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## Case Comments

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## CASE COMMENTS

### EMPLOYMENT DISCRIMINATION LAW—*TRIGG v. FORT WAYNE COMMUNITY SCHOOLS*: STATE EMPLOYEE DISCRIMINATION CLAIMS—IS THE CONFLICT BETWEEN TITLE VII AND SECTION 1983 RESOLVED?

By enacting the Equal Employment Opportunity Act of 1972 (EEOA),<sup>1</sup> Congress amended the Civil Rights Act of 1964<sup>2</sup> and extended its protection against employment discrimination to federal, state, and local government employees. Congress intended that Title VII<sup>3</sup> of the Civil Rights Act should not preclude a claimant from pursuing alternative statutory remedies against a private employer.<sup>4</sup> Congress did not specify, however, whether the EEOA precluded federal, state, and local government employees from pursuing alternative statutory remedies.<sup>5</sup> In interpreting the EEOA, courts are divided on whether Title VII provides the exclusive employment discrimination remedy for state and local government employees.<sup>6</sup>

In *Trigg v. Fort Wayne Community Schools*,<sup>7</sup> the United States Court of Appeals for the Seventh Circuit addressed the relationship between Title VII and section 1983 of Title 42 of the United States Code<sup>8</sup> in a claim brought by a state employee. Under section 1983, the relief available to a claimant exceeds Title VII's limited remedial scope.<sup>9</sup> Furthermore, claims brought under section 1983 are not subject to the rigorous administrative machinery through which Title VII claims must proceed.<sup>10</sup> In holding that the state employee was not limited to Title VII in seeking relief from employment discrimination,<sup>11</sup> the Seventh Circuit took a position disputed by some courts.<sup>12</sup>

Part I of this comment compares the remedial and procedural aspects of Title VII and section 1983. Part II then outlines the varying interpretations of Title VII's exclusivity through an analysis of

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1 Pub. L. No. 92-261, 86 Stat. 103 (1972) (codified as amended at 42 U.S.C. § 2000e-1 to -17 (1981)).

2 Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified in scattered sections of 5, 28, & 42 U.S.C.).

3 Civil Rights Act of 1964, tit. 7, 42 U.S.C. § 2000e-1 to -17 (1981).

4 See note 49 *infra*.

5 *Id.*

6 See notes 88-92 *infra* and accompanying text.

7 766 F.2d 299 (7th Cir. 1985).

8 See notes 13-32 *infra* and accompanying text.

9 See notes 31-32 *infra* and accompanying text.

10 See notes 17 and 25 *infra*.

11 *Trigg*, 766 F.2d at 302.

12 See notes 91-92 *infra* and accompanying text.

relevant Supreme Court decisions. Next, Part III analyzes the *Trigg* holding and explores the reasoning of the Seventh Circuit. Finally, Part IV applies the alternative theories of Title VII's exclusivity to the two major fact situations where this question arises: (1) when an employer's actions violate both Title VII and constitutional rights; and (2) when a course of conduct infringes only Title VII rights.

### I. A Comparison of Title VII and Section 1983

Both section 1983 and Title VII provide remedies for discrimination in employment. These two statutes differ, however, in regard to procedural steps, burdens of proof, statutes of limitation, and remedies available. This part outlines the scope and requirements of these statutory provisions and how the two statutes differ.

#### A. Title VII

Congress enacted Title VII<sup>13</sup> to prohibit discriminatory employment practices based on race, color, religion, sex, or national origin.<sup>14</sup> The Equal Employment Opportunity Commission (EEOC) has the power to investigate discrimination charges, to seek voluntary compliance through conciliation, and to institute civil actions to enforce Title VII's provisions.<sup>15</sup>

Title VII also grants individuals substantive rights.<sup>16</sup> For an individual to bring suit under Title VII, however, he must first exhaust the Act's administrative requirements.<sup>17</sup> Moreover, Title VII has burden of proof requirements based upon alternative theories of "disparate impact" and "disparate treatment."<sup>18</sup> Under the disparate impact theory it is not necessary to show intent.<sup>19</sup> The disparate treatment theory, on the other hand, requires proof of

13 See note 3 *supra*.

14 Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2 (1981).

15 42 U.S.C. § 2000e-5(a) (1981).

16 See 42 U.S.C. § 2000e-2 to -3 (1981).

17 See 42 U.S.C. § 2000e-5(b)(f) (1981) which dictates that an aggrieved party must file a charge with the EEOC within 180 days. The EEOC must then investigate the claim. 42 U.S.C. § 2000e-5(b) (1981). If the EEOC finds reasonable cause for the charge, it pursues conciliation through conference. *Id.* If these efforts fail, the EEOC notifies the complainant of his right to sue in a federal court. 42 U.S.C. § 2000e-5(f) (1981). In addition, the EEOC may recommend to the Attorney General that he bring suit. 42 U.S.C. § 2000e-6(f) (1981).

18 See, e.g., *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (two types of Title VII claims: "(1) disparate treatment which is intentional discrimination, and (2) disparate impact which is the use of neutral rules that have a disproportionate impact upon a protected group.").

19 See *id.* See also *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (rules having a disproportionate impact are illegal unless justified: "Under the Act, practices, procedures,

discriminatory intent. Courts, however, imply such intent from circumstantial evidence.<sup>20</sup>

Title VII provides plaintiffs injunctive relief and back pay for a

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or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to freeze the status quo of prior discriminatory employment.”).

A plaintiff can establish a prima facie case of discrimination under the disparate impact theory by showing that the standard, policy, or practice alleged operated in a discriminatory manner. For an example of a prima facie case of disparate impact, see *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 426 (1975) (plaintiff must show facially neutral policy excludes members of Title VII protected class). A plaintiff may establish a prima facie case by showing that a policy operates to exclude a protected class at a markedly disproportionate rate. See *Connecticut v. Teal*, 475 U.S. 440 (1982); *Griggs*, 401 U.S. 424. But see *EEOC v. Greyhound Lines, Inc.*, 635 F.2d 188, 191-92 (3d Cir. 1980) (no-beards rule excluded many blacks but was inadequate proof of disproportionate exclusion).

The defendant-employer may rebut a prima facie case by demonstrating that the policy is “job related.” See *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 n.13 (1979) (employer must show its rule is a means which significantly serves its goal). See also *Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361 (4th Cir. 1980) (neutral rule must accomplish such an important end that it justifies a disproportionate impact); *Robinson v. Lorillard Co.*, 444 F.2d 791, 798-99 (4th Cir. 1971) (important business goal must be shown, not simply any goal).

The plaintiff, however, can prevail over the defendant’s rebuttal by showing that the employer’s goals can be served by a less discriminatory means. For examples on how to prove “less drastic means” in plaintiff’s response to defendant’s successful rebuttal, see *Pegues v. Mississippi S.E.S.*, 699 F.2d 760, 773 (5th Cir. 1983); *EEOC v. Ball Corp.*, 661 F.2d 531, 541-42 (6th Cir. 1981); *de Laurier v. San Diego Unified School Dist.*, 588 F.2d 674, 676 (9th Cir. 1978).

20 See *Teamsters*, 431 U.S. at 335 n.15. The requirements to establish a prima facie case of disparate treatment were given in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1972). They are used as a tool to search for intent. However, “the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.” *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). See generally *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577-78 (1978); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Coates v. Johnson & Johnson*, 756 F.2d 524, 530-31 (7th Cir. 1985). In *McDonnell Douglas*, 411 U.S. at 802-04, the Court set forth a three-part approach:

First, the plaintiff must prove four factors: (1) he belongs to a racial minority; (2) he applied for a job for which he was qualified; (3) he was rejected; and (4) the position remained open. See, e.g., *Gray v. Waiters’ & Dairy Lunchmen’s Union*, 694 F.2d 531, 546-49 (9th Cir. 1982) (defines what constitutes a job opening and what constitutes job application); *Flowers v. Crouch-Walker*, 552 F.2d 1277, 1283 (7th Cir. 1977) (defines “qualified”); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013-14 (1st Cir. 1979) (whether job must be filled by person outside plaintiff’s group).

Second, the burden then shifts to the employer to articulate some non-discriminatory reason for denying the plaintiff employment. See, e.g., *Burdine*, 450 U.S. at 257 (any lawful reason may suffice). Some courts recognize that erroneous or unsound decisions satisfy the requirement of a non-discriminatory reason for not hiring plaintiff. See *Turner v. Texas Instruments, Inc.*, 555 F.2d 1251, 1256-57 n.6 (5th Cir. 1977); *Lieberman v. Grant*, 630 F.2d 60, 65 (2d Cir. 1980).

Third, the plaintiff may show that the offered reason was pretext and not the defendant’s true motive. Plaintiff may prove that the neutral reason offered in rebuttal has not been applied alike to blacks and whites. See generally *McDonnell Douglas*, 411 U.S. at 802-04; *Burdine*, 450 U.S. at 256; *Soria v. Ozinga Bros.*, 704 F.2d 990, 998-99 (7th Cir. 1983).

two-year period.<sup>21</sup> The Act also allows for the prevailing party to recover attorneys' fees.<sup>22</sup>

### B. Section 1983

Section 1983 makes it unlawful for any person who, "under color of any statute," deprives another of rights guaranteed by the "Constitution and laws."<sup>23</sup> Unlike Title VII, section 1983 neither creates substantive rights<sup>24</sup> nor requires exhaustion of complicated administrative proceedings prior to bringing suit.<sup>25</sup>

When a plaintiff bases a section 1983 claim on constitutional grounds, he must prove both purpose and intent to discriminate.<sup>26</sup> Furthermore, section 1983 actions are subject to the particular state's statute of limitations.<sup>27</sup> State statutes of limitation are less restrictive than Title VII which requires that claimants file charges with the EEOC within 180 days of the alleged practice,<sup>28</sup> and that claimants commence suit within 90 days of receiving the right-to-sue letter.<sup>29</sup> Section 1983 also allows for trial by jury whereas Title VII does not.<sup>30</sup> Finally, a plaintiff in a section 1983 action may ob-

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21 See 42 U.S.C. § 2000e-5(g) (1981) which in part provides:

If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.

See also *Murry v. American Standard, Inc.*, 488 F.2d 529 (9th Cir. 1973). A trial judge, however, has great discretion in his preliminary injunction order. See *Groves v. McLucas*, 552 F.2d 1079 (5th Cir. 1979).

22 42 U.S.C. § 2000e-5(k) (1981). See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 312 (1978) (acknowledging the appropriateness of this practice).

23 42 U.S.C. § 1983 (1981).

24 The statute simply provides a remedy for the violation of rights created elsewhere. See, e.g., *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 616-18 (1979). See also CONG. GLOBE, 42d Cong., 1st Sess. 568 (1871) ("All civil suits . . . which this act authorizes, are not based upon it; they are based upon the right of the citizen. The act only gives a remedy.") (statement of Sen. Edmunds).

25 To assert a claim under § 1983, a plaintiff need not exhaust available administrative remedies. See, e.g., *Patsy v. Board of Regents of State of Fla.*, 457 U.S. 496, 502 (1982). But see *Parratt v. Taylor*, 451 U.S. 527 (1981) (plaintiff bringing § 1983 claim based on fourteenth amendment due process clause must exhaust state administrative remedies).

26 See *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1978) ("'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decision-maker . . . selected or reaffirmed a . . . course of action . . . 'because of,' not merely, 'in spite of,' its adverse effects . . ."). See also *Washington v. Davis*, 426 U.S. 229, 241 (1976) (disproportionate impact must be traced to a purpose to discriminate).

27 See *Wilson v. Garcia*, 105 S. Ct. 1938 (1985).

28 42 U.S.C. § 2000e-5(e) (1981).

29 42 U.S.C. § 2000e-5(f)(1) (1981).

30 42 U.S.C. § 2000e-5(f)(4) (1981).

tain both equitable and legal relief, including compensatory<sup>31</sup> and punitive damages.<sup>32</sup>

By awarding only backpay and no other punitive or compensatory damages, Title VII minimizes the opportunity to eliminate discrimination. Courts are presently debating two issues: whether a section 1983 claim may be brought in lieu of a Title VII claim,<sup>33</sup> and whether Title VII may provide the basis for a section 1983 claim when it involves state or local employees.<sup>34</sup>

## II. Background: Title VII and Concurrent Causes of Action

Both Title VII and section 1983 could apply to the same conduct.<sup>35</sup> Because of the procedural and remedial distinctions between the two statutes, the question of the EEOA's exclusivity is crucial. In recent years, the United States Supreme Court has issued varying opinions on issues similar to those presented in *Trigg*.<sup>36</sup> The Court, however, has never specifically addressed whether Title VII and its administrative mechanisms provide the exclusive remedy in employment discrimination involving federal, state, or local employees. Thus, to effectively analyze the questions presented in *Trigg*, this part of the comment examines analogous United States Supreme Court decisions.

In its earliest decisions<sup>37</sup> interpreting Title VII's exclusivity, the Supreme Court held that Congress designed Title VII to "supplement, rather than supplant,"<sup>38</sup> existing legislation in cases of private employment discrimination. The more recent Supreme Court decisions, on the other hand, have emphasized Title VII's exclusivity in relation to other remedial schemes.<sup>39</sup>

In *Alexander v. Gardner-Denver Co.*,<sup>40</sup> the Court held that an employee has a right to a trial de novo under Title VII even if the employee previously submitted a claim to arbitration under the

31 See, e.g., *Maine v. Thiboutot*, 448 U.S. 1 (1980). See also *Carey v. Phipps*, 435 U.S. 247 (1978) (the purpose of a § 1983 action would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law rule does not recognize an analogous cause of action).

32 See, e.g., *Carey*, 435 U.S. at 257 n.11; *Basista v. Weir*, 340 F.2d 74 (3d Cir. 1965). But see *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (the deterrence rationale of § 1983 did not justify making punitive damages available against municipalities.).

33 See notes 88-92 *infra* and accompanying text.

34 *Compare* *Day v. Wayne County Bd. of Auditors*, 749 F.2d 1199 (6th Cir. 1984) (Title VII may not provide the basis for a § 1983 claim) with *Huebschen v. Department of Health and Social Servs.*, 547 F. Supp. 1168 (W.D. Wis. 1982) (Title VII may provide the basis for a § 1983 claim), *rev'd on other grounds*, 716 F.2d 1167 (7th Cir. 1983).

35 See notes 14 and 23 *supra* and accompanying text.

36 See notes 40-62 *infra* and accompanying text.

37 See notes 40-51 *infra* and accompanying text.

38 *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48 (1975).

39 See notes 52-62 *infra* and accompanying text.

40 415 U.S. 36 (1974).

terms of a collective bargaining agreement.<sup>41</sup> The Court supported its refusal to declare Title VII the exclusive remedy for unlawful employment practices by relying on the legislative history of the 1964 Act<sup>42</sup> and its 1972 amendment.<sup>43</sup> In the amendment's legislative history, Congress defeated a proposal attempting to make Title VII the exclusive remedy for all employment discrimination.<sup>44</sup> Based upon that history and upon a finding that the rights created under Title VII were separate and distinct from those guaranteed to the parties under the collective bargaining agreement, the Court held that the petitioner could pursue both remedies in their respective forums.<sup>45</sup>

The focus on the separate nature of overlapping rights was reiterated one year later in *Johnson v. Railway Express Agency*.<sup>46</sup> In *Johnson*, Title VII conflicted with section 1982,<sup>47</sup> another reconstruction-era civil rights statute.<sup>48</sup> This conflict provided an even

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41 In *Alexander*, the petitioner filed a grievance under the collective bargaining agreement claiming that his private employer discharged him unjustly. As provided by the collective bargaining agreement, the dispute was channeled through a four-step grievance process before it was submitted to arbitration. Prior to the arbitration hearing, petitioner added a charge of racial discrimination which he referred to the EEOC. When the arbiter ruled that petitioner had been discharged for just cause, petitioner pursued his discrimination charge with the EEOC. The EEOC refused to pursue the discrimination claim under Title VII, but notified the petitioner of his right to initiate his own civil action. Petitioner subsequently brought the discrimination claim under Title VII in federal court. *Id.* at 39-43.

42 The Court quoted Senator Joseph Clark, a sponsor of the bill, who stated in an interpretive memorandum: "Title VII is not intended to and does not deny to any individual rights and remedies which he may pursue under either federal or state statutes." 110 CONG. REC. 7207 (1964) (remarks of Sen. Clark).

43 415 U.S. at 48-50.

44 The House amendment declaring Title VII's exclusivity was stated in H.R. 1746, 92d Cong., 1st Sess. § 3(b) (1971). This provision, however, was specifically rejected by the House-Senate Conference Committee, which convened to resolve differences in the two versions of the proposed amendments to the legislation in 1972. *See generally* S. REP. NO. 681, 92d Cong., 2d Sess. (1972).

45 "The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums." 415 U.S. at 50. The Court had previously enunciated its oft-quoted passage on Title VII's exclusivity:

[T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination.

*Id.*

46 421 U.S. 454 (1975).

47 Civil Rights Act of 1866, 42 U.S.C. § 1981 (1981).

48 The specific issue in *Johnson* was whether the petitioner's § 1981 claim was time-barred. Initially, the petitioners filed a timely charge with the EEOC. Despite a "Final Investigation Report" generally supporting the petitioner's position, the Commission waited 27 months to issue its decision finding reasonable cause to support the petitioner's

stronger basis to assert Title VII's non-exclusivity than *Alexander* because the legislative history of the EEOA's 1972 amendment specifically noted that the existing rights of state and local government employees were not affected.<sup>49</sup> Thus, the Court allowed the petitioner to pursue remedies under both Title VII and section 1981,<sup>50</sup> but noted that the separate statutes of limitations must be individually met.<sup>51</sup>

Unlike the private employment situation of *Alexander* and *Johnson*, the Court has subjected some public employees, such as the claimant in *Trigg*, to different requirements while enforcing their Title VII rights. Beginning with *Brown v. General Services Administration*,<sup>52</sup> the Supreme Court has distinguished Title VII actions arising in certain areas of public employment from those originating in private employment. The Court drew this distinction from the EEOA's 1972 amendment<sup>53</sup> extending Title VII's scope to federal, state, and local government employees. The *Brown* Court focused on the extension to federal employees in distinguishing the prior Supreme Court interpretations of Title VII's non-exclusivity.<sup>54</sup> The Court noted that because *Brown* dealt with federal, rather than private employment discrimination, different mechanisms of en-

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charges. Petitioner subsequently brought suit in district court alleging racial discrimination in violation of Title VII and § 1981. While the complaint satisfied the Title VII requirement that the plaintiff take action within 30 days after the issuance of a right-to-sue letter, the statute of limitations on the § 1981 claim had expired.

49 In establishing the applicability of Title VII to state and local government employees, the Committee wishes to emphasize that the individual's right to file a civil action in his own behalf, pursuant to the Civil Rights Act of 1870 and 1871, 42 U.S.C. §§ 1981 and 1983, is in no way affected. . . . Title VII was envisioned as an independent statutory authority meant to provide an aggrieved individual with an additional remedy to redress employment discrimination. . . . [T]he remedies available to the individual under Title VII are coextensive with the individual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and . . . the two procedures augment each other and are not mutually exclusive. The bill, therefore, by extending jurisdiction to state and local government employees, does not affect existing rights that such individuals have already been granted by previous legislation.

H.R. REP. NO. 92-238, 92d Cong., 2d Sess. 19 (1971), reprinted in 1972 U.S. CODE CONG. & AD. NEWS 2137, 2154. See also S. REP. NO. 92-415, 92d Cong., 2d Sess. 24 (1971).

