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PUBLIC INTERVENTION IN ADMINISTRATIVE LICENSING AND THE BURDEN OF PROOF

BY GERALD W. GRANDEY*

INTRODUCTION

Governmental licensing of private developments such as broadcasting stations and power production facilities is not a new phenomenon; nor is public intervention into those proceedings. Given this background one would think that a rational, well-settled approach toward the allocation of the burdens of proof between the applicant and intervenor would have been developed. Unfortunately such is not the case. In the almost 100-year history of administrative law neither the agencies themselves nor reviewing judicial bodies have been able to agree upon an allocation which achieves the proper balance between fairness to all parties and administrative efficiency.

This article begins with the assumption that the public intervenor has already been admitted as a party to the licensing proceeding—a status which is not always easily attained. Once the obstacle of admittance has been hurdled, the applicant and intervenor each raise those issues they wish considered. The agency must then decide which party will present evidence first and who will have the ultimate burden of proof with respect to the various issues presented.

This article will focus primarily upon present practice before the Atomic Energy Commission. The sheer number of administrative agencies precludes an inclusive overview. The wealth of experience reflected in the practice before other agencies, however, will not be ignored. The AEC was chosen because it provides a topical example of the difficulties a federal agency faces when it is confronted by an intervenor intending to oppose the grant of a license.

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The Atomic Energy Act of 1954[1] was enacted to encourage, among other things, the development and utilization of atomic energy for peaceful purposes.[2] Normally such development and utilization would be left to the private sector in accordance with the theories of a capitalistic economy. But because of the hazardous nature of the source, byproduct, and special nuclear material, Congress determined that it was in the national interest to regulate not only the material, but also the facilities using the material.[3] Pursuant to this determination, a Commission was established and given the authority to regulate the use of atomic energy.[4] Concomitantly it was empowered to issue licenses to qualified persons who made application to construct and operate commercial nuclear power reactors.[5]

Under provisions of the Act an application must be in writing and contain sufficient information to permit the Commission to make a determination that the utilization of the nuclear material will be consonant with the common defense and provide adequate protection to the health and safety of the people.[6] Thus utilization of nuclear fuel is not a fundamental right, but rather a privilege specifically granted by statute to a qualified applicant.

Once the Commission receives an application for the construction or operation of a nuclear facility it is under a statutory duty to make findings with respect to the applicant's technical qualifications; the impact of the reactor's location, design, and operation upon the public's health and safety;[7] and the deleterious effects, if any, of the facility's presence and operation upon the environment.[8] To resolve these issues public hearings are held upon the request of any person whose interest may be affected by the grant of an application.[9] Any person demonstrating the requisite interest is entitled to be admitted to the proceeding as a party.[10]

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[1]42 U.S.C. §§ 2011-2296 (1970).

[2]*Id.* § 2013(d).

[3]*Id.* §§ 2012(c)-(d).

[4]*Id.* § 2031.

[5]*Id.* § 2132.

[6]*Id.* § 2232(a).

[7]*Id.*

[8]*Id.* §§ 4321-35.

[9]Actually, the licensing of a commercial facility involves two stages: (1) a mandatory construction licensing hearing, and (2) a post-construction operational licensing hearing upon the request of an interested person.

[10]42 U.S.C. § 2239(a) (1970).

Recently, as the number of applications for nuclear facilities has proliferated, members of communities affected by the proposed facility have sought to intervene in the proceedings as interested parties. Primarily their purposes have been to represent and protect their own health and safety and to preserve the endangered local environment. On several occasions the Commission has permitted organizations and citizens representing the public interest in this way to intervene to the extent that they were able to raise reasonably specific allegations about the facility and furnish a factual basis for their contentions.[11]

When an interested person successfully intervenes he does so on the basis of the contentions that he raises in his petition. During the prehearing phase these contentions are frequently amended and revised and in some cases satisfactorily answered by the applicant or the Commission. Those contentions remaining are presented to the licensing board[12] which then decides whether they are meritorious enough to become issues in the licensing hearing. Depending upon the success of prehearing negotiations between the Commission and the applicant, the staff may or may not have issues of its own to raise.

Under the Act the Commission is obligated to consider the issues and make findings with respect to the public and national interest.[13] In this regard all parties, including intervenors, may present evidence relevant to the issues, but the Act is silent as to which party must bear the burden of convincing the Commission. Inevitably the question arises whether the applicant must prove the facility "safe" with respect to each issue or whether the staff or intervenor must prove the plant "unsafe." The allocation of the burden of proof is especially sensitive with regard to the intervenor's contentions.

Conceivably the apportionment of this burden could be made in several ways. The applicant could bear the burden exclusively, or, alternatively, the onus could be imposed solely upon the intervenor. The burden could be shared between the applicant and the intervenor, each having the responsibility to present direct evidence on the issues, with the ultimate burden of persuading the licensing board imposed on either the applicant or

[11]10 C.F.R. § 2.714 (1973).
[12]42 U.S.C. § 2241 (1973).
[13]*Id.* § 2133 (1970).

the intervenor depending upon the issue. Alternatively, the Commission could adopt a policy of indifference to the burden, deciding that its distribution is immaterial and directing all parties to present their direct evidence. The board would then balance the evidence and make its determination in accordance with the public interest.

Further complications arise when the order in which the parties present their case is considered. The applicant, the staff, or the intervenor could be directed to proceed first, which in itself would be a de facto determination that that party has some burden. Alternatively, all parties could be ordered to produce their direct testimony simultaneously by filing it in written form. Such a procedure likewise would be tantamount to a determination that all parties have some burden to sustain, as no party is then able to prevail merely by controverting his opponent's prima facie case.

This inquiry will proceed with a brief examination of the allocation of the burdens of proof in the context of civil litigation, specifically for the purpose of identifying certain underlying concepts. Once identified these concepts will be analyzed in an abstract setting in order to ascertain if some useful generalizations can be derived. The concepts and generalizations will then be tested against legislation applicable to atomic energy licensing, against procedures of other federal agencies, and against the needs of the Atomic Energy Commission. Ultimately a determination will be made of the optimal apportionment of the burden of proof for purposes of nuclear power plant licensing.

I. CONCEPTS DERIVED FROM CIVIL LITIGATION

Before embarking upon a full analysis of the proper allocation of the burden of proof in administrative practice, it is desirable to explore some fundamental concepts developed in the context of civil litigation. In normal two-party civil litigation where a plaintiff and defendant appear before a judge with or without a jury, the distribution of the burden of proof is, in most instances, well settled. The plaintiff, as the initiator of the action or the proponent of an affirmative order, bears the risk of failing to persuade the jury that his cause is just. This risk is frequently called the "risk of non-persuasion," for if the plaintiff fails to present persuasive evidence he loses.[14] Having the risk of nonper-

[14] 9 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2485 (3d ed. 1940) [hereinafter cited as WIGMORE].

suasion, the plaintiff is naturally the one upon whom falls the initial duty of going forward with evidence. If he fails to do this, the jury can take no action and the defendant-opponent need not adduce evidence at all.[15] However, if the proponent produces sufficient evidence to persuade a jury of reasonable men that his action has merit, the burden of presenting evidence shifts to the opponent. The plaintiff's burden of going forward is met, and the defendant, if he wishes to prevail, must now sway the jury with evidence of his own.[16]

There are several ways by which a plaintiff can successfully carry his initial burden of "going forward" and pass the burden to the defendant. He may obtain a specific ruling from the judge upon the particular evidence, or invoke an appropriate presumption, or ask that a matter be judicially noticed. But because the plaintiff's evidence is subject to attack by the cross-examining opponent, the transition point is not automatically surmounted by perfunctorily presenting evidence. If the defendant can sufficiently weaken the credibility of the proponent's evidence so that it is unpersuasive to the jurors, then the plaintiff has failed to sustain his burden.

Moreover, just because the plaintiff succeeds in meeting his burden of going forward does not guarantee his ultimate success in the case. The risk of nonpersuasion is always on the proponent, and if the defendant adduces evidence sufficiently rebutting the plaintiff's evidence, the jury is to render its decision accordingly.

Specific legal consequences follow from meeting or failing to meet the evidentiary requirements. If the plaintiff fails to carry his burden of going forward, either because it was insufficient on its face or inadequate under the onslaught of cross-examination, the judge may properly direct a verdict for the defendant. Similarly, if the plaintiff succeeds in going forward and the defendant responds with no evidence, the judge may properly direct a verdict for the plaintiff. Evidence, which, if unanswered, would justify men of ordinary reason and fairness in affirming the claim which the plaintiff asserts, establishes what is often referred to as a prima facie case. If such evidence is not rebutted it may result in a directed verdict; moreover, even if rebutted, it entitles the plaintiff to have his case considered by the jury.[17]

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[15] *Id.* § 2487.
[16] *Id.* § 2487(c).
[17] *Id.* § 2494.

II. ALLOCATION OF THE BURDENS OF PROOF IN THE ABSTRACT

Although the foregoing provides a basis for analysis, it is couched in the context of civil litigation which, though similar in many respects, is not identical to an administrative licensing hearing. The typical administrative hearing involves as participants at least an applicant and the regulatory staff, who in the normal course of regulation will have resolved their disagreements in advance. With intervention, contested issues arise and the number of parties to the proceeding increases to three or more, correspondingly increasing the complexity of the adversary relationships. More fundamentally, in civil litigation the judge assumes the role of an impartial arbiter, a servant of justice only, whereas in an administrative hearing a licensing board is charged with the affirmative duty of pursuing and protecting the public interest.[18] This latter distinction is a significant determinant in a licensing board's perception of evidentiary matters.

Since civil litigation is not exactly analogous, it is perhaps better to see if evidentiary rules governing the allocation of the burdens of proof can be developed in the abstract given certain axioms.

As in civil actions, the proponent of an administrative rule or order still should bear the risk of nonpersuasion. The question is how that proponent is identified. One way would be to engage in a semantic game in which identification of the proponent turns upon the positive or negative of the question, *e.g.*, the applicant is a proponent of an order granting a license, or the intervenor is a proponent of an order denying the granting of a license. Wigmore eschewed this approach and turned instead to the pleadings or applicable rules to distinguish the ultimate facts—the *facta probanda*—in the case.[19] Whoever had to prove these facts bore the risk of nonpersuasion and was therefore the proponent. In the final analysis it is the language of the pleadings and the applicable rules which determine the proponent and the imposition of the risk.

As to the burden of going forward with evidence Wigmore made the assumption that it naturally fell on the party having the risk of nonpersuasion since, without evidence, the trier of fact

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[18]Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

[19]9 WIGMORE § 2485.

could properly take no favorable action at all and there would be no need for the opponent to adduce evidence.[20] While this assumption may be valid in civil litigation, it is not axiomatic in an abstract sense, nor necessarily applicable to administrative hearings. The burden of going forward could be imposed upon the opponent, with his failure to maintain the burden neutralizing his opposition but not necessarily insuring the victory of the proponent. Placement of this burden is indeterminate in the abstract and ultimately depends upon not only the pleadings and applicable rules of practice, but also upon broad considerations of policy.[21]

Before turning to statutes and regulations pertinent to atomic energy licensing hearings, one further observation by Wigmore is germane to the abstract model. In special situations "the burden of proving a fact is . . . put on the party who presumably has peculiar means of knowledge enabling him to prove its falsity if it is false."[22]

III. Allocation of the Risk of Nonpersuasion and the Burden of Going Forward: AEC Licensing Proceedings

The Atomic Energy Act of 1954 has no provision explicitly addressing the apportionment of the burden of proof in licensing hearings.[23] It does require an applicant for an operating license to state in its application technical specifications of the nuclear material, specific characteristics of the facility, and other information which will enable the Commission to find that the utilization of the nuclear material will be in accord with the common defense and security and will provide adequate protection to the health and safety of the public.[24] Other evidence is implicitly called for where the statute requires the Commission to make findings and issue licenses to applicants

> (1) whose proposed activities will serve a useful purpose proportionate to the quantities of special nuclear material or source material to be utilized;
> (2) who are equipped to observe and who agree to observe such

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[20] *Id.* § 2487.

[21] *Cf. id.* § 2488(a).

[22] *Id.* § 2486 (italics deleted). Wigmore observed that: "This principle had received frequent application in modern statutes making it an offense to pursue a certain occupation without a State *license* . . . ." *Id.*

[23] 42 U.S.C. §§ 2011-2296 (1970).

[24] *Id.* § 2232(a); 10 C.F.R. §§ 50.30-.38, .55a, .110, Apps. A-F (1974).

> safety standards to protect health and to minimize danger to life or property as the Commission may by rule establish; and
> (3) who agree to make available to the Commission such technical information and data concerning activities under such licenses as the Commission may determine necessary to promote the common defense and security and to protect the health and safety of the public.[25]

Regulations of the Atomic Energy Commission require additional showings by the applicant which will permit the Commission to find that:

> (1) Construction of the facility has been substantially completed, in conformity with the construction permit and the application as amended, the provisions of the Act, and the rules and regulations of the Commission; and
> (2) The facility will operate in conformity with the application as amended, the provisions of the Act, and the rules and regulations of the Commission; and
> (3) There is reasonable assurance (i) that the activities authorized by the operating license can be conducted without endangering the health and safety of the public, and (ii) that such activities will be conducted in compliance with the regulations in this chapter; and
> (4) The applicant is technically and financially qualified to engage in the activities authorized by the operating license in accordance with the regulations in this chapter; and
> (5) The applicable provisions of Part 140 of this chapter have been satisfied; and
> (6) The issuance of the license will not be inimical to the common defense and security or to the health and safety of the public.[26]

In essence the foregoing findings of fact to be made by the licensing board are the ultimate facts or *facta probanda* which must be proved at the hearing. Analysis of the language reveals that the findings are positively stated necessitating proof of compliance with applicable standards, safety, utility, technical ability, and financial qualification. Thus the risk of nonpersuasion is on the person who must satisfy the commission with respect to the requisite findings—namely the applicant.[27] This conclusion follows irrespective of the origin of the issues so long as they relate to the ultimate facts to be proved.

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[25]42 U.S.C. § 2133(b) (1970).

[26]10 C.F.R. § 50.57 (1973). Similar conditions are imposed for construction permits. *Id.* §§ 50.55-.55a.

[27]The opponent would normally phrase his allegations in terms of unsafeness, noncompliance, technical inability, and financial unqualification. If the ultimate facts were likewise stated in the negative, *i.e.*, a license will be denied if a facility is found to be unsafe, etc., then the opponent would bear the risk of nonpersuasion.

As in the abstract model, imposition of the risk of nonpersuasion is not necessarily dispositive of the assignment of the burden of going forward on the issues in an administrative hearing. The intervenor-opponent still may have some burden of going forward in regard to contentions that he raises even though they relate to the ultimate facts to be proved in the proceeding.

The Commission complicates the problem with an ambiguous regulation. Section 2.732 provides that: "Unless otherwise ordered by the presiding officer the applicant or the proponent of an order has the burden of proof."[28] The regulation speaks generally of the burden of proof and arguably could include both the risk of nonpersuasion and the burden of going forward with evidence. If so, the applicant, as the proponent of an order, would suffer both burdens. More likely, however, the regulation merely addresses the ultimate burden in a proceeding—the risk of nonpersuasion—leaving the allocation of the burden of going forward undecided. In addition, even though analysis of the Act has led to the conclusion that the applicant should have the risk of nonpersuasion, under the regulation, the presiding officer may decide otherwise. No standards or criteria are enumerated under which the decision to shift the burden of proof is to be made.

The clause conferring such discretion upon the presiding officer may have no force and effect whatsoever because it apparently conflicts with the Administrative Procedure Act (APA) which is incorporated by reference into the Atomic Energy Act.[29] Referring to administrative hearings, section 7(c) of the APA states that "except as otherwise provided by statute the proponent of a rule or order has the burden of proof."[30] Since the regulation is not a "statute" within the meaning of section 7(c), the Commission's attempt, absent authority under the Atomic Energy Act, to give the presiding officer some discretion in assigning the risk of nonpersuasion is without effect. But even if the exercise of discretion with regard to the risk of nonpersuasion is prevented by section 7(c) of the APA, that prohibition may not be dispositive of the ability of a presiding officer to exercise discretion with regard to the burden of going forward.

Section 7(c) uses the familiar language that "the proponent of a rule or order has the burden of proof," which thus far has

[28] 10 C.F.R. § 2.732 (1973).
[29] 42 U.S.C. § 2231 (1970).
[30] 5 U.S.C. § 556(d) (1970).

failed to yield a hint as to the apportionment of the burden of going forward. Both the House and Senate reports explained the provision in the following language:

> That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain. Similarly the requirement that no sanction be imposed or rule or order be issued except upon evidence of the kind specified means that the proponents of a denial of relief must sustain such denial by that kind of evidence. For example, credible and credited evidence submitted by the applicant for a license may not be ignored except upon the requisite kind and quality of contrary evidence. No agency is authorized to stand mute and arbitrarily disbelieve credible evidence. Except as applicants for a license or other privilege may be required to come forward with a prima facie showing, no agency is entitled to presume that the conduct of any person or status of any enterprise is unlawful or improper.[31]

The House Report went on to say:

> In other words, this section means that every proponent of a rule or order or the denial thereof has the burden of coming forward with sufficient evidence therefor; and in determining applications for licenses or other relief any fact, conduct, or status so shown by credible and credited evidence must be accepted as true except as the contrary has been shown or such evidence has been rebutted or impeached by duly credited evidence or by facts officially noticed and stated.[32]

Based upon this interpretation the applicant for a nuclear facility license apparently would have the burden of going forward with sufficient evidence to establish a prima facie case. Sufficient evidence means that there are facts in evidence which if unanswered would justify the licensing board, as men of ordinary reason and fairness, in granting the license which the applicant seeks.[33]

The language of the report would seem to be conclusive with respect to the applicant's burden of going forward on all issues whether raised by the Commission or the opponents, if it were not for the phrase that "proponents of some different result, also . . . have a burden to maintain." The phrase is capable of supporting two inferences. Conceivably it could mean that the intervenor-

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[31]H.R. REP. No. 1980, 79th Cong., 2d Sess. 36 (1946); S. REP. No. 752, 79th Cong., 1st Sess. 22 (1945).

[32]H.R. REP. No. 1980, *supra* note 31, at 36.

[33]9 WIGMORE § 2494.

opponent has a burden of going forward regardless of the issues being raised; or it could signify that the intervenor has the burden only with respect to the affirmative issues that he raises, and as to those issues on which the Act requires the applicant to present evidence, the intervenor need only rebut the applicant's prima facie case.

Practice in civil litigation demonstrates the unacceptability of the first possibility. The civil defendant, if he wishes to prevail following presentation of a prima facie case by the plaintiff, must come forward with evidence sufficient to rebut the plaintiff's evidence and sway the jury.[34] Only insofar as the plaintiff is able to establish credible and credited evidence does the defendant have a burden to maintain. A similar result in the conduct of administrative proceedings seems to be contemplated by both reports noted above. While credible and credited evidence put forward by the applicant cannot be ignored or disbelieved by the agency unless the opponent of a licensing privilege offers commensurate evidence in rebuttal, only if the applicant has presented such a prima facie case do the opponents have a burden to sustain. If, instead, the applicant's evidence is impeached by cross-examination and a prima facie case is not established, the license cannot be granted and the opponents have no burden to sustain at all.

The second inference which may be drawn from the language of the reports is that the intervenor-opponent may have to maintain a burden of going forward with respect to those issues which he raises and need only rebut or impeach the evidence which the Act requires the applicant put forth.

If, on the one hand, the issues relate to the ultimate issues to be proved prior to granting a license, then the applicant should initially bear both the risk of nonpersuasion and the burden of going forward. For example, where the intervenor merely asserts that the applicant is not financially qualified or that a portion of the facility is unsafe, it is clear that the applicant, to establish its prima facie case, must present evidence on such issues irrespective of the intervenor's contention.[35] In essence, when the

[34] *Id.* § 2487(c).

[35] For example, if the ultimate issue is the safety of a nuclear facility, then the applicant, to establish a prima facie case, must come forward with credible evidence as to all safety considerations and issues including, but not limited to, safety issues raised by

opponent raises such issues, he is doing nothing more than putting the respective parties on notice that he does not believe that the applicant can present credible evidence with respect to the issue and that, if the applicant does, he is prepared to rebut with evidence of his own. The applicant, once notified of the intervenor's issues, can establish his prima facie case as to aspects outside the opponent's issues confident that such evidence will go unchallenged by the opponent.

A different result probably should be reached when the intervenor's issues fall outside the sphere of or do not relate to the ultimate issues before the board. Hence when the intervenor alleges unlawful or improper conduct on the part of an applicant, unless the statute requires a prima facie showing to the contrary by the applicant, the burden of going forward should be on the intervenor. In fact, both the House and Senate reports contemplated just such a result.[36]

In summary, after having looked at the pleadings and applicable rules of practice, one must reach the conclusion that the Atomic Energy Act, the APA, and the Commission's regulations all require that the risk of nonpersuasion be borne by the applicant. Less certain is the allocation of the burden of going forward; however, the legislative history of the APA strongly suggests that at least with respect to those issues relating to the *facta probanda* the applicant should also bear this responsibility. As to issues not relating to the ultimate facts, the burden of going forward should rest with the intervenor.

IV. ALLOCATION OF THE BURDEN OF GOING FORWARD IN ADMINISTRATIVE PROCEEDINGS

To fully develop and explore considerations of policy in the atomic energy licensing field, an understanding of the practice and experience in other federal administrative bodies is essential. In doing so at least one caveat should be noted. Administrative procedure is variable and molded to the function of the agency. Consequently, procedures of dissimilar agencies will differ. The Atomic Energy Commission in particular seems to be unique among the federal agencies. The subject matter of its regulatory

opponents. The agency should not depend upon opponents to raise important issues of fact necessary to support affirmative findings. Calvert Cliffs Coordinating Comm. v. AEC, 449 F.2d 1109, 1118-19 (D.C. Cir. 1971).

[36] *See* text accompanying note 33 *supra*.

responsibilities is complex and technical, with regulation requiring a high degree of scientific sophistication. Most of the information relevant to its regulatory decisions is exclusively in the hands of the applicant or the Commission. The public in general does not understand the information and hence does not accumulate it. Furthermore, nuclear energy is inherently dangerous with awesome consequences if exploitation ignores considerations of safety. For these reasons the procedure of another agency must be carefully examined before applying it to the AEC arena.

A cursory analysis of procedures in various federal agencies leads to the conclusion that there is an unsystematized approach toward apportionment of the burdens of proof. A more thorough analysis reveals that while there may be some functional justification for disparate treatment, there remains an inexplicable degree of difference among the several agencies when making the allocation.[37]

To reiterate there are basically three approaches an agency can take toward the allocation. First, it may determine that, although the applicant has the risk of nonpersuasion, the intervenor-opponent bears at least some burden of going forward with evidence. Second, the agency may decide that the applicant has both the risk of nonpersuasion and the burden of going forward on all issues. Finally, the agency may conclude that in administrative hearings it is largely immaterial which party has the burden of going forward though the applicant bears the risk of nonpersuasion. Judicial and administrative bodies have failed to settle upon a uniform approach; therefore, it is necessary to explore fully each alternative.

A. *Burden of Going Forward on Intervenor-Opponent*

The leading case imposing a burden of going forward on the intervenor-opponents is *Office of Communication of the United Church of Christ v. FCC*.[38] Familiarity with the decision's long

[37]It should be noted that there is a fundamental distinction in administrative law between proceedings initiated by the agency and proceedings initiated by an applicant. In the former the agency is usually attempting to enforce a regulation or take some remedial action against a party and therefore has at least the initial burden of going forward and, in most instances, the risk of nonpersuasion. It is the latter variety which concerns this paper although occasional reference will be made to agency initiated actions for purpose of comparison. The distinction is logical and comports with section 556(d) of the APA since, in an enforcement proceeding, the agency is the proponent of a rule or order. 5 U.S.C. § 556(d) (1970).

[38]425 F.2d 543 (D.C. Cir. 1969).

and complex history is essential to the understanding of the court's distribution of the burdens of proof. An earlier opinion of the District of Columbia Court of Appeals dealing with the same controversy directed that individuals and organizations representing the applicant's listening public be permitted to intervene and participate[39] in the Federal Communication Commission's license renewal hearing. The prospective intervenors sought a hearing, contending that the applicant had willfully practiced racial discrimination and had knowingly violated the fairness doctrine.

On remand the Commission ruled that the applicant had the burden of proof on the ultimate issue of whether renewal of its license would serve the public interest, convenience, or necessity, but that the Church of Christ and other intervenors had the burden, including the risk of nonpersuasion, of proving violation of the fairness doctrine and discrimination against significant groups within the community of the applicant's service area.[40] The Commission's allocation being unacceptable, the intervenors petitioned for reconsideration and sought an order assigning the ultimate burden of proof upon all the issues to the applicant.[41] Intervenors justified their request because the applicant knew the most about the facts, and because otherwise the burden of proof on the ultimate issue would be meaningless.[42] It is important to note that the intervenors desired to impose only the risk of nonpersuasion on the applicants while they were content to carry the burden of going forward themselves.[43] Even with this concession the Commission rejected the proposed allocations on the ground that:

> The issues involved in this proceeding are based upon the charges made by intervenors and relate largely to acts of omission rather than commission. . . . Those who allege such discrimination are in at least as good a position as the applicant to know the facts relating to it. . . .
> . . . In essence, the hearing order . . . merely requires that those making specific accusations shall come forward with their evidence and afford the one accused an opportunity to reply after he is fully informed of the charges and the evidence.[44]

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[39]359 F.2d 994 (D.C. Cir. 1966).

[40]Lamar Life Broadcasting Co., 3 F.C.C.2d 784 (1966).

[41]Lamar Life Ins. Co., 20 Ad. L. Dec. 2d 92 (F.C.C. 1966).

[42]*Id.* at 94.

[43]Lamar Life Broadcasting Co., 14 F.C.C.2d 431, 433 n.8 (1968).

[44]Lamar Life Ins. Co., 20 Ad. L. Dec. 2d 92, 95-6 (F.C.C. 1966). The Commission also stated:

It is evident that the Commission fell into the semantic trap of positives and negatives and made an incorrect analogy to cases involving charges of criminal conduct.[45]

Intervenors, in making their argument, had relied upon two earlier FCC cases involving serious allegations of misconduct raised in an opponent's petition to deny a license. In both cases the Commission ruled that the intervenor was to proceed with the initial introduction of evidence on the issue even though the applicant had the ultimate burden of proof.[46] In its decision concerning the burden to be placed on Church of Christ the Commission gave little attention to the two earlier cases, stating that in those cases the rationale for splitting the ultimate burden of proof from the burden of first proceeding with evidence was that the facts in issue were peculiarly within the knowledge of the applicant.[47] The Commission then issued an order renewing the broadcaster's license and noting that the intervenors had failed to come forward and sustain their serious allegations against the applicant.[48]

On appeal the circuit court vacated the order and held that the Commission had gravely misunderstood the role of the intervenors as well as the allocation of the burden of proof.[49] The court held that the applicant has the ultimate burden of proof on all the issues and that:

> The failure to present particular viewpoints and the failure to provide the opportunity for expression by significant community groups may be better known to those claiming to represent the viewpoints of groups denied access to broadcast facilities than to the broadcaster who keeps records of what he has presented rather than what he has not presented.

Id. at 95.

[45]*See* 10 C.F.R. § 2.732 (1973) and dissenting statement of Commissioner Cox in Lamar Life Ins. Co., 20 Ad. L. Dec. 2d 92 (F.C.C. 1966). *See also* 9 WIGMORE § 2488(a). The Commission cited as precedent for its allocation of the burden of proof D & E Broadcasting Co., 1 F.C.C.2d 78 (1965), which involved a charge that the applicant had violated the law by smuggling horses into the United States from Mexico. The Commission ruled that where an issue involving serious misconduct has been raised, the party making the charges has not only the burden of going forward with the evidence, but the ultimate burden of proof as well.

[46]Elyria-Lorain Broadcasting Co., 6 R.R.2d 191 (1965); Washington Broadcasting Co., 3 F.C.C.2d 777 (1966). In the latter opinion the Commission stated that placement of the burden of going forward upon the intervenor was in accord with concepts of basic fairness. However, the Commission also explicated that the purpose of so placing the burden was to delineate the facts in issue and to inform the applicant of precise factual issues to be resolved.

[47]*See* Lamar Life Ins. Co., 20 Ad. L. Dec. 2d 92 (F.C.C. 1966).

[48]Lamar Life Broadcasting Co., 14 F.C.C.2d 495, 549 (1967).

[49]Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969).

> We did not intend that intervenors representing a public interest be treated as interlopers. Rather, . . . a "Public Intervenor" who is seeking no license or private right is, in this context, more nearly like a complaining witness who presents evidence to police or a prosecutor whose duty it is to conduct an affirmative and objective investigation of all the facts and to pursue his prosecutorial or regulatory function if there is probable cause to believe a violation has occurred.[50]

The court's opinion is dispositive of the allocation of the ultimate burden—the risk of nonpersuasion. But since the intervenors had assumed from the beginning that the burden of going forward with respect to their contentions was on them, the assignment of the burden of going forward was never decided. In dictum, however, the court concluded that the intervenors did have to sustain a burden of going forward. Judge, now Chief Justice, Burger, writing for the majority, analogized to the situation where a complaining witness must present evidence before a prosecutor will act. In a footnote to the analogy the court approvingly referred to a memorandum statement prepared by it in denying intervenors' motion for clarification of the earlier *Church of Christ* opinion.[51] In that statement the court impliedly sanctioned imposition of the burden of going forward on intervenors by making the assumption that the Commission's reference to the burden of proof with respect to issues raised by intervenors was intended to mean "only the burden of going forward with evidence in the first instance."[52]

In short, the *Church of Christ* court assumed, but did not decide, that the intervenors had a burden of going forward with respect to the issues raised by them. The validity of this assumption is questionable. The court regarded the public intervenors as complaining witnesses. Without a doubt they were; but they were not complaining of criminal misconduct to a prosecutor as in the court's analogy; rather they were complaining of a violation of public trust by the applicant to an agency established to protect the public interest. In a criminal complaint, where probable cause is required before action can be taken, a complainant must certainly come forward with some evidence. Whether a public interest organization making allegations similar to the ones made

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[50]*Id.* at 546.

[51]*Id.* at 546 n.6.

[52]*Id.*

by the Church of Christ must initially present evidence should depend upon the applicable statute, rules of practice, and considerations of policy.[53]

If the applicant had an affirmative duty under the Communication Act or FCC regulations to demonstrate compliance with the fairness doctrine and to show nondiscriminatory practices, then the burden of going forward would properly be upon it irrespective of the intervenors' contentions. On the other hand, in the absence of an affirmative duty the APA precludes an agency from presuming that the conduct of any person is unlawful or improper, and therefore an evidentiary burden of going forward with some evidence should lie with the intervenors.[54] It is this rationale which the court misses and which justifies the assumption the court made.

