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CASE COMMENTS

CONSTITUTIONAL LAW—*UNITED STATES v. WAYTE*: THE BIG CHILL ON VOCAL DRAFT NONREGISTRANTS

A defendant contending that he has been singled out for prosecution from among a large number of alleged lawbreakers is not new. As early as 1886, in *Yick Yo v. Hopkins*,¹ Chinese defendants claimed that building code regulations in San Francisco were being enforced against them alone. This selective prosecution defense rests upon the fourteenth amendment guarantee that no state shall "deny to any person within its jurisdiction the equal protection of the laws."² In *United States v. Wayte*,³ David Alan Wayte was indicted for failing to register for the draft.⁴ The district court dismissed the indictment, finding that the government had selectively prosecuted Wayte.⁵ The United States Court of Appeals for the Ninth Circuit reversed, finding that Wayte had not shown selective prosecution.⁶ The court applied the equal protection test, requiring the defendant to show governmental discriminatory motive.⁷

Although a selective prosecution case is grounded in equal protection, a case like *Wayte* involves another important constitutional consideration: the first amendment right to free speech. The introduction of first amendment rights into the selective prosecution defense raises new concerns. Many courts, in other first amendment contexts, have applied a test which focuses on the effect of the conduct, rather than analyzing motive. Thus, although the court in *United States v. Wayte* applied the traditional equal protection test, the first amendment values involved may be strong enough to justify applying an "effect" test when protected speech is involved in a traditional selective prosecution fact pattern.

This comment examines the holding in *Wayte* and its effect on both first amendment rights and the selective prosecution defense. Part I explains the facts and holding of *United States v. Wayte*. Part II looks at the history of the selective prosecution defense, from its equal

1 118 U.S. 356 (1886).

2 U.S. CONST. amend. XIV, § 1.

3 710 F.2d 1385 (9th Cir. 1983), *cert. granted*, 104 S. Ct. 2655 (1984).

4 *Id.* at 1386.

5 *Id.*

6 *Id.* at 1387.

7 *Id.*

protection roots to more recent cases, including *Wayte*. Finally, Part III examines the *Wayte* holding, the selective prosecution defense, and the right to free speech. This comment concludes that first amendment analysis is appropriate when protected speech is involved in a selective prosecution claim.

I. *United States v. Wayte*

In 1980, President Carter issued a Presidential Proclamation which required all males within a certain age group to register with the Selective Service System.⁸ David Alan Wayte, the petitioner in this case, fell into the class of required registrants but did not register.⁹ Instead, he wrote letters to the Selective Service and the President informing them that he had not registered and did not plan to register.¹⁰ Wayte wrote another letter six months later, restating his refusal and adding that he would be traveling the country encouraging resistance to registration.¹¹

The Selective Service followed a policy of "passive enforcement" with regard to draft nonregistrants.¹² Under that system, the Selective Service prosecuted only those nonregistrants who were brought to its attention by either third party reports or by self-admission.¹³ United States Attorneys notified Wayte by letter that prosecution was possible if he did not register within a specified time period.¹⁴ Wayte ignored this warning and on July 22, 1982, he was indicted for failure to register, in violation of 50 U.S.C. app. § 462.¹⁵

The district court granted Wayte's motion to dismiss, concluding that the government's passive enforcement policy resulted in the selective prosecution of the defendant.¹⁶ Two factors led to this decision. First, Judge Hatter stated that of the approximately 500,000 males who failed to register for the draft, only eleven were prosecuted.¹⁷ Of these eleven, all were vocal opponents of the govern-

8 "Male citizens of the United States . . . who were born on or after January 1, 1960 . . . shall present themselves for registration . . ." Proclamation No. 4771, 45 Fed. Reg. 45,247 (1980).

9 *Wayte*, 710 F.2d at 1386

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.* at 1387.

15 *Id.*

16 *United States v. Wayte*, 549 F. Supp. 1376, 1391 (C.D. Cal. 1982), *rev'd*, 710 F.2d 1385 (9th Cir. 1983), *cert. granted*, 104 S. Ct. 2655 (1984).

17 549 F. Supp. at 1379.

ment's registration policy.¹⁸ In addition, the court believed that the government, with access to Social Security records, could have easily located vocal violators.¹⁹ Judge Hatter concluded, therefore, that while the government could have investigated and prosecuted silent violators of the draft regulation, they chose to prosecute only vocal nonregistrants.²⁰ Second, the government's normal prosecution procedure was not followed in the investigation of vocal nonregistrants.²¹ The Presidential Military Manpower Taskforce, the United States Justice Department, and the White House, through Presidential Counselor Edwin Meese III, were involved in the decisions.²² Thus, the court felt that this "involvement of high Government officials in enforcement and prosecution decisions regarding nonregistrants strongly suggest[ed] impermissible selective prosecution."²³

Based on these two factors, the district court held that Wayte established a *prima facie* case of selective prosecution.²⁴ The court shifted the burden of proof to the government to establish that its passive enforcement policy was not designed to discourage the exercise of first amendment rights.²⁵ The government, in refusing to comply with Wayte's discovery requests and subsequent court orders, failed to rebut the inference of impropriety.²⁶ Therefore, the district court dismissed the indictment.²⁷

The Court of Appeals for the Ninth Circuit reversed the district court's decision for two reasons.²⁸ First, Judge Wright, writing for the majority, noted that Wayte's evidence did not demonstrate an impermissible motive.²⁹ Rather, it showed only that the government was *aware* that the passive enforcement system would result in the prosecution of moral and vocal objectors.³⁰ According to the court, "Wayte made no showing that the government focused its investigation on him because of his protest activities."³¹ Second, the court

18 *Id.* at 1381.

19 *Id.*

20 *Id.*

21 *Id.* at 1382.

22 *Id.*

23 *Id.* at 1383.

24 *Id.* at 1382.

25 *Id.*

26 *Id.*

27 *Id.* at 1385.

28 *United States v. Wayte*, 710 F.2d 1385 (9th Cir. 1983), *cert. granted*, 104 S. Ct. 2655 (1984).

29 *Id.* at 1387.

30 *Id.*

31 *Id.*

determined that the government's justifications for its passive enforcement policy were logical and did not evidence an impermissible motive.³² The court accepted the government's claim that the identities of nonvocal violators could not be established.³³ Therefore, Judge Wright reasoned that the government could logically prosecute vocal violators, since their identities were the only ones known to the government.³⁴ The court also found merit in the government's contention that its interest in prosecuting wilful violators justified the use of passive enforcement.³⁵ The *Wayte* court stated that the government "may, in making prosecutorial decisions, consider whether the potential defendants have, by their public statements or otherwise, made clear their actual or intended participation in the illegal activity."³⁶ Therefore, since *Wayte* made no showing that he was prosecuted because he exercised his first amendment rights, and the government's justifications for its passive enforcement system defeated the inference of improper motive, the court held that the district court's finding of selective prosecution was clearly erroneous.³⁷

Judge Schroeder, writing in dissent, stated that "an enforcement procedure focusing solely upon vocal offenders is inherently suspect."³⁸ She believed the key question was whether the government sufficiently explained the passive enforcement policy by showing that it was motivated by concerns other than suppression of *Wayte*'s criticisms.³⁹ She maintained that the government's justifications did not defeat the inference of an improper motive.⁴⁰

Judge Schroeder argued that nonvocal nonregistrants could have been traced easily.⁴¹ "The district court noted that a law student armed only with a telephone was able to obtain lists, from several randomly chosen states, of persons legally required to register; those lists could have been compared with the government's list of actual registrants to locate violators."⁴² In addition, the dissent contended that the offender's statements were not necessary to establish

32 *Id.* at 1388.

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.*

38 702 F.2d 1385, 1390 (9th Cir. 1983) (Schroeder, J., dissenting).

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.*

the wilfulness of the violators.⁴³ Before deciding to prosecute, the government wrote to each suspected violator offering him a chance to comply with the law.⁴⁴ Only those who ignored this warning were prosecuted.⁴⁵ Schroeder thus reasoned that "the government had a method, independent of suspected violators' communications, for excluding from prosecution persons who might have an innocent explanation for failing to register."⁴⁶ For these reasons, Judge Schroeder concluded that the passive enforcement policy punished Wayte because he spoke out rather than because he violated the law.⁴⁷ Wayte was impermissibly prosecuted because he exercised his first amendment rights.⁴⁸

II. The Selective Prosecution Defense

A. *The History of Selective Prosecution: Roots in Equal Protection*

The selective prosecution defense has its roots in suspect class equal protection analysis. In *Yick Wo v. Hopkins*,⁴⁹ the Supreme Court struck down a facially valid ordinance because of its discriminatory enforcement. The municipal ordinance in question required all those who operated laundries in wooden buildings to obtain a license. The Court voided the law because it was administered by public authorities "with an evil eye and an unequal hand"⁵⁰ to discriminate against Chinese laundry owners. The Court held that equal protection of the laws is denied when state officials enforce a valid statute in discriminatory fashion.⁵¹

Following the foundation laid in *Yick Wo*, the Supreme Court in *Oyler v. Boles*⁵² considered the selective prosecution defense in a criminal context for the first time. The defendant was prosecuted under West Virginia's habitual criminal statute upon his third felony conviction. In *Oyler*, the defendant challenged the constitutionality of the state's enforcement of the statute, alleging that of the six men subject to prosecution as habitual offenders in his county, he was the only man sentenced under the statute. This, he argued, was a viola-

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.* at 1389.