50 "Despite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief." 421 U.S. at 459.

51 *Id.* at 461-62.

52 425 U.S. 820 (1976).

53 See note 1 *supra*.

54 After the Civil Service Commission opted not to pursue his complaint alleging employment discrimination, the petitioner in *Brown* sued his federal employer alleging violations of § 1981 and Title VII. The Court dismissed the complaint as untimely because it was filed after the 30 day limit required by § 717 of the Civil Rights Act of 1964, as added by § 11 of the EEOA of 1972. The Court also held that any other remedies were precluded because Title VII provided exclusive relief for federal employment discrimination.



forcement were available to the newly covered employees.<sup>55</sup> Additionally, the Court cited the specificity of Title VII's remedial scheme as preempting the more general section 1981.<sup>56</sup>

In *Great American Federal Savings & Loan v. Novotny*,<sup>57</sup> the Supreme Court extended the exclusivity rationale adopted in *Brown* to a private employee alleging discrimination in a section 1985 claim. In *Novotny*, the Court held that a claimant may not invoke section 1985 to remedy discrimination when Title VII provides the only basis for the claim.<sup>58</sup> In espousing Title VII's exclusivity, the Court noted that allowing a section 1985 claim based on Title VII

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55 425 U.S. at 833-34. Unlike employees of non-governmental bodies who were included in the scope of the original Act, the 1972 amendment gave federal employees protection via Title VII for the first time. As a result of the legislative history of § 717, which indicated that federal employees had no access to the courts under the pre-1972 scheme, the *Brown* Court distinguished this section from the legislative intent cited in *Alexander* and *Johnson* declaring the independent nature of existing federal and state statutes. *Id.* The *Brown* Court interpreted the passage of § 717 as a Congressional signal that Title VII was designed to create "an exclusive, pre-emptive and judicial scheme for the redress of federal employment discrimination." 425 U.S. at 828-29. See generally *Hearings on S.2515 et al. Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 1st Sess. 296, 301, 308, 318 (1971); *Hearings on H.R. 1746 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 1st Sess. 320, 322, 385-86, 391 (1971).

56 425 U.S. at 834. "The balance, completeness, and structural integrity of § 717 are inconsistent with the petitioner's contention that the judicial remedy afforded by § 717(c) was designed merely to supplement other putative judicial relief. . . . In a variety of contexts the Court has held that a precisely drawn, detailed solution pre-empts more general remedies." *Id.* at 832, 834.

Despite these justifications, however, the *Brown* decision has been criticized on several grounds. Initially, Justice Stevens stated in dissent that the majority misrepresented the legislative history of the amendment to Title VII. *Id.* at 835-39. As discussed in *Chandler v. Rosebush*, 425 U.S. 840 (1976), the legislative history indicated that the principal goal of Title VII was to vindicate "entrenched discrimination in the Federal sector by strengthening internal safeguards and by according aggrieved federal employees or applicants . . . the full rights available in the courts as are granted to individuals in the private sector under Title VII." *Id.* at 840-41 (citations omitted). In addition, Justice Stevens noted that the General Subcommittee on Labor of the House Committee on Education and Labor rejected an amendment which would have made § 717 the exclusive remedy for federal employees. *Brown*, 425 U.S. at 837 (Stevens, J., dissenting). See generally H.R. REP. NO. 92-238, 92d Cong., 2d Sess. 66 (1971), reprinted in 1972 U.S. CODE CONG. & AD. NEWS 2137, 2175.

Subsequently, one commentator has suggested that *Brown* was decided contrary to legislative intent in fear of the potential voluminous federal liability. Brooks, *Use of Civil Rights Act of 1866 and 1871 to Redress Employment Discrimination*, 62 CORNELL L. REV. 258 (1977). Others have noted that the reasoning of *Brown* is at least "suspect." Recent Development, *Civil Rights—Employment Discrimination—Section 1985(c) Unavailable to Vindicate Title VII Rights*, 65 CORNELL L. REV. 114 (1979).

57 442 U.S. 366 (1979).

58 *Id.* at 378. Section 1985 is a remedial statute which addresses conspiracies which interfere with civil rights. 42 U.S.C. § 1985 (1981). The claimant in *Novotny* charged discrimination based on his support of female employees who complained of disparate treatment. After proceeding through the EEOC and obtaining a right-to-sue letter, the claimant commenced an action alleging a discriminatory conspiracy violating both § 1985(3) and Title VII. The Supreme Court ordered the § 1985(3) claim dismissed, noting that "the deprivation of a right created by Title VII cannot be the basis for a cause of action under Section 1985(3)." 442 U.S. at 378.

would destroy the procedural requirements of Title VII.<sup>59</sup> Additionally, the *Novotny* Court characterized the dispute as involving a single right with two available remedies instead of the "two basic rights" approach adopted in the *Alexander* and *Johnson* decisions.

Several subsequent Supreme Court cases have enunciated the *Brown-Novotny* preemption theme in addressing overlapping statutory claims.<sup>60</sup> In these cases,<sup>61</sup> the Court failed to recognize a claim brought under section 1983 by focusing on the specific nature of the remedial scheme. While these cases do not present a Title VII-section 1983 conflict, they do evidence the Supreme Court's tendency to eliminate alternative remedial options when other comprehensive statutes are available.

Thus, two distinct theories on Title VII's exclusivity emerge from the Supreme Court's focus on the issue. First, the *Johnson* and *Alexander* decisions emphasize the separate and independent nature of rights arising under Title VII and sections 1981 and 1983 in private employment discrimination cases. Second, the *Brown-Novotny* line of reasoning emphasizes Title VII's exclusivity as a remedial scheme. While both strands of reasoning are analogous, neither resolves the specific issues raised in *Trigg*.<sup>62</sup>

### III. *Trigg v. Fort Wayne Community Schools*

In *Trigg*,<sup>63</sup> the United States Court of Appeals for the Seventh

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59 If a violation of Title VII could be asserted through Section 1985(3), a complainant could avoid most, if not all, of these detailed and specific provisions of the law. Section 1985(3) expressly authorized compensatory damages; punitive damages might well follow. The plaintiff or defendant might demand a jury trial. The short and precise time limitations of Title VII would be grossly altered. Perhaps most importantly, the complainant could completely bypass the administrative process, which plays such a crucial role in the scheme established by Congress in Title VII.

*Id.* at 375-76.

60 See *Smith v. Robinson*, 468 U.S. 104 (1984) (Education of the Handicapped Act, 20 U.S.C. §§ 1400-1464 (1985 Supp.), was the exclusive remedy for a plaintiff asserting an equal protection claim to a publicly financed education); *Middlesex County Sewage Auth. v. National Sea Clammers Ass'n*, 435 U.S. 1, 20 (1981) ("when the remedial devices provided in [the] particular Act [here the Federal Water Pollution Control Act, 33 U.S.C. § 1251 (1981)] are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under Section 1983"); *Maine v. Thiboutot*, 448 U.S. 1, 22 n.11 (1980) (Powell, J., dissenting) (§ 1983 would not be available where the "governing statute provides an exclusive remedy for violations of its terms.").

61 See note 60 *supra*.

62 In fact, district courts, in acknowledging the inconsistency in the present state of the law, have clamored for a resolution. One court acknowledged its frustration by stating: "[T]his Court readily admits its disagreement with [tribunals adopting opposing viewpoints] and trusts that the court of appeals for this circuit and perhaps the Supreme Court itself will one day tell us all who is right." *Torres v. Wisconsin Dep't of Health and Social Servs.*, 592 F. Supp. 922, 931 (E.D. Wis. 1984).

63 766 F.2d 299 (7th Cir. 1985).

Circuit addressed the question of whether Title VII provides the exclusive remedy for state and local government employees in a discrimination action. Both litigants looked to the varying Supreme Court interpretations for support. Because the Supreme Court had not addressed Title VII's exclusivity in a claim brought by a state government employee, neither line of reasoning discussed in prior Supreme Court cases controlled.<sup>64</sup>

In *Trigg*, the plaintiff, a black woman, worked as a liaison aide at the defendant-school system.<sup>65</sup> Upon her discharge, she claimed discrimination based upon race and sex and filed suit. The plaintiff charged the defendant with violating her rights under the United States Constitution and laws and sought redress under section 1983.<sup>66</sup> The plaintiff argued that Title VII and the fourteenth amendment guarantee two distinct rights.<sup>67</sup> She claimed that, as a state government employee, she could base her section 1983 action on a constitutional violation whether or not this conduct also violated rights created under Title VII.<sup>68</sup>

In addition to contending that the plaintiff was discharged for cause,<sup>69</sup> the defendant argued that Title VII provided the exclusive remedy for a state or local government employee alleging discrimination.<sup>70</sup> The defendant argued that the plaintiff's fourteenth amendment rights were not independent of those rights provided under Title VII.<sup>71</sup> Thus, following this line of reasoning, section 1983 remedies were unavailable because the plaintiff failed to exhaust the administrative requirements of Title VII.

The district court granted summary judgment for the defendant, holding that the plaintiff was bound by the administrative remedies of Title VII.<sup>72</sup> Because *Trigg's* complaint clearly stated a claim covered by Title VII, the court held that she was not allowed to bypass the administrative remedies created under the Act by fil-

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64 Recall that the legislative history of the 1964 Act only pertained to private employment discrimination, as federal, state, and local government employees were not encompassed under the Act until the 1972 amendment. See note 55 *supra*. Moreover, the exclusivity provisions cited by the Court in *Brown* related only to federal employees. See text accompanying note 54-55 *supra*. Thus, the Act's relationship to state and local government employees remained undetermined.

65 766 F.2d at 300.

66 *Id.* Title VII prohibits employment discrimination based on race or sex. The equal protection clause of the fourteenth amendment prohibits discrimination based upon membership in a particular class. *Id.*

67 *Id.*

68 *Id.*

69 The defendant cited insubordination, tardiness, and absenteeism as justifications for the plaintiff's release. *Id.*

70 *Id.*

71 *Id.*

72 *Id.*

ing an action directly under section 1983.<sup>73</sup> Thus, Trigg's failure to file a charge with the EEOC and obtain a right-to-sue letter precluded her action in federal court.

The Seventh Circuit reversed. The court held that Title VII was not the exclusive remedy for state and local government employees.<sup>74</sup> In so holding, the Seventh Circuit characterized the suit in *Trigg* as falling under the rule of the Supreme Court's *Alexander*<sup>75</sup> and *Johnson*<sup>76</sup> decisions. In distinguishing *Brown*,<sup>77</sup> the *Trigg* court stated that section 2 of the EEOA<sup>78</sup> applied in this case. That section was not intended to affect a state employee's right to pursue an alternative action under section 1981 or section 1983.<sup>79</sup> Conversely, *Brown* involved section 11 of the same act,<sup>80</sup> which established exclusive protection for federal employees. Therefore, the court stated that the defendant's reliance on section 11 of the EEOA and *Brown* was misplaced.<sup>81</sup>

The *Trigg* court also distinguished *Novotny*,<sup>82</sup> which the defendant claimed precluded the plaintiff from basing a remedial claim under section 1983 on a Title VII violation. The Seventh Circuit correctly noted that *Novotny* dealt with private employment discrimination, while *Trigg* was employed in the public sector. While a private employee has rights conferred by Title VII, section 1983, like section 1985(3), is a purely remedial statute and affords the private employee no protection.<sup>83</sup> In contrast, a public employee has two independent rights, one conferred by Title VII and the other guaranteed by the fourteenth amendment.<sup>84</sup>

The holding in *Trigg* is significant in three respects. First, the decision settles the previous debates on the issue which raged between the district courts in the Seventh Circuit.<sup>85</sup> Second, the deci-

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73 *Id.*

74 *Id.* at 302.

75 See notes 40-45 *supra* and accompanying text.

76 See notes 46-51 *supra* and accompanying text.

77 See notes 52-56 *supra*.

78 See note 1 *supra*.

79 See H.R. REP. NO. 92-238, 92d Cong., 2d Sess. 19, reprinted in 1972 U.S. CODE CONG. & AD. NEWS 2137, 2154, and note 49 *supra*.

80 42 U.S.C. § 2000e (1981).

81 766 F.2d at 301.

82 See notes 57-59 *supra* and accompanying text.

83 See *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (the fourteenth amendment "erects no shield against merely private conduct, however discriminatory or wrongful.").

84 766 F.2d at 301. The Seventh Circuit in *Trigg* elaborated on the non-applicability of *Novotny* in noting, "[i]mportantly, two Justices in the *Novotny* majority wrote separately to suggest that Mr. Novotny's employment discrimination claim based on Section 1985(3) would have been legally sufficient if he could have asserted constitutional violations. See *Novotny*, 442 U.S. at 379-81 (Stevens, J., concurring)." *Id.* at 301-02.

85 The conflict between the district courts of Wisconsin graphically illustrates this turmoil. In *Torres v. Wisconsin Dep't of Health and Social Servs.*, 592 F. Supp. 922 (E.D. Wis.

sion acknowledges that, to adequately protect constitutional rights, courts must allow employees to bring section 1983 claims independent of their Title VII assertions. Third, in addition to the questions presented in *Trigg*, the case is significant for an issue it fails to address: Where a state or local government employer's conduct violates a Title VII provision *without* a corresponding fourteenth amendment violation, may an employee bring a section 1983 claim based upon a Title VII claim? Arguably, allowing a claimant to do so effectively negates the administrative remedies of Title VII.<sup>86</sup>

#### IV. Analysis of *Trigg*

The exclusivity question under Title VII arises in two distinct factual situations. The first, and more common, situation arises when the plaintiff-employee asserts that the defendant-employer violated both his constitutional and Title VII rights. This was the

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1984), the Eastern District Court of Wisconsin asserted the minority position that Title VII is the only remedy available to a discriminated state employee. The Court stated that:

The Congress has wisely constructed a sophisticated mechanism for the redress of discrimination practices in the employment setting; absent some discrete allegation of deprivations of rights and privileges secured by laws of the land, these plaintiffs should be confined to prosecuting what are in the end, Title VII claims within the framework of Title VII. Because the Court so interprets the plaintiffs' cause of action it will preclude them from prosecuting their § 1983 count based on either an alleged violation of Title VII or a claimed infringement of their Fourteenth Amendment rights.

*Id.* at 930.

Five months later, the Western District Court of Wisconsin examined "whether Title VII is the exclusive avenue of relief available to plaintiff" and decided that it was not. The Court was not impressed by the Eastern District's reliance upon *Novotny* and *Brown* and stated this sentiment quite clearly:

Unlike the district court in [*Torres*], I reject the view that when the claim asserted can be brought under Title VII as well as under another label, Title VII is the exclusive remedy. . . . I find no indication in case law that the exclusivity of Title VII turns on whether the claim could be brought solely under Title VII. Hence, I conclude that plaintiff is not limited to Title VII in her quest for relief from alleged discrimination in state employment.

*Storey v. Board of Regents of Univ. of Wis. Sys.*, 600 F. Supp. 838, 841 (W.D. Wis. 1985).

One month before the *Trigg* decision was handed down, the Eastern District reaffirmed its belief in the controlling nature of *Brown* and *Novotny* and followed its earlier decision in *Torres*:

While plaintiff may argue that the conspiracy, procedural due process, retaliation and equal protection claims pertain to distinct rights which are guaranteed under the Constitution, the Court feels that these claims are part and parcel of the same cause of action. The court concludes that Title VII provides the exclusive remedy for the allegedly discriminatory actions of the defendants in this case.

*Ratliff v. City of Milwaukee*, 608 F. Supp. 1109, 1128 (E.D. Wis. 1985).

In *Trigg*, the Seventh Circuit silenced this intrastate squabble by adopting the *Storey* position and declaring that Title VII is not the exclusive remedy for a discriminated state employee.

<sup>86</sup> See notes 125-29 *infra* and accompanying text.

situation that the Seventh Circuit faced in *Trigg*. The second situation occurs when the employee asserts a violation of his Title VII rights but not of his constitutional rights. The United States Court of Appeals for the Sixth Circuit recently confronted this situation in *Day v. Wayne County Board of Auditors*<sup>87</sup> when an employee premised his Title VII and section 1983 claims solely upon a violation of his Title VII rights. Both of these situational frameworks have forced the lower federal courts to address the exclusivity of Title VII remedies.

### A. Section 1983 Claim Based on a Constitutional Violation

#### 1. Lower Court Decisions

Where the state or local government employee's Title VII and constitutional rights have been violated, most lower federal courts do not limit the plaintiff's remedy to a Title VII claim.<sup>88</sup> The courts believe that:

[W]here an employee establishes employer conduct which violates both Title VII and rights derived from another source—the Constitution or a federal statute—which existed at the time of the enactment of Title VII, the claim based on the other source is independent of the Title VII claim, and the plaintiff may seek the remedies provided by Section 1983 in addition to those created by Title VII.<sup>89</sup>

This majority position, adopted by the Seventh Circuit in *Trigg*, is based on the expansive judicial interpretations of Title VII remedies found in *Alexander* and *Johnson* and the clear intent of the Act's

<sup>87</sup> 749 F.2d 1199 (6th Cir. 1984).

<sup>88</sup> See *Trigg*, 766 F.2d at 302; *Day*, 749 F.2d at 1205; *Owens v. Rush*, 636 F.2d 283, 285 (10th Cir. 1980); *Tafoya v. Adams*, 612 F. Supp. 1097, 1102-03 (D. Colo. 1985); *Green v. Illinois Dep't of Transp.*, 609 F. Supp. 1021, 1027 (N.D. Ill. 1985); *Meyett v. Coleman*, 613 F. Supp. 39 (W.D. Wis. 1985); *Storey v. Board of Regents of Univ. of Wis. Sys.*, 600 F. Supp. 838, 840 (W.D. Wis. 1985); *Zewde v. Elgin Community College*, 601 F. Supp. 1237, 1246 (N.D. Ill. 1984); *Daisernia v. New York*, 582 F. Supp. 792, 797 (N.D.N.Y. 1984); *Skadegaard v. Farrell*, 578 F. Supp. 1209, 1218 (D.N.J. 1984); *Hall v. Board of County Comm'rs of Frederick County*, 509 F. Supp. 841, 848 (D. Md. 1981).

The following cases, though not specifically addressing whether Title VII is an exclusive remedy, impliedly adopt the majority position. In all of them, § 1983 claims, based on rights independent of Title VII, were brought along with Title VII claims in the same action. *Nilsen v. City of Moss Point*, 701 F.2d 556 (5th Cir. 1983); *Costa v. Markey*, 677 F.2d 158 (1st Cir. 1982), *cert. denied*, 104 S. Ct. 547 (1983); *Poolaw v. City of Anadarko*, 660 F.2d 459 (10th Cir. 1981); *Whiting v. Jackson State Univ.*, 616 F.2d 116 (5th Cir. 1980); *Calhoun v. Illinois State Bd. of Educ.*, 550 F. Supp. 796 (N.D. Ill. 1982); *Williams v. City of New Orleans*, 543 F. Supp. 662 (E.D. La. 1982), *rev'd on other grounds*, 694 F.2d 987 (5th Cir. 1982); *Strong v. Demopolis City Bd. of Educ.*, 515 F. Supp. 730 (S.D. Ala. 1981); *Woerner v. Brzeczek*, 519 F. Supp. 517 (N.D. Ill. 1981); *Lewis v. Southeastern Pa. Transp. Auth.*, 440 F. Supp. 887 (E.D. Pa. 1977).