Additional grounds for assigning the burden to the intervenors may have been implicit in the court's assumption. Both the Commission and the court seem to have been under the impression that the intervenors' knowledge of programming violations was just as good as the applicant's. In fact, the court noted that the intervenors had made a monitoring study covering one week's broadcasts and had several witnesses willing to testify to discriminatory practices.[55] When such evidence is within the grasp of public intervenors there is little reason why they should not be expected to sustain an initial burden of going forward.

In addition the allegations of misconduct or other improper behavior may have evoked a feeling in the court that the intervenor must proceed with evidence so that the applicant can have reasonable notice as to the charges he is expected to meet. But the requirement of notice could as easily be met by compelling the intervenor to make reasonably specific contentions in his pleadings.

If it is accepted that the court is correct in its judgment that intervenors bear some burden of going forward there are several distinctions which may require a different result in the context of nuclear facility licensing. Contentions raised before Atomic Safety and Licensing Boards normally relate directly to the ultimate issues before the Board, they are not allegations of miscon-

[53]*See* text accompanying note 21 *supra*.
[54]*See* text accompanying note 32 *supra*.
[55]425 F.2d at 547-48.

duct or unlawful behavior. Atomic Energy Commission regulation requires that contentions be put forward in reasonably specific detail; therefore, there is no notice problem.[56] Finally, in a field as technical as that of nuclear energy there can be little question that the applicant is unique in its position of knowledge.

Other administrative cases which have placed a burden upon opponents or intervenors have done so for a variety of reasons.

In rate proceedings the burden shifts between the regulated body and the opponent depending on whether the objection is against a proposed change or against a change that has already taken place but has yet to receive official sanction. In the proposed rate-change situation there is an applicant who is the proponent of an order and, as such, has the burden of going forward as well as the ultimate risk of nonpersuasion. Where the change is in effect and is only questioned if an investigation is conducted there is theoretically no applicant but only a complainant who, in the context, is a proponent of an order vacating the change.[57]

The shift in the burden from the regulated body to the intervenor-opponent is a result of the presumption of validity given the increased or changed rate. If it is already in effect and thus presumed valid, then the regulated body's initial burden is ipso facto met, and the opponent must then present evidence to overcome the presumption. Where a rate change is proposed the regulated body must come forward with evidence in the first instance before the opponent is required to do anything. Aside from the existence of the presumption, the shift in the burden makes little sense, since information in the hands of the parties is the same regardless of the status of the rate. However, from a theoretical standpoint the result is consistent with the APA, which places the burden upon the proponent of a "rule" or "order."[58]

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[56]10 C.F.R. § 2.714 (1972).

[57]In IML Freight, Inc. v. United States, 30 Ad. L. Dec. 2d 712 (D. Utah 1972) the motor carrier published rates that greatly exceeded the national classifications. The hearing examiner ruled the intervenor-complainants had the burden of going forward and that the burden had been met by a presumption of unreasonableness which attached to the published rates because they so grossly exceeded the recommendations. The court upheld the procedure as warranted. *See also* Terminal Charge, at Various Points, on Order Bill of Lading Shipments, 315 I.C.C. 327 (1962), where the Commission indicated that where a charge becomes effective prior to the institution of an investigation there is no changed rate in issue. Accordingly, the proponent of the change does not have the burden of proof and the complainant does.

[58]5 U.S.C. § 556(d) (1970).

In two related rate proceedings[59] before the Federal Power Commission, the burden of going forward with evidence as to excessive contractual rates was placed on the FPC's regulatory staff. The applicant in both cases, Seaboard Oil Company, had sought a certificate authorizing it to sell natural gas in interstate commerce, and the FPC staff had injected the issue of rates into the proceeding. Although the ultimate risk of nonpersuasion was on Seaboard, the Commission ruled that imposition of the burden of going forward to justify the rates would present an impossible task to any applicant. Since the staff failed to present sufficient evidence to justify a different rate, the applications were granted.[60]

The rationale underlying the Commission's allocation of the burden of going forward is far from clear. The Commission believed that the question of reasonable rates was an essential element of the ultimate issue in the application, *i.e.*, whether the production and sale of natural gas in interstate commerce by Seaboard would be consistent with the public interest, convenience, and necessity.[61] Since Seaboard had the risk of nonpersuasion with respect to the ultimate issue, logic would suggest that it should also have had a burden to maintain with respect to the question of reasonable rates. Undoubtedly rates that are not reasonable cannot be in the public interest.

Conceivably the Commission might have attached a presumption of reasonableness to the contract rates. If so, any initial burden of going forward which the applicant had was automatically satisfied and the burden of proof shifted to the staff to overcome the presumption. Unfortunately, the Commission's opinion reveals no such presumption. However, an indication that it might have existed can be inferred from a dissenting opinion which pointed out that there is a distinction between a rate schedule submitted in evidence to support an application for a certificate on the one hand, and, on the other, a rate schedule filed by an already certified natural gas company.[62] A presumption of reasonableness, it would seem, might be appropriate in the latter case. The dissent further stated that:

[59]Seaboard Oil Co., 19 F.P.C. 416 (1958); Transcontinental Gas Pipeline Corp., 20 F.P.C. 264 (1958).

[60]Seaboard Oil Co., 19 F.P.C. 416, 420 (1958).

[61]Transcontinental Gas Pipeline Corp., 20 F.P.C. 264, 271 (1958).

[62]Seaboard Oil Co., 19 F.P.C. 416, 435 (1958) (dissenting opinion).

> There is no burden of proceeding which shifts to the Commission or the Staff in a . . . licensing proceeding. Neither the Commission nor our staff are proponents. Either the standards are met or they are not.[63]

An alternative ground for the Commission's assignment of the burden of going forward may be found in the skepticism of several Commissioners who questioned the FPC's authority to alter or set the initial contract rates between producers and purchasers.[64] However, even if the Commission lacked the authority, such an inadequacy should not be dispositive of the allocation of the burden of proof. Certainly rates set by contract could be found unreasonable without the Commission, at the same time, having to set reasonable rates. A finding by the Commission that the contract rates were unreasonable would only mean that Seaboard would have to renegotiate the rate and resubmit it to the Commission with proof of reasonableness.[65] Thus, the question of the allocation of the burden of going forward as to reasonable rates is independent of the Commission's authority to fix such rates. Since the reasonableness of a rate is germane to the inquiry of public interest, convenience, and necessity the initial burden of presenting some evidence as to reasonableness should have been upon the applicant. By assigning the initial burden to the staff the Commission was in error unless it entertained the presumption noted above.[66]

There are several instances where a burden of going forward has been placed upon the intervenor-opponent with apparent jus-

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[63]*Id.* at 429 (dissenting opinion).

[64]Transcontinental Gas Pipeline Corp., 20 F.P.C. 264, 272 (1958), *citing* Phillip Petroleum Co. v. FPC, 258 F.2d 906 (10th Cir. 1958) where the court held that under the Natural Gas Act the rate to be charged for natural gas is initially fixed by contract between the seller and the purchaser and the Commission had no initial rate making powers. An initial rate fixed by contract remained in effect unless and until it was changed in a proceeding under section 5(a) of the Natural Gas Act. *But see* Atlantic Refinery Co. v. Public Service Comm'n, 360 U.S. 378 (1959), in which the Court decided that the rate level issue was a factor bearing on the public convenience and necessity. This opinion did not overrule *Seaboard* because it did not address the respective burdens of proof. However, it does support the inference that the applicant must come forward with evidence to show that the contractual rate is in the public interest. *Id.* at 391-92.

[65]Transcontinental Gas Pipeline Corp., 20 F.P.C. 264, 290 (1958) (dissenting opinion). It should not be impossible for the applicant to establish the reasonableness of his contractual rate, and, if found unreasonable, then renegotiate the rate with the producer before reapplying for certificate.

[66]Seaboard Oil Co., 19 F.P.C. 416, 421-24 (1958). There are also overtones in the opinion to the effect that consideration of a rate issue, although within the scope of the ultimate issue, was too burdensome for the agency to undertake.

tification even though normally the opponent has no such burden.

In *National Airlines, Inc. v. CAB*[67] the CAB conducted an adequacy-of-service investigation and ordered National to institute a Baltimore-Miami flight. As the proponent of a rule or order the Board theoretically had the ultimate burden of showing that the additional service was warranted, as well as the burden of going forward. In spite of this it placed the burden of going forward with evidence as to financial infeasibility upon National and justified the imposition by saying that the Board was not asking the airline to come forward with evidence on the entire subject of economic feasibility, but only with evidence as to facts particularly within the airline's knowledge.

National objected to the imposition as contrary to the APA and sought review. The court upheld the agency's assignment of the burden of going forward because, as the Board had indicated, the knowledge was peculiar to the airline even though the agency had access to some of the data. The court considered that

> cities petitioning for adequate service and the Board would be unduly hampered by any requirement for overly detailed profit and loss projections to establish the economic feasibility of adequate service. This could not only intolerably protract adequacy of service proceedings, but might create an insuperable barrier to petitioning civic groups lacking both the relevant operating data and the assistance of experts.[68]

The rationale of the court is equally applicable to the placement of the burden of going forward in a nuclear facility licensing hearing. Where an applicant utility possesses particular knowledge about the nuclear facility—as it must—imposition of the burden of going forward upon a public intervenor will certainly protract the proceedings and create an insuperable barrier to the citizen organization which lacks the relevant data and the assistance of experts.[69]

In an FPC proceeding,[70] the intervenor, American Louisiana Pipe Line Company, sought to show that the application before the Commission should be extended to cover Upper Michigan.

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[67]300 F.2d 711 (D.C. Cir. 1962).

[68]*Id.* at 715.

[69]9 WIGMORE § 2486. *See also* Clarke v. United States, 101 F. Supp. 587, 594 (D.D.C. 1951).

[70]American La. Pipe Line Co., 19 F.P.C. 1 (1958).

The applicant had purposefully excluded the area, intending to apply for coverage of the area in the future. The intervenor sought to prove its case solely by cross-examination, but the Commission, in granting the certificate as originally applied for, held that American Louisiana could not sustain its contention in that manner and should have submitted direct evidence as requested.

The burden of going forward was placed upon American Louisiana because its contention was outside the scope of whether the applicant could demonstrate that the public interest, convenience, and necessity required an extension of service into the region it had selected. The intervenor raised an issue which according to the Commission was unrelated to the ultimate issue involved. The peninsula was specifically excluded from the application, and intervenors, by seeking to enlarge the area of service, became a proponent of an order with at least a burden of going forward if not the risk of nonpersuasion.[71]

In *Hall v. FCC*[72] the applicant for modification of a construction permit relied upon an agency study of reception probabilities to show that reception would be reduced unless its permit were modified. The opponent contended that since the study was related to a normal area, and the area in which the applicant operated might be abnormal, the applicant had the burden of proving the normality of its broadcast area. The court held, however, that the opponent must prove the area to be abnormal.

Upon first analysis it appears that the burden of going forward with initial evidence in regard to the issue of normality was placed on the opponent. But this is incorrect. The applicant had the initial burden of going forward, and the risk of nonpersuasion; but under the circumstances the court was willing to entertain a presumption that the region was normal. This presumption was sufficient to establish a prima facie case and cast the burden of producing rebuttal evidence on the opponent.[73]

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[71] *See* Ashworth Transfer, Inc. v. United States, 27 Ad. L. Dec. 2d 494 (D. Utah 1970), where the court placed the burden of proof on the intervenors to demonstrate that proposed restrictions on a certificate were in the public interest. The restrictions were outside the scope of the issues considered in granting certificate of public convenience and necessity.

[72] 6 Ad. L. Dec. 2d 419 (D.C. Cir. 1956).

[73] 9 WIGMORE § 2488(a). This case has implications for issues attacking the interim criteria for emergency core cooling systems. If a presumption is raised by an applicant's compliance with the criteria then the burden shifts to the intervenor to come forward with special circumstances demonstrating why the criteria are inapplicable.

It is evident, then, that a burden of going forward can be imposed justifiably upon the intervenor-opponent in some instances, but not without regard to the circumstances and issues involved. When an intervenor becomes a proponent of a rule or order either by statute or because the issues it raises fall outside the scope of those which are expected to be or are normally raised therein, then an initial burden of going forward can be properly placed upon the intervenor. Likewise when an intervenor-opponent has peculiar knowledge, or where the commission or court is willing to entertain a presumption, the intervenor may have an initial burden to sustain. The question remains whether a public interest intervenor raising contentions directly related to and circumscribed by the ultimate factual issues involved should have any initial burden except in those instances noted above, or whether an applicant should have the burden of going forward with respect to those issues. Judicial and administrative bodies have seldom, and then only indirectly, placed this burden upon the applicant.

B. *Burden of Going Forward on Applicant*

The issue of whether an intervenor has any burden to sustain arose obliquely in *Deep South Broadcasting Co. v. FCC.*[74] There the Commission authorized the applicant to increase its broadcasting power over the objections of the intervenor, Deep South. The applicant had not been required to show that the increase in power would have no deleterious impact upon future assignments to other stations. On appeal the Commission attempted to rationalize the shortcoming by claiming that Deep South could have done nothing in a hearing, or in meeting evidence brought forward by the applicant that would have altered the result reached. The Commission also claimed that its review board had made an "independent evaluation" of the impact of the power increase, and subsequently had indicated its willingness to hear any challenge to the evaluation's accuracy. Since Deep South had failed to ask the review board to reopen the hearings at that time, the Commission argued that the intervenor should not be heard to complain on appeal.[75]

The court rejected the attempted rationalization stating that neither the Commission's "independent evaluation" or its will-

[74]347 F.2d 459 (D.C. Cir. 1965).

[75]*Id.* at 464.

ingness to reopen the proceeding had the effect of shifting the burden of proof on a controlling issue from the applicant to the intervenor, who theoretically begins with no burden at all.[76] The court explained that the intervenor was not an applicant and

> had no burden of proof of any kind on this issue either affirmative or negative. It was entitled to see what evidence [the applicant] could or would bring forward on that issue, and to test it by cross-examination or to counter it by evidence of its own.[77]

The court believed that since the question of the impact of the power increase was directly related to the ultimate issue of whether the increase would be in the public interest, the applicant should have both the burden of going forward and the ultimate risk of nonpersuasion.

In spite of the unconditional language appearing in the opinion the decision is not dispositive of the allocation of the burden of going forward with regard to issues raised by an intervenor because the issue before the court was initially raised by a member of the licensing board. Thereafter, the issue was adopted and pursued by the intervenor, but it is apparent that the court regarded the question as one raised by the Commission.[78]

In another rate proceeding,[79] Union Oil Company of Califor-

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[76] *Id.* at 464 n.3. The court stated that:

> It is said that Deep South should not now be heard to complain because it did not ask the Board to reopen the hearings at that time. But Deep South was not an applicant for a licensing privilege, nor was there any burden of proof on it to establish that WKTG's application should be denied. It was entitled to lay before the Commission, as it did, alternative contentions that WKTG had not sustained its burden of proof as to the merits of its application, and that the application should be denied; or that the procedure followed in assembling the quantum of proof on behalf of the application had been so irregular that, if the Commission was not disposed to deny the application without more, it should remand the application to a hearing examiner so that WKTG could seek to sustain its burden of proof on the record.

Id. at 464.

[77] *Id.* at 465.

[78] The court relied upon section 309(e) of the Communications Act of 1934 which provided that:

> The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented in a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

47 U.S.C. § 309(e) (Supp. 1974). If the court had viewed the issue as raised by the intervenor then it would have referred to the discretionary authority vested in the Commission by statute to assign the burdens of proof. Instead the court found that the statute required both burdens be placed upon the applicant.

[79] *In re* Union Oil Co., 16 F.P.C. 100 (1956).

nia applied for a rate increase on the sale of natural gas.[80] Following the applicant's presentation intervenors waived cross-examination and moved to dismiss the application because Union Oil had failed to produce evidence that the increased rates were no higher than necessary to encourage exploration for and production of known and future gas reserves. The Commission gave Union Oil further time to adduce evidence and, upon its failure to do so, held that the applicants had failed to submit evidence on which it could be determined as a matter of law that the rates were just and reasonable.[81]

The Commission stated that the applicant had the burden of proving that the proposed rate increase was just and reasonable, and the discharge of that burden must be affirmative, concrete, and persuasive.[82] Further,

> [n]o burden of proof rests with intervenors or the staff to present negative evidence that the increased rate is unreasonable, for until the applicant has presented a *prima facie* case opposing parties have no burden of going forward.[83]

In *Railway Express Agency, Inc.*,[84] the Civil Aeronautics Board instituted an investigation of the tariff schedule by which REA proposed to increase its charges. The burden of going forward was placed upon REA to show that the proposed rate was just and reasonable because the proponent had within its possession the major portion of the evidence supporting the charge,

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[80]The distinction between seeking a rate increase and attacking an existing rate should be remembered. *See* text accompanying note 57 *supra*. In this case Union Oil is the proponent of an order permitting it to raise its rates on the sale of natural gas.

[81]16 F.P.C. at 113.

[82]*Id.* at 111, *citing In re* Mississippi River Fuel Corp., 2 F.P.C. 170, *aff'd* 121 F.2d 159 (8th Cir. 1941).

[83]*Id. See also* Colorado-Arizona-California Express, Inc. v. United States, 224 F. Supp. 894 (D. Colo. 1963), where the Interstate Commerce Commission denied a carrier's application for a certificate because the applicant had failed to establish that present and future public convenience and necessity required the grant of the application, and had failed to establish its fitness, willingness, and ability to properly conduct the proposed operation. In affirming the Commission's action the court held that the applicant had a burden of proof to show inadequate service, and that burden cannot be met by inferences drawn from failures of protesting carriers to prosecute their cause. *See also* Pacific Intermountain Express Co., 8 Ad. L. Dec. 2d 235 (I.C.C. 1958) where the Commission, denying the merger application because applicant had failed to sustain its burden of proof, stated:

> Nor are we relieved of this application by the fact that many of the competing carriers refrained from intervening and introducing evidence . . . . The burden is upon applicants to submit the necessary evidence . . . .

Id. at 237.

[84]8 Ad. L. Dec. 2d 543 (C.A.B. 1958).

evidence which was not readily available to other parties.[85] The Board concluded that to place such an onus upon an opponent would create a heavy obstacle in its path by requiring it to make an initial presentation on the basis of evidence readily available only to the proponent. Moreover, substantial delay to the administrative process would ensue if the opponent were forced to gather evidence sufficient to support a prima facie case.[86]

The ICC easily disposed of intervenors' numerous contentions in *Atlanta-New Orleans Motor Freight Co. v. United States.*[87] There M.R. & R. Trucking Company made application to extend its motor common carrier service by annexing approximately 150 shipping points, all to be serviced from Atlanta. At the hearing 10 protesting intervenors contended that the applicant could not and did not show need for improved service with respect to each and every one of the points involved. The applicant did offer direct testimony relating to 22 of the points, and this showing convinced the Commission that the proposed service was required by the present and future public convenience and necessity.

On judicial review intervenors alleged that the certificate was granted without being supported by substantial evidence. The court, however, refused to impose the burden of presenting direct evidence with respect to all of the points upon the applicant. Instead the evidence which was introduced was sufficient to support a presumption of need at other points within the area as to which no specific testimony was offered.[88] The inference shifted the burden to the intervenors who, in order to rebut it, were required to demonstrate by direct evidence that the public convenience and necessity did not require the proposed operations of the applicant.

The applicant had the initial burden of going forward in the face of intervenors' contentions, but because of an interest in

[85] *Id.* at 545. The attitude of the CAB toward a rate increase is somewhat different than that of the FPC. In an FPC investigation the increased rate has a presumption of validity with the consequence that the opponent has the burden of proof. The CAB views its investigation as an application for a rate increase with no presumption attached.

[86] The dissenting Board members argued that the CAB, as a proponent of an order rescinding the charges, should have the burden of establishing a prima facie case before shifting the burden to REA.

[87] 197 F. Supp. 364 (N.D. Ga. 1961).

[88] *Id.* at 369.

administrative efficiency, its burden was deemed satisfied by a rebuttable presumption.[89]

None of the foregoing decisions placing a burden of going forward upon an applicant squarely faced the question of the apportionment of this burden in instances where an intervenor raised contentions. In *Deep South* the language strongly suggests that there would be no burden whatsoever upon the intervenor, but the court's decision related solely to an issue raised initially by the licensing board and considered important by it. In the remainder of the cases in which the applicant was found to have a burden of initially presenting evidence, the court or administrative body, in effect, merely held that the applicant had the burden of going forward on issues normally involved in a licensing hearing even without the presence of intervenors.[90] Logically the language and rationale of these cases would support the conclusion that if an intervenor raises a contention, which contention is or would be considered by the board to be part of the applicant's case even without intervention, then the applicant should have the initial burden of going forward with evidence. But this conclusion is not the one best suited to the efficient conduct of administrative proceedings, nor is it generally applicable to all contentions raised by an intervenor or all circumstances in which administrative agencies function.

Certain rate cases illustrate the third approach which administrative agencies have adopted toward the apportionment of the burden of going forward.

C. *Burden of Going Forward Immaterial*

Terminal Charge, at Various Points, on Order Bills of Lading Shipments[91] involved an investigation of existing motor carrier

[89] *Id.* A petition for leave to intervene in proceedings before the Interstate Commerce Commission must set forth "the grounds of the proposed intervention, the position and interest of the petitioner in the proceeding, and whether petitioner's position is in support of or in opposition to the relief sought." 49 C.F.R. § 1100.72 (1974). Under the regulation, although the opinion of the court does not mention it, intervenors must have raised contentions with regard to each one of the points in question.

[90] In *In re* Union Oil Co., 16 F.P.C. 100 (1956) the applicant had the burden of going forward on the issue of just and reasonable rates irrespective of the intervenor's presence. Similarly, Colorado-Arizona-California Express, Inc. v. United States, 224 F. Supp. 894 (D. Colo. 1963), Pacific Intermountain Express Co., 8 Ad. L. Dec. 2d 235 (I.C.C. 1958), and Atlanta-New Orleans Motor Freight, 197 F. Supp. 364 (N.D. Ga. 1961), were all cases involving issues normal to the administrative inquiry and not regarded as contentions placed in issue by intervenors.

[91] 315 I.C.C. 327 (1962).

charges by the Interstate Commerce Commission. Because there was no changed rate in issue, the proponents of the existing rate did not have the burden of proof; instead the protesting intervenors as proponents of an order changing the rate had the burden.

The Commission, considering the case important because of the burden of proof issue, cautioned that the allocation of the burden of proof was primarily a rule of evidence designed to insure orderly procedure; but if viewed solely in quantitative terms, it soon would become master of the administrative process rather than the servant.

The Commission found that the intervenors had failed to establish that the charges were unlawful even though they had submitted as much evidence as could reasonably be expected in light of information available to them. Nevertheless, the Commission held that the existing charge was unreasonable because the carriers had failed to produce evidence justifying the charges on the basis of facts peculiarly within their knowledge. This seemingly injudicious regard for the consequences of bearing the burden of proof was brought about because the Commission was confronted with a situation where identical rates in other proceedings had been found unreasonable. If the rates in *Terminal Charge* had been permitted to stand simply because the intervenor had failed to meet its burden of proof there would be an irrational and unacceptable inconsistency. Thus the Commission explained that even if the intervenor had offered no evidence at all, the Commission as protector of the public interest would have been obliged to supplement the record to determine if the rates were reasonable.

Although the ICC in *Terminal Charge* did not explicitly so indicate, it seemed to regard the administrative hearing as fundamentally different from the ordinary civil litigation between two private parties. According to the Commission the agency's determination could not be based upon who proved what by a preponderance of the evidence, or by which party came forward with evidence to establish a prima facie case. Rather, as the protector of the public interest, it had the affirmative duty to search out all the evidence as well as draw upon its own technical expertise before rendering a decision. In essence, if the Commission's judgment is correct, the question of who has the burden of going forward may be irrelevant in the administrative process except in terms of orderly procedure and the public interest. If an agency

believes that imposition of the burden upon an intervenor would best assist the Commission in protecting the public interest, then according to the reasoning in *Terminal Charge* it may do so.[92]

The FPC adopted a similar approach towards the burden of going forward in *Area Rate Proceeding*[93] when it ordered simultaneous written presentation of direct cases by all parties including intervenors, followed by simultaneous presentation of rebuttal evidence. After considering intervenors' motion to revise the schedule to permit them to present their direct cases after the staff and respondent had presented theirs, the Commission remarked that

> [it] unquestionably [had] the authority in discharging its duties to establish an appropriate hearing procedure. It has done so in this proceeding. Whether or not the staff or any of the parties has the burden of proof or the burden of going forward in no wise calls for any change in the requirement that simultaneous direct presentations be made.[94]

The intervenors contended that fair procedure dictated that they be allowed to see the respondent's direct case before presenting their own because they needed more time. They also argued that simultaneous submission of direct evidence would be inefficient as there was bound to be much duplication by staff and intervenors or staff and applicant. Rejecting these contentions, the Commission found the approach to be the fairest and most expeditious means of conducting the proceeding.[95]

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[92]*Id. See also* Great Northern Ry. Discontinuance of Service, 307 I.C.C. 59 (1959), where the hearing examiner, after considering carrier's request that the burden of proof should be upon the parties complaining that public convenience and necessity required continuation of service, ruled that the carrier seeking to abandon passenger service must proceed with the presentation of evidence. Noting that the carrier had not been prejudiced by the procedure, the Commission declined to decide who had the burden of proof in investigation proceedings and stated:

> In any event, the question is of more theoretical than practical importance . . . . Regardless of where the burden of proof lies, a carrier subject to our regulation is expected to aid in the disposition of proceedings to which it is a party by making available all pertinent facts within its knowledge.

Id. at 61.

[93]30 F.P.C. 512 (1963).

[94]*Id.* at 512.

[95]*See also* Midwestern Gas Transmission Co., 29 F.P.C. 723 (1963), where the intervenor in a rate proceeding requested that the presiding examiner follow a procedure whereby the cases in chief of the proponents would be served upon all parties prior to the cases in chief of any intervenors. The presiding officer declined, adopting a plan requiring intervenors to proceed first. On review the Commission upheld the examiner's procedure stating that

Thus far the decisions analyzed have disclosed three alternative approaches toward the apportionment of the burden of proof. In general there seems to be no consistent formula applied by either administrative or judicial bodies. As an outsider to the numerous varieties of agency adjudicatory hearings, one should hesitate to conclude that the agencies and courts approach the apportionment of the burden on an ad hoc basis. Perhaps no comprehensive scheme can or should be developed. Arguably the kinds of privileges applied for, whether they be a motor carrier's certificate, a rate increase, renewal of a broadcast license, or construction permit, are dissimilar enough to justify a different approach by each agency.

If the analysis of the three alternatives has not provided a consistent approach, it has at least imparted a sense that administrative hearings are not procedurally similar to two-party civil litigation. The ultimate issue before a licensing board is not who wins or loses, but, more importantly, whether grant of the privilege will best serve the public interest. And thus the agency's apportionment of the burdens of proof becomes less a substantive rule with legal significance in terms of dismissal or directing a verdict and more a procedural rule serving the interests of the administrative body and the public.

In the abstract the question of who has the burden of going forward, or even the risk of nonpersuasion with regard to issues raised by an intervenor, might and probably should be immaterial, as suggested by the third alternative. And if the allocation is in the first instance a neutral proposition, then perhaps the agency should have the discretion to assign the burdens in such a way as to facilitate its statutory duty. In fact, there is one federal agency with statutory authority to adopt a discretionary approach. Section 309(e) of the Communications Act of 1934 provides:

> Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the

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considerations of who may ultimately bear the burden of proof in these proceedings have little bearing on the real problem confronting the Examiner, *i.e.*, establishing a schedule which most nearly balances the needs and conveniences of the parties against the interests of expedition.

Id.

> applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.[96]

The legislative decision to give the Federal Communications Commission this discretion was not without reference to practical experience. Predecessor sections of section 309(e) had categorically stated that with respect to issues set forth in protest and not adopted or specified by the Commission, both the burden of going forward and the ultimate burden of proof would be on the protestant.[97] Although the legislative history is unclear, the categorical approach seems to have been abandoned because of a legislative feeling that it was sometimes difficult for a legitimate opponent to sustain the burdens and that the Commission required the flexibility to effectively ascertain the public interest.[98]

Now that courts have begun to recognize that administrative agencies can no longer rely solely upon the evidence presented by the parties, but instead must affirmatively search out all aspects relevant to the public interest,[99] the flexibility authorized by section 309(e) and assumed by other agencies is essential. It is also essential, when the public interest is at stake, to impose upon all parties participating in the administrative proceeding a duty to make available all pertinent facts within their knowledge irrespective of any burden of proof.[100]

Determination of the order in which disclosure of the pertinent facts is made should rest with the agency, but its discretion should not be exercised arbitrarily, frivolously, or with malice toward any party. Since by statute all parties participate with equal right, the allocation should be made, as Wigmore sug-

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[96]47 U.S.C. § 309(e) (Supp. 1974).

[97]*Id.* § 309(c) (1956). *See* Carroll Broadcasting Co. v. FCC, 258 F.2d 440 (D.C. Cir. 1958), where a competitor of an applicant for a broadcasting license alleged that the grant of a license would be adverse to the public interest because it would impair his (the competitor's) economic position. Although the burden of proof issue was not squarely presented, the court found that the intervenor had the burden of showing potential economic injury and that it was "certainly a heavy burden." *Id.* at 444. At the time section 309(d) of the Communications Act placed both burdens of proof upon the protestant. However, the result is also justified because the facts relevant to a competitor's economic vulnerability are peculiarly within the control of the competitor.

[98]S. REP. No. 690, 86th Cong., 1st Sess. 2, 4 (1959). Ironically Clay T. Whitehead, director of the White House Office of Telecommunications Policy, recently proposed legislation which seeks to reinstate the burden of proof upon the challenger in a license renewal hearing, as reported in the Chicago Tribune, March 14, 1972.

[99]*See* Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 620 (2d Cir. 1965).

[100]*See* cases cited note 92 *supra.*

gested, on the basis of broad considerations of policy.[101]

An agency should consider numerous facts when making its determination, not the least important of which is that the applicant is asking the public to grant it a privilege. Important also is the nature of the party and of the regulated subject matter. Additional consideration should focus upon the particular party's access to relevant information, and his ability to process facts and hire competent expert witnesses. Administrative efficiency, while not paramount, should also receive attention.

Thus in proceedings before the Atomic Energy Commission, the hearing examiner should be vested with the discretion to assign the burdens of proof as considerations of policy dictate.