49 118 U.S. 356 (1886).

50 *Id.* at 373-74.

51 *Id.* at 374.

52 368 U.S. 448 (1962).

tion of the equal protection clause of the United States Constitution. The Court rejected the defendant's challenge, stating that some selectivity in enforcement is not in itself a federal constitutional violation so long as the selection was not deliberately based on an unjustifiable standard such as race, religion, or other arbitrary classification.⁵³

Using *Oyler*, the court in *United States v. Berrios*⁵⁴ developed a two-prong test for deciding whether a defendant has been selectively prosecuted in violation of the equal protection clause:

To support a defense of selective or discriminatory [sic] prosecution, a defendant bears the heavy burden of establishing, at least *prima facie*, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government's discriminatory selection of him for prosecution has been invidious or in bad faith, i.e., based upon such impermissible considerations as race, religion, or *the desire to prevent his exercise of constitutional rights*. These two essential elements are sometimes referred to as "intentional and purposeful discrimination."⁵⁵

This test has been adopted in a majority of the federal circuits.⁵⁶ Thus, the selective prosecution defense is couched in the equal protection language suggested by the Supreme Court in *Oyler v. Boles*.⁵⁷

In applying the test, the initial presumption is that the government has undertaken the prosecution in good faith.⁵⁸ When a defendant raises a reasonable doubt of intentional discrimination, he establishes a *prima facie* case of selective prosecution.⁵⁹ At this stage, two benefits accrue to the defendant. The burden of proof shifts to

53 *Id.* at 456; *see also* *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

54 501 F.2d 1207 (2d Cir. 1974).

55 *Id.* at 1211 (emphasis added).

56 *See, e.g.,* *United States v. Mangieri*, 694 F.2d 1270 (D.C. Cir. 1982); *Barton v. Malley*, 626 F.2d 151 (10th Cir. 1980); *United States v. Murdock*, 548 F.2d 599 (5th Cir. 1977); *United States v. Ojala*, 544 F.2d 940 (8th Cir. 1976); *United States v. Leggett & Platt, Inc.*, 542 F.2d 655 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977); *United States v. Bourque*, 541 F.2d 290 (1st Cir. 1976); *United States v. Peskin*, 527 F.2d 71 (7th Cir. 1975), *cert. denied*, 429 U.S. 818 (1976); *United States v. Scott*, 521 F.2d 1188 (9th Cir. 1975), *cert. denied*, 424 U.S. 955 (1976).

57 368 U.S. 448 (1962).

58 *United States v. Falk*, 479 F.2d 616, 620 (7th Cir. 1973) ("The presumption is always that a prosecution for violation of a criminal law is undertaken in good faith and in nondiscriminatory fashion for the purpose of fulfilling a duty to bring violators to justice.").

59 *See* *United States v. Catlett*, 584 F.2d 864, 866 (8th Cir. 1978) ("A hearing is necessitated only when the motion . . . raises a reasonable doubt as to the prosecutor's purpose."); *United States v. Falk*, 479 F.2d 616, 620-21 (7th Cir. 1973) ("However, when a defendant alleges intentional purposeful discrimination and presents facts sufficient to raise a reasonable doubt about the prosecutor's purpose, we think a different question is raised.").

the government to prove nondiscriminatory enforcement of the law.⁶⁰ In addition, the court may order an evidentiary hearing on the issue of selective prosecution.⁶¹ The defendant may then petition the government to comply with his discovery requests.⁶² Since the government may not be willing to release the requested documents, establishing a *prima facie* case may result in dismissal of the indictment.⁶³

B. *Beginning of a Change: Introduction of the First Amendment into Selective Prosecution Cases*

Courts have eased the strict requirement of showing discriminatory motive in some cases where the exercise of free speech is alleged to have been the impermissible consideration in the decision to prosecute. While no court has expressly used a more lenient test, it seems that courts have interpreted the law and facts more favorably for defendants when speech is involved. This is consistent with the courts' overall tendency to place the right of free speech "on the highest rung of the hierarchy of First Amendment values."⁶⁴

In *United States v. Oaks*,⁶⁵ the defendant was convicted of wilfully failing to file a tax return.⁶⁶ He contended that he was prosecuted solely because of his public protests against government tax poli-

60 *United States v. Falk*, 479 F.2d 616, 621 (7th Cir. 1973) ("The particular circumstances of this case . . . compelled the government to accept the burden of proving nondiscriminatory enforcement of the law . . .").

61 *See, e.g.*, *United States v. Schmucker*, 721 F.2d 1046 (6th Cir. 1983) (evidentiary hearing on the question of selective prosecution granted); *United States v. Wayte*, 549 F. Supp. 1376 (C.D. Cal. 1982) (evidentiary hearing on the question of selective prosecution), *rev'd on other grounds*, 710 F.2d 1385 (9th Cir. 1983), *cert. granted*, 104 S. Ct. 2655 (1984).

62 *See, e.g.*, *United States v. Oaks*, 508 F.2d 1403, 1405 (9th Cir. 1974) ("If the defendant makes an initial factual showing of impermissible discrimination, then the trial court may, in the exercise of its discretion, require disclosure of relevant privileged information."); *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974) (showing colorable basis entitles defendant to subpoena documentary evidence required to establish a selective prosecution defense).

In camera inspection may be available. *See United States v. Oaks*, 508 F.2d 1403, 1405 (9th Cir. 1974); *United States v. Berrios*, 501 F.2d 1207, 1212-13 (2d Cir. 1974).

63 *United States v. Wayte*, 549 F. Supp. 1376 (C.D. Cal. 1982) (dismissal for failing to cooperate in discovery), *rev'd*, 710 F.2d 1385 (9th Cir. 1983), *cert. granted*, 104 S. Ct. 2655 (1984).

64 *NAACP v. Claiborne Hardware*, 458 U.S. 886, 913 (1982) (citing *Carey v. Brown*, 447 U.S. 455, 467 (1980)). In a dispute over civil rights, leaders of the NAACP launched a boycott against white merchants. The boycott consisted of picketing, though some acts of violence did occur. The merchants sued for damages and an injunction. The state courts allowed the plaintiffs' damages claim. The Supreme Court reversed, holding that the nonviolent activities were protected under the first amendment.

65 508 F.2d 1403 (9th Cir. 1974).

66 *Id.* at 1404.

cies.⁶⁷ On appeal, the court of appeals held that Oaks was entitled to an evidentiary hearing on the selective prosecution question.⁶⁸ "Hearings on similar pretrial objections are usually in order when enough facts are alleged to take the question past the frivolous stage" ⁶⁹ The standard used by the court would allow a defendant to obtain evidence from the government, possibly even privileged information,⁷⁰ upon enough facts to show that his claim is not frivolous.

In another free speech case, *United States v. Steele*,⁷¹ the United States Court of Appeals for the Ninth Circuit allowed the defendant to shift the burden of proof on the selective prosecution issue to the government.⁷² Steele was convicted for refusing to complete census forms.⁷³ He alleged that the government chose to prosecute him because of his involvement in a census resistance movement.⁷⁴ Steele produced evidence that the four men who were prosecuted were involved in the resistance movement.⁷⁵ In addition, he found six others who violated the statute, but did not publicly protest and were not prosecuted.⁷⁶ The court held that Steele "had presented evidence which created a strong inference of discriminatory prosecution."⁷⁷ Based upon this, the court required the government to explain its selection process.⁷⁸ Since the government did not present an explanation, the court reversed the conviction.⁷⁹

The Court of Appeals for the Seventh Circuit addressed both the burden of proof issue and the discovery of documents issue in

67 *Id.*

68 *Id.* at 1405.

69 *Id.* at 1404.

70 On the subject of privileged information, the court stated:

If the defendant makes an initial factual showing of impermissible discrimination, then the trial court may, in the exercise of its discretion, require disclosure of relevant privileged information. *See United States v. Berrigan*, 482 F.2d at 181. But even then the court can minimize the risk to the government by holding the proceedings *in camera* and issuing appropriate protective orders.

508 F.2d at 1405. Thus, the defendant may be able to obtain privileged information upon a sufficient *prima facie* showing. The government is still protected from being forced to disclose sensitive information to defendants by the possibility of the *in camera* review.

71 461 F.2d 1148 (9th Cir. 1972).

72 *Id.* at 1152.

73 *Id.* at 1150.

74 *Id.*

75 *Id.*

76 *Id.* at 1151.

77 *Id.* at 1152.