<sup>89</sup> *Day*, 749 F.2d at 1205.

legislative history.<sup>90</sup>

When an employer allegedly violates both a Title VII and a fourteenth amendment right, a few courts have disallowed a section 1983 claim even when based on the constitutional violation.<sup>91</sup> These courts view Title VII and fourteenth amendment rights as so similar in nature that separate claims based upon their violation are "part and parcel of the same cause of action."<sup>92</sup> Consequently, according to this minority position, only the comprehensive remedial scheme of Title VII is open to the plaintiff.

Two flaws exist within the minority position's reasoning. First, all of the courts espousing such a view rely heavily upon the Supreme Court's *Novotny* decision.<sup>93</sup> As was noted above, *Novotny* dealt exclusively with discrimination of a private employee whose section 1985(3) claim could only be based upon Title VII rights.<sup>94</sup> The minority position fails to recognize that when state and local government employees are discriminated against, two distinct rights are violated; distinct rights which two separate remedial vehicles can redress. The *Novotny* decision, though giving some insight into the Supreme Court's opinion on Title VII remedies, does not apply when dealing with public employment discrimination. Second, the courts adopting the minority position either inadequately address or completely ignore the legislative history of Title VII.<sup>95</sup> Congress clearly intended that Title VII remedies should not preempt existing remedies available under section 1983.<sup>96</sup> Courts should consider the congressional intent behind Title VII when analyzing public employment discrimination. Disregarding such intent exposes the weak foundation upon which the minority position rests.

## 2. Constitutional Rights May Be Redressed Through Section 1983

The *Trigg* Court decided that "[a] plaintiff may sue her state employer for violations of the Fourteenth Amendment through

90 See notes 40-51 *supra* and accompanying text.

91 See *Keller v. Prince George's County Dep't of Social Servs.*, No. N-85-793 (D. Md. Aug. 19, 1985); *Torres v. Wisconsin Dep't of Health and Social Servs.*, 592 F. Supp. 922 (E.D. Wis. 1984); *Ratliff v. City of Milwaukee*, 608 F. Supp. 1109 (E.D. Wis. 1985). See also *Tafaya*, 612 F. Supp. 1097.

92 *Ratliff*, 608 F. Supp. at 1128.

93 See *Keller*, *supra* note 91; *Ratliff*, 608 F. Supp. at 1127, 1128; *Torres*, 592 F. Supp. at 926-28.

94 See notes 57-59 *supra* and accompanying text.

95 For example, in both the *Keller* and *Ratliff* decisions, the courts did not even mention the important legislative history of the 1972 amendments to Title VII. And, in *Torres*, the district court expressly refused "to engage in . . . an exhaustive restatement of the legislative history." 592 F. Supp. at 930.

96 See note 49 *supra*.

Section 1983 and escape Title VII's comprehensive remedial scheme, even if the same facts would suggest a violation of Title VII."<sup>97</sup> The court recognized that state and local government employees must be allowed to enforce their constitutional as well as their Title VII rights.<sup>98</sup> To hold otherwise would declare that Congress, with the enactment of Title VII, intended to disallow the enforcement of these constitutional rights. The relevant legislative history does not warrant such a position.<sup>99</sup> And as one court noted, "[a]rguably, courts should require express legislative intent to repeal statutory rights of action for constitutional violations. At the very least, judges should be more hesitant to find an implied repeal of a constitutional right of action than to find one of a statutory violation."<sup>100</sup>

The rights of equal protection and due process guaranteed by the fourteenth amendment are not "inherently bound up" with the right of discrimination-free employment granted by Title VII.<sup>101</sup> The rights are distinct, not coextensive. Congress recognized this by setting up two separate remedial structures to protect such rights. Title VII, designed to redress statutory rights, disallows trial by jury and punitive damages while section 1983, established to remedy more fundamental, constitutional rights, provides for both of these within its remedial framework.<sup>102</sup> In establishing both Title VII and section 1983, Congress afforded greater protection to constitutional rights than to Title VII's statutory rights. Accordingly, courts must allow public employees to assert constitutional violations independent of their other discrimination claims.

As the Seventh Circuit recognized in *Trigg*, a state or local government employee must have both avenues of relief available to him. If an employer's actions have had a discriminatory impact upon his employment practices, Title VII, with its provisions for reinstatement and back pay, adequately redresses the employee's

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97 *Trigg*, 766 F.2d at 302.

98 The Seventh Circuit in the recent case, *Alexander v. Chicago Park Dist.*, No. 77-1205 (7th Cir. Sept. 19, 1985), acknowledged that its decision in *Trigg* "created an anomalous [sic] situation that a federal employee is limited by the administrative procedures of Title VII while state employees are not." Slip op. at 11. The court maintained, however, that Title VII's explicit legislative history warranted such a result. "Because we interpret what remedies Congress has provided, we rule as we do. Congress may amend Title VII if it so chooses." *Id.*

99 See note 49 *supra*.

100 *Zewde v. Elgin Community College*, 601 F. Supp. 1237, 1246 (N.D. Ill. 1984).

101 See *Ratliff*, 608 F. Supp. at 1128 ("the Court believes that the plaintiff's Section 1983 claims in this case are inherently bound up with her Title VII claim such that her sole remedy is provided by Title VII."); *Torres*, 592 F. Supp. at 930 ("In a case like the present, where the plaintiffs' so-called constitutional allegations are so tied up with their cause of action under Title VII that they are, in the Court's view, nearly unidentifiable as discrete claims, the principle articulated in *Novotny* [and] *Brown* . . . is wisely followed.").

102 See notes 30 and 32 *supra* and accompanying text.



injuries. If, however, an employee believes his employer acted with a discriminatory motive, Title VII relief is not adequate. A showing of discriminatory intent, which satisfies section 1983's burden of proof,<sup>103</sup> merits a more severe punishment of an employer than Title VII can provide. Only if an employee can recover punitive damages will an employer be deterred from future discriminatory behavior. Thus, only if section 1983 claims are permitted will such deterrence be accomplished.

### B. *Section 1983 Claim Based on a Title VII Violation*

The question of Title VII's exclusivity also arises when an employee asserts Title VII but not constitutional rights as the basis for a section 1983 claim. The issue in this context is whether Title VII may provide the substantive basis for a section 1983 claim.<sup>104</sup> Courts should not preempt section 1983 claims based on constitutional violations. However, when section 1983 claims are based on Title VII violations, courts should not allow them.

The foremost difference between a section 1983 claim based on the fourteenth amendment and one based on Title VII is the nature of the rights involved. One is constitutional, the other is statutory. The supremacy of constitutional rights allows a plaintiff to bring a section 1983 action. Where such rights are not involved, plaintiffs must not be allowed to bypass Title VII's administrative process. The Supreme Court has not addressed this issue and the lower courts are divided over it. The *Trigg* court chose not to address the issue.

#### 1. Lower Court Decisions

Lower courts addressing the issue of whether Title VII may provide the substantive basis for a section 1983 claim have adopted three lines of reasoning. First, the majority of courts hold that a claimant cannot premise a section 1983 claim upon a Title VII violation.<sup>105</sup> These courts rely on the trend of Supreme Court cases holding that statutes with complex administrative procedures may not provide the basis for a section 1983 claim. These courts pro-

103 See note 26 *supra*.

104 Recall that § 1983 provides no substantive rights of its own, but rather must be based on a violation of the Constitution or other laws. See note 24 *supra*.

105 *Day v. Wayne County Bd. of Auditors*, 749 F.2d 1199 (6th Cir. 1984); *Irby v. Sullivan*, 737 F.2d 1418 (5th Cir. 1984); *Hymes v. Harnett County Bd. of Educ.*, 664 F.2d 410, 412 (4th Cir. 1981); *Gresham v. Chambers*, 501 F.2d 687 (2d Cir. 1974); *Meyett v. Coleman*, 613 F. Supp. 39 (W.D. Wis. 1985); *Tafoya v. Adams*, 612 F. Supp. 1097 (D. Colo. 1985); *Ratliff v. City of Milwaukee*, 608 F. Supp. 1109 (E.D. Wis. 1985); *Torres v. Wisconsin Dep't of Health and Social Servs.*, 592 F. Supp. 922 (E.D. Wis. 1984); *Woerner v. Brzeczek*, 519 F. Supp. 517 (N.D. Ill. 1981); *LeBoeuf v. Ramsey*, 503 F. Supp. 747 (D. Mass. 1980).

hibit plaintiffs from bypassing Title VII's remedial procedures through section 1983.<sup>106</sup>

The second group of courts reach the opposite conclusion and allow Title VII to provide the basis for a section 1983 claim.<sup>107</sup> These courts rely on the *Alexander-Johnson* line of reasoning that Title VII should supplement, and not supplant, a plaintiff's other remedies.<sup>108</sup> Courts following both lines of reasoning have grounded their positions on the same passage from the legislative history of the 1972 amendments to Title VII.<sup>109</sup> Because this passage is subject to varied interpretations,<sup>110</sup> it is of little value in deciding this issue.

A third group of courts takes an accommodative position between those discussed above. These courts allow Title VII to provide the substantive basis for a section 1983 claim, but they limit relief to that available under Title VII.<sup>111</sup> Justice White suggested this accommodative position in his dissenting opinion in *Novotny*.<sup>112</sup> Justice White reasoned that a plaintiff asserting his Title VII rights under section 1985(3) should first exhaust his Title VII remedies.<sup>113</sup> This would remove any objection to the section 1985(3) claim on the ground that it allows the plaintiff to bypass Title VII.

<sup>106</sup> See note 60 *supra*.

<sup>107</sup> *Knoll v. Springfield Township School Dist.*, 699 F.2d 137 (3d Cir. 1983), *aff'd on rehearing on other grounds*, 763 F.2d 584 (3d Cir. 1985); *Johnson v. City of Cincinnati*, 450 F.2d 796, 798 (6th Cir. 1971); *Storey v. Board of Regents of Univ. of Wis. Sys.*, 600 F. Supp. 838 (W.D. Wis. 1985); *Huebschen v. Department of Health and Social Servs.*, 547 F. Supp. 1168 (W.D. Wis. 1982), *rev'd on other grounds*, 716 F.2d 1167 (7th Cir. 1983).

<sup>108</sup> See notes 40-51 *supra* and accompanying text.

<sup>109</sup> See note 49 *supra* and note 110 *infra*.

<sup>110</sup> The courts which hold that Title VII is the exclusive remedy, see note 105 *supra*, focus on the language that the bill "does not affect existing rights." They reason that because Title VII rights were not existing prior to the enactment of the amendment, Congress did not intend those rights to provide the basis for a § 1983 claim. See *Day*, 749 F.2d at 1204.

Courts which would allow Title VII to provide the basis of a § 1983 claim, see note 107 *supra*, rely on the language that "the individual's right to file a civil action in his own behalf, pursuant to the Civil Rights Act of 1870 and 1871, 42 U.S.C. §§ 1981 and 1983, is in no way affected."

<sup>111</sup> *Rivera v. City of Wichita Falls*, 665 F.2d 531, 534 n.4 (5th Cir. 1982); *Bradshaw v. Zoological Soc'y of San Diego*, 569 F.2d 1066, 1068 (9th Cir. 1978); *Carrion v. Yeshiva Univ.*, 535 F.2d 722, 729 (2d Cir. 1976). These courts have not directly addressed the issue of whether Title VII may provide the basis for a § 1983 claim but have allowed such claims where they do not exceed the scope of Title VII.

The Seventh Circuit followed the concept of *Rivera* and *Carrion* in *Huebschen v. Department of Health and Social Servs.*, 716 F.2d 1167, 1170 (7th Cir. 1983). There the court stated that it need not reach the issue of whether Title VII may provide the basis for a § 1983 claim because even if the claim were allowed, the plaintiff could not show that the defendant violated Title VII where the defendant was not an employer within the meaning of Title VII. The court saw "no basis for reaching a result different from the Second and Fifth Circuits." *Id.*

<sup>112</sup> *Novotny*, 442 U.S. at 396 (1979) (White, J., dissenting). Justices Brennan and Marshall joined Justice White in his opinion.

<sup>113</sup> Like § 1983, § 1985(3) is remedial and provides no substantive rights.

Both statutes would remain effective. This rationale could easily extend to section 1983 claims as well.<sup>114</sup>

## 2. Title VII Rights Should Not Be Redressed Through Section 1983

In *Trigg*, the Seventh Circuit had the opportunity to address this issue. The lower court held that when a "plaintiff has not satisfied her EEOC requirements, she may not maintain her claim of employment discrimination under either Title VII or section 1983."<sup>115</sup> In addition, the defendant raised the issue in its brief<sup>116</sup> and the lower courts have explicitly requested that the court answer this question.<sup>117</sup> Instead, the Seventh Circuit chose to decide the case on the narrow issue presented by the plaintiff, thus sidestepping a crucial issue.<sup>118</sup>

By failing to address the issue of whether Title VII may provide the substantive basis for a section 1983 claim, the Seventh Circuit let stand the inference, created in *Huebschen v. Department of Health and Social Services*,<sup>119</sup> that they favor the accommodative view.<sup>120</sup> While the accommodative view purports to settle the conflicts between Title VII and section 1983, it falls short of that goal. Under the accommodative view, a plaintiff must exhaust Title VII's administrative remedies prior to bringing suit in district court under section 1983. While this eliminates the procedural conflicts between Title VII and section 1983, other conflicts remain. Section 1983 affords punitive damages and a right to a jury trial, both of which are unavailable under Title VII.<sup>121</sup> Allowing these remedies expands Title VII's remedies through the use of section 1983.<sup>122</sup> Courts which require Title VII as the exclusive remedy do so to avoid expanding Title VII. On the other hand, not allowing these remedies in effect reduces the section 1983 claim to a Title VII claim. Thus, the conflict is not resolved.

In *Alexander v. Chicago Park District*,<sup>123</sup> the court was faced with the same issue posed in *Trigg*. This time the court appeared to de-

114 See Recent Development, *Civil Rights—Employment Discrimination—Section 1985(c) Unavailable to Vindicate Title VII Rights*, 65 CORNELL L. REV. 114, 124-26 (1979).

115 *Trigg*, No. F-82-55, slip op. at 4 (N.D. Ind. May 2, 1984).

116 Appellee's Opening Brief at 3, *Trigg v. Fort Wayne Community Schools*, 766 F.2d 299 (7th Cir. 1985).

117 See note 62 *supra*.

118 *Trigg*, 766 F.2d at 300 n.2.

119 716 F.2d 1167 (7th Cir. 1983).

120 See note 111 *supra*; Appellant's Opening Brief at 10, *Trigg v. Fort Wayne Community Schools*, 766 F.2d 299 (7th Cir. 1985).

121 See notes 30-32 *supra*.

122 Punitive damages were allowed in *Bradshaw v. Zoological Soc'y of San Diego*, 569 F.2d 1066 (9th Cir. 1978) (§ 1983 concurrent with, and based on, Title VII).

123 No. 84-2995 (7th Cir. Sept. 19, 1985).

part from the accommodative view in suggesting that Title VII may not provide the basis for a section 1983 claim. The court stated in dicta that "[o]nly if the right asserted was created by Title VII must it be vindicated through the procedural system set up in that Act."<sup>124</sup> In this manner, the court perhaps recognized the shortcomings of accommodation. However, the court continued to rely on cases which support the accommodative view.<sup>125</sup>

Arguably, the better position requires a plaintiff to redress violations of Title VII exclusively through Title VII. Allowing a plaintiff to assert Title VII rights through section 1983 renders Title VII's administrative procedures ineffective. This result is unfavorable for two reasons. First, it does not comport with longstanding rules of statutory construction.<sup>126</sup> These rules require more recent and more specific expressions from the legislature to prevail when statutes irreconcilably conflict. Second, allowing plaintiffs to bypass the administrative procedures of Title VII places an increased burden on the courts and municipal defendants, thus forfeiting the tremendous strides taken by the EEOC in conciliating disputes over discrimination in employment.<sup>127</sup> The success of the EEOC in ne-

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<sup>124</sup> Slip op. at 10.

<sup>125</sup> The court relied on *Rivera v. City of Wichita Falls*, 665 F.2d 531 (5th Cir. 1982), which allows a § 1983 action as an alternative to a Title VII claim. *Id.* at 534 n.4. See also note 111 *supra*.

<sup>126</sup> Allowing Title VII claims based upon § 1983 violates fundamental rules of statutory construction. The provisions of § 1983 and Title VII are in conflict. See notes 24-32 *supra* and accompanying text. When two statutes are in conflict, courts should construe them to accommodate each other. However, in the case of § 1983 and Title VII this is not possible. See notes 121 and 122 *supra* and accompanying text. Where the conflict between statutes is irreconcilable, the most recent statute or the one embodying more specific terms should prevail. J. SINGER, *SOUTHERLAND STATUTORY CONSTRUCTION* § 23.09 (4th ed. 1985) [hereinafter cited as *SOUTHERLAND*].

As stated above, the terms of Title VII and § 1983 conflict over exhaustion of administrative remedies, right to a jury trial, and punitive damages. See notes 24-32 *supra* and accompanying text. The terms of Title VII specifically address these items (and, in failing to address punitive damages, impliedly exclude them). See generally *SOUTHERLAND* § 47.23. Section 1983 does not address administrative remedies, jury trial, or punitive damages. Moreover, Title VII is the more recent expression of the legislature on the subject. Therefore, Title VII should preempt § 1983 with respect to these provisions.

<sup>127</sup> Almost one-half of the cases before the EEOC result in negotiated settlements. In 1974, 41.7% of conciliation efforts were successful and in the prior year over 1,000 cases were settled by the EEOC prior to issuing a charge. 5 REPORT OF THE U.S. COMM'N ON CIVIL RIGHTS, *THE FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT TO ELIMINATE EMPLOYMENT DISCRIMINATION* 523, 525 (1975).

In 1981, a General Accounting Office Study set the EEOC's conciliation success rate at 50% for an 8 month period which resulted in a 56% reduction in the current backlog. *Oversight of the Equal Employment Opportunity Comm'n: Hearing Before the Comm. on Labor and Human Resources*, 97th Cong., 2d Sess. 97 (1982) (letter from Eleanor Holmes Norton, Professor of Law, Georgetown University, citing *Further Improvements Needed in EEOC Enforcement Activities*, in REP. OF THE GEN. ACC'TING. OFFICE 8, 9 (1981)).

In 1983, conciliation efforts resulted in 14,447 cases being settled without resort to the district courts. *Oversight Hearings on the Federal Enforcement of Equal Employment Opportunity*

gotiating settlements has helped to reduce the backlog of cases in the district courts. Arguably, this backlog is partially attributable to the overuse of section 1983.<sup>128</sup> Like the courts, municipalities, the frequent targets of section 1983 claims, are also burdened by the increase in litigation.<sup>129</sup> Allowing plaintiffs to bypass the EEOC's conciliation efforts through section 1983 needlessly compounds the burdens on the courts and municipal employers.

### 3. Current Trend

In early Title VII litigation, the emphasis was placed on expanding the scope of Title VII's protection by breaking down procedural barriers.<sup>130</sup> The *Alexander* and *Johnson* cases resulted from these efforts. Recently, defense attorneys and the Justice Department under President Reagan have moved to limit discrimination actions through the use of procedural restrictions.<sup>131</sup> *Brown* and *Novotny* illustrate this current trend. While the Seventh Circuit implied in *Trigg* that it favored the expansive scope of Title VII, it is moving toward a more restrictive view. The court should adopt the current trend and prohibit Title VII from providing the basis for a section 1983 claim.