V. ALLOCATION OF THE BURDENS OF PROOF IN AEC PROCEEDINGS

Before analyzing the considerations relevant to the question of whether a public interest intervenor should have a burden of going forward or even the ultimate burden of persuasion, it is best to understand the procedure that the Commission has provided for intervention. Under the applicable rules of practice intervention is only permitted when the prospective intervenor is able to set forth with particularity both the facts pertaining to his interest and the basis for his contentions with regard to each aspect on which he desires to intervene.[102]

Once intervention is permitted, an intervenor is entitled to utilize the discovery devices available to gather facts relevant to the contentions raised.[103] Upon the discovery of new information which was not previously available to the intervenor, it has been the Commission's policy to permit amendments to the contentions.

Historically, public interest intervenors in each AEC licensing proceeding have presented to the licensing board an average of 150 contentions. In the course of discovery a substantial number of these are normally explained to the intervenor's satisfac-

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[101] 9 WIGMORE § 2488(a).

[102] 10 C.F.R. § 2.714 (1973). The new regulations require that the petition to intervene shall set forth the interests of the petitioner in the proceeding, how that interest may be affected by Commission's action, and other contentions including the facts and reasons why he should be permitted to intervene. The petition must be accompanied by supporting affidavits setting forth with particularity both the facts pertaining to his interest and the basis for his contentions with regard to each aspect on which he desires to intervene.

[103] The anomaly has been pointed out previously that the contentions have to be supported initially, otherwise intervention is denied. 10 C.F.R. § 2.714 (1973).

tion. The remaining contentions are again given to the licensing board for a determination of relevancy and merit. After hearing argument from each of the parties, the board decides whether the contentions will become issues in the licensing hearing. The number of contentions surviving this prehearing process is usually no more than 20.

Almost invariably the issues raised by the intervenor relate directly to the ultimate findings of fact that the board must make before granting or denying a license. For example, an intervenor's contention might postulate a steam line rupture leading eventually to a serious accident. There can be no question that the steam line is adequately constructed and is within the sphere of the required finding of safety. In most instances intervenors simply deny that the applicant has complied with an explicit AEC standard which must be met before a license can be issued. This, then, is the context in which the various policy considerations must be analyzed and balanced.

Applicants eager to begin constructing or operating a nuclear facility vigorously argue that fairness and administrative efficiency require that some burden of going forward be placed upon intervenors. They contend that without imposing some evidentiary burden there is no way to protect the administrative process or the applicant from frivolous contentions contrived to delay the licensing of a multimillion dollar facility. The floodgate argument, used to bar public intervenors so many times in the past, is here resurrected once again.[104]

Viscerally, one might be inclined to sympathize with the applicant. Perhaps a modest burden should be imposed upon a public intervenor to show that his claims have merit. Otherwise, if they are frivolous, the applicant and the agency will suffer needless delay and expense.[105] There are, however, countervailing considerations.

In order to obtain permission to utilize special nuclear material, with all of its inherent hazards, an applicant must demon-

[104]In *Church of Christ*, Judge Burger gave short shrift to the floodgate argument raised against allowing intervention. He noted that the prohibitive cost of participating in litigation would serve to discourage the bringing of frivolous claims.

[105]Giving the intervenor the benefit of the doubt for the moment, its original petition to intervene is prepared without the benefit of discovery. Consequently some of the contentions will be well founded while others may be based upon a misunderstanding. However, once intervention is granted and discovery proceeds, the responsible intervenor will

strate to the satisfaction of the Commission that the proposed facility meets all of the requirements of the Atomic Energy Act as well as the Commission's regulations. These requirements include the ultimate findings that must be made, as well as detailed design and operational criteria.[106] The applicant, as the proponent of an order granting the license, must bear the risk of nonpersuasion on these issues and the burden of presenting sufficient evidence to establish a prima facie case. Presumably, absent intervention or a contested proceeding, the applicant could sustain this burden solely with the introduction of documentary evidence addressing the applicable standards and criteria.[107]

After viewing the applicant's evidence, the board then makes findings on the ultimate issues, *e.g.*, the plant has been designed and constructed in accordance with the Commission's rules and regulations; the applicant is technically and financially qualified; and there is reasonable assurance that the facility can be operated without endangering the health and safety of the public.

As noted earlier, an intervenor's contentions will frequently deny an applicant's compliance with certain specific criteria, criteria on which the applicant must make a prima facie showing irrespective of the intervenor's presence. In such a case the intervenor has done nothing more than place the parties and the board on notice that it intends to challenge the applicant's evidence and rebut it if his fears are not assuaged or if he considers it necessary. To impose any initial burden upon an intervenor when the Commission's own criteria are in question makes little sense and can result only in delay and inefficiency.

Those contentions which do not call into question the appli-

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narrow its contentions, making them more accurate and more specific. If discovery works properly, *i.e.*, if there is a free interchange of information between all parties, then those contentions based upon a misunderstanding will be satisfied and laid aside. A serious intervenor should not wish to jeopardize his valid claims by alienating the board with frivolous ones.

[106]10 C.F.R. §§ 50.55-.55(a), .57 (1973).

[107]Commission regulation requires an applicant to prepare a multivolume Final Safety Analysis Report (F.S.A.R., Preliminary Safety Report for a construction license) and draft a Detailed Environmental Statement covering all aspects of the facility's compliance with design and construction standards and all deleterious effects upon the environment. These documents form the basis of the applicant's evidence and if unchallenged might be sufficient to establish a prima facie case. 10 C.F.R. §§ 2.743(g), 60.34(a), (b) (1973). Section 2239 seems to contemplate just such a result where the Commission can make the requisite findings upon an operational license application without a hearing absent a protest by any person whose interest may be affected. 42 U.S.C. § 2239 (1970).

cant's compliance with existing specific criteria but are nevertheless directly related to an ultimate finding do nothing more than focus upon deficiencies in the applicant's case. If, for example, the applicant must prove that his plant is safe, then he must convince the board by direct evidence, by inference, or whatever, that every aspect of the facility is safe. It is of course beyond the mortal competence of the applicant to show that his plant is universally safe; however, when licensing the use of such inherently hazardous material, the board should not compromise the goal or the public interest. It should not permit the applicant to escape his duty when deficiencies in his case are revealed.[108] If the intervenor's issue relates to safety, or any other required finding, then as part of the whole it is legitimately a component of the applicant's case. As such, the applicant must meet the specific issue in order to establish its prima facie case or suffer an unfavorable finding on the ultimate or general issue. Administrative economy would dictate that the issue should be met by the applicant at the same time it comes forward with evidence with respect to other specific issues in the proceeding.

Ideally, the question of who should come forward with evidence in an administrative hearing should have no quantitative legal significance for any of the parties. Once all the evidence is before the board it is sufficient that a determination whether the grant of a license would be in the public interest can be made. If an intervenor is to have any initial burden with regard to issues related to the ultimate findings, neither the applicant nor the Commission should be free to ignore such issues simply because the intervenor fails to establish a prima facie case.[109] Nuclear energy is so hazardous that no question about safety ought to remain unresolved. The applicant and the Commission have a duty to the public to explore every conceivable hazard, every perceived problem, without imposing legal standards that operate to foreclose inquiry.

The risk of litigating frivolous issues is considerably lessened by the Commission's prehearing procedure. It is arguable that, because the board makes a judgment as to the merit of an issue before permitting it to be litigated, it has, in effect, adopted the issue, and the intervenor need not establish a prima facie case at all.

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[108] *See* Calvert Cliffs Coordinating Comm., Inc. v. AEC, 449 F.2d 1109, 1118 (D.C. Cir. 1971).

[109] *See* text accompanying note 92 *supra*.

The danger posed by procedural traps inherent in requiring an intervenor to come forward and establish a prima facie case is greatly enhanced in a field as technical as nuclear engineering. A facility is designed and built by an applicant with all of its multifarious experts. The Commission with its expert regulatory staff reviews the design and monitors the construction. But a public intervenor with limited resources and limited expertise is severely handicapped in the gathering and processing of information.

The information relevant to the intervenor's contentions is peculiarly in the hands of an applicant. With its vast resources and abundance of experts, the imposition of the burden of going forward upon an electrical utility will create slight inconvenience. Any hardship would be miniscule when compared with the risk which would be created by placing an evidentiary burden upon an intervenor.

Availability of information has frequently been used to determine the placement of the burden of going forward. When a party is specially or peculiarly in possession of information relevant to the proceeding, then it has, and rightfully should bear, the burden of initially coming forward with evidence on the issue.[110] When it is recognized that a party lacks the expertise and the resources to effectively establish a prima facie case, then no initial burden should be placed upon it.[111]

Congress provided for public participation in nuclear facility licensing proceedings primarily because it wanted local citizens to be informed about the awesome and hazardous force placed in the midst of their community. Secondly, legislators wished to insure that the agency would be accountable to the public for its actions. Both of these reasons argue in favor of full discussion of all the issues raised irrespective of any burden of going forward.

CONCLUSION

In conclusion, the placement of the burden of going forward in administrative proceedings is initially a neutral factor whose eventual assignment depends ultimately upon considerations of policy. A public interest intervenor participating in atomic energy litigation is under a duty to present all of the information within its possession to the licensing board. But because of its role

[110]9 WIGMORE § 2486.

[111]National Airlines, Inc. v. CAB, 300 F.2d 711 (D.C. Cir. 1962).

in the proceedings and because of its relative lack of information and expertise, the attention given the intervenor's issues should not depend upon whether he is able to establish a prima facie case. All of the issues raised should be fully explored and resolved to the satisfaction of all the parties. On balance, it would seem that the most efficient approach would be to have the applicant proceed first with regard to all the issues raised in the proceeding, with the intervenor following.

EMPLOYMENT OF NONTENURED FACULTY: SOME IMPLICATIONS OF *Roth* AND *Sindermann*

BY CAROL HERRNSTADT SHULMAN*

INTRODUCTION

In concurrent 1972 decisions authored by Justice Potter Stewart, the Supreme Court examined the right of nontenured teachers[1] in public institutions to a statement of reasons and collegiate due process hearings prior to nonrenewal of their contracts. These cases, *Board of Regents v. Roth*[2] and *Perry v. Sindermann*,[3] came before the Court at a time when there was considerable conflict among the various circuits concerning the rights to be accorded to such teachers.[4] They raised two major issues: whether the fourteenth amendment entitled teachers to institutional due process hearings prior to contract nonrenewal, and whether nonrenewal might be an infringement of free speech interests protected by the first amendment.

The Court held in *Roth* and *Sindermann* that nontenured teachers are entitled to due process protection[5] only under limited conditions: (1) when a teacher has been deprived of proven interests in "property" or "liberty" as these concepts have been interpreted under the fourteenth amendment; or (2) when an institu-

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[1]A tenure system provides that:

> After the expiration of a probationary period, teachers, or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.

AMERICAN ASS'N OF UNIV. PROFESSORS, *Academic Freedom and Tenure, 1940 Statement of Principles and 1970 Interpretive Comments*, in A.A.U.P. POLICY DOCUMENTS AND REPORTS 2 (1973).

[2]408 U.S. 564 (1972).

[3]408 U.S. 593 (1972).

[4]*See, e.g.*, Drown v. Portsmouth School Dist., 435 F.2d 1182 (1st Cir. 1970); Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, 397 U.S. 991 (1970); Freeman v. Gould Special School Dist., 405 F.2d 1153 (8th Cir.), *cert. denied*, 396 U.S. 843 (1969).

[5]"Due process of law is a summarized constitutional guarantee of respect for those personal immunities which . . . are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Rochin v. California, 342 U.S. 165, 169 (1952), *citing* Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). The central meaning of procedural due process is that "parties whose rights are to be affected are entitled to be heard; and in order that they enjoy that right they must first be notified." Fuentes v. Shevin, 407 U.S. 67, 80 (1972), *citing* Baldwin v. Hale, 68 U.S. (1 Wall.) 223 (1864).

tion has directly violated a teacher's first amendment free speech interests.

This article will analyze the decisions in *Roth* and *Sindermann,* consider their impact on first and fourteenth amendment rights of nontenured teachers, and explore some of the policy implications raised by the decisions.

I. ANALYSIS OF THE DECISIONS IN *Roth* AND *Sindermann*

A. Board of Regents v. Roth

David Roth was employed under a 1-year contract for the 1968-69 academic year as an assistant professor at Wisconsin State University-Oshkosh. He did not have tenure, which is granted under Wisconsin statutes only after 4 years of continuous service.[6] Without a statement of reasons, Roth was notified in January 1969, that his contract would not be renewed for the next academic year. This notification followed a period of conflict on campus during which Roth had openly criticized the university administration. His suit in federal district court[7] claimed that his free speech and due process rights under the fourteenth amendment had been violated because his publicly expressed views were the reasons his contract was not renewed, and, in any case, he was entitled to an institutional hearing before a final decision on his contract could be made.[8] The district court agreed with the latter contention[9] and granted summary judgment ordering the university to provide Roth with a statement of reasons and to set a mutually agreeable date for a hearing.[10] The court of appeals affirmed.[11] In its review of *Roth,* the Supreme Court addressed itself only to Roth's due process rights under the fourteenth amendment and did not consider the free speech aspects of the case, which had caused the district court to deem summary judgment[12] inappropriate, since the facts surrounding the alleged interference with Roth's freedom of speech would have to be developed at trial.

The Supreme Court approached the case differently than did

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[6]WIS. STAT. § 37.31 (1966).

[7]Roth v. Board of Regents, 310 F. Supp. 972 (W.D. Wis. 1970).

[8]*Id.* at 974.

[9]*Id.* at 983.

[10]*Id.* at 984.

[11]Roth v. Board of Regents, 446 F.2d 606 (7th Cir. 1970).

[12]Summary judgment is granted where there are no material facts in the controversy that need to be litigated and where the party asking for summary judgment is entitled to judgment as a matter of law. FED. R. CIV. P. 56.

the district court and the court of appeals. The lower courts had been concerned with weighing the plaintiff's interest in securing his job against the institution's need for unfettered discretion in its employment practices. The Court asserted that this weighing process must come only after a determination that there is either a "liberty" or "property" interest under the fourteenth amendment. Therefore, the Court examined the circumstances surrounding Roth's initial employment and his contract nonrenewal for the existence of such interests.

On the question of liberty, the Court recognized that term as meaning "generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men."[13] The Court held that if a teacher's liberty under this interpretation were impaired, he would be entitled to a due process hearing. Examples given by the Supreme Court of circumstances that would impair a teacher's liberty when his contract is not renewed are an accusation that "might seriously damage his standing and associations in his community,"[14] or a nonrenewal that "impose[s] on [the teacher] a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities."[15] The Court noted that while the district court and the court of appeals deemed nonretention itself to have a "substantial adverse effect" on a teacher, it found nothing in the record to support this belief. Therefore, the Court held that there was nothing in Roth's case to show that his liberty had been impaired.[16]

After reviewing decisions on property interests, the Court announced a standard to be used in determining the existence of such an interest:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.[17]

The Court found that such a claim emerges from the "rules or understandings" issued by an independent source, such as a state government.[18] In Roth's case, a property interest would have

[13]408 U.S. at 572, *quoting from* Meyer v. Nebraska, 262 U.S. 390, 399 (1923).
[14]408 U.S. at 573.
[15]*Id.*
[16]*Id.* at 574 & n.13.
[17]*Id.* at 577.
[18]*Id.*

to have been shown from the terms of his employment or the state statutes relating to granting tenure at public institutions. Roth's appointment, however, did not provide for employment beyond June 30, 1969, nor was there any renewal provision in his teaching contract. Despite Roth's observation that Wisconsin State University-Oshkosh generally rehires teachers who have 1-year contracts, the Court noted that the district court had found no "common law" of reemployment.[19] Therefore, the University's practices did not create the sort of expectation of renewal that would require a statement of reasons and a hearing on nonrenewal. State statutes also did not establish any right to reemployment for Roth. Given these considerations, the Court found that Roth did not have a "sufficient" property interest to entitle him to a statement of reasons and a hearing.[20] Accordingly, the Court reversed and remanded the case for further proceedings consistent with its decision.

In its conclusion, the Court made clear that its

> analysis of the respondent's constitutional rights in this case in no way indicates a view that an opportunity for a hearing or a statement of reasons for nonretention would, or would not, be appropriate or wise in public colleges and universities.[21]

B. Perry v. Sindermann

Sindermann presented the Court with a claim of free speech violations under the first and fourteenth amendments, as well as a charge that he was entitled to fourteenth amendment procedural due process. Because it dealt with different issues and with a substantially different set of circumstances in *Sindermann,* the Court's judgment was more favorable to the teacher than in *Roth.*

Robert Sindermann had been employed at Odessa Junior College in Odessa, Texas from 1965 through 1969 under a series of 1-year contracts. Odessa had no tenure system at that time.[22] He had previously worked for 6 years in the Texas state college system. During the 1968-69 academic year Sindermann testified before committees of the Texas legislature in his capacity as president of the Texas Junior College Teachers Association. He favored changing Odessa to a 1-year institution, a position opposed by the college's Board of Regents. In May 1969, Sindermann was

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[19] *Id.* at 578 n.16.

[20] *Id.* at 578.

[21] *Id.* at 578-79.

[22] This situation has been changed. *See* note 68 and accompanying text *infra.*

notified that his contract would not be renewed, and the Board of Regents issued a press release setting forth allegations of insubordination by Sindermann. Despite its public stance, the board refused to provide Sindermann with an official statement of the reasons for nonrenewal of his contract or with an opportunity for a hearing.

In federal district court, Sindermann claimed that his nonrenewal was based on his public criticism of the Board of Regents and it therefore infringed upon his right of free speech. He also asserted that his fourteenth amendment right to procedural due process was violated by the college administration's refusal to provide a hearing. The district court's summary judgment for the college[23] was reversed because the court of appeals felt that a full hearing on the contested facts was necessary.[24] It further held that despite Sindermann's nontenured status, his contract nonrenewal would be impermissible if it violated his constitutionally protected free speech rights.

The Supreme Court agreed with the court of appeals that the district court had to investigate the facts of Sindermann's claim that his free speech rights had been violated. The Court declared it to be a well-established principle of constitutional law that a government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."[25]

On the issue of Sindermann's right to a due process hearing, the Court held that he should have been given the opportunity to demonstrate that he had a property interest in continued employment, despite the absence of a formal tenure policy at Odessa. The Court defined such a property interest as follows:

> A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.[26]

It found that Sindermann's allegations based on factors such as his years of service in the Texas state college system and the policies and practices of Odessa Junior College might be suffi-

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[23]Sindermann v. Perry, Civil No. MO-69-CA34 (W.D. Tex., Aug. 4, 1969).

[24]Sindermann v. Perry, 430 F.2d 939 (5th Cir. 1970).

[25]Perry v. Sindermann, 408 U.S. 593, 597 (1972).

[26]*Id.* at 601.

cient for him to prove a property interest.[27] In this regard, Sindermann had claimed that he had a form of job tenure because the guidelines of the Coordinating Board of the Texas College and University System provided for tenure after 7 years of service in institutions of higher education. (Sindermann had 10 years of service.) Odessa's faculty handbook declared:

> Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has permanent tenure . . . as long as he displays a cooperative attitude toward his co-workers and his supervisors, and as long as he is happy in his work.[28]

The Court therefore found that Sindermann had raised tenable claims to a property interest in continued employment.

The Court concluded that "[Sindermann] must be given an opportunity to prove the legitimacy of his claim of [property] entitlement in light of 'the policies and practices of the institution.' "[29] Such proof would require the college to grant him a hearing at which he would be given the reasons for his nonretention and would be able to "challenge their sufficiency."[30]

II. IMPLICATIONS OF THE COURT'S INTERPRETATIONS OF LIBERTY AND PROPERTY

A. *Liberty*

As noted earlier, *Roth* held that for the nonrenewal of a teacher's contract to violate his liberty as guaranteed by the fourteenth amendment, it must cause serious damage to his reputation in the community or so stigmatize him as to impair his ability to obtain other employment.[31] Precisely what constitutes a stigma severe enough to be considered deprivation of liberty is not yet clear.

Both the district court[32] and the court of appeals[33] in *Roth* viewed nonretention as a serious impediment to a college teacher's career, but the Supreme Court stated:

> [O]n the record before us, all that clearly appears is that the respondent was not rehired for one year at one university. It stretches

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[27] *Id.* at 599-601.
[28] *Id.* at 600.
[29] *Id.* at 603.
[30] *Id.*
[31] *See* note 15 and accompanying text *supra.*
[32] 310 F. Supp. at 970.
[33] 446 F.2d at 809.

> the concept too far to suggest that a person is deprived of "liberty" when he simply is not rehired in one job but remains as free as before to seek another.[34]

Disagreeing with the majority opinion, Justice Douglas argued in his *Roth* dissent:

> Nonrenewal of a teacher's contract is tantamount in effect to a dismissal and the consequences may be enormous. Nonrenewal can be a blemish that turns into a permanent scar and effectively limits any chance the teacher has of being rehired as a teacher, at least in his State.[35]

Others have also recognized the obstacles to future employment which may result from nonrenewal of a teacher's contract.[36] For example, Professor William Van Alstyne of Duke University Law School,[37] a distinguished commentator on matters relating to higher education, observed that the majority opinion in *Roth* fails to recognize the stigma of nonrenewal by treating Roth as if he had only a special, 1-year, limited appointment:

> By placing Professor Roth in this different frame, as though he were not a regular appointee and as though there were no significant distinction between his situation and that of a special one-year terminal appointment, the majority of the Supreme Court reduced his constitutionally cognizable substantive interests in reappointment to zero.[38]

Laurence H. Kallen notes the Court's statement:

> Mere proof, for example, that his [Roth's] record of nonretention in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of liberty.[39]

and asks: "[W]hat does this say about the teacher who is given notice of nonrenewal in January and by May has one hundred rejections to applications for employment?"[40]

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[34]408 U.S. at 575.

[35]*Id.* at 585 (Douglas, J., dissenting).

[36]*See, e.g.*, Kallen, *The Roth Decision: Does the Nontenured Teacher Have a Constitutional Right to a Hearing Before Nonrenewal?*, 61 ILL. B.J. 464 (1973); Levinson, *The Fourteenth Amendment, Fundamental Fairness, the Probationary Instructor, and the University of California — An Incompatible Foursome?*, 5 DAVIS L. REV. 608 (1972); Van Alstyne, *The Supreme Court Speaks to the Untenured: A Comment on Board of Regents v. Roth and Perry v. Sindermann*, 58 A.A.U.P. BULL. 268 (1972); Comment, *Constitutional Law — The Rights of the Untenured Teacher to Procedural Due Process Prior to Dismissal — Roth v. Board of Regents*, 7 RICHMOND L. REV. 357 (1972).

[37]Professor Van Alstyne was formerly Chairman of the American Association of University Professor's Committee on Academic Freedom and Tenure.

[38]Van Alstyne, *supra* note 36, at 268.

[39]Kallen, *supra* note 36, at 467.

[40]*Id.*

That the stigma caused by nonrenewal of a teacher's contract can indeed create difficulties in securing other employment is illustrated by the two case histories which follow.

In *Orr v. Trinter*[41] a Columbus, Ohio high school teacher whose contract was not renewed and who was not given a statement of reasons was unable to find a teaching position for the following year. He claimed that he

> will continue throughout the remainder of his professional career to suffer the [stigma] of having his professional qualifications [impugned] by the present action of the [school board] in refusing to renew his contract for unknown reasons, and will have his prospects of acquiring future teaching positions at other schools substantially impaired by the aforementioned actions . . . .[42]

The district court agreed and held that Orr was entitled to a statement of reasons and to a hearing,[43] but the court of appeals reversed,[44] holding that the school board's interest in freedom to hire was not outweighed by the teacher's interest in learning the reasons for nonrenewal.[45]

Mrs. Susan Russo, a high school art teacher in Henrietta, New York, also found that she was not able to find employment in her profession after her contract was not renewed. The reason given for nonrenewal was "insubordination." However, the court of appeals found that this reason was invalid because "Mrs. Russo's dismissal resulted directly from her refusal to engage in the school's daily flag ceremonies."[46] The court of appeals therefore reversed the lower court and remanded the case for proceedings not inconsistent with its opinion.[47] Despite this judicial finding, a highly satisfactory teacher observation report during her probationary year, and further scholastic achievement, Mrs.

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[41]318 F. Supp. 1041 (S.D. Ohio 1970), *rev'd*, 444 F.2d 128 (6th Cir. 1971), *cert. denied*, 408 U.S. 943, 409 U.S. 898 (1972).

Two petitions for certiorari were filed. The first petition, submitted before the *Roth* and *Sindermann* decisions were handed down, raised the issue of whether Orr was entitled to a statement of reasons and procedural due process before nonrenewal. The second petition, submitted after the Court's decisions in *Roth* and *Sindermann* and after Orr's first petition was denied, raised the issue of first amendment violations, which was present in the original complaints but not examined by the district court.

[42]Petition for Writ of Certiorari at 5, Orr v. Trinter, 408 U.S. 943 (1972).

[43]318 F. Supp. at 1046-47.

[44]444 F.2d 128 (6th Cir. 1971).

[45]*Id.* at 135.

[46]Russo v. Central School Dist. No. 1, 469 F.2d 623, 630 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973).

[47]*Id.* at 634.

Russo has been unable to find work as an art teacher in and around Henrietta. She believes that work is available, but she has found that the controversy surrounding her nonrenewal has proved an insurmountable obstacle to employment as an art teacher. She has been told as much in job interviews.[48]

Although it is clear that nonrenewal can be a professional detriment, cases decided since *Roth* have not clearly settled the extent to which difficulty in reemployment—and, hence, how great the stigma of nonrenewal—constitutes deprivation of liberty.[49]

For example, in *Lipp v. Board of Education*[50] the Seventh Circuit held that an elementary school substitute teacher was not deprived of liberty when he was characterized as "anti-establishment" in a generally satisfactory efficiency rating, since the court did not consider the comment sufficient to damage his reputation so as to constitute a deprivation of liberty. Further, the court of appeals found that the comment did not prevent him from obtaining other employment in the school system.[51] Moreover, the court of appeals noted, "not every negative effect upon one's attractiveness to future employers violates due process if it results without a hearing."[52]

But in another 1972 decision, *Wilderman v. Nelson,*[53] the Eighth Circuit reviewed a case in which it found evidence "tending to show state action imposing a stigma upon Wilderman which may affect his future employment opportunities."[54] Wilderman, a welfare worker, was discharged, and his letter of dismissal, which cited his unfavorable attitude, was filed in several state offices. Also, a reference letter to a prospective employer "commented adversely upon [his] ability willingly to carry out his employer's policies."[55] The court held that the district court

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[48]THE NEW YORKER, July 30, 1973, at 35.

[49]*See, e.g.*, Lipp v. Board of Educ., 470 F.2d 802 (7th Cir. 1972); Johnson v. Fraley, 470 F.2d 179 (4th Cir. 1972); Wilderman v. Nelson, 467 F.2d 1173 (8th Cir. 1972); McDowell v. Texas, 465 F.2d 1342 (5th Cir. 1971); Wellner v. Minnesota State Junior College Bd., No. 4-71 Civil 555 (D. Minn., Dec. 18, 1972); Franz v. Board of Educ., No. 772 Civil 151 (N.D. Ill., Aug. 10, 1972); Hostrop v. Board of Junior College Dist., 337 F. Supp. 977 (N.D. Ill. 1972).

[50]470 F.2d 802 (7th Cir. 1972).

[51]*Id.* at 805.

[52]*Id.*

[53]467 F.2d 1173 (8th Cir. 1972).

[54]*Id.* at 1176.

[55]*Id.*

"was not justified in summarily dismissing Wilderman's complaint insofar as it alleged a right to a pretermination hearing."[56]

An examination of *Roth, Sindermann,* and the other cases discussed in this section suggests that college administrations and school boards can minimize legal entanglements if they avoid impairing a teacher's reputation in his community or attaching such discredit to his nonrenewal that other job opportunities are foreclosed. Thus, college administrators and school boards may find that the best course legally is to say or publish nothing about a teacher whose appointment is not being renewed.[57]

B. *Property*

The Supreme Court's treatment of the deprivation of property question in *Roth* and *Sindermann* suggests that it is in the best interest of a school board or college administration to be very explicit in its employment policy concerning yearly contracts and probationary teachers. This conclusion is suggested by the different results reached in *Roth,* where clearly the teacher had not been granted tenure, and *Sindermann,* where the teacher was able to allege that he had tenure based on a de facto tenure system.

Although in *Roth* there had been an explicit tenure system, neither state statutes nor university regulations gave rise to a legitimate expectation by Roth of continued employment as a probationary teacher. Professor Van Alstyne notes, however, that the Court made this finding in the absence of any evidence to the contrary in the record. He suggests that there may be situations in which,

> on a better record, under more compelling circumstances, where the

[56]*Id.* The district court had granted summary judgment for the defendants. Wilderman v. Nelson, 335 F. Supp. 1381 (E.D. Mo. 1971).

[57]James F. Clark, of Ela, Christianson, Esch, Hart & Clark, counsel for the Wisconsin Association of School Boards, noted that the Supreme Court decisions "appear to have resulted in some reluctance on the part of school officials to give reasons for nonrenewal." Letter from James F. Clark to Carol Herrnstadt Shulman, July 10, 1973. His view is corroborated by Bruce F. Ehlke of Lawton & Cates, counsel for the Wisconsin Education Association. Letter from Bruce F. Ehlke to Carol Herrnstadt Shulman, Aug. 8, 1973. *See also* Shannon, *Due Process for Nontenured Teachers from the Board's Viewpoint,* in FRONTIERS OF SCHOOL LAW 15 (1973). However, Mr. Clark has also informed the author that reasons for nonrenewal were given to some plaintiffs following the court of appeals' decision in *Roth* and, in turn, these plaintiffs have amended their complaints following *Roth* and *Sindermann* to charge a deprivation of an interest in liberty without due process, because the reasons given for their nonrenewal damage their professional reputations.

> faculty member is well along the tenure track under policies explicitly encouraging reliance, peremptory notice of nonreappointment may not be enough to quench the constitutional claim to more specific consideration than none at all.[58]

In order for schools with an explicit tenure system to avoid creating expectations of continued employment for probationary teachers, another writer has suggested following Harvard's example.[59] It hires more probationary teachers than can be used to fill the available and expected tenured positions, and stresses to them that tenure is only a "faint possibility." Since administrators at other institutions and teachers are aware of this competitive situation, Mr. Levinson believes that little stigma is attached to nonrenewal of these teachers' contracts, and that the same would be true for other institutions that adopt similar hiring policies.[60]

Institutions without explicit tenure systems may discover that they have created an expectancy of reemployment in some circumstances. A series of 1-year contracts may indicate a property interest in continued employment.[61] In *Johnson v. Fraley*[62] the court appeared to recognize what one authority has called the "quasi tenure" situation which had been acknowledged in the Supreme Court,[63] *i.e.*, official actions by the institution that lead a teacher to expect continued employment despite the legal barrier of mere periodic contracts.[64]

On the other hand, one court has found that a long period of employment under a series of 1-year contracts did not constitute de facto tenure.[65] In this case, the Fifth Circuit held that the complaint of a public school teacher who had been employed 22 years under 1-year contracts, but whose contract was not renewed for the 23d year, failed to state a claim upon which relief could be granted. The court further found that the teacher did not allege "the existence of rules or understandings promulgated or fostered by state officials which would justify any legitimate claim of entitlement of continued employment."[66]

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[58]Van Alstyne, *supra* note 36, at 270.