78 *Id.*

79 *Id.*

United States v. Falk,⁸⁰ a case very similar to *Wayte*. Falk was convicted for violations of the Selective Service Act.⁸¹ He had alleged in the district court that he was prosecuted because of his involvement with a draft counseling organization.⁸² The court refused to allow an evidentiary hearing on the issue, and also refused to allow Falk to introduce that evidence at trial.⁸³ The court of appeals reversed the conviction, holding that Falk was entitled to an evidentiary hearing.⁸⁴ The court expained its standard:

The presumption is always that a prosecution for violation of a criminal law is undertaken in good faith and in nondiscriminatory fashion for the purpose of fulfilling a duty to bring violators to justice. However, when a defendant alleges intentional purposeful discrimination and presents facts sufficient to raise a reasonable doubt about the prosecutor's purpose, we think a different question is raised.⁸⁵

The court then discussed the factors which required the government to assume the burden of proof. Of the persuasive factors, the court noted Falk's participation in public protest activity, his allegation that extraordinary prosecutorial channels had been used, and his allegation that over 25,000 others had similarly violated the statute yet had not been prosecuted.⁸⁶

These cases certainly do not provide controlling authority that a different test should be used when speech is involved in a selective prosecution case. The decisions do illustrate, however, that courts may be more sensitive to the defense when the defendant alleges that he is being prosecuted based upon his speech.

C. *The Wayte Effect: Resisting the Change*

The *Wayte* court held that, in any selective prosecution case, the defendant must show the government's discriminatory motive.⁸⁷ This is the traditional equal protection test.⁸⁸ The test itself is the same as the one applied in *Oaks*,⁸⁹ *Steele*,⁹⁰ and *Falk*,⁹¹ but the court's

80 479 F.2d 616 (7th Cir. 1973).

81 *Id.* at 618.

82 *Id.*

83 *Id.*

84 *Id.*

85 *Id.* at 620-21.

86 *Id.* at 621-22.

87 *Wayte*, 710 F.2d at 1387.

88 See notes 52-57 *supra* and accompanying text.

89 508 F.2d 1403 (9th Cir. 1974); see notes 65-70 *supra* and accompanying text.

90 461 F.2d 1148 (9th Cir. 1972); see notes 71-79 *supra* and accompanying text.

91 479 F.2d 616 (7th Cir. 1973); see notes 80-86 *supra* and accompanying text.

attitude seems to have changed.⁹² In those previous cases, the courts showed a sensitivity to the defendants by allowing them to shift the burden of proof on a lesser showing and to obtain evidentiary hearings.⁹³ While not explicitly stating it, the courts moved toward a more tolerant test when first amendment issues were present. Indeed, the analysis they used is similar to the standard first amendment analysis, since it does not require a showing of motive.⁹⁴ The *Wayte* court could easily have jumped onto the bandwagon, but did not. Instead, it retained the traditional equal protection test.

III. A Proposed Analysis: The First Amendment and the Selective Prosecution Defense

The introduction of first amendment values into a selective prosecution case warrants application of a first amendment standard of review. This standard would focus upon the *effect* of a prosecutorial process, as opposed to the actual *intent* of the prosecutors.⁹⁵ Such a standard would strike a proper balance between the interests of law enforcement and protection of free speech.

A. *The First Amendment Analysis Should be Applied*

In some cases, it is obvious that protected speech is involved. *United States v. Wayte* is not such a case. Wayte wrote letters to the Selective Service and the President, criticizing the draft and confessing that he had violated the statute which compelled him to register.⁹⁶ The government contends that these letters are simply confessions, and are not entitled to protection.⁹⁷ While a first amend-

92 Judge Wright wrote the opinions in both *Steele* and *Wayte*. He distinguished the two cases on the government's twofold explanation for the passive enforcement policy in *Wayte*: first, that the government could not identify other violators and, second, that the vocal violators had established their wilfulness in refusing to register. Judge Schroeder refuted these reasons in her dissent. She noted that quiet nonregistrants can be traced by comparing lists of those required to register (presumably from driver's license or Social Security records) and comparing those with lists of actual registrants. She also argued that wilfulness was not in controversy. In light of the government's repeated attempts to persuade Wayte to register, his wilfulness is established without resort to his statements. If Judge Schroeder's arguments are to be accepted, the two cases can be reconciled, possibly, on a simple reluctance on the part of the Court of Appeals for the Ninth Circuit to fully break from prior law.

93 See notes 65-86 *supra* and accompanying text.

94 See notes 101-13 *infra* and accompanying text.

95 See note 101 *infra* and accompanying text.

96 *Wayte*, 710 F.2d at 1386.

97 Brief for the United States at 31, *Wayte v. United States*, cert. granted, 104 S. Ct. 2655 (1984).

ment analysis is appropriate whenever the right to free speech is involved, it cannot apply to *Wayte* if the letters are not found to be protected speech.⁹⁸

Wayte's letter is a communication with two functions: it is both a confession of a crime and an expression of opinion on government policy. In *Cohen v. California*,⁹⁹ Justice Harlan recognized that speech may have more than one meaning:

Additionally, we cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function *which, practically speaking, may often be the more important element of the overall message sought to be communicated*.¹⁰⁰

Cohen stands for the proposition that expressions may convey ideas in more than one way, and that an idea does not have to be conveyed explicitly to be entitled to constitutional protection. Wayte's letter was, in a cognitive sense, a confession and a criticism of government policy. In the emotive sense that Justice Harlan describes, however, it was an exercise of a citizen's right to free speech.

98 Another possible issue, apparently not argued by the government, is Wayte's actual protest activity. In his second letter to the Selective Service, Wayte said that he would be "traveling the nation . . . encouraging resistance and spreading the word about peace and disarmament." 710 F.2d at 1386. While this language is vague, it may indicate some draft counseling activities. The Selective Service Act provides a penalty for anyone who "knowingly counsels, aids, or abets another to refuse or evade registration." 50 U.S.C. app. 462(a) (1982); Offenses and Penalties: Registration Under the Military Service Act, Proclamation No. 4771, 45 Fed. Reg. 45,247 (1980). If Wayte's activities fall within that statute, he would be subject to prosecution independently from his failure to register. In this context, the first amendment will not preclude prosecution, even though Wayte's counseling activities involved speech. See *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969).

99 403 U.S. 15 (1971). The appellant was convicted under California Penal Code § 415, which prohibited "maliciously and wilfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct." CAL. PENAL CODE § 415 (West 1970). Cohen was arrested in the Los Angeles County Courthouse for wearing a jacket that bore the words "Fuck the Draft." He said that he wore the jacket to inform the public of his feelings about the Vietnam War and the draft. The California court's justification for the conviction was that offensive conduct as defined in the statute was anything that might provoke others to disturb the peace. The Supreme Court reversed, holding that "absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense." 403 U.S. at 26.

100 403 U.S. at 26 (emphasis added).

In deciding whether the first amendment is implicated, this emotive, expressive element must be considered. Based upon the expressive element in Wayte's letters, the impact of the first amendment cannot be ignored.

B. *First Amendment Analysis*

If, as has been argued, Wayte's letters fall within the protection of the first amendment, the selective prosecution defense should not follow its two-pronged equal protection path.¹⁰¹ Two changes will transform the traditional approach into a new first amendment selective prosecution defense. First, a showing of improper prosecutorial motive is unnecessary to establish a *prima facie* case. Rather, showing that the *effect* of the government's policy is to prosecute individuals *because* they spoke out should be sufficient to establish a *prima facie* case of first amendment selective prosecution. Second, once a *prima facie* case is made out, a balancing approach should be applied instead of the current "shifting the burden" method, where the governmental interests behind the prosecutorial policy are weighed against the impingement on first amendment freedoms. If the benefits do not outweigh the burden on first amendment rights or if the policy's impact on first amendment freedoms is greater than necessary to further those interests, the policy should be declared unconstitutional and the defendant's conviction reversed.

1. Relaxing the Prima Facie Showing

In practice, the *Wayte* decision requires the defendant to make

101 The government's argument in this area is twofold. First, it refutes Wayte's selective prosecution claim using the traditional two-pronged equal protection test. It asserts that passive enforcement did not discriminate against Wayte because he was vocal. The government posits that all the people prosecuted under the system shared one characteristic: they were known to the Selective Service. Because the government prosecuted all *known* nonregistrants, Wayte did not show that he was prosecuted while others *similarly situated* were not. In addition, the government asserts that it investigated all known nonregistrants without regard to their exercise of first amendment rights. No one who engaged in protests and who was not reported to the government was prosecuted. Thus, the government maintains that Wayte simply was not discriminated against because he was vocal. Wayte selected himself for prosecution by reporting his violation and persistently refusing to register. Second, to the extent that Wayte's first amendment rights were implicated, vocal nonregistrants were not impermissibly selected for prosecution because the passive enforcement system served legitimate governmental purposes. Brief for the United States at 14-18, *Wayte v. United States*, *cert granted*, 104 S. Ct. 2655 (1984).