## V. Conclusion

In *Trigg*, the Seventh Circuit correctly held that Title VII cannot be the only remedy available to an aggrieved state or local government employee when both Title VII and constitutional violations are present. As stated in *Trigg*, and supported by the majority of cases, a section 1983 claim, when premised upon a constitutional violation, is indeed a viable one. Consequently, Title VII

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*Laws: Hearings Before the Subcomm. on Employment Opportunities of the Comm. on Education and Labor, House of Representatives, 98th Cong., 1st Sess. 192 (1983) (response to questions from the committee, Phyllis Berry, Director, EEOC).*

Conciliation has been termed the most important part of the EEOC's activities. *Id.* at 191. But the EEOC has been criticized for resolving disputes prior to conducting a full investigation. Critics claim that this practice results in lost opportunity to try pattern and practice suits and thus join the Agency's enforcement and conciliatory functions in an effort to more effectively combat employment discrimination. *Id.* at 12 (Statement of Herbert Hill, Professor of Industrial Relations and Afro-American Studies, Univ. of Wis. at Madison). These results, however, are far superior to the 11% conciliation rate of earlier years. *Id.*

128 Note, *Is the Section 1983 Civil Rights Statute Overworked? Expanded Use of Magistrates—An Alternative to Exhaustion*, 17 U. MICH. J.L. REF. 361 (1984).

129 Lindsey, *Surge in Lawsuits Strain Budgets of Cities*, Chicago Daily Law Bulletin, May 14, 1985 at 1, col. 2.

130 Belton, *Title VII of the Civil Rights Act of 1964: A Decade of Private Enforcement and Judicial Developments*, 20 ST. LOUIS U.L.J. 225, 231-39 (1976).

131 Chambers & Goldstein, *Title VII at Twenty: The Continuing Challenge*, 1 LAB. LAW. 235, 241-45 (1985); Robinson, *What is the Justice Department Doing in Civil Rights: A Record of Hostility*, 71 A.B.A. J. 38, 40 (1985).

does not provide the exclusive remedy to state and local government employees in discrimination cases.

Beyond this *Trigg* is silent. The legislative history of Title VII, relevant case law, and practical concerns indicate that Title VII must be the exclusive remedy when no distinct constitutional violation exists. Thus, a section 1983 claim cannot be based on Title VII. While courts opposing this view have advocated allowing a section 1983 claim without an independent basis, the exclusivity position must stand. Otherwise, the administrative machinery of Title VII will become a legislative goal which is effectively side-stepped by judicial interpretation.

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## CORPORATE LAW—*UNOCAL CORP. v. MESA PETROLEUM CO.*: THE SELECTIVE SELF-TENDER—FIGHTING FIRE WITH FIRE

In the last twenty years, unsolicited tender offers have emerged as important weapons in contests for corporate control.<sup>1</sup> During the 1980's, takeover battles have increased dramatically in number, scope, and intensity.<sup>2</sup> As the creative use of takeover tactics has increased, so too has the sophistication of the target's defenses against hostile bidders.

Two takeover techniques accounting for the increased tender offer activity are "junk bond" financing<sup>3</sup> and front-end loaded, two-tier tender offers.<sup>4</sup> Both of these techniques afford a raider substantial leverage in financing a takeover. Using these techniques in tandem allows takeover entrepreneurs to finance the acquisition of extremely large corporations with a small amount of capital.<sup>5</sup>

Target companies have recently employed a defensive tactic called the selective self-tender offer to fend off a hostile bidder utilizing these two techniques. This tactic excludes the raider from participating in a target's self-tender offer. The Delaware Supreme Court upheld the use of this defensive mechanism in *Unocal Corp. v. Mesa Petroleum Co.*<sup>6</sup>

This comment examines the legitimacy of the selective self-tender offer. Part I sets forth the facts and holding of *Unocal*. Part II reviews the court's analysis. Part III addresses the SEC's immediate response to the *Unocal* decision and analyzes the validity of its proposals. Part IV discusses *Unocal*'s likely impact and concludes that, in certain circumstances, the selective self-tender is a viable defensive tactic enabling target boards to protect their shareholders from potential economic harm.

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1 See Greene & Junewicz, *A Reappraisal of Current Regulation of Mergers and Acquisitions*, 132 U. PA. L. REV. 647, 650 (1984).

2 See Lipton and Brownstein, *Takeover Responses and Directors Responsibilities—An Update*, 40 BUS. LAW. 1403 (1985).

3 For a discussion of "junk bond" financing, see *id.* at 1411-12.

4 See note 11 *infra*.

5 See Lipton and Brownstein, *supra* note 2, at 1411-13. The bidder, through a shell acquisition entity, borrows sufficient funds to obtain 51 percent of the target's stock in a first-step cash tender offer. It then "squeezes out" the remaining shareholders in a lower priced "back-end" merger, issuing "junk bonds" in exchange for the remaining stock. Because these "junk bonds" are subordinated to the original borrowing, the banks financing the bidder are assured of adequate collateral value in excess of funds advanced. Following the takeover, the raider may then sell off the target's assets to retire the initial acquisition financing. This leaves the raider in control of the remaining company without having utilized its own funds. Without the two-step technique or "junk bond" financing, raiders often could not otherwise finance such bids.

6 493 A.2d 946 (Del. 1985).

# I. *Unocal Corp. v. Mesa Petroleum Co.*

Mesa Petroleum Co. (Mesa)<sup>7</sup> owned approximately 13 percent of the stock<sup>8</sup> of Unocal Corporation (Unocal).<sup>9</sup> Mesa, a noted greenmailer,<sup>10</sup> commenced a two-tier, front-end loaded tender offer<sup>11</sup> in April 1985. This first step was for 37 percent of Unocal's outstanding common stock.<sup>12</sup> The offer consisted of \$54 cash in the front-end tender offer and highly subordinated debt securities, purportedly worth \$54, in the back-end merger.<sup>13</sup>

Unocal's board, comprised of eight outside and six inside di-

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7 Mesa Petroleum acted in concert with Mesa Asset Co., Mesa Eastern Inc., and Mesa Partners II. T. Boone Pickens, Jr. held controlling interest in each of the Mesa Companies. 492 A.2d at 949 n.1.

8 *Id.* at 949.

9 Unocal, a Delaware corporation engaged principally in petroleum, chemical, geothermal, and metal operations, had approximately 174 million shares of common stock held by over 70,000 record shareholders. See *Mesa Petroleum Co. v. Unocal Corp.*, No. 7997, slip op. (Del. Ch. May 13, 1985).

10 Greenmail refers to the practice of buying out a takeover bidder's stock at a premium not available to other shareholders in order to prevent a takeover. See Dennis, *Two-Tiered Tender Offers and Greenmail: Is New Legislation Needed?*, 19 GA. L. REV. 281, 282 (1985).

11 A front-end loaded, two-tier tender offer is a tactic enabling a bidder to acquire 100 percent control of a target corporation in two steps. Before initiating the tactic, the bidder usually acquires a small amount of the target company's stock in open market transactions. The bidder then initiates a public tender offer to acquire voting control. In the first step of the tender, the bidder typically offers an amount of cash greater than the market price of the target's stock. After gaining voting control, the bidder merges the target with its own corporation, and the remaining shareholders receive securities worth less than the first step cash price. See generally Note, *Front-end Loaded Tender Offers: The Application of Federal and State Law to an Innovative Acquisition Technique*, 131 U. PA. L. REV. 389 (1982).

The tactic is coercive because bidders pressure shareholders to tender hastily or risk losing the higher front-end price. This creates a "stampede" effect and benefits the raiding party. The coercive nature of the two-tier tender offer is well documented. See ADVISORY COMM. ON TENDER OFFERS, SECURITIES AND EXCHANGE COMM'N REPORT OF RECOMMENDATIONS (1983). Because coercive tender offers adversely affect the unsophisticated shareholder more than the institutional investor, the board is even more compelled to oppose the hostile bidder. See Weidenbaum, *The Best Defense Against the Raiders*, BUS. WK., Sept. 23, 1985, at 21, col. 3. Fears that the raider may not be a qualified manager may also fuel the "stampede" to tender. This pressure could force the shareholders to sell their interests before evaluation of the merits of the sale. See Greene & Junewicz, *supra* note 1, at 679.

Commentators have debated the impact of such tenders in the back end. Compare Brudney & Chirelstein, *Fair Shares in Corporate Mergers and Takeovers*, 88 HARV. L. REV. 297 (1974) (arguing the tactic unfairly penalizes shareholders who prefer to hold their shares) with Dennis, *supra* note 10 (arguing that such offers economically benefit and do not harm back-end shareholders).

12 493 A.2d at 949.

13 The back end of the two-step transaction theoretically would receive \$54 worth of subordinated debt securities and preferred stock. Mesa, however, would have subordinated these securities to \$2,400 million worth of debt securities of Mesa Eastern as well as to indebtedness incurred to refinance \$1,000 million of bank debt owed by affiliates of Mesa Partners II. *Id.* at 950 n.3. Unocal aptly termed these securities "junk bonds." *Id.* at 950. For a discussion of "junk bond" financing, see Lipton & Brownstein, *supra* note 2, at 1411-12.



rectors, met to evaluate the Mesa offer.<sup>14</sup> First, outside counsel evaluated the board's obligations under both Delaware state law and federal securities law.<sup>15</sup> Second, independent investment bankers concluded that the liquidation value of Unocal stock exceeded \$60 per share<sup>16</sup> and that, in their opinion, Mesa's proposal was wholly inadequate.<sup>17</sup> Third, the investment bankers presented various defensive strategies available to Unocal, the cost of each, and the potential effect each would have on Unocal.<sup>18</sup> Finally, the outside directors, who constituted a majority of the board, met separately with corporate financial advisors and attorneys. The outside directors unanimously recommended that the full board reject Mesa's offer as inadequate<sup>19</sup> and pursue a selective self-tender offer as a defensive strategy.<sup>20</sup>

The full board unanimously adopted both recommendations.<sup>21</sup> The board decided to adopt the selective self-tender<sup>22</sup> because in its opinion, the value of Unocal stock was substantially higher than the \$54 per share offered in cash in the front-end tender, and the "junk bonds" offered in the back-end merger were worth far less than \$54.<sup>23</sup> To protect the back-end shareholders, the board commenced a selective self-tender for 50 million shares of outstanding Unocal common stock. The board offered \$72 worth of senior secured debt for each share exchanged.<sup>24</sup>

The most significant aspect of Unocal's offer was the exclusion of Mesa from participation in the self-tender.<sup>25</sup> The directors be-

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14 One of the inside directors was absent when the board met to evaluate Mesa's offer and formulate a response. 493 A.2d at 950.

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 Unocal's tender offer was for its own common stock. It was selective because it excluded Mesa from participation. *Id.* at 950, 951.

21 *Id.* at 950-51. Originally, the board conditioned the offer upon Mesa acquiring 51 percent of Unocal's stock (the "Mesa Purchase Condition"). Unocal later waived the condition as to 50 million shares of the 64 million shares which Mesa sought, thus no longer requiring that Mesa successfully complete its tender offer. The board waived the condition because the shareholders felt that, if shares were tendered to Unocal, neither offeror would purchase shares. By waiving the Mesa Purchase Condition, Unocal provided shareholders with a fairly priced alternative to the Mesa offer. *Id.* at 951.

22 Self-tender offers of this nature were not new to Mesa. In 1983, Mesa initiated a coercive, two-tier tender offer for General American Oil ("GAO"). In response, GAO initiated a self-tender for the 50 percent of the stock on the back end of the offer. GAO's offer was identical to Unocal's except that GAO offered cash while Unocal offered an exchange of senior debt securities. Using this tactic, GAO successfully fended off Mesa's takeover attempt. See Lipton & Brownstein, *supra* note 2, at 1416-18.

23 493 A.2d at 956.

24 *Id.* at 951, 956.

25 *Id.* at 949, 956.

lieved that including Mesa would have defeated Unocal's goals of protecting back-end shareholders.<sup>26</sup> Under the proration aspect of Unocal's exchange offer, every share owned by Mesa which Unocal accepted would displace one held by another shareholder.<sup>27</sup> Further, if Unocal permitted Mesa to tender to Unocal at \$72, Unocal would in effect be financing Mesa's \$54 offer by allowing Mesa to take advantage of the \$18 spread.<sup>28</sup>

Mesa challenged Unocal's selective self-tender in Delaware state court.<sup>29</sup> The Delaware Chancery Court made three important findings of fact. First, the facts justified a reasonable inference that Mesa's principal objective was greenmail.<sup>30</sup> Second, the directors made their decision to oppose Mesa's tender offer based on a good faith belief that the offer was inadequate.<sup>31</sup> Finally, the board's decision to act was informed and the action was undertaken with due care.<sup>32</sup> The Chancery Court, however, granted Mesa a preliminary injunction, concluding that Unocal unlawfully excluded Mesa.<sup>33</sup> The trial court certified the case for interlocutory appeal as a question of first impression.<sup>34</sup>

On appeal, the Delaware Supreme Court reversed the lower court and vacated the preliminary injunction.<sup>35</sup> The court first held that the Unocal board had the power and the duty to oppose a bid it reasonably perceived as harmful to the corporate enterprise. Second, the court held that the business judgment rule protected the board's actions.<sup>36</sup>

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26 *Id.* at 951.

27 *Id.*

28 *Id.* at 951, 956.

29 *Mesa Petroleum Co. v. Unocal Corp.*, No. 7997, slip op. (Del. Ch. May 13, 1985). Mesa also attempted to obtain a preliminary injunction in federal district court. The court denied the injunction because Mesa had not shown irreparable harm or that the Williams Act, 15 U.S.C. §§ 78m(d)-(f), 78n(d)-(f) (1982), prohibited such tender offers. *Unocal Corp. v. Pickens*, 608 F. Supp. 1081 (C.D. Cal. 1985).

30 493 A.2d at 952.

31 *Id.*

32 *Id.*

33 *Id.* at 949.

34 *Id.* at 953. Mesa originally moved for a temporary restraining order ("TRO"). The Vice Chancellor granted the TRO and Unocal immediately sought certification of an interlocutory appeal. The Vice Chancellor declined to certify the case, stating that the TRO did not decide an issue of first impression. The Delaware Supreme Court determined that issuance of the TRO was an appealable decision and an issue of first impression. But the court deferred hearing the case pending enlargement of the record at a preliminary injunction hearing. The Vice Chancellor granted Mesa a preliminary injunction on May 13, 1985, upon concluding that the selective exchange offer excluding Mesa was illegal, and also certified the interlocutory appeal. The Delaware Supreme Court accepted the appeal on an expedited basis on May 14, 1985. *Id.* at 951-53.

35 *Id.* at 949.

36 *Id.*

## II. The *Unocal* Court's Analysis

The Delaware Supreme Court first considered the power of the Unocal board of directors to adopt a defensive measure of this type. The court determined that the board had ample authority to manage the corporation's business and affairs<sup>37</sup> and to deal in its own stock under Delaware corporate law.<sup>38</sup> The court also noted that, under Delaware case law, a corporation may deal selectively with its shareholders in acquiring its own shares, provided, however, that the directors do not act with the sole or primary purpose of entrenching themselves in office.<sup>39</sup> Finally, the court observed that a board of directors is not a passive instrumentality.<sup>40</sup> The court reasoned that the board's power to act derives from its fundamental duty and obligation to protect the corporate enterprise, including shareholders, from harm reasonably perceived, irrespective of its source.<sup>41</sup> Accordingly, the court concluded that Unocal's board had the power to oppose the Mesa tender offer.<sup>42</sup>

37 *Id.* at 953 (citing DEL. CODE ANN. tit. 8, § 141(a) (1983)). Because most state corporation statutes are silent as to the target management's role in the tender offer context, many commentators have argued, and most courts have agreed, that a tender offer and an asset purchase are functionally equivalent. See, e.g., Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW. 101, 104, 116 (1979) (takeover bids are no different from other major business decisions); Herzel, Schmidt & Davis, *Why Corporate Directors Have a Right to Resist Tender Offers*, 61 CHI. B. REC. 152, 154 (1979) (the basic difference between a merger and a tender offer is that tender offers are made directly to shareholders); Steinbrink, *Management's Response to the Takeover Attempt*, 28 CASE W. RES. 882, 892 (1978) (management's position in a tender offer is identical to that occupied in conventional statutory merger or sale).

38 493 A.2d at 953 (citing DEL. CODE ANN. tit. 8, § 160(a) (1983)).

39 493 A.2d at 953-54 (citing *Cheff v. Mathes*, 41 Del. Ch. 494, 504, 199 A.2d 548, 554 (1964); *Bennett v. Propp*, 41 Del. Ch. 14, 22, 187 A.2d 405, 408 (1962); *Martin v. American Potash & Chemical Corp.*, 33 Del. Ch. 282, 287, 92 A.2d 295, 302 (1952); *Kaplan v. Goldsamt*, 380 A.2d 556, 568-69 (Del. Ch. 1977); *Kors v. Carey*, 39 Del. Ch. 47, 56, 158 A.2d 136, 140-41 (1960)).

40 493 A.2d at 954. For additional discussion supporting the view that a board is not a passive instrumentality, see generally Lipton, *supra* note 37; Lipton, *Takeover Bids in the Target's Boardroom: An Update After One Year*, 36 BUS. LAW. 1017 (1981) (advocating the majority view that the target board should take an active management role). But see Easterbrook & Fischel, *Takeover Bids, Defensive Tactics, and Shareholder Welfare*, 36 BUS. LAW. 1733 (1981); Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981) (advocating a rule of passivity for target management under which the board simply evaluates the offer and disseminates such information, allowing the shareholders to decide whether to accept or reject the offer). Easterbrook and Fischel concede that the latter view has not been accepted by the courts or state legislatures. See 94 HARV. L. REV. at 1194.

41 493 A.2d at 954 (citing *Panther v. Marshall Field & Co.*, 646 F.2d 271, 297 (7th Cir.), *cert denied*, 454 U.S. 1092 (1981); *Crouse-Hinds Co. v. InterNorth, Inc.*, 634 F.2d 690, 704 (2d Cir. 1980); *Heit v. Baird*, 567 F.2d 1157, 1161 (1st Cir. 1977); *Northwest Indus., Inc. v. B.F. Goodrich Co.*, 301 F. Supp. 706, 712 (N.D. Ill. 1969); and cases listed at note 39 *supra*). See also A. FLEISCHER, JR., *TENDER OFFERS: DEFENSES, RESPONSES, AND PLANNING* 148-216 (1983).

42 493 A.2d at 958. The court also observed that the power of the board of directors is not absolute. "A corporation does not have the unbridled discretion to defeat any perceived threat by any Draconian means available." *Id.* at 955.

The court next considered the standards by which it would measure the Unocal board's actions. The court first recognized that the business judgment rule applies to corporate takeovers in Delaware.<sup>43</sup> The court then analyzed the applicability of this rule to the Unocal board's actions. The business judgment rule is "a presumption that, in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."<sup>44</sup> Under this rule, a court will not substitute its judgment for that of the board if the court can attribute "any rational business purpose" to the board's decision.<sup>45</sup>

The court concluded that the business judgment rule would protect the board only if the directors exercised good faith and conducted a reasonable investigation pursuant to a clear duty to protect the corporate enterprise.<sup>46</sup> Furthermore, the court stated that,

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43 *Id.* at 954 (citing *Pogostin v. Rice*, 480 A.2d 619, 627 (Del. 1984)). The *Unocal* court reasoned that, when a board addresses a pending takeover bid, it must determine whether the offer is in the best interests of the corporation and its shareholders. The court suggested that, in this respect, the board's duty is no different from any other responsibility it bears. Thus, these decisions should receive the same respect other decisions receive in the realm of business judgment. *Id.* For further discussion, see articles cited at note 37 *supra*.

44 493 A.2d at 954 (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)).