[59]Levinson, *supra* note 36, at 619.

[60]*Id.*

[61]*See, e.g.*, Johnson v. Fraley, 470 F.2d 179 (4th Cir. 1972); Scheelhaase v. Woodbury Cent. Community School Dist. 349 F. Supp. 988 (N.D. Iowa 1972).

[62]470 F.2d 179 (4th Cir. 1972).

[63]Perry v. Sindermann, 408 U.S. 593, 601-02 (1972).

[64]Letter from William Van Alstyne to Carol Herrnstadt Shulman, July 12, 1973.

[65]Skidmore v. Shamrock Independent School Dist., 464 F.2d 605 (5th Cir. 1972). *See also* Lukac v. Acocks, 466 F.2d 577 (6th Cir. 1972).

[66]464 F.2d at 606.

These unpredictable results in contract nonrenewal cases may lead institutions without an explicit tenure system either to develop such a system or to adopt form contracts and an institutional policy that are very clear on the terms and conditions of employment. Such institutions may profit from Odessa College's unhappy example. Following the Supreme Court's decision in *Sindermann,* Odessa settled with Sindermann for $48,000 in back pay and court fees.[67] It has also, however, replaced its old statement of policy and contract system[68] with a formal tenure policy.[69]

III. IMPLICATIONS OF THE COURT'S TREATMENT OF THE FREE SPEECH QUESTION

In *Sindermann,* the Court did not rule on the allegation that nonrenewal was in reprisal for the exercise of free speech rights, since the district court had granted summary judgment for Odessa College. Thus, *Sindermann* does not directly speak to the question of pretermination proceedings on charges of free speech violations. But when *Sindermann* is read with *Roth,* it is evident that direct violations of free speech rights would require such pretermination hearings. In *Sindermann,* the Court noted:

> The Court of Appeals suggested that the respondent might have a due process right to some kind of hearing simply if he *asserts* to college officials that their decision was based on his constitutionally protected conduct. . . . We have rejected this approach in *Board of Regents v. Roth, ante* . . . .[70]

This reference is to an extensive footnote in *Roth,* which states in part: "Whatever may be a teacher's right of free speech, the interest in holding a teaching job at a state university, *simpliciter,* is not itself a free speech interest."[71] In *Sindermann,* however, the Court found that the "allegations represent a bona fide constitutional claim. . . . For this reason we hold that the grant of summary judgment against the respondent, without full exploration of this issue, was improper."[72]

Summary judgment was also held to be improper in a later case in which it was claimed that first amendment rights were

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[67]Telephone conversation with Richard J. Clarkson (attorney for Robert Sindermann) in Odessa, Texas, Aug. 22, 1973.

[68]*See* text accompanying note 28 *supra.*

[69]Policy Statement on Academic Freedom, Tenure, and Responsibility of Odessa College, adopted by Board of Regents of Odessa College, March 27, 1972.

[70]408 U.S. at 599 n.5 (citation omitted).

[71]408 U.S. at 575 n.14.

violated. In *Chitwood v. Feaster*[73] nontenured teachers at a state college claimed that their contracts were not renewed because of their free speech activities and that they were entitled to a statement of reasons for nonrenewal. The court of appeals reversed the lower court decision that granted summary judgment for the college, holding that while the teachers were not entitled to a statement of reasons under *Roth,* their free speech claims, "although unsupported by hard evidence," must be heard.[74] The court of appeals noted:

> The concurrence of protected speech, which may be unpopular with college officials, and the termination of the employment contract seem to be enough, in the view of the Supreme Court, to occasion inquiry to determine whether or not the failure to renew was in fact caused by the protected speech.[75]

Not all speech by teachers is protected, however. For example, in *Duke v. North Texas State University*[76] a teaching assistant was not rehired because she had used profane language when criticizing the university and its administration. The university claimed that such language impaired her effectiveness as a teacher. The court of appeals held that:

> As a past and prospective instructor, Mrs. Duke owed the University a minimal duty of loyalty and civility to refrain from extremely . . . offensive remarks aimed at the administrators of the University. By her breach of this duty, the interests of the University outweighed her claim for protection.[77]

A similar decision was reached in another case involving similar issues, although the employee was not a teacher. In *Tygrett v. Washington*[78] the court also found for the employer, here the District of Columbia police force. Tygrett, a probationary officer, was dismissed after he announced that he would falsely call in sick, organize, and lead a "sick-out" unless certain personnel benefits were implemented. In finding for the employer, the district court noted: "[T]he First Amendment Right of Free Speech, whether in the context of employment or any other legitimate activity, is not absolute. Frequently the right to speak freely

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[73]408 U.S. at 598.
[74]468 F.2d 357 (4th Cir. 1972).
[75]*Id.* at 361.
[76]*Id.*
[77]469 F.2d 829 (5th Cir.), *cert. denied,* 412 U.S. 932 (1973).
[78]*Id.* at 840.
[79]346 F. Supp. 1247 (D.D.C. 1972).

must be balanced against legitimate conflicting interests."[79]

These cases demonstrate that teachers cannot be assured of success in court when seeking relief on the ground that their first amendment rights have been violated.

One significant effect of *Roth* and *Sindermann* may be to inhibit the bringing of such first amendment cases to court when contracts are not renewed. Roth's attorneys argued that if institutional proceedings were foreclosed to probationary teachers,

> few professors, faced with non-retention decisions, will seek judicial relief. Litigation and the attendant public exposure may be costly both in terms of money and personal embarrassment. Moreover, without a statement of reasons, the professor has only two alternatives: quietly acquiesce in the non-retention or begin a major law suit based on his suspicion that the reasons behind the non-retention were constitutionally impermissible.[80]

The National Education Association and Robert P. Sindermann, in their amici curiae brief in *Roth,* presented a similar argument about the "chilling effect" which results when litigation is the only available alternative in a nonretention dispute.[81] Their comments are directed to an opposing amicus argument of the Commonwealth of Massachusetts that a teacher has an adequate remedy in nonrenewal cases under section 1983.[82] Massachusetts appears to advocate this position in the belief that institutional proceedings in every nonrenewal case would be more burdensome

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[79] *Id.* at 1250, *citing* Pickering v. Board of Educ., 391 U.S. 563 (1968). In *Pickering,* a teacher was dismissed by his school board because of his criticism of the board's activities. The Court, while finding for the teacher, also noted that

> it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Id. at 568.

[80] Brief for Respondents at 8, Board of Regents v. Roth, 408 U.S. 564 (1972).

[81] Brief for National Education Association and Robert P. Sindermann as Amici Curiae at 3, Board of Regents v. Roth, 408 U.S. 564 (1972).

[82] Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action by law, suit in equity, or other proceeding for redress.

42 U.S.C. § 1983 (1970).

than occasional court proceedings.[83]

IV. Policy Implications of *Roth* and *Sindermann*

The Supreme Court decisions in *Roth* and *Sindermann* establish the "constitutional boundary lines around the territory covered by procedural due process."[84] If institutions work within these "boundary lines," they will find that they have wide discretion in renewing the contracts of probationary teachers. On the other hand, probationary teachers confronted with the limits imposed by the Court's decisions will find that seeking relief through the courts is costly and yields unpredictable results.

Because there is a surplus of qualified college teachers,[85] *Roth* and *Sindermann* come at a time when institutions desire great flexibility in hiring, retaining, and dismissing faculty members. New concepts and needs in higher education in areas such as curricula, organization, and time spent in obtaining a degree also require colleges and universities to maintain flexibility in their programs. Under these circumstances, colleges and universities want to maintain a balance between tenured and nontenured faculty which will provide flexibility as well as stability.[86] If the Court had held that the mere fact of contract nonrenewal required a statement of reasons and an institutional hearing, institutions might have been overburdened with the work required for processing a substantial number of nonrenewal cases. They might then have been tempted to retain teachers simply to avoid the nonrenewal procedures, and as a consequence would have heavily tenured faculties with little flexibility. Such a situation might easily have arisen in an institution with a standard tenure policy of a 7-year probationary period after which the teacher must be granted tenure or not rehired, since the institution might have found it difficult to offer satisfactory reasons for nonrenewal after 7 years of continuous employment. In light of *Roth* and *Sindermann,* however, colleges and universities are legally free to develop employment policies that will provide the faculty mix most favorable to their own institutional goals.

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[83]Brief for Massachusetts as Amicus Curiae at 7, Board of Regents v. Roth, 408 U.S. 564 (1972).

[84]Rosenblum, *Legal Dimensions of Tenure*, in Commission on Academic Tenure in Higher Education, Faculty Tenure: A Report and Recommendations 160 (1973).

[85]T. Furniss, Steady-State Staffing in Tenure-Granting Institutions and Related Papers 2 (1973).

[86]*Id.*

As an alternative to tenure policies, colleges might consider the pure contract system of employment. This system was recently implemented by the Virginia community colleges which simultaneously abolished tenure for all faculty members who had not yet attained it.[87] The system's multiple contract plan does not contain any stated or implied promise of continuous employment beyond the term of a particular contract. The plan does, however, detail a procedure for appeal of a decision not to renew a contract. In view of *Sindermann,* institutions adopting this plan should not be found to have created an implied tenure-by-contract system.

In either a formal tenure or a contract system, the refusal of administrators to give reasons for nonrenewal,[88] coupled with the surplus of qualified college teachers, places probationary teachers at an obvious disadvanatage. However, in practice such teachers may not be at as great a disadvantage as these considerations suggest. There are pressures on universities not to adhere rigidly to the legal rights they have under the Court's decisions. First, the Court itself in *Roth* noted that its decision does not set university policy as to the "appropriate" action for a public institution to take in its treatment of employees.[89] It merely made clear that a hearing or statement of reasons would not inevitably be required when a nontenured teacher's contract was not renewed.

Second, it is important to note in this connection that many universities already provide a statement of reasons in nonrenewal cases. A survey conducted in April of 1972 by the American Council on Education's Higher Education Panel found that tenure systems are "nearly universal" in public and private universities and 4-year colleges, and that almost half of these institutions give written reasons for nonrenewal.[90] The survey also found that about 90 percent of these institutions had procedures for appeal following denial of tenure or contract nonrenewal, but that in only about 14 percent of these institutions had more than three appeals been taken during the preceding 30 months.[91]

Third, it is likely that teachers—and perhaps their un-

[87]Memorandum from Chancellor Dana B. Hamel to the presidents of the Virginia community college system, Sept. 20, 1972.

[88]*See, e.g.*, authorities cited note 57 *supra.*

[89]408 U.S. at 578. *See* note 21 and accompanying text *supra.*

[90]T. FURNISS, *supra* note 85, at 21. *See also* C. SHULMAN, COLLECTIVE BARGAINING ON CAMPUS (ERIC Clearinghouse on Higher Education No. 2, 1973).

[91]T. FURNISS, *supra* note 90.

ions—will exert pressure to continue and extend the probationary teacher's opportunities for redress. In this regard, William Van Alstyne has commented:

> The experience of the AAUP [American Association of University Professors] vividly demonstrates that . . . the lack of *any* intramural opportunity for hearing at all must ultimately undermine the untenured faculty member's constitutional freedom of speech and his academic freedom. Thus, we [AAUP] shall doubtless continue to stand by our own policy statement on this matter, whatever the prevailing fashion on the Court.[92]

The AAUP's position on this issue is, in fact, in opposition to the Court's rulings. But its position is apparently not out of favor with the Court, since the Court referred to the AAUP in its comment that institutional policy need not be limited by the *Roth* decision.[93]

Current AAUP policy classifies the question of nonrenewal under two separate headings: (1) cases in which the probationary teacher claims that his nonrenewal is based upon inadequate consideration of his qualifications; and (2) cases in which the probationary teacher charges that his nonrenewal resulted from considerations in violation of academic freedom or "governing policies on making appointments without prejudice with respect to race, sex, religion, or national origin."[94] In the first situation, the AAUP advises that the teacher be allowed to present his claim charging inadequate consideration of his qualifications to a designated faculty committee that will determine whether the original decision is in accordance with institutional standards. The faculty body may recommend a reconsideration of the decision, but will not "substitute its judgment on the merits for that of the [responsible] faculty body."[95] In the second situation, informal settlement of the teacher's charge should be attempted. If this is unsuccessful, a hearing may be held at which the faculty member has the burden of proof. If he makes a prima facie case, his supervisors must demonstrate the validity of their decision.[96] In either situation, the AAUP urges that a teacher, upon request, should receive a written statement of reasons for nonrenewal.

A more ambitious plan for the protection of nontenured fac-

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[92]Letter from William Van Alstyne, *supra* note 64.

[93]408 U.S. at 579 n.15.

[94]A.A.U.P. POLICY DOCUMENTS AND REPORTS, *supra* note 1, at 19.

[95]*Id.* at 16.

[96]*Id.* at 19.

ulty members is found in a draft statement by the National Education Association (NEA).[97] This statement differs from the AAUP position in three ways: it places the burden of proof for justifying nonrenewal on the institution rather than the teacher; it gives the teacher the right to appeal the institution's decision to a neutral third party, *e.g.*, the American Arbitration Association; and, most significantly, it maintains that "the conferring of the initial annual contract upon a probationary employee does . . . carry with it an expectation of renewal so long as his work meets the predetermined standards of scholarship and teaching."[98] Both the NEA and the AAUP serve as collective bargaining agents for colleges and universities. It is predictable that in their contract negotiations they will press for guarantees to carry out their respective policies.

CONCLUSION

The Supreme Court's decisions in *Roth* and *Sindermann* place conservative interpretations on the fourteenth amendment concepts of liberty and property that limit probationary teachers' opportunities to obtain a statement of reasons and institutional due process hearings when their contracts are not renewed. Such teachers can, of course, resort to the courts, but success in court is unlikely if their institutions have acted knowledgeably in light of the Court's discussion of what will or will not constitute a violation of liberty or property interests.

In addition, when nontenured teachers allege that their nonretention was in retaliation for their exercise of first amendment rights, institutions are not, in general, legally required to offer due process hearings under the *Roth* and *Sindermann* decisions. *Sindermann* does provide, however, that allegations of contract nonrenewal for exercise of free speech rights must be heard in court without summary judgment against the teacher.[99] On the question of a property interest in continued employment, *Sindermann* holds that proof of an objective expectancy of de facto tenure entitles the teacher to an intramural hearing and a statement of reasons for contract nonrenewal.[100]

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[97]National Education Association, *Due Process and Tenure in Institutions of Higher Education*, Today's Education, Feb. 1973, at 60.

[98]*Id.* at 61.

[99]408 U.S. at 598.

[100]*Id.* at 603.

The courts, therefore, are a nontenured teacher's first and last source of redress in most cases of violations of liberty and property interests and violations of first amendment rights. However, commentators have questioned whether it is desirable for higher education to rely so heavily on the courts for adjudication of its disputes. The Commission on Academic Tenure in Higher Education (the "Keast Commission") criticizes such dependence on the courts, because it demonstrates that an institution has not implemented satisfactory standards and procedures.[101] In addition, it claims that "frequent resort to court determination of personnel questions will surely erode institutional and faculty autonomy, thus jeopardizing the ability of faculties and institutions to govern themselves in the interest of their students and society generally."[102] Therefore, the commission recommends that colleges and universities develop policies and procedures for handling faculty personnel problems which will "minimize reliance on the courts."[103]

Much of the adverse effect of *Roth* and *Sindermann* on nontenured teachers may disappear as faculty collective bargaining units clarify in their contracts the rights of represented nontenured teachers to institutional hearings and statements of reasons in the event of contract nonrenewal. It remains to be seen, however, how the national pressures of the faculty labor market and the several professional faculty organizations will in fact affect institutional policies and practices in the nonrenewal of faculty contracts.

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[101]The "Keast Commission" was established in 1971 under the sponsorship of the Association of American Colleges and the American Association of University Professors with a grant from the Ford Foundation. The commission examined the full range of issues concerning tenure: current status, criticisms, alternatives, and improvements. William R. Keast, chairman of the commission, is professor of English and Director of the Center for Higher Education of the University of Texas at Austin. The commission's report is COMMISSION ON ACADEMIC TENURE, FACULTY TENURE: A REPORT AND RECOMMENDATIONS (1973).

[102]*Id.* at 33.

[103]*Id.*

NOTE

CRIMINAL LAW—THE PRINCIPLE OF HARM AND ITS APPLICATION TO LAWS CRIMINALIZING PROSTITUTION

INTRODUCTION

The past decade has witnessed a renascence of interest in criminal justice. As the rights of an accused have received more intense judicial scrutiny, multitudinous protections have been prescribed and delineated[1] with the concomitant establishment of unprecedented protections against abuse of procedure. Nor has the expansion of rights stopped at the prison gates. More and more constitutional claims of prisoners are being recognized,[2] and the case law in the field of corrections is expanding at a prolific rate. From arrest through incarceration, the criminal process is now closely monitored by the courts.[3]

The failure of the courts is that their monitoring of the criminal process begins so late—that it remains dormant until a confrontation has arisen between the state and a citizen. The requisite attention is not given to the substantive criminal law which determines, by delineating what conduct is and is not criminal, *what* confrontations can legitimately be created by the system and its agents. Thus what should be the most basic and

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[1]*E.g.*, Argersinger v. Hamlin, 407 U.S. 25 (1973); Chimel v. California, 395 U.S. 752 (1969); Spinelli v. United States, 393 U.S. 410 (1969); Duncan v. Louisiana, 391 U.S. 145 (1968); United States v. Wade, 388 U.S. 218 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Wong Sun v. United States, 371 U.S. 471 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

[2]The following areas are representative of those in which post-convicton claims are being sustained by the courts.

Limitations upon censorship of mail: Goodwin v. Oswald, 462 F.2d 1237 (2d Cir. 1972); Meola v. Fitzpatrick, 322 F. Supp. 878 (D. Mass. 1971); Palmigiano v. Travisono, 317 F. Supp. 776 (D.R.I. 1970).

Access to the press: Nolan v. Fitzpatrick, 451 F.2d 545 (1st Cir. 1971); Burnham v. Oswald, 342 F. Supp. 880 (W.D.N.Y. 1972).

Right to congregational worship: Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971); Theriault v. Carlson, 339 F. Supp. 375 (N.D. Ga. 1972).

Conditions of confinement: Wright v. McMann, 460 F.2d 126 (2d Cir. 1972); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970).

Due process protections in disciplinary hearings: Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971); Nolan v. Scafati, 306 F. Supp. 1 (D. Mass. 1969).

Rights upon revocaton of parole or probation: Gagnon v. Scarpelli, 93 S. Ct. 1756 (1973).

[3]For a discussion of the effectiveness of judicial control over prearrest confrontations which occur within the context of police field interrogation see Tiffany, *The Fourth Amendment and Police-Citizen Confrontations*, 60 J. CRIM. L.C. & P.S. 442 (1969).

preeminent constitutional question—"When is governmental intrusion into the private lives of citizens warranted?"—is being judicially ignored. The courts should be under a continuing duty to ask and to attempt to answer this fundamental question and, in so doing, to impose limits on the use of the criminal sanction. But with few exceptions[4] the United States Supreme Court has been unwilling to rule on the constitutionality of the substance, and not merely the procedure, of the criminal law.

The thesis of this note is that the fourteenth amendment, through its prohibition against arbitrary deprivations of life, liberty, and property, imposes not only procedural but also substantive limitations on the criminal justice system; that there are basic criteria to which the courts should look in evaluating the constitutionality of the substance of the criminal law; and that these criteria must be satisfied before conduct can be declared criminal and the machinery of the criminal process thereby set in motion. Specifically, conduct which does not meet the criterion of *legal* harm should not be declared criminal. The principle of legal harm will be developed, its elements set forth, and the validity of criminalization of prostitution evaluated in light of this principle.

The crime of prostitution is an appropriate subject for a harm analysis for several reasons. Not only has "[t]he debate over criminal laws forbidding certain varieties of sexual conduct . . . become the *locus classicus* of modern interest in the limits of criminal law,"[5] but also the opponents of prostitution assert with great vigor that prostitution causes several harms. But what makes prostitution particularly apropos is that although recently challenges to the constitutionality of prostitution laws have been brought[6] and sustained in several jurisdictions,[7] the constitu-

[4]In Robinson v. California, 370 U.S. 660 (1962), the Supreme Court held unconstitutional a provision which made it a crime "to be addicted to the use of narcotics." *Id.* at 660. However, in Powell v. Texas, 392 U.S. 514 (1968), the Court refused to extend the *Robinson* rationale and upheld a provision which made it a crime to "get drunk or be found in a state of intoxication in any public place . . . ." *Id.* at 517. The Court clarified its holding in *Robinson* by stating that the crucial issue is whether or not "the accused has committed some act . . . ." *Id.* at 533.

[5]H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 301 (1968).

[6]Unsuccessful challenges have been brought in Maryland and Indiana. In Cherry v. State, 18 Md. App. 252, 306 A.2d 634 (1973), where the male defendant had advertised in the *Washington Post* for prostitutes to entertain his clients under the guise of advertising a receptionist position, the court rejected overbreadth, vagueness, and freedom of speech arguments and sustained the constitutionality of MD. ANN. CODE art. 27 § 15(e) (1957) which prohibited solicitation for the purposes of prositution. In Wilson v. State, 278

tional issues thus far raised—equal protection,[8] right to privacy,[9] and freedom of speech[10]—fail to go to the heart of the constitutional infirmities which beset laws *criminalizing* prostitution. These arguments should be reserved for attacking *regulation* of, and not criminal prohibition of, prostitution.[11]

After a brief survey of the scope, function, and inadequacies of each theory which has been utilized in framing constitutional challenges to prostitution laws, the principle of harm, which will be shown to address the *critical* constitutional defect of laws criminalizing prostitution, will be applied to the harms most frequently alleged to be caused by prostitution. This analysis will show that criminalization of prostitution should not constitutionally be allowed to stand.

I. PRESENT CHALLENGES

A. *Equal Protection*

By far the most successful argument asserted in attempts to

N.E.2d 569 (Ind. 1972), *cert. denied*, 408 U.S. 928 (1972), the court rejected an equal protection challenge to its facially discriminatory law. In Sumpter v. State, 14 CRIM. L. REP. 2373 (Ind. Sup. Ct. 1974), the court upheld a statute making it a crime for women but not men to frequent or live in a house of ill fame. The court rejected arguments that the statute violated the equal protection clause and the prohibitions against establishment of religion, suffered from unconstitutional vagueness, and imposed punishment for a "status" rather than for criminal conduct.

[7]Successful challenges have been brought in three jurisdictions. In State v. Fields, No. 72-4788 Cr. (3d Jud. Dist. Ct. Alas., June 27, 1973), the court held ALASKA STAT. § 11.40.210 (1970), criminalizing prostitution, invalid on its face under the equal protection clause and ALASKA STAT. § 11.40.230 (1970), criminalizing solicitation for prostitution, discriminately enforced against females in contravention of the equal protection clause. In United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1972), *appeal docketed*, No. 7042, D.C. Cir., Nov. 10, 1972 (abbreviated opinion reported in 41 U.S.L.W. 2298), the court held D.C. CODE ANN. § 22-2701 (1967), criminalizing solicitation for prositution, invalid as an unconstitutional invasion of the defendants' rights of privacy and freedom of speech. It furthermore found discriminatory enforcement of the provision against female offenders constituted a denial of equal protection. In State v. Woods, No. 443012 (Minneapolis Mun. Ct., Dec. 21, 1971), the court held MINNEAPOLIS ORD. 870.10 invalid on its face under the equal protection clause and void for vagueness.

[8]Equal protection issues were raised in State v. Fields, No. 72-4788 Cr. (3d Jud. Dist. Ct. Alas., June 27, 1973), United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1972), Wilson v. State, 278 N.E.2d 569 (Ind. 1972), and State v. Woods, No. 443012 (Minneapolis Mun. Ct., Dec. 21, 1971).

[9]Right of privacy issues were raised in State v. Fields, No. 72-4788 Cr. (3d Jud. Dist. Ct. Alas., June 27, 1973); and United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1972).

[10]Freedom of speech issues were raised in Cherry v. State, 18 Md. App. 252, 306 A.2d 634 (1973); United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1973).

[11]Regulation of prostitution consists of legalization by the state accompanied by reten-

invalidate prostitution laws has been that the challenged law in some manner contravenes the equal protection clause of the fourteenth amendment. Three courts have found that a challenged prostitution law treated those similarly situated differently and thus worked a denial of equal protection.[12] Such disparate treatment generally results in one of two ways: (1) a statute may be discriminatory on its face by defining prostitution as an offense by a *female*, thereby precluding prosecution of male prostitutes;[13] or (2) a statute neutral on its face may be discriminately enforced against female prostitutes.[14]

While all the courts which have struck down contested prostitution laws have done so either totally or partially on equal protection grounds, the limitation of equal protection challenges should be recognized. The equal protection clause provides no basis for a prohibition of all laws which criminalize prostitution, but only a basis for ensuring that laws criminalizing prostitution are drafted and enforced without discrimination.

B. *Right of Privacy*

Prostitution laws are also being challenged as representing an infringement of the right of privacy, although to date only one court has recognized the applicability of this argument to prosti-

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tion of authority to license, tax, require periodic health inspections, and, in the case of houses of prostitution, to regulate the hours of operaton. NEV. REV. STAT. § 244.345(8) (1971) legalizes prostitution in counties with populations under 200,000 and confers upon those counties authority to issue licenses for houses of prostitution. Regulation and criminalization of prostitution raise different constitutional questions. Because the concern and scope of this note is exclusively the criminal law, laws which regulate but do not proscribe prostitution will not be considered.

[12]State v. Fields, No. 72-4788 Cr. (3d Jud. Dist. Alas., June 27, 1973); United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1972); and State v. Woods, No. 433012 (Minneapolis Mun. Ct., Dec. 21, 1971). For a thorough discussion of equal protection arguments as a basis for the invalidation of prostitution laws, see Rosenbleet & Pariente, *The Prostitution of the Criminal Law*, 11 AM. CRIM. L. REV. 373 (1973).

[13]Examples of such facially discriminatory laws are those held invalid in State v. Fields, No. 72-4788 Cr. (3d Jud. Dist. Ct. Alas., June 27, 1973) and in State v. Woods, No. 433012 (Minneapolis Mun. Ct., Dec. 21, 1971). ALASKA STAT. § 11.40.210 (1970) provided, "Prostitution includes the giving or receiving of the body by a female for sexual intercourse for hire." MINNEAPOLIS ORD. 870.10 provided, "No female shall offer or submit her body indiscriminately for sexual intercourse whether or not for a consideration."

[14]D.C. CODE ANN. § 22-2701 (1967), which provided, "It shall not be lawful for any person to invite, entice, persuade, or to address for the purpose of inviting, enticing or persuading any person or persons sixteen years of age or over . . . for the purpose of prostitution, or any other immoral or lewd purpose . . ." was found in United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1972), to be neutral on its face but discriminatorily enforced against the female offender.

tution laws.[15] While commercialized sex between unmarried adults may eventually be included within the scope of the right of privacy,[16] it is doubtful that many courts will be willing to rest the invalidation of laws criminalizing prostitution on this ground in the near future. This is particularly true in light of the Supreme Court's recent obscenity decisions holding that an activity which would be protected if indulged in within the privacy of one's home will be accorded less protection in a commercial situation.[17]

Right of privacy challenges, unlike equal protection challenges, would, if successful, result in total prohibition of laws criminalizing prostitution. However, the usefulness of right of privacy arguments for present challenges to prostitution laws is limited by the as yet fairly narrow and undeveloped scope of the right.[18]

C. *Freedom of Speech*

Statutes which proscribe solicitation for the purpose of prostitution have been attacked on the ground that they abridge the

[15]United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1972) slip op. at 31. The argument was raised in State v. Fields, No. 72-4788 Cr. (3d Jud. Dist. Ct. Alas., June 27, 1973), but the equal protection issue was held to be dispositive of the case and the right of privacy issue was not considered.

[16]Eisenstadt v. Baird, 405 U.S. 438 (1972) is a step in this direction. In upholding the right of unmarried individuals to receive contraceptives, the Court stressed that the right of privacy recognized in Griswold v. Connecticut, 381 U.S. 479 (1965) is not limited to the marital relationship. 405 U.S. at 453.

[17]United States v. 12 200-Ft. Reels of Super 8mm. Film, 413 U.S. 123, 128 (1973); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 57 (1973); United States v. Reidel, 402 U.S. 351, 354-55 (1971).

[18]The Supreme Court has recognized the right of privacy in matters relating to abortion (Roe v. Wade, 410 U.S. 113 (1973)); contraception (Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972)); marriage (Loving v. Virginia, 388 U.S. 1, 12 (1967)); family relationships (Prince v. Massachusetts, 321 U.S. 158, 166 (1944)); and childrearing and education (Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923)). For a discussion of post-*Griswold* federal court decisions which address the ninth amendment, see Rhoades & Patula, *The Ninth Amendment: A Survey of Theory and Practice in the Federal Courts Since Griswold v. Connecticut*, 50 DENVER L.J. 153 (1973).

The now famous case of Roe v. Wade, 410 U.S. 113 (1973), has raised the question whether invalidation of laws which contravene the right of privacy will be based on the doctrine of substantive due process. Significant in this respect are the Court's words, "This right of privacy, may it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or . . . in the Ninth Amendment's reservation of rights to the people . . . ." *Id.* at 153. One effect of a shift to due process might well be abandonment of the need for showing a "compelling state interest" and a lack of a "less restrictive alternative"; both must be shown under the ninth amendment approach before the state can override the fundamental right involved. Under

first amendment's guarantee of freedom of speech.[19] This claim has much merit and chance of success in the three jurisdictions which prohibit solicitation for prostitution but not prostitution itself;[20] however, in those jurisdictions which define the act itself as a crime and make solicitation to commit a crime a punishable offense, the doctrine will be of little use.

None of the arguments currently utilized in framing challenges to the constitutionality of prostitution laws[21] address the crucial issue in criminalization of prostitution. For whenever state intrusion into the private lives of its citizens is accompanied by potential imposition of the criminal sanction, questions of a very peculiar nature must be asked.