If the court applies the equal protection test and accepts the government's argument or applies the first amendment analysis in this section and finds that the government did have valid justifications for its prosecutorial policy, Wayte's claim of selective prosecution will be defeated.

an almost direct showing of discriminatory motive to establish a prima facie case of selective prosecution.¹⁰² Since a defendant largely relies on circumstantial evidence to prove his prima facie case,¹⁰³ a direct showing of improper motive is a very difficult burden to bear.¹⁰⁴

The Supreme Court has stated that motive is irrelevant in evaluating the acts of the government that infringe upon first amendment rights.¹⁰⁵ In *NAACP v. Alabama*,¹⁰⁶ the Court said that "[i]n the domain of these indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, *even though unintended*, may inevitably follow from varied forms of governmental action."¹⁰⁷ Thus, a valid governmental purpose will not immunize the act from first amendment scrutiny.¹⁰⁸

This strict first amendment scrutiny should allow the defendant to establish a prima facie case of first amendment selective prosecution not by showing improper motive, but by showing that the *effect* of the government's prosecutorial policy is to investigate and prosecute the defendant *because* he spoke out against the registration policy. By presenting evidence that the passive enforcement system had the effect of targeting vocal nonregistrants, as opposed to quiet

102 See note 104 *infra*.

103 See, e.g., *United States v. Schmucker*, 721 F.2d 1046 (6th Cir. 1983) (evidentiary hearing on selective prosecution granted when only thirteen nonregistrants who expressed their opposition to the registration were indicted, out of approximately 500,000 violators); *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973) (untimely indictment against defendant after he protested American activities in Vietnam enough to establish prima facie case); *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972) (strong inference of discriminatory prosecution because background reports were compiled only on persons who had publicly attacked the census).

104 See *United States v. Wayte*, 710 F.2d 1385 (9th Cir. 1983) (defendant made no showing that the government focused its investigation on him because of his protest activities), *cert. granted*, 104 S. Ct. 2655 (1984).

105 See, e.g., *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 103 S. Ct. 1365, 1376 (1983) ("Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment . . . even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment."); *NAACP v. Button*, 371 U.S. 415, 438-39 (1963) ("Thus it is no answer to the constitutional claims asserted . . . that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression. For a state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights."); *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938) ("Whatever the motive which induced its adoption [municipal ordinance prohibiting distribution of circulars without permit], its character is such that it strikes at the very foundation of the freedom of the press . . .").

106 357 U.S. 449 (1958).

107 *Id.* at 461 (emphasis added).

108 See generally Note, *Rethinking Selective Enforcement in the First Amendment Context*, 84 COLUM. L. REV. 144, 149-51 (1984).

nonregistrants, for prosecution, the defendant should establish his *prima facie* case. Using this "effect" approach rather than the traditional motive standard, Wayte presented enough evidence to establish a *prima facie* case of first amendment selective prosecution. First, Wayte demonstrated that of the approximately 500,000 violators of the registration law, only eleven vocal nonregistrants were prosecuted.¹⁰⁹ Moreover, Wayte showed that high government officials were involved in the prosecution decision.¹¹⁰ Finally, Wayte argued that the government, with access to Social Security records, could have easily located nonvocal nonregistrants.¹¹¹ This evidence suggests, at least on its face, that Wayte was singled out for prosecution because he protested the government's registration policy. This "first amendment tripwire"¹¹² demonstrates that the effect of passive enforcement is to target a disproportionate number of vocal violators for prosecution.¹¹³ Thus, if Wayte's letters are constitutionally protected speech, Wayte's evidence should establish a *prima facie* case of first amendment selective prosecution.

2. The Balancing Approach

Once a *prima facie* case of first amendment selective prosecution is established, the traditional "shifting the burden" approach should be discarded in favor of a balancing approach designed to weigh the justifications for the prosecutorial policy against the burdens on the exercise of first amendment rights. In *United States v. O'Brien*,¹¹⁴ the Supreme Court introduced a balancing test to evaluate infringements upon first amendment freedoms:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.¹¹⁵

109 *United States v. Wayte*, 549 F. Supp. 1376, 1379 (C.D. Cal. 1982), *rev'd*, 710 F.2d 1385 (9th Cir. 1983), *cert. granted*, 104 S. Ct. 2655 (1984).

110 *Id.* at 1382.

111 *Id.* at 1381.

112 Brief for the Petitioner at 22, *Wayte v. United States*, *cert. granted*, 104 S. Ct. 2655 (1984).

113 *United States v. Wayte*, 549 F. Supp. 1376, 1379 (C.D. Cal. 1982). In *Wayte*, only eleven of the approximately 500,000 males who failed to register were prosecuted. *Id.*

114 391 U.S. 367 (1968).

115 *Id.* at 377.

While *O'Brien* can be distinguished from *Wayte*,¹¹⁶ this balancing test has been applied by the Supreme Court in factual contexts similar to *Wayte*. In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*,¹¹⁷ a special tax on paper and ink was struck down by the Court because its effect was to target a small group of newspapers for disadvantageous treatment.¹¹⁸ The Court viewed the tax as a first amendment issue and agreed that "the appropriate method of analysis is to balance the burden implicit in singling out the press against the interest asserted by the state."¹¹⁹ Thus, the Court applied the *O'Brien* balancing test in a situation where the effect of the government's action was to impinge on first amendment values. In *Wayte*, the effect of passive enforcement is to implicate a person because he expresses a particular message.¹²⁰ Therefore, the test advanced in *O'Brien* should apply to evaluate the constitutionality of the policy.

In applying the balancing approach to *Wayte*, the first step is to determine if the government can advance substantial interests to justify its passive enforcement policy.¹²¹ The government has offered

116 In *O'Brien*, the defendant questioned the constitutionality of a draft card burning statute on first amendment grounds. The question in *Wayte* is not *if* the regulation is to be enforced, but *how*. The issue is "whether the Selective Service may create a prosecution policy which relies on protected expression as the sole basis for investigation and prosecution of suspected nonregistrants." Brief for the Petitioner at 22, *Wayte v. United States*, *cert. granted*, 104 S. Ct. 2655 (1984).

117 103 S. Ct. 1365 (1983).

118 *Id.* at 1375.

119 *Id.* at 1372 n.7.

120 Brief for the Petitioner at 23, *Wayte v. United States*, *cert. granted*, 104 S. Ct. 2655 (1984).

121 The government could argue, although they have not, that *Wayte* would have been prosecuted even without the letter. The Supreme Court illustrated this idea in *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). *Doyle*, a teacher, alleged that the Board failed to rehire him because he had exercised first amendment rights. There were several other incidents, however, which might also have justified dismissal. The district court found that the first amendment was involved and that it did play a substantial part in the decision to terminate. On this ground, it ordered *Doyle* rehired with backpay. The Supreme Court reversed. It agreed with the district court's first two conclusions, but held that the court should have gone on to determine whether the Board had "shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." 429 U.S. at 287. The Court wanted to prevent a defendant from placing himself in a better position by speaking out. For example, if a teacher knew he might be fired, or a lawbreaker knew he might be prosecuted, they might speak out and allege that the firing or prosecution was based on their speech activities. This type of "insulation" from prosecution will not work under the *Mt. Healthy* analysis.

This analysis does not support the government's position in *Wayte*. The government policy was to prosecute only those it knew about, and it knew about *Wayte* because of the letter. The only way the government could prove that the same result would occur without the letter would be to show some other way that it would have discovered *Wayte*. The facts of the case do not suggest that another method of discovery existed.

four justifications for passive enforcement.¹²² First, by relying on reports of nonregistration as its prosecutorial source, the system allowed the government to identify and prosecute violators with a minimal expenditure of its limited investigatory resources.¹²³ Second, since the law requires the government to prove that the defendant, with knowledge of his obligation, did not register,¹²⁴ and because failure to register is "by itself an equivocal act that could easily be asserted to be due to such things as ignorance, mistake, or inadvertence,"¹²⁵ the defendant's statements are useful in showing he knowingly and deliberately refused to register for the draft.¹²⁶ Third, passive enforcement effectively promotes general deterrence by proceeding against publicly known offenders. This will encourage others in violation of the law to register.¹²⁷ Finally, the government asserts that it has an interest in prosecuting those who flaunt their violation by calling it to the government's attention and persist in refusing to register despite numerous opportunities to comply.¹²⁸

If the government establishes important objectives to justify its actions, the *O'Brien* test requires that the means chosen to achieve those objectives cannot be substantially broader than necessary.¹²⁹ The government argues that its enforcement policy was substantially related to the interests noted above and that any incidental effect on first amendment rights was "no greater than essential to the furtherance of such interests."¹³⁰ By focusing on those who were reported as nonregistrants, the government asserts that it could target its investigatory resources on people who it had reason to believe had violated the law.¹³¹ Moreover, passive enforcement helped the government pursue the strongest cases and the most flagrant violators while reinforcing the deterrent effect of the prosecutions.¹³² Finally, the gov-

122 Brief for United States at 44, *Wayte v. United States*, cert. granted, 104 S. Ct. 2655 (1984).

123 *Id.* at 34.

124 50 U.S.C. app. § 462(a) (1982). See, e.g., *United States v. Boucher*, 509 F.2d 991, 993 (8th Cir. 1975); *United States v. Klotz*, 500 F.2d 580, 581-82 (8th Cir. 1974); *Kaohelaulii v. United States*, 389 F.2d 495, 497 (9th Cir. 1968).

125 Brief for United States at 34, *Wayte v. United States*, cert. granted, 104 S. Ct. 2655 (1984).

126 *Id.*

127 *Id.*

128 *Id.* at 44.

129 *United States v. O'Brien*, 391 U.S. at 377.