45 493 A.2d at 954 (citing *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971)). While the *Unocal* court employed the traditional rational business purpose test, other courts have used different standards. See, e.g., *Klaus v. Hi-Shear Corp.*, 528 F.2d 225, 233 (9th Cir. 1975) (under California law, the board must show a compelling business purpose).

The *Unocal* court noted that a hostile takeover invariably creates a conflict of interest for a target director because the board may retain control as a result of a defensive action. The business judgment rule, however, still applies unless perpetuation of control is shown to be the sole or primary purpose for adoption of the tactic. *Id.* at 954-55. See also *Terco, Inc. v. Land of Lincoln Sav. and Loan*, 749 F.2d 374, 378-79 (7th Cir. 1984) (applying Illinois law); *Panther v. Marshall Field & Co.*, 646 F.2d 271, 293 (7th Cir.) (applying Delaware law), *cert. denied*, 454 U.S. 1092 (1981); *Johnson v. Trueblood*, 629 F.2d 287, 293 (3d Cir. 1980) (applying Delaware Law), *cert. denied*, 450 U.S. 999 (1981); *Crouse-Hinds Co. v. InterNorth, Inc.*, 623 F.2d 690, 702 (2d Cir. 1980) (applying New York law); *Heit v. Baird*, 567 F.2d 1157, 1160 (1st Cir. 1977) (applying Massachusetts law); *Schilling v. Belcher*, 582 F.2d 995, 1004 (5th Cir. 1978) (applying Florida law); *Enterra Corp. v. SGS Associates*, 600 F. Supp. 678, 686 (E.D. Pa. 1985) (applying Pennsylvania law); *Horowitz v. Southwest Forest Indus., Inc.*, 604 F. Supp. 1130, 1135 (D. Nev. 1985) (applying Nevada law).

Some commentators, dissenting judges, and courts, however, argue that the business judgment rule presumption should not apply if control is "a" motive. In this case the board will then have the burden of proving that the transaction was fair and reasonable. See, e.g., *Siegel, Tender Offer Defense Tactics: A Proposal for Reform*, 69 HASTINGS L.J. 377 (1985); *Easterbrook & Fischel, supra* note 40, 36 BUS. LAW. at 1745-49; *Norlin v. Rooney, Pace Inc.*, 744 F.2d 255, 264 (2d Cir. 1984); *Panther v. Marshall Field & Co.*, 646 F.2d 271, 293 (7th Cir. 1981) (*Cudahy, J.*, concurring in part and dissenting in part); *Johnson v. Trueblood*, 629 F.2d 287, 295 (3d Cir. 1980) (*Rosenn, J.*, concurring in part and dissenting in part).

46 493 A.2d at 955, 958 (citing *Cheff v. Mathes*, 41 Del. Ch. 494, 506, 199 A.2d 548, 555 (1964)). For a discussion of the requirements of good faith and reasonable investigation, see *Smith v. Van Gorkom*, 488 A.2d 858, 872-73 (Del. 1985), *reh'g denied*, 488 A.2d 898 (Del. 1985). In *Van Gorkom*, the board of directors failed to reasonably investigate the adequacy of a tender offer and were held personally liable for the difference between the fair

to come within the ambit of the business judgment rule, the defensive measure must be reasonable in relation to the threat posed.<sup>47</sup> If the board met these criteria, the court would not substitute its judgment for that of the board unless it was shown that the directors' decisions were primarily based on perpetuating themselves in office or some other breach of fiduciary duty.<sup>48</sup>

With respect to the good faith and reasonable investigation requirements, the Delaware Supreme Court endorsed the Chancery Court's findings that the Unocal board's decision to act was informed and was undertaken with due care.<sup>49</sup> The court noted that the board had consulted several outside advisors for both financial and legal advice regarding the adequacy of Mesa's offer and the viability of various defensive tactics.<sup>50</sup> Moreover, the court observed that such proof of good faith and reasonable investigation was materially enhanced by the unanimous approval of a board comprised of a majority of outside directors.<sup>51</sup> Unocal thus satisfied the court that reasonable grounds existed for the board's belief

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market value of the stock and the amount received in the merger. The failure to investigate was shown by the absence of any outside appraisal of the offering price or evaluation of the proposed merger by investment bankers and by the lack of documentation at the board meeting.

47 493 A.2d at 955, 958. To determine if the action is reasonable in relation to the threat, it is first necessary to analyze the nature of the takeover bid and its impact on the corporate enterprise. The court noted that such an analysis should consider the basic stockholder interests at stake, including those of short term speculators whose actions may have fueled the coercive aspect of an offer at the expense of the long term investors. *Id.* at 955-56. See also note 50 *infra* (the final item of Lipton's "reasonable investigation" guidelines lists factors which relate to the determination of reasonableness in relation to a threat).

48 493 A.2d at 958.

49 *Id.* at 959.

50 *Id.* at 950-51. See also text accompanying notes 14-20 *supra*. For further discussion regarding reasonable investigation, see Lipton, *supra* note 37, at 121-22. Lipton sets forth the following checklist to assist directors in properly evaluating a takeover offer: (1) management, usually with the assistance of investment bankers and outside legal counsel, should make a full presentation of the factors relevant to the consideration of the tender offer; (2) investment bankers should analyze the adequacy of the price offered and the sufficiency of management's presentation; (3) outside legal counsel should examine legal and regulatory issues involved in the takeover and determine whether the directors received adequate information on which to base a reasonable decision; (4) one investment banker and one outside law firm should advise a committee of disinterested, independent board members; (5) inadequate price, illegality, adverse impact on non-shareholder constituencies, failure to provide equally for all shareholders, and doubt as to the quality of the raider's securities offered in the exchange offer are all sufficient grounds for the directors to reject a takeover bid.

51 493 A.2d at 955 (citing *Aronson v. Lewis*, 473 A.2d 805, 812, 815 (Del. 1984); *Puma v. Marriott*, 283 A.2d 693, 695 (Del. Ch. 1975); *Panther v. Marshall Field & Co.*, 646 F.2d 271, 294 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981)). In contrast, some commentators have argued that courts place too much weight on the role of independent or outside directors. See, e.g., *Werner, Corporation Law in Search of its Future*, 81 COLUM. L. REV. 1611, 1656-57 (1981) (courts should not defer too readily to outside directors' judgments because this may impair the protection of shareholders against management abuse). See also *Panther v.*

that the Mesa offer represented a threat to the corporate enterprise and its other shareholders.

The court determined that the board had designed Unocal's selective self-tender offer to achieve two purposes.<sup>52</sup> The Unocal board had clearly stated its dual objectives when it adopted the selective self-tender offer as "either to defeat the inadequate Mesa offer or, should the offer still succeed, [to] provide the 49 percent of its shareholders, who would otherwise be forced to accept 'junk bonds,' with \$72 worth of senior debt."<sup>53</sup> The court concluded that both purposes were valid.<sup>54</sup>

In addition, the court found Unocal's selective self-tender offer reasonable in relation to the threat posed.<sup>55</sup> The court noted that the threat in this case consisted of the gross inadequacy of Mesa's coercive offer, coupled with Mesa's national reputation as a green-mailer.<sup>56</sup> The court recognized that, to protect the Unocal shareholders from this threat, the Unocal board had to exclude Mesa from the self-tender offer.<sup>57</sup> The court specified two reasons why the tactic would fail if Mesa had participated in the Unocal offer.<sup>58</sup> First, if Mesa could tender its shares, Unocal would in effect subsidize Mesa's continuing tender offer. Additionally, Mesa could not, by definition, fit within the class of shareholders the board intended to protect from Mesa's own coercive and inadequate tender offer. The court therefore determined that the board's defensive measure was reasonably related to the threat posed by Mesa's offer.

The court also examined the transaction's fairness and determined that the self-tender offer was fair to the minority shareholders.<sup>59</sup> The court found that the board's decision to offer what it determined as the fair value of the corporation was reasonable and consistent with the directors' duty to ensure that the minority shareholders receive equal value for their shares.<sup>60</sup>

The court next focused on Mesa's principal contention—that Unocal could not lawfully discriminate against one of its shareholders.<sup>61</sup> The court rejected Mesa's argument and concluded that, given the nature of the threat posed, the selective self-tender offer

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Marshall Field & Co., 646 F.2d 271, 300-01 (7th Cir. 1981) (Cudahy, J., concurring in part and dissenting in part).

52 493 A.2d at 956.

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.*

59 *Id.* at 956-57.

60 *Id.* (citing *Sterling v. Mayflower Hotel Corp.*, 33 Del. Ch. 293, 304, 93 A.2d 107, 114 (1952)).

61 493 A.2d at 957.

was neither unlawful nor unreasonable.<sup>62</sup> While Delaware corporate law is silent on the matter, the court indicated that this did not mean that the tactic was unlawful.<sup>63</sup> Reasoning by analogy, the court based its determination on prior judicial approval of selective stock repurchases as well as other defensive techniques with selective features.

First, the court observed that in the case of "greenmail" transactions, Delaware courts have authorized selective stock repurchases.<sup>64</sup> In these transactions, the target purchases the stock of the raider at a premium to prevent a takeover.<sup>65</sup> The target, however, denies all other shareholders such favored treatment.<sup>66</sup> The court stated that Mesa's claim of discrimination was ironic, given Mesa's past history of greenmail.<sup>67</sup> Second, the court recognized that many current defensive measures have highly selective features.<sup>68</sup> These measures, designed to counter threats to the corporate enterprise, have also received judicial sanction despite their selective features.

Having determined that the selective self-tender offer was neither unlawful nor unreasonable, the court addressed Mesa's remaining arguments relating to selective treatment. The court found that the offer did not become an "interested director transaction" merely because certain board members were large shareholders; this fact alone did not create a disqualifying "personal pecuniary interest" to defeat the operation of the business judgment rule.<sup>69</sup>

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62 *Id.*

63 *Id.*

64 *Id.* (citing cases listed at note 39 *supra*).

65 *Id.* Some debate exists regarding the impact of greenmail on shareholder interests. Compare "SEC Study says 'Greenmail Has Negative Impact on Target Company Shareholders,'" [Current Binder] SEC. REG. L. ALERT, Vol. 17, No. 22, January 1, 1984 (citing to [Current Binder] FED. SEC. L. REP. (CCH) ¶ 83,713 (1984)) with Dennis, *supra* note 10.

66 493 A.2d at 957. See also Nathan & Sobel, *Corporate Stock Repurchases in the Context of Unsolicited Takeover Bids*, 35 BUS. LAW. 1545, 1554 (1980). In this article the authors argue that other shareholders do not have an opportunity to participate in a selective stock repurchase. Because the transaction is principally designed to remove a threat to the corporation, a pro rata offer to all shareholders will not accomplish this goal. The greenmail transaction is "premised on the fact that all shares of stock are not fungible and to ignore this reality in the guise of being fair to all shareholders is self-defeating." *Id.*

67 493 A.2d at 957. See also *Trans World Airlines, Inc. v. Icahn*, 609 F. Supp. 825, 828 n.8 (S.D.N.Y. 1985) (characterizing the selective self-tender offer employed by Unocal as a form of "reverse greenmail").

68 493 A.2d at 957 (referring to the following popular defensive tactics: Crown Jewel, Pac Man, White Knight, and Golden Parachute). For a discussion of defensive tactics, see Lipton and Brownstein, *supra* note 2, and Siegel, *supra* note 45.

69 493 A.2d at 958 (citing *Cheff v. Mathes*, 41 Del. Ch. 494, 505, 199 A.2d 548, 554 (1964)). Mesa also contended that the Unocal directors received a benefit from the tender of their own shares which, because of the Mesa exclusion, did not devolve upon all shareholders equally. But Mesa conceded that if the exclusion were valid, then the directors and

As to the fiduciary duties owed to Mesa, the court determined that the board continued to owe Mesa the duties of due care and loyalty. But because of the perceived destructive threat of Mesa's tender offer, the board had a supervening duty to protect the corporate enterprise, including the other shareholders.<sup>70</sup>

Finally, regarding Mesa's contention that the selective self-tender offer was punitive, the court noted that nothing precluded Mesa, as a shareholder, from acting in its own self interest.<sup>71</sup> The court, however, stressed that Mesa, in pursuing its own interests, had acted in a manner contrary to the best interests of Unocal and its other shareholders. The court found no support in Delaware law for Mesa's argument that, when responding to a perceived harm, a corporation must guarantee a benefit to those shareholders who deliberately provoked the danger being addressed.<sup>72</sup> In the face of such a challenge, the court concluded, Unocal and its shareholders had no obligation of self sacrifice.<sup>73</sup>

The Delaware Supreme Court therefore sanctioned Unocal's use of a selective self-tender offer on the following grounds: (1) the Unocal board, consisting of a majority of independent directors, acted in good faith and, after reasonable investigation, found Mesa's tender offer both inadequate and coercive; (2) under the circumstances, Unocal's board had both the power and the duty to oppose a bid it perceived harmful to the corporate enterprise; and (3) under these facts, the Unocal tactic was reasonable in relation to the threat posed. Because the board acted in the proper exercise of sound business judgment, the court refused to substitute its views for those of the Unocal board and upheld the use of the selective self-tender offer.<sup>74</sup>

### III. The SEC Response

The *Unocal* holding, by permitting a corporation to treat its shareholders unequally, conflicts with the Securities and Exchange Commission's corporate takeover policies. These policies provide for uniform treatment of shareholders and a balance of neutrality between the target and the takeover bidder.<sup>75</sup> Because of this conflict, the Securities and Exchange Commission reacted to *Unocal* almost immediately by issuing a corrective proposal.

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other shareholders would share the same benefit. Since the court concluded that the exclusion was valid, the question became moot. 493 A.2d at 957.

70 *Id.* at 958.

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.* at 949, 958.

75 See SEC Release No. 34-22,198, 50 Fed. Reg. 27,976 (1985).



In response to *Unocal*, the SEC proposed Rule 14(d)-10<sup>76</sup> which, if implemented, would prohibit the tactic employed by the Unocal board.<sup>77</sup> The rule first requires a tender offeror to hold the offer open to all holders of the class of securities subject to the tender offer (the "all holders" requirement).<sup>78</sup> Second, although not bearing directly on the *Unocal* tactic, Rule 14(d)-10 requires a tender offeror to pay every tendering security holder the highest consideration offered to any other security holder during the tender offer period (the "best price" requirement).<sup>79</sup>

Rule 14(d)-10 is inappropriate, however, in the context of Unocal's defensive tactic for two reasons. First, contrary to SEC arguments, the Commission does not appear to have the necessary authority from Congress to promulgate such a rule. Second, the proposed rule would not promote a balance of neutrality in all cases.

The SEC argues that its authority to promulgate Rule 14(d)-10 derives from both the language and legislative intent of sections 14(d) and 14(e)<sup>80</sup> of the Williams Act.<sup>81</sup> The SEC has consistently

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76 *Id.* The proposed rule states in relevant part:

(a) No bidder shall make a tender offer unless:

(1) The tender offer is open to all security holders of the class of securities subject to the tender offer. . . .

(2) In addition to the provisions of section 14(d)(7) of the [Securities Exchange Act of 1934], the consideration paid to any security holder pursuant to the tender offer is the highest consideration offered to any other security holder at any time during such tender offer, determined from the earlier of the date of public announcement as specified in Rule 14(d)-2(b) or the date of commencement pursuant to Rule 14(d)-2(a).

77 Indeed, the SEC wrote the rule intending to forbid selective self-tender offers. See SEC Release No. 34-22,198, 50 Fed. Reg. at 27,977 n.5.

78 *Id.* at 27,977.

79 *Id.* If the tender offeror offers more than one type of consideration, then both types must be substantially equivalent in value.

80 15 U.S.C. §§ 78n(d)(6), 78n(e) (1982). Section 14(d)(6) provides:

Where any person makes a tender offer, or request or invitation for tenders, for less than all the outstanding equity securities of a class, and where a greater number of securities is deposited pursuant thereto within ten days after copies of the offer or request or invitation are first published or sent or given to security holders than such person is bound or willing to take up and pay for, the securities taken up shall be taken up as nearly as may be pro rata, disregarding fractions, according to the number of securities deposited by each depositor. The provisions of this subsection shall also apply to securities deposited within ten days after notice of an increase in the consideration offered to security holders . . . .

Section 14(e) provides:

It shall be unlawful for any person to make any untrue statement of material fact or omit to state any material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition of or in favor of any such offer, request, or invitation. The Commission shall, for the purposes of this subsection, by rules and

maintained that section 14(d) implicitly contains the "all holders requirement."<sup>82</sup> First, the SEC claims that Congress intended the Williams Act "to require fair and equal treatment of all holders of the class of security which is the subject of the tender offer."<sup>83</sup> Second, the SEC specifically points to the legislative history of section 14(d)(6)<sup>84</sup> of the Williams Act, which describes the purpose of that section as "allowing all shareholders a fair opportunity to participate in the offer."<sup>85</sup> Third, the SEC relies upon the testimony of former SEC Chairman Manuel F. Cohen before the Senate: "[The Williams Act] is designed to eliminate conditions surrounding the offer which discriminate unfairly among those who may desire to tender their shares."<sup>86</sup>

In promulgating any rule, an administrative agency must rely on a specific grant of congressional authority.<sup>87</sup> Yet Congress designed sections 14(d) and 14(e) to provide information and to prohibit fraudulent, deceptive or manipulative acts.<sup>88</sup> Indeed, the Supreme Court has held that the Williams Act's primary concern is disclosure.<sup>89</sup> Furthermore, there is little evidence that Congress seriously considered an "all holders" requirement in either section 14(d) or 14(e). Mr. Cohen's statement contains the only reference

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regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative.

81 See SEC Release, *supra* note 75, at 27,977. The Williams Act, 15 U.S.C. §§ 78m(d)-(f), 78n(d)-(f) (1982), amended sections 13 and 15 of the Securities Exchange Act of 1934.

82 The SEC also maintains that the Williams Act impliedly contains the "best price" requirement. See SEC Release, *supra* note 75, at 27,977. The SEC cites the legislative history of section 14(d)(7) of the 34 Act, 15 U.S.C. § 78n(d)(7) (1982). The history states that the purpose is "to assure fair treatment of those persons who tender their shares at the beginning of the tender period and to assure equality of treatment among all shareholders who tender their shares." 44 Fed. Reg. at 70,355 n.40 (quoting S. REP. NO. 550, 90th Cong., 1st Sess. 10 (1967); H.R. REP. NO. 1711, 90th Cong., 2d Sess. 11 (1968)).

83 SEC Release No. 34-16,385, 44 Fed. Reg. 70,349, 70,355 (1979) (citing S. REP. NO. 550, 90th Cong., 1st Sess. 17 (1967)).

84 See note 80 *supra*.

85 SEC Release No. 34-16,385, *supra* note 83 (quoting S. REP. NO. 550, 90th Cong., 1st Sess. 17 (1967); H.R. REP. NO. 1711, 90th Cong., 2d Sess. 11 (1968)).

86 SEC Release, *supra* note 83, at 70,355 (citing *Full Disclosure of Corporate Equity Ownership in Corporate Takeover Bids: Hearings on S. 510 Before the Subcomm. on Securities of the Sen. Comm. on Banking & Currency*, 90th Cong., 1st Sess. 17 (1967) (hereinafter cited as *Full Disclosure*)). In his testimony, Chairman Cohen also stated that "[t]he second objective of the bill is to assure fair treatment of all shareholders who decide to accept a tender offer." *Full Disclosure* at 21.

