186.

310. *Id.*

311. *Id.*

In anticipation of telecommunication deregulation, the company laid off many employees for efficiency and invested billions of dollars in state-of-the-art technologies.<sup>312</sup> Fourth, AT&T quickly positioned itself to compete for local exchange services in all fifty states.<sup>313</sup> As discussed above, once the negotiations for interconnection and collocation conclude, AT&T will immediately begin to provide local telephone services.<sup>314</sup> To summarize AT&T's position following the recent reforms, "[u]nless it royally screws up, AT&T is the only company that really can't lose."<sup>315</sup>

## 2. Bell Atlantic, BellSouth, SBC Communications, and US West

The RBOCs clearly have the most to lose by deregulation of the local exchange market. With scores of companies prepared to provide local telephone services, the RBOCs, unfamiliar with the art of competition, are certain to lose significant portions of their once-monopolistic empires.<sup>316</sup> However, for three primary reasons, the larger and wealthier RBOCs—such as Bell Atlantic, BellSouth, SBC Communications, and US West—will remain major providers of local exchange services. First, the RBOCs almost exclusively possess the most valuable assets of any of the telecommunications carriers: the local telephone networks. RBOC competitors will need to either construct more comprehensive local networks or access the RBOCs' networks. As mentioned, constructing a local network is expensive, and access to the RBOCs' networks will not occur without a prolonged and costly fight.<sup>317</sup> Second, the local exchange markets are the RBOCs' to lose. Almost every local telephone subscriber in the United States is a customer of an RBOC.<sup>318</sup> Many nervous consumers likely will prefer to maintain the status quo and remain with their regional telephone company rather than switch to a carrier that has never before offered local telephone services. Third, the RBOCs are extremely wealthy. The regional telephone companies have a combined annual revenue of over \$95 billion,<sup>319</sup> cash flow of over \$32

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312. *Id.*

313. AT&T Tries for Local Service, *supra* note 277, at C1.

314. See discussion *supra* part VI.B.

315. MANEY, *supra* note 100, at 186.

316. "[W]hen you have 100 percent of the local dial-tone (business) in the market, there's only one way to go, and that's down." Rene Stutzman, Phone-Service Providers Plan to Answer Call for Competition; Change Expected to Expand Industry by Adding Jobs, *ORLANDO SENT.*, Jan. 8, 1996, at 29 (quoting Sprint/United vice president of finance Rick McRae).

317. Stern, *supra* note 279, at 58.

318. MANEY, *supra* note 100, at 66.

319. Pantoja, *supra* note 91, at 660.

billion,<sup>320</sup> and assets of over \$200 billion.<sup>321</sup> This money would be well-spent by the RBOCs to rapidly update their antiquated copper wire networks into more desirable advanced fiber-optic networks.

### 3. TCI, Time Warner, and Comcast

The nation's largest cable companies, such as TCI, Time Warner, and Comcast, possess three main advantages that will permit them to compete with the telephone companies for local exchange subscribers. First, cable companies currently own more technologically advanced wired networks than their competitors.<sup>322</sup> Compared to the telephone companies' primitive copper wire networks, coaxial cable and fiber-optic cable networks have more desirable transmission capabilities.<sup>323</sup> Second, approximately sixty percent of American households are currently wired for cable television.<sup>324</sup> With the addition of switching equipment, cable companies will quickly possess the ability to compete in the local exchange arena.<sup>325</sup> Third, cable companies are wealthy, albeit not as wealthy as the RBOCs or major long-distance carriers. The annual revenues of the cable companies are approximately \$24 billion, and their assets roughly total \$50 billion.<sup>326</sup> These funds will be necessary to continue to build fiber-optic networks, pay interconnection and collocation fees, and purchase advanced switching equipment.

## VII. CONCLUSION

The recent telecommunications reforms will achieve the goal of bringing competition to the local exchange market. No longer will consumers be forced to receive antiquated local exchange services from a single carrier. In the future, competing global supercarriers will not only provide advanced local exchange services, but also the full array of consumers' telecommunications needs. Be-

320. MANEY, *supra* note 100, at 65-66.

321. Pantoja, *supra* note 91, at 660.

322. MANEY, *supra* note 100, at 112. The major telephone companies do not consider cable companies a threat in the competition for local exchange services. Speaking before a cable television conference, one commentator noted that "cable should remember that 'telephone companies don't look at cable companies as equals. . . . Don't even question [the telephone companies'] manhood.'" Marcia H. Pounds, *Cable's Tough Fight Starts at the Bells*, FT. LAUD. SUN-SENT., Mar. 15, 1996, at 1D.

323. Pantoja, *supra* note 91, at 662.

324. *Id.* at 661.

325. See discussion *supra* part V.C.

326. Pantoja, *supra* note 91, at 661.

cause of the consolidation of the industry and the competitive advantages shared by the major telecommunications companies, however, an era of effective oligopoly eventually will emerge, in which a small number of supercarriers dominate each of the nation's telecommunications markets. Should this state of oligopoly adversely impact consumers and the development of beneficial technologies, Congress must again act. The nation's telecommunications laws must evolve with the telecommunications industry. The Telecommunications Act of 1996 may well need to give way to the Telecommunications Act of 2010.

# FREEING THE LAW: CASE REPORTER COPYRIGHT AND THE UNIVERSAL CITATION SYSTEM\*

JAMES H. WYMAN\*\*

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## I. INTRODUCTION

K. must remember that the proceedings were not public; they could certainly, if the Court considered it necessary, become public, but the Law did not prescribe that they must be made

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public. Naturally, therefore, the legal records of the case . . . were inaccessible to the accused and his counsel, consequently one did not know in general, or at least did not know with any precision, what charges to meet in the first plea; accordingly it could only be by pure chance that it contained really relevant matter.<sup>1</sup>

Franz Kafka

The striking and seemingly sudden rise of the Internet has had a dramatic effect upon public access to information. For a minimal monthly fee—or even for no charge<sup>2</sup>—citizens with a computer and a modem are able to instantly browse anything from their Senator's most recent musings in the Congressional Record<sup>3</sup> to the latest notices of proposed rulemaking in the Federal Register.<sup>4</sup> Perhaps nowhere have the ramifications of such readily available information been as intensely debated as they have been in the legal profession. For twenty years, case law has been electronically available to the bench and bar via the WESTLAW and LEXIS computer-assisted legal research services, albeit at a steep price.<sup>5</sup> The prospect of an extensive body of case law archived on the Internet and inexpensive CD-ROMs has engendered a stormy and sometimes cantankerous debate among information activists, law librarians, and legal publishers.

The courts of this country—for whom “[i]t is emphatically the province and duty . . . to say what the law is”<sup>6</sup>—have slowly begun to promulgate their decisions on “what the law is” over the Internet.<sup>7</sup> In part because of the enterprising offices of several

1. FRANZ KAFKA, *THE TRIAL* 115 (Willa & Edwin Muir trans., Schocken Books 1988) (1925).

2. A number of communities throughout the United States have set up, generally through public libraries, FreeNet systems that provide free access to the Internet. See Rob Pegoraro, *Free; The Info Freeway; On-Line on the Cheap*, WASH. POST, June 28, 1995, at R5.

3. See Search Full Text of the Congressional Record—104th Congress, available at <http://thomas.loc.gov/home/r104query.html> (Aug. 16, 1996).

4. See, e.g., GPO Access on the Web, available at <http://thorplus.lib.purdue.edu/vlibrary/reference/gpo/index.html> (Aug. 16, 1996).

5. Both WESTLAW and LEXIS charge upwards of \$200 per hour for the use of their services. See Susan Hansen, *Fending Off the Future*, AM. LAW., Sept. 1994, at 76.

6. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

7. Although a bulletin board system (BBS) is not strictly a part of the Internet, each U.S. Court of Appeals has a BBS through which decisions can be retrieved for 75 cents a minute. Laura Mansnerus, *Easing Limits on Legal Publishing*, N.Y. TIMES, Oct. 9, 1995, at D5. In addition, many state supreme courts place their opinions on a BBS as well. However, a number of courts delete older cases on their BBSs and replace them with newer cases. Morenike Efundade, *Alternative Case Citation Issue Examined* by Joint DOJ-Judicial Group, U.S. L. WEEK—DAILY ED., May 1, 1995, available in LEXIS, News library, Wires file. Moreover, a BBS can only be accessed by dialing—usually while incurring long distance tolls—a dedicated phone line the court has set up for its BBS. See *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 833-34 (E.D. Pa. 1996).

law schools around the nation,<sup>8</sup> the opinions of the U.S. Supreme Court,<sup>9</sup> all U.S. Courts of Appeals,<sup>10</sup> and over a third of all state supreme courts<sup>11</sup> are now available on the Internet's World Wide Web. Far from providing a complete body of case law to the user, however, these Web sites generally offer opinions dating back a few years at most.<sup>12</sup>

More important, though, is the fact that the opinions on the Internet are virtually useless to anyone who wishes to cite them in a court document.<sup>13</sup> Almost all federal courts and a large number of state courts require citations that contain the page numbers of West Publishing Company's case reporters.<sup>14</sup> Although it is in almost all other respects an outstanding corporate citizen, West's assertion of copyright in its case reporter pagination<sup>15</sup>

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8. See, e.g., Bill Rankin, *Law Libraries: Emory Offering Court Rules*, *Legal Documents*, ATLANTA J. & CONST., Feb. 14, 1996, at D7.

9. Decisions of the U.S. Supreme Court, available at <http://www.law.cornell.edu/supct/supct.table.html> (Aug. 16, 1996) (providing all decisions since 1990).

10. A list of the U.S. Courts of Appeals, the addresses of the Web sites containing their opinions, and the dates of the earliest opinions available may be found in the Appendix to this Comment.

11. As of August 1996, 19 state supreme courts had World Wide Web sites that provided and archived their opinions. A list of these courts, their Web site addresses, and the dates of the earliest opinions available may be found in the Appendix to this Comment.

12. See Proposed Final Judgment and Competitive Impact Statement, *United States v. Thomson Corp.*, 61 Fed. Reg. 35,250, 35,261 (1996) ("The Internet does not provide access to historical opinions.").

13. *Id.* ("[T]he case law offered on the Internet does not provide citations that are accepted by courts or are relied on by attorneys.").

14. See, e.g., D.C. CIR. R. 28(b) ("Citations to decisions of this court shall be to the Federal Reporter."); 3D CIR. R. 28.3(a) ("[C]itations to federal opinions that have been reported shall be to the United States Reports, the Federal Reporter, the Federal Supplement or the Federal Rules Decisions . . ."); MISS. R. APP. P. 28(e) ("[A]ll Mississippi cases shall be cited to both the Southern Reporter and, in cases decided prior to 1967, the official Mississippi Reports."); IND. R. APP. P. 15(C) ("The North [E]astern Reporter shall constitute the official reporter of the Indiana Supreme Court and the Indiana Court of Appeals.").

15. West claims that the pagination in its reporters is a reflection of its copyrighted selection and arrangement of cases and that the use of its page numbers therefore constitutes copyright infringement. See *West Publishing Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1227 (8th Cir. 1986), cert. denied, 479 U.S. 1070 (1987); see also discussion *infra* part III.A. Although West does not claim copyright in its case reporter pagination *per se*, see *Joint Stipulation of Facts* ¶ 31, *Oasis Publishing Co., Inc. v. West Publishing Co.*, 924 F. Supp. 918 (D. Minn. 1996) (No. 3-95-563), for simplicity's sake, this Comment treats West's claim of copyright in its selection and arrangement of cases as if it were a claim of copyright in the pagination of its reporters.

On February 26, 1996, the Thomson Corporation, a diversified Canadian publishing concern, announced that it was purchasing West Publishing Company for \$3.43 billion dollars. See Iver Peterson, *Thomson to Buy Legal Publisher in a \$3.43 Billion Cash Accord*, N.Y. TIMES, Feb. 27, 1996, at D1. The Justice Department gave conditional approval to the purchase on June 19, 1996. See Iver Peterson, *West Publishing Purchase by Thomson is Approved*, N.Y. TIMES, June 20, 1996, at D6. In addition to requiring West to sell off 58 electronic publications, the Justice Department's settlement also requires West to license the pagination of its case reporters. *Id.* The proposed final judgment specifically states, however, that the settlement "should not be read to suggest that . . . a license is required"



precludes the providers of opinions on the Internet and CD-ROMs from including star pagination<sup>16</sup> to the West reporters. The result is clear: the judiciary says “what the law is,” yet drastically limits its unfettered electronic use by requiring citation to case law enshrouded in the copyrighted print volumes of a private vendor. While this limitation may be of little concern to the larger law firms that can afford to conduct electronic legal research via WESTLAW or LEXIS—or for that matter to the judiciary, to whom these services are frequently provided either entirely free or at steep discounts—less well-heeled parties are put at a disadvantage. In the end, the public pays, either through increased legal services costs or less effective legal representation.

This Comment discusses the issues underlying the debate over electronic case law citation. Part II provides an historical background that begins with the seminal case law copyright decisions of the nineteenth century and concludes with the rise of the West Publishing Company and LEXIS. Part III explores West Publishing’s pagination copyright claim, from its recognition by the Eighth Circuit in *West Publishing Co. v. Mead Data Central, Inc.*,<sup>17</sup> to its continuing tenability in light of the U.S. Supreme Court’s 1991 decision in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*<sup>18</sup> and ongoing litigation. Part III also examines the obstacles confronting the possibility of a complete archive of case law on the Internet and the more ready availability of case law on inexpensive CD-ROMs. Part IV explores the alternative, medium-neutral citation systems that have recently been offered and discusses the practical application of such a system, using Florida as an example. Finally, Part V concludes that the judiciary should recognize the changing nature of legal research by moving to adopt a universal citation system that does not favor any particular vendor or medium.

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and that the settlement “shall have no impact whatsoever on any adjudication concerning these matters.” Proposed Final Judgment and Competitive Impact Statement, *United States v. Thomson Corp.*, 61 Fed. Reg. 35,250, 35,251 (1996). The pagination license agreement itself provides for an escalating scale of royalties that begins at a yearly rate of \$.09 per 1,000 characters and increases to a yearly rate of \$.13 per 1,000 characters by the third year. *Id.* at 35,254. Critics have characterized the agreement as being too expensive, and one CD-ROM publisher who does not currently use West’s pagination estimated that a license would increase costs by 20 percent. Richard C. Reuben, *Creating a Gentle Publishing Giant*, A.B.A. J., Aug. 1996, at 22.

16. Star pagination is “a feature whereby a published case . . . includes the internal page breaks from another publisher’s version of the case.” *Oasis Publishing Co., Inc. v. West Publishing Co.*, 924 F. Supp 918, 921 (D. Minn. 1996).

17. 799 F.2d 1219 (8th Cir. 1986), cert. denied, 479 U.S. 1070 (1987).

18. 499 U.S. 340 (1991).

## II. HISTORICAL BACKGROUND

While there are a significant number of legal publishers in the United States, West Publishing Company has, by virtue of the judiciary's case reporter citation requirements, established a de facto monopoly over case law in this country. This notion of a quasi-monopoly is further buttressed by West's aggressive defense of its copyright claim in the pagination of its case reporters. However, the West defense is entirely at odds with the public policy articulated in over 150 years of precedent, and rests solely upon the decision of an Eighth Circuit panel that profoundly underestimated the ramifications of its holding.

### A. The Copyrightability of Case Reporters

#### 1. *Wheaton v. Peters*

The Eighth Circuit's decision to grant copyright protection to West's case reporter pagination<sup>19</sup> was one of the more recent in a long line of case reporter copyright decisions that stretch back to the era of Chief Justice John Marshall.

In 1834, the Marshall Court decided *Wheaton v. Peters*.<sup>20</sup> Richard Peters, Jr. began his tenure as the fourth Reporter of Decisions for the U.S. Supreme Court in 1828.<sup>21</sup> After recognizing the prohibitive cost of owning a complete set of the Court's opinions to date, Peters developed a plan to publish the reports of his predecessors' twenty-five volumes in a condensed six-volume version for less than a third of the price of the originals.<sup>22</sup> Although Peters planned to publish no more than "a 'Digest' of the facts of the Cases and the opinions of the Court,"<sup>23</sup> his immediate predecessor, Henry Wheaton, filed a bill in equity in 1831 alleging copyright infringement and seeking to enjoin Peters from further publication of Peters' Condensed Reports.<sup>24</sup>

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19. See *West Publishing Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219 (8th Cir. 1986), cert. denied, 479 U.S. 1070 (1987); see also discussion *infra* part III.A.

20. 33 U.S. 591 (1834).

21. See Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1358 (1985).

22. *Id.* at 1365.

23. *Id.* at 1367 (quoting Letter from Richard Peters, Jr. to William Cranch (Aug. 14, 1828)).

24. *Id.* at 1370. The first three of the four volumes of Alexander Dallas, the unofficial first Reporter of Decisions who died in 1817, had already entered the public domain. *Id.* at 1366 n.428. The 45 pages of Supreme Court decisions in Dallas' fourth volume were apparently of insufficient interest to his heirs and assigns to warrant litigation. *Id.* William Cranch, the Court's second Reporter of Decisions, agreed to settle with Peters out of court in return for 50 copies of Peters' Condensed Reports. *Id.* at 1369.

Wheaton v. Peters was the Supreme Court's first decision on copyright law.<sup>25</sup> The Court found that rather than sanctioning any existing common law copyright, the Copyright Act of 1790 created a new statutory right.<sup>26</sup> To obtain this statutory right, which Congress created to execute the Copyright Clause of the Constitution,<sup>27</sup> an author had to substantially comply with the Congress's requirements.<sup>28</sup> More important, however, was the Court's pronouncement on what was, as one commentator has put it, the "ultimate question in the case[:] . . . whether [judicial opinions], embodying as they do the law of the land, might be the subject of private property at all."<sup>29</sup> Justice McLean, writing for the majority—and supplying no reasoning or analysis at all—observed in a terse concluding paragraph that "[i]t may be proper to remark that the court are unanimously of [the] opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right."<sup>30</sup>

The Court apparently adopted the reasoning of Peters' counsel. Thomas Sergeant had argued that the Court had supplied its opinions to Wheaton "not for his own sake, but for the benefit and use of the public; not for his own exclusive property, but for the free and unrestrained use of the citizens of the United States."<sup>31</sup> Peters' other counsel, J.R. Ingersoll, was even more blunt:

[I]n all countries that are subject to the sovereignty of the laws, it is held that their promulgation is as essential as their existence. . . . The extended principles of national law . . . are fairly and authoritatively known only as they are promulgated from this bench. It is therefore the true policy, influenced by the essential spirit of the government, that laws of every description should be universally diffused. To fetter or restrain their dissemination, must be to counteract this policy. To limit, or even to regulate it, would, in fact, produce the same effect. Nothing

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25. See L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. REV. 719, 732 (1989).

26. *Wheaton v. Peters*, 33 U.S. 591, 661 (1834).

27. Congress has the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

28. *Wheaton*, 33 U.S. at 664.

29. *Patterson & Joyce*, *supra* note 25, at 733.

30. *Wheaton*, 33 U.S. at 668.

31. *Id.* at 638.

can be done, consistently with our free institutions, except to encourage it and promote it.<sup>32</sup>

The impact of the Court's opinion was sudden and extensive. Where case reports had once been scarce because of the inflated prices charged by the owners of copyrights in the volumes, publishers around the country now raced to put out their own, presumably lower-priced editions.<sup>33</sup> The law was thus more readily available to the citizenry than ever before. Wheaton laid the foundation for the Court's "bedrock policy . . . that the public should have maximum access to the law."<sup>34</sup>

## 2. Callaghan v. Myers

In 1888, the Court affirmed Wheaton in *Banks v. Manchester*,<sup>35</sup> framing its holding denying copyright to the work of an official state reporter as a matter of public policy.<sup>36</sup> The Court had yet to rule, however, upon the thornier question of whether anyone might be entitled to copyright in case reporters as whole. That opportunity came almost immediately. *Callaghan v. Myers*,<sup>37</sup> decided the same term as *Banks*, involved a fact pattern similar to Wheaton. Callaghan & Co. owned the copyright on the first thirty-one volumes of the Illinois Supreme Court Reports, while E.B. Myers owned the copyright on volumes thirty-two through forty-six.<sup>38</sup> Callaghan, wishing to publish a complete set of reports, attempted to buy the rights to the subsequent volumes from Myers.<sup>39</sup> Callaghan refused to pay the price asked by Myers, however, and proceeded to reprint the Myers volumes with, among other things, marginally altered headnotes.<sup>40</sup> Myers sued Callaghan. Despite Callaghan's argument that it had edited the opinions on its own, the circuit court found that the Callaghan

32. *Id.* at 619-20.