130 Brief for the United States at 34, *Wayte v. United States*, cert. granted, 104 S. Ct. 2655 (1984).

131 *Id.*

132 *Id.* at 45.

ernment asserts that passive enforcement was the only practical means available at the time to enforce registration laws.¹³³ Thus, the government posits that passive enforcement is justified under *O'Brien* because the policy's impact on first amendment rights did not extend beyond legitimate prosecutorial purposes.¹³⁴

With these arguments, the government claims that the benefits of passive enforcement outweigh any incidental burdens the policy places on the exercise of first amendment rights.¹³⁵ The defendant, on the other hand, advances three reasons why passive enforcement does not further any substantial governmental interests. First, Wayte argues that passive enforcement does not further registration because it is not a general prosecution policy.¹³⁶ By prosecuting only those offenders who voice their objections to the registration requirement, the policy encourages *silence*, not *compliance* with the law.¹³⁷ Second, the defendant claims that the Selective Service could have afforded an active enforcement policy.¹³⁸ Even if administrative costs were severe, this could not justify curtailing first amendment rights.¹³⁹ Finally, Wayte argues that his statements were not necessary to establish the wilfulness of the violation in light of the government's "beg policy"¹⁴⁰ which gave violators an opportunity to register without the threat of prosecution.¹⁴¹

In addition, Wayte argues that even if the government's reasons for passive enforcement were legitimate, the government could have enacted a prosecutorial policy better tailored to achieve those

133 *Id.* at 45-46.

134 *Id.* at 45.

135 *Id.*

136 Brief for the Petitioner at 34, *Wayte v. United States*, *cert. granted*, 104 S. Ct. 2655 (1984).

137 *Id.*

138 *Id.* at 36. Under an active enforcement policy, the government actively seeks out violators of the draft registration requirement by comparing Social Security or drivers license records (which would reveal the names of nearly all males required to register) to the list of all males who did in fact register to determine who did not comply with the law. In contrast, under a passive enforcement system, the government does nothing to determine the identities of people who have not registered. It awaits information that reveals the names of violators. In this way, the government is passively receiving information instead of actively seeking it out.

139 *Id.*; see *Schneider v. State*, 308 U.S. 147, 162 (1939) (burden upon city in cleaning streets does not justify ordinance prohibiting distribution of handbills).

140 Before prosecuting, the government wrote vocal violators offering them a chance to comply with the law and told them of their possible prosecution if they did not register. In this way, the government "begged" offenders to comply with the registration requirement. Brief for the Petitioner at 32-33, *Wayte v. United States*, *cert. granted*, 104 S. Ct. 2655 (1984).

141 *Id.* at 35.

ends.¹⁴² Wayte asserts that the government could have initiated an alternate means to enforce the registration requirement that did not exclusively rely on the identification of vocal nonregistrants.¹⁴³ Specifically, Wayte claims that the government, by using records from state drivers licensing agencies, could have identified both vocal and nonvocal violators.¹⁴⁴ Thus, the defendant posits that passive enforcement was overbroad because a less restrictive alternative was available that would not have burdened the defendant's first amendment rights so heavily.¹⁴⁵

3. Adjudication of a Case of First Amendment Selective Prosecution

In summary, if Wayte's letters fall within the first amendment, the traditional two-prong test for selective prosecution should be discarded in favor of an analysis that recognizes that first amendment rights are involved. Under this approach, the government's motive for prosecuting is irrelevant; the defendant can establish a *prima facie* case by demonstrating that the effect of the prosecutorial policy is to select a disproportionate number of vocal violators for prosecution. The analysis would then become a balancing approach where the interests underlying the policy would be weighed against the burdens on first amendment rights. The outcome of a first amendment selective prosecution claim would then depend on whether the court accepts the government's interests, how it weighs those interests against first amendment burdens, and whether the policy's effect on first amendment freedoms is no greater than necessary to further those interests.¹⁴⁶

142 *Id.* at 37.

143 Brief for the Petitioner at 39, *Wayte v. United States*, *cert. granted*, 104 S. Ct. 2655 (1984).

144 *Id.* at 39; *see note 138 supra*.

145 *Id.* at 39.

146 It is possible to conclude that this approach requires a fairly low threshold of proof to establish a case of first amendment selective prosecution. This could make it relatively easy for a defendant to string along a case with nothing more than scant evidence to justify his claim of selective prosecution. This is a valid concern, but it is unwarranted for two reasons. First, scant evidence will not make out a *prima facie* case of first amendment selective prosecution. Wayte presented three pieces of evidence to establish his *prima facie* case. The most important was evidence of the sheer effect of passive enforcement: eleven out of approximately 500,000 nonregistrants were prosecuted. All eleven were vocal protestors of the government's registration requirement. In addition, Wayte presented evidence that the government had the capabilities and resources to implement a more active prosecutorial policy. Unless a defendant has evidence of this magnitude, courts simply will not recognize a defendant's claim of selective prosecution. Even if the court recognized a defendant's claim,

IV. Conclusion

The *Wayte* court views selective prosecution as an equal protection issue and views the first amendment as nothing more than a peripheral consideration. The court requires the defendant to introduce almost direct evidence of impermissible prosecutorial motive to prove his prima facie case. Because this is such a formidable standard to meet, future defendants like *Wayte* are not likely to be able to establish their prima facie cases¹⁴⁷ and the defense of selective prosecution will be useless in first amendment contexts. The government will be able to prosecute a disproportionate number of vocal violators, while a defendant is left to prove motive with nothing more than circumstantial evidence. The big chill will be complete.

The first amendment is implicated in cases like *Wayte*. This will transform the traditional equal protection approach into a new first amendment selective prosecution defense. The defense will operate on two levels. The defendant will establish a prima facie case of first amendment selective prosecution by showing that the effect of the government's passive enforcement policy is to prosecute a disproportionate number of vocal violators.¹⁴⁸ If the defendant meets this burden, the government must then advance justifications for its passive enforcement system. The government's interests will be weighed against the burden upon speech with an eye towards alternate means of enforcement. If the court invalidates passive enforcement under this proposed analysis, an active enforcement system based on random prosecution of known violators would ensure that both vocal and nonvocal nonregistrants would be prosecuted.¹⁴⁹ Under this new

however, the government can still prevail by asserting valid justifications for its policy. If it has good reason for its prosecutorial policy, the defendant's claim will be defeated.

147 See, e.g., *United States v. Eklund*, 551 F. Supp. 964 (S.D. Iowa 1982) (selective prosecution defense rejected because of defendant's failure to establish motive), *aff'd*, 733 F.2d 1287 (8th Cir. 1984).

148 See, e.g., *United States v. Schmucker*, 721 F.2d 1046 (6th Cir. 1983) (passive enforcement may be a guise for suppressing criticisms of government policy).

149 The government has since replaced passive enforcement with an active enforcement system to identify nonregistrants. The system utilizes Social Security records and state drivers license lists along with information from other federal and state sources. As of June 1984, more than 160,000 names have been transmitted to the Department of Justice and 599 individuals have been selected for further investigation. Thus far, all people subject to the registration requirement have elected to comply with the law pursuant to the government's "beg policy," and thus no prosecutions have been initiated. Brief for *United States* at 10, *Wayte v. United States*, *cert. granted*, 104 S. Ct. 2655 (1984).

One could legitimately raise the issue of mootness and argue that there is no longer a live controversy in this case. One could argue that the Court need not decide the constitutionality of passive enforcement since it is clear it will not be used again in this context. The Court

system, the defendant will not be able to immunize himself from prosecution by speaking out against the government. By prosecuting both vocal and nonvocal violators, the defendant's claim of selective prosecution will be meritless.

John D. Goetz
Michael R. Seghetti

would then have to come to grips with Wayte's conviction under the obsolete policy. The Court could find that under the new policy, it would be just a matter of time before the Department of Justice would discover and investigate Wayte. Thus, the Court could affirm Wayte's conviction on an *inevitable discovery* theory. See *Nix v. Williams*, 104 S. Ct. 2501 (1984).

A better view, however, is that the Supreme Court should decide the constitutionality of passive enforcement. As argued, this involves seeing selective prosecution in a new first amendment context. The issue is not moot for two reasons. One, first amendment involvement in selective prosecution claims is not limited to draft registration cases. The situation could come up in other contexts. For example, the Professional Air Traffic Controller cases, in which the government prosecuted the leaders of local unions, provide a similar situation where defendants could claim that the effect of the government's prosecutorial policies was to select a disproportionate number of vocal strikers for prosecution. See *United States v. Taylor*, 693 F.2d 919 (9th Cir. 1982). Because the fact situation in *Wayte* is capable of repetition in other contexts, the court should grapple with the constitutional issues behind passive enforcement. Two, it is recognized that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (citing *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953)).

CONSTITUTIONAL LAW—*JOHN F. KENNEDY MEMORIAL HOSPITAL, INC. v. BLUDWORTH*: REMOVING COURTS FROM THE DECISION TO TERMINATE LIFE SUPPORT SYSTEMS

Mary Doe, mother of two, has had a stroke. She has been comatose for two weeks. A respirator breathes for her. She is fed through a naso-gastric tube and requires constant care. According to the physician, Mary is in a chronic vegetative state. The doctor believes that Mary's condition will never improve.