II. THE PRINCIPLE OF HARM

Jerome Hall, one of the foremost scholars of criminal law, divided propositions about criminal law into three categories: principles, doctrines, and rules;[22] those which are of the widest generalization and universally applicable to all crimes are denominated principles.[23]

> [T]he principles of criminal law consist of seven ultimate notions expressing: (1) *mens rea*, (2) act (effort), (3) the "concurrence" (fusion) of *mens rea* and act, (4) harm, (5) causation, (6) punishment,

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a due process approach, a less stringent "balancing test" would likely be substituted. "The right of personal privacy includes the abortion decision, but that . . . right is not unqualified and must be considered against important state interests in regulation." *Id.* at 154.

[19]The claim was rejected in Cherry v. State, 18 Md. App. 252, 306 A.2d 634 (1973), but was sustained in United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1972).

[20]The District of Columbia, Michigan, and Nevada are the only jurisdictions which prohibit solicitation for prostitution but not prostitution itself. The relevant statutory provisions are D.C. CODE ANN. § 22-2701 (1967), held invalid in United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1972); MICH. COMP. LAWS ANN. § 750.448 (1968), *as amended*, MICH. COMP. LAWS ANN. § 750.448 (1969); NEV. REV. STAT. § 207.030(b) (1971).

[21]The cruel and unusual punishment clause of the eighth amendment was asserted in United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1972), as a basis for invalidating D.C. CODE ANN. § 22-2701 (1967), which prohibits solicitation for the purposes of prostitution. The court did not address the issue but rested its decision on other grounds. In *Ex parte* Carey, 57 Cal. App. 297, 207 P. 271 (1922), the defendant unsuccessfully raised the plea of cruel and unusual punishment in response to the imposition of an indeterminate sentence following her conviction for solicitation for prostitution. For a discussion of the utility of the cruel and unusual punishment clause in framing challenges to prostitution laws, see Rosenbleet & Pariente, *supra* note 12, at 379-80.

[22]J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 17 (2d ed. 1960).

[23]*Id.* at 17, 22.

> and (7) legality. . . . [T]he principles of criminal law, excepting . . . "punishment" and "legality" refer to essential elements of "crime" . . . .[24]

Unlike most of the above principles, which have been well developed and well integrated into criminal theory, the principle of harm has been largely ignored. The briefest examination of American criminal law theory confirms the contention of the well-known legal theorist G. O. W. Mueller that "[t]he principle of harm is the most underdeveloped concept in our criminal law."[25] In failing to take account of the principle of harm, American jurisprudence has failed to recognize what should be one of the primary limitations on the power of government to make conduct criminal.

Perhaps the genesis of the problem can be traced to the extent to which framers of both state and federal constitutions concentrated on procedural safeguards, foregoing, for the most part, specific substantive limitations on the kinds of conduct which could be declared criminal.[26] H. L. A. Hart points out that the framers, in lieu of supplying substantive limitations, relied primarily on the legislature's sense of justice and, secondarily, on the courts' use of due process to prevent an arbitrary application of the criminal sanction when the legislature's sense of justice somehow went awry.[27] It is debatable whether the reliance on the legislature or on the courts in this instance was more misplaced. Both appear to have almost totally abrogated responsibility in first, developing, and secondly, abiding by principles of criminal liability consonant with constitutional mandates. Hart summarizes the problem:

> Closely and vitally related to the failure of American courts to develop adequate principles of criminal liability . . . has been their failure to come to grips with the underlying constitutional issues involved. This failure is the more surprising because of the obvious concern of the Constitution to safeguard the use of the method of the criminal law—especially, but not exclusively, on the procedural

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[24] *Id.* at 18.

[25] Mueller, *Criminal Theory: An Appraisal of Jerome Hall's Studies in Jurisprudence and Criminal Theory*, 34 IND. L.J. 206, 220 (1959).

[26] Of ex post facto laws, an obvious exception, H.L.A. Hart says, "the principles of just punishment implicit in such clauses have relevance in other situations than that only of condemnation under an after-the-fact enactment—a wider relevance than courts have yet recognized." Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 411 n.27 (1958).

[27] *Id.* at 411.

> side . . . . What sense does it make to insist upon procedural safeguards in criminal prosecutions if anything whatever can be made a crime in the first place?[28]

That one may not be deprived of "life, liberty, or property without due process of law" has traditionally meant that one may not be deprived arbitrarily of the same. Concern over arbitrariness explains the reverence with which the principle of legality is viewed and the enshrined positions of the guarantees of notice and trial by jury. But if no set principles are used in defining criminal conduct, if criminality is determined solely by undefinable, constantly changing public notions of morality, is this not an arbitrary imposition of punishment and deprivation of liberty without due process of law? As Justice Harlan wrote in his dissent in *Poe v. Ullman*:

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . .[29]

If due process is to have any meaning at all as a check on the police power, its protection must extend to the very heart of the criminal system and first and foremost provide constitutional limits on what conduct may be declared criminal. If it is to be no more than protection against arbitrary procedure in a system whose prime characteristic is arbitrariness, it is a hollow guarantee indeed.

A. *Morality: A Legitimate State Interest*

Discussions of "victimless crimes" have traditionally been carried on within the context of the age-old debate over the legitimacy and propriety of governmental regulation of morality. This approach is both misleading and ineffective. It is misleading because it obscures the fact that the real issue is not regulation of morality but criminalization of nonharmful conduct.[30] It is inef-

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[28] *Id.* at 430-31. Hart's thesis is that a sanction which imports blame is misused when it is applied to conduct which is not blameworthy. Although he concerns himself with conduct which is not blameworthy because the actor lacks a criminal state of mind, many of his criticisms of the failure of American courts to develop adequate principles of criminal liability and to recognize and attempt to resolve the underlying constitutional issues are directly applicable to the courts' treatment of conduct which is not blameworthy because of the lack of any resultant objective harm.

[29] Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

[30] "What truly distinguishes the offenses commonly thought of as 'against morals' is

fective because, while the propriety of governmental regulation of morality is a question which has been discussed, debated, and disposed of by many legal philosophers,[31] the regulation of morality as a component of the police power has been long accepted by American courts.[32] In the words of Eugene Rostow, "Men often say that one cannot legislate morality. I should say that we legislate hardly anything else."[33]

The argument should not be that government should not regulate morality, but rather that applications of the criminal law should be restricted to that aspect of morality which concerns a harm committed.[34] This argument addresses the real issue: When can the government's general authority to regulate morality be exercised without transgressing constitutional norms? The answer should be that morals may be regulated by means of the criminal sanction when, and only when, a breach of the moral code would imminently cause a cognizable harm to a legally protected interest of another.

B. *The Elements of Legal Harm*

1. Invasion of a Legally Protected Interest

Upon first glance harm appears to be a normative concept, neither lending itself to legal analysis nor to a systematized application within a legal context. Indeed, few legal theorists have ventured to define the term.

Hall and Mueller have defined harm as implying "interests or values which have been destroyed, wholly or in part,"[35] and as "the violation of [an] intangible, legally protected interest . . . ."[36] The latter definition is preferable because of the impor-

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not their relation to morality but the absence of ordinary justification for punishment by a nontheocratic state." Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669 (1963).

[31]*See* P. DEVLIN, THE ENFORCEMENT OF MORALS (1965); L. FULLER, THE MORALITY OF LAW (1969); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Hart, *Social Solidarity and the Enforcement of Morality*, 35 U. CHI. L. REV. 1 (1967).

[32]Lochner v. New York, 198 U.S. 45, 53 (1905); Boston Beer Co. v. Massachusetts, 97 U.S. 25, 33 (1877). *But see* United States Dep't of Agriculture v. Moreno, 413 U.S. 528, 535 n.7 (1973).

[33]Rostow, *The Enforcement of Morals*, 18 CAMB. L.J. 174, 197 (1960).

[34]Comment, *Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality*, 14 U.C.L.A.L. REV. 581, 582 (1967). *See* J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 158 (1947 ed.).

[35]J. HALL & G. MUELLER, CRIMINAL LAW AND PROCEDURE 90 (2d ed. 1965).

[36]*Id.*

tance of limiting definitions of harm to the destruction in whole or in part of *legally protected*[37] interests. By so limiting its meaning, harm becomes a workable, legally significant concept, removed from the normative, subjective sphere. It makes clear that in analyzing the external effect of a legally prohibited act, the harm requirement will not be fulfilled merely by asserting that the effect is in some way undesirable to some individual or individuals. The harm requirement is only satisfied when legally protected interests have been infringed. The determination of which interests are to be given legal protection is one made continuously both by the courts and the legislatures.

2. Harm to Others

John Stuart Mill once wrote:

> [T]he only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.[38]

His words have sparked much heated debate; the sides have been chosen and the battlelines formed.[39] The issue, however, should not be decided in the abstract according to one's philosophical disposition, but rather by rigorous adherence to legal analysis. Within the framework of the principle of harm there are two separate issues: (1) Can the harm requirement be satisfied if the only injury resulting from a given act is to the individual performing the act? and (2) Is *all* harm to others punishable?

The answer to the former question turns upon whether one has any interests which are legally protected against infringement by oneself. Laws making it a crime to commit suicide are the most obvious example of laws which implicitly assert that one's interests (*i.e.*, in life) are protected from such infringement.

If one accepts the basic premise that the sole purpose of according legal protection to various interests is to provide sanctions for unwanted interference with those interests, the faulty logic of maintaining that one has interests which are legally protected against infringement by oneself is easily highlighted. By

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[37]*See generally* Eser, *The Principle of "Harm" in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests*, 4 DUQUESNE U.L. REV. 345 (1965-66).

[38]J. MILL, *On Liberty*, in UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 95-96 (1951).

[39]*See* note 31 *supra*.

definition *whenever* the interference with one's interests stems from an act which one performs oneself, the interference is not unwanted. Since there can be no harm without interference with legally protected interests, the harm requirement can never be fulfilled outside of the context of harm to others.

Generally courts avoid having to rule on the constitutionality of legislation which has as its only purpose the protection of the individual from himself by holding that the statute challenged on this ground does in fact cause harm to others.[40] However, as H. L. Packer has pointed out, "The question is one of the remoteness and probability of the harm."[41] Therefore, the second issue, *what* harm to others is punishable, must be resolved by considering the requirement of imminence set forth below.[42]

3. Factually Demonstrable Harm

One of the most important criteria which must be met before harm can appropriately be subjected to the criminal sanction is that harm must be harm in *fact*. Given the courts' failure to recognize and require harm as an element of every crime, it is not surprising the extent to which they have been willing, when they have considered harm at all, to satisfy themselves with mere presumptions of harm.[43]

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[40]People v. Schmidt, 54 Misc. 2d 702, 283 N.Y.S.2d 290, 292 (Erie County Ct. 1967); People v. Bielmeyer, 54 Misc. 2d 466, 282 N.Y.S.2d 797, 799-800 (City Ct. Buffalo 1967); State *ex rel.* Colvin v. Lombardi, 104 R.I. 28, 31, 241 A.2d 625, 627 (1968).

American Motorcycle Ass'n v. Davids, 11 Mich. App. 351, 158 N.W.2d 72 (1968) is one of the few cases which held that a criminal statute whose only purpose is to protect the individual from himself is unconstitutional. The court struck down a statute requiring motorcyclists to wear crash helmets on the grounds that it violated the due process, equal protection, and right of privacy protections of the ninth and fourteenth amendments. The court's response to the attorney general's contention that the state has an interest in the viability of its citizens and can legislate to keep them healthy and self-supporting was that "this logic could lead to unlimited paternalism." *Id.* at 75.

[41]H. PACKER, *supra* note 5, at 266.

[42]*See* text accompanying notes 56-58 *infra*.

[43]In Guarro v. United States, 237 F.2d 578 (D.C. Cir. 1956), where the defendant was prosecuted for assault after he touched a policeman's genitals, the victim denied any emotional injury. However, the court said that no specific proof of emotional injury was required. "[I]t would seem that a sexual touching is a sufficiently offensive act to constitute an assault. Nor should the fact that an experienced policeman denies emotional injury alter the situation." *Id.* at 580. *But see* Commonwealth v. Leis, 355 Mass. 189, 243 N.E.2d 898 (1969), where the defendants challenged their convictions for unlawful possession of marijuana on due process grounds, asserting that the law was irrational and unreasonable because there was no evidence that marijuana endangered the health, safety, welfare, or morals of the community. In reaching its conclusion that the statute was reasonable the court found "harm" by examining the results of several scientific studies. *Id.* at 194 nn.11 & 12, 243 N.E.2d at 903 nn. 11 & 12. It is important to note that

Of those jurists who have concerned themselves with the principle of harm, Orville Snyder has been the most adamant about the need for factual harm:

> The principle, "implicit in the concept of ordered liberty," that only conduct causing or threatening public harm can be made a crime and that public harm is a matter of fact, which must be susceptible of factual demonstration, is the fundamental limitation on legislative power and of the essence of law as a means of protecting freedom. While it is not the function of the courts to second-guess legislatures on the wisdom of making or not making conduct in fact harmful a crime, the question of whether conduct is or is not harmful in fact . . . is open . . . . The answer is not to be extracted from the exegesis of an abstract morality, from social-welfare generalities . . . nor is the touchstone . . . what public opinion demands. The answer is to be found in a public evidential inquiry into such matters as, What and who are affected? How are they affected? To what extent are they affected? In what is this harmful? How is this a public harm?[14]

Snyder's admonititions aside, factual establishment of the presence or absence of harm is admittedly difficult because of the very definition of harm, the impairment of legally protected interests or values. Interests and values are, by their nature, often intangible, and the measurement of their infringement or destruction not susceptible to quantification. However, to accept Hall's premise that harm in those crimes where there is no physical injury (*e.g.*, libel, kidnapping, perjury) may be stated in terms of intangibles such as harm to reputation, public safety, or institutions[15] is *not* to say that there is no necessity for factual proof in such situations.

Who has the burden of proving the existence or nonexistence of factual harm? Given the lattitude accorded the legislature in its exercises of the police power, the answer is fairly clear. The judgments of the legislature enjoy a presumption of constitutionality even though unsupported by evidence, and the burden of proof generally falls on the challenger.[16] Evidence on the record supporting a particular provision is not a condition precedent to the courts' upholding it upon challenge. However, while the bur-

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the court chose to focus on those studies which did support the allegation of harm to the public health, rather than simply to hold that a showing of harm was not necessary to support the provision.

[14]O. SNYDER, AN INTRODUCTION TO CRIMINAL JUSTICE 764 (1953).

[15]J. HALL, *supra* note 22, at 217.

[16]United States v. Carolene Prods. Co., 304 U.S. 144, 154 (1938).

den of proof would remain on the challenger, a showing of a lack of factual harm should result in mandatory invalidation of the provision.

4. Imminent Harm

It must be emphasized that it will often be possible to find *some* harm, some infringement of a legally protected interest, which if traced back far enough can be found to originate with a given act. Thus discussions of harm should not be carried on in terms of a sharp dichotomy—harm or no harm.[47] The issue is whether the harm in question is a proper subject of the criminal law. The resolution of this issue involves a great interplay between Hall's principles of harm and causation.[48]

Harm to others may be one of two kinds—direct or indirect. The former is always punishable; the latter may or may not be. What is needed is a principle to separate punishable from nonpunishable indirect harm—a principle which could provide a consistent, *nonarbitrary* test, whose operation would meet the due process requirements of rationality and regularity in the application of the laws. That the proximity of an act to its resultant harm is the crucial criterion in separating punishable from nonpunishable harm is shown by an examination of attempt law.

a. *Attempt Law*

The problems and issues of attempt law are a microcosm of the problems and issues involved in the principle of harm. According to Hall, the doctrine of criminal attempt represents "a major explication of the fundamental principle stipulating the commission of external harm."[49]

The presence and the nature of the harm in inchoate offenses such as attempt, solicitation, conspiracy, and possession of burglar's tools, has been a matter of much debate.[50] If it is said that such offenses contain no harm, the basis for infliction of punishment must be the moral culpability of the actor. But if moral culpability of the actor as evidenced in crime-directed behavior suffices, why the emphasis in attempt law to distinguish between states of preparation, which are held to be nonpunishable, and attempts, which are held to be punishable? In both instances equivalent moral culpability and antisocial behavior can be found.

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[47]Hall, *Perennial Problems of the Criminal Law*, 1 HOFSTRA L. REV. 15, 23 (1973).

[48]*See* note 24 *supra*.

[49]J. HALL, *supra* note 34, at 95-96.

[50]J. HALL, *supra* note 22, at 217-18 & n.18.

> If *all* conduct "in the direction" of certain harms were penalized, the . . . problem would disappear. But only the criminal attempt, not the preparation, is punishable. The plain implication of that must be explored.[51]

The remoteness or proximity of the harm from the actor's conduct is the distinguishing element between preparation and attempt in both case law[52] and statutory codifications.[53] For the defendant to be liable for attempt there "must be a dangerous proximity to success"[54] or "an act or omission constituting a substantial step in a course of conduct planned to culmimate in [the actor's] commission of the crime."[55] Attempt law, then, separates those harms which are punishable from those which are not by examining the attenuation of the relationship between the act and its resulting harm, by asking the question, "How far removed from the act or tangentially connected to the act is the harm in question?"

b. *The Test of Imminence*

A criterion similar to that applied in attempt law to distinguish culpable from nonculpable conduct should be applied to other determinations of criminal liability. A principle conveniently termed "imminence" would (1) accurately represent criteria considered in imposition of liability for attempt, a major area of the law where the harm is intangible, and (2) serve a function in determinations of criminal liability analogous to that of proximate cause in determinations of civil liability.

The imminence principle would focus attention on the question, "Is the harm imminently forthcoming from the act?" Application of the principle would answer the crucial question, "Is the harm involved of a nature which should be subject to criminal sanctions or is it too removed in time and space from the act engendering it?"

The answer to the latter question is, of course, ultimately a policy determination, as are proximate cause determinations in

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[51]J. HALL, *supra* note 34, at 101.

[52]In Commonwealth v. Kennedy, 170 Mass. 18, 48 N.E. 770 (1897), Justice Holmes said for the court, "As the aim of the law is not to punish sins, but is to prevent certain external results, the act done must come pretty near to accomplishing that result before the law will notice it." *Id.* at 20, 48 N.E. at 770.

[53]"A person commits criminal attempt if . . . he intentionally engages in conduct constituting a substantial step toward commission of the offense." COLO. REV. STAT. ANN. § 40-2-101 (Supp. 1971), *amending* COLO. REV. STAT. ANN. § 40-25-1 (1963).

[54]Hyde v. United States, 225 U.S. 347, 388 (1912) (Holmes, J., dissenting).

[55]MODEL PENAL CODE § 5.01 (Proposed Official Draft 1962).

civil liability. Of importance here, however, is that proximate cause determinations have been the task of the *courts*; the imminence principle also envisions active participation of the courts in deciding what conduct should be made criminal—an all too new role.

What should the test of imminence be? It is not necessary nor even desirable that the test be narrowly drawn; it must be flexible and capable of application in a wide variety of circumstances. It is significant that the guidelines for proximate cause determinations of civil liability have been drawn in such a way as to give the courts wide latitude.[56]

A test which is reflective of the above considerations and which would at once provide the courts with the necessary guidelines, yet leave them free to make independent determinations based on the merits of the individual case, is, "Is there a direct and causal sequence between the act and the resulting harm, such that the chain of causation can be perceived and evaluated, and the harm determined thereby not to be too remote nor the relationship between the act and the harm too attenuated?" The crucial part of the test is that there be a perceivable chain of causation. If the chain must be assumed, liability cannot attach.

Having posited the imminence principle as a workable criterion for distinguishing punishable from nonpunishable harm, a test of its general applicability is in order. For purposes of analysis crimes can be separated into two broad categories: (1) result-oriented crimes, where the act prohibited is itself the harm to be prevented, and (2) simple conduct crimes. With crimes of the first category application of the principle is easy. By definition, once the elements of the crime are satisfied, the harm has occurred. For example, "[a] person is guilty of criminal homicide if he . . . causes the death of another human being."[57] The act (causing death) is contemporaneous with the specific harm (interference with the interest in life). Thus result-oriented crimes contain a built-in satisfaction of the imminence requirement.

In the second category of cases, where the conduct prohibited is not itself the harm to be prevented, each crime must be individually examined to ascertain whether or not harm is imminently forthcoming from the prohibited act. A simple chart demonstrates that even where the harm sought to be prevented is intan-

[56]*See, e.g.*, Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).
[57]MODEL PENAL CODE § 210.1 (Proposed Official Draft 1962).

gible, penal codes by and large restrict liability to instances where the harm is imminent:

	Crime	Imminent Harm
(1)	perjury	obstruction of justice
(2)	libel	harm to reputation
(3)	treason	overthrow of state[58]
(4)	assault	psychic harm, apprehension
(5)	bribery	corruption of public officers

A glaring exception to this general rule is crimes commonly termed "crimes against morals." Such crimes represent a sphere where none of the usual principles of criminal liability are applied and where none of the usual considerations which result in making conduct criminal are present.

III. THE HARM IN PROSTITUTION

Having established the fundamental nature of the principle of harm and that harm should be an essential element of every crime, the question, "What is the harm in prostitution?" will now be explored. The asserted harms in prostitution will be examined in light of the principle that for conduct to be punishable, it must satisfy the four elements of legal harm: (1) a factually demonstrable (2) invasion of a legally protected interest (3) of another (4) imminently caused by the conduct.

The harms which are alleged to be caused by prostitution and thereby justify its prohibition are: (1) prostitution provides an opportunity for the commission of crimes which may be ancillary to prostitution; (2) prostitution provides a breeding ground for the activities of organized crime; (3) prostitution is a significant factor in the spread of venereal disease; (4) prostitution results in the subjection of citizens to offensive public solicitation; and (5) prostitution contributes to the destruction of public morals.

A. *Opportunities for Commission of Ancillary Crimes*

Does the act or practice of prostitution imminently cause harm in fact by providing an increased opportunity for the commission of other crimes? It is often argued that prostitution should be suppressed because its commission is inevitably connected with the commission of other crimes such as beatings and

[58]Note the imminence requirement built into the crime of treason by the requirement of an overt act. U.S. CONST. art. III, § 3.

theft. The first step in the analysis is the determination of the presence or absence of a legally protected interest to serve as the basis of harm. Arguably, a legally protected interest is present in the form of the general security of the community; no doubt concern for the general security underlies *every* criminal prohibition, each of which protects the general security from destruction in a specific way.

Although a legally protected interest is perhaps present, the cause in fact requirement is unsatisfied. There is nothing about an act of intercourse for hire which *in itself* makes the commission of other crimes likely. The harm embodied in the ancillary crimes is a byproduct of the environment to which society consigns prostitution, not a harm caused by that conduct itself. The irrationality of criminalizing prostitution to decrease theft or assault is obvious if one realizes that it is precisely *because* prostitution is criminalized that such crimes are not reported when committed within the context of prostitution.[59] If anything, then, criminalization of prostitution serves as an incentive and shield for the would-be thief or assailant. Armed with the knowledge that his or her victim will be reluctant to report the illegal incident, the actor, whether the patron or the prostitute, is encouraged rather than deterred.

More basically, there may be a limit on the extent to which a state may proscribe one kind of conduct with the purpose of eradicating a different kind of conduct. In *Stanley v. Georgia*[60] the Supreme Court found an overstepping of that limit by the state legislature and held:

> [The legislature] may no more prohibit mere possession of obscene matter on the ground that it may lead to anti-social conduct than it may prohibit the possession of chemistry books on the ground that they may lead to the manufacture of home-made spirits.[61]

In holding invalid their respective prostitution laws, both the Washington, D.C., Superior Court in *United States v. Moses*[62] and an Alaska district court in *State v. Fields*[63] examined the ancillary crimes argument. Both courts, in finding the harm not

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[59]James & Burnstin, *Prostitution in Seattle*, 6 WASH. STATE BAR NEWS 7-8 (Aug.-Sept. 1971).

[60]394 U.S. 557 (1969).

[61]*Id.* at 567.

[62]Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1972).

[63]No. 72-4788 Cr. (3d Jud. Dist. Ct. Alas., June 27, 1973).

only unsubstantiated but also unsound constitutionally as a basis for criminalization, cited *Stanley*. The court in *Fields* said:

> [P]rosecution of future criminality presumed to be associated with certain types of offenses or offenders may not only have little empirical support, but is incompatible with our constitutional system of due process and equal protection of the laws.[64]

And in *Moses* the court said:

> If indeed there is evidence that prostitution is sometimes coincident with certain crimes, there is also ample indication that the extension of the criminal law to soliciting significantly hinders application of legal sanctions to those very crimes. By the most fundamental precepts of our law, it is to those violent acts that such sanctions must directly be addressed. Endorsement of an alleged state interest which precisely inverts this proscriptive emphasis would be a perversion of justice . . . .[65]

B. *The Encouragement of Organized Crime*

Does the act or practice of prostitution imminently cause harm in fact by providing a breeding ground for the activities of organized crime? The drafters of the *Model Penal Code* seriously considered following Britain's example of decriminalizing prostitution and retaining only public solicitation as a crime; one of the determinative factors in their decision not to do so was the belief that "call-houses" were an important part of the financial machine of the underworld and closely linked to "rackets" such as narcotics.[66]

This contention has much in common with the previously discussed assertion that prostitution causes an increased opportunity for the commission of other crimes. The allegation that prostitution provides a breeding ground for the activities of organized crime *may*, like the allegation that prostitution results in an increase in other crimes, confuse the effects of prostitution with those of *illegalized* prostitution. The San Francisco Committee on Crime has stated that "[i]t is . . . probable that if prostitution were not a crime, it would not be organized."[67]

Even assuming that the presence of organized crime in a given activity is not a function of the illegality of the activity, the

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[64]*Id.*, slip op. at 9.

[65]United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1972), slip op. at 22.

[66]Schwartz, *supra* note 30, at 682.

[67]THE SAN FRANCISCO COMMITTEE ON CRIME, A REPORT ON NON-VICTIM CRIME IN SAN FRANCISCO 32 (1971).

harm requirement is still not met because invasion of the interest in the general security through encouragement of organized crime can be factually rebutted. The President's Commission on Law Enforcement and Administration of Justice reported in 1967 that the role of organized crime in prostitution is both small and declining[68] and its findings have been corroborated by two other recent studies.[69] Significantly, the drafters of the *Model Penal Code* formulated their position without the benefit of the above information—all three studies were published after the completion of the *Proposed Official Draft* in 1962.[70]

In conclusion, the assertion that prostitution causes harm by providing a breeding ground for organized crime fails to satisfy that element of legal harm of a *factually* demonstrable invasion of a legally protected interest. Not only can it not be factually established that prostitution itself and not illegalized prostitution is tied to organized crime, but the presence of organized crime cannot be factually established at all. On the contrary, a substantial body of evidence tends to disprove its presence.

C. *Transmission of Venereal Disease*

Does the act or practice of prostitution imminently cause harm in fact by the transmission of venereal disease? Such a contention has been a continuously proffered justification for criminalization of prostitution.[71] The community no doubt has

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[68]PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 189 (1967).

[69]Sherwin & Winick, *Debate: Should Prostitution Be Legalized?*, SEXUAL BEHAVIOR, Jan. 1972, at 72; Esselstyn, *Prostitution in the United States*, 376 ANNALS 123, 127 (1968).

[70]The court in *Moses* took judicial notice of the reports cited in notes 67-69 *supra* in holding the possible connection of organized crime with prostitution insufficient to justify an invasion of the defendants' rights of privacy and freedom of speech through prohibition of solicitation for prostitution. After citing yet another study which heralded the decline of prostitution as an underworld activity and also highlighted underworld involvement in more profitable activities such as labor control (DAVIS, *Prostitution*, in CONTEMPORARY SOCIAL PROBLEMS 262 (1961)), the court said:

> While this Court naturally expresses no view on the relationship of organized crime with organized labor, it is a conceivable affiliation no less logically plausible than that of organized crime and prostitution. However, one would expect to find few serious proponents of the abolition of labor unions in order to prevent their potential domination by criminal syndicates. Courts have, in fact, long held that society should regulate illegal conduct directly, rather than prohibit other activities on the ground that those activities are somehow, in some cases, connected with illegality.

United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1972), slip op. at 19.

[71]J. WARREN, THIRTY YEARS' BATTLE WITH CRIME 141-42 (1875); MODEL PENAL CODE § 207.12, Comment at 171-75 (Tent. Draft No. 9, 1959).

a legally protected interest in the state of its health; protection of "the general health, safety, and welfare" has long been recognized as a component of the police power.[72] Analysis can proceed to whether or not such interest is in fact invaded by prostitution.

In reaching its decision to retain prostitution as a crime in the *Model Penal Code*, the American Law Institute put considerable weight on the alleged impairment of community health caused by prostitution.[73] However, in arriving at their conclusions that "[p]rostitution is an important source of venereal disease"[74] and that "non-commercial 'promiscuity' appears to be less dangerous [in this respect] than commercial prostitution"[75] the Institute relied upon data gathered from studies conducted three decades ago on the causes of venereal disease in army populations.[76]

Fortunately more recent and representative data are available. An extensive 3-year study in Seattle, Washington, based in part upon a medical examination of every prostitute arrested, found syphilis to be almost nonexistent among prostitutes and the rate of gonorrhea to be between 5 and 6 percent.[77] The Public Health Service of the Department of Health, Education and Welfare found that of over 13,600 females diagnosed with infectious syphilis, less than 3 percent were prostitutes.[78]

Two other sources suggest a relatively constant rate of venereal disease among prostitutes of less than 5 percent.[79] Furthermore, as the court in *Moses* noted, the conclusions of experts that there is no significant link between prostitution and the spread of venereal disease may easily be corroborated inferentially: while the 15 to 30-year-old age group accounts for 84 percent of all reported cases of venereal disease, the 30 to 60-year-old age group accounts for 70 percent of all visits to prostitutes.[80]

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[72]"According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations . . . as will protect the public health and the public safety." Jacobson v. Massachusetts, 197 U.S. 11, 25 (1904).

[73]MODEL PENAL CODE § 207.12, Comment at 171-75 (Tent. Draft No. 9, 1959).

[74]*Id.* at 171.

[75]*Id.* at 175.

[76]*Id.* at 171 n.10, 173 n.20, 174 n.21.

[77]James & Burstin, *supra* note 59, at 9.

[78]United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1972), slip op. at 15, *citing* DEPT. OF HEALTH, EDUCATION AND WELFARE, PUBLIC HEALTH SERVICE, per J. Millar, M.D., Chief, Veneral Disease Branch, Center for Disease Control, Atlanta, Ga. (June 1, 1972).

[79]Sherwin & Winick, *supra* note 69; Honolulu Star Bulletin, Mar. 23, 1972, at B-8.

[80]James & Burstin, *supra* note 59, at 8.