33. *Patterson & Joyce*, *supra* note 25, at 734.

34. *Id.* at 742.

35. 128 U.S. 244 (1888).

36. *Id.* at 253;

Judges . . . can themselves have no pecuniary interest or proprietorship, as against the public at large, in the fruits of their judicial labors. . . . The question is one of public policy, and there has always been a judicial consensus, from the time of [Wheaton], that no copyright could, under the statutes passed by [C]ongress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties. The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all . . .

37. 128 U.S. 617 (1888).

38. *Id.* at 619-20.

39. *Id.* at 622.

40. *Id.*

reprints infringed Myers' copyright.<sup>41</sup> The Supreme Court affirmed.<sup>42</sup>

Justice Blatchford's opinion reaffirmed Wheaton, yet held that, in the absence of a statute to the contrary, public policy did not prohibit a reporter of cases from obtaining a copyright to protect his own intellectual property in a volume of law reports.<sup>43</sup> As to which material comprised a reporter's intellectual property, the Court found that this was "the matter not embracing the written opinions of the court, namely, the title-page, table of cases, head-notes, statements of facts, arguments of counsel, and index."<sup>44</sup> In dictum, Justice Blatchford noted:

Such work of the reporter, which may be the lawful subject of copyright, comprehends also the order of arrangement of the cases, the division of reports into volumes, the numbering and paging of the volumes, the table of the cases cited in the opinions, (where such table is made,) and the subdivision of the index into appropriate, condensed titles, involving the distribution of the subjects of the various head-notes, and cross-references, where such exist. A publication of the mere opinions of the court, in a volume, without more, would be comparatively valueless to any one.<sup>45</sup>

Although Justice Blatchford seemed to be announcing that the pagination of case reporters and their arrangement of cases are the lawful subject of copyright, he contradicted this notion later in the opinion when he stated that the Court "concur[red] with the conclusions of [Circuit Court] Judge Drummond."<sup>46</sup> One of those conclusions, quoted approvingly by the Court, was that

[t]he fact appears to be, and, indeed, it is not a subject of controversy, that in arranging the order of cases, and in the paging of the different volumes, [Myer's] edition has been followed by the defendants; but, while this is so, I should not feel inclined, merely on that account, and independent of other matters to give a decree to the plaintiff, although it is claimed that the arrangement of the cases and the paging of the volumes are protected by a copyright. Undoubtedly, in some cases, where are involved labor, talent, judgment, the classification and disposi-

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41. *Id.* at 625.

42. *Id.* at 667. Because Myers had apparently failed to deposit volume 32 for copyright protection by the required deadline of three months following publication, the Court reversed and remanded the circuit court's decree with respect to that volume.*Id.*; see also *id.* at 655.

43. *Id.* at 647.

44. *Id.* at 649.

45. *Id.*

46. *Id.* at 661.

tion of subjects in a book entitle it to a copyright. But the arrangement of law cases and the paging of the book may depend simply on the will of the printer, of the reporter, or publisher, or the order in which the cases have been decided, or upon other accidental circumstances. . . . [T]he arrangement of cases and the paging of the volumes is a labor inconsiderable in itself, and I regard it, not as an independent matter, but in connection with other similarities existing between the two editions . . . .<sup>47</sup>

Professors Craig Joyce and L. Ray Patterson point out that the seeming inconsistency disappears when viewed from a perspective grounded in nineteenth-century copyright theory. Myers' volumes were compilations consisting of distinct elements, and in the nineteenth century, copyright vested " 'in the materials as combined and arranged; in the union of form and substance. Any one may use the same materials in a different combination, or adopt a similar arrangement for different selections.' "<sup>48</sup> Thus, while the Court might have drawn the distinction more clearly, it evidently viewed arrangement and pagination as merely two elements that are not to be considered independently of the work as a whole.

### 3. Banks Law Publishing Co. v. Lawyers' Co-operative Publishing Co.

Unlike Callaghan, the Second Circuit's 1909 decision in *Banks Law Publishing Co. v. Lawyers' Co-operative Publishing Co.*<sup>49</sup> revolved entirely around the issue of copyright in case reporter arrangement and pagination. In 1882, in response to the lack of ready availability of U.S. Supreme Court decisions, the Lawyers' Co-operative Publishing Company (Lawyers' Co-op) decided to utilize a new printing technology involving stereotype plates and produce low-cost sets of Supreme Court reports.<sup>50</sup> The Banks Law Publishing Company published and owned the copyright in the *United States Reports*, the official reporter of the U.S. Supreme

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47. *Id.* at 661-62 (quoting *Myers v. Callaghan*, 20 F. 441, 442 (C.C.N.D Ill. 1884)) (emphasis added).

48. Patterson & Joyce, *Monopolizing the Law*, *supra* note 25, at 739 (quoting EATON S. DRONE, *A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES* 156 (1879)).

49. 169 F. 386 (2d Cir. 1909) (per curiam), appeal dismissed per stipulation, 223 U.S. 738 (1911).

50. THOMAS A. WOXLAND & PATTI J. OGDEN, *LANDMARKS IN AMERICAN LEGAL PUBLISHING* 41 (1990). The need for low-cost sets of Supreme Court opinions was understandable: complete sets of the 103 volumes of the *U.S. Reports* cost 500 dollars in 1882. *Id.* Lawyers' Co-op sold their editions for a dollar per volume.*Id.*

Court.<sup>51</sup> When Lawyers' Co-op began using star pagination to the U.S. Reports in its Lawyers' Edition of Supreme Court cases, Banks sued in equity, alleging infringement via the arrangement of cases, the division into volumes, the table of cases, and star pagination.<sup>52</sup>

Reducing the issue to whether arrangement and pagination were copyrightable, the trial court found for Lawyer's Co-op.<sup>53</sup> The Second Circuit, in a *per curiam* opinion, affirmed the lower court's findings, stating that "the arrangement of reported cases in sequence, their paging and distribution into volumes, are not features of such importance as to entitle the reporter to copyright protection of such details."<sup>54</sup> The court derived this language from the trial judge's opinion, which the Second Circuit adopted as its own.<sup>55</sup> Commenting upon the testimony at trial describing Banks' selection and arrangement of cases, the trial court said:

It is inconceivable to me that to merely arrange the cases in sequence (though concededly the reporter uses good judgment in so doing) and paging the volumes—things essential to be done to produce the volumes—are features or characteristics of such importance as to entitle him to copyright protection of such details. In my estimation no valid copyright for these elements or details alone can be secured to the official reporter. A different question would be presented if, for instance, infringement of the headnotes, or syllabuses, index digest, synopses of arguments or statements of the cases, or an abridgment thereof were claimed.<sup>56</sup>

The trial court then quoted, in full, the Callaghan trial court's remarks concerning arrangement and pagination, which Justice Blatchford had excerpted in his opinion. Remarking upon the significance of Justice Blatchford's approving quotation to the holding in Callaghan, the Lawyers' Co-op trial court observed:

This excerpt conspicuously intimates that, if the elements infringed consisted simply of the arrangement of the cases and the pagination, a different conclusion would have been reached.

No authority is cited which supports the contention that complainant is entitled to be protected in its pagination and arrangement of cases where the substance of the origination is not pirated . . . [F]or another to simply adopt the plan and

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51. Lawyers' Co-op, 169 F. at 386.

52. *Id.*

53. *Id.* at 391.

54. *Id.*

55. *Id.*

56. *Id.* at 390.

grouping of the cases, making marginal reference to the paging of the volumes issued under his direction, without in any way pirating the substance of his origination, is not enough, in my judgment, to establish infringement.<sup>57</sup>

After briefly referring to a Sixth Circuit case in which the plaintiff was denied an injunction against a competing volume containing the laws of Michigan,<sup>58</sup> the trial court concluded: "Applying this holding to the facts under consideration, an action for infringement does not lie if the defendant's asserted wrongdoing simply consisted of reprinting the decisions of the court with the paging, the defendant independently supplying headnotes, statements of cases, etc."<sup>59</sup>

Lawyers' Co-op cleared up whatever confusion Justice Blatchford had introduced into the maximum access policy underlying the Wheaton line of cases with his seemingly conflicting remarks about the copyrightability of pagination and arrangement of case reporters. The clear holding of Lawyers' Co-op is that the pagination and arrangement of court opinions are, as a matter of public policy, insufficient intellectual labor to warrant copyright protection.<sup>60</sup> Although the Lawyers' Co-op court reasoned that the pagination and arrangement of cases were elements necessary to the official reporter's statutory duties<sup>61</sup>—something the Eighth Circuit pointedly noted in its decision in *West Publishing Co. v. Mead Data Central, Inc.*<sup>62</sup>—the court went on to remark that, in other circumstances not involving case reporters, the pagination and arrangement "of the material matter of a book may be the subject of a valid copyright."<sup>63</sup> The court was understandably not able to foresee a time when court rules of citation would trans-

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57. *Id.*

58. See *Howell v. Miller*, 91 F. 129 (6th Cir. 1898). The Lawyers' Co-op trial court quoted Justice Harlan's opinion in *Howell*:

If Miller had cut from Howell's books, delivered to him by the state, the general laws of Michigan as therein printed, and the pages so cut out had been used when his compilation was printed—if this had been done, and nothing more—there would have been no ground of complaint.

Lawyers' Co-op, 169 F. at 390-91 (quoting *Howell*, 91 F. at 137).

59. Lawyers' Co-op, 169 F. at 391.

60. See *id.* at 390.

61. See *id.* ("[T]he statute prescribing his duties does not point out how the cases shall be arranged into volumes and printed, but to fittingly reproduce the decisions and opinions in volumes it is necessary to supply pagings, together with an orderly arrangement of the cases.").

62. 799 F.2d 1219, 1225-26 (8th Cir. 1986), cert. denied, 479 U.S. 1070 (1987); see also discussion *infra* part III.A.

63. Lawyers' Co-op, 169 F. at 390.



form the nominally unofficial status of a reporter into all but official status.

## B. The Rise of West and the Emergence of LEXIS

### 1. West Publishing Company: "Everywhere Familiar"

The West Publishing Company came into being amidst this evolution of nineteenth-century copyright jurisprudence involving case reporters. John B. West was a traveling salesman for an office supply company in Minnesota.<sup>64</sup> Having the opportunity to visit a number of attorneys, he discovered a common complaint: the publication of official court reports frequently lagged far behind the date courts issued their opinions.<sup>65</sup> Sensing a business opportunity, the twenty-four-year-old West began publishing *The Syllabi* in 1876.<sup>66</sup> An eight-page weekly, *The Syllabi* promised "prompt and reliable intelligence as to the various questions adjudicated by the Minnesota Courts at a date long prior to the publication of the State Reports."<sup>67</sup> Within six months, *The Syllabi*'s growth and popularity were such that West revamped the format and coverage, renaming the publication the *North Western Reporter* and including the full text of all Minnesota Supreme Court decisions, Minnesota federal court decisions, and Wisconsin Supreme Court decisions "of special importance."<sup>68</sup>

Two years later, in 1879, John West transformed his publication into the first of his company's modern regional reporters.<sup>69</sup> The *North Western Reporter* contained the full text of all supreme court decisions from Iowa, Minnesota, Michigan, Nebraska, Wisconsin, and the Dakota Territory.<sup>70</sup> Over the next two years, West began publishing the *Federal Reporter* and the *Supreme Court Reporter*.<sup>71</sup> In 1885, the West Publishing Company, as it was now known, began publishing four new regional reporters, completing

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64. WOXLAND & OGDEN, *supra* note 50, at 38.

65. *Id.* This complaint provides an eerie parallel to the issue facing the legal publishing industry today. The print publication of court opinions still lags behind the date courts issue their opinions (albeit to a considerably lesser extent than in John West's day). However, the electronic publication of court opinions is virtually instantaneous. The modern-day version of the complaint John West heard is that these instantly published electronic opinions are useless because courts expect citations to the print versions. For a solution to this problem, see discussion *infra* part IV.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

what would eventually be known as the National Reporter System.<sup>72</sup> West Publishing thus became the first legal publishing company to provide nationwide coverage of court decisions. Because the National Reporter System published every appellate case in the country, West was criticized for being indiscriminate—for being a “waste-basket” or “blanket” publisher.<sup>73</sup> West took pride in this criticism, however, explaining that “[i]t is one of the greatest merits of the National Reporter System that it gives all the cases.”<sup>74</sup>

In 1887, West introduced the *American Digest*, an annual publication which contained digests of all the cases handed down in a given year.<sup>75</sup> In 1889, West hired John A. Mallory to work on the *American Digest*.<sup>76</sup> Mallory’s plan was to transform the *American Digest* into an annual update of a new publication, a comprehensive digest entitled the Century Edition of the *American Digest*, which would cover cases from 1658 through 1896.<sup>77</sup> Mallory completed the first volume in 1897 and promoted it at the annual meeting of the American Bar Association.<sup>78</sup> The *American Digest*, with its comprehensive classification system—to be dubbed the “Key Number” system in 1908<sup>79</sup>—was a rousing success. It soon became the standard system for conducting legal research. As West Publishing itself noted in the introduction to the First Decennial Edition of the *American Digest*, “The *American Digest* classification is now everywhere familiar to the bar; it is taught in law schools and in law offices . . . .”<sup>80</sup>

West’s success grew with the twentieth century. In addition to setting the standard for legal research methods, West’s comprehensive case reporter coverage enabled it to become the de facto official reporter for a number of jurisdictions. As of 1995, nineteen states had no official reporter, presumably requiring citation to one of West’s National Reporter System volumes.<sup>81</sup> Thirty-one

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72. *Id.*

73. *Id.*

74. *Id.* at 40 (quoting A Symposium of Law Publishers, 23 AM. L. REV. 396, 406-407 (1889)).

75. *Id.* at 60.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* (quoting 1 FIRST DECENNIAL EDITION OF THE AMERICAN DIGEST vii (1908)).

81. See Robert Berring, On Not Throwing Out the Baby: Planning the Future of Legal Information, 83 CAL. L. REV. 615, 633 n.66 (1995). Professor Berring, in an “informal survey,” found that only seven of the states without official reporters required citation to West publications. *Id.* at 631 n.61. However, in the absence of any alternative citation system, it is difficult to imagine a different source, save perhaps the not

states still have official reporters, a number of which are published by West.<sup>82</sup> In addition, while the official reporter of the U.S. Supreme Court remains the U.S. Reports, federal district and circuit courts have no official reporter; the de facto official reporters are West's Federal Reporter and Federal Supplement.<sup>83</sup> Finally, and perhaps most notably, the fifteenth edition of The Bluebook eliminated its requirement of parallel citation to both a state's official reporter and a West NRS reporter for out-of-state documents, requiring instead citation to West's NRS alone.<sup>84</sup>

Nevertheless, West's preeminence in legal publishing and legal research has been tied to its dominance of the printed page. The advent of the computer as an alternative, if not preferred, method of conducting legal research planted the seeds of a still-continuing revolution.

## 2. The Arrival of LEXIS

In the early 1960s, a team of University of Pittsburgh employees working under Professor John Horty converted the public health statutes of all fifty states into digital form, using punched cards whose codes were transferred to magnetic tape.<sup>85</sup> Horty's team moved beyond statutes, and by 1965 had put a selection of U.S. Supreme Court and Pennsylvania cases on magnetic tape.<sup>86</sup> To demonstrate the system, Horty would occasionally allow search requests by lawyers, who would mail or telephone their searches and, after the system ran the search overnight, would receive their search results by mail or telephone the next day.<sup>87</sup>

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terribly economical WESTLAW or LEXIS, to which a court in the remaining 12 states could allow citation.

82. See *id.* at 624 n.37. West only admits to publishing the official reporter for eight states. See Joint Stipulation of Facts ¶ 72, *Oasis Publishing Co., Inc. v. West Publishing Co.*, 924 F. Supp. 918 (D. Minn. 1996) (No. 3-95-563).

83. Professor Berring's informal survey turned up only 15 of 101 federal district and circuit courts that require citation to West publications. *Id.* at 631 n.61. Although West is the only publisher of lower federal court decisions in comprehensive book form, see *Matthew Bender & Co., Inc. v. West Publishing Co.*, No. 94 Civ. 0589, 1995 U.S. Dist. LEXIS 17688, at \*1-2 (S.D.N.Y. Nov. 28, 1995), presumably there is some flexibility allowed in citation to opinions not yet published in the Federal Reporter or the Federal Supplement.

84. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 169-215 (15th ed. 1991). Aside from law reviews, a number of courts require adherence to The Bluebook's citation requirements in court documents. See, e.g., FLA. R. APP. P. 9.800(n) ("All other citations shall be in the form prescribed by the latest edition of The Bluebook . . .").

85. William G. Harrington, A Brief History of Computer-Assisted Legal Research, 77 LAW LIBR. J. 543, 544 (1985).

86. *Id.*

87. *Id.*

The Ohio State Bar Association had heard of Horthy's work.<sup>88</sup> Deciding to develop a computer-assisted legal research service for Ohio lawyers, the Ohio group set forth a definition of the service it wanted: a nonindexed, full-text, on-line, and interactive system.<sup>89</sup> Nonindexing freed the user from the more rigid indexing systems such as the one used by the West digests, allowing the creation of "an ad hoc index specific to the problem at hand."<sup>90</sup> Full-text searching was a departure as well; traditional legal research with index-based digests involved searching headnotes or summaries.<sup>91</sup> On-line searching allowed the user to contact the computer directly, rather than by communicating search requests to intermediaries.<sup>92</sup> Finally, interactivity allowed the user to instantly respond to the results of a search by either amending or resubmitting search terms.<sup>93</sup>

The Ohio group, now organized into a nonprofit corporation called Ohio Bar Automated Research (OBAR), entered into a contract with Data Corporation, which had developed a nonindexed, full-text, on-line, and interactive system for the Air Force called (Data) Central.<sup>94</sup> The results of the OBAR experiment were mixed: while OBAR had demonstrated the feasibility of computer-assisted legal research, it had a number of problems that could only be solved by the investment of significant financial resources.<sup>95</sup> In 1969, the Mead Corporation acquired Data Corporation, apparently unaware of the latter's contractual obligation to OBAR.<sup>96</sup> Mead, however, recognized the potential for computer-assisted legal research and invested in and improved the system.<sup>97</sup> It formed a subsidiary, Mead Data Central (MDC), to develop and market the research service.<sup>98</sup> The OBAR organization sold its interest in the system to MDC.<sup>99</sup> By the end of 1972, MDC had made a number of improvements to the system, switching from printers to display terminals and revising the language and logic of the system.<sup>100</sup> MDC dubbed the new system LEXIS and

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88. *Id.* at 545.

89. *Id.*

90. *Id.* at 546.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 547-48.

95. *Id.* at 549-50.

96. *Id.* at 550.

97. *Id.*

98. *Id.*

99. *Id.* at 551.

100. *Id.*

introduced it at a news conference in April 1973.<sup>101</sup> By the end of the year, a number of major New York law firms were performing legal research on LEXIS.<sup>102</sup>

That same year, the West Publishing Company decided to enter the computer-assisted legal research business.<sup>103</sup> Its system—WESTLAW—went on-line exactly two years after MDC introduced LEXIS.<sup>104</sup> Unlike LEXIS, however, the WESTLAW database consisted entirely of West headnotes rather than the full text of opinions.<sup>105</sup> By the end of 1976, West began to build a full-text database.<sup>106</sup> Nevertheless, WESTLAW was widely regarded throughout the rest of the 1970s as vastly inferior to LEXIS.<sup>107</sup> In 1980, West began an overhaul of WESTLAW, adding new features and remedying design deficiencies such as the prolonged search times and frequent interruptions that had plagued the system in the 1970s.<sup>108</sup> By 1984, WESTLAW had become “a highly sophisticated, user-friendly research service.”<sup>109</sup> Possessing few advantages over WESTLAW, MDC announced in June 1985 that it would do something very much like what Lawyers’ Co-op had done almost a century earlier: it would provide star pagination in its database to the West National Reporter System.<sup>110</sup>

### III. DECONSTRUCTING THE WEST “MONOPOLY”

And then he continued: “Besides, you were quite right in what you said; I am in the confidence of the Court.” He paused, as if he wanted to give K. time to digest this fact. . . . K. abandoned any attempt at apology, for he did not want to deflect the conversation, nor did he want the painter to feel too important, and so become in a sense inaccessible, accordingly he asked: “Is your position an official appointment?” “No,” said the painter curtly, as if the question had cut him short. K., being anxious to keep him going, said: “Well, such unrecognized posts often carry more influence with them than the official ones.”<sup>111</sup>

Franz Kafka

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101. *Id.* at 552-53.