87 See *United States v. Vogel Fertilizer Co.*, 455 U.S. 16 (1982). See also *Rowan Cos. v. United States*, 452 U.S. 247 (1981) (where Congress delegated to an agency broad authority to make judgments, as in the case of the SEC, the judgments should coincide with the specific language or the legislative intent of the statutes creating the agency).

88 See generally S. REP. NO. 550, 90th Cong., 1st Sess. (1967); H.R. REP. NO. 1711, 90th Cong., 2d Sess. (1968).

89 See *Schreiber v. Burlington Northern, Inc.* 105 S. Ct. 2458, 2464 (1985) (citing *Edgar v. MITE Corp.*, 457 U.S. 624, 632-34 (1982); *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 35 (1977); *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58-59 (1975)).

in the Senate hearing to an "all holders" requirement.<sup>90</sup> Thus, the SEC relies on its own testimony for congressional intent. The Williams Act therefore does not specifically permit the SEC to promulgate the "all holders" requirement.<sup>91</sup>

If selective tender offers are found fraudulent, deceptive, or manipulative, then the SEC's position would be valid. The Supreme Court, however, has held that misrepresentation or nondisclosure is essential to a finding of fraud, deceit, or manipulation.<sup>92</sup> Thus, unless selective tender offers inherently involve misrepresentation or nondisclosure, the proposed rule arguably extends beyond the scope of the SEC's current regulatory authority.

To further support its promulgating the "all holders" requirement,<sup>93</sup> the SEC argues that unequal treatment of shareholders upsets the balance of neutrality between target management and takeover bidders.<sup>94</sup> This view, however, should be considered in light of the *Unocal* holding.

In sanctioning the use of the selective self-tender offer, the *Unocal* court implicitly recognized that an inadequate and coercive two-tier tender offer tips the balance of neutrality in favor of the raiding party. The *Unocal* court justified Unocal's tactic, which excluded the raiding party from participation, on the grounds of the tactic's reasonableness in relation to the threat posed. By prohibiting a legitimate defense to an inherently coercive takeover device,<sup>95</sup> the SEC would allow the balance of neutrality to remain tipped in favor of the raider, thus foreclosing any real balance. Consequently, the proposed rule would achieve the opposite of its stated policy of neutrality.

#### IV. Analysis of the *Unocal* Tactic

This section analyzes the reasonableness of Unocal's discriminatory tactic and considers the circumstances in which courts are likely to sanction its use in the future. To determine the reason-

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<sup>90</sup> See note 86 *supra* and accompanying text.

<sup>91</sup> Several commentators have criticized the SEC for promulgating rules pursuant to section 14(d) which exceed its rule-making authority. See Dennis, *supra* note 10, at 286-89; Note, *supra* note 11; Comment, *SEC Tender Offer Timing Rules: Upsetting a Congressionally Selected Balance*, 68 CORNELL L. REV. 914 (1983). See also Posner, *Misuse of Confidential Information Concerning a Tender Offer as a Securities Fraud*, 49 BROOKLYN L. REV. 1265, 1285-86 (1982).

<sup>92</sup> See *Schreiber v. Burlington Northern, Inc.*, 105 S. Ct. 2358, 2462 n.2 (1985) (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199-206 (1976); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 476 (1977)).

<sup>93</sup> See notes 82-86 *supra* and accompanying text.

<sup>94</sup> See SEC Release, *supra* note 75, at 27,977, 27,978 (citing *Edgar v. MITE Corp.*, 457 U.S. 624 (1982)). See also *Piper v. Chris-Craft Indus. Inc.*, 430 U.S. 1, 31 (1971); *Full Disclosure*, *supra* note 86, at 38.

<sup>95</sup> For a discussion of the increased use of two-tier tender offers, see Comment, *The Front-end Loaded, Two-Tiered Tender Offer*, 78 NW. U.L. REV. 811, 812 (1983).

ableness of the selective self-tender, the tactic must be examined in light of the coercive nature of the two-tier tender offer,<sup>96</sup> Mesa's history of greenmailing,<sup>97</sup> and traditional notions of equity.

Mesa presumably selected the two-tier tender offer to maximize its chance of successfully completing the hostile takeover attempt. By utilizing the two-tier pricing structure, Mesa intended to induce a front-end stampede. This pricing structure discriminated against the Unocal shareholders relegated to the grossly inadequate back-end merger.<sup>98</sup> To protect back-end shareholders, the directors adopted a discriminatory self-tender which amounted to a response-in-kind to Mesa's own discriminatory bid. A discriminatory defensive tactic is not unreasonable in such circumstances.

Moreover, as a noted greenmailer, Mesa benefitted in the past from a corporation's ability to deal selectively with its shareholders.<sup>99</sup> In greenmail transactions, courts have sustained a board's ability to discriminate against its shareholders by selectively repurchasing a hostile bidder's stock and removing a threat to the corporate enterprise.<sup>100</sup> A raider with a greenmail reputation should not prevail on an allegation that a board unjustly discriminated against him through the use of "reverse" greenmail.<sup>101</sup>

Finally, a raider such as Mesa should find it difficult to persuade a court to enjoin a target company from pursuing a self-tender offer. The guiding doctrine is the equitable maxim that "he who comes into equity must come with clean hands."<sup>102</sup> Under this doctrine, a court should not award injunctive relief where the party seeking relief, the raider, engages in discriminatory "conduct not unlike the conduct of which it is complaining."<sup>103</sup>

The *Unocal* court's approval of the discriminatory self-tender offer might suggest that the Delaware Supreme Court endowed corporate boards with broad new powers to resist tender offers. Yet the *Unocal* decision probably does not reach so far. This case involved a unique combination of factors—a grossly inadequate offer, a coercive two-tier pricing structure, and a noted greenmailer. While the greenmailing inference contributed to the threat of harm to minority shareholders, the court based its sanction of the selec-

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96 See note 11 *supra*.

97 See note 10 *supra*.

98 See note 11 *supra*.

99 See notes 64-66 *supra* and accompanying text.

100 493 A.2d at 957 (citing cases listed at note 39 *supra*).

101 See note 67 *supra* and accompanying text.

102 *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 814, *reh'g denied*, 325 U.S. 893 (1945). The "clean hands" argument is "a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief." 324 U.S. at 814.

103 *Martin Marietta Corp. v. Bendix Corp.*, 549 F. Supp. 623, 634 n.7 (D. Md. 1982).

tive self-tender on the tactic's reasonableness in relation to the threat posed by the inadequate and coercive two-tier tender offer. Courts will likely restrict the selective self-tender to cases involving inadequate and coercive two-tier tender offers. The selective self-tender should have little application to tender offers which adequately compensate all participating shareholders.

*Unocal* represents the principle of "fighting fire with fire." The decision sanctions the adoption of a discriminatory defensive tactic when a discriminatory tender offer threatens the economic interests of minority shareholders.<sup>104</sup> If the courts in a particular jurisdiction permit coercive two-tier offers,<sup>105</sup> and the appropriate circumstances exist, the selective self-tender will effectively oppose an unsolicited tender offer.

## V. Conclusion

In *Unocal*, the Delaware Supreme Court sanctioned, under the business judgment rule, a selective self-tender offer designed to thwart an inadequate two-tier tender offer. *Unocal* used the tactic to protect shareholder interests. A discriminatory tender offer can be justified when a board's obligation to protect other shareholders from economic harm outweighs the obligations it owes to the shareholder-raider provoking the threat.

Courts should not interpret the *Unocal* decision as broad authority to engage in discriminatory tender offer tactics. It is, in fact, a limited decision. The defensive tactic should not be sanctioned in

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<sup>104</sup> See 493 A.2d at 956.

<sup>105</sup> States which choose to regulate or prohibit certain takeover tactics have created a piece-meal approach which invariably creates nonuniformity. See, e.g., OHIO REV. CODE ANN. § 1701.83.1 (Page 1985) (requiring shareholder approval prior to the consummation of the sale of a company's stock by tender offers for more than 20 percent, market purchases for more than 33 1/3 percent, or private purchases of more than 50 percent); MD. CORPS. & ASS'NS CODE ANN. §§ 4-601 to 3-603 (Supp. 1984) (requiring supermajority approval for liquidations, sales of assets, mergers, and recapitalizations unless the transaction meets defined "fair price" requirements); PA. STAT. ANN. tit. 15, § 1910 (Purdon Supp. 1984-85) (requiring a person receiving 30 percent or more of a corporation to pay the remaining shareholders the "fair value" of their shares); HAWAII REV. STAT. § 317E-2(3) (1976) (expressly prohibiting tender offers for fewer than all of the target's outstanding shares). Because Hawaii's statute precludes the use of two-tier tender offers, the targets could not implement the selective self-tender under Hawaii law.

The SEC, given legislative authorization, could more effectively achieve a uniform solution. For example, S. 2783, 98th Cong., 2d Sess. (1984) would have authorized the SEC to prohibit the use of two-tier tender offers. H.R. 5693, 98th Cong., 2d Sess. (1984) would have expanded SEC authority. The House bill, if enacted, would have limited greenmail payments by requiring shareholder approval for purchases above the market price for any person holding three percent or more of the outstanding stock for less than three years, unless the same offer was open to all shareholders. The bill also would have prohibited self-tender offers after a third party has initiated a tender offer, unless the shareholders approve. The bill passed the House Energy and Commerce Committee in 1984, but was not acted upon by the full House.

cases involving adequate tender offers; rather, courts should permit the tactic principally in situations involving inadequate two-tier tender offers, consistent with the concept of "fighting fire with fire."

While the SEC has proposed a rule to eliminate selective self-tender offers, the proposal is misdirected. Aside from an apparent lack of authority, the proposed SEC rule would benefit a raider by eliminating an effective means of allowing a target company to oppose a hostile two-tier tender offer. The selective self-tender restores a balance of neutrality between the raider and the target and merely responds to a takeover device which favors the raider. In jurisdictions permitting the use of coercive two-tier tender offers, the selective self-tender will be a useful addition to a target board's arsenal of defensive tactics.

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**TORT LAW—HEPPS v. PHILADELPHIA NEWSPAPERS, INC.: THE VALIDITY OF THE COMMON LAW PRESUMPTION OF FALSITY IN LIGHT OF NEW YORK TIMES AND ITS PROGENY**

Historically, courts did not require plaintiffs in a defamation action to prove the falsity of an allegedly libelous statement. Plaintiffs were afforded a presumption of falsity and defendants could prove that the statement was true as an affirmative defense. The United States Supreme Court, however, has modified this common law rule to require plaintiffs who are “public officials” and “public figures” to prove falsity when suing a media defendant.<sup>1</sup> The Court, though, has not stated whether private plaintiffs must also prove the falsity of the allegedly libelous statement. Presently, some states allow a presumption of falsity while others require private plaintiffs to establish falsity. In *Hepps v. Philadelphia Newspapers, Inc.*,<sup>2</sup> the Pennsylvania Supreme Court held that a state statute which allowed a presumption of falsity when a private individual brings a libel action against a media defendant did not violate the first amendment.

Part I of this comment outlines the facts and the holding of *Hepps*. Part II then traces the rules and policies of libel recognized at common law through the United States Supreme Court’s decisions in *New York Times* and its progeny. Finally, Part III examines the Restatement (Second) of Torts’ shift away from the common law presumption of falsity, lower courts’ decisions reflecting this shift, and United States Supreme Court decisions implying a constitutional requirement that all plaintiffs prove falsity as part of their prima facie case.

*I. Hepps v. Philadelphia Newspapers, Inc.*

In 1975, *The Philadelphia Inquirer* ran a series of five articles linking Maurice S. Hepps, General Programming, Inc. (“General Programming”), and nineteen corporations to organized crime.<sup>3</sup> Each

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1 In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Supreme Court held that the first amendment requires a plaintiff who is a public official to prove “actual malice” in order to recover from a media defendant. See notes 26, 28-32 *infra* and accompanying text. In *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, 388 U.S. 130 (1966), the Supreme Court extended the *New York Times* actual malice burden to public figures. See notes 33-36 *infra* and accompanying text.

2 506 Pa. 304, 485 A.2d 374 (1984), *prob. jur. noted*, 105 S. Ct. 3496 (1985).

3 One of the articles asserted that former state Senator Frank Mazzei, who allegedly had several underworld associates, improperly used his political influence to subvert a ruling of the Pennsylvania Liquor Control Board. The article commented that while no clear financial link between the Senator and General Programming existed, the Senator had re-

of the corporations distributed beer and soda in Pennsylvania under a license issued by General Programming. Hepps, the principal stockholder of General Programming, General Programming, and its licensees all instituted a libel suit against the reporters who prepared the story<sup>4</sup> and against Philadelphia Newspapers, Inc.

At trial, the court noted that a Pennsylvania statute placed upon defendants in a libel suit the burden of proving the truth of defamatory statements.<sup>5</sup> The court, however, determined that this statute was unconstitutional because it presumed the falsity of the defendant's statement, thereby requiring the defendant in a civil libel suit to establish the truth of the defamatory publication to prevail.<sup>6</sup> Thus, contrary to the statute, the court instructed the jury that the plaintiff bears the burden of proving the falsity of the allegations in the defendant's article.<sup>7</sup> The jury returned a verdict in favor of the defendants.<sup>8</sup>

The Pennsylvania Supreme Court reversed the trial court's decision. The court stated that Pennsylvania law had traditionally recognized the common law rule that in defamation actions, when the issue is properly raised, the defendant has the burden of proving the truth of the defamatory communication. The court stated that because the defendant can more easily prove the truthfulness of the statement, the defendant should bear the burden of proving its truthfulness.<sup>9</sup> Nevertheless, because of two United States Supreme

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peatedly interfered in state government on behalf of Hepps. Further, the article stated that the wife of one of Mazzei's underworld associates was a licensed distributor of General Programming's beverages. *Hepps v. Philadelphia Newspapers, Inc.*, 3 Pa. D. & C.3d 193 (1977).

4 The reporters were William Ecenbarger and William Lambert. 485 A.2d at 377.

5 *Id.*

6 42 PA. CONS. STAT. § 8343(b)(1) (1978) provides in relevant part:

(a) Burden of plaintiff. In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised:

(1) The defamatory character of the communication.

(2) Its publication by the defendant.

(3) Its application to the plaintiff.

(4) The understanding by the recipient of its defamatory meaning.

(5) The understanding by the recipient of it as intended to be applied to the plaintiff.

(6) Special harm resulting to the plaintiff from its publication.

(7) Abuse of a conditionally privileged occasion.

(b) Burden of defendant. In an action for defamation, the defendant has the burden of proving, when the issue is properly raised:

(1) The truth of the defamatory communication.

(2) The privileged character of the occasion on which it was published.

(3) The character of the subject matter of defamatory comment as of public concern.

7 485 A.2d at 377.

8 *Id.*

9 485 A.2d at 378 (quoting *Corabi v. Curtis*, 441 Pa. 432, 273 A.2d 399 (1971)).



Court decisions, *New York Times Co. v. Sullivan*<sup>10</sup> and *Gertz v. Robert Welch, Inc.*<sup>11</sup>, the Pennsylvania Supreme Court acknowledged that it had to consider whether Pennsylvania's statute violated the first amendment.

Writing for the majority in *Hepps*, Chief Justice Nix noted that *New York Times* held that a plaintiff who is a public official must prove that a media defendant published with "actual malice," that is, with knowledge of falsity or reckless disregard of the truth. *New York Times* did not, however, state that a libel plaintiff who is a private individual must establish falsity.<sup>12</sup> Chief Justice Nix then emphasized that the United States Supreme Court in *Gertz* allowed the states to define for themselves the proper standard of fault a private plaintiff must prove against a media defendant. *Gertz*, however, prohibited states from imposing liability without fault.<sup>13</sup> Consequently, Chief Justice Nix declared that Pennsylvania's statute did not violate the first amendment because it did not apply liability without fault.<sup>14</sup>

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10 376 U.S. 254 (1964). In *New York Times* the Court had to decide whether a media defendant forfeits constitutional protection when he publishes false defamatory statements concerning a public official. Plaintiff Sullivan was a Commissioner of Public Affairs in Montgomery, Alabama. His duties included supervision of the Police Department. Defendant *New York Times Co.* published a full-page advertisement asserting that the police department engaged in violent and intimidating acts against Dr. Martin Luther King and black students protesting segregation. The Supreme Court held that although the accusations were false, Sullivan could not recover because he did not prove that the *New York Times Co.* acted with actual malice; that is, with knowledge of the false nature of the statements or with reckless disregard of whether the statements were false or not.

11 418 U.S. 323 (1974). Unlike *New York Times*, *Gertz* involved a private plaintiff. A jury convicted a Chicago policeman named Nuccio of murder. The plaintiff *Gertz* represented the victim's family in a civil action against Nuccio. Defendant *Robert Welch, Inc.* published an article in its magazine stating that *Gertz* arranged Nuccio's frame-up and *Gertz's* representing the victim evidenced his part in a Communist conspiracy to discredit the local police. The article also implied that *Gertz* had a criminal record and that he had served as an official of the Marxist League of Industrial Democracy.

The Supreme Court held that a media defendant who allegedly defames a private plaintiff will not receive as much constitutional protection as a media defendant who allegedly defames a public official or public figure. The Court reasoned that because a private plaintiff, such as *Gertz*, becomes involved in an issue of public interest involuntarily, courts should not require him to meet the demanding burden of *New York Times*. The Court concluded, however, that a state may not impose liability on a media defendant without a showing of at least some degree of fault. The Court remanded the case for a new trial to determine whether defendant *Robert Welch, Inc.* published the article with at least negligence as to its falsity.

12 485 A.2d at 381. Chief Justice Nix emphasized that the Court in *New York Times* dealt only with a public official plaintiff.

13 *Id.* at 383-84. Chief Justice Nix also stated that Pennsylvania law had recognized this position years before the Supreme Court adopted it. *Id.* at 384.

14 *Id.* at 385. The Pennsylvania libel statute requires the plaintiff to establish that the defendant disseminated the allegedly libelous material without due care. The court explained that the inability of the publisher to overcome the presumption of falsity will not

## II. Development of the Law of Libel

### A. Common Law Principles

The law of defamation protects an individual's interest in the enjoyment and maintenance of a good reputation.<sup>15</sup> Prior to *New York Times*, a plaintiff had to plead the following five elements in his libel complaint to avoid dismissal of his action: (1) that the defendant published a statement of fact to a third party;<sup>16</sup> (2) that the publication was defamatory;<sup>17</sup> (3) that the publication concerned the plaintiff;<sup>18</sup> (4) falsity of the publication;<sup>19</sup> and, in some actions, (5) damages.<sup>20</sup>

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guarantee recovery by the plaintiff. Rather, recovery depends on the plaintiff's ability to establish negligence. See 42 PA. CONST. STAT. § 8344 (1978).

15 See W. KEETON, PROSSER AND KEETON ON TORTS § 113 (5th ed. 1984).

16 *Duchensnaye v. Munro Enterprises, Inc.*, 125 N.H. 244, 480 A.2d 123 (1984); *Casio v. Holt*, 425 So. 2d 820 (La. App. 1982); *Great Atl. & Pac. Tea Co. v. Paul*, 256 Md. 643, 261 A.2d 731 (1970); *Gaetano v. Sharon Herald Co.*, 426 Pa. 179, 231 A.2d 753 (1967); *Weaver v. Beneficial Finance Co.*, 199 Va. 196, 98 S.E.2d 687 (1957); *Lunz v. Neuman*, 48 Wash. 2d 26, 290 P.2d 697 (1955); *Kelly v. Hoffman*, 137 N.J.L. 695, 61 A.2d 143 (1948).