What conclusions can be drawn from the above data? First, because the incidence of venereal disease among prostitutes is approximately 5 percent, it can be assumed that approximately 5 percent of all persons who patronize prostitutes will thereby acquire venereal disease. But is a legally protected interest of a patron invaded by the acquisition of venereal disease from a consensual act of intercourse? This question must be answered in the negative because, as previously established, the harm requirement cannot be satisfied if the only injury resulting from a given act is to the individual performing that act.

However, the possibility exists that the patron who acquires venereal disease from a prostitute will transmit that disease to another, who may in turn transmit it to another, and so on. While at no point will there be legally cognizable harm to any individuals who acquire venereal disease from a consensual act of intercourse, at some point the contagion may reach a dimension where it can be said to invade the broad interest in community health.

Does the prostitute who infects a patron who in turn infects other members of the community cause harm to the interest in community health? The existence of venereal disease can be factually demonstrated and its widespread existence invades a legally protected interest. Therefore only one element of legal harm still remains to be fulfilled: Is the invasion of the interest imminently forthcoming from the act?

There is a perceivable chain of causation, composed of a series of acts of intercourse, between the act by which the patron was first infected and the ensuing infection of numerous members of the community—which widespread infection constitutes the harm. Thus it could be maintained that the prostitute who infected the patron, who in turn transmitted the disease to other members of the community, caused harm to the interest in community health. But it could just as logically be maintained that the patron who first transmitted venereal disease to the prostitute, who transmitted it to a patron, who in turn transmitted it to other members of the community, caused the harm to the interest in community health. With whom should the chain of causation be said to originate?

Is there validity to the argument that the harm should be attributed to prostitutes as a matter of policy—on the grounds that they account for a great volume of indiscriminate sexual activity? The problem with this argument is that it fails to focus accurately on the harm involved. The harm is widespread vener-

eal disease and it is caused by indiscriminate sexual activity by one who has venereal disease. Even if it is conceded that prostitutes may contribute more than their *proportional* share to the spread of venereal disease, the fact remains that they only cause a very small fraction—approximately 5 percent—of all venereal disease.

Therefore,a criminal provision which prohibits all prostitution in order to prevent the harm of venereal disease bears no reasonable relation to the end it is designed to serve, and consequently is an invalid exercise of the police power. The Supreme Court stated long ago:

> The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects . . . it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.[81]

Most importantly for purposes of a harm analysis, the finding that provisions criminalizing prostitution bear no substantial relationship to the object they are designed to protect—community health—means that although there may be a perceivable chain of causation between the prohibited conduct and some resulting harm, the relationship between the act and the resulting harm is too attenuated to fulfill the imminence requirement.

The harm alleged to be caused by prostitution to community health fails to satisfy the criteria of legal harm and thus fails to provide the necessary justification for criminalization.

D. *Subjection of Citizens to Offensive Solicitation*

Does the act or practice of prostitution imminently cause harm in fact by the subjection of citizens to offensive public solicitation? The determination of harm in this instance is a matter of some difficulty since it is unclear whether or not a legally protected interest is involved. The issue is twofold: first, whether the public's sensibilities are ever a legally protected interest; and secondly, even if they are sometimes legally protected, whether

[81]Mugler v. Kansas, 123 U.S. 623, 661 (1887).

or not they are protected when the only interference stems not from acts, but speech.

That the public's sensibilities receive some protection may be shown by an examination of the internal division of penal codes. Such crimes as prostitution, open lewdness, and disseminating obscene materials are often subsumed under the appellation "Public Indecency."[82] The crime of open lewdness is based squarely on protection of the sensibilities of others; statutes prohibiting open lewdness make it a crime to do "any lewd act which [the actor] knows is likely to be observed by others who would be affronted or alarmed."[83]

Despite consensus on the permissibility of protecting public sensibilities from offensive *acts*, first amendment issues arise when protection is attempted to be invoked against offensive speech. The Supreme Court has made it clear that the right of an individual to be shielded from speech which he may deem offensive is severely limited by the right of others to enjoy the freedom of speech guaranteed by the first amendment.[84]

But even assuming that public sensibilities are a legally protected interest and that offensive public solicitation for the purposes of prostitution causes an invasion of that interest, the issue remains whether the *practice* of prostitution is the cause in fact of the harm which results from such solicitation. The answer is that it is not the cause in fact. Publicly soliciting customers for one's business is by no means an intrinsic part of doing business; were prostitution not illegal, the multifarious mechanisms for procuring business available to the average commercial enterprise would likewise be available to prostitutes. Great Britain has recognized the separability of prostitution and solicitation for prostitution and deals with whatever problems are caused by the latter directly. It continues to apply criminal sanctions to offensive public solicitation while preserving the noncriminal status of prostitution itself[85] in keeping with the recommendations of the *Wolfenden Report*[86] that private sexual behavior between consenting adults should not be criminalized.

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[82]MODEL PENAL CODE, art. 251 (Proposed Official Draft, 1962).

[83]*Id.* § 251.1.

[84]Cantwell v. Connecticut, 310 U.S. 296 (1940).

[85]Street Offenses Act, 7 & 8 ELIZ. 2, c. 57 (1959).

[86]COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, REPORT, CMND No. 247 at 25 (1957).

Because prostitution and public solicitation for prostitution are separate and severable, the harms occasioned by the latter should not be attributed to the former. No invasion of the interest denominated the public's sensibilities is caused by prostitution itself; therefore, this asserted harm cannot serve as a basis for criminalization of prostitution, but only for criminalization of offensive public solicitation.

A statute which prohibited all public solicitation, whether or not offensive, would not only encounter serious first amendment problems,[87] but would suffer from the defect of not satisfying the requirements of legal harm. Statutory prohibitions of solicitation should be drafted to incorporate the requirement that to be punishable, solicitation must in fact invade the public sensibilities. Furthermore, "[i]n order to curb effectively the use of undesirable police techniques, it might also be desirable to provide that a conviction for public solicitation should require evidence that the *person solicited* was offended thereby . . . ."[88]

Under such a statute,[89] present enforcement practices for prostitution could not continue. Unlike the majority of offenses which involve a complaint by a harmed citizen, "morals offenses" are enforced by the costly practice[90] of police posing as potential customers; "[i]n these cases, the policemen holding themselves out as potential customers seeking solicitation can scarcely claim to have been offended or harrassed [sic] by any conversation their subterfuge elicited."[91]

An alternative method of dealing with harm caused by offensive public solicitation is through presently existing breach of the peace or disorderly conduct statutes. The court in *Moses* suggests this approach.[92] Statutes or ordinances which

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[87]United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1972), slip op. at 24-26.

[88]H. PACKER, *supra* note 5, at 331.

[89]Such a statute could be worded:

> A person commits an offense if he addresses another in a manner designed to, or likely to, and which does offend that other, for the purpose of engaging that other in a sexual act for hire.

[90]A publication prepared by the Alliance for a Safer New York suggests that present enforcement practices of prostitution laws result in a yearly loss to the nation of $10 million. "On a per case basis it is one of the most expensive non-victim crimes to 'control.' San Francisco estimates run to about $270,000 a year, or $175 per arrest." ALLIANCE FOR A SAFER NEW YORK, CRIMES WITH NO VICTIMS 35 (1972).

[91]United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1972), slip op. at 23.

[92]*Id.* at 25.

> make it unlawful to provoke a breach of the peace by acting in a manner as to annoy, disturb, obstruct or be offensive to others, [focus] narrowly on the problem of the individual grievously offended by certain language. . . . [An] advantage of this or some alternative "disorderly conduct" statute is that . . . the individual citizen as complainant ascertains the offense, rather than . . . a police officer . . . whose quality of performance is measured by the number of successful prosecutions flowing from his efforts.[93]

In summary, the allegation that the practice of prostitution causes harm by subjecting citizens to offensive public solicitation is unfounded in that prostitution is distinct from solicitation and is not the cause in fact of whatever impairment of legally protected interests is caused by the latter. While some solicitation for prostitution may be criminally prohibited, the principle of harm requires that the criminal prohibition include only that solicitation which causes an invasion of the legally protected interest of the public's sensibilities.

E. *Destruction of Morals*

Does the act or practice of prostitution imminently cause harm in fact by contributing to the destruction of morals? Of all the harms alleged to be caused by prostitution, this requires the most careful scrutiny. Not only is it probable that this alleged harm is foremost in the minds of those who advocate criminalization of prostitution,[94] but it is a "harm" which is inevitably approached and analyzed incorrectly. The court's treatment of this alleged harm in *Moses* is illustrative of the problem; although it recognized the primacy of the alleged harm in the mind of the legislature, it phrased the issue in misleading and ultimately ineffectual terms:

> The inordinate overextension of this statute, so disproportional with any of the potential evils occasioned by solicitation for prostitution, contributes to the inevitable deduction that the government's primary concern here is to suppress prostitution because it is "immoral." Having reached what this Court believes to be the central, if tacit, state interest in these cases, it must now consider the broad question of the right of government to regulate morality.[95]

As emphasized above,[96] the real issue is not whether, but

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[93]*Id.*

[94]MODEL PENAL CODE § 207.12, Comment at 171 (Tent. Draft No. 9, 1959).

[95]United States v. Moses, Nos. 17778-72 & 21346-72 (D.C. Super. Ct., Nov. 3, 1972), slip op. at 28.

[96]*See* text accompanying notes 30-34 *supra*.

when, government may regulate morality. Because of the many instances in which morals receive, if not direct protection, at least indirect protection through the overlap of moral and legal prohibitions (*e.g.*, prohibitions against taking the life of another), this analysis will presume morality to be a legally protected interest. Attention will be focused on the issue of whether or not prostitution imminently causes a factually demonstrable invasion of that interest.

The first obstacle to resolution of this issue is the difficulty of determining exactly what constitutes the interest. It begs the question merely to assert that "morals" means the public morals[97]—whose morals are to be the standard? In *In re Davis*[98] a California court struggled with a similar issue in reviewing a conviction under a statute which made it a crime "wilfully and wrongfully" to commit any act "which openly outrages public decency."[99] In attempting to decide what constitutes a violation of "public decency" the court asked:

> "[W]ho is the public?" . . . That answer is a great deal easier to give in a homogeneous society, in times of well established precepts of morality and manners, such as Victorian England, than today . . . . When the statute speaks of "public decency" does it presuppose some kind of consensus among the majority of the public as to what is and what is not "decent" and, if that assumption is wrong, to which segment of the public is the trier to look?[100]

In a complex and pluralistic urban society a term as amorphous as morals cannot easily be ascribed meaning.

Even if one uses as the standard whatever the majority, through the medium of the penal code, says the public morals are, the problem remains to determine when those morals have been destroyed, wholly or in part, by a given act. To maintain that harm may be presumed from the simple act of disobedience of the mandate would be to ignore an essential element of legal harm—that it be factually demonstrable.

Does prostitution, as is frequently maintained, in some manner cause a public harm? The danger of an allegation of "public harm" is that it often serves as "an intellectual smokescreen hiding a lack of analysis."[101] "Society has no interests over and above

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[97]Comment, *supra* note 34, at 582 n.4.

[98]242 Cal. App. 2d 645, 51 Cal. Rptr. 702 (Cal. App. 1966), *vacated*, 245 Cal. App. 2d 376, 53 Cal. Rptr. 810 (1966).

[99]CAL. PENAL CODE § 650½ (West 1970).

[100]242 Cal. App. 2d 645, 652, 51 Cal. Rptr. 702, 706-07 (Cal. App. 1966).

[101]Comment, *supra* note 34, at 592.

the interests of its constituent members. To say that society is harmed can only mean that some number of individuals are harmed."[102] Therefore, in every allegation of a public harm there must be some ascertainable member or members of the public who are harmed. Asserting the existence of a public harm thus does not destroy the need to demonstate factually who is harmed and in what manner.

In this case it is impossible to identify an effect on anyone's morals except possibly those of the participants. But can the morals of the participants be *legally* harmed? The requirement of harm to others necessitates answering this question in the negative. The morals of the participants are not interests which are legally protected against actions taken by themselves.

It can be seen that attempts to establish harm by destruction or impairment of the interest denominated "general morals" are deficient by virtue of an inability to establish a factually demonstrable invasion of a legally protected interest. However, this is not the only weakness in the argument that deviation from community notions of morality results in destruction of public morals. The question which highlights the most fallible point in such an argument is, assuming that there *is* harm, "Is harm imminently forthcoming from the act?"

Applying the test, "Is there a direct and causal sequence between the act and the resulting harm, such that the chain of causation can be perceived and evaluated, and the harm thereby determined not to be too remote nor the relationship between the act and the harm too attenuated?" to the alleged harm, no chain of causation between the act of intercourse and the destruction of general morals can be perceived. And, as established above, if the chain of causation is so attenuated that it must be assumed, liability cannot attach.

The harm to morals alleged to be caused by the practice of prostitution fails to meet the requirements of legal harm in two major respects: (1) there is no factually demonstrable invasion of a legally protected interest; and (2) even if the assumption is made that the practice of prostitution affects the community's interest in general morals, the alleged harm is not imminently forthcoming from the act, but rather is remote and only tangentially connected thereto. Therefore, the harm to morals alleged to

[102] *Id.*

result from the practice of prostitution fails and criminal liability cannot be imposed.

CONCLUSION

Perhaps in a country as prone to examine its criminal doctrine as its constitutional doctrine—and to examine the former within the context of the latter—the crime of prostitution would long ago have been eliminated. Application of the principle of harm to the criminalization of prostitution demonstrates that none of the harms alleged to be caused by prostitution meet the criteria of legal harm. A rigorous adherence to the principle of harm would achieve both a reconciliation of prostitution with fundamental principles of criminal liability and a greater harmony of constitutional and criminal doctrines.

It is entirely too easy to forget that American pride in having a government of laws and not of men is a sham if those laws are not founded on reason, sound principles of liability, and, ultimately, the Constitution itself. Recognition and application of the principle of harm would bring the body of criminal law back into concord with the most fundamental of constitutional mandates—that one may not *arbitrarily* be deprived of life, liberty, or property. A criminal code which ignores this fundamental precept, which makes nonharmful conduct criminal, should not be allowed to stand. It is the duty and responsibility of the courts to ensure that such codes do *not* stand and their acceptance of this responsibility has been too long delayed.

The historic concern of American courts to provide procedural safeguards for those threatened with loss of their liberty is laudable. It is not enough. If the full scope of liberty guaranteed by the fourteenth amendment is to be realized, the courts must recognize that due process of law is properly a safeguard of not only the procedure, but also the substance of the criminal law.

Madeline S. Caughey

NOTE

ADMINISTRATIVE LAW—THE FREEDOM OF INFORMATION ACT AND EQUITABLE DISCRETION
5 U.S.C. § 552 (1970)

INTRODUCTION

The Freedom of Information Act (FOIA)[1] provides for judicial review of an agency's refusal to produce information. Section 552(a)(3)[2] of that Act grants federal district courts jurisdiction to order agencies to disclose improperly withheld records. The FOIA was intended by Congress to give any person access to governmental records, unless the material sought falls within one of nine expressly enumerated exemptions.[3] In general, the Act places the burden on the agency to justify nondisclosure.[4]

This Act replaced section 3 of the Administrative Procedure Act (APA),[5] which had granted administrative agencies discretion in determining whether to release information, with little or no opportunity for judicial review of the agency's action. Under

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[1]5 U.S.C. § 552 (1970).

[2]The pertinent text of the statute is set forth in section I, *infra*.

[3]Exempted are:

> (b) [M]atters that are . . . .
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> (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;
>
> (2) related solely to the internal personnel rules and practices of an agency;
>
> (3) specifically exempted from disclosure by statute;
>
> (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
>
> (7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;
>
> (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
>
> (9) geological and geophysical information and data, including maps, concerning wells.

5 U.S.C. § 552(b) (1970). *See also* Annot., 7 A.L.R. FED. 870 (1970).

[4]5 U.S.C. § 552(a)(3) (1970).

[5]Act of June 11, 1946, ch. 324, § 3, 60 Stat. 237.

the prior provisions, if agency officials determined that the information sought could be withheld for any of a number of reasons,[6] the party seeking the information had no remedy available unless an action was pending before a court so that pretrial discovery under the Federal Rules of Civil Procedure would be available.[7] Both the House and Senate condemned the results under the prior Act, which through its broad language generally allowed the withholding of information.[8] The changes made by the FOIA were fundamental, creating a true disclosure act and eliminating the vague standards embodied in the APA.

The emphasis in the FOIA on required disclosure, however, has led to the further question of whether courts should exercise equitable discretion in applying the Act, beyond determining if any of the nine specified exemptions apply. An increasing divergence of viewpoint within and between jurisdictions that have considered this issue has become apparent since the exercise of such discretion was first upheld in *Consumers Union, Inc. v. Veterans Administration*.[9] One view is that the Act allows courts to exercise equitable discretion; the opposite is that in applying the Act, courts should limit themselves to ascertaining whether any specific exemption applies, and, if not, disclosure should be ordered. The recent case of *Hawkes v. IRS*[10] typifies the ongoing debate regarding equitable discretion under the Act. *Hawkes* also provides a vantage point for possible reconciliation of the conflict that has emerged from this debate.

To understand these recent developments and their implications, this note will analyze the Act's language and its legislative history to determine whether Congress intended that Act to abro-

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[6]The prior Act allowed agencies to withhold records for such reasons as secrecy required "in the public interest;" the agency officials determined that the records sought related to the internal management of the agency; or there was "good cause found" to withhold the records. *Id.*; Annot., *supra* note 3, at 884.

[7]Act of June 11, 1946, ch. 324, § 3, 60 Stat. 237; Annot., *supra* note 3, at 884-85.

[8]H.R. REP. No. 1497, 89th Cong., 2d Sess. 2 (1966); S. REP. No. 813, 89th Cong., 1st Sess. 5 (1965); *see* Annot., *supra* note 3, at 879; Note, *Judicial Discretion and the Freedom of Information Act: Disclosure Denied: Consumers Union v. Veterans Administration*, 45 IND. L.J. 421 (1970); Note, *Administrative Law—The Freedom of Information Act—The Use of Equitable Discretion to Modify the Act*, 44 TUL. L. REV. 800 (1970).

[9]301 F. Supp. 796 (S.D.N.Y. 1969), *dismissed as moot*, 436 F.2d 1363 (2d Cir. 1971). For discussions of this issue in light of *Consumers Union*, *see* Note, *Judicial Discretion and the Freedom of Information Act: Disclosure Denied: Consumers Union v. Veterans Administration*, *supra* note 8, at 424; Note, *Administrative Law—The Freedom of Information Act—The Use of Equitable Discretion to Modify the Act*, *supra* note 8, at 805.

[10]467 F.2d 787 (6th Cir. 1972).

gate courts' equitable remedies, discuss the *Consumers Union* and *Hawkes* cases concerning the use of traditional equitable principles to withhold disclosure which would otherwise be available under the Act, and propose reconciliation through coexistence of the two seemingly conflicting viewpoints enumerated above.

I. FOIA: Its Language and Legislative History

The language of the FOIA appears to convey a clear Congressional intent to make the Act the exclusive authority for withholding information. The pertinent sections of the Act provide:

> (3) [E]ach agency, on request for identifiable records made in accordance with published rules . . . shall make the records promptly available to *any person.* On complaint, the district court of the United States in the district in which the complainant resides, . . . has jurisdiction *to enjoin* the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court *shall determine the matter de novo* and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee . . . .
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> . . . .
>
> (c) This section does not authorize withholding of information or limit the availability of records to the public, *except as specifically stated in this section.* This section is not authority to withhold information from Congress.[11]

In spite of this strong language, it is not clear from the legislative history of the Act that Congress intended to exclude judicial use of equitable discretion in the application of the FOIA. The intention of the Senate in enacting the FOIA was to close the loopholes of section 3 of the APA, which it superseded, thereby creating a disclosure act to replace what had become a withholding act.[12] The FOIA was to make available "to any person" all information disclosable under its terms, and to allow exemptions based only on the nature of the material sought, not on the identity or status of the seeker.[13] However, the authority of the Senate's interpretation of the Act, approved by the House and Senate when the Act was passed, is weakened through contradiction by the interpretation given the Act by the House Committee on

[11] 5 U.S.C. § 552(a)(3), (c) (1970) (emphasis added).
[12] S. Rep. No. 813, 89th Cong., 1st Sess. 2 (1965).
[13] *Id.*

Government Operations, which reported favorably *without amendment* on the Senate bill to amend section 3 of the APA. The House interpretation of the language in subsection 552(a)(3) was that the proceedings were to be de novo "so that the court can consider the propriety of the withholding instead of being restricted to judicial sanctioning of agency discretion."[14] The grant of authority to the district courts was, in the view of the House, to enjoin an agency from withholding information "whenever [the court] considers such action equitable and appropriate."[15] Thus, either viewpoint of the Act—that it does or does not allow equitable discretion in its application by the courts—gives effect to what was arguably the legislative intent, based on both the language and the legislative history of the Act.

It has been suggested that an amendment is necessary to clarify Congressional intent with respect to equitable discretion. During the 1972 Hearings before a Subcommittee of the House Committee on Government Operations, one witness[16] stated:

> Those of us who participated, in the 1960's, in the drafting and passage of the act never dreamed that our glaring imperfections would be reviewed and, hopefully, corrected at such an early stage. We knew that we had achieved only a small beginning, and that we had compromised away much for the sake of passage of the act.
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> . . . .
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> The major deficiencies in the act as codified, in my view, are contained in section 552(a)(3) and (4).
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> . . . .
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> . . . [T]he phrase "shall make the records promptly available to any person" is still causing troubles. Judges continue to inquire into a person's "need to know." It was not the intent of the drafters of the Freedom of Information Act that a person should have to have any particular or stated reason for wishing to see Government records, nor that motivation should be a matter for the courts.
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> . . . [J]udges have decided for themselves that it is discretion-

[14]H.R. REP. NO. 1497, 89th CONG., 2d Sess. 9 (1966).

[15]*Id.*

[16]The witness was Bernard Fensterwald, Jr., an attorney, described as one of the "experienced frontline soldiers in the fight for the public's 'right to know' [who has] brought and is presently engaged in litigation which has substantially opened the doors on our Government's activities," by Representative William S. Moorhead, Chairman of the Foreign Operations and Government Information Subcommittee of the Committee on Government Operations. *Hearings on U.S. Government Information Policies and Practices—Administration and Operation of the Freedom of Information Act Before a Subcomm. of the House Comm. on Government Operations*, 92d Cong., 2d Sess., pt. 5, at 1375-76 (1972).

> ary with them whether they order the production of nonexempt material. In effect, they are applying theories of equity. This, again, was not the intention of the drafters. Hence the phrase "has jurisdiction to enjoin" should be changed to read "shall enjoin."[17]

This proposed change, however, would be unlikely to effectuate clearly the intent of Congress to remove equitable discretion from courts, as there is precedent that even the words "shall enjoin" are not necessarily sufficient to preclude courts from exercising their inherent equity powers.[18] In commenting on the Supreme Court's position in *Hecht Co. v. Bowles,*[19] Professor Davis stated:

> Even though the Emergency Price Control Act of 1942 provided that an injunction "shall be granted" against a violation, the Supreme Court held "we do not think that under all circumstances the court must issue the injunction or other order which the Administrator seeks." The Court emphasized the fundamental character of equity jurisdiction: "The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." The Court accordingly upheld a refusal to enjoin violations resting on "mistakes . . . made in good faith . . . ."
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> When the Supreme Court so holds even under a statutory provision that an injunction "shall be granted," surely equitable traditions apply under the Information Act's provision that the court "shall have jurisdiction . . . ."[20]

The Supreme Court recognizes its jurisdiction to exercise equitable discretion in appropriate cases, and by analogy to the *Hecht* case, the Supreme Court would not restrict courts to application of the Act's exemptions where the equities involved called for additional considerations. If Congress is to limit the equity powers of a court, then, it must do so expressly, and the words "shall enjoin" are probably not sufficient to convey decisively that under all circumstances Congress intends that courts apply only statutory rules, and not equitable principles.[21]

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[17] *Id.* at 1377-78.

[18] Hecht Co. v. Bowles, 321 U.S. 321, 328 (1944).

[19] *Id.*

[20] Davis, *The Information Act: A Preliminary Analysis,* 34 U. CHI. L. REV. 761, 767 (1967). *But see* United Steelworkers v. United States, 361 U.S. 39 (1959), wherein the Supreme Court held that the court *must* issue an injunction when the statutory requirements of the Labor-Management Relations Act were met.

[21] It should be noted, however, that the fact that Congress would *change* the FOIA to say "shall enjoin," after extensive hearings showing that this would deprive courts of

II. FOIA CASES AND THE USE OF EQUITABLE PRINCIPLES

A. Consumers Union, Inc. v. Veterans Administration

If words as strong as "shall enjoin" are insufficient under present rules of statutory construction to remove equitable discretion from the courts, it is hardly surprising that, under the current wording of the Act, numerous cases exist upholding equitable discretion to refuse enforcement in FOIA cases even when the material sought does not come within a specific exemption.[22] In the first case upholding such discretion, *Consumers Union, Inc. v. Veterans Administration,*[23] Consumers Union sought release of Veterans Administration (VA) test results and evaluations that had served as the basis of a qualified products list from which VA doctors prescribed hearing aids. The court concluded that although none of the exemptions from disclosure in subsection 552(b) applied, it was not automatically bound under the Act to order disclosure. The *Consumers Union* court held that, if records are not exempted from disclosure under that Act, the court must order disclosure unless the agency proves that greater harm than good would result; moreover, the court emphasized that it is the effect on the public rather than on the person seeking information that must be weighed.[24]

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equity jurisdiction, might in itself make a stronger case for courts to abstain from exercising their discretion. Generally, however, where principles and rules of equity are extended or abridged by statute, the statute is given a strict construction, *i.e.*, courts will normally construe the statute so as to preserve their equitable powers. Dennis v. Prather, 212 Ala. 449, 103 So. 59 (1925); Ethridge v. Pitts, 152 Ga. 1, 108 S.E. 543 (1921); Jay-Bee Realty Corp. v. Agricultural Ins. Co., 330 Ill. App. 310, 50 N.E.2d 973 (1943); Brown v. Chicago & N.W. Ry., 82 N.W. 1003 (Iowa 1900). It has also been said that a court of equity may not be divested of its jurisdiction by implication. Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 291-92 (1960). When Congress extends to an equity court power to enforce statutory enactments, "it must be taken to have acted cognizant of the historic power of equity to provide complete relief in the light of statutory purposes." *Id.* at 292.

[22]Cases holding or implying that courts do have equitable discretion to decide whether to order disclosure of documents not exempt from the Act include Wu v. National Endowment for Humanities, 460 F.2d 1030 (5th Cir. 1972); General Servs. Admin. v. Benson, 415 F.2d 878 (9th Cir. 1969); Long v. IRS, 349 F. Supp. 871 (W.D. Wash. 1972); Consumers Union v. Veterans Administration, 301 F. Supp. 796 (S.D. N.Y. 1969), *dismissed as moot,* 436 F.2d 1363 (2d Cir. 1971). Cases with implications that such discretion does *not* exist include Cuneo v. Schlesinger, 484 F.2d 1086 (D.C. Cir. 1973); Hawkes v. IRS, 467 F.2d 787, 792 n.6 (6th Cir. 1972); Tennessean Newspapers, Inc. v. FHA, 464 F.2d 657, 661-62 (6th Cir. 1972); Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971); Soucie v. David, 448 F.2d 1067, 1076 (D.C. Cir. 1971) (dictum); Wellford v. Hardin, 444 F.2d 21, 24 (4th Cir. 1971); Stokes v. Hodgson, 347 F. Supp. 1371, 1377 (N.D. Ga. 1972); Sears, Roebuck & Co. v. NLRB, 346 F. Supp. 751 (D.D.C. 1972).

[23]301 F. Supp. 796 (S.D.N.Y. 1969), *dismissed as moot,* 436 F.2d 1363 (2d Cir. 1971).

[24]*Id. See* Annot., *supra* note 3, at 891; Wiel, *Administrative Finality,* 38 HARV. L. REV. 447, 462 (1925) (discussion of effects of administrative action on the public); Davis, *supra* note 20.

The *Consumers Union* court expressly adopted the general rule that statutes are not to be construed so as to divest by implication a court of equity of its jurisdiction.[25] The court looked to the language of subsection 552(a)(3) granting district courts "jurisdiction to enjoin,"[26] which sounds in equity, as a basis for its reasoning that courts can and should apply their full equity powers in FOIA cases.

The mandate in subsection 552(a)(3) that "the court shall determine the matter de novo"[27] has also been used as a basis for arguing that the general scope of judicial review in considering an order to disclose particular records should not be limited merely to determining the technical applicability of the nine exemptions.

> The injunction is an equitable remedy. In a trial de novo under subsection (c) the district court is free to exercise the traditional discretion of a court of equity in determining whether or not the relief sought by the plaintiff should be granted.[28]

Under this argument, subsection 552(a)(3) is interpreted as implicitly providing for the use of equitable discretion, and therefore the restriction of subsection 552(c) does not prevent courts from exercising such discretion.

B. Hawkes v. IRS

Equally forceful arguments have been made by courts refusing to apply equitable discretion when none of the FOIA exemptions authorize withholding information. The majority opinion in *Hawkes v. IRS*[29] typifies the latter approach. In *Hawkes*, the plaintiff had been indicted for tax fraud, and to prepare his defense sought information and documents held by the IRS, some through regular discovery proceedings and some extrajudicially. The IRS declined to release some of the requested information, including portions of an IRS manual which had not been requested through the discovery proceedings. Hawkes then sought in a separate action under the FOIA an order requiring disclosure of all requested materials. The IRS successfully moved for dis-

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[25]See the discussion of general principles concerning statutory enactments and equity discretion, *supra* note 21.

[26]5 U.S.C. § 552 (1970).

[27]*Id.*

[28]ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE APA 27, 29 (1967). Subsection (c) provides that the Act does not authorize withholding information except as specifically provided. 5 U.S.C. § 552(c) (1970); *see* text accompanying note 11 *supra*.