102. *Id.* at 553.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 554.

108. *Id.*

109. *Id.*

110. See Dan Oberdorfer, West-Mead Data Copyright Suit Hearing Slated, *NAT’L L.J.*, Sept. 9, 1985, at 20.

111. *KAFKA*, *supra* note 1, at 147-48.

### A. West Publishing Co. v. Mead Data Central, Inc.

West responded to MDC's plans to implement star pagination in LEXIS by seeking an injunction in a Minnesota federal district court.<sup>112</sup> The district court granted the injunction,<sup>113</sup> and MDC appealed. The Eighth Circuit affirmed, finding that "West's arrangement is a copyrightable aspect of its compilation of cases, that the pagination of West's volumes reflects and expresses West's arrangement, and that MDC's intended use of West's page numbers infringes West's copyright in the arrangement."<sup>114</sup>

#### 1. The Opinion

The majority opinion in Mead methodically addressed MDC's series of arguments. MDC contended that case arrangement was per se uncopyrightable because it could meet neither the standard of originality nor the standard for consideration as the original work of an author,<sup>115</sup> both of which are basic requirements under the Copyright Act of 1976.<sup>116</sup> In response, the court pointed out that the standard for originality was minimal, meaning only that the work must have its origin with the author,<sup>117</sup> and that a work must be the product of only a slight degree of creative or intellectual labor to be the original work of an author.<sup>118</sup> Furthermore, the court observed that the Copyright Act provided protection for compilations and derivative works<sup>119</sup> and noted that "[a]n arrangement of opinions in a case reporter, no less than a compilation and arrangement of Shakespeare's sonnets, can qualify for copyright protection."<sup>120</sup> As support for its proposition, the court cited Callaghan.<sup>121</sup> Although noting the seeming discrepancy between Justice Blatchford's allusion to the copyrightability of pagination and arrangement and his approv-

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112. *Id.*

113. *West Publishing Co. v. Mead Data Cent., Inc.*, 616 F. Supp 1571, 1574 (D. Minn. 1985), *aff'd*, 799 F.2d 1219 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987).

114. *West Publishing Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1223 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987). West and MDC eventually settled out of court, with MDC reportedly agreeing to pay "tens of millions of dollars" to purchase a license from West for the use of its page numbers. Stephen Labaton, *Westlaw and Lexis Near Truce*, N.Y. TIMES, July 19, 1988, at D5.

115. *Id.*

116. See 17 U.S.C. § 102(a) (1994).

117. *Mead*, 799 F.2d at 1223 (citing *Hutchinson Tel. Co. v. Fronteer Directory Co.*, 770 F.2d 128, 131 (8th Cir. 1985)).

118. *Id.* (citing *Goldstein v. California*, 412 U.S. 546, 561 (1973); MELVIN NIMMER, 1 NIMMER ON COPYRIGHT § 1.08(C)(1) (1985)).

119. *Id.* at 1223-24 (citing 17 U.S.C. §§ 101, 103).

120. *Id.* at 1224.

121. *Id.*

ing quotation of the circuit court's opinion indicating a different result,<sup>122</sup> the court nonetheless extracted a rule of sorts: "Callaghan establishes at least that there is no per se rule excluding case arrangement from copyright protection, and that instead, in each case the arrangement must be evaluated in light of the originality and intellectual-creation standards."<sup>123</sup>

MDC also argued that Lawyers' Co-op strongly supported its contention that case arrangement and pagination were insufficient to meet the required originality standard.<sup>124</sup> The Eighth Circuit, however, dismissed this contention, finding that the official status of the reporter in Lawyers' Co-op was dispositive in the denial of copyright protection.<sup>125</sup> MDC maintained further that the holding in Lawyers' Co-op did not depend upon the reporter's official status because the statute prescribing his duties did not specify how to arrange the cases or paginate the volumes.<sup>126</sup> Thus, MDC argued, the reporter exercised discretion and judgment in case arrangement and pagination, elements which the Lawyers' Co-op court must have viewed as involving insufficient intellectual labor for copyright purposes.<sup>127</sup> The Eighth Circuit agreed that the reporter had exercised independent judgment, but noted that the Lawyers' Co-op court "dismissed the matters in which the reporter exercised discretion as things done 'voluntarily and in evident compliance with the proper and faithful discharge of his official duties.'"<sup>128</sup> Moreover, the court continued, the Lawyers' Co-op court did not reach the question of whether that judgment met the originality and intellectual creation requirements because "it was unwilling to look past the fact that [arrangement and pagination] were done to meet the reporter's statutory obligations."<sup>129</sup> Additionally, the court pointed out that Callaghan involved an official reporter as well, yet the Callaghan Court did not find pagination and arrangement of cases per se uncopyrightable.<sup>130</sup> Concluding its discussion of Lawyers' Co-op,

122. *Id.* at 1225 ("The teaching of Callaghan with respect to the issues before us does not come through with unmistakable clarity.").

123. *Id.*

124. *Id.*

125. *Id.* ("[T]he ultimate rationale for the [Lawyers' Co-op] decision was that . . . because the reporter's statutory duties required case arrangement and pagination, these should not be considered the product of the reporter's intellectual labor.").

126. *Id.*

127. *Id.*

128. *Id.* at 1226 (quoting *Banks Law Publishing Co. v. Lawyers' Co-op. Publishing Co.*, 169 F. 386, 389-90 (2d Cir. 1909)).

129. *Id.*

130. *Id.*

the majority noted that the Second Circuit had required “a greater degree of intellectual creativity than the trend of modern cases” and had written its decision at a time when compilations and derivative works were neither expressly defined nor included in the Copyright Act.<sup>131</sup>

MDC added a twist to the discussion of official reporter status: it argued that West was indeed the official reporter for some states, and that therefore Lawyers’ Co-op, regardless of the linchpin upon which it turned, supported MDC’s view that West could not copyright its case arrangement and pagination.<sup>132</sup> The majority, however, viewed the denomination of a West’s regional reporter as “official” in orders discontinuing official state reporters as “mean[ing] something quite different from the title ‘official reporter’ held by Messrs. Wheaton and Peters.”<sup>133</sup> The court said it did “not believe” that any state employed West and controlled the details of its work.<sup>134</sup> Furthermore, the court added, even if it were willing to grant that West had some official status, it found that West had used “sufficient talent and industry in compiling and arranging cases” to qualify for copyright protection.<sup>135</sup>

Finding that there was nothing to preclude copyright in case arrangement and pagination, the Eighth Circuit then described what it felt was West’s “sufficient talent and industry” to meet the originality and intellectual creativity requirements.<sup>136</sup> West, according to the court, “collect[ed]” the opinions, separated state court decisions from federal court decisions, and assigned them—

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131. *Id.*

132. *Id.*

133. *Id.* Curiously, the Third Circuit came to the opposite conclusion about West during litigation unrelated to copyright claims. See *Lowenschuss v. West Publishing Co.*, 542 F.2d 180, 186 (3d Cir. 1976) (“Where, as here, no official reporter exists, a convincing argument may be made that West, an unofficial reporter, performs the same function as an official reporter and should be accorded the identical protection from liability for defamation when it publishes verbatim opinions of the courts.”).

134. *Mead*, 799 F.2d at 1226. It is interesting to speculate what the *Mead* court would have made of Florida’s codified arrangement with West. See FLA. STAT. § 25.381 (1995) (“[T]he Supreme Court and the Attorney General shall jointly enter into a contract with West Publishing . . . providing for the publication . . . of Florida Cases . . .”). A Minnesota federal district court would later find that regardless of whether Florida viewed West as its official reporter, the state’s contractual agreement reserving case arrangement copyright in West eliminated official status as a dispositive consideration. See *Oasis Publishing Co., Inc. v. West Publishing Co.*, 924 F. Supp. 918, 930 (D. Minn. 1996); see also discussion *infra* part III.B.

135. *Mead*, 799 F.2d at 1226.

136. It is worth noting at this point that the majority did not rely upon anything contained in the record for its examination of West’s arrangement and pagination process. See *id.* at 1237 (Oliver, J., dissenting) (“The record in this case does not indicate in any way how or by whom West’s page numbers are, in fact, created.”). In later litigation, West would stipulate as to its arrangement process. See *infra* note 234 and accompanying text.



on a geographical basis for state decisions and by court level for federal decisions—to the appropriate West reporter.<sup>137</sup> West then assigned opinions to a particular volume of the reporter and arranged them within the volume.<sup>138</sup> The court concluded that the process was “the result of considerable labor, talent, and judgment” and easily met the intellectual creativity requirement.<sup>139</sup>

Because it found West was entitled to copyright its arrangements, the court reduced MDC’s argument to its “insistence that all West seeks to protect is numbers on pages.”<sup>140</sup> The court agreed that if this were the case, MDC would win, because a mere sequence of numbers is not copyrightable.<sup>141</sup> However, the court reasoned that

protection for the numbers is not sought for their own sake. It is sought, rather, because access to these particular numbers—the “jump cites”—would give users of LEXIS a large part of what West has spent so much labor and industry in compiling, and would pro tanto reduce anyone’s need to buy West’s books. The key to this case, then, is not whether numbers are copyrightable, but whether the copyright on the books as a whole is infringed by the unauthorized appropriation of these particular numbers.<sup>142</sup>

The court went on to hold that the use of the page numbers would infringe West’s copyright in its arrangement.<sup>143</sup> To support its analysis, the majority used the example of LEXIS’s LEXSEE feature. A hypothetical LEXIS user might call up the first page in a West volume, page down through to the last page of the case, and then, having discerned the page number of the following case, use LEXSEE to bring that case to the screen.<sup>144</sup> LEXSEE would thus “permit LEXIS users to view the arrangement of cases in every volume of West’s National Reporter System.”<sup>145</sup> Moreover, the court found that even if this procedure were not possible, it would still find that MDC’s uses of star pagination infringed West’s copyright.<sup>146</sup> This was so, the court reasoned, because the jump cites within LEXIS cases gave LEXIS users the precise location

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137. Mead, 799 F.2d at 1226.

138. *Id.*

139. *Id.* at 1226-27. The court also found that West met the originality requirement because West did not copy its cases from another source. *Id.* at 1227.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

in West's case arrangement of that portion of the opinion the user is viewing.<sup>147</sup> In addition, the court observed that MDC's star pagination would obviate the need for consumers to purchase West's reporters and would thus adversely affect West's market position.<sup>148</sup>

Finally, in response to MDC's argument that the star pagination was not an infringement because West's page numbers were statements of pure fact, the court observed that MDC's proposed use of these facts was closer to constituting wholesale appropriation of the arrangement rather than an isolated use of the arrangement's factual aspects.<sup>149</sup> To support its reasoning that such an appropriation was an infringement, the majority cited *Hutchinson Telephone Co. v. Fronteer Directory*,<sup>150</sup> a case the Eighth Circuit had decided a year earlier: "The names, addresses, and phone numbers in a telephone directory are 'facts'; though isolated use of these facts is not copyright infringement, copying each and every listing is an infringement."<sup>151</sup>

## 2. *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*

Five years after *Mead*, the U.S. Supreme Court decided *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*<sup>152</sup> Because *Feist* was the Supreme Court's first opportunity to interpret the 1976 Copyright Act's express provision granting copyright protection to factual compilations and derivative works,<sup>153</sup> it has a significant impact on any analysis of the holding in *Mead*.

*Rural Telephone Service Company, Inc.*, a public utility that provided telephone service in Kansas, published a telephone directory consisting of both white and yellow pages.<sup>154</sup> *Feist Publications, Inc.*, published telephone directories that covered wider geographic areas than is otherwise the norm.<sup>155</sup> *Rural* refused to license its listings to *Feist*.<sup>156</sup> *Feist* nevertheless extracted listings

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147. *Id.*

148. *Id.* at 1228.

149. *Id.*

150. 770 F.2d 128 (8th Cir. 1985).

151. *Mead*, 799 F.2d at 1228.

152. 499 U.S. 340 (1991).

153. An exhaustive look at *Feist* and its ramifications is beyond the scope of this Comment. For a detailed examination of *Feist*, see Jane C. Ginsburg, No "Sweat"? Copyright and Other Protection of Works of Information After *Feist v. Rural Telephone*, 92 COLUM. L. REV. 338 (1992).

154. *Feist*, 499 U.S. at 342.

155. *Id.* at 342-43.

156. *Id.* at 343.

from Rural's directory and published them in its own directory.<sup>157</sup> Rural sued for copyright infringement, the district court granted summary judgment to Rural, and the Court of Appeals affirmed.<sup>158</sup>

The Feist Court began its inquiry by noting the tension between two "well-established propositions": (1) facts are not copyrightable; and (2) compilations of facts "generally" are copyrightable.<sup>159</sup> The difference between the two lies in the requirement of originality, which the Court said "means only that the work was independently created by the author . . . and that it possesses at least some minimal degree of creativity."<sup>160</sup> The level of creativity required "is extremely low; even a slight amount will suffice."<sup>161</sup> The originality requirement, the Court added, is rooted in Article I, Section 8 of the Constitution, in which the terms "'authors' [and] 'writings' . . . presuppose a degree of originality."<sup>162</sup> Because facts do not owe their origin to an act of authorship, they are not original.<sup>163</sup> Compilations, however, are different:

Factual compilations, on the other hand, may possess the requisite originality. The compilation author typically chooses which facts to include, in what order to place them, and how to arrange the collected data so that they may be used effectively by readers. These choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original that Congress may protect such compilations through the copyright laws . . . . Thus, even a directory that contains absolutely no protectible written expression, only facts, meets the constitutional minimum for copyright protection if it features an original selection or arrangement.<sup>164</sup>

Nonetheless, the Court found that the copyright protection afforded to factual compilations is limited in a significant respect: "The mere fact that a work is copyrighted does not mean that every element of the work may be protected."<sup>165</sup> Only those elements original to the author are entitled to copyright protection.<sup>166</sup> If a factual compilation contains nothing but facts, protec-

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157. *Id.*

158. *Id.* at 344.

159. *Id.*

160. *Id.* at 345.

161. *Id.*

162. *Id.* at 346.

163. *Id.* at 347.

164. *Id.* at 348 (citations omitted).

165. *Id.*

166. *Id.*

tion is extended only to the selection and arrangement of those facts, and then only if the selection and arrangement are "original."<sup>167</sup> Thus, the Court observed, "copyright in a factual compilation is thin."<sup>168</sup>

The Feist Court repudiated the "sweat of the brow" line of factual compilation cases<sup>169</sup> in which "the underlying notion was that copyright was a reward for the hard work that went into compiling facts."<sup>170</sup> The "sweat of the brow" doctrine, the Court said, went beyond extending copyright protection to selection and arrangement and extended protection to the facts themselves.<sup>171</sup> Moreover, Congress had recognized the mistaken assumption of this line of cases and rectified it by defining "compilation" in the Copyright Act of 1976: "A 'compilation' is a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship."<sup>172</sup> The Court noted that the focus on selection, coordination, and arrangement of facts was an application of the originality requirement.<sup>173</sup> More importantly, however, Congress had gone on to require that facts be selected, coordinated, or arranged "in such a way" that the resulting work is original:

This implies that some "ways" will trigger copyright, but that others will not. . . . Otherwise, the phrase "in such a way" is meaningless and Congress should have defined "compilation" simply as "a work formed by the collection and assembly of preexisting materials or data that are selected, coordinated, or arranged." That Congress did not do so is dispositive. . . . [W]e conclude that the statute envisions that there will be some fact-based works in which the selection, coordination, and arrangement are not sufficiently original to trigger copyright protection.<sup>174</sup>

The Court then considered whether Feist had copied anything original from Rural's directory. As Rural had already conceded that the names, addresses, and telephone numbers in its direc-

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167. *Id.* at 349.

168. *Id.*

169. The Court cited *Leon v. Pacific Telephone & Telegraph Co.*, 91 F.2d 484 (9th Cir. 1937), and *Jeweler's Circular Publishing Co. v. Keystone Publishing Co.*, 281 F. 83 (2d Cir.) cert. denied, 259 U.S. 581 (1922), as examples from this line of cases.

170. Feist, 499 U.S. at 352.

171. *Id.* at 353.

172. 17 U.S.C. § 101 (1994).

173. Feist, 499 U.S. at 358.

174. *Id.*

tory were “preexisting material”<sup>175</sup>—in other words, uncopyrightable facts—the question that remained for the Court was whether Rural had selected, coordinated, or arranged these facts in an original way. Describing Rural’s work as a “garden-variety white pages directory,” the Court held that the directory’s selection and arrangement did not satisfy the minimum standards for copyright protection.<sup>176</sup> Because it published “the most basic information” about its subscribers, “Rural’s selection of listings could not be more obvious.”<sup>177</sup> Moreover, Rural’s arrangement of the listings lacked the requisite originality as well:

The white pages do nothing more than list Rural’s subscribers in alphabetical order. This arrangement may, technically speaking, owe its origin to Rural; no one disputes that Rural undertook the task of alphabetizing the names itself. But there is nothing remotely creative about arranging names alphabetically in a white pages directory. It is an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course. . . . It is not only unoriginal, it is practically inevitable. This time-honored tradition does not possess the minimal creative spark required by the Copyright Act and the Constitution.<sup>178</sup>

The Court found that while the Rural directory as a whole was entitled to copyright protection, the white pages “utterly lack[ed] the] originality” necessary for copyright protection under the Copyright Act of 1976.<sup>179</sup> Feist’s use of the listings could therefore not constitute infringement, regardless of the effort Rural had expended in compiling its directory.

### 3. Analysis

#### a. The Tenability of Mead After Feist

What is perhaps most immediately noticeable about the Mead opinion when viewed in light of Feist is the Eighth Circuit’s reliance upon another white pages infringement case, *Hutchinson Telephone Co. v. Fronteer Directory*,<sup>180</sup> for both a standard for originality<sup>181</sup> and for its proposition that wholesale appropriation

175. *Id.* at 361.

176. *Id.* at 362.

177. *Id.*

178. *Id.* at 363.

179. *Id.* at 364.

180. 770 F.2d 128 (8th Cir. 1985).

181. See *Mead*, 799 F.2d at 1223 (citing *Hutchinson*, 770 F.2d at 131).

of factual compilations always constitutes infringement.<sup>182</sup> Hutchinson has been called “the most specious of authority” by at least one post-Feist commentator;<sup>183</sup> it is probably more accurately described as having been entirely undermined by Feist. The Feist Court overruled not only Hutchinson’s standard for originality, but also its view of the degree of copyright protection extended to factual compilations.

Further, in dismissing MDC’s reliance upon Lawyers’ Co-op, the Mead court stated that the 1909 decision “requir[ed] a greater degree of intellectual creativity than the trend of modern cases.”<sup>184</sup> As support for this proposition, the Eighth Circuit cited *Rockford Map Publishers v. Directory Service Co.*,<sup>185</sup> a 1985 Seventh Circuit decision. The *Rockford Map* court, however, stated that “copyright depend[s] on the fact that the compiler ma[kes] a contribution—a new arrangement or presentation of facts.”<sup>186</sup> Indeed, the *Rockford Map* court did not even inquire into whether the “contribution” made by the plaintiff in that case was sufficient to constitute an original work of authorship—an inquiry that, as the Feist Court pointed out, the Copyright Act mandates.<sup>187</sup> Ignoring the requirement that facts be “selected, coordinated, or arranged in such a way” that the resulting work is an original work of authorship, the *Rockford Map* court instead found that the fact of arrangement alone was sufficient to warrant copyright protection.<sup>188</sup> If this is the “modern trend” against which the Lawyers’ Co-op court’s denial of copyright protection to case reporter pagination stands in contrast, Feist has brought it to a screeching halt.