17 Historically, courts considered a publication defamatory if it tended "to hold the plaintiff up to hatred, contempt or ridicule or cause him to be shunned or avoided." *Parmiter v. Coupland*, 151 Eng. Rep. 340, 342 (1840). Courts generally adhered to this standard in determining, as a matter of law, whether the publication could "reasonably be construed" to have a libelous meaning ascribed to it. *Bogash v. Elkins*, 405 Pa. 437, 440, 176 A.2d 677, 678 (1962). See also *Hays v. American Broadcasting Defense Soc'y*, 252 N.Y. 266, 169 N.E. 380 (1929) (the plaintiff must convince the court that the publication is "capable" of the defamatory meaning ascribed to it).

Some jurisdictions broadened the standard to include any publication "which upon its face has a natural tendency to injure a person's reputation, either generally, or with respect to his occupation." *Dethlefsen v. Stull*, 86 Cal. App. 2d 499, 501, 195 P.2d 56, 58 (1948). If the publication was capable of more than one meaning, it was then for the jury to decide whether the publication was in fact understood in a defamatory sense by a third party as pleaded in the plaintiff's complaint. *Washington Post Co. v. Chaloner*, 250 U.S. 290 (1919); *Clark v. American Broadcasting Cos.*, 684 F.2d 1208 (6th Cir. 1982); *Schultz v. Reader's Digest Assoc.*, 468 F. Supp. 551 (E.D. Mich. 1979).

18 The plaintiff must plead and prove that the publication concerned him. *Neeley v. Winn-Dixie Greenville, Inc.*, 255 S.C. 301, 305, 178 S.E.2d 662, 665-66 (1971). See also *Davis v. Macon Tel. Publishing Co.*, 93 Ga. App. 633, 635, 92 S.E.2d 619, 623 (1956) ("[T]he defamatory words must refer to some ascertained or ascertainable person, and that person must be the plaintiff."). Although the words may appear to apply only to a class of individuals, a member may maintain an action if he can satisfy the jury that the publication referred especially to him. 93 Ga. App. at 635, 92 S.E.2d at 623.

19 The plaintiff was required to plead that the publication was false. *Mathews v. Atlanta Newspapers, Inc.*, 116 Ga. App. 337, 157 S.E.2d 300 (1967) (no cause of action because the plaintiff failed to allege falsity in his complaint); *Greathouse v. Credit Bureau, Inc.*, 279 Ala. 524, 187 So. 2d 565 (1966) (court in libel must allege that the defendant falsely made the charges); *Herrmann v. Newark Morning Ledger Co.*, 48 N.J. Super. 420, 138 A.2d 61 (1958) (a general allegation of falsity will ordinarily suffice); *Yelle v. Cowles Publishing Co.*, 46 Wash. 2d 105, 278 P.2d 671 (1955) (amended complaint sufficiently alleged that certain statements in an editorial were false). But see *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 273 A.2d 899 (1971) (falsity not even an element of the plaintiff's prima facie case); *Lipman v. Brisbane Elementary School Dist.*, 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961) (plaintiff need not allege falsity); note 21 *infra*.

20 If the publication was "libelous per se," where it was clear from the face of the publi-

As to falsity of the publication, it was presumed that the plaintiff met his burden.<sup>21</sup> Once the plaintiff established his *prima facie* case, the defendant could plead and prove, as an affirmative defense, the truth of the publication<sup>22</sup> or an absolute<sup>23</sup> or qualified<sup>24</sup> privilege to avoid liability. If the defendant proved a privilege, the plaintiff still had the opportunity to show that the defendant abused his privilege.<sup>25</sup>

cation and without the aid of extrinsic evidence that the publication would tend to defame the plaintiff's reputation, the court, as a matter of law, presumed that some damage occurred from the publication. The plaintiff did not then have to prove damages for a jury award of general damages. See *Diplomat Elec. Inc. v. Westinghouse Supply Co.*, 378 F.2d 377 (5th Cir. 1967); *Thompson v. Upton*, 218 Md. 433, 146 A.2d 880 (1959); *Morey v. Barnes*, 212 Minn. 153, 2 N.W.2d 829 (1942). But see note 48 *infra*. If the action was a "libel per quod," a court would not presume damages and would not allow the jury to award compensatory damages without proof of injury. Instead, the plaintiff had to plead and prove "special damages" in the form of itemized pecuniary loss. *Wainman v. Bowler*, 176 Mont. 91, 576 P.2d 268 (1978) (the publication must upon its face, in clear unequivocal language, contain defamatory words concerning the plaintiff; if not, then the action will be treated as a libel per quod).

21 Although the plaintiff was required to plead falsity, he was not required to prove it. The common law presumed the good reputation of the plaintiff. *Arnold v. National Union of Marine Cooks and Stewards*, 44 Wash. 2d 183, 265 P.2d 1051 (1954). As a result, falsity of the publication was presumed. See *Rogozinski v. Airstream By Angell*, 152 N.J. Super. 133, 377 A.2d 807, *modified*, 164 N.J. Super. 465, 397 A.2d 334 (1979); *Wetherby v. Retail Credit Co.*, 235 Md. 237, 201 A.2d 344 (1964); *Steffes v. Crawford*, 143 Mont. 43, 386 P.2d 842 (1963); *Rickbeil v. Grafton Deaconess Hospital*, 74 N.D. 525, 23 N.W.2d 247 (1946). But see *Krutech v. Schimmel*, 51 Misc. 2d 1052, 272 N.Y.S.2d 261, *rev'd*, 27 A.D.2d 837, 278 N.Y.S.2d 25 (1966) (falsity must be pleaded and proved in actions where defendant has a qualified privilege); *Pheiffer v. Haines*, 320 Mich. 263, 30 N.W.2d 862 (1948). See also notes 52-85 *infra* and accompanying text.

22 Generally courts have required the defendant to prove that the publication was "substantially true." *Fendler v. Phoenix Newspapers, Inc.*, 130 Ariz. 475, 636 P.2d 1257 (1981); *Hein v. Lacy*, 228 Kan. 249, 616 P.2d 277 (1981).

23 Absolute privileges included: (1) judicial proceedings, *Irwin v. Ashurst*, 158 Or. 61, 74 P.2d 1127 (1938); (2) executive communications, *Mellon v. Brewer*, 18 F.2d 168 (D.C. Cir. 1927) (Secretary of the Treasury); (3) legislative proceedings, *Cochran v. Couzens*, 42 F.2d 783 (D.C. Cir. 1930) (U.S. Senator); (4) consent of the plaintiff, *Nelson v. Whitten*, 272 F. 135 (D.C.N.Y. 1921); (5) communications between husband and wife, *Campbell v. Bannister*, 79 Ky. 205 (1886); (6) political broadcasts, *Farmers Educ. & Coop. Union v. WDAY Inc.*, 360 U.S. 525 (1959). *New York Times* and *Gertz* have not affected the availability of absolute privileges to all defendants.

24 Qualified privileges included: (1) self-defense, *Shenkman v. O'Mally*, 2 A.D.2d 567, 157 N.Y.S.2d 290 (1956); (2) defense of others, *Berry v. Moench*, 8 Utah 2d 191, 331 P.2d 814 (1958); (3) common interest, where the publisher and recipient have a common interest and the communication is of a kind reasonably calculated to protect or further that interest, *Ward v. Painter's Local Union No. 300*, 41 Wash. 2d 859, 252 P.2d 253 (1953); (4) fair comment on matters of public concern, *Bailey v. Charleston Mail Ass'n.*, 126 W. Va. 292, 27 S.E.2d 837 (1943); (5) reports on public proceedings, *O'Brien v. Franich*, 19 Wash. App. 189, 575 P.2d 258 (1978); (6) privilege to provide the means of publication, *Haas v. Evening Democrat Co.*, 252 Iowa 517, 107 N.W.2d 444 (1961). See RESTATEMENT (SECOND) OF TORTS §§ 583-98, 611-12 (1977).

25 The qualified privileges did not extend to the publication of any irrelevant defamatory matter with no bearing upon the public or private interest entitled to protection. The defendant lost his qualified privilege if he acted chiefly from motives of ill-will or spite, or if

### B. *Impact of the First Amendment*

Courts applied the common law principles of libel without affording a defendant first amendment protection for false publications until the United States Supreme Court's decisions in *New York Times Co. v. Sullivan*<sup>26</sup> and *Gertz v. Robert Welch, Inc.*<sup>27</sup> In *New York Times*, the Court acknowledged that courts must balance the interests of a state in protecting the reputation of individuals against the first amendment guarantees of free speech and press. The Court held that common law principles, which disregarded the culpability of a media defendant as to the false nature of publication concerning a public official, violated the first amendment.<sup>28</sup> Justice Brennan, speaking for the majority stated that:

The constitutional guarantees [under the first amendment] require . . . a federal rule that prohibits a public official from recovering for a defamatory falsehood relating to his official conduct unless he proves that the statements were made with *actual malice*, that is, *with knowledge that it was false or with reckless disregard of whether it was false or not.*<sup>29</sup>

Justice Brennan explained that debate on public issues should be robust and wide open, and that any principle of law requiring a media defendant to guarantee the truth of all its statements would lead to self-censorship; thereby failing to provide safeguards for the freedom of speech and press.<sup>30</sup> The Court did not impose a theory of absolute free speech which would allow a defendant to publish as he pleased, free of liability.<sup>31</sup> It did, however, reject a common law policy that the first amendment did not protect a defendant who

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he acted with knowledge of the false nature of his statement or with reckless disregard in ascertaining whether it was true or false. See *Boston Mutual Life Ins. Co. v. Varone*, 303 F.2d 155 (1st Cir. 1962); *Mullins v. Brando*, 13 Cal. App. 3d 409, 91 Cal. Rptr. 796 (1970), cert. denied, 403 U.S. 923 (1971); *Sokolay v. Edlin*, 65 N.J. Super. 112, 167 A.2d 211 (1961).

26 376 U.S. 254 (1964). See note 10 *supra*.

27 418 U.S. 323 (1974). See note 11 *supra*.

28 376 U.S. at 283-84.

29 *Id.* at 279-80 (emphasis added). The Supreme Court later defined reckless disregard as publishing with "serious doubts" as to the truth of the publication. The Court explained that "publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

30 376 U.S. at 279.

31 Justices Douglas and Black advocated absolute theories of free speech which would abolish any law that sought to redress a defamed plaintiff. Justice Black, dissenting in *New York Times*, stated that "the First and Fourteenth Amendments do not merely 'delimit' a State's power to award damages to 'public officials against critics of their official conduct' but completely prohibit a State from exercising such a power." 376 U.S. at 293. Justice Douglas, dissenting in *Gertz*, stated that "in light of the First Amendment, no 'accommodation' of its freedoms can be 'proper' except those made by the Framers themselves . . . the rights of free speech and free press were protected by the Framers in verbiage whose proscription seems clear." 418 U.S. at 356.

published a false defamatory statement.<sup>32</sup>

In *Curtis Publishing Co. v. Butts*<sup>33</sup> and *Associated Press v. Walker*,<sup>34</sup> the Supreme Court extended the *New York Times* actual malice burden to public figures.<sup>35</sup> The Court held that because the plaintiff's actual malice burden affords media defendants the necessary insulation to protect the fundamental guarantees of the first amendment, courts should place it evenly on all public official and public figure plaintiffs.<sup>36</sup>

Six years later in *Rosenbloom v. Metro Media, Inc.*,<sup>37</sup> the Supreme

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32 As a result of *New York Times*, a media defendant may prevail even though it failed to prove a privilege as long as the plaintiff failed to meet its additional burden of proving actual malice. See notes 22-25 *supra* and accompanying text.

33 388 U.S. 130 (1966).

34 *Id.* The Court decided *Butts* and *Walker* together.

35 In *Butts*, an article published in the Saturday Evening Post accused Butts, an athletic director at the University of Georgia, of conspiring to fix a football game between the Universities of Georgia and Alabama. 388 U.S. at 135. In *Walker*, a news dispatch stated that Walker led a protest at the University of Mississippi against federal marshals who were sent to the school to enforce a court order compelling the enrollment of a black student. *Id.* at 140. The trial court held that Butts and Walker were not required to prove actual malice because neither was a public official like the plaintiff in *New York Times*. *Id.* at 138-39. Chief Justice Warren, speaking for the majority, rejected the holding and explained that the first amendment requires that limitations be placed on state libel laws in actions involving public figures as well as public officials. *Id.* at 162.

The Court found that Butts and Walker were public figures because they commanded a substantial amount of independent public interest at the time of the publication. *Id.* at 154, 162. The Court explained that citizens have "a legitimate and substantial interest in the conduct of [public figures], and freedom of the press to engage in uninhibited debate about their involvement in public issues and events and is as crucial as it is in the case of 'public officials.'" *Id.* at 164. Although the court concluded that they were public figures and were thus constitutionally required to prove actual malice, the Supreme Court found that Butts met his burden and was entitled to recover. *Id.* at 156-59. Walker, however, failed to establish fault amounting to at least reckless disregard for the truth or falsity of the publication. *Id.*

36 Justice Harlan announced the judgments of the Court. Justices Clark, Fortas, and Stewart concurred in whole with Justice Harlan's opinion. 388 U.S. at 133. However, Chief Justice Warren concurred only in the result and not in Justice Harlan's opinion. *Id.* at 162. Justices Black, Brennan, Douglas, and White concurred in the result in *Walker* and dissented in the result in *Butts*. *Id.* at 170, 172. Therefore, the *Butts* decision was affirmed and the *Walker* case was reversed and remanded for further proceedings consistent with the opinions of Chief Justice Warren, Justice Black, and Justice Brennan. *Id.* at 161-62.

Because of the split in opinions, the Court extended the *New York Times* actual malice burden to public figures instead of applying the new standard which Justice Harlan sought to impose. Justice Harlan would have had a public figure recover only "on a showing of highly unreasonable conduct [by the defendant] constituting an extreme departure from the hazards of investigating and reporting ordinarily adhered to by responsible publishers." *Id.* at 155. Chief Justice Warren declined to afford media defendants less constitutional protection in cases involving public figures. He thus adhered "to the *New York Times* [actual malice] standard in the case of 'public figures' as well as 'public officials.'" *Id.* at 164. See generally Note, *Extension of Sullivan's Actual Malice Standard to Defamation of Public Figures*, 2 GA. L. REV. 393 (1968).

37 403 U.S. 29 (1977). The police arrested the plaintiff Rosenbloom for selling allegedly obscene magazines as he arrived at a store for a delivery. The defendant's radio station, WIP, broadcasted that the police arrested and charged him with possession of obscene

Court expanded the scope of constitutional protection for media defendants. The Court shifted its focus away from classifying the plaintiff as a public official, public figure, or private individual, to examining the publication's subject matter.<sup>38</sup> The Court held that any plaintiff at the time of the publication involved in "an issue of public or general interest" must prove actual malice, regardless of whether the plaintiff was a public official or public figure.<sup>39</sup>

In *Gertz v. Robert Welch, Inc.*<sup>40</sup> the Supreme Court rejected the *Rosenbloom* permissive "public interest" test. The Court shifted its analysis back to classifying the plaintiff as a public official or a public figure.<sup>41</sup> In narrowing the scope of protection, the Supreme Court held that before it placed the demanding *New York Times* actual malice burden on a public figure plaintiff, the media defendant must first prove that the plaintiff was "voluntarily" involved in an issue of public interest.<sup>42</sup> Justice Powell, writing for the majority justified the rejection of the *Rosenbloom* test by stating that public figures have voluntarily exposed themselves to a risk of injury from defamatory falsehoods concerning them.<sup>43</sup> Justice Powell explained that voluntariness is the key because such persons "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."<sup>44</sup> Accordingly, they invite attention and comment.<sup>45</sup> On the other hand, private individuals who are involuntarily involved in a matter of

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literature. *Id.* at 33-34. The broadcast also stated that *Rosenbloom* was involved in a "smut literature racket." *Id.* At trial the judge instructed the jury that as a matter of law the magazines were not obscene. The jury later acquitted *Rosenbloom* of the criminal obscenity charges. *Rosenbloom* then immediately filed his libel action.

38 *Id.* at 43.

39 *Id.* at 43-44. The Court stated that "if a matter is of public or general interest it cannot suddenly become less so merely because in some sense the individual did not voluntarily choose to become involved." *Id.* at 43. The Court stated that the public's primary interest is in "the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety." *Id.* The Court then found that the public had an interest in the enforcement of its criminal laws, and thus *Rosenbloom* was required to prove that the defendant published with actual malice as to his involvement in a "racket." *Id.*

40 418 U.S. 323 (1974).

41 *Id.* at 351-52.

42 The Court proposed two alternative bases for classifying a person as a public figure. First, an individual who achieves pervasive fame in the community may become a public figure for all purposes; a general public figure. *Id.* at 351. Second, a person who voluntarily injects himself into a particular public controversy and assumes special prominence may become a public figure for a limited range of issues; a limited public figure. *Id.* The Supreme Court affirmed the voluntariness test in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

43 *Id.* at 345. In addition, public officials and public figures have greater access to the channels of communication and, therefore, have a better opportunity to counteract false statements than private individuals. *Id.* at 344.

44 *Id.* at 345.

45 *Id.*

general interest are more vulnerable to injury and more deserving of recovery. Thus, private individuals should not be required to meet the demanding actual malice burden.<sup>46</sup>

After Justice Powell determined that the plaintiff was not voluntarily involved in an issue of public interest, he addressed the issue of whether the first amendment still affords a media defendant any protection. Justice Powell stated that the first amendment did not require extending the actual malice burden to a private individual because the state interest in compensating private persons under state-defined standards prevailed.<sup>47</sup>

The Court, however, did afford some constitutional protection to the media defendant. The Court held that the states may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual "so long as they do not impose liability without fault." Moreover, the substantial danger to the plaintiff's reputation must be apparent from the substance of the publication.<sup>48</sup>

Since the *New York Times* decision, the Supreme Court has attempted to provide a proper balance between first amendment guarantees and a state's interest in compensating private individuals injured by a defamatory statement published by a media defendant.<sup>49</sup> To maintain the proper balance, the Supreme Court must

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 347.

<sup>48</sup> Although the *Gertz* holding allows a private person to recover from a media defendant on a lesser burden than actual malice as long as some fault is required, the Court also held that the state's interest in compensating private individuals defamed by media defendants extends no further than compensation for "actual injury" which may include impairment to reputation, mental anguish, as well as out-of-pocket loss. *Id.* at 351. Thus, states may not permit presumed or punitive damages unless the plaintiff proves actual malice. *Id.* at 349. As for the common law presumption of damages, the Court held that courts must now instruct juries that plaintiffs must support all awards of damages with evidence concerning the injury. *Id.* at 350.

<sup>49</sup> The Supreme Court has left open the issue of whether it will require public officials and public figures to meet the actual malice burden in actions against private non-media defendants. See *Hutchinson v. Proxmire*, 443 U.S. 111, 113-14 n.16 (1979) ("This court has never decided the question . . . whether the *New York Times* burden can apply to a [private] defendant rather than a media defendant"). See generally Christie, *The Public Figure Plaintiff v. the Non-media Defendant in Defamation Law: Balancing the Respective Interests*, 68 IOWA L. REV. 823 (1984).