Mary Doe has often told her family that if she became ill and there was no hope of recovery, she would not want to be kept alive on a machine. What can the family do? Can the physician withdraw treatment solely on the family's request, or must the family obtain prior court approval? If prior court approval is required, what value will the court place on Mary's oral statements? Before becoming ill, could Mary have taken steps to ensure that her wishes would be followed?

The United States Supreme Court has yet to address the issue of whether a terminally ill incompetent patient has the right, exercisable by a guardian, to refuse life sustaining treatment. States which have addressed the issue recognize the patient's right to refuse treatment, but differ on how this right may be exercised. In *John F. Kennedy Memorial Hospital, Inc. v. Bludworth*,¹ the Supreme Court of Florida reduced the procedural requirements a family must meet before exercising the incompetent's right to refuse treatment.

Part I of this comment sets forth the facts and holding of *Bludworth*. Part II examines the constitutional basis of the incompetent's right to refuse treatment. Part III analyzes the case law and statutory means of exercising this right. Finally, Part IV concludes that the *Bludworth* court has taken a positive step by reducing the restrictions on exercising an incompetent patient's right to refuse life sustaining treatment. The court, however, has not placed enough emphasis on the patient's prior expressions embodied in a living will.

I. *John F. Kennedy Memorial Hospital, Inc. v. Bludworth*

In 1975, Francis Landy executed a written document, known as a "living will," expressing his desire not to be maintained by artificial

¹ 452 So. 2d 921 (Fla. 1984).

life support systems.² Six years later, Mr. Landy was hospitalized and subsequently placed on a respirator. He could not breathe without the assistance of the respirator due to his impaired neurological and respiratory functions. His physician diagnosed the condition as terminal.³

Landy's wife delivered the living will to hospital physicians. Shortly thereafter, the probate court declared Landy incompetent and appointed his wife as guardian. As guardian, Landy's wife asked the physicians to discontinue all extraordinary means of life support for her husband.⁴

The hospital filed suit for a declaratory judgment, asking the court to assess its rights and liabilities in complying with Mrs. Landy's request.⁵ The trial court held: (1) a guardian must be appointed to act on behalf of the incompetent, and (2) the guardian must obtain prior court approval for termination of life support systems.⁶ The Florida District Court of Appeal affirmed the need for prior court approval but, because the issue was one of "great public importance," certified the question to the state supreme court.⁷

The Supreme Court of Florida held that an incompetent terminally ill patient has the right to refuse continued maintenance on artificial life support systems.⁸ The court declined to require that prior court approval be obtained,⁹ however, and held that close family members or court appointed guardians may exercise the incompetent's right to refuse extraordinary medical treatment without resorting to the judicial system.¹⁰ According to the court, civil or

2 Landy and two witnesses signed the document. Landy reaffirmed his wishes two months prior to his hospitalization. *Id.* at 922.

3 *Id.*

4 *Id.*

5 Although Landy died prior to a hearing on the issue, the court refused to dismiss for mootness since other incompetent terminally ill patients were being maintained on life support systems at the same hospital. *Id.* at 923. The controversy was "capable of repetition, yet evaded review." See *John F. Kennedy Memorial Hosp., Inc. v. Bludworth*, 432 So. 2d 611, 614 (Fla. Dist. Ct. App. 1983) (citing *Roe v. Wade*, 410 U.S. 113, 125 (1973); *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)); see also note 49 *infra*.

6 452 So. 2d at 923.

7 The Florida District Court of Appeal recognized the right of a terminally ill patient to refuse extraordinary medical treatment based on the constitutional right to privacy. In the case of an incompetent, however, the court held that this right must be exercised through the courts. *John F. Kennedy Memorial Hosp., Inc. v. Bludworth*, 432 So. 2d 611 (Fla. Dist. Ct. App. 1983), *decision quashed*, 452 So. 2d 921 (Fla. 1984).

8 *John F. Kennedy Memorial Hosp., Inc. v. Bludworth*, 452 So. 2d 921, 923 (Fla. 1984).

9 *Id.* at 925.

10 The court emphasized that the attending physician and two specialists (in a field related to the patient's illness) should certify that the patient is in a vegetative state with no

criminal liability would result only upon a showing that the parties had acted in bad faith with an intent to harm the patient.¹¹

II. Recognition of the Right to Privacy

The *Bludworth* court, like others, held that the patient's right to refuse or discontinue life sustaining treatment was inherent in the patient's right to privacy.¹² One of the earliest Supreme Court decisions to refer to this right to privacy was *Union Pacific Railway v. Botsford*.¹³ The Court, in *Botsford*, held that a plaintiff in a personal injury case could not be required to submit to a medical examination because to do so would violate his *common law* right to privacy.¹⁴ Recent Supreme Court decisions do not rely on a common law right but hold, instead, that the right to privacy is constitutionally mandated,¹⁵ even though the Constitution does not explicitly guarantee this right.

The Supreme Court first recognized an implied constitutional right to marital privacy in *Griswold v. Connecticut*,¹⁶ a decision which declared a state statute prohibiting the use of contraceptives unconstitutional.¹⁷ Writing for the majority, Justice Douglas identified the source of this privacy right as the "penumbras, formed by emanations from [specific guarantees in the Bill of Rights] that help give them life and substance."¹⁸ According to the "penumbras" theory, the Bill of Rights contains implied rights¹⁹ which are necessary to

reasonable chance of recovery before family members or the patient's guardian request the termination of any medical treatment. *Id.* at 926.

11 *Id.*

12 *Id.* at 924.

13 141 U.S. 250 (1891).

14 *Id.* at 251.

15 See *Roe v. Wade*, 410 U.S. 113 (1973) (right to privacy includes a woman's decision to seek abortion); *Stanley v. Georgia*, 394 U.S. 557 (1969) (statute which punishes mere possession of obscene material violates first amendment right to receive information free from government intrusion into personal privacy); *Katz v. United States*, 389 U.S. 347 (1967) (fourth amendment protects an individual's reasonable expectation of privacy); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right to marital privacy protected by the penumbras of the Bill of Rights).

16 381 U.S. 479 (1965).

17 In *Griswold*, the executive director and medical director of a Planned Parenthood office had been convicted, as accessories, for giving advice and information on contraceptives to married couples. *Id.* at 485.

18 *Id.* at 484.

19 The implied right to privacy derives from the express guarantees of the first, third, fourth, and fifth amendments. 381 U.S. 479, 482-84 (1965); see also Clark, *Constitutional Sources of the Penumbral Right to Privacy*, 19 VILL. L. REV. 833 (1974); Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U. L. REV. 670 (1973).

give meaning to the express rights.²⁰

In *Eisenstadt v. Baird*,²¹ the Court expanded the protections of the right to privacy by recognizing the individual's right of equal access to contraceptives regardless of marital status.²² In *Roe v. Wade*,²³ the Court held that the right to privacy also protects a woman's *decision* to end her pregnancy through abortion.²⁴ The Supreme Court cases demonstrate an expansion of the right to privacy from a narrow focus on the marital relationship to a broader protection of decision-making, at least in the context of abortions. This evolution signifies a growing recognition of the right to privacy as a personal right of self-control and self-determination.²⁵

Throughout this evolution, however, the Supreme Court has

20 Justice Goldberg, in a concurring opinion, identifies the ninth amendment as the source of the right to privacy. 381 U.S. 479, 495-99 (Goldberg, J., concurring). The ninth amendment states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX. The "other" rights alluded to include fundamental personal rights, such as the right to privacy. Therefore, the right to privacy should receive equivalent protection by the courts. *See also* Clark, *The Ninth Amendment and Constitutional Privacy*, 5 U. TOL. L. REV. 83 (1973).

21 405 U.S. 438 (1972).

22 In *Eisenstadt*, the respondent challenged the constitutionality of a Massachusetts statute which limited the distribution of contraceptives to married persons, and then only by a physician or pharmacist. The respondent was convicted for violating this statute when he gave a package of contraceptive foam to a woman following a lecture at Boston University. The Supreme Court held that the statute violated the equal protection clause of the fourteenth amendment because, as applied, it caused dissimilar treatment of persons similarly situated. In addition, the Court clarified its holding in *Griswold*:

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity, . . . but an association of two individuals If the right of privacy means anything, it is the right of the *individual* . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

Id. at 453 (emphasis in original).

23 410 U.S. 113 (1973).

24 Ms. Roe, a pregnant single woman, brought a class action challenging the constitutionality of a Texas statute which prohibited abortion except when necessary to save the mother's life. She sought declaratory and injunctive relief, arguing that the statute was void for vagueness and infringed on her personal privacy right. The district court granted declaratory relief and held that the abortion statute did infringe on Roe's right to privacy, in contravention of the ninth amendment. *Roe v. Wade*, 314 F. Supp. 1217, 1223 (N.D. Tex. 1970). On direct appeal, the Supreme Court affirmed this portion of the lower court ruling but took the position that the right to privacy derives from the fourteenth amendment. 410 U.S. at 153.