[29]467 F.2d 787 (6th Cir. 1972).

missal, arguing that disclosure under the FOIA was an equitable remedy which should not be granted when there was an adequate remedy at law available, here discovery proceedings. The IRS also argued that the material sought was specifically exempted from the FOIA under subsection 552(b)(2).[30] The district court ruled in favor of the IRS, and, while his civil appeal was pending, Hawkes entered a plea of nolo contendere to the fraud case and was sentenced to prison.[31]

Although the Sixth Circuit was able to dispose of Hawkes' civil appeal on an unrelated issue,[32] the court felt the matter of equitable discretion was of sufficient importance to merit comment, even though the court specifically declined to set a binding precedent pending a "live controversy."[33]

The majority in *Hawkes* looked to the intent of the legislature as their basis for rejecting the IRS' argument that a district court, in applying the FOIA, is bound by rules traditionally governing equity courts, and in particular the principle that equitable relief is not to be granted where an adequate remedy at law exists. The *Hawkes* majority reasoned that not only may Congress cut back on both discretionary power and on restrictions of equity jurisdiction when it grants courts injunctive power to enforce federal policy, but that Congress actually intended to do so under the Act. Therefore, they reasoned, Congress did not intend to require exhaustion of the criminal discovery process as a prerequisite to disclosure under the FOIA. The court held that in accordance with Congressional intent the FOIA denies the court power to refuse disclosure of materials covered by the Act for any reason other than those exceptions listed in subsection 552(b).[34] The majority pointed out that protection for documents to be disclosed only through the discovery process is afforded by subsections 552(b)(7) and (b)(3) of the Act, and that whatever conflicts might arise between criminal discovery procedure and civil disclosure suit under the Act would be minimal in nature and could be handled by the judicial process.[35]

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[30]5 U.S.C. § 552(b)(2) (1970).

[31]467 F.2d at 790 n.3.

[32]The lower court had failed to consider the propriety of withholding all the requested information. Its ruling, and the IRS' arguments for dismissal, focused solely upon the IRS manual. *Id.* at 790-91.

[33]*Id.* at 792-93 n.6.

[34]This is also the position of the Ninth and District of Columbia Circuits. Note, *Developments Under the Freedom of Information Act—1972*, 1973 DUKE L.J. 178 n.9.

[35]467 F.2d at 792-93 n.6.

The court viewed the legislative history of section 3 of the APA and of the Information Act as expressing an intent to allow exemptions based "on the nature of the material sought—not the identity or status of the seeker."[36] Therefore application of the principle that equitable relief would not be granted where an adequate remedy at law exists would thwart the Act's purpose since it would require a court to look at the seeker's situation and reasons for requesting the information in order to determine if he might obtain the requested information through any other legal means prior to allowing him to invoke the injunctive remedy provided by the Act. In sum, the majority in *Hawkes* found that in giving effect to Congressional intent the court, under the Act, does not possess its full equitable powers.

C. *Judge Miller's Separate Opinion in* Hawkes

Judge Miller in his separate opinion, concurring in part and dissenting in part, did not agree that the power of a court sitting in equity is necessarily restricted by the FOIA, and especially objected to the majority's discussion of the equitable discretion question prior to its presentation in a live controversy.[37] He stated that "a strong argument can be made that courts do possess equitable powers under the Act."[38] It was his opinion that it was unnecessary to decide whether a court may apply equitable principles under the Act, but since the majority saw fit to speak out on the issue he resisted their contention that the FOIA generally restricts discretionary jurisdiction and the powers of a court sitting in equity.

The majority and Judge Miller start from contrary premises: The majority, that application of the FOIA is governed by the legislative intent which precludes a court from exercising its traditional equitable jurisdiction; Judge Miller, that the court retains equity powers when applying the Act, since neither its language nor its history expressly provides otherwise.

III. Resolution

By juxtaposing and analyzing the seemingly conflicting viewpoints of the *Consumers Union* court and the *Hawkes* court, a basis for resolution can be found. An analysis of Judge Miller's

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[36] *Id.* *See also id.* at 790 n.3.

[37] *Id.* at 797.

[38] *Id.* Judge Miller was quoting his concurring opinion in Tennessean Newspapers, Inc. v. FHA, 464 F.2d 657 (6th Cir. 1972).

separate opinion in the *Hawkes* case is a helpful catalyst to this process.

Judge Miller's remarks, while stating the general rule that the court cannot be deprived of its equitable powers by mere statutory enactment, appear to recognize some limitation on these powers. Judge Miller qualifies his objections by saying that it is "unnecessary to decide whether a court may not *in some situations* under the Freedom of Information Act apply general equitable principles."[39] His is not a categorical rejection of any encroachment whatsoever on the court's equity powers, but a rejection of *general* abdication of such powers. Even though Judge Miller does not accept the majority's view that the Act's legislative history controls its application such that the court becomes bound to implement the Act *in place of* exercising its own equitable powers, he appears to concur in all other aspects of the majority opinion. And in so doing Judge Miller impliedly accepts the Act as preempting the court's discretion at least to the extent that equitable principles do not become applicable unless the court first determines that none of the nine exemptions apply. This reasoning necessarily implies that the Act requires court review of an agency's action in withholding information, and possible application of any of the Act's statutory exemptions, prior to applying general equitable principles and imposing a nonstatutory remedy. Such a modified approach would not preclude the trying of a suit altogether, as would, for example, the principle that where an adequate remedy at law exists equitable relief is not available.[40] The necessity of following this sequence creates a condition precedent to the exercise of a court's traditional equitable discretion, thereby placing some limit on its equity jurisdiction.

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[39]467 F.2d at 797 (emphasis added).

[40]Concerning available remedies for withholding disclosable information, it is interesting to note the contradiction between the Department of Justice's endorsement of a court's inherent equitable powers in administering the Act and the statement of Mr. Robert Ackerly, another attorney engaged in litigation under the FOIA, who was called to testify before the 1972 House Subcommittee on Government Operations. Discussing the possibility of speeding up agency action by asking the court to enjoin renegotiation proceedings until the agency complies with the Act, he stated: "The Department of Justice denies that the court has any jurisdiction whatsoever to enter an injunction outside the injunction mentioned in the Act." Hearings, *supra* note 16, at 1401. Accepting Mr. Ackerly's statement as accurate, the position of the Justice Department, that a court has inherent power to exercise equitable discretion, but that this does not extend to shaping equitable remedies, is untenable.

On the other hand, the view of the majority in *Hawkes,* and of the other circuits holding the same way, appears to leave itself open for the exercise of equitable discretion if the need should arise. It is significant that the *Hawkes* majority declined to hold as a rule of law that in general the Act precludes exercise of a court's equity powers. Similarly, *Soucie v. David,*[41] often cited for holding that the Act precludes a court's equity powers, also leaves itself leeway for applying equity rules in extreme circumstances.[42] These cases which uphold the Act's displacement of the court's equity jurisdiction, seem to imply that in extreme circumstances, if none of the Act's exemptions apply so as to withhold disclosure, the court retains such equitable powers as are necessary to do justice outside the Act's language.

A basis for resolution of these seemingly antagonistic points of departure exists in the recognition that, although certain of a court's traditional powers have been limited and that certain equitable principles have been made inapplicable under the Act,[43] situations may arise which could lead the court to apply equitable principles.[44] The resolution of the equitable discretion question, then, would not necessarily involve a substantial shift from present policy and practice, but would lie in the courts' incorporation of both of the positions that have been developing. This compromise, if adopted by the courts, would make for an adaptable, flexible, and realistic application of the FOIA.

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[41]448 F.2d 1067 (D.C. Cir. 1971).

[42]The *Soucie* court stated:

> Since judicial use of traditional equitable principles to prevent disclosure would upset this legislative resolution of conflicting interests, we are persuaded that Congress did not intend to confer on district courts a general power to deny relief on equitable grounds apart from the exemptions in the Act itself. There may be exceptional circumstances in which a court could fairly conclude that Congress intended to leave room for the operation of limited judicial discretion, but no such circumstance appears in the present record of this case.

Id. at 1077 (footnote omitted).

[43]*E.g.*, the principle that equity is not available where an adequate remedy at law exists should not be applied under the Information Act since this would focus on the seeker rather than the material sought. It is true that this principle was also rejected in *Hawkes* because of the change of circumstance such that substantial justice would have been denied had the court applied it. But the majority intimated that the district court was not justified in apparently accepting the IRS' argument that this principle applied.

Also, certain equitable principles which would bar an action altogether are made inapplicable because the court must first apply the Act to find if any exemptions apply before considering any equitable principles.

[44]*See* text accompanying notes 19-20 *supra.*

Incorporation of both views, however, would necessarily impose equity jurisdiction (at least in extreme circumstances, with the definition and application of what is "extreme" left up to the courts) on courts such as the *Hawkes* majority which do not want equity jurisdiction under the Act. Moreover, such a two-step resolution, in which the Act is first construed to find out if any exemption applies, and then if none applies the courts are allowed to invoke equity jurisdiction, could result in a one-sided construction in favor of nondisclosure, in effect giving the government two chances in which to defy what appears on the Act's face to be a clear mandate to disclose. Such a result flies in the face of the Act's purpose, and yet appears justified somewhat by the ambivalence inherent in its language and history.

CONCLUSION

Realistically, however, the circuit courts appear unlikely to resolve the equitable discretion question on their own, since five circuits have already reached conflicting positions on the issue. The Fifth and Ninth Circuits have upheld courts' equitable discretion in applying the FOIA, and the Fourth, Sixth, and District of Columbia Circuits have decided that courts do not have such discretion under the Act.[45] Although the Supreme Court could decide this issue, it has not yet done so. Therefore, the solution to the equitable discretion question will more likely be forthcoming, if at all, from Congress.

Phyllis I. Crist

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[45]Note, *supra* note 34.

COMMENT

ADMINISTRATIVE LAW—THE COLORADO ADMINISTRATIVE PROCEDURE ACT—COLO. REV. STAT. ANN. § 3-16-6: Application—A Matter of Construction

INTRODUCTION

The coexistence of procedural requirements in the State Administrative Procedure Act (APA)[1] and in the organic statutes of many state agencies frequently presents a dilemma for the Colorado attorney representing a client in an administrative matter. He must choose the applicable procedures from overlapping and sometimes inconsistent statutory authority. To guide him in this choice the final section of the APA provides that "where there is conflict between the APA and a specific statutory provision relating to a specific agency, such specific statutory provision shall control as to such agency."[2] Prior to 1969 this provision had simply stated that specific statutory provisions pertaining to a specific agency "shall control as to such agency."[3] Implicit in the addition of the *conflict* language to section 3-16-6 is the legislature's intent to make procedures in an organic statute and the APA jointly apply where they parallel each other. The 1969 amendment's expanded definition of the APA's jurisdiction, which makes it apply "to *every* agency of the state having statewide territorial jurisdiction" and also "to every other agency to which it is made to apply by specific statutory reference"[4] further evidences the intended overlap. Taken together, these changes suggest a legislative attempt to delineate the APA's scope and to clarify its proper application.

Two recent Colorado Supreme Court cases have interpreted section 3-16-6 as amended: *North Kiowa-Bijou Management District v. Ground Water Commission*[5] and *PUC v. District Court*.[6]

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[1]COLO. REV. STAT. ANN. §§ 3-16-1 to -7 (Supp. 1969), *amending* COLO. REV. STAT. ANN. §§ 3-16-1 to -7 (1963). Section 3-16-7 provides that the entire article shall be known and cited as the "State Administrative Procedure Act."

[2]COLO. REV. STAT. ANN. § 3-16-6 (Supp. 1969).

[3]COLO. REV. STAT. ANN. § 3-16-6 (1963).

[4]COLO. REV. STAT. ANN. § 3-16-6 (Supp. 1969) (emphasis added). Prior to 1969 the APA's jurisdiction had to be inferred from the definition of "agency" in section 3-16-1. COLO. REV. STAT. ANN. § 3-16-1 (1963). The addition of the language quoted in text to section 3-16-6 obviates the necessity for such an inference by providing a clearly dispositive definition of the APA's jurisdiction.

[5]505 P.2d 377 (Colo. 1973).

[6]505 P.2d 1300 (Colo. 1973).

Although they arose under different statutes, both cases involved judicial review of administrative action. Unfortunately, neither opinion adequately examined the possible application of the APA to the procedural problems involved.

In *PUC* the court concluded, after quoting the conflict language in section 3-16-6, that the APA should not apply because "the statutory authority governing the judicial review of PUC orders and decision is *specifically detailed* in 1969 Perm. Supp., C.R.S. 1963, 115-6-14, 15 and 16."[7] In a similar perfunctory manner the court in *North Kiowa* concluded:

> As a threshold matter . . . the Code has no applicability where a specific statutory provision relating to a specific agency provides a scheme for the administrative control of that agency. Such is the situation with the Ground Water Management Act . . ., which contains a *comprehensive scheme* for administering the provisions of that article.[8]

While *PUC* does at least acknowledge the existence of the new APA language, neither opinion addresses itself to an interpretation of the conflict requirement. Specifically, neither opinion lays out any conflict it has found between provisions in the organic statutes and the APA. The court thus fails to require, much less define, the statutorily mandated conflict. As a result the attorney, when forced to choose between the parallel procedures, is left with broad, imprecise standards—whether or not the organic procedures are "specifically detailed" or constitute a "comprehensive scheme"—which may sanction arbitrary exclusion of the APA in many situations where it should now apply.

A particularized construction of the conflict language should have been an important issue in both cases. The problem is the extent to which a conflict precludes use of the APA. Does any conflict eliminate the entire APA provision or section in question, or should the organic statute control only insofar as there is actual, specific conflict, thus leaving the APA's procedures operational on all other points? The question becomes one of legislative intent and the extent to which the APA's standardized procedural scheme should supplement organic statutes where they are silent. This comment will pursue the legislative history of the 1969 amendment in order to clearly establish an intent to

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[7] *Id.* at 1301 (emphasis added).

[8] 505 P.2d at 379 (emphasis added). The Ground Water Management Act may be found at COLO. REV. STAT. ANN. §§ 148-18-1 to -38 (Supp. 1965).

expand the APA's use and will then suggest a construction of the amended language which will correctly direct the application of the coexisting procedures where they conflict.[9]

I. Legislative History and Intent

A. *Administrative Codes: The Basic Concept*

The basic idea underlying the promulgation of an administrative code is the standardization of administrative procedures in one enactment and the application of those procedures to all agencies within a jurisdiction. While the concept has won wide acceptance, in practice many situations exist in which the particular needs of individual agencies require specialized procedures. Moreover, even in some instances where the merits of such specialized needs are debatable, the special procedures remain because local concerns—the vested interest of an entrenched bureaucracy or specialized bar—so dictate.[10]

Where such compromise obtains, as it often does in Colorado,[11] there are two possible solutions to the inherent problem of conflict between provisions of the organic statutes and the uniform procedures of an administrative code. First, where specific statutory procedures exist, they could be deemed controlling and exclusive. *PUC* and *North Kiowa* incorrectly suggest this possibility, although without clearly articulating such a rule. Second, the separate provisions can coexist and jointly apply. Although this solution lacks the definiteness of the first solution, it allows potentially broader employment of the APA, a preferable result since the specialized organic procedures, even if they serve a legitimate, particular need, are often skeletal.[12] Colorado's statutory scheme, the *PUC* and *North Kiowa* opinions notwithstanding, should be interpreted so as to follow this second possibility.

B. *The Conflict Requirement: Its Origin and Intent*

In support of the proposition that the amended language of section 3-16-6 should be read to increase the APA's use is the specific origin of the language and the expressed intention of its

[9]Obviously, in a situation where the organic and code procedures parallel each other exactly there is no problem of choosing between them.

[10]More often than not, this situation arises when the organic statute of an agency predates the adoption of the State APA. *See* note 11 *infra*.

[11]*See* Henry, *The Colorado Administrative Procedure Act: Exclusions Demanding Reform*, 44 Denver L.J. 42 (1967).

[12]*See* text accompanying notes 30-32 *infra*.

author. The origin of the conflict language, and, in fact, the meaning of the entire provision, has a history unique to Colorado. The drafters of the Colorado APA worked from both the revised Model State APA and the final draft of a revised federal code which was never enacted.[13] Hubert Henry, a longtime Chairman of the Administrative Law Committee of the Colorado Bar Association and the drafter of much of the language in the Model State APA, including the 1969 amendment to section 3-16-6, points out, however, that many changes and additions were made to conform to Colorado's specific needs.[14] The language in section 3-16-6 is one of these changes, and it represents Colorado's novel "solution" to the problem of inconsistencies between the APA and organic statutes. The absence of similar language in other states negates the possibility of using constructions from other jurisdictions as a guide. This circumstance places primary importance on the amendment's legislative history. Fortunately, such legislative history is available and it offers not only insight into the origin of the amended language, but also directions as to its proper construction.

The conflict language was first proposed by Henry in a 1967 *Denver Law Journal* article as the desired judicial construction of the pre-1969 language of section 3-16-6.[15] Arguing for a judicial interpretation that would increase the APA's use, he contended:

> The number of conflicts can and should be held to a minimum by strictly and narrowly construing the crucial provision that "where a specific statutory provision applies to a specific agency, such specific statutory provision shall control as to such agency."[16]

The author then proceeded to articulate the interpretation he would give the provision in words later to be codified in the 1969 amendment:

> Only if there is an *actual conflict* between the APA and the statute applying to any specific agency, does the latter control, *and then only to the extent of the specific conflict.*[17]

To whatever degree the language of the statute fails to convey an exact, statutory command as to the application of the article, the words and intent of its author should supply the proper direction.

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[13]Henry, *supra* note 11, at 43.

[14]*Id.*

[15]*Id.* at 50.

[16]*Id.*

[17]*Id.* (emphasis added).

II. A Matter of Construction

The language of the 1969 amendment deserves detailed attention from the court, for it provides a workable, even if not precise, guide to the legislature's intention. The conflict requirement has suffered, though, from an unfortunate judicial tendency to apply the APA not according to its own instructions, but in accordance with traditional rules of common law construction.

In 1968 the Colorado Supreme Court construed the pre-amendment language of section 3-16-6 in *Shoenberg Farms, Inc. v. People*.[18] The defendants wanted the adequacy of notice issue to be resolved by reference to section 3-16-6 of the APA, but, according to the court in this case, the state APA is a general law and "[i]t is a general rule of statutory construction that a specific statute prevails over a general one."[19] There was no need, however, to resort to this general rule of statutory construction in order to preclude the application of the APA to this case. A separate provision of the organic statute in question provided that the organic procedures should control to the exclusion of any general law.[20] The resulting, unnecessarily broad preemption of the APA foreshadows the treatment section 3-16-6 received in *North Kiowa* and *PUC*.[21]

In Colorado, it is a fundamental rule of statutory interpretation that in construing amendments a change in meaning must be attributed to a change in language.[22] Furthermore, "[i]n arriving at legislative intent, the language of an amendment must be construed in light of previous decisions by courts of last resort construing the original act . . . ."[23] Therefore, it must be presumed that the legislature had in mind the judicial construction in the *Shoenberg Farms* opinion when the 1969 amendment was passed. Construed in light of the *Shoenberg Farms* opinion, the

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[18]166 Colo. 199, 444 P.2d 277 (1968).

[19]*Id.* at 215, 444 P.2d at 285.

[20]Colo. Rev. Stat. Ann. § 7-3-23 (1963).

[21]Colorado is not the only state where the judiciary has limited the applicability of an administrative code by resorting to the rule that the specific controls the general. Three Michigan cases dealing with the availability of APA procedures for judicial review where such procedures were also provided in the organic statutes in question were decided on the same basis. Superex Drug Corp. v. State Bd. of Pharmacy, 375 Mich. 314, 134 N.W.2d 678 (1965); Dossin's Food Prods. v. Michigan State Tax Comm'n, 360 Mich. 312, 103 N.W.2d 474 (1960); Imlay T. Primary School Dist. No. 5 v. State Bd. of Educ., 359 Mich. 478, 102 N.W.2d 720 (1960).

[22]General Motors Corp. v. Blevins, 144 F. Supp. 381, 393 (D. Colo. 1956).

[23]Industrial Comm'n v. Milka, 159 Colo. 114, 120, 410 P.2d 181, 184 (1966).

clause— "[B]ut, where there is a *conflict* between this article and a *specific* statutory provision relating to a specific agency, such specific statutory provision shall control as to such agency"[24]—should have persuaded the court to abandon its reliance upon a blanket application of the specific-over-general rule in favor of the more restrictive guidelines set forth by the legislature.

The supreme court should have devoted special attention to the words "conflict" and "specific." Applying the accepted rule of statutory construction that "[i]n interpreting words of a legislative enactment . . . the intention of the legislature is to be found in the ordinary meaning of the words used in the statute when considered in the light of the object to be accomplished or remedied,"[25] "conflict" implies terms directly in opposition, an inconsistency rather than the mere existence of separate statutory provisions which pertain to the same procedures. Moreover, the adjective "specific" modifies the phrase "statutory provision," and thus narrows the focus to the exact procedural requirements within a provision rather than to the provision as a whole. The amended language of section 3-16-6 anticipates, then, the situation where a particular requirement in an organic statute would actually vary the application of the uniform procedures of the APA.

The Colorado Supreme Court, in both the *North Kiowa* and *PUC* opinions, failed to give the words such a detailed analysis and instead relied on more general impressions to reach its conclusions, saying the APA is not to apply where the organic statute is "specifically detailed" or constitutes a "comprehensive scheme." The net result of the court's imprecision is the creation of a doctrine of preemption that, potentially, could be used to exclude the APA whenever an organic statute provides *any* procedures for its administration—a result in direct derogation of the legislative intent embodied in the amended version of section 3-16-6.

III. APPLICATION

The foregoing analysis of the legislative intent and statutory language shows that there are problematic deficiencies in the supreme court's handling of the applicability question in *PUC*

[24]COLO. REV. STAT. ANN. § 3-16-6 (Supp. 1969) (emphasis added).
[25]Blevins v. Truitt, 134 Colo. 88, 90, 299 P.2d 1100, 1101 (1956).

and *North Kiowa*. Fortuitously, the procedural questions were not determinative of the outcome in either case. Indeed, if the issue were restricted solely to the substantive merit of the decisions, the overbroad language would pose no problem.[26] The question is rather the value of these two opinions as precedent on the more general issue of the APA's application where its procedures are to some degree paralleled in an organic statute.

A. PUC v. District Court

The organic statute[27] involved in *PUC* specifically incorporates the APA by reference; however, it also states that "where there is a specific statutory provision in this chapter applying to the commission such specific statutory provision shall control as to the commission."[28] Furthermore, section 115-6-15(4) provides that "[n]o court of this state, except the district court *to the extent specified*, shall have jurisdiction to review . . . or to enjoin, restrain, or interfere with the commission in the performance of its official duties . . . ."[29] A closer examination shows that the procedures in sections 115-6-14 to -16 pertaining to judicial review of agency action are more detailed than those in most organic statutes. Indeed, the section in issue, 115-6-16(2), which provides for stays pending judicial review, contains procedures more detailed than those found in section 3-16-5(5) of the APA.[30] The more detailed provisions in the organic statute should obviously control in this case.

Still, the court's sweeping exclusion of the APA, however specifically detailed the PUC's organic procedures may be in some respects, fails to give the problem the particular analysis it needs. Because the specific conflicts are not recited, the standard

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[26]In *PUC* it was held that Sentry Services, Inc. lacked standing because it was not a "person" aggrieved by possible self-incrimination, the fifth amendment right being inapplicable to a corporation. The PUC's order to produce records was upheld and the district court was prohibited from staying it. Application of the APA's procedures would have had no effect on this outcome. Likewise, in *North Kiowa* the holding that the review provisions in the Ground Water Management Act applied only to rulemaking by the districts and that review of individual adjudications should be in the district courts would be unaffected by the APA.

[27]COLO. REV. STAT. ANN. §§ 115-6-1 to -21 (Supp. 1969), *amending* COLO. REV. STAT. ANN. §§ 115-6-1 to -21 (1963).

[28]COLO. REV. STAT. ANN. § 115-6-1(1) (Supp. 1969).

[29]*Id.* § 115-6-15(4) (emphasis added).

[30]COLO. REV. STAT. ANN. § 3-16-5(5) (Supp. 1969). The organic statute adds the requirement of a hearing upon 3 days' notice. COLO. REV. STAT. ANN. § 115-6-16(2) (Supp. 1969).

"specifically detailed" remains vague and without content, potentially subject to misuse in cases where the organic procedures are not as comprehensive. In short, the court should have limited its holding to the particular sections involved and itemized the detailed requirements in the organic statute which make it exclusively controlling.

B. North Kiowa-Bijou Management District v. Ground Water Commission

The *North Kiowa* case substantiates the potential for misuse inherent in the sweeping standards the supreme court has articulated. It also provides a good example of the possible uses of the APA that would be lost thereunder. In *North Kiowa* the court's analysis of the applicability problem is limited to one summary paragraph where the APA is dismissed because the Ground Water Management Act provides "a comprehensive scheme for administering the provisions of that article."[31] The specific statutory provision which would now control the disposition of the case on remand, however, is far from comprehensive and, as a solution to the problem of the applicable form of judicial review, it leaves many questions unanswered.[32] It provides in pertinent part, "Any person aggrieved by an act of the district board . . . may appeal the same to a court of competent jurisdiction within thirty days of said decision."[33] When compared to section 3-16-5 of the APA only one actual "conflict" appears and that is the provision which provides 60 as opposed to 30 days in which an appeal can be brought.[34]

There exist, then, large areas where the organic statute is silent, but where the APA details the necessary procedures. The obvious proposition in a situation such as this is that the APA should be used to fill in gaps in the procedures outlined in the organic statute; in other words, the APA should be accorded the status of a procedural supplement. For example, the APA, if applied, could take care of such potentially difficult problems as

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[31]505 P.2d at 380.

[32]In fact the original statute was silent on this point, a circumstance which brings into question the validity of the "comprehensive scheme" test the court used to exclude the APA. The court seems in reality to have been acknowledging an after-the-fact amendment to the organic statute [COLO. REV. STAT. ANN. § 148-18-30(1) (Supp. 1971)] which did provide for review in the district court. Interview with John Maley, attorney, in Denver, Colorado, June 12, 1973.

[33]COLO. REV. STAT. ANN. § 148-18-30(1) (Supp. 1971).

[34]COLO. REV. STAT. ANN. § 3-16-5(4) (Supp. 1969).

what constitutes the record on review, the scope of review, and the procedures necessary to stay action pending review, among others.[35]

Using virtually indistinguishable standards—"specifically detailed" and "comprehensive scheme"—the supreme court has excluded the APA in two vastly dissimilar statutory contexts (compare the specificity of the review procedures in *PUC* with the mere outline in *North Kiowa*). The court's opinions seem more a judicial flex of old muscle in the form of familiar rules of statutory construction than an accurate reading of the statute as it now stands. The mere existence of parallel procedures in a specific statute seems to preclude any consideration of the statutorily required "conflict." Thus, neither opinion offers a functional construction of the amended language of section 3-16-6. The court's handling of the issue is an invitation to arbitrary and, given the judicial predisposition, limited application of the code.

CONCLUSION

Employment of all possible procedural guides within the APA will, of course, not be necessary in every case. In some instances the scheme provided in an organic statute will prove entirely sufficient.[36] The important practical result of giving the APA wider application is that the more comprehensive provisions are there if needed; moreover, there is also a far-reaching policy dividend in that the APA procedures will come closer to being the standard than they now are. Thus, the APA's use and hence its value can increase if a broadening interpretation is given to the new conflict requirement. Implicit in this goal is the imperative that the judicial branch recognize, insofar as the applicability of the APA is concerned, that the *North Kiowa* and *PUC* opinions must be recast as soon as a suitable opportunity presents itself.

The thrust of the 1969 amendment to section 3-16-6 was to expand the APA's applicability and use. The statutory conferral of concurrent jurisdiction joins with the logical meaning of the language, as well as the expressed intention of its author, to argue persuasively for that result. Therefore, as a rule, coexisting procedures in the APA and organic statutes should jointly apply in all instances. Where there is conflict the organic statute should con-

[35] *Id.* § 3-16-5.

[36] The review provisions in the organic statute of the PUC come immediately to mind as one example. COLO REV. STAT. ANN. §§ 115-6-1 to -21 (Supp. 1969).

trol, but only to the extent of the conflict. Where the organic statute is silent the APA should supplement it. To this end, the conflict requirement should be interpreted narrowly to mean actual, specific conflict. If so construed, section 3-16-6 will allow specialized organic procedures to coexist usefully with the more general provisions of the APA and, when forced to choose between them, the Colorado practitioner will have a guideline rather than a dilemma.

William M. Clowdus

COMMENT

TORTS—RELEASE—Release of One Tort-Feasor Not a Release of Others When Tort-Feasors Are Independent and Successive *Sanchez v. George Irvin Chevrolet Co.*, 31 Colo. App. 320, 502 P.2d 87 (1972).

INTRODUCTION

The legal consequence that inheres in finding two or more wrongdoers to be joint tort-feasors[1] has long been a vexatious area for the courts and a popular topic for legal writers. Once "jointness" is established, any or all of the following ramifications may ensue: (1) joinder of defendants in the same action is possible; (2) each wrongdoer is liable for the entire damages of the injured party; (3) satisfaction of a judgment against one releases all; (4) no contribution is permitted between the joint tort-feasors (unless changed by statute); or (5) a release of one releases all.[2] This last result, the effect of a release, has experienced a particularly agonizing evolution in this country. The relatively harsh common law rule which required that a release of one joint tort-feasor was a release of all[3] has been attacked, modified, and finally, in great part, abrogated in favor of a seemingly more just rule.

According to Dean Prosser, a release is "*a surrender of the cause of action*, which may be gratuitous, or given for inadequate consideration."[4] This definition itself has contributed to some of the problems with the law of releases.[5] Where there are multiple wrongdoers and the victim's cause of action is "extinguished," *i.e., surrendered*, by the release of one, a doctrinaire jurist, historically, would have a difficult time letting the plaintiff proceed with his case when theoretically it had virtually disappeared into thin air.

This comment reviews the evolution of the law of releases in Colorado and examines what appear to be contradictory developments in analogous situations: Colorado's abrogation of

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[1]Prosser, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413 (1937).

[2]*Id.* at 422-25.

[3]*See, e.g.*, Morris v. Diers, 134 Colo. 39, 42, 298 P.2d 957, 959 (1956); Pinkham Lumber Co. v. Woodland State Bank, 156 Wash. 117, 131, 286 P. 95, 100 (1930); 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 10.1, at 711 (1956); W. PROSSER, LAW OF TORTS § 49, at 301 (4th ed. 1971).

[4]W. PROSSER, *supra* note 3 (emphasis added).

[5]*Id.* at 301-03.

the common law rule of releases in *Sanchez v. George Irvin Chevrolet, Inc.*,[6] contrasted with its continued application of the common law rule in recent cases of medical malpractice.

I. COMMON LAW DEVELOPMENT

As mentioned above, the effect to be given a release where there are joint tort-feasors has not escaped theoretical confusion. The common law rule was based, in part, on the notion that since there was but a single cause of action against both tort-feasors, a release as to one of them extinguished the cause of action itself and necessarily protected the others.[7] Although the elements of jointness never seem to have been too clear, once the label was attached the courts have had no difficulty reaching a conclusion. The potential for hardship is apparent. Any time the unwitting victim of multiple wrongdoers released one of them for what seemed to him to be a roughly pro-rata share of his damages, the victim later discovered that he was foreclosed from collecting the balance of his damages from the other wrongdoers.