The majority opinion in *Mead* focused an inordinate amount of attention on the labor West expended in compiling its case reporters. West’s arrangement, the court observed, was “the result of considerable labor, talent, and judgment”;<sup>189</sup> and what MDC was trying to do was give its users “a large part of what West has

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182. See *id.* at 1228 (citing *Hutchinson*, 770 F.2d at 128).

183. Carl J. Khalil, *Are Page Numbers Really Copyrightable? The Effect of Feist on the West Publishing v. LEXIS Case*, 76 J. PAT. & TRADEMARK OFF. SOC’Y 807, 811 (1994).

184. *Mead*, 799 F.2d at 1226 (citation omitted).

185. 768 F.2d 145 (7th Cir. 1985), cert. denied, 474 U.S. 1061 (1986).

186. *Id.* at 149. The *Rockford Map* court relied in part on *Jewelers’ Circular Publishing Co. v. Keystone Publishing Co.*, 281 F. 83 (2d Cir), cert. denied, 250 U.S. 581 (1922), one of the two cases the Feist Court used as exemplars of the discredited “sweat of the brow” doctrine. See Feist, 499 U.S. at 352 (“[S]ome courts misunderstood the [copyright] statute.”).

187. See Feist, 499 U.S. at 358.

188. *Rockford Map*, 768 F.2d at 149.

189. *Mead*, 799 U.S. at 1226.

spent so much labor and industry in compiling.”<sup>190</sup> In a similar vein, Mead concluded that the Supreme Court had not found the independent use of case reporter page numbers an infringement in Callaghan because the plaintiff’s “case arrangement and pagination involved little labor.”<sup>191</sup> However, the amount of labor expended in producing factual compilations is, after Feist, entirely irrelevant to copyright considerations.

Finally, the Feist Court’s articulation of a threshold requirement for originality in factual compilations casts further doubt upon Mead. Because the Mead court arguably applied a lower standard for originality than that mandated by Feist, West’s case arrangement process must be reevaluated in light of the considerations set out in Feist.

Before evaluating West’s arrangement of cases, it is necessary to remark that the separation of decisions is unquestionably a process not performed by West. Federal and state court opinions are not stored in some central repository from which West subsequently collects and sorts them out; rather, because West receives them from both individual federal courts and individual states, the opinions arrive at West already separated.<sup>192</sup>

More important, however, is the short shrift that Mead gave to West’s arrangement process, which would appear to have been a primary consideration. Because there was no record at trial of West’s arrangement and pagination process, a look at how the cases appear on their face in the reporters is both necessary and enlightening.<sup>193</sup>

The Southern Reporter contains the state court opinions of Alabama, Florida, Louisiana, and Mississippi. Volume 661 of the Second Series of the Southern Reporter begins with a group of opinions from the Florida District Courts of Appeal in chronological order.<sup>194</sup> Next, the volume reports two decisions of the Louisiana Supreme Court and then a group of opinions of the Louisiana Circuit Courts of Appeal, all in chronological order.<sup>195</sup> The following pages contain Mississippi Supreme Court opinions, again in

190. *Id.* at 1227.

191. *Id.* at 1224.

192. See Khalil, *supra* note 183, at 817 (“One would imagine that the opinions arrive already ‘separated’ since they originate from separate courts.”)

193. West would later explain its arrangement process in *Oasis Publishing Co., Inc. v. West Publishing Co.*, 924 F. Supp. 918 (D. Minn. 1996). See *infra* note 234 and accompanying text.

194. 661 So. 2d at 19-141. A list of Florida decisions without published opinions occupies the first 18 pages of the volume. See *id.* at 1-18.

195. See *id.* at 142-76.

chronological order.<sup>196</sup> The volume then reports decisions of the Alabama Supreme Court in chronological order,<sup>197</sup> followed by opinions of the Alabama Court of Civil Appeals, also in chronological order.<sup>198</sup> Immediately following, however, are the opinions of both the Alabama Court of Criminal Appeals and the Alabama Supreme Court for two cases, both of which are reported in the order of their procedural posture before the Alabama courts and, as a whole, not in chronological order.<sup>199</sup> Next, the volume reports decisions of the Florida Supreme Court chronologically<sup>200</sup> before beginning again with decisions of the Florida District Courts of Appeal and repeating the entire pattern described above.<sup>201</sup> Within the subsequent jurisdictional case groupings, however, the reporter often presents additional cases from the same time periods covered by the earlier jurisdictional case groupings. Nevertheless, the cases within the groupings are reported in chronological order.

The Second Series of the Federal Reporter follows a similar tack. The reporter groups cases chronologically by circuit, using much the same round robin approach within the volume. In other words, although cases are grouped by circuit, each circuit frequently has more than one grouping within a volume. Again, although the time frame of a later grouping for a particular circuit often overlaps with the time frame of an earlier grouping for that circuit, the cases are nevertheless reported in chronological order within each grouping.

Two things immediately become clear from the above descriptions. First, West arranges the cases in its reporters by jurisdiction. Second, within each jurisdictional grouping, West arranges the cases in chronological order. Feist compels the question: Is there originality in this arrangement of facts?<sup>202</sup> Although the Feist Court reasoned that the originality standard “does not require that facts be presented in an innovative or surprising way,” it insisted that “the arrangement of facts cannot be so mechanical or routine as to require no creativity whatsoever.”<sup>203</sup> Arranging cases chronologically by jurisdiction in a case reporter would seem to be on a plane with arranging names alphabetically in a

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196. See *id.* at 177-202.

197. See *id.* at 203-39.

198. See *id.* at 239-55.

199. See *id.* at 255-77.

200. See *id.* at 278-305.

201. See *id.* at 306.

202. See 499 U.S. at 363.

203. *Id.* at 362.



telephone directory. To report cases one after another in the same order a court has decided them “is not only unoriginal, it is practically inevitable.”<sup>204</sup> Moreover, if “there is nothing remotely creative about arranging names alphabetically in a white pages directory,”<sup>205</sup> much the same can be said about arranging cases by court of origin in a case reporter. The cases simply arrive that way to begin with. “Arranging” cases by jurisdiction and in chronological order is a “time-honored tradition [that] does not possess the minimal creative spark required by the Copyright Act and the Constitution.”<sup>206</sup> Yet even if one assumes that this form of arrangement comes close to possessing that minimal creative spark, extending copyright protection beyond the arrangement to the arrangement’s page numbers—which are, without question, the result of a rote, mechanized system or process—stretches the already “thin” copyright in factual arrangements to transparent absurdity.

#### b. Public Policy

Although it is difficult—but not impossible—to fault the Mead court for its inability to anticipate Feist, the Eighth Circuit decision nonetheless disregarded a public policy backed by a century and a half of precedent. Of the cases in the Wheaton line, only Callaghan had found the use of a case reporter infringing.<sup>207</sup> The defendant in Callaghan did far more than simply appropriate the plaintiff’s arrangement of cases, however; he pirated the plaintiff’s headnotes, statements of cases, and arguments of counsel as well.<sup>208</sup> No court has ever found the appropriation of such material from a case reporter to be noninfringing. Yet until Mead, no court had ever found the mere use of a case reporter’s arrangement and pagination infringing. Both the Callaghan Court and the Lawyers’ Co-op court had the chance to do just that; both, however, declined. From the Callaghan Court’s relative lack of clarity on the point, the majority in Mead was able to glean that there was no rule against copyrighting case reporter arrangement and pagination,<sup>209</sup> and from this ostensible absence of the barking dog, the court fashioned the rule that copyrighting these comparatively insignificant elements was indeed permissible in all

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204. *Id.* at 363.

205. *Id.*

206. *Id.*

207. See *Callaghan v. Myers*, 128 U.S. 617, 661 (1888).

208. See *id.* at 659.

209. *Mead*, 799 F.2d at 1225.

instances save those where positive law effectively compels the publisher to arrange the cases in a volume.<sup>210</sup> The Mead holding is thus at odds with the current of thought underlying *Wheaton* and its progeny. The public policy this line of cases furthers is one of maximum, unimpeded access to the law,<sup>211</sup> not of unimpeded access to a publisher's intellectual property.

The *Wheaton* public policy of not allowing legal publishers to encumber free access to the law is derived directly from the balancing of interests embodied in the Copyright Clause of the Constitution and reflected in the Copyright Act of 1976. As Professors Patterson and Joyce point out, copyright in a work is not meant to be treated as the proprietary right of an author, but as "the grant of a closely regulated statutory monopoly."<sup>212</sup> The 1976 Act balances the monopolistic interests of authors in protecting their works from wrongful appropriation against the interests of the public in restricting the monopoly and allowing reasonable access to the works.<sup>213</sup> Mead all but ignored the latter and instead over-emphasized the former.<sup>214</sup>

Joyce and Patterson make the implicit argument that the Mead decision effectively violates the Copyright Clause.<sup>215</sup> By extending copyright protection to the page numbers of legal materials, the Mead court essentially retarded rather than "[p]romot[ed] the Progress of [legal] Science".<sup>216</sup>

Where a single publisher is the sole compiler of a jurisdiction's case reports and statutes, permitting that publisher to control others' use of such numbers produces one of two results: either it impedes more efficient access to the law by restricting the use of competitors' developing technologies, as occurred prior to the settlement in Mead; or it in effect imposes a tax for the use

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210. See *id.* at 1226.

211. See Patterson & Joyce, *supra* note 25, at 742.

212. *Id.* at 803.

213. *Id.* at 807.

214. According to Professors Joyce and Patterson, one of the many flaws in the Mead decision was a conflation of unfair competition and copyright law. See *id.* at 778. The court continually focused on the market effects of star pagination—a consideration irrelevant to a finding of copyrightability and subsequent infringement. See *id.* at 781.

215. Although it made no mention of the Mead decision, the Feist Court liberally cited to the Joyce and Patterson article. See 499 U.S. 340 at 347-49, 351, 361-62. By embracing the Joyce and Patterson view of copyright, it is fair to say that the Feist Court implicitly endorsed the article's understanding of the *Wheaton* public policy of encouraging maximum access to the law.

216. U.S. CONST. art. I, § 8, cl. 8.

of the law, preventing effective price competition by sanctioning the imposition of license fees on the publisher's rivals.<sup>217</sup>

Mead has undoubtedly brought about both results. Competitors who seek to release, say, federal court decisions on CD-ROM will only do so if the bar finds the product useful (and hence profitable to the publishing company). The threat of a West lawsuit, however, precludes competitors from providing the bar and the public in general with ready, cost-efficient access to the law.<sup>218</sup> The only remaining alternative for competitors who wish to avoid litigation is to enter into a licensing and royalty agreement with West.<sup>219</sup> West thus exerts a quasi-monopolistic control over access to the law, charging prohibitively expensive fees and intimidating competitors into either acquiescing or simply refraining from publishing the law. To a great degree, then, legal science ends up being held hostage—in direct contravention of the Constitution.

Finally, the Eighth Circuit's decision glossed over the extent to which West has become a *de facto*—and, in at least one state, *de jure*<sup>220</sup>—official reporter in numerous jurisdictions. In so doing, the court took a narrow, *laissez-faire* view of the state of legal publishing in this country. Unless West were bound by statutory duties to produce a volume of cases, the court reasoned, it was entirely free to cloak the law it reported in a questionable form of intellectual property, namely page numbers.<sup>221</sup> This view only sanctions monopolistic behavior on the part of legal publishers. If, indeed, West were the only publisher of case reporters in the United States, the Eighth Circuit's reasoning would entitle West to safeguard its case reporter pagination and effectively control access to the law. Moreover, when the court held that notwithstanding West's possibly official status, its arrangement and pagination were nevertheless sufficient to warrant copyright protection,<sup>222</sup> it undercut its own analysis of Lawyers' Co-op. If, as the Mead court found, the denial of copyright protection to case arrangement and pagination in Lawyers' Co-op turned upon the reporter's official status,<sup>223</sup> then regardless of whatever judgment

217. Patterson & Joyce, *supra* note 25, at 810.

218. See Plaintiff's Brief ¶ 25, *Oasis Publishing Co., Inc. v. West Publishing Co.*, (S.D. Fla.) (No. 95-0481), available at [gopher://essential.essential.org:70/00/pub/tap/Legal/oasis](http://gopher://essential.essential.org:70/00/pub/tap/Legal/oasis).

219. See *id.* ¶ 24.

220. See FLA. STAT. § 25.381 (1995).

221. See Mead, 799 F.2d at 1226.

222. See *id.*

223. See *id.* at 1225.

or discretion West exercised in its arrangement of cases, its official status precluded copyright protection for those elements.

### B. Mead Revisited: A Failed Attempt to Free Florida Law

Ten years after the Mead decision, West still finds itself involved in litigation over its claimed copyright to the internal pagination of its case reporters. In February 1994, Matthew Bender & Co., Inc. filed suit against West, seeking a declaratory judgment that West does not possess a federal copyright in the internal pagination of its case reporters and that therefore the use of West's pagination in Bender's CD-ROM of New York cases would be noninfringing.<sup>224</sup> The Manhattan federal district court denied West's motion to dismiss in May 1996.<sup>225</sup> The Bender litigation was still ongoing as of August 1996. Nevertheless, West did score an important victory in May 1996 when the same Minnesota federal district court that decided Mead granted West partial summary judgment in an action filed by a CD-ROM publisher seeking to include West's pagination on a CD-ROM of Florida case law.<sup>226</sup>

Oasis Publishing Co., Inc. originally brought suit against West in the Southern District of Florida, alleging, among other things, that West's refusal to allow the use of the Southern Reporter's pagination on Oasis's proposed CD-ROM of Florida cases violated "various Florida public records statutes."<sup>227</sup> In addition, Oasis sought a declaratory judgment that West has no federal copyright in the page numbers of the Southern Reporter, that any use of the page numbers by Oasis would be noninfringing, and that "Florida public records law makes unenforceable any copyright in the page numbers in the Southern Reporter."<sup>228</sup> West moved to dismiss and to transfer the case to Minnesota; the court, without ruling on the motion to dismiss, granted the motion to transfer the case.<sup>229</sup>

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224. See *Matthew Bender & Co., Inc. v. West Publishing Co.*, No. 94 Civ. 0589, 1995 U.S. Dist. LEXIS 17688, at \*1-3 (S.D.N.Y. Nov. 28, 1995).

225. *Matthew Bender & Co., Inc. v. West Publishing Co.*, No. 94 Civ. 0589, 1996 U.S. Dist. LEXIS 5871, at \*35 (S.D.N.Y. May 2, 1996).

226. *Oasis Publishing Co., Inc. v. West Publishing Co.*, 924 F. Supp. 918, 931 (D. Minn. 1996).

227. *Id.* at 921.

228. *Id.* The Oasis complaint also alleged four other counts: (1) that West had created and was maintaining an illegal monopoly in violation of 15 U.S.C. § 2; (2) that West had created "a dangerous probability of monopolization" in violation of 15 U.S.C. § 2; (3) that the alleged West monopoly also violated section 542.19, Florida Statutes; and (4) that West was attempting to create a monopoly under section 542.22, Florida Statutes. *Id.*

229. *Id.*

The Minnesota federal district court first addressed the overall question of whether West could copyright the internal pagination of any of its case reporters. The court immediately disposed of Oasis's contention that Feist had overruled Mead: "[T]he [Mead court] applied essentially the same creativity standard discussed and applied in Feist. . . . Feist did not overrule Mead."<sup>230</sup> The court stated that even if Mead had not applied the appropriate standard of originality, "its analysis demonstrates that West's arrangement in that case easily satisfied the 'modicum of creativity' later emphasized repeatedly by the Supreme Court in Feist."<sup>231</sup>

Unlike Mead, the district court in Oasis had more facts in the record on which to base a determination of creativity in the arrangement of cases.<sup>232</sup> After noting West's division of cases by state and court level,<sup>233</sup> the court explained that West then divides opinions within each state and court level "and arranges them by placing first the fully headnoted opinions and jacketed memoranda, next sheet memoranda, and finally table dispositions."<sup>234</sup> Attorney-editors at West decide which cases deserve

230. Oasis, 924 F. Supp. at 922.

231. Id. at 923.

232. Id. at 924.

233. Id. As in Mead, the court's depiction of West as actively "divid[ing] the cases by state" apparently overlooked the fact that the opinions arrive already separated by state. See supra note 192 and accompanying text.

234. Oasis, 924 F. Supp. at 924. West had stipulated as to the arrangement of the Southern Reporter as follows:

Reports of opinions, full[-]text memorandum decisions (called "jacketed memorandums" by West because West provides them with a separate case folder "jacket"), consecutively[ issued memorandum dispositions (such as a batch of review-denied or appeal-denied decisions by a state appellate court) and then memorandum decisions reported in tables are generally first coordinated and arranged in the following order: Supreme Court of Alabama; Court of Civil Appeals of Alabama; Court of Criminal Appeals of Alabama; Supreme Court of Florida; Court of Appeals of Florida; Supreme Court of Louisiana; Court of Appeals of Louisiana; Supreme Court of Mississippi.

Within each jurisdiction, reports of opinions and jacketed memorandum decisions come first and within that grouping, are arranged in filing date order. Other memorandum case reports, if any, are grouped together and come next. Tables of dispositions, if any, generally are coordinated and arranged next.

In addition to this general arrangement, West has a procedure whereby it links two or more case reports together in a "precede and follow" arrangement which overrides any general arrangement rule that would otherwise split the two case reports.

In Southern Reporter, all cases from the Florida Supreme Court precede cases from the Florida Appellate Courts. Within each court division the cases are ordered by case type: Florida Supreme Court opinions precede Florida Supreme Court memorand[a] which precede Florida Supreme Court unpublished opinion tables, which precede the Florida district court opinions (Fla. App. 1st Dist., Fla. App. 2[d] Dist., etc.).

headnotes and, based upon the subject matter of the decisions, override West's general arrangement guidelines in approximately twenty-five percent of the cases.<sup>235</sup> Finding that no other publisher followed West's arrangement, and that the arrangement "require[d] far more than rote chronological or jurisdictional sequencing," the court held that West's arrangement "easily" satisfied the requirements of Feist.<sup>236</sup>

The court then quickly dismissed the argument that even if West's arrangement were protected by copyright, such protection did not extend to pagination.<sup>237</sup> Oasis contended that the pagination of each case was simply a system or process devoid of creativity and, therefore, could not be copyrighted.<sup>238</sup> In response, the court pointed out that the Mead court had rejected the same argument.<sup>239</sup> Calling pagination "an integral part" of West's arrangement, the court held that it was an original work of authorship entitled to copyright protection.<sup>240</sup>

Oasis also argued that because West had conceded that citation to the first page of each case within its volumes was a noninfringing fair use, any copyright protection in West's internal pagination was diminished because the initial page numbers already revealed West's arrangement of cases.<sup>241</sup> The court responded by pointing out that West's concession did not authorize others to copy every page citation.<sup>242</sup> Moreover, the court continued, even if one could determine West's arrangement from the

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Page numbers in Southern Reporter and Florida Cases are input by automated machinery used by West in its publication process of publishing reports of Florida court decisions.

Joint Stipulation of Facts ¶¶ 33-37.

235. Oasis, 924 F. Supp. at 924. The court provided several examples illustrating the override process:

For example, the West editor might choose to process a case more quickly where the case otherwise would be destined for a later volume, so that the case instead will follow a related decision in the same volume. Similarly, West may decide to speed its process and publish a decision immediately after a related decision, disregarding the date the decisions were rendered. Or West might choose to combine separate decisions into a single published opinion.

Id. (citations omitted).

236. Id. at 924-25.

237. See id. at 925.

238. Id.

239. Id.

240. Id. As support for this holding, the court quoted Justice Blatchford's dictum in Callaghan, see *supra* text accompanying note 45, without mentioning the Callaghan Court's approving quotation of the lower court's countervailing language, see *supra* text accompanying note 47.