25 *See, e.g.,* Cantor, *A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life*, 26 RUTGERS L. REV. 228, 239 (1973); Comment, *Roe v. Wade and In Re Quinlan: Individual Decision and the Scope of Privacy's Constitutional Guarantee*, 12 U.S.F.L. REV. 111, 120 (1970); Note, *On Privacy: Constitutional Protection for Personal Liberty*, 48 N.Y.U. L. REV. 670, 697-701 (1973).

consistently indicated that the right to privacy is not absolute.²⁶ Rather, courts must weigh the individual's interest in the right to privacy against the legitimate state interests infringing on that right. If the individual's privacy interests outweigh the state's interests, the court will prevent state interference.²⁷

Although the Supreme Court has not addressed the issue of whether a terminally ill patient may refuse life sustaining medical treatment, several state courts have interpreted the right to privacy to include the authority to make such decisions.²⁸ The Supreme Court of New Jersey, in *In re Quinlan*,²⁹ upheld an incompetent's right to refuse the continued use of life support systems based on the individual's right to privacy.³⁰ The New Jersey court relied on the

26 See *Roe v. Wade*, 410 U.S. 113, 154 (1973) (privacy right is not absolute and may be subject to important state interests); *Griswold v. Connecticut*, 381 U.S. 479, 503-04 (1965) (White, J., concurring) (state statutes which are "reasonably necessary" to protect legitimate state interests do not violate the due process clause); see also *Poe v. Ullman*, 367 U.S. 497, 522 (Harlan, J., dissenting) (right to privacy is not absolute).

27 For example, in *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court reversed the petitioners' conviction, holding that the statute under which they were convicted was unconstitutional as a violation of the right to marital privacy. The state's interest in controlling the use of contraceptives did not justify infringement of this right. In *Roe v. Wade*, 410 U.S. 113 (1973), the Court granted declaratory relief where the state's interest in maintaining medical standards and protecting public health did not outweigh the individual's right to privacy in deciding to seek an abortion.

28 See *Severns v. Wilmington Medical Center*, 425 A.2d 156 (Del. Ch. 1980) (incompetent's right to refuse medical treatment may be expressed through a guardian when the patient is in a chronic vegetative state); *Satz v. Perlmutter*, 379 So. 2d 359 (Fla. 1980) (constitutional right to privacy supports the decision of a competent adult, suffering from a terminal illness, to refuse extraordinary treatment); *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977) (right to refuse medical treatment for terminal illness extended to incompetent patients); *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (right to privacy includes the right of an incompetent to refuse, via her guardian, continued life sustaining treatment), *cert. denied*, 429 U.S. 922 (1976); *Leach v. Akron Gen. Medical Center*, 68 Ohio Misc. 1, 426 N.E.2d 809 (1980) (right to privacy includes the right of a terminally ill patient in a vegetative state to decide the course of his own treatment); *In re Welfare of Colyer*, 99 Wash. 2d 114, 660 P.2d 738 (1983) (constitutional right to privacy includes the right of a terminally ill adult patient to refuse life prolonging treatment, subject to countervailing state interests). But see *Storar v. Storar*, 52 N.Y.2d 362, 438 N.Y.S.2d 266, 420 N.E.2d 64 (*common law* right to self-determination includes the right to refuse medical treatment in some circumstances), *cert. denied*, 454 U.S. 858 (1981).

29 70 N.J. 10, 355 A.2d 647 (1976).

30 Karen Ann Quinlan was, at the time of this case, a twenty-two year old female in a chronic vegetative state due to anoxia (lack of oxygen in the blood) of unknown origin. Although not clinically brain dead, she existed at a primitive level and required total assistance with the basic functions of life such as breathing, eating, and excretion. Karen's father sought appointment as her guardian with express authority to order the withdrawal of all extraordinary medical treatment. He asserted that the use of a respirator violated Karen's free exercise of religion, constituted cruel and unusual punishment, and violated her right of personal privacy. The Supreme Court of New Jersey rejected the first two claims but agreed that

Supreme Court's decision in *Roe v. Wade*,³¹ reasoning that if the right to privacy protects the right to *obtain* certain types of health care, then it must also protect the right to *refuse* care.³² The *Bludworth* court also upheld the incompetent's right to terminate life support systems,³³ but differed from New Jersey and other state courts on how that right may be exercised.³⁴

III. Implementation of the Right

A. Common Law Development

State courts which have addressed the issue³⁵ fall into two

Karen's right of personal privacy encompassed her freedom to order the withdrawal of extraordinary treatment. On this basis, the court granted Mr. Quinlan's petition. *Id.* at 39-42, 355 A.2d at 663-64.

31 See note 24 *supra* and accompanying text.

32 70 N.J. at 40, 355 A.2d at 663 (emphasis added). The court, however, clearly stated that the right to privacy is not absolute but must be weighed against legitimate state interests. In this case, the state's interest in preserving life and protecting physicians' autonomy did not justify interference with Quinlan's right to refuse treatment. According to the court, "[t]he state's interest *contra* weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims. Ultimately there comes a point at which the individual's rights overcome the state interest." *Id.* at 41 (emphasis in original); see also Cantor, *Quinlan, Privacy, and the Handling of Incompetent Dying Patients*, 30 RUTGERS L. REV. 243, 244 (1977); Comment, *supra* note 25, at 133-34.

Other state courts, in applying this balancing test, have identified four areas of state interest which the court must consider. The state interests are: (1) preservation of life, (2) prevention of suicide, (3) protection of third party interests, and (4) maintenance of medical ethical integrity. See *Satz v. Perlmutter*, 362 So. 2d 160 (Fla. Dist. Ct. App. 1978), *aff'd*, 379 So. 2d 359 (Fla. 1980); *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977); *Leach v. Akron Gen. Medical Center*, 68 Ohio Misc. 1, 426 N.E.2d 809 (1980).

33 452 So. 2d 921, 926 (Fla. 1984).

34 See notes 45-51 *infra* and accompanying text.

35 The patients in these cases have been diagnosed terminally ill. With or without life support systems, most of them will die within a relatively short time. These patients are also incompetent, unable to make their wishes known. A few cases have dealt with severely retarded adults, see, e.g., *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977), *Storar v. Storar*, 52 N.Y.2d 363, 438 N.Y.S.2d 266, 420 N.E.2d 64 (1981), or infants, see, e.g., *In re Guardianship of Barry*, 445 So. 2d 365 (Fla. Dist. Ct. App. 1984); *In re P.V.W.*, 424 So. 2d 1015 (La. 1982); *Custody of a Minor*, 385 Mass. 697, 434 N.E.2d 601 (1982). Most cases have dealt with previously competent adult patients who are now in a comatose, vegetative state with no reasonable possibility of returning to a cognitive, sapient state. These patients are not dead under either of the legally recognized standards: brain death or cessation of circulation. But they are kept alive only by the use of life support systems. Life support systems generally involve mechanical replacements for one or more of the body's vital functions. These life support systems offer no hope of curing the patient's illness—they merely postpone the inevitable moment of death. See generally 79 A.L.R.3d 237 (1977 & Supp. 1984) (power of court to order or authorize termination of extraordinary medical treatment); 93 A.L.R.3d 67 (1979 & Supp. 1984) (patient's right to refuse life sustaining treatment).

groups: those that require court approval before physicians withhold or withdraw life support,³⁶ and those that do not require judicial involvement. The courts which fall into this latter group prefer that the decision to withhold or withdraw life support be made within the patient-physician-family relationship.³⁷

The leading case requiring court approval before withholding treatment, *Superintendent of Belchertown State School v. Saikewicz*,³⁸ held that the decision could only be made by the court.³⁹ The Supreme Judicial Court of Massachusetts stated: "We take a dim view of any attempt to shift the ultimate decision-making responsibility away from the duly established courts of proper jurisdiction to any committee, panel or group, ad hoc or permanent."⁴⁰

36 See, e.g., *Custody of a Minor*, 385 Mass. 697, 434 N.E.2d 601 (1982); *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977); *Leach v. Akron Gen. Medical Center*, 68 Ohio Misc. 1, 426 N.E.2d 809 (1980); cf. *In re Spring*, 380 Mass. 629, 405 N.E.2d 115 (1980) (prior court approval not required, but if issue is brought to court, the court must make the decision itself—not delegate it to others).

As an aftermath of *Leach*, the patient's husband filed a civil suit against the hospital and the doctor, claiming that unwanted treatment violated the patient's constitutional rights. The case is awaiting trial. Malcolm, *Many See Mercy in Ending Empty Lives*, N.Y. Times, Sept. 23, 1984, § 1, at 1, col. 3.

37 See, e.g., *John F. Kennedy Memorial Hosp., Inc. v. Bludworth*, 452 So. 2d 921 (Fla. 1984); *In re Guardianship of Barry*, 445 So. 2d 365 (Fla. Dist. Ct. App. 1984); *In re Dinnerstein*, 6 Mass. App. Ct. 466, 380 N.E.2d 134 (1978); *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976); *Storar v. Storar*, 52 N.Y.2d 363, 438 N.Y.S.2d 266, 420 N.E.2d 64 (1981) (*Storar v. Storar* addressed the issue of terminating blood transfusions for a terminally ill, profoundly retarded adult cancer patient. *Eichner v. Dillon* addressed the issue of terminating life support for 83 year old Brother Fox. On appeal, the court consolidated *Storar* and *Eichner*. Since the focus of this case comment is life support termination, we are concerned with the court's ruling in *Eichner* and will refer to the case as such throughout the remainder of this article.); *In re Welfare of Colyer*, 99 Wash. 2d 114, 660 P.2d 738 (1983); cf. *Dockery v. Dockery*, 559 S.W.2d 952 (Tenn. Ct. App. 1977), cert. denied, (Dec. 12, 1977) (when no possibility of cure exists, physician has no authority to continue use of respirator without family's consent).