The courts have justified the common law rule with such legal flyswatters as proximate cause,[8] avoidance of double recovery by greedy plaintiffs,[9] the single cause of action fiction,[10] and others. Fortunately, the common law rule has been discarded to a great extent in most jurisdictions by statutes abolishing or severely weakening the common law rule,[11] by considering the intent of the parties, regardless of the form of the instrument,[12] and by construing what appears to be a release as a covenant not to sue.[13]

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[6]31 Colo. App. 320, 502 P.2d 87 (1972).

[7]*See, e.g.*, Cocke v. Jennor, 1614 Hob. 66, 80 Eng. Rep. 214, 215 (K.B. 1614); Duck v. Mayeu, [1892] 2 Q.B. 511, 513; W. PROSSER, *supra* note 3; Annot., 73 A.L.R.2d 403, 407 (1960).

[8]*See, e.g.*, Poltera v. Garlington, 489 P.2d 334, 335 (Colo. Ct. App. 1971), *cert. denied*, Oct. 26, 1971 (not selected for official publication).

[9]*See, e.g.*, Lamoreux v. San Diego & Ariz. E. Ry., 48 Cal. 2d 617, 624, 311 P.2d 1, 5 (1957) (dictum).

[10]*See* note 7 *supra*.

[11]*See, e.g.*, N.Y. GENERAL OBLIGATIONS LAW §§ 15-101 to -107 (McKinney 1964); N.D. CENT. CODE §§ 32-38-01 to -04 (1960); Baer, *Effect of Release Given Tortfeasor Causing Initial Injury in Later Action for Malpractice Against Treating Physician*, 40 N.C.L. REV. 88 (1961); *see also* 12 VAND. L. REV. 1414, 1416 n.9 (1959) for a list of jurisdictions with such statutory enactments.

[12]*See, e.g.*, Jukes v. North American Van Lines, Inc., 181 Kan. 12, 20, 309 P.2d 692, 699 (1957); Gronquist v. Olson, 242 Minn. 119, 125, 64 N.W.2d 159, 164 (1954); *see also* Annot., 73 A.L.R.2d 403, 425 (1960) for a collection of cases on this point.

[13]McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943); Breen v. Peck, 28 N.J. 351, 358-

The strict common law rule and the seemingly protracted period of change can be attributed, at least in part, to a rather serious and prolonged confusion in the courts between a release and satisfaction.[14] It is said that "[a] satisfaction is an acceptance of a full compensation for the injury."[15] As indicated above, a release could be gratuitous or given for inadequate consideration.[16] A release, therefore, did not necessarily mean the claimant was satisfied in fact, but since a release at common law was a sealed instrument which, by definition, dispelled any questions as to the adequacy of the consideration,[17] the courts mistakenly considered a release to be for full compensation.[18] Although the efficacy of the sealed instrument waned, the confusion in the courts persisted in the form of the so-called presumption of full satisfaction.

One of the simplest ways for the courts to avoid the common law rule is to find that the tort-feasors are independent, concurrent, successive, or any other similarly expressive classification other than joint. This avenue is appealing in that it circumvents the centuries of fictions and mysteries that have grown up around joint tort-feasors. Some courts have, in fact, made use of this distinction.[19] The simplicity of the logic is attractive, and, indeed,

> as to independent wrongdoers, not acting in concert, who were liable for the same loss, there seems to be no reason to conclude that a release of one would release the others, except insofar as it was based upon actual satisfaction of the claim.[20]

As attractive as this path is, it is not totally free from hazards. The obvious question is: Who are joint and who are independent tort-feasors? Harper and James feel that if construed strictly, "the words 'joint tort' should be used only where the behavior of two or more tort-feasors is such as to make it proper

59, 146 A.2d 665, 668-69 (1958). A covenant not to sue, unlike a release, does not release any of the tort-feasors. Instead of extinguishing the cause of action, it is an agreement not to enforce it against one or more of the wrongdoers; the cause continues to exist and is enforceable against the nonparty tort-feasors.

[14]W. PROSSER, *supra* note 3.

[15]*Id.*

[16]*See* text accompanying note 4 *supra*.

[17]S. WILLISTON & G. THOMPSON, SELECTIONS FROM WILLISTON'S TREATISE ON THE LAW OF CONTRACTS § 333A (Rev. ed. 1936).

[18]W. PROSSER, *supra* note 3.

[19]Panichella v. Pennsylvania R.R., 150 F. Supp. 79, 81 (W.D. Pa. 1957); Ash v. Mortensen, 24 Cal.2d 654, 657, 150 P.2d 876, 877 (1944); Valles v. Union Pac. R.R., 72 Idaho 231, 238-39, 238 P.2d 1154, 1159-60 (1951).

[20]W. PROSSER, *supra* note 3.

to treat the conduct of each as the conduct of the others as well."[21] In an early work,[22] Dean Prosser notes that there have been several tests for "jointness,"[23] but that the cases in which he found them "[lead] to the conclusion that 'joint tort-feasor' means radically different things to different courts, and often to the same court."[24] Although he may be correct, *his* conclusion can only lead to the *further* conclusion that to establish independence the practitioner's approach must be as broad-based as possible in order to square with the court's attitude on any given day. The most felicitous approach would seem to be an exclusionary one. Rather than casting about for a positive rule of law to show independence, one ought to guide the court in scrutinizing the actors under each of the traditional tests for jointness (concert of action, common plan, etc.) while pointing out the differences. The more tests the tort-feasors fail, the more likely independence will be conclusively established. Whatever the method, the literature taken as a whole shows a definitive trend away from the original common law rule in all jurisdictions, albeit to varying degrees.

II. COLORADO DEVELOPMENT

Colorado has been a long and faithful adherent to the common law rule that a release of one joint tort-feasor releases all.[25] In fact, in 1959, at the time when most other jurisdictions were in the process of reexamining the old rule,[26] the Colorado Supreme Court held, in *Price v. Baker*,[27] that a covenant not to sue had exactly the same effect as a general release and that it was the legal effect, not the intent of the parties, that was the control-

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[21]1 HARPER & JAMES, *supra* note 3, at 692.

[22]Prosser, *supra* note 1.

[23]They include:

> "[T]he identity of a cause of action against each of two or more defendants; the existence of a like, or common duty; whether the same evidence will support an action against each; the single, indivisible nature of the injury to the plaintiff; identity of the facts as to time, place and result; whether the injury is direct and immediate, rather than consequential; responsibility of the defendants for the same *injuria*, as distinguished from the same *damnum*."

Id. at 413.

[24]*Id.*

[25]Ashley v. Roche, 163 Colo. 498, 431 P.2d 783 (1967); Morris v. Diers, 134 Colo. 39, 298 P.2d 957 (1956); Sams v. Curfman, 111 Colo. 124, 137 P.2d 1017 (1943); Denver & R.G.R.R. v. Sullivan, 21 Colo. 302, 41 P. 501 (1895).

[26]*See* 12 VAND. L. REV. 1414 (1959) for a review of the various approaches.

[27]143 Colo. 264, 352 P.2d 90 (1959). *See also* 37 DICTA 121 (1960) and 33 ROCKY MTN. L. REV. 127 (1960).

ling element.[28] Recently, however, the Colorado courts have evinced a change of heart. In 1969, the supreme court finally gave credence to a covenant not to sue and began circumventing the common law rule by way of the "intent" approach.[29] Even more encouraging, the court has recently held that a written instrument whereby a plaintiff agrees not to object to the motion to dismiss of some of the defendants will not affect the plaintiff's rights as to the remaining tort-feasors, and the intent of the parties will be given the same effect *as if* it were a pure covenant not to sue.[30] This holding would seem to point toward adoption by the Colorado courts of the "construction of releases as covenants not to sue" approach; that is, construing an instrument, whatever its appearance, in such a way that the plaintiff's rights are most fully protected and preserved. Indeed, were it not for the medical malpractice situation where the Colorado courts have not budged,[31] they would appear to have joined the majority jurisdictions in the space of three or four short years. By examining a case which is representative of Colorado's attitude in many release situations, the inconsistency in the malpractice area becomes evident.

III. *Sanchez v. George Irvin Chevrolet*[32]

Rufina Sanchez, the plaintiff, bought a new car from the defendant, George Irvin Chevrolet. Under the terms of the contract, the defendant had agreed to secure insurance coverage for the plaintiff. When Mrs. Sanchez sought insurance payment through Irvin for a broken windshield she was informed that the defendant had failed to acquire coverage for her, and she was denied reimbursement for the loss. Shortly thereafter, Mrs. Sanchez' automobile was involved in a collision and her car was taken to the defendant for repairs. While the car was in the defendant's custody, the rear wheels and tires were stolen, and the windshield was broken again. The defendant completed repairs on the car but refused to return it to the plaintiff until the $954.46 bill (which included the cost of wheels and tires) was paid. The plaintiff was allegedly unable to pay the bill and was forced to rent a

[28]143 Colo. at 265, 352 P.2d at 91.

[29]Cox v. Pearl Inv. Co., 168 Colo. 67, 73-74, 450 P.2d 60, 67 (1969).

[30]Farmer's Elevator Co. v. Morgan, 172 Colo. 545, 474 P.2d 617 (1970).

[31]When the second tort-feasor is an allegedly negligent physician, the Colorado courts continue to hold that the release of the first wrongdoer thereby protects the doctor. Title v. Freed, 515 P.2d 1149 (Colo. Ct. App. 1973) (not selected for official publication); Poltera v. Garlington, 489 P.2d 334 (Colo. Ct. App. 1971) (not selected for official publication).

[32]31 Colo App. 320, 502 P.2d 87 (1972).

car. Three months later, Mrs. Sanchez settled with the owner-driver of the other car involved in the collision and signed a general release from liability in his favor. She subsequently paid the repair bill and recovered possession of her automobile. She then brought an action against the defendant to recover the amounts which she had paid for the stolen wheels and tires, the broken windshield, and the cost of the rental car on the basis of defendant's alleged negligence. On the defendant's motion, the trial court granted summary judgment as to all amounts except the cost of the original windshield on the grounds that the defendant was protected, as a matter of law, by the release of the earlier tort-feasor. However, the judgment was reversed and remanded by the Colorado Court of Appeals which held that, where a plaintiff's claim involves distinct and separate injuries caused by independent successive tort-feasors, a release of one tort-feasor does not serve to release all unless the evidence discloses an intent to do so.[33]

The court dealt first with *Sams v. Curfman*[34] and *Ashley v. Roche*,[35] on which the trial court relied in granting summary judgment. These cases involved original wrongdoers and subsequently negligent physicians responsible for aggravation of the victims' injuries. In both it was held that a general release as to the first tort-feasors shielded the doctor from liability. The theory was that the first tort-feasor was the proximate cause of the later aggravation, presumably because the result was reasonably foreseeable. From this the courts reasoned that once the injured party settled with the original wrongdoer, full compensation was presumed and there was no longer any cause for concern.[36] In *Sanchez*, the court pointed out that the presumption of full compensation, which in any event is rebuttable, did not come into play because of the nature of plaintiff's claim. The claim involved "distinct and separate injuries" caused by "independent successive tort-feasors."[37] The release, therefore, was effective only as to the first tort-feasor who was a party to it unless "the evidence discloses an intent to release both."[38]

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[33]*Id.* at 323, 502 P.2d at 89.
[34]111 Colo. 124, 137 P.2d 1017 (1943).
[35]163 Colo. 498, 431 P.2d 783 (1967).
[36]*See* text accompanying notes 7-10 *supra*.
[37]31 Colo. App. at 323, 502 P.2d at 89.
[38]*Id.*

The court next cited Prosser's law review article,[39] which had been quoted with approval in *Bayers v. W.O.W., Inc.*,[40] to introduce the element of actual satisfaction of the claim as the basis for a multiparty release[41] and in order to determine the "jointness" (or lack of it) of the actors.[42] Finally, after disposing of the major elements of the case, the court indicated that while a release such as the one here may be a defense at trial, it is not a bar to suit as a matter of law.

The reasoning and holding in *Sanchez* are sound, just, and not lacking in authority,[43] and the court's emphasis of the intent factor in the face of a general release is a proper and realistic approach. However, in distinguishing the instant case from *Sams*[44] and *Ashley*,[45] the court could have dealt more forcefully with the full compensation question. Rather than stating that the presumption of full compensation is a rebuttable one and not relevant to the *Sanchez* case (and thereby giving credence to its very existence), the court might have been a little less delicate, exposing the presumption as the fiction that it is and emphasizing the existence *vel non* of actual satisfaction from the outset. Instead, the court relied on the "independent successive" tort-feasors rationale found in *Ash v. Mortensen*.[46] This case does provide relevant language, but one wonders if the court was aware that *Ash* was a malpractice case, not unlike *Sams* and *Ashley*. The law review quotations are undoubtedly valid and appropriate, with the exception that in the first-quoted material the author is talking about wrongdoers liable for the same loss and the court had just determined that *Sanchez* involved separate and distinct injuries. Although it is possible to quibble with these citations, the court eventually reaches what seems to be the right result. Indeed, had the opposite result been reached, "the repairman not only is excused from negligence, he also has *a license to*

[39]Prosser, *supra* note 1.

[40]162 Colo. 391, 396, 426 P.2d 552, 555 (1967).

[41]*Id.* at 396, 426 P.2d at 555 (1967). " '[A]s to independent wrongdoers, not acting in concert, who were liable for the same loss, there seems to be no reason to conclude that a release of one would release the others, except in so far as it was based upon actual satisfaction of the claim.' " *Id.*

[42]" 'The question is whether, upon the facts, it is possible to say that each defendant is responsible for a separate portion of the loss sustained.' " *Id.*

[43]*See generally* W. PROSSER, *supra* note 3.

[44]111 Colo. 124, 137 P.2d 1017 (1943).

[45]163 Colo. 498, 431 P.2d 783 (1967).

[46]24 Cal. 2d 654, 657, 150 P.2d 876, 877 (1944).

steal because the release of the original tort-feasor follows his every act."[47]

IV. THE ANALOGY TO MEDICAL MALPRACTICE

In Colorado, a release of one joint tort-feasor still releases a subsequent tort-feasor who is not a party to the release if he is an allegedly negligent physician.[48]

The policy considerations in favor of abrogation of the common law rule in this area, besides the generally unjust and unintended result it effects, are numerous and sound. The rule has been severly criticized as harsh, unfounded, and not in accord with the trend in other jurisdictions.[49]

It has been aptly pointed out that the old rule (1) provides a trap for the innocent plaintiff whereby he may be deprived of full compensation, (2) allows the courts to disregard totally the language and intent of the parties, (3) rewards the wrongdoer who makes no attempt to settle at the expense of the one who does, (4) gives tort-feasors an advantage inconsistent with the nature of their liability, and (5) stifles compromise since each wrongdoer wants to wait until the other settles first.[50]

When the current trend in other jurisdictions, Colorado's avowed denial of that trend, and the *Sanchez* case are considered together, one begins to wonder if, on its facts, *Sanchez* is really very different from malpractice cases like *Poltera v. Garlington*[51] and *Title v. Freed*.[52] Arguably not. In *Sanchez*, there is an original tort-feasor who actually inflicted the initial damage (injury). There is a person (doctor), corporate here, to whom the automobile (victim) was taken for repairs (treatment). In the course of that repair, certain mistakes are made through the repairman's

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[47]Brief for Appellant at 6, Sanchez v. George Irvin Chevrolet Co., 31 Colo. App. 320, 502 P.2d 87 (1972) (emphasis added).

[48]Title v. Freed, 515 P.2d 1149 (Colo. Ct. App. 1973) (not selected for official publication); Poltera v. Garlington, 489 P.2d 334 (Colo. Ct. App. 1971) (not selected for official publication).

[49]DeNike v. Mowery, 69 Wash. 2d 357, 418 P.2d 1010 (1966); Annot., 40 A.L.R.2d 1075 (1955) (as supplemented); Note, *Smith v. Conn: Effect of Release of Original Tortfeasor as to Subsequently Negligent Physician*, 6 WILLAMETTE L.J. 335 (1970); Comment, *Torts: Release of Joint and Successive Tort-Feasors in Oklahoma*, 15 OKLA. L. REV. 97 (1962).

[50]McKenna v. Austin, 134 F.2d 659, 662 (D.C. Cir. 1943) (not a malpractice case but involving identical policy considerations).

[51]489 P.2d 334 (Colo. Ct. App. 1971) (not selected for official publication).

[52]515 P.2d 1149 (Colo. Ct. App. 1973) (not selected for official publication).

(doctor's) negligence resulting in further loss to the plaintiff.[53]

In *Poltera*, the plaintiff sustained personal injuries as the result of an automobile collision. During the pendency of legal proceedings against the original tort-feasor, the plaintiff was examined by a physician at the request of the first wrongdoer and his insurer. After settling with the original tort-feasor, the plaintiff sought relief against the physician for his alleged negligence. The Colorado Court of Appeals held, in response to plaintiff's appeal from an adverse summary judgment at the trial court, that plaintiff's action was indeed barred as a matter of law:

> The law is settled in this jurisdiction that, where a person accepts a settlement for injuries with the tort-feasor who caused the accident resulting in his or her disability and executes a formal release from any and all causes of action, claims and demands, damages and expenses growing out of that accident, that person cannot thereafter recover from a physician for damages resulting from the alleged negligent treatment of those injuries. The rationale upon which this rule rests is that the original injuries are held to be the proximate cause of the additional damages which result from the purported negligence of the physician against whom recovery is sought.[54]

The court of appeals expressed the identical attitude in *Title*. In that case, the plaintiff suffered skull injuries in an automobile accident. Five days after the defendant-surgeon operated on the plaintiff, the plaintiff lost the use of his left arm. Later the plaintiff settled with the party responsible for the automobile accident and executed a general release. When the plaintiff appealed from an adverse summary judgment in his action against the doctor, the Colorado Court of Appeals, in affirming, stated:

> Under these facts *Ashley v. Roche* . . . and *Sams v. Curfman* . . . are controlling. In the latter case a party injured in an accident sued the tortfeasor, settled the case, executed a general release, and then sued the physician for alleged negligence in his treatment of the resultant injuries, all as in the present case. The Supreme Court affirmed the trial court's dismissal of the action on the ground that the release given in the first action released the physician because,

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[53]To some, the analogy may be weakened by the fact that the negligent doctor has personally committed a physical act that has aggravated the injury while the repairman, in a custodial capacity, has failed to act, leading to further damage. This will not be so troublesome to the reader who considers the defendant as the law does, as a corporate "person," and notes that the similarities in the fact situations far outweigh any possible differences.

[54]489 P.2d at 335, *citing* Ashley v. Roche, 163 Colo. 498, 431 P.2d 783 (1967), and Sams v. Curfman, 111 Colo. 124, 137 P.2d 1017 (1943).

> "the original injuries are held to be the proximate cause of the added damages resulting from the negligence and unskillfulness of the attending physician."[55]

These analyses, based on proximate cause, are typical of those used by courts applying the old common law rule. Their use seems dangerous in the law of releases,[56] and any such unfortunate theory[57] ought to be used only where nothing else is available.[58] Rather than diving headlong into the quagmire of proximate cause, one question most effectively answers the conflict better than volumes of precedent: Is it really more reasonably foreseeable that a physician, with years of formal education and training, will be more unskilled and negligent than an automobile body shop? Framed in this manner, the conflicting results in the cases are hard to reconcile. The visceral reaction in favor of abrogation of the common law rule is strong indeed, but there are other, more persuasive, arguments for an extension of *Sanchez* to the *Poltera* and *Title* situations.

As has been shown, Colorado has broken with the common law rule that a release of one joint tort-feasor releases all. This jurisdiction seems to be leaning towards abolishing the *Poltera* rule, but, to date, the development away from the old rule has taken place in fact situations with which the courts could cope.[59] Stating that the traditional rule has absolutely no efficacy may be too dramatic a step for the Colorado courts to take, but they may not have to do exactly that. *Ash v. Mortensen*[60] was used by the *Sanchez* court to arrive at the conclusion that they were dealing with independent and successive tort-feasors and separate and distinct claims.[61] In *Ash*, the plaintiff's injuries were aggravated by a negligent physician and the plaintiff had released the

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[55]515 P.2d at 1150.

[56]Both counsel in *Sanchez* relied heavily on *Poltera* in their briefs to the court of appeals. The trial court relied on two malpractice cases in granting the summary judgment. It is quite possible that if the malpractice cases are allowed to remain on the books their inevitable use in other fact situations might well lead to a revival of the old common law rule in cases that, to date, have denied its efficacy.

[57]*See* W. PROSSER, *supra* note 3, at 236 for an introduction to the nightmare of proximate cause.

[58]*E.g.*, Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

[59]Cox v. Pearl Inv. Co., 168 Colo. 67, 450 P.2d 60 (1969), and Bayers v. W.O.W., Inc., 162 Colo. 391, 426 P.2d 552 (1967) (both dealing with financial loss to the plaintiff); Sanchez v. George Irvin Chevrolet Co., 31 Colo. App. 320, 502 P.2d 87 (1972) (involving property damage).

[60]24 Cal.2d 654, 150 P.2d 876 (1944).

[61]31 Colo. App. at 323, 502 P.2d at 89.

original tort-feasor. When the physician attempted to use that release as a defense, he was thwarted in his effort by the California court finding independence of the wrongdoers and holding the release to be effective only as to the original tort-feasor. The fact that the *Sanchez* court relied heavily on a malpractice case, totally inconsistent with Colorado's own malpractice cases, together with the fact that the Colorado Supreme Court cited *Ash* with approval in another recent release case[62] may well be the ultimate bridge in the gap between the last vestiges of the common law rule in Colorado and a modern realistic approach to releases. That is, in the next *Poltera* or *Title*, the Colorado courts can either flatly deny the efficacy of the common law rule or, if they prefer, find that it does not apply because the tort-feasors are not joint. In terms of "jointness" in malpractice cases like *Poltera* and *Title*, the problem of separability or inseparability of the injury[63] may often arise. It may well be a hard factual question, but it should not, as a matter of law, lead to "jointness" and its unjust consequences.[64] Likewise, with regard to the old common law rule itself, since the identity of cause of action fiction can be easily avoided by the technically unique (but practically identical) covenant not to sue,[65] its continued efficacy as a bar to recovery in the area of releases seems at best a minor obstacle to a new rule in Colorado.

CONCLUSION

Common sense, reported cases, and legal writers accurately point out that the vital elements in any release situation are the intent of the parties and the extent of actual compensation.[66] A plaintiff should never be barred from pursuing a second tort-feasor by a release of the first unless, by the instrument, he intended to release both or he has been so fully compensated for his injury that he ought not to be entitled to do so. The use of *Ash* by the Colorado courts more likely represents thorough analysis and thoughtful study of a sister state's precedent than an inad-

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[62]Bayers v. W.O.W., Inc., 162 Colo. 391, 396, 426 P.2d 552, 555 (1967).

[63]Prosser, *supra* note 1.

[64]*Id.* at 434-35.

[65]Comment, *Release of Joint Tort-Feasors in Texas*, 36 TEX. L. REV. 55, 56 (1957).

[66]*See, e.g.*, Justice Rutledge's excellent opinion in McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943); Wecker v. Kilmer, 294 N.E.2d 132 (Ind. 1973) (a malpractice case); Annot., 40 A.L.R.2d 1075, 1084 (1955); 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 10.1 (1956); W. PROSSER, *supra* note 3, at 304; Note, *supra* note 49; Comment, *supra* note 49, at 99; 3 WASH. & LEE L. REV. 151 (1941).

vertent extraction of appropriate language from a case in direct conflict with *Poltera*. Since *Poltera* was not selected for official publication, it is persuasive precedent only[67] and is not, therefore, too great a barrier in itself, to a new rule. If the rights of personal injury victims are to be as fully preserved and protected as the plaintiff's in *Sanchez*, and if medical practitioners are to be held accountable for their negligence, hopefully, at the next opportunity, the Colorado courts will finally lay to rest the problem raised here. Until that time, the only safe route for the cautious practitioner seeking to fully protect his client's rights is to have the victim execute a covenant not to sue[68] in favor of the settling tort-feasor evidencing a clear intent to benefit only that party and specifically exempting any treating physicians from its coverage. Such a procedure, requiring technical accuracy by the well-advised plaintiff and holding great potential injury for the ill-advised, provides a possible escape from the harsh common law rule of releases, but, in failing to repudiate the common law rule completely, lays an unjustified and unfortunate trap for the unwary.

Daniel M. Fowler

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[67]COLO. APP. R. 35(f).

[68]Cox v. Pearl Inv. Co., 168 Colo. 67, 450 P.2d 60 (1969); Title v. Freed, 515 P.2d 149 (Colo. Ct. App. 1973) (not selected for official publication).

BOOK REVIEW

A TREATISE ON INTERNATIONAL CRIMINAL LAW
VOLUME I: CRIMES AND PUNISHMENT
VOLUME II: JURISDICTION AND COOPERATION
BY M. CHERIF BASSIOUNI AND VED P. NANDA

Springfield, Illinois: Charles C. Thomas, 1973. Volume I: Pp. xxv, 751; $26.50 (cloth), $19.75 (paper). Volume II: Pp. xix, 426; $19.75 (cloth), $15.95 (paper).

It is only once in a while that a legal treatise appears which is acknowledged as a truly masterful compilation in one area of the law. Such a book is *A Treatise on International Criminal Law*. The work is a daring and critical search to unravel the intricacies of international criminal law as it presently exists and to probe into its likely future development. In form, the book is a series of contributed articles by internationally renowned scholars, edited by the authors of the *Treatise* and followed by appended documents. Each chapter explores a given aspect of international criminal law from a historical and juridical perspective. In addition, each chapter includes relevant treaties and documents, and draft treaties, proposed statutes, and other recommendations for change.

Since in a short review it is impossible to do justice to the breadth of the topics and the richness of the material presented in these two volumes totaling 1221 pages, only a few general comments will be made here.

Perhaps the most noteworthy characteristic of the book is that it seeks to develop a wholly new discipline. While the current limitations of international law in dealing with international criminal conduct are duly recognized, the book breaks new ground in offering viable alternatives on national, regional, and international levels. Compared with most prior works on the subject which are often plagued by narrowly circumscribed parochial and nationalistic approaches and are consequently of little universal appeal, this treatise is truly international in scope—it contains contributions from 51 internationally renowned authors representing more than 20 countries and almost all the major legal systems and ideologies in the world.

Obviously, the question of controlling international criminality has been thrust into the forefront of political and legal thinking primarily because of the recently manifested worldwide concern with terrorism and international traffic in narcotics. The

acceptance that international crime consists of offenses committed against mankind has led to the recognition of the priority of preserving minimum world order and the necessity of controlling conduct contrary to the common interest of the world community. The authors make a significant contribution by discussing each area of international criminal activity separately, identifying major problem areas, and offering a viable control system for such activity. Additionally, they make useful suggestions to clarify several ambiguous concepts of international law, such as "aggression," "armed conflict," and "terrorism."

Although the idea of controlling international criminal conduct by the establishment of an international court is not a novel one, the authors have made this seem plausible by the delineation of specific offenses, such as air and sea piracy, unlawful use of certain weapons, international sale of narcotics, kidnapping diplomats, theft of art treasures, and certain common crimes presently grouped under the uneasy label of terrorism. The authors also offer other proposals which show promise of implementation. The possibility that a system for controlling international conduct could be devised and effectuated indicates the birth of a new era of international juridical cooperation. The *Treatise* seeks to usher in this new era, with sensitivity and regard for the ideas and values of all peoples who share the common goal of world public order.

The two volumes are organized on the basis of a continuum of responsibility from the state to the individual. *Volume I* seeks to ascertain and define for each crime who the participants are, what the potential scope of their culpability is, and how each crime is juxtaposed with defenses that may arise, depending upon the actual role of the participants. By taking this approach, the authors have taken another step in removing the barriers to the creation of a viable international criminal law. Hopefully the book and the ideas it contains will form the basis of seminars and courses in international criminal law, which at present are being offered at only a few law schools.

Volume II includes treatment of topics such as extradition and asylum, theories of jurisdiction, conflict of laws, and judicial cooperation in penal matters. Individual and state accountability for war crimes and crimes against humanity is examined. A comparative study of the conflict of laws in international and municipal criminal law is undertaken with reference to both Western and Socialist countries. Also, the subject of judicial assistance

and cooperation in penal matters is discussed with reference to conceptual differences between civil and common law countries.

The last part of *Volume II* deals with extradition and asylum. The authors point to major problems in these areas, for instance, the paucity of workable and binding extradition treaties regarding the surrender of international and national criminals, the rigid nature of the agreements that do exist, and the excessive procedural requirements contained in those agreements. These problems are treated in conjunction with the chronically insoluble issue of dealing with the ideologically motivated offender. Here, the interplay is recognized between and among the competing considerations of political justifications and expediency, the need to punish offenses and not persons, basic human rights in the treatment of ideologically motivated individuals, and the delicate balance between public order and the freedom of expression. While avoiding the luxury of lengthy philosophical rhetoric, the authors allow the reader to appreciate these competing values through logical and comprehensive factual analysis.

Regarding judicial assistance, the thesis of the authors is not a simplistic plea for cooperation, but rather a meticulous analysis of the cooperative system now extant in the international legal structure. Typical of the problems in this area is the Benelux Treaty, the product of the Benelux Commission, which took 14 years to be ratified by 3 states and 5 more years to bring into force an agreement among homogeneous and friendly nations. While the authors feel that this treaty may "open the road" to more enlightened international criminal law, the road is, as their own studies show, replete with problems. An equally fine treatment of the international recognition of penal judgments is undertaken, carefully analyzing the consequences of such recognition on the domestic laws of various member nations.

These two volumes encompass the objective structure of international criminal law with a precision and clarity not found elsewhere. The comprehensive documentation and a penchant for detail make this work an invaluable aid for practitioner and academician alike. The editors have succeeded in their efforts to present a logical and cogent analysis of international criminal law.

The traditionally abstract and esoteric approach usually associated with the writing in this field is pleasantly replaced in this book by a lucid examination of the rights and obligations of defined juridical personalities, such as the individual and the corporation. In particular, these rights are superimposed on a structure

of international conflict-of-laws issues, giving rise to a workable framework for discussing and analyzing the rights of an individual entity. Various arenas in which these rights may be exercised are identified. For instance, while activities in ocean space and outer space are discussed, several articles deal with activities taking place within a nation-state. Thus, there is a constant awareness of the interface between international regulation and intrastate regulation and the delicate balance existing between the two. It becomes clear that the protection of rights and the enforcement of obligations is not a matter of exclusive nation-state or international jurisdiction, but rather a blending of the two.

Professors Bassiouni and Nanda deserve credit for the production of this treatise which is not only a first of its kind, but also promises to be a highly influential work in this field of growing importance.

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