241. Oasis, 924 F. Supp. at 926.

242. Id.

initial page citations, their use, unlike that of the internal page citations, did not obviate the need to buy West's reporters.<sup>243</sup>

After weighing and dismissing Oasis's contention that its proposed star pagination to the Southern Reporter was a fair use,<sup>244</sup> the court then addressed the question of whether West's alleged status as Florida's official reporter precluded copyright in the page numbers of the Southern Reporter.<sup>245</sup> In 1948, Florida had ceased publishing its own official reporter, Florida Reports, and had adopted the Southern Reporter as the state's official publication of state court opinions.<sup>246</sup> The following year, West began publishing Florida Cases, a version of the Southern Reporter with non-Florida cases omitted, yet with the same pagination as the Southern Reporter.<sup>247</sup>

Although West allows others to freely star paginate to volumes that it publishes as a state's official reporter, it denied that it was the official reporter for Florida.<sup>248</sup> Oasis contended that the opposite was true, however, because section 25.381, Florida Statutes explicitly directed the Florida Supreme Court and Florida's Attorney General to enter biannually into a contract with West providing for the publication and distribution of Florida Cases.<sup>249</sup> Moreover, Oasis argued that West had "acquiesce[d]" in Florida's view of West as the state's official reporter and that the following notice issued by the Florida Supreme Court and published by West in the Southern Reporter supported its position:

The SOUTHERN REPORTER, beginning with 1948 Florida Supreme Court cases reported in 37 So.2d 692 et seq., is adopted by the Supreme Court of Florida, and by the Board of Commissioners of State Institutions of Florida as the official publication of the opinions and decisions of the Supreme Court of Florida. This book connects with Volume 160 Florida Reports, without omission or duplication.

Citations should be to Southern Reporter volume and page thus: 42 So.2d 368

[signed]  
Alto Adams

243. *Id.*

244. *See id.* at 926-29.

245. *Id.* at 929-30. Oasis actually argued that Florida Cases—the West-published volume that contains only the Florida decisions published in the Southern Reporter and which uses the Southern Reporter's pagination—was in the public domain. *Id.* at 930.

246. *Id.* at 920; *see also* *infra* text accompanying notes 416-20.

247. *Id.*

248. *Id.* at 930 ("West denies it publishes the official reports of Florida.").

249. *Id.* at 929-30 (citing FLA. STAT. § 25.381 (1995)).

Chief Justice<sup>250</sup>

The Oasis court stated its reluctance to “mark the legal relationship between the State of Florida and West” and noted that the facts of the case did not require it to do so.<sup>251</sup> The copyright interest at issue, the court went on, did not involve the opinions of Florida’s courts per se, but rather West’s arrangement of those opinions.<sup>252</sup> The court reasoned that even if West were the official reporter of Florida, the state had given its “express consent” to the contractual clause allowing West to keep its copyright in the arrangement of cases.<sup>253</sup> Since 1957, Florida’s contract with West had acknowledged West’s copyright interest in the syllabi and other material original to West; immediately after the Mead decision, the contract was revised to include language covering West’s arrangement.<sup>254</sup> The court found that the “undisputed evidence” showed that Florida had “freely acquiesced to the added language.”<sup>255</sup>

Finally, as to Oasis’s claim that the pagination of Florida Cases was freely copyable because Florida Cases is a public record subject to Florida’s Public Records Act,<sup>256</sup> the court adopted West’s counterargument in response. The Florida Supreme Court had already held that the Public Records Act did not apply to judicial records;<sup>257</sup> further, even if the Public Records Act did apply, allowing it to negate West’s copyright interest would violate the

250. *Id.* at 930 & n.6. West published the notice in Volume 37 of the Second Series of the Southern Reporter. See insert facing 37 So. 2d at viii.

251. 924 F. Supp. at 930.

252. *Id.*

253. *Id.*; see also Florida Cases, July 1, 1995-June 30, 1997, Contract for Publication and Distribution, at D.2 (on file with author): “The Synopsis, Syllabi and Key Number Digest classifications, Index Digest, Table of Statutes Construed, and arrangement of cases, editorially prepared and supplied by the FIRST PARTY and included in the volumes of FLORIDA CASES, are subject to copyright and will be copyrighted by the FIRST PARTY.”

254. Oasis, 924 F. Supp. at 930-31.

255. *Id.* at 931.

256. See FLA. STAT. § 119.01 (“[A]ll state, county, and municipal records shall be open for personal inspection by any person.”).

257. Oasis, 924 F. Supp. at 931 (citing *Times Publishing Co. v. Ake*, 660 So. 2d 255 (Fla. 1995)). Oddly enough, the court did not address Oasis’s claim that Florida Cases is a public record subject to the Florida Constitution, which provides that:

Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf . . . . This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder . . . .

FLA. CONST. art. I, § 24(a) (emphasis added). Admittedly, this would still have raised the Supremacy Clause problem the court discussed. In addition, the agreement between West and Florida, while ostensibly violative of the Florida Constitution, is nonetheless a valid contract. See *infra* text accompanying notes 258-59.



Supremacy Clause of the U.S. Constitution.<sup>258</sup> Moreover, the court added, even assuming the absence of any constitutional difficulty, Florida's contract with West had expressly reserved in West the copyright in the arrangement of cases.<sup>259</sup>

The Oasis court's finding that Feist did not overrule Mead is not surprising. While Feist arguably overruled Mead implicitly, it certainly did not do so expressly. Thus, the district court, being a part of the Eighth Circuit, understandably felt bound to view Mead as still constituting good law.<sup>260</sup> However, the court's ostensibly blind adherence to Mead simply points out that the reasoning in Mead has led to bad public policy. The issue is not the arrangement of cases. No publisher is interested in duplicating West's arrangement case-by-case. Even granting that West's arrangement process is sufficiently original to satisfy Feist, other legal publishers are hardly champing at the bit to mimic that process by presenting cases in the precise manner West publishes them in its reporters. Rather, the issue is whether West's pagination is sufficiently original to satisfy Feist.

While the district court in Oasis found that pagination was "an integral part" of West's arrangement,<sup>261</sup> the court was far too quick to dismiss Oasis's argument that extending West's copyright interest beyond its arrangement of cases to pagination gave West copyright in a system.<sup>262</sup> As one of West's experts had affirmed, West's pagination "is a system of citation."<sup>263</sup> The Copyright Act expressly precludes copyright protection in "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."<sup>264</sup> The form in which West's system of pagination is embodied happens to be West's arrangement of cases. The Oasis court, however, found that the system was an integral part of the arrangement.<sup>265</sup> Thus, the court should have balanced the prohibition against copyrighting systems with the extent of West's copyright interest in its arrangement of cases. This balancing would necessitate in turn

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258. Oasis, 924 F. Supp. at 931.

259. *Id.*

260. See Transcript of Oral Argument at 51 ("I suspect . . . I'm simply a whistle stop on the way to the Circuit.").

261. Oasis, 924 F. Supp. at 925; see also *West Publishing Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1227 (8th Cir. 1986) (finding internal pagination "an important part" of West's arrangement).

262. See Oasis, 924 F. Supp. at 925.

263. Transcript of Oral Argument at 25 (quoting Prof. Robert Berring).

264. 17 U.S.C. § 102(b) (1994).

265. Oasis, 924 F. Supp. at 925.

weighing public policy ramifications; and, because the courts of this country generally require that parties who seek resolution of cases and controversies use West's pagination, public policy would seem to dictate that the line of copyright protection be drawn to exclude such pagination. This is a view entirely consistent with *Wheaton* and its progeny.<sup>266</sup> Nevertheless, both *Oasis* and *Mead* eschewed any public policy analysis and found that the mere possibility of market harm to West was sufficient to warrant extending copyright protection to West's pagination.<sup>267</sup> Market harm, however, while relevant to considerations of fair use, has no bearing on whether there is a copyright interest in the first place.<sup>268</sup>

The holdings in *Mead* and *Oasis* should serve as a wake-up call to states such as Florida. Implicit in the *Oasis* court's continual reiteration of Florida's "express consent" in allowing the copyright interest in the arrangement of Florida Cases to remain with West is the observation that Florida has effectively duped itself. Other states for whom West publishes official reports have required West to give up its copyright in the arrangements of cases in those official reports.<sup>269</sup> In discontinuing its own official reporter, however, and in denominating as official—solely in its own eyes, apparently—the Florida-only version of the *Southern Reporter* entitled *Florida Cases*, Florida has lost control over the citation system for "what the law is" in Florida.<sup>270</sup> The contract between West and Florida, which gives West control over the arrangement of the opinions reported in *Florida Cases*, limits access to the most important public records of the Florida judiciary—the law itself—and arguably violates the public records

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266. See *supra* discussion part II.A.1-3.

267. *West Publishing Co. v. Mead Data Cent., Inc.*, 799 F.2d 1219, 1228 (8th Cir. 1986); *Oasis*, 924 F. Supp. at 926.

268. See *Patterson & Joyce*, *supra* note 25, at 781 (observing that it is improper "to resort to the market effect of an infringer's conduct . . . to determine initially whether there was copyright protection and therefore infringement").

269. Transcript of Oral Argument at 43, *Oasis*, (No. 3-95-563) ("The contract between West and Ohio specifically states that the arrangement of the Ohio official reports shall be in the public domain. By contract, the state required West to give up the copyright and West did so.")

270. By eliminating the official *Florida Reports* in 1948, Florida did eliminate the problem of parallel citations to both the *Florida Reports* and the *Southern Reporter*. Where a state has an official reporter, such as the erstwhile *Florida Reports*, *The Bluebook* requires that documents submitted to the courts of that state contain citations to both the official reporter and the West regional reporter. See, e.g., *The Bluebook: A Uniform System of Citation* 202 (15th ed. 1991) ("In documents submitted to Ohio state courts, cite to Ohio St., Ohio St. 2d, Ohio St. 3d, or Ohio, if therein, and to N.E. or N.E.2d if therein.")

provision of the Florida Constitution, which specifically includes the judiciary.<sup>271</sup> In effect, West owns Florida's law.<sup>272</sup>

### C. The "Crown Jewels": Electronic Case Law Databases on the Internet

West Publishing Company has not only zealously safeguarded its interest in the page numbers of its reporters, it has also sought to prevent public access to electronic case law databases originally created by the government. In 1963, the U.S. Air Force created Finding Legal Information Through Electronics (FLITE), an electronic database of legal materials containing, among other things, all United States Supreme Court decisions dating back to 1937.<sup>273</sup> In 1971, the Department of Justice (DOJ) created an electronic database called the Justice Retrieval and Inquiry System (JURIS), which inherited the Supreme Court decisions from FLITE, and which came to contain a complete collection of federal case law dating back, in some instances, to 1789.<sup>274</sup> JURIS allowed DOJ attorneys to conduct research and also provided a citing service similar to Shepard's.<sup>275</sup> Access to JURIS was limited to DOJ attorneys and federal and state agencies that subscribed through a reimbursement agreement with DOJ.<sup>276</sup> In 1983, DOJ decided to contract the data entry and management for JURIS out to a private vendor: West Publishing Company.<sup>277</sup> Unfortunately, the DOJ contract allowed West to remove from JURIS the case law West had input should West ever choose not to renew the contract.<sup>278</sup> In 1993, in response to a petition submitted to Attorney General Janet Reno by information activist James Love seeking general public access to JURIS, West decided not to re-

271. See FLA. CONST. art. I, § 24(a); see also *supra* note 257.

272. While the Florida Supreme Court has apparently relaxed its citation requirements by only "preferr[ing]" pinpoint citation to the Southern Reporter, see FLA. R. APP. P. 9.800(n), as counsel for Oasis pointed out during oral argument, "when a court expresses to counsel a practice in the Bar before it, that . . . it would prefer something be done in a certain way, well, by golly, that is the way the lawyer is going to do it." Transcript of Oral Argument at 34, Oasis, (No. 3-95-563).

273. See James Love, Supreme Court Decisions in FLITE Database, Dec. 22, 1995, h-ternet listserv posting available at <http://www.essential.org/listproc/tap-juris/0178.html> (Aug. 16, 1996) (copy on file with the author).

274. Gary Wolf, Who Owns the Law?, WIREd, May 1994, at 98; John J. Oslund, Debate Rages Over Who Owns the Law, MINN. STAR-TRIB., Mar. 6, 1995, at A8.

275. Tax Analysts v. Department of Justice, 913 F. Supp. 599, 601 (D.D.C. 1996).

276. *Id.*

277. Wolf, *supra* note 274, at 100. As Gary Wolf notes, this was "a move consistent with the Reagan-era emphasis of privatization." *Id.*

278. *Id.*

new its contract and removed the case law it had input.<sup>279</sup> Lacking the budget to re-enter the data from the ten years West had control over JURIS, DOJ shut the system down.<sup>280</sup>

Although JURIS is no longer active, DOJ has not yet erased the case law comprising the JURIS database.<sup>281</sup> A nonprofit organization named Tax Analysts, which had also submitted a Freedom of Information Act (FOIA)<sup>282</sup> request for the JURIS database in 1993, brought suit in federal district court in 1994 seeking to compel release of JURIS under FOIA.<sup>283</sup> West intervened as of right in the action because of its substantial interest in JURIS.<sup>284</sup> The district court granted DOJ's partial motion to dismiss and West's motion to dismiss, finding that JURIS was not an "agency record" within the meaning of FOIA.<sup>285</sup>

The district court's decision, relying as it did upon *Mead* for part of its reasoning,<sup>286</sup> seems open to question. The court, in commenting upon the contract between DOJ and West, found that West was not attempting to license data in the public domain, but rather its electronic compilation of data in the public domain.<sup>287</sup> Without any discussion of the originality requirement mandated by *Feist*, the court held that by "electronically format[ing]" case law, West was "legally entitled" to license the data in JURIS.<sup>288</sup> The court stated that "[m]aking data 'readable' . . . takes considerable time and effort."<sup>289</sup> Of course, *Feist* makes considerations of time and effort expended irrelevant to a finding

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279. *Id.*

280. *Id.*

281. *Id.* at 100-01.

282. 5 U.S.C. § 552 (1994).

283. *Tax Analysts v. Department of Justice*, 913 F. Supp. 599, 600-01 (D.D.C. 1996).

284. *Id.* at 601.

285. *Id.* The district court found that the U.S. Supreme Court's decision in *Department of Justice v. Tax Analysts*, 492 U.S. 136 (1989), did not provide adequate guidance as to what constituted agency "control" of a document. 913 F. Supp. at 602. "Agency records" are documents which are (1) created or obtained by the agency, and (2) under agency control at the time of the FOIA request. 492 U.S. at 144-45. Although the Supreme Court specifically defined "control" as meaning "that the materials have come into the agency's possession in the legitimate conduct of its official duties," *id.* at 145, the district court de-emphasized this definition and instead insisted that possession alone does not determine control. See 913 F. Supp. at 603. The district court thus disregarded the Supreme Court's instruction to consider not possession alone, but whether the agency took possession of the materials in the "legitimate conduct" of its official duties.

286. See *Tax Analysts*, 913 F. Supp. at 605 (citing *West Publishing Co. v. Mead Data Cent., Inc.*, 616 F. Supp. 1571, 1577 (D. Minn. 1985), *aff'd*, 799 F.2d 1219 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987)).

287. *Id.*

288. *Id.*

289. *Id.*

of copyrightability.<sup>290</sup> Further, the proper inquiry is whether the process of “electronically formatting” case law possesses the minimal degree of creativity to satisfy the Copyright Act’s originality requirement.<sup>291</sup> Inputting text to make it readable by DOJ’s computer system, regardless of the particular quirks of JURIS, is simply a rote, mechanized process devoid of creativity. The Copyright Act specifically excludes mechanical processes from copyrightability.<sup>292</sup>

Regardless of the district court’s ruling, a number of individuals and organizations are continuing their press to make the electronic case law databases commissioned by the government accessible to the general public. Taxpayers Asset Project (TAP), a public interest group headed by James Love, has dubbed the effort to release the electronic case law databases “the Crown Jewels” campaign.<sup>293</sup> In addition to supporting Tax Analysts’ push to have DOJ release JURIS to the public, TAP is particularly interested in gaining access to the almost sixty years of U.S. Supreme Court opinions contained in the FLITE database.<sup>294</sup> Unlike JURIS, FLITE contains no copyrightable materials and was developed entirely at taxpayer expense.<sup>295</sup> The Clinton Administration, apparently lobbied hard by West, has claimed that it does not have to release the records contained in the FLITE database because it views them as “library” materials.<sup>296</sup> A federal district court in California agreed with the Clinton Administration in 1995, finding that the definition of “records” in the Records Disposal Act<sup>297</sup>—which was in effect at the same time Congress passed the FOIA—specifically excluded library reference materials.<sup>298</sup> Because such materials are used for reference or research purposes, the court reasoned, “the indicia of control are lacking.”<sup>299</sup>

Although the lower federal courts have dealt the information activists a setback, it would seem to be only a matter of time be-

290. 499 U.S. at 353-54.

291. *Id.* at 358-59.

292. See 17 U.S.C. § 102(b) (1994) (“In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”).

293. See Love, *supra* note 263.

294. *Id.*

295. *Id.*

296. *Id.*

297. 44 U.S.C. § 3301 (1994).

298. *Baizer v. Department of the Air Force*, 887 F. Supp 225, 229 (N.D. Cal. 1995).

299. *Id.* at 228.

fore an archive of older federal case law is made available on the Internet. Either a higher federal court will recognize that public access to the taxpayer-subsidized JURIS and FLITE databases is solidly within the public policy embodied in both the FOIA and the Wheaton line of cases, or technology will eventually allow relatively painless electronic scanning of older court decisions and their subsequent placement on the Internet.<sup>300</sup>

However, even though Feist and subsequent lower court decisions<sup>301</sup> have made it clear that the copyright interest in factual compilation databases is highly limited, West and other commercial interests are pushing for congressional passage of H.R. 3531, the Database Investment and Intellectual Property Antipiracy Act of 1996.<sup>302</sup> The Act would in a sense overrule Feist by granting protection to databases<sup>303</sup> that are "the result of a qualitatively or quantitatively substantial investment of human, technical, financial or other resources in the collection, assembly, verification, organization or presentation of the database contents . . . ."<sup>304</sup> In other words, the Act would afford database producers the "sweat of the brow" protection Feist read out of the Copyright Act.<sup>305</sup> The Act creates a cause of action against anyone who uses "all or a substantial part" of a protected database's contents "in a manner that conflicts with the database owner's normal exploitation of the database or adversely affects the actual or potential

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300. Although the proposed National Information Infrastructure Copyright Protection Act now pending before Congress would prohibit such activity, see H.R. 2441, 104th Cong., 1st Sess. § 2 (1995), there is nothing in the Copyright Act that prevents a WESTLAW user from systematically downloading opinions from WESTLAW, stripping out the West syllabi, headnotes, and page numbers, and creating a publicly accessible case law database. WESTLAW's subscriber agreement, however, does prohibit the practice. Nevertheless, small CD-ROM publishers have attempted to accomplish much the same thing by electronically scanning cases from West's print reporters. See *West Publishing Co. v. On Point Solutions, Inc.*, No. 93-CV2071MHS, 1994 U.S. Dist. LEXIS 20040 (N.D. Ga. Sept. 1, 1994).

301. See, e.g., *BellSouth Advertising & Publishing Corp. v. Donnelley Info. Publishing, Inc.*, 999 F.2d 1436, 1438-39, 1444 (11th Cir. 1993), cert. denied, 114 S. Ct. 943 (1994) (finding that extraction of all listings from yellow pages directory for use in competing directory was permissible); *ProCD, Inc. v. Zeidenberg*, 908 F. Supp. 640, 647-48 (W.D. Wis. 1996) (finding no copyright infringement where user downloaded telephone listings from publisher's CD-ROM and made listings available on Internet).

302. H.R. 3531, 104th Cong., 2d Sess. (1996); see also IIA Praises Introduction of Database Protection Measure, P.R. NEWSWIRE, May 30, 1996, available in LEXIS, News Library, Curnws File.

303. The Act uses the term "database" to mean not just electronic databases, but rather any "collection, assembly or compilation, in any form or medium now or later known or developed, of works, data or other materials, arranged in a systematic or methodical way." H.R. 3531, 104th Cong., 2d Sess. § 2 (1996) (emphasis added).

304. *Id.* § 3(a).

305. See *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 354 (1991).

market for the database."<sup>306</sup> A database owner may also bring an action against anyone who "engage[s] . . . in the repeated or systematic extraction, use or reuse of insubstantial parts" of a protected database's contents.<sup>307</sup> Moreover, the Act also provides for criminal penalties against those who violate the Act "for direct or indirect commercial advantage or financial gain" or whose violation of the Act "causes loss or damage to a database owner aggregating \$10,000 or more in any one-year calendar period."<sup>308</sup>

Because of West's ostensible "substantial interest" in JURIS, the Act would seem to allow West to sue those who used the opinions in JURIS to create their own electronic database. Furthermore, the Act, along with the equally pro-publisher (and anti-public interest) National Information Infrastructure Copyright Protection Act of 1995,<sup>309</sup> would make it impossible for anyone to electronically scan a West-published opinion into a computer, delete West's proprietary material, and publish the raw opinion. Because many older opinions are only found in West reporters, there is generally no other way for a case law database publisher to provide these older opinions. West would thus remain the sole proprietor of a substantial portion of the law in this country.