In *Greenmoss Builders, Inc. v. Dun & Bradstreet*, 105 S. Ct. 2939 (1985), the Supreme Court had the opportunity to address the issue of whether the principles of *Gertz*, or any first amendment analysis at all, applied to actions involving a private plaintiff and a private non-media defendant. The defendant, Dun & Bradstreet, a credit reporting agency, issued a false credit report to a bank regarding the plaintiff, a construction contractor. The Court ruled 5 to 4 that private plaintiffs may recover presumed and punitive damages from a non-media defendant without proving actual malice when the libel in question did not involve a matter of public concern. Dun & Bradstreet argued that *Gertz* precluded the award of punitive damages absent a showing of actual malice. Justice Powell explained that because the Dun & Bradstreet credit report circulated to only five subscribers it "was speech

now decide whether affording a private plaintiff a presumption of falsity and requiring a media defendant to prove truth as an affirmative defense offends the first amendment guarantees of freedom of speech and press.

### III. The Judicial Shift from the Common Law Presumption of Falsity

The *Hepps* court noted that because fault and falsity are two separate elements of a libel action, the first amendment does not require a private plaintiff to prove a statement's falsity even though it does require a private plaintiff to prove the defendant's fault.<sup>50</sup> Rather, because the elements are separate, the private plaintiff can rely upon the common law presumption of falsity and the defendant has the burden of proving truth as an affirmative defense.<sup>51</sup> The *Hepps* decision, however, may not withstand current constitutional analysis. Arguably, the private plaintiff can no longer rely upon the common law presumption of falsity. Both a public and private plaintiff must plead and prove falsity as an element of their prima facie case of defamation.<sup>52</sup>

#### A. Lower Court Decisions and the Restatement

In light of *New York Times* and its progeny,<sup>53</sup> state and lower federal court decisions have required the private plaintiff to prove not only some degree of fault but also falsity. The Sixth Circuit in *Wilson v. Scripps-Howard Broadcasting Co.*<sup>54</sup> reasoned that because the *New York Times* standard requires the public plaintiff to prove falsity, the *Gertz* standard must also require the private plaintiff to prove falsity.<sup>55</sup> The Sixth Circuit further reasoned that "coherent consid-

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solely in the individual interest of the speaker and its specific business audience." *Id.* at 2947. As a result, Justice Powell stated that the report was not a matter of public concern which required the enhanced protection of *Gertz*. *Id.* Consequently, *Dun & Bradstreet* may indicate that the Court is willing to allow states to apply common law principles in cases involving a private plaintiff and private defendant in a matter of private concern. See notes 15-25 *supra* and accompanying text.

50 485 A.2d at 387.

51 *Id.* See notes 65 and 79 *infra*.

52 The Restatement (Second) of Torts and various state and federal courts share this view. See notes 53-65 *infra* and accompanying text.

53 See note 26-49 *supra* and accompanying text.

54 642 F.2d 371 (6th Cir. 1981). In *Wilson*, a private plaintiff brought a defamation action against a media defendant. The defendant published a statement about the plaintiff alleging that the plaintiff was starving his cattle. The court recognized the impact of constitutional standards on the common law of libel and slander and held that a private plaintiff must prove falsity as part of his prima facie case. *Id.* at 374-75.

55 *Id.* at 374-75. The court stated that:

This common law allocation of the burden of proof is drawn into question by the constitutional prohibition against liability without fault established in *Gertz*. The language of *New York Times* and later cases makes clear that the burden of



eration" of the overall issue requires that the party with the burden of proving fault also bear the burden of proving falsity.<sup>56</sup>

Moreover, the Virginia Supreme Court in *Gazette, Inc. v. Harris*<sup>57</sup> held that the *Gertz* standard does not allow courts to afford the private plaintiff a presumption of falsity. The court reasoned that "truth no longer is an affirmative defense to be established by the defendant. Instead, the plaintiff must prove falsity, because he is required to establish negligence with respect to such falsity."<sup>58</sup>

In response to *Gertz*, the Restatement (Second) of Torts added section 580B. This section provides the permissible levels of culpability that states may require defamed private plaintiffs to prove.<sup>59</sup> The Maryland Supreme Court, in *Jacron Sales Co., Inc. v. Sindorf*,<sup>60</sup> interpreted section 580B as requiring the private plaintiff to prove falsity. The court came to its conclusion by reasoning that the private plaintiff "is already required to establish negligence with respect to such falsity."<sup>61</sup> The court noted that by requiring the plaintiff to prove falsity, "truth is no longer an affirmative defense

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demonstrating the falsity of the defamatory statement rests on the plaintiff when the actual malice standard applies.

The same rule requiring the plaintiff to prove falsity is required under the First Amendment in libel cases based on negligence or some other standard of fault of lesser magnitude than malice.

56 *Id.* at 375. ("Fairness and coherent consideration of the issue lead us to the conclusion that the party with the burden of proving carelessness must also carry the burden of proving falsity as a part of the concept of fault."). The *Wilson* court saw the *Gertz* standard of fault as composed of both falsity and carelessness. The *Hepps* court, however, claimed that fault and falsity are two theoretically separate elements. The *Wilson* court, on the other hand, justifies the blending of the two elements because as a practical matter, "coherent consideration" requires that the plaintiff plead and prove both elements.

57 229 Va. 1, 325 S.E.2d 713 (1985). The *Gazette* court consolidated four libel cases in one decision. The plaintiffs were all private individuals. In three of the cases the defendants were members of the media and in the fourth the defendant was an individual. The court was forced to decide what standard of liability applied in light of *New York Times* and its progeny. The court concluded that an allegedly defamed plaintiff must establish at least the defendant's negligence and the statement's falsity with respect to such negligence. 325 S.E.2d at 724-25.

58 325 S.E.2d at 724-25.

59 RESTATEMENT (SECOND) OF TORTS § 580B (1977). Section 580B, in part, provides: One who publishes a false and defamatory communication concerning a private person, . . . is subject to liability if, but only if, he

- (a) knows that the statement is false and that it defames the other
- (b) acts in reckless disregard of these matters, or
- (c) acts negligently in failing to ascertain them.

60 276 Md. 580, 350 A.2d 688 (1976). In *Jacron*, the private plaintiff, Sindorf, brought a defamation action against his former employer, Jacron, a non-media defendant. Sindorf claimed that the defendant falsely implied to Sindorf's present employer that Sindorf had stolen merchandise. The *Jacron* court concluded, after discussing recent United States Supreme Court cases from *New York Times* to *Gertz*, that the *Gertz* standard applies to private plaintiffs in actions against both media and non-media defendants. *But see Dun & Bradstreet*, note 49 *supra*.

61 350 A.2d at 698.

to be established by the defendant . . . ."<sup>62</sup> The defendant, however, may prove truth as a defense once the plaintiff has established falsity. The Fourth Circuit, in *Jenoff v. Hearst Corporation*,<sup>63</sup> also applied the *Jacron* court's interpretation of section 580B and stated that the *Jacron* court's holding was "comprehensive, precise and correct in its definitions."<sup>64</sup>

Thus, courts, by analyzing *New York Times* and its progeny and through interpretation of section 580B, have reached similar conclusions. That is, even though fault and falsity are theoretically separate elements, *New York Times* and its progeny effectively require, and practical considerations demand, that the private plaintiff bear the burden of proving both fault and falsity in a defamation action.<sup>65</sup>

### B. *Implications Within Supreme Court Decisions*

The United States Supreme Court, subsequent to *New York Times*, stated that an allegedly defamed public official or public figure must prove both falsity and also knowledge of or reckless disregard with respect to such falsity in order to recover in a libel action.<sup>66</sup> In *Cox Broadcasting v. Cohen*,<sup>67</sup> Justice Powell arguably implied that a private plaintiff must prove falsity and, therefore, can no longer constitutionally rely upon the common law presumption

62 *Id.*

63 644 F.2d 1004 (4th Cir. 1981). In *Jenoff*, an undercover police informant brought a defamation action against a publisher. The defendant had published articles insinuating that Jenoff stole documents from an attorney's office. The court held that Jenoff was a private plaintiff and that *Jacron* correctly laid down the law of Maryland.

64 *Id.* at 1008. See also *Yerkie v. Post-Newsweek Stations, Inc.*, 470 F. Supp. 91, 92 (D. Md. 1979) (acknowledging that *Jacron* established the law of Maryland with its interpretation of section 580B).

65 Moreover, the Pennsylvania statute, see note 6 *supra*, at issue in *Hepps* followed section 613 of the first Restatement of Torts. Section 613 placed the burden of proving the affirmative defense of truth on the defendant. RESTATEMENT OF TORTS § 613 (1938). Subsequent to the Pennsylvania statute, however, the Restatement authors revised section 613. See RESTATEMENT (SECOND) OF TORTS § 613 (1977). In the caveat to section 613, the authors expressed no opinion on whether the plaintiff's burden of proving fault also requires the plaintiff to prove falsity. The authors suggest, however, that regardless of which standard courts require, "[m]eeting this requirement has, as a *practical matter*, made it necessary for the plaintiff to allege and prove the falsity of the communication, and from a realistic standpoint, has placed the burden of proving falsity on the plaintiff." RESTATEMENT (SECOND) OF TORTS § 613 comment j (1977) (emphasis added).

66 *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) ("We held in *New York Times* that a public official might be allowed the civil remedy only if he establishes that the utterance was false . . . ."). See also *Rosenblatt v. Baer*, 383 U.S. 75, 84 (1966).

67 420 U.S. 469 (1974). In *Cox*, the father of a rape victim brought an invasion of privacy action against the defendant for the truthful publication of the victim's name. The plaintiff relied upon a Georgia statute which made it a misdemeanor to publish the name of a rape victim. The Court held that a state may not impose sanctions on the accurate publication of statements obtained from public records.

of falsity. Moreover, in *Herbert v. Lando*,<sup>68</sup> Justice White stated in dicta that the private plaintiff must prove falsity.

In *Cox*, Justice Powell concurred with the opinion of the Court, but wrote a separate opinion to crystallize the impact of his majority opinion in *Gertz*.<sup>69</sup> In his concurring opinion, Justice Powell disagreed with the Court's dicta that previous Supreme Court decisions had "left open" the question whether truth is a constitutional defense in a private defamation action.<sup>70</sup> Justice Powell arguably implied that *Gertz* requires a private plaintiff to prove falsity. Justice Powell stated that:

The requirement that the state standard of liability *be related to* the defendant's failure to avoid publication of "defamatory falsehood" limits the grounds on which a normal action for defamation can be brought. It is fair to say that if the statements are *true*, the standard contemplated by *Gertz* cannot be satisfied.<sup>71</sup>

Thus, Justice Powell arguably implies that under the *Gertz* standard, truth is a constitutional defense and not an affirmative defense. This is true because the constitutional defense of truth directly negates the plaintiff's prima facie elements as required by the *Gertz* standard rather than affirmatively overcoming a presumption of falsity.<sup>72</sup>

Furthermore, Justice Powell stated that the constitutional defense of truth is "implicit" within both the *New York Times* standard of liability and the *Gertz* standard of liability. Justice Powell stated that:

Indeed, even if not explicitly recognized, this determination [constitutional defense of truth] is *implicit* in the Court's articulation of a standard of recovery that rests on knowing or reckless disregard of the truth. I think that the constitutional necessity

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68 441 U.S. 153 (1979). In *Lando*, a public figure brought a defamation action against a television station, two of its employees, and a magazine. Herbert, a Viet Nam war veteran, was vocal in expressing his criticism of the war. He alleged that the defendant defamed him by portraying him as a liar and a person who made war-crimes charges to explain his relief from command. Because the plaintiff was a public figure, the *New York Times* standard applied and he was required to prove actual malice. The plaintiff, to meet his burden, sought discovery relating to the defendant's editorial process. The defendants opposed this discovery. Nevertheless, the Court held that the first amendment does not create a privilege preventing the plaintiff from inquiring into the defendant's editorial process.

69 420 U.S. at 497-98.

70 *Id.* at 490. By "constitutional defense of truth," the Court refers to where the defendant introduces evidence showing that the allegedly defamatory statement was true. The burden of proving falsity rests with the plaintiff. Contrast this with the affirmative defense of truth. In this situation, the plaintiff receives a presumption of falsity, and the defendant rebuts this presumption by affirmatively proving truth. See 485 A.2d at 379 n.2 ("The fact that an element is presumed and can only be overcome by affirmative evidence to the contrary . . .").

71 *Id.* at 499 (emphasis added).

72 See notes 65 and 70 *supra* and note 79 *infra*.

of recognizing a defense of truth is *equally implicit* in our statement of the permissible standard of liability for the publication or broadcast of defamatory statements whose substance makes apparent the substantial danger of injury to the reputation of a private citizen.<sup>73</sup>

Both standards include the constitutional defense of truth because the defense directly negates the plaintiff's prima facie elements.

The *Cox* Court, again in dicta, set forth the public plaintiff's prima facie elements. The Court stated that "the defamed public official or public figure must prove *not only* that the publication was false *but* that it was knowingly so or was circulated with reckless disregard *for its* truth or falsity."<sup>74</sup> Justice Powell articulated the private plaintiff's prima facie elements by tracking the *New York Times* standard. Justice Powell noted that "the decisions of this Court have undertaken to identify a standard of care *with respect* to the truth of the published facts" and that there is "the requirement that the state standard *be related* to the defendant's failure to avoid publication of the 'defamatory falsehood' . . . ."<sup>75</sup> Both standards, therefore, require proof of culpability with respect to falsity.

Thus, both the *New York Times* standard and the *Gertz* standard require a plaintiff to prove the same prima facie elements. This is true because the different degrees of culpability enunciated in *New York Times* and *Gertz*—actual knowledge, reckless disregard, and negligence—are simply separate points on the spectrum of the element of fault. Unlike fault, the element of falsity is unified and incapable of separation into different degrees. Therefore, if the *New York Times* standard and the *Gertz* standard require an interconnection between fault and falsity, then, arguably, the burden of proving falsity relates to the element of fault regardless of the applicable level of culpability.<sup>76</sup>

Moreover, in *Gertz*, the Court held that a private plaintiff must prove knowledge of falsity or reckless disregard with respect to the truth if he seeks punitive damages.<sup>77</sup> This standard of fault would require the private plaintiff to prove falsity.<sup>78</sup> In *Gertz*, the Court was not opposed to requiring a private plaintiff to prove falsity in relation to a higher level of culpability. Thus, placing the burden of proving falsity on the plaintiff would not infringe upon the need outlined in *Gertz* that the private plaintiff deserves more protection from the media. Because falsity cannot be separated into different

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73 420 U.S. at 498-99 (emphasis added).

74 420 U.S. at 490 (emphasis added).

75 *Id.* at 499 and n.3 (emphasis added).

76 See notes 74-75 *supra* and accompanying text.

77 418 U.S. at 349.

78 See text accompanying note 74 *supra*.

degrees, the private plaintiff must also prove falsity with respect to a lower level of culpability.

Therefore, the private plaintiff can no longer rely upon the common law presumption of falsity. It is theoretically possible and historically accurate<sup>79</sup> to allow a private plaintiff to establish his *prima facie* case with a presumption of falsity. Such a position, however, contradicts the evidentiary<sup>80</sup> and constitutional considerations involved in allocating the burden of proof. *New York Times* and its progeny require that a defamed plaintiff prove fault with respect to falsity. As the *Hepps* court noted, truth was an affirmative defense at common law because it negated a presumption of falsity. Under constitutional analysis, however, truth is a defense, and not an affirmative defense, because it negates the element of falsity and not a presumption of falsity.<sup>81</sup>

In *New York Times*, the court held that a state-created presumption inconsistent with a federal rule is invalid. Indeed, "[t]he power to create presumptions is not a means of escape from constitutional restrictions."<sup>82</sup> *New York Times* and *Gertz* require an interconnection between fault and falsity. Therefore, these Court decisions established a constitutional restriction inconsistent with the common law presumption of falsity. Thus, a defamed plaintiff cannot constitutionally rely upon the common law presumption of falsity. He must bear the burden of proving falsity.

Moreover, in *Herbert v. Lando*,<sup>83</sup> the Court was faced with a defamation action by a public plaintiff. The Court, however, fused the

79 See, e.g., W. KEETON, PROSSER AND KEETON ON TORTS § 116 (5th ed. 1984):

The well settled common law rule prior to decisions by the United States Supreme Court related to the constitutional privilege to defame was that truth is an affirmative defense which the defendant must plead and prove . . . [T]here is no inconsistency in assuming falsity until defendant publisher proves otherwise and requiring the plaintiff to prove negligence or recklessness with respect to the truth or falsity of the imputation.

80 No single factor determines who should bear the burden of proof with regard to any issue. Rather, it is a "question of policy and fairness based on experience in the different situations." 9 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2486 (3d ed. 1940). The burden of proof, therefore, is not a static principle. Rather, it is a principle that responds to and adjusts to changing social factors to insure fairness. Generally, relevant factors to determine the burden of proof are: (1) who is the "party having in form the affirmative allegation;" (2) who is the "party to whose case the fact is essential;" and (3) who is the "party who presumably has peculiar means of knowledge." *Id.*

Evaluating these factors in a defamation action supports the argument that the private plaintiff should bear the burden of proving falsity. First, the plaintiff affirmatively alleges that the defendant defamed him by a false statement. Second, falsity is arguably essential to the private plaintiff's case because he must prove some standard of fault other than strict liability with respect to such falsity. And, third, the private plaintiff knows more about himself and his actions than others. See note 85 *infra*.

81 See notes 65, 70, 73, and 79 *supra* and accompanying text.

82 376 U.S. at 284.

83 441 U.S. 153 (1979).

elements of the public and private plaintiff's prima facie case. Justice White, writing for the majority, stated in dicta that:

Although defamation litigation, including suits against the press, is an ancient phenomena, it is true that our cases from *New York Times* to *Gertz* have considerably changed the profile of such cases. In years gone by, plaintiffs made out a prima facie case by proving the damaging publication. Truth and privileges were defenses. Intent, motive and malice were not necessarily involved except to counter qualified privileges or to prove exemplary damages. The plaintiff's burden is now considerably expanded. In every or almost every case, the plaintiff must focus on the editorial process and prove a false publication attended by some degree of culpability on the part of the publisher.<sup>84</sup>

Thus, "new" constitutional standards enunciated from "*New York Times* to *Gertz*" are replacing the "ancient" common law of defamation. *New York Times* involved a public plaintiff and *Gertz* involved a private plaintiff. Justice White fused both types of plaintiffs by stating that "[t]he plaintiff's burden is now considerably expanded." Regardless of the appropriate standard of liability, in "every or almost every case," the plaintiff must prove falsity in relation to the applicable level of culpability. Therefore, the common law presumption of falsity must fail and *the plaintiff*, public or private, in a defamation action must plead and prove falsity as an element of his prima facie case.<sup>85</sup>

#### IV. Conclusion

In *Hepps*, the Pennsylvania Supreme Court held that a Pennsylvania statute placing the burden of proving truth on the defendant did not violate the first amendment. Arguably, the court erred for two reasons. First, the *Gertz* decision implies that the plaintiff's obligation to prove fault necessarily requires the plaintiff to prove the falsity of the allegedly libelous statement. Second, other courts and the Restatement provide persuasive authority that, as a practical matter, the burden of proving fault entails the burden of proving falsity.

The United States Supreme Court should reverse the *Hepps* de-

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84 *Id.* at 175-76.

85 In *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264 (3d Cir. 1980), a public plaintiff brought a defamation action claiming that the defendant had libeled him by alleging that he engaged in deceptive sales tactics. The court interpreted Pennsylvania's shield statute as barring discovery of any unpublished materials in the defendant's possession. The court noted that Pennsylvania's libel statute may be unconstitutional because it placed upon the defendant the burden of proving truth. The court implied that requiring a plaintiff to prove falsity would not be an insurmountable burden, even where a state has a very broad shield law.

cision. Affording the plaintiff a presumption of falsity offends the principles provided by the Supreme Court in *New York Times* and its progeny.

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