Yet even absent this legislative agenda, the problem of star pagination would still remain. Most of the opinions in JURIS contain star pagination to West reporters.<sup>310</sup> Unless West finds itself caught up in a sudden fit of altruism and places its page numbers in the public domain—or unless ongoing litigation seeking to have West's page numbers declared uncopyrightable is successful<sup>311</sup>—the older opinions, much like the new opinions which law libraries are placing on the Internet, will be of limited use.

306. H.R. 3531, 104th Cong., 2d Sess. § 4(a)(1) (1996).

307. *Id.* § 4(a)(2).

308. *Id.* § 8(a).

309. H.R. 2441, 104th Cong., 1st Sess. (1995). The proposed legislation would make it a civil violation for anyone to place copyrighted material into a computer's random access memory (RAM) without permission of the copyright owner. See *id.* § 2(a) (adding "by transmission" to copyright owner's exclusive distribution right); *id.* § 2(a)(B)(2) (adding to definition of "transmit" additional definition that "to 'transmit' a reproduction is to distribute it by any device or process whereby a copy or phonorecord of the work is fixed beyond the place from which it was sent").

310. See *Tax Analysts v. Department of Justice*, 913 F. Supp. 599, 601 (D.D.C. 1996). The opinions from the ten-year span during which West had been inputting data contain West's headnotes as well, which are undeniably the publisher's intellectual property. *Id.*

311. See *Matthew Bender & Co., Inc. v. West Publishing Co.*, No. 94 Civ. 0589, 1996 U.S. Dist. LEXIS 5871 (S.D.N.Y. May 2, 1996) (denying West's motion to dismiss); *Matthew Bender & Co., Inc. v. West Publishing Co.*, No. 94 Civ. 0589, 1995 U.S. Dist. LEXIS 17688 (S.D.N.Y. Nov. 22, 1995) (granting Bender permission to file a second supplemental complaint); see also *supra* discussion part III.B.

#### IV. THE UNIVERSAL CITATION SYSTEM

It would be a mistake to think that just because a certain kind of judicial business has always been conducted in a particular way in the past, it therefore ought to be conducted that way in the future. The federal courts, like other governmental institutions, must, where necessary, change with the changing times.<sup>312</sup>

Chief Justice William H. Rehnquist

Notwithstanding the ongoing debate over pagination copyright, the placement on the Internet of all federal circuit court decisions<sup>313</sup> and decisions from a significant number of state courts has led some to question whether a citation system tied to the print medium (let alone tied to a single vendor in that medium) is desirable. For even if West's page numbers became freely available for all to use as they see fit, the Internet and CD-ROM purveyors of court opinions would still have to wait at least until the arrival of West's advance sheets before being able to insert star pagination to the West reporters. Moreover, star pagination is an overly time-consuming process. Thus, the work involved in inserting page numbers in court opinions would seem considerably more than one could expect from the public-spirited yet shallow-pocketed law libraries now placing opinions on the World Wide Web. Together with legal CD-ROM publishers, the law libraries retrieve opinions from court bulletin board systems (BBSs). Aside from a case name and docket number, there is usually nothing to identify these cases.

##### A. Toward the Wisconsin Proposal

Aware that the federal court opinions available for downloading from court BBSs were of little use to practitioners without a proper form of citation, the Library Program Subcommittee of the United States Judicial Conference Committee on Automation and Technology issued a report in 1991 proposing the development of

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312. Chief Justice William H. Rehnquist, Remarks at the Washington College of Law Centennial Celebration (Apr. 9, 1996).

313. Ironically, the Eighth Circuit completed the array of U.S. Courts of Appeals on the World Wide Web when the Washington University School of Law in St. Louis began placing Eighth Circuit decisions on-line in January 1996. See United States Court of Appeals for the Eighth Circuit, available at <http://www.wulaw.wustl.edu/8th.cir/> (Aug. 16, 1996).



a parallel electronic citation system.<sup>314</sup> The committee recommended the use of the following citation form:

Smith v. Jones, 1990 FED App. 0322P (5th Cir.)

In this citation, "1990" is the year of the opinion, "0322" designates the opinion as the 322d issued during 1990, and "P" indicates that the opinion is published.<sup>315</sup> The proposed citation form would have been used as a temporary measure until the citation to the West reporter became available.<sup>316</sup> During the September 1991 hearings on the proposal, both West Chief Executive Officer Dwight Opperman and Chief Judge Gerald B. Tjoflat of the U.S. Court of Appeals for the Eleventh Circuit testified against adopting the new citation system, claiming it would lead to increased court work loads.<sup>317</sup> West lobbied hard against the plan, sending to law librarians information booklets that warned of dire consequences and voicing to individual federal judges its opposition.<sup>318</sup> In 1992, the Judicial Conference declined to mandate the proposal, yet left the individual circuits free to experiment with the system.<sup>319</sup>

The Sixth Circuit decided to adopt the new citation system in January 1994.<sup>320</sup> Apparently, the increased work load feared by some in the federal judiciary has yet to materialize. Inserting slip opinion page numbers or sequential case identification numbers

314. WIS. STATE BAR TECH'Y RESOURCE COMM., PROPOSED CITATION SYSTEM FOR WISCONSIN 11 (1994), available at <http://www.law.cornell.edu/papers/wiscite/wiscite.overview.html> (Aug. 16, 1996) [hereinafter WIS. CITATION REPORT].

315. AMERICAN ASS'N OF L. LIBR., REPORT OF THE TASK FORCE ON CITATION FORMATS ¶ 46 (1995), available at <http://lawlib.wuacc.edu/aallnet/citeform.html> (Aug. 16, 1996) [hereinafter AALL CITATION REPORT].

316. *Id.*

317. Hansen, *supra* note 5, at 78; Tom Hamburger & Sharon Schmickle, High Stakes and Hot Competition; In Face of Change, West Publishing Fights to Maintain Its Lead in Legal Publishing, MINN. STAR-TRIB., Mar. 6, 1995, at 1A. Judge Tjoflat testified that "it's simply that we have lots to do, and we don't want to have any red tape in what we do." Hamburger & Schmickle, *supra*. He later clarified: "I don't want anything to be imposed on the federal judiciary that would require . . . one more whit of work." Hansen, *supra* note 5, at 78.

A number of commentators have remarked upon the appearance of impropriety engendered by federal judges accepting perquisites from West. West, in addition to giving federal judges personally inscribed calendars, free books, and even bound collections of a particular judge's opinions, sponsors the Edward J. Devitt Distinguished Service Award. An independent panel of federal judges hands out the award, which honors a different member of the federal judiciary every year with a \$15,000 cash prize and a crystal obelisk. Each year, West flies members of the panel, at West's expense, to such destinations as Palm Springs, the Virgin Islands, Palm Beach, Naples, Florida, and Bel Air, California. See Hamburger & Schmickle, *supra*.

318. Hansen, *supra* note 5, at 78.

319. AALL CITATION REPORT, *supra* note 315, ¶ 46.

320. See *id.* ¶ 46 n.63.

into the electronic opinions available on the circuit's BBS has added little to the work of the court.<sup>321</sup> Chief Judge Gilbert Merritt has remarked that the new citation system "just makes [an electronic opinion] more usable. It's not any great big deal."<sup>322</sup> However, the Sixth Circuit's citation system serves only to fill the gap between release of opinions on the court's BBS and their final publication in the West reporter.<sup>323</sup> Thus, the citation form is only final for unpublished opinions.

At about the same time that the Sixth Circuit adopted its new citation system, the Supreme Court of Louisiana ordered all Louisiana appellate courts to begin using a "uniform public domain citation form" along with a parallel citation to West's Southern Reporter.<sup>324</sup> The Louisiana system dispenses with the idea of adding sequential case identification numbers, and uses docket numbers instead.<sup>325</sup> For pinpoint citations, the Louisiana citation system uses slip opinion page numbers; pinpoint citations to the Southern Reporter are optional.<sup>326</sup> Thus, a pinpoint citation to a Louisiana case looks as follows:

Smith v. Jones, 93-2345, p. 7 (La. 7/15/94); 650 So. 2d 500

Unlike the Sixth Circuit's citation system, however, the Louisiana citation form is final.<sup>327</sup> Thus, its effects on legal publishing have been measurable. Prior to the adoption of the new citation form, Louisiana court opinions were available only in the Southern Reporter, WESTLAW, LEXIS, and on West's Louisiana Cases CD-ROM.<sup>328</sup> The new citation form allowed two new CD-ROM products containing Louisiana court opinions to appear on the market.<sup>329</sup> Neither of the two companies marketing the new CD-ROMs are licensed to use West's page numbers.<sup>330</sup> Moreover, not only has the Louisiana Supreme Court's order encouraged competition in the legal publishing arena, it has led to a "considerable lowering of prices" as well.<sup>331</sup>

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321. Hansen, *supra* note 5, at 78.

322. *Id.*

323. See AALL CITATION REPORT, *supra* note 315, ¶ 47.

324. LA. SUP. CT. GEN. ADMIN. R. Part G, § 8.

325. *Id.* In addition, instead of just the year, the citation form indicates the month and day of issue. *Id.*

326. *Id.*

327. See AALL CITATION REPORT, *supra* note 315, ¶ 50.

328. *Id.* ¶ 49.

329. *Id.*

330. *Id.*

331. *Id.* (quoting Thorne D. Harris III, CD-ROMs—The New Basic Research Tool, LA. B.J., Dec. 1994, at 381).

Both the Louisiana and the Sixth Circuit moves, forward-looking as they may seem, are at best only half measures.<sup>332</sup> For in retaining the use of slip opinion page numbers, the two jurisdictions ignored the fact that page numbers are a convention ill-suited to electronic publication. Although slip opinion page numbers are obviously available much sooner than case reporter page numbers, page breaks in the word processing files courts use shift when the user selects a different typeface, changes the margins, or has a printer different from that of the disseminating court.<sup>333</sup> The traditional solution to such difficulties—star pagination—is cumbersome and time-consuming.<sup>334</sup> Apparently aware of this inconvenience, the Colorado Supreme Court authorized both the use of and pinpoint citation to paragraph numbers in all Colorado decisions beginning in May 1994.<sup>335</sup> Nevertheless, the Colorado court retained the use of West's Pacific Reporter as the basic citation form for Colorado, only replacing West's internal pagination with paragraph numbers.<sup>336</sup>

A well-thought-out proposal for an electronic citation system finally appeared on June 22, 1994, when the Technology Resource Committee of the Wisconsin State Bar (Wisconsin TRC) issued a report on a proposed medium-neutral citation system for Wisconsin.<sup>337</sup> The Wisconsin TRC discarded the disadvantages of the Sixth Circuit, Louisiana, and Colorado citation formats and instead incorporated the advantages of those formats in one system. It kept the year and sequential opinion numbering conventions from the Sixth Circuit format and used the paragraph numbering system from the Colorado format. In addition, after the year in the new format, the Wisconsin TRC added a jurisdiction identifier—traditionally placed, along with the year, in the paren-

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332. The Louisiana citation form has an additional flaw as well. By using docket numbers instead of the sequential opinion numbers used by the Sixth Circuit, the Louisiana form necessitates the use of an opinion's specific date to obviate confusion with a case containing the same docket number. AALL CITATION REPORT, supra note 315, ¶ 64. The use of docket numbers possesses other disadvantages as well: (1) they have no connection with whether the case is published; (2) they do not indicate the sequence of publication; (3) they are frequently too long, creating a greater possibility of error in the citation; and (4) they frequently do not work well with many electronic case law validation and research tools. *Id.*

333. See ABA SPECIAL COMM. ON CITATION ISSUES, REPORT TO THE HOUSE OF DELEGATES ¶ 33 (1996) [hereinafter ABA CITATION REPORT]; WIS. CITATION REPORT, supra note 314 at 21; AALL CITATION REPORT, supra note 315, ¶ 37.

334. Star pagination to slip opinion page numbers would require a court clerk to type in a bracketed page number at the beginning of each page of text.

335. AALL CITATION REPORT, supra note 315, ¶ 51.

336. *Id.*

337. WIS. CITATION REPORT, supra note 314; see also Marcia J. Koslov, What is the Citation Proposal?, WIS. LAW., Feb. 1995, at 10.

thetical at the end of case citations. Pinpoint citations in the proposed Wisconsin format appear as follows:

Smith v. Jones, 1996 Wis App 35, 15.

This simple citation refers the reader to the fifteenth paragraph of the Wisconsin Court of Appeals' thirty-fifth decision in 1996.

The Wisconsin proposal was thus the first universal citation form that recognized the coming primacy of electronic case law and adapted citation requirements accordingly. The Wisconsin State Bar Board of Governors approved the new format almost immediately; after a May 1995 hearing, however, the Wisconsin Supreme Court postponed consideration of the issue for eighteen months.<sup>338</sup> Nevertheless, the Wisconsin proposal caught on. In March 1995, the American Association of Law Libraries (AALL) Task Force on Citation Formats submitted a report to the AALL Executive Board recommending adoption of the Wisconsin citation format.<sup>339</sup> The entire AALL approved the proposal on July 18, 1995.<sup>340</sup> Following the AALL recommendation, the South Dakota State Bar Association, which had been distributing state court opinions to its members using the medium-neutral citation format, began preparing a proposal for the South Dakota Supreme Court, urging it to adopt the new format.<sup>341</sup> At the annual meeting of the American Bar Association in August 1995, the ABA's Board of Governors appointed a Special Committee on Citation Issues to develop recommendations concerning citation systems and make those recommendations to the ABA's House of Delegates the following year.<sup>342</sup> In October 1995, the Florida Supreme Court, which had earlier requested comments on a proposal to eliminate pinpoint citations to West's Southern Reporter, adopted a rule which stated that while attorneys should continue to cite to the Southern Reporter, pinpoint citations, while "preferred," were

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338. See John J. Oslund, Wisconsin High Court Delays Decision on Case Citation Plan; West Publishing Opposes Proposed Change, MINN. STAR-TRIB., May 26, 1995, at 1D. The Wisconsin Supreme Court did, however, decide to begin posting all of its decisions on court BBS by September 1995. *Id.*

339. See AALL CITATION REPORT, *supra* note 315.

340. Federal Courts: Law Librarians Adopt Resolutions Calling for Alternative Legal Cites, DAILY REP. FOR EXECUTIVES, July 19, 1995, at D45.

341. Dana Coleman, Other States Battling Over Universal Citations, NEW JERSEY LAW., July 31, 1995, at 18. The South Dakota Supreme Court had earlier rebuffed attorneys' attempts to cite the bar association's opinions to the court, claiming that it could not find the cited opinions and reiterating that attorneys had to use West's North Western Reporter because it was the state's official reporter. *Id.*

342. See Jill Schachner Chanen, In the Matter of Cites, A.B.A. J., Feb. 1996, at 87; see also ABA Special Committee on Citation Issues, available at <http://www.abanet.org/citation/home.html> (Aug. 16, 1996).

not absolutely necessary.<sup>343</sup> In January 1996, the California Supreme Court's Advisory Committee on Publication of Official Reports asked for comments on a proposed "neutral-format" citation style for state appellate court opinions.<sup>344</sup> In May 1996, the ABA Special Committee released its final report, recommending the adoption of the Wisconsin proposal as a standard citation system for all United States jurisdictions.<sup>345</sup> The ABA House of Delegates accepted the Special Committee's recommendation and endorsed the proposed system in August 1996.<sup>346</sup>

### B. Analysis of the New Citation Format

Although driven in part by West's insistence upon asserting copyright in the pagination of its case reporters, the move toward a universal citation system is primarily a response to the vast changes technology has wrought upon the manner in which legal information is stored and delivered. A generation ago, legal research meant using print-based case reporters. Computer-assisted legal research was available to only a handful of top law firms.<sup>347</sup> Since 1990, however, every law student in the United States has been given a free LEXIS and WESTLAW account.<sup>348</sup> After the first semester of law school, during which students are generally prohibited by their schools from accessing either LEXIS or WESTLAW, students rarely return to the library stacks con-

343. See *In re Fla. R. App. P. 9.800(n)*, Citations, 661 So. 2d 815 (Fla. 1995).

344. Posting of James Evans to law-lib Internet listserv (Jan. 23, 1996) (copy on file with the author).

345. See ABA CITATION REPORT, *supra* note 333, ¶ 11. The Special Committee provided the following examples of the citation form at the federal level:

Supreme Court: 1996 US 15

Court of Appeals: 1996 5Cir 15

District Court: 1996 SDNY 15

*Id.* ¶ 40, app. A. The AALL proposes a slightly different format for federal district courts and courts of appeals:

Court of Appeals: 1996 US App (5th) 15

District Court: 1996 US NY (S Dist) 15

AMERICAN ASS'N OF L. LIBR., USER GUIDE TO THE AALL MEDIUM NEUTRAL CITATION Rule 4.2, 4.3 (Draft Release 2.2 1996). The ABA Special Committee also recommended that "all jurisdictions [should] strongly encourage parallel citation to a print source" during a transition to "primary reliance on electronic case reports." ABA CITATION REPORT, *supra* note 333, ¶ 38.

346. M.A. Stapleton, ABA Backs 'Instant' Legal Cite System, CHI. DAILY L. BULL., Aug. 6, 1996, at 1. The vote in the House of Delegates was an overwhelming 336-59. *Id.* Four days earlier, the ABA's Board of Governors unanimously endorsed the new citation form. M.A. Stapleton, ABA Body Backs Universal System for Legal Cites, CHI. DAILY L. BULL., Aug. 2, 1996, at 1.

347. See Harrington, *supra* note 85, at 553.

348. Marilyn R. Walter, Retaking Control over Teaching Research, 43 J. LEGAL EDUC. 569, 581 (1993).

taining case reporters; the overwhelming bulk of legal research that students conduct takes place electronically.<sup>349</sup> Moreover, law schools frequently give their students not only free e-mail accounts, but also free access to the Internet<sup>350</sup>—where they can now find a wealth of case law and an assortment of other legal research resources. The United States has thus reached a point where its new lawyers are entirely familiar and comfortable with electronic legal research, and turn to the print medium only as a last resort.

Further, CD-ROM technology, which allows the entire body of case law from a given state to be placed on a small disk, has allowed the sole practitioners and small firms that had hitherto been unable to afford building a library of case reporters in print an efficient means of accessing the case law in their jurisdictions.

The citation forms developed for use in print reporters are, however, a product of both nineteenth-century technology and nineteenth-century ways of thinking. Pages do not naturally exist in cyberspace. The nearest analogy to other forms of information dissemination immediately comes to mind when one looks at the scroll bar that generally resides on the right side of the screen of most computer applications. Before Gutenberg invented the printing press—and pages—there were scrolls. Citations to scrolls took a simple form: the number of the scroll (or chapter or book) and the paragraph number of the material being cited within the scroll.<sup>351</sup> Instead of being determined by technology, as pages are, paragraphs indicate what the author intended as a complete thought.<sup>352</sup> Examples of scroll/book/chapter and paragraph numbers abound, the most obvious being the Bible, e.g., Genesis 2:8.<sup>353</sup> As the Wisconsin TRC noted, “The proposal of the Committee is, in no small part, a proposal to use this system. In several millennia, we have come full circle.”<sup>354</sup>

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349. Exceptions occur when students clerk for small law firms or other legal entities that do not subscribe to WESTLAW or LEXIS. See Carol L. Schlein, *Selecting On-Line Research and Discussion Service for Small Firms*, NEW JERSEY LAW., May 8, 1995, at 15 (noting that LEXIS and WESTLAW have historically been too expensive for lawyers in small firms).

350. See, e.g., THE FLORIDA STATE UNIVERSITY COLLEGE OF LAW, 1995-1996 STUDENT HANDBOOK 79 (noting that “law students have access to Internet services [and] e-mail”).

351. WIS. CITATION REPORT, *supra* note 314, at 22.

352. *Id.* at 28.

353. *Id.* at 22-23.

354. *Id.* at 23.

## 1. Criticism of the Proposed Form

### a. A Citation to Nowhere

Criticism of the proposal centers around the observation that the new citation form does nothing to inform the user where the material being cited may be found.<sup>355</sup> Calling the universal citation form “incomplete and inefficient,” critics point out that users are left to guess whether a cited case can be found in a legal newspaper, a reporter volume, or on the Internet or a CD-ROM.<sup>356</sup> Therefore, the argument goes, the new system “makes it much more difficult to evaluate the reliability of information sources” because “it is very likely that one will find variant texts between competing products.”<sup>357</sup> Such observations, while undeniably valid, are hardly novel. For example, in those jurisdictions that require parallel print citations, the reader is left to wonder which of the parallel sources the author used.<sup>358</sup> Moreover, even if an attorney cites to one case reporter, there is no indication whether the attorney used the actual print volume, a CD-ROM, WESTLAW, or LEXIS.<sup>359</sup> In any event, the issue would seem to be a minor one at best, for it only comes into play where there are differing versions of court opinions.<sup>360</sup> Furthermore, the definitive version of a particular case originates on a court BBS, from which all providers will have obtained the opinion. To create a different version, a provider would have to actively alter the opinion in some fashion. Thus, at least in theory, the competitive marketplace should winnow out such unreliable providers of legal information.<sup>361</sup>

### b. Citations to “Any Reliable Source”

West Publishing is quick to point out that it is not opposed to new citation forms. It prefers a citation rule that is really no rule:

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355. See, e.g., Donna M. Bergsgaard & Andrew M. Desmond, *Keep Government Out of the Citation Business*, JUDICATURE, Sept.-Oct. 1995, at 61; Donna M. Bergsgaard & William H. Lindberg, *Case Citation Formats in the United States: Is a Radical New Approach Needed?*, 23 INT'L J. LEGAL INFO. 53, 59 (1995); Berring, *supra* note 81, at 632.

356. Bergsgaard & Desmond, *supra* note 355, at 61.

357. Berring, *supra* note 81, at 632.

358. AALL CITATION REPORT, *supra* note 315, ¶ 59.

359. *Id.*

360. *Id.* As the AALL report indicates, “in actual practice this is not a common occurrence and may be easily remedied by obtaining a different version of the case, from one’s own office, another practitioner, a library, or the court.”*Id.*

361. *Id.* It is precisely this form of unreliability that, among other things, led many to view WESTLAW as inferior to LEXIS in the late 1970s. See Harrington, *supra* note 85, at 554.

an “open rule” where courts allow citation to any reliable source.<sup>362</sup> In other words, if a case can only be found on CD-ROM, the Internet, or in a legal newspaper, courts should allow citation to any of those specific sources. One West spokesperson has even suggested that World Wide Web location citations, known as Uniform Resource Locators (URLs), may make the proposed citation form obsolete within a few years.<sup>363</sup> Thus, West maintains that “[i]t is not necessary for courts to require attorneys to cite specific sources of the law.”<sup>364</sup>

West’s comments are somewhat disingenuous. West reporters are undoubtedly the most comprehensive and reliable source of case law; thus, most attorneys would continue to use West reporters even if courts adopted such an “open rule” system. An “open rule” of citation, however, is the sort of anarchic system that would be anathema to most courts. Courts promulgate citation requirements precisely because they do not want to subscribe to every possible source of case law. Moreover, the universal citation form leads to a more appropriate version of the “open” citation rule envisioned by its critics because it allows attorneys to use “any reliable source” rather than cite to any of those sources. The proposed citation form requires the use of the citation contained within the opinion itself. The citation will thus be readily found in all sources. For example, an attorney in Florida might cite a case found on the Internet as follows:

Smith v. Jones, 1996 Fla 23

A Florida Supreme Court justice, lacking access to the Internet but possessing a CD-ROM of Florida opinions, could easily find the opinion simply by locating the twenty-third Florida Supreme Court opinion from 1996 on the disk.<sup>365</sup> Under West’s “open rule” proposal, the attorney’s citation might look like this:

Smith v. Jones, <http://nersp.nerdc.ufl.edu/~lawinfo/flsupct/cases/feb96/op-86532.html>

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362. Bergsgaard & Desmond, *supra* note 355, at 63-64; Bergsgaard & Lindberg, *supra* note 355, at 63.

363. Bergsgaard & Desmond, *supra* note 355, at 61.

364. *Id.*

365. It would be left to CD-ROM publishers how best to locate an opinion on disk. The easiest system would entail the use of a search engine which would allow the user to input the citation—much in the same manner as the LEXIS LEXSEE and WESTLAW Find functions—to call up the case in question.

The same case would be equally easy to find on the Internet. A Web site containing a particular court’s cases would list opinions sequentially by year. A user accessing the site would simply click on the sequential opinion number to call up the opinion in question.



Although perhaps able to garner some helpful information from the URL, our putative justice would have a much more difficult time finding the opinion in question without access to the Internet. Moreover, the use of such lengthy citations is not only cumbersome, it is also more prone to error.<sup>366</sup>

Finally, the notion of reliability—or, more precisely, unreliability—is often mentioned as an argument against the universal citation form. Without publishers such as West to edit and clean up court opinions, those who take opinions with the new citation format off of Internet databases will simply be getting the “[r]aw output of the courts.”<sup>367</sup> This line of thinking conjures up visions of hopelessly ungrammatical judges carelessly tossing off muddled opinions that must be filtered through legal publishers to make sense. Yet the notion that publishers make any significant changes to final opinions is unfounded.<sup>368</sup> As one commentator has noted, once final opinions are issued, “they do not change significantly, except in rare cases. Even the publishers confirm that most of their suggestions are technical, concerning issues like the form of footnotes.”<sup>369</sup> Minor technical changes would have no impact upon the paragraph numbers in an opinion with a universal citation. Moreover, the ranks of appellate court clerks—who frequently either write or edit a judge’s opinion—are generally filled with notoriously particular former law review editors. Thus, an overall system of quality control is already in place in the courts.

### c. Disadvantaging the Print Medium

Critics also contend that the universal citation form puts both print reporters and their users at a disadvantage.<sup>370</sup> In addition to failing to identify the print reporter in which a cited case might be found, the citation proposal would entail the use of a citation translation table for print reporter users, the addition of

366. See discussion *infra* part IV.B.2.

367. Robert C. Berring, *Universal Citation Systems—Will Tinkering with the Future Be the End of Reliable, Standardized Opinions? Yes: Keep Committees Out and Let Market Forces Work*, A.B.A. J., July 1996, at 74. Professor Berring also notes that “[m]aterial [currently] is gathered, edited, cleaned up, standardized and vetted” by legal publishers. *Id.*

368. See Gary Sherman, *Universal Citation Systems—Will Tinkering with the Future Be the End of Reliable, Standardized Opinions? No: Court Bulletin Boards Pose No Threat to Quality*, A.B.A. J., July 1996, at 75 (observing that “judges . . . generally deny that the print publishers make significant editorial contributions to the final opinion”).

369. *Id.*

370. See Donna M. Bergsgaard & William H. Lindberg, *A Dissenting View*, in AALL CITATION REPORT, *supra* note 315, at 30-33 (dissenting from majority recommendation).

“confusing spine labels to volumes that now carry easily understood and easily transcribed volume numbers,” and “significant” retraining of every attorney who currently knows how to find cases in print publications.<sup>371</sup> Moreover, these critics point out that while electronic products have become a popular means of searching for the law, print remains the preferred medium for legal study and analysis.<sup>372</sup>

The first point—that the appropriate print reporter would be difficult to locate with the proposed citation system—is not a fault of the citation form but rather of the print reporter itself. For if a given legal publisher insists upon continuing the use of volume numbers that only signify how many volumes of a print reporter it has published, rather than indicating upon the volume’s spine which cases from which jurisdiction and which year are included within the volume, then the publisher should release a translation table to allow the print user to find a case that uses the proposed citation form in the publisher’s volume. These solutions, however, become the gist of the critics’ argument that universal citations would disadvantage print reporters. Nevertheless, West provides translation tables today, for translating citation forms from those jurisdictions with official reporters to West’s National Reporter System.<sup>373</sup> West does not argue that these official reporters disadvantage users of the National Reporter System. However, this does seem to be the very argument that West is making with respect to universal citations: the proposed form will disadvantage users of the National Reporter System because the reporters in that system group multiple jurisdictions within a single volume, thus making it difficult (though not impossible) for West to indicate to the user which cases from which years are included within a volume. Of course, this is where the potential for “confusing spine labels” comes in. Yet this difficulty does not exist where print reporters contain only cases from one jurisdiction. The solution there is simply to stop assigning volume numbers to such reporters and instead number them by year, indicating in addition the sequentially numbered cases contained within the volume. While West’s National Reporter System was a stroke of marketing genius which made legal research more convenient, its success should not be allowed to

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371. *Id.* at 31.

372. *Id.*

373. AAAL CITATION REPORT, *supra* note 315, ¶ 58. West’s National Reporter Blue Book contains translation tables that convert official citations to National Reporter System citations. *Id.*

stand as an obstacle to making legal research even more convenient—not to mention less expensive.

The potential retraining of a nation of attorneys who have grown accustomed to researching in print reporters is not a particularly strong argument. The current system of citation is hardly intuitive, as any first-year law student who is trying to figure out what “661 So. 2d 288 (Fla. 1995)” means will tell you. The universal citation form conveys information in a way that even nonlawyers might understand, for instead of an esoteric reference to a particular volume number of a publisher’s reporter series, the proposed form simply indicates the year. Retraining attorneys to recognize the information conveyed in a much simpler citation system is not an onerous task.<sup>374</sup>

Finally, it is difficult to argue with the proposition that print remains the preferred medium in which to read case law. However, this is not necessarily the same as saying that print reporters remain the preferred medium in which to read case law. Many users of electronic products confess to some difficulty reading cases from a computer screen.<sup>375</sup> Yet it seems unlikely that these users, once they have found a case electronically, then travel to the nearest law library and read the case in a reporter. Rather, users of electronic case law are much more apt to print out the case file they are viewing on the screen.<sup>376</sup> Thus, the universal citation form cannot be said to disadvantage users who prefer to read cases in print.

374. Indeed, the proposed citation form by and large maintains the jurisdiction identifiers familiar to attorneys from the parentheticals of the current citation system. What is perhaps most novel about the new citation form is that it numbers cases sequentially by year and uses paragraph numbers instead of page numbers. Although the use of these two numbers might take attorneys some time to accustom themselves, it seems difficult to agree with critics who call it a “significant new learning task.” See *id.*

375. *Id.* As Chief Judge Richard A. Posner of the Seventh Circuit says, “The problem is, us older guys are accustomed to reading on the printed page.” Christine Biederman, *Growing Internet Law Libraries Shake Century-Old Legal Tradition*, N.Y. TIMES ON THE WEB, Feb. 16, 1996, available at <http://www.nytimes.com/library/cyber/week/0216bluebook.html> (Aug. 16, 1996).

376. The author conducted virtually all of the research for this Comment electronically and printed out those sources he chose to read. Ironically, the only instances that compelled the author to visit a law library occurred when an electronic database did not include star pagination for a particular journal. This suggests that law journals consider adopting a medium neutral citation format as well: instead of volume numbers, law journals would use the year of publication; instead of continuous pagination within a volume (which might still be retained for the sake of convenience), articles would be numbered sequentially; and instead of relying upon page numbers for pinpoint citation, paragraphs would be numbered.

#### d. Letting the Market Decide

Another line of criticism is perhaps best summed up as being of the “if-it-ain’t-broke-don’t-fix-it” variety. Taking a page from the teachings of the law and economics movement, critics of the citation proposal suggest that the market should dictate legal citation form.<sup>377</sup> The reason current citation practices favor West reporters is because the market has decided this.<sup>378</sup> The market, the argument goes, will only accept the new citation format when it is ready.<sup>379</sup> Moreover, a universal citation system requirement is likened to unwanted “Big Government” and “Excessive Regulation.”<sup>380</sup> Requiring the new form would, according to this view, “make the world of citation far more restrictive than it has ever been in the past.”<sup>381</sup>

The market did indeed anoint West as the favored resource for case law. Recognizing this fact, many courts—as well as The Bluebook—followed suit and, because West reporters were so readily available, required citations to West volumes. But these very requirements, together with West’s assertion of copyright in its reporter pagination, have skewed any “natural” market response to new citation forms. Thus, one cannot suggest that the market dictates citation form because current citation requirements prevent it from doing so. If the courts gave up citation requirements to specific sources such as West reporters and adopted the “open rule” of citation, then perhaps the market would eventually come to favor a particular citation form. As discussed earlier, however, courts would be loathe to adopt such a rule.<sup>382</sup> Thus, it is up to the courts—whether seen as “Big Government” involvement or no—to sort out citation requirements and adapt them to evolving technological needs. The Bluebook editors have done just that. While the fifteenth edition of The Bluebook dispensed with the use of parallel citations (except within individual jurisdictions) and adopted West’s National Reporter System as the preferred manner for case citation, the editors of the sixteenth edition have decided to recommend that

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377. See, e.g., Berring, *supra* note 81, at 631 (“Under no circumstances should citation requirements be changed in a way that would interfere with the natural evolution of legal information in the marketplace.”).

378. *Id.* at 633.

379. *Id.* at 634.

380. See Bergsgaard & Desmond, *supra* note 355, at 66.

381. Berring, *supra* note 81, at 631.

382. See discussion *supra* part IV.B.1.b.

“when vendor-neutral citations are available, people should use those vendor-neutral citations as the preferred citation.”<sup>383</sup>

## 2. Theory: Requirements of Legal Citation Form

While legal citation forms serve a number of purposes, the primary purpose is “to direct the reader to a source of the information referred to by the author.”<sup>384</sup> In his article *Legal Citation Form: Theory and Practice*,<sup>385</sup> Paul Axel-Lute listed 13 principles of legal citation form: Uniqueness, Brevity, Redundancy, Informativeness, Dissimilarity among forms, Similarity to original, Logic, Permanence, Readability/ Transcribability, Tradition, Standardization, Simplicity, and Honesty.<sup>386</sup>

To satisfy the criterion of Uniqueness, “[a] citation should contain sufficient information to identify unambiguously the material cited.”<sup>387</sup> The universal citation form easily complies with this requirement, as it identifies the court issuing the opinion and assigns a unique identifying number to the opinion. Brevity requires that a citation form “should not be longer than necessary.”<sup>388</sup> The new citation form is, in fact, shorter than traditional citation forms, because it does not include references to a particular publisher’s volume. Redundancy is a two-pronged criterion, requiring that the citation form (1) enable one to recover from an error in the citation, and (2) provide references to different sources for the same material.<sup>389</sup> The current print-based citation form has fairly strong redundancy in the first sense, as the volume number and year repeat much the same information.<sup>390</sup> The new citation form lacks this redundancy, but more than makes up for it in that the citation is part of the opinion itself, thus making it easier to recover from errors.<sup>391</sup> In addition, because of this inateness, the new form is superior in the second sense of redundancy, as it refers readers to all sources of case law, e.g., CD-ROMs, print reporters, on-line databases, etc.<sup>392</sup>

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383. Biederman, *supra* note 375 (quoting Harvard Law Review president Dave Friedman).

384. Byron D. Cooper, *Anglo-American Legal Citation: Historical Development and Library Implications*, 75 *LAW LIBR. J.* 3, 3 (1982).

385. Paul Axel-Lute, *Legal Citation Form: Theory and Practice*, 75 *LAW LIBR. J.* 148 (1982).

386. *Id.* at 148-49.

387. *Id.* at 148.

388. *Id.*

389. *Id.*

390. *WIS. CITATION REPORT*, *supra* note 314, at 33.

391. *Id.*

392. *Id.*

Informativeness requires that the citation possess “the information that is most likely to be useful to the reader in understanding and evaluating the authority behind the statement supported by the citation.”<sup>393</sup> Both new and old forms convey equally the information needed to evaluate the authority of the material cited. Dissimilarity among forms requires that citation forms of material cited in the same context be sufficiently dissimilar to minimize confusion.<sup>394</sup> According to the Wisconsin TRC report, the four-digit year of the new form provides “a distinctive format that will prevent confusion with other forms.”<sup>395</sup> To satisfy the criterion of Similarity to original “[a] citation form should be as close as possible to the full identifying information on the cited material.”<sup>396</sup> The new citation form meets this criterion, as the cite and the identifying material in the case are one and the same; such is not the case with the current system. Logic requires that elements of a citation form be arranged to reflect the logical relationships of the cited material’s attributes.<sup>397</sup> Both new and old forms satisfy this principle equally. Permanence means precisely that: citation information “should be as permanent as possible, minimizing the need to revise the citation at a later time.”<sup>398</sup> This criterion is lacking in the current system, as the means for citing new cases—slip opinions<sup>399</sup>—eventually changes to advance sheets and then a permanent reporter.<sup>400</sup> Because it is a part of the opinion, the new citation form is permanent as soon as the case is released. Readability/ Transcribability refers to a citation’s “expressib[ility] in different media.”<sup>401</sup> Both citation forms possess this quality equally.

Tradition requires that authority “be cited the way it has been cited previously, in order to avoid a confusing multiplicity of forms.”<sup>402</sup> Generations of attorneys have used the current system, while the proposed citation form represents a significant change. Axel-Lute goes on to say, however, that “[c]itation forms found on the cited material itself should be followed unless they are defec-

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393. Axel-Lute, *supra* note 385, at 148.

394. *Id.* at 149.

395. WIS. CITATION REPORT, *supra* note 314, at 33.

396. Axel-Lute, *supra* note 385, at 149.

397. *Id.*

398. *Id.*

399. See *The Bluebook: A Uniform System of Citation* 67 (15th ed. 1991) (“When a case is unreported and available only in separately printed slip opinions, give the docket number, the court, and the full date of the most recent major disposition of the case.”).

400. WIS. CITATION REPORT, *supra* note 314, at 34.

401. Axel-Lute, *supra* note 385, at 149.

402. *Id.*

tive with respect to other principles.”<sup>403</sup> Because the new form will be found within a cited case, this principle seems to mandate the use of the new form, traditional citation form notwithstanding. The Standardization principle requires that a “writer should follow [The Bluebook:] A Uniform System of Citation.”<sup>404</sup> The Bluebook has made the current system all but uniform across the country. However, the editors of The Bluebook have indicated that they will recommend the new citation form be used once it is adopted as an official method of citation by a given court.<sup>405</sup> The AALL and the ABA have already endorsed the Wisconsin proposal; thus, it would seem likely that it will become the standard form of vendor-neutral citation.

To satisfy the Simplicity principle, the number of separate rules to be learned should be kept to a minimum.<sup>406</sup> The proposed citation form is a good deal simpler than the current form, as it only requires the user to learn jurisdiction designations. Finally, the Honesty principle requires that “[t]he writer should cite the source that was actually used, rather than another source for the same material.”<sup>407</sup> Under the current system, one cites to a publication containing a copy of the opinion, rather than the opinion itself. Because one would cite to the opinion itself under the proposed system, one would be citing to the source actually used.

The Axel-Lute principles, published in 1982, do not address certain conditions that have subsequently arisen, namely the advent of electronic publication, CD-ROMs, and the Internet, as well as the controversy surrounding pagination copyright.<sup>408</sup> To address the concerns these conditions engendered, the Wisconsin TRC report added four additional principles: Precision, Public Domain, Longevity, and Universality. Precision requires that a citation “allow the user to easily find the precise material referred to.”<sup>409</sup> The Wisconsin report observes that paragraph citations provide far greater accuracy than page number citations, “particularly when the page is in a multi-columned version . . . and consequently covers a large amount of material.”<sup>410</sup> The Public Domain principle requires that one should be able to use a ci-

403. *Id.*

404. *Id.*

405. See Bluebook Editors Moving Toward Recommending Vendor-Neutral Citations, *DAILY REP. FOR EXECUTIVES*, Mar. 7, 1996, at A45.

406. Axel-Lute, *supra* note 385, at 149.

407. *Id.*

408. AALL CITATION REPORT, *supra* note 315, ¶ 21.

409. WIS. CITATION REPORT, *supra* note 314, at 35-36.

410. *Id.*

tation system without legal hindrance.<sup>411</sup> As the proposed system is, by definition, vendor-neutral, it is not the property of any one entity, and may be freely used by all.

To satisfy the Longevity principle, a citation form should be able to conform to changes in technology over a long period of time.<sup>412</sup> The vendor neutral citation form is tied to the author's thoughts, expressed as paragraphs, rather than the page numbers, which are the result of a medium-specific mechanical process that is independent of the author. Related to this principle is Universality, which requires that one be able to use a citation system within a variety of media and for a variety of purposes.<sup>413</sup> The proposed system meets this criterion, while the current system does not.

### 3. Practice: The Potential Application of the Universal Citation Form in Florida

Raising the specter of "Big Government" and an overworked judiciary, criticism of the universal citation system frequently takes the form of objecting to the costs involved in putting it into practice. Therefore, exploring the potential application of the proposed system in a single jurisdiction is helpful. For example, Florida has a tradition of encouraging unfettered access to public records.<sup>414</sup> Indeed, in addition to the public records statute,<sup>415</sup> the Florida Constitution guarantees access to public records, specifically including the public records of the judiciary.<sup>416</sup> Yet Florida is also typical of a number of states, in that its court rules require citation to a reporter in West's National Reporter System—in this case, the Southern Reporter.<sup>417</sup>

#### a. Background

As discussed earlier,<sup>418</sup> Florida had published its own cases in volumes known as Florida Reports until 1948.<sup>419</sup> State law in ef-

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411. *Id.*

412. *Id.* at 36.

413. *Id.*

414. See, e.g., Barbara A. Petersen & Charlie Roberts, Access to Electronic Public Records, 22 FLA. ST. U. L. REV. 443, 499 (1994) (discussing Florida legislation that requires record custodians to provide copies of public records in the medium requested if the record is maintained in that medium); Matthew D. Bunker et al., Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology, 20 FLA. ST. U. L. REV. 543, 557-59 (1993) (discussing guidelines to ensure access to computerized records in Florida).

415. See FLA. STAT. ch. 119 (1995).

416. FLA. CONST. art. I, § 24(a).

417. FLA. R. APP. P. 9.800(a)-(b), (n).

418. See *supra* text accompanying note 246.



fect before that time allowed the supreme court to contract with a "reputable publisher" to print and bind the cases for the state.<sup>420</sup> The publisher physically delivered the reporters to the supreme court, where court personnel would mail them to judges throughout Florida and also sell them.<sup>421</sup> After the Second World War, the case load had grown too big for the court to physically distribute its own case reporters; therefore, along with a number of other jurisdictions, the state decided to rely upon West's National Reporter System.<sup>422</sup>

Florida is unusual, however, because the court rules requiring citation to the Southern Reporter are a reflection of Florida statutory law, which specifies that every two years the state must enter into a contract with West Publishing providing for the publication of Florida case law.<sup>423</sup> Thus, because it enjoys the rare privilege of being a private company enshrined in the Florida Statutes, West Publishing would seem to be the official reporter for Florida.<sup>424</sup> Nevertheless, West denies its official status in Florida<sup>425</sup> and has zealously pursued competitors who have tried to use its page numbers for their compilations of Florida cases.<sup>426</sup> Florida therefore has found itself in a rather odd position: it has a constitution that specifically mandates repeal of any statute or court rule limiting access to public records,<sup>427</sup> yet it keeps a statute on the books<sup>428</sup> requiring its court system to sign agreements with a publishing company that claims copyright in the versions of the public records it publishes for the state. Further, the Florida Supreme Court still requires, via court rule,<sup>429</sup> that the only

419. Interview with Jo Dowling, Ass't Librarian, Supreme Court of Florida, in Tallahassee, Fla. (Apr. 2, 1996).

420. *Id.*

421. *Id.*

422. *Id.*

423. FLA. STAT. § 25.381 (1995).

424. The Florida Supreme Court has admitted as much. See SUPREME COURT MANUAL, § 4, at 700 ("Publishers other than the Court's official reporter . . ."); see also *supra* text accompanying note 250.

425. *Oasis Publishing Co., Inc. v. West Publishing Co.*, 924 F. Supp. 918, 930 (D. Minn. 1996).

426. See *West Publishing Co. v. On Point Solutions, Inc.*, No. 93-CV-2071-MHS, 1994 U.S. Dist. LEXIS 20040 (N.D. Ga. Sept. 1, 1994); see also discussion *supra* part III.B.

427. FLA. CONST. art. I, § 24(d) provides:

All laws that are in effect on July 1, 1993 that limit public access to records or meetings shall remain in force, and such laws apply to records of the legislative and judicial branches, until they are repealed. Rules of court that are in effect on the date of adoption of this section that limit access to records shall remain in effect until they are repealed.

428. FLA. STAT. § 25.381 (1995).

429. FLA. R. APP. P. 9.800(a)-(b), (n).

acceptable citation form for case law in Florida is the publisher's copyrighted version. Because the copyright claim prevents competitors from offering citable and affordable versions of case law, the Florida statute and court rule work to hinder access to these public records.

Therefore, it would seem that Florida would be ripe for adopting the universal citation form. The Florida Supreme Court, however, while apparently recognizing the difficulty West's copyright claims have created, has simply opted to discard the requirement of pinpoint citations to the Southern Reporter rather than adopt the new citation form.<sup>430</sup> This decision, while understandably cautious considering the rapid changes taking place, was perhaps too cautious if one understands how easy it would be for Florida to adopt the new citation form.

#### b. The Opinion Dissemination Process in Florida

After a Florida Supreme Court opinion is drafted with word processing software, it is circulated to the panel that originally heard the case.<sup>431</sup> Depending upon how long the justices' voting process takes, the opinion is then ready to be finalized.<sup>432</sup> After being checked one more time for corrections, the opinion—now called a "file stamp case"—is put in a special directory for West Publishing on a clerk's computer.<sup>433</sup> From there, the court's Information System Services (ISS) department transmits opinions to West every Thursday after 10:00 a.m.<sup>434</sup> After all of the opinions have been transmitted to West, ISS takes the opinions and places them on the court's BBS.<sup>435</sup> From there, LEXIS retrieves its copies of opinions, as does the official supreme court opinion Web site at the University of Florida College of Law.<sup>436</sup> Court data from 1993 indicates that the court disseminated "roughly" 428 opinions with dispositions that year.<sup>437</sup>

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430. In re Fla. R. App. P. 9.800(n), Citations, 661 So. 2d 815, 816 (Fla. 1995): "[P]inpoint citation to . . . the Southern Reporter . . . is optional, although preferred." As noted earlier, few attorneys practicing before the Florida Supreme Court would venture to disregard its "preferences." See *supra* note 272.

431. Interview with Janie Bentley, Deputy Clerk, Supreme Court of Florida, in Tallahassee, Fla. (Apr. 2, 1996).

432. *Id.*

433. *Id.*

434. *Id.*

435. *Id.*

436. *Id.*

437. *Id.*

### c. Implementing the New Citation Form

The obvious time to append the universal citation form to the Florida Supreme Court's opinions is when they are checked for corrections a final time, immediately prior to their becoming a "file-stamp case" ready for distribution. Court personnel checking the opinion could easily assign sequential case numbers at this point, because it is from here that the opinions are released for distribution; thus, the assigned numbers would accurately reflect the sequence in which the court releases its opinions. This requires no more work than the clerk checking the last sequential case number issued and typing, e.g., "1996 Fla 23" at the top of the document.

Assigning paragraph numbers at this stage would seem desirable as well. Software currently exists that completely automates the assignment of paragraph numbers with a minimum of checking required.<sup>438</sup> Indeed, macros within currently used word processing software can automatically assign paragraph numbers to opinions.<sup>439</sup> The Wisconsin TRC report recommends that paragraph numbers start at the line containing the author's name, while the AALL report proposes that paragraph numbers begin with the first paragraph of the opinion.<sup>440</sup> Both reports agree that indented quotations and footnotes should remain unnumbered.<sup>441</sup>

Implementing the universal citation in Florida would thus be a simple task that requires minimal additional effort on the part of existing court personnel. Of greater concern is the disposition of the court's electronic opinions. Currently, ISS deletes opinions from the court's BBS within two weeks after placing them there.<sup>442</sup> While the opinions are being archived prospectively on the official court opinion Web site, they are only readily accessible as Web pages, not as the original source files.<sup>443</sup> While Rich Text Format (RTF) versions of the original source files are available for downloading, they are only formally accessible as individual files at the end of each case's web page.<sup>444</sup> The court should seri-

438. AALL CITATION REPORT, *supra* note 315, ¶ 72.

439. WIS. CITATION REPORT, *supra* note 314, at 28.

440. *Id.* at 30; AALL CITATION REPORT, *supra* note 315, ¶ 67.

441. WIS. CITATION REPORT, *supra* note 314, at 28; AALL CITATION REPORT, *supra* note 315, ¶ 67. A footnote would be considered a part of the paragraph in which it appears, while an indented quotation would be considered a part of the paragraph immediately preceding it. WIS. CITATION REPORT, *supra* note 314, at 28.

442. Bentley, *supra* note 431.

443. See Supreme Court of Florida Opinions, available at <http://nersp.nerdc.ufl.edu/~lawinfo/flsupct/index.html> (Aug. 16, 1996).

444. See *id.*

ously consider replacing its Internet-inaccessible BBS with a file transfer protocol (ftp)<sup>445</sup> Internet site where the files are kept permanently. Indeed, since 1990, the U.S. Supreme Court has been archiving its opinions through its Project Hermes at an ftp site at Case Western Reserve University.<sup>446</sup> The opinions are available both in a plain text format as well as in the Court's original Word Perfect word processing format.<sup>447</sup> When combined with the universal citation form, a similar system in Florida would allow anyone who is interested to download opinions and compile them on CD-ROM, Web sites, or even in print reporters. The market would then reward those who add the most value to the data with headnotes, syllabi, or search engines at the lowest cost. Most important, the site would serve as the authoritative location for Florida case law.<sup>448</sup> Just as users of current citations know to look to the Southern Reporter for the authoritative versions of Florida opinions today, the users of the universal citation system would know to look to the court's electronic archive<sup>449</sup> for the authoritative versions of Florida opinions tomorrow.

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445. Ftp allows a user "to list the names of computer files available on a remote computer, and to transfer one or more of those files to an individual's local computer." *American Civil Liberties Union v. Reno*, 929 F. Supp. 824, 835 (E.D. Pa. 1996).

446. See Robert J. Ambrogi, *Finding Court Decisions on the Internet*, RES GESTAE, June 1995, at 44.

447. *Id.*

448. This is hardly a significant investment in financial terms. The average Florida Supreme Court opinion for the month of February 1996 was approximately nine kilobytes in length. See Index of /~lawinfo/flsupct/cases/feb96, available at <http://nersp.nerdc.ufl.edu/~lawinfo/flsupct/cases/feb96/> (Aug. 16, 1996). Assuming a caseload of no more than 500 cases per year, see *supra* note 437 and accompanying text, a year's worth of Florida Supreme Court opinions would take up 4.5 megabytes of space. A moderately well-equipped personal computer costs approximately \$2,000 today and contains over one gigabyte—a thousand megabytes—of storage space. See Elisa Williams, *It's Time to Buy a Computer*, ORANGE COUNTY REGISTER, May 5, 1996, at K7. Thus, an average personal computer contains enough space for 222 years of Florida Supreme Court opinions.

The biggest investment would be in providing a system with wide bandwidth Internet access to meet the demands of users. The purchase of server hardware, software, and a direct connection to the Internet runs "anywhere from \$10,000 to \$35,000 and up, depending on the power of the computer system and the speed of the connection." Eric Richardson, *Site Construction*, INTERNET WORLD, Apr. 1996, at 62, 64. The cost of a 1.54 megabyte-per-second T1 connection ranges from \$1,300 to \$2,000 a month. *Id.* at 66. Thus, after the initial investment in setting up the ftp server, the yearly cost (excluding that of an individual to oversee the system) would be between \$15,600 and \$24,000—insignificant in terms of state budgetary appropriations.

449. These users would presumably also be aware of conveniently designed Web sites or CD-ROMs containing copies of all opinions in the archive.

CD-ROM users, who now generally have to wait for periodic updates to their collections of case law on CD-ROM, will quite likely be able to instantly update their CD-ROM case law libraries via supplements on the World Wide Web. See Robert E. Calem, *Hybrid CD-ROMs Send Users to the Web*, N.Y. TIMES ON THE WEB, Apr. 18, 1996, available at <http://www.nytimes.com/library/cyber/week/0419interactive.html> (Aug. 16, 1996); Robert E. Calem, *CD-ROM Publishers Seek Salvation in On-Line Links*, N.Y. TIMES ON THE WEB,

## V. CONCLUSION

[T]he Law . . . should be accessible to every man and at all times.<sup>450</sup>

Franz Kafka

Courts in this country have two jobs: to say “what the law is” and to disseminate those sayings to the citizenry.<sup>451</sup> Those sayings on what the law is should be made available to the bench, bar, and public at little or no cost. The dissemination of this information should not be limited via either copyright law or exclusive contracts. Nevertheless, this is currently the state of case law dissemination in the United States, even though such a policy is at odds with both 150 years of court precedent and at least one state constitution.

However, the ascendance of new information technologies, in particular the Internet and CD-ROMs, is having a radical effect upon the way information is disseminated. Court opinions are quickly finding their way onto both the Internet as well as the CD-ROMs of small publishers who have neither copyright claims nor contractual agreements with particular jurisdictions. Current court rules of citation lag far behind this technological revolution, generally permitting citation only to the print reporters of a private legal publisher that asserts copyright in the page numbers of those volumes. While this claim seems spurious in the light of the Supreme Court’s decision in *Feist*, it nonetheless continues to restrict the sound public policy of maximum access to the law by both discouraging competitors from entering the legal publishing market and keeping the price of access artificially high.

The print medium, however, is no longer the primary means via which the legal researcher accesses court opinions. Recognizing this fact, several organizations have proposed a new citation form that is independent of both vendor and medium formats. The implementation of the new format requires little or nothing in the way of extra court resources. Indeed, its success would be assured if each jurisdiction began maintaining its own authoritative electronic databases of court opinions. Therefore, the judiciary should move immediately to adopt a uniform system of cita-

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Apr. 17, 1996, available at <http://www.nytimes.com/library/cyber/week/0418interactive.html> (Aug. 16, 1996).

450. KAFKA, *supra* note 1, at 213.

451. The judiciary is the third branch of the government, and “governments have a duty to disseminate government information to their citizens.” AALL CITATION REPORT, *supra* note 315, ¶ 14.

tion that denominates opinions by the year and sequential order of release, and that provides for precise location markers within each opinion via the use of paragraph numbers.

## APPENDIX

## U.S. COURTS OF APPEALS ON THE WORLD WIDE WEB (AUG. 1996)

Court	World Wide Web URL	Date of Earliest Opinion
D.C. Cir.	<a href="http://www.ll.georgetown.edu/Fed-Ct/cadc.html">http://www.ll.georgetown.edu/Fed-Ct/cadc.html</a>	Mar. 95
1st Cir.	<a href="http://www.law.emory.edu/1circuit">http://www.law.emory.edu/1circuit</a>	Nov. 95
2d Cir.	<a href="http://www.law.pace.edu/legal/us-legal/judiciary/second-circuit.html">http://www.law.pace.edu/legal/us-legal/judiciary/second-circuit.html</a>	Sep. 95
3d Cir.	<a href="http://www.law.vill.edu/Fed-Ct/ca03.html">http://www.law.vill.edu/Fed-Ct/ca03.html</a>	May 94
4th Cir.	<a href="http://www.law.emory.edu/4circuit">http://www.law.emory.edu/4circuit</a>	Jan. 95
5th Cir.	<a href="http://www.law.utexas.edu/us5th/us5th.html">http://www.law.utexas.edu/us5th/us5th.html</a>	Nov. 92
6th Cir.	<a href="http://www.law.emory.edu/6circuit">http://www.law.emory.edu/6circuit</a>	Jan. 95
7th Cir.	<a href="http://www.law.emory.edu/7circuit">http://www.law.emory.edu/7circuit</a>	Aug. 95
8th Cir.	<a href="http://www.wulaw.wustl.edu/8th.cir/">http://www.wulaw.wustl.edu/8th.cir/</a>	Oct. 95
9th Cir.	<a href="http://www.law.vill.edu/Fed-Ct/ca09.html">http://www.law.vill.edu/Fed-Ct/ca09.html</a>	June 95
10th Cir.	<a href="http://www.law.emory.edu/10circuit">http://www.law.emory.edu/10circuit</a>	Aug. 95
11th Cir.	<a href="http://www.law.emory.edu/11circuit">http://www.law.emory.edu/11circuit</a>	Nov. 94
Fed. Cir.	<a href="http://www.ll.georgetown.edu/Fed-Ct/cafed.html">http://www.ll.georgetown.edu/Fed-Ct/cafed.html</a>	Aug. 95

## STATE SUPREME COURTS ON THE WORLD WIDE WEB (AUG. 1996)

Court	World Wide Web URL	Date of Earliest Opinion
Alaska <sup>†</sup>	<a href="http://www.touchngo.com/sp/sp.htm">http://www.touchngo.com/sp/sp.htm</a>	Jan. 91
Ark. <sup>†</sup>	<a href="http://www.state.ar.us/supremecourt/opinions/sc1996.htm">http://www.state.ar.us/supremecourt/opinions/sc1996.htm</a>	Jan. 96
Florida	<a href="http://nersp.nerdc.ufl.edu/~lawinfo/flsupct/index.html">http://nersp.nerdc.ufl.edu/~lawinfo/flsupct/index.html</a>	Sep. 95
Idaho <sup>†</sup>	<a href="http://www.state.id.us/judicial/scopins.html">http://www.state.id.us/judicial/scopins.html</a>	Dec. 95
Indiana <sup>†</sup>	<a href="http://www.law.indiana.edu/law/incourts/incourts.html">http://www.law.indiana.edu/law/incourts/incourts.html</a>	Jan. 95
Mass. <sup>†</sup>	<a href="http://www.lweekly.com/wm/lw/page/lw/sjc">http://www.lweekly.com/wm/lw/page/lw/sjc</a>	Apr. 96
Michigan	<a href="http://www.umich.edu/~icle/misupct/index.htm">http://www.umich.edu/~icle/misupct/index.htm</a>	Oct. 95
Minn. <sup>†</sup>	<a href="http://www.courts.state.mn.us/opinions/sc/current/sccur.html">http://www.courts.state.mn.us/opinions/sc/current/sccur.html</a>	May 96
Miss. <sup>†</sup>	<a href="http://www.mslawyer.com/mssc/case.html">http://www.mslawyer.com/mssc/case.html</a>	Feb. 96
Missouri	<a href="http://www.state.mo.us/sca/mosupct.htm">http://www.state.mo.us/sca/mosupct.htm</a>	Feb. 95
N.H.	<a href="http://www.state.nh.us/courts/supreme/opinions.htm">http://www.state.nh.us/courts/supreme/opinions.htm</a>	Nov. 95
N.Y.	<a href="http://www.law.cornell.edu:80/ny/ctap/overview.html">http://www.law.cornell.edu:80/ny/ctap/overview.html</a>	Jan. 92
N.C. <sup>†</sup>	<a href="http://www.aoc.state.nc.us/www/courts/appeals/sc/contents.html">http://www.aoc.state.nc.us/www/courts/appeals/sc/contents.html</a>	Dec. 95
Ohio	<a href="http://www.sconet.ohio.gov/">http://www.sconet.ohio.gov/</a>	May 92
Tenn. <sup>†</sup>	<a href="http://www.tsc.state.tn.us/opinions/tsc/oplittsc.htm">http://www.tsc.state.tn.us/opinions/tsc/oplittsc.htm</a>	Aug. 95
Vermont	<a href="gopher://dol.state.vt.us:70/11GOPHER_ROOT3%3A%5BSUPCT%5D">gopher://dol.state.vt.us:70/11GOPHER_ROOT3%3A%5BSUPCT%5D</a>	Aug. 91
Wash. <sup>†</sup>	<a href="http://www.wa.gov/courts/opinpage/home.htm">http://www.wa.gov/courts/opinpage/home.htm</a>	Mar. 96
Wis. <sup>†</sup>	<a href="http://www.wisbar.org/Wis/index.html">http://www.wisbar.org/Wis/index.html</a>	Oct. 95
Wyo.	<a href="http://courts.state.wy.us/opinion.htm">http://courts.state.wy.us/opinion.htm</a>	Jan. 96

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<sup>†</sup> State court of appeals opinions are also available from the same Web site.