38 373 Mass. 728, 370 N.E.2d 417 (1977).

39 Joseph Saikewicz, a 67 year old man with a mental age of approximately 2 years, 8 months, suffered from leukemia. A court appointed guardian *ad litem* recommended that it would be in Mr. Saikewicz's best interests not to receive chemotherapy. This position was supported by the following facts: (1) The illness was incurable. Even with treatment, the best that could be hoped for was remission. (2) Mr. Saikewicz's advanced age reduced the chance of remission. (3) Chemotherapy would cause Mr. Saikewicz significant adverse side effects and discomfort. (4) Due to Mr. Saikewicz's retardation, he would be unable to understand the need for the treatment and be unable to cope with its side effects. *Id.* at 729-35, 370 N.E.2d at 419-22. The court approved the guardian *ad litem*'s recommendation, finding that the fear and suffering Mr. Saikewicz would be subjected to was not justified by the possibility of temporary remission. *Id.* at 753-55, 370 N.E.2d at 432.

40 *Id.* at 758, 370 N.E.2d at 434. The court noted that the judge may find the advice of attending physicians, other medical experts or hospital ethics committees helpful in reaching a decision, but refused to require that such advice be sought or accorded any particular weight in the decision-making process. In its ruling, the court expressly rejected the *Quinlan*

The majority of cases, however, favor the patient-physician-family context for decision-making. The leading case, *In re Quinlan*,⁴¹ specifically found that court confirmation of such decisions was "inappropriate."⁴² The Supreme Court of New Jersey felt such practice would be a "gratuitous encroachment upon the medical profession's field of competence"⁴³ and would be "impossibly cumbersome."⁴⁴ Instead of prior court approval, the court required a hospital ethics committee⁴⁵ to review decisions made by the attending physician, the court appointed guardian and the family.⁴⁶ The court stressed that the decision-makers should focus their deliberations on the "reasonable possibility of [the patient's] return to cognitive and sapient life."⁴⁷

The Washington Supreme Court, in *In re Welfare of Colyer*,⁴⁸ also found prior court approval "unresponsive and cumbersome,"⁴⁹ noting that when physicians and family agree to terminate life support, court approval "becomes little more than a formality."⁵⁰ *Colyer* re-

approach of allowing the patient's guardian, family, physicians and hospital ethics committee to decide whether life sustaining treatment will be withheld or withdrawn. *Id.*

41 70 N.J. 10, 355 A.2d 647; see note 30 *supra*.

42 *Id.* at 50, 355 A.2d at 669.

43 *Id.*

44 *Id.*

45 The hospital ethics committee would be composed of physicians, social workers, attorneys and theologians. *Id.* at 49, 355 A.2d at 668 (quoting Teel, *The Physician's Dilemma: A Doctor's View: What The Law Should Be*, 27 BAYLOR L. REV. 6, 8-9 (1975)). The court suggested that the ethics committee might offer the same advantages in the life support termination decision that multi-judge courts provide in deciding difficult questions of law at the appellate level. 70 N.J. at 50, 355 A.2d at 669.

46 First, the attending physician must determine that no reasonable probability exists that the patient will return to a cognitive, sapient state and that life support should be terminated. Second, the guardian and family must agree to termination. Third, the hospital ethics committee must agree with the attending physician's prognosis. At that point, life support may be withdrawn without civil or criminal liability. 70 N.J. at 55, 355 A.2d at 671-72.

47 *Id.* at 51, 355 A.2d at 669.

48 99 Wash. 2d 114, 660 P.2d 738 (1983). Bertha Colyer sustained cardiopulmonary arrest. She was resuscitated, but her body had been without oxygen for approximately ten minutes. The resulting massive brain damage left her in a persistent vegetative state. Her husband, acting as her court appointed guardian, sought an order to terminate life sustaining systems. *Id.* at 116-17, 660 P.2d at 740.

49 *Id.* at 127, 660 P.2d at 746. The court noted that many of the leading cases in this area are those in which the patient died before the judicial process was completed. *Id.* (citing *Eichner v. Dillon*, 52 N.Y.2d 363, 438 N.Y.S.2d 266, 420 N.E.2d 64 (1981); *In re Spring*, 380 Mass. 629, 405 N.E.2d 115 (1980)). Other courts have confronted the same situation. See, e.g., *John F. Kennedy Memorial Hosp., Inc. v. Bludworth*, 452 So. 2d 921 (Fla. 1984); *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977); cf. *Dockery v. Dockery*, 559 S.W.2d 952 (Tenn. Ct. App. 1977), *cert. denied*, (Dec. 12, 1977) (case dismissed as moot when patient died while appeal was pending).

50 99 Wash. 2d at 127, 660 P.2d at 746.

quired basically the same procedure as *Quinlan*, substituting a hospital prognosis board for the hospital ethics committee.⁵¹

In *Bludworth*, the Florida Supreme Court spoke out even more strongly against a requirement of prior court approval. The court stated: "To require prior court approval for termination of life support systems in this type of case is too burdensome, is not necessary to protect the state's interests or the interests of the patient, and could render the right of the incompetent a nullity."⁵²

The *Bludworth* court was the first court to state as a general rule that court appointment of a guardian was unnecessary if a spouse, adult children or parents were willing to exercise the incompetent patient's right to have life support systems terminated.⁵³ The court, adopting the holding of *In re Guardianship of Barry*,⁵⁴ stressed that while judicial intervention was not necessary, courts must be available to hear cases that are brought.⁵⁵ This is consistent with earlier case law.⁵⁶

The step taken by the *Bludworth* court is a small, but significant development. By its decision, the Florida Supreme Court gives unqualified approval to removing the decision to terminate life support systems from the courts. As the *Bludworth* court points out, "[t]he is-

51 *Colyer* required a physician to diagnose the patient incurable with no reasonable medical probability of returning to a cognitive state. The hospital prognosis board must unanimously concur. Then a court appointed guardian could decide whether to terminate life support. *Id.* at 137, 660 P.2d at 751.

The court stated that, in normal cases, court involvement was only required in appointing the guardian. In the following types of cases, however, court approval would be required to withhold or withdraw life support: (1) if family members disagree as to the incompetent's wishes; (2) if physicians disagree on the prognosis; (3) if the patient's wishes can not be known because he has always been incompetent; (4) if evidence exists of wrongful motives or malpractice; or (5) if no family member can serve as guardian. Guardians, family members, physicians or hospitals may petition for court intervention. *Id.* at 136, 660 P.2d at 750; see also *Barry*, 445 So. 2d at 372; *In re Spring*, 380 Mass. 629, 636-37, 405 N.E.2d 115, 120-21 (1980).

52 452 So. 2d at 925.

53 *Id.* at 926. One justice, concurring in the result only, felt prior court approval was not necessary to terminate life support systems but was presently inclined to require the appointment of a guardian. *Id.* at 927 (McDonald, J., concurring).

Earlier in the year, the Florida Fourth District Court of Appeal had stated: "where . . . the question concerns a young child, we do not think the parents must always qualify as legal guardians and seek judicial sanctions to discontinue these extraordinary measures." *Barry*, 445 So. 2d at 372.

54 445 So. 2d 365, 372 (Fla. Dist. Ct. App. 1984).

55 The court stated that "families, guardians, affected medical personnel, or the state" could bring the petition either because they wanted a judicial order, because doubt existed, or because the family, physicians and hospital did not agree. 452 So. 2d at 926.

56 See note 51 *supra*.

sue in these cases is not whether a life should be saved. Rather it is how long and at what cost the dying process should be prolonged.”⁵⁷ Families and physicians facing this sober decision do not need the advice of the courts. Sufficient checks exist in the process, without court intervention, to guard against hasty or ill-motivated action. In cases where conflicts exist, interested parties always have recourse to the courts. In cases where no conflicts exist as to the proper course of action, family members and physicians no longer have to watch as the patient is “held on the threshold of death”⁵⁸ while court proceedings drag on.

In addition to speaking out in favor of removing courts from the decision to terminate life support, the *Bludworth* court summarily dealt with issues regarding the effect of a living will and the potential for civil or criminal liability. Whenever courts or families exercise an incompetent patient’s right to withdraw life support systems, they do so under the doctrine of “substituted judgment.”⁵⁹ “Substituted judgment” requires the decision-maker to determine, to the best of his ability, what the incompetent person would have done, if competent.⁶⁰ The decision-maker should try to “ascertain the incompetent’s actual interests and preferences.”⁶¹

If the incompetent person, while still competent, had made prior statements, either oral or written, about his wishes regarding termination of life support, the decision-maker’s task is simplified.⁶² The

57 452 So. 2d at 924.

58 *Id.* at 922.

59 The doctrine of “substituted judgment” originated over 150 years ago within the context of administering the estate of an incompetent person. The original doctrine required “the court to ‘don the mental mantle of the incompetent.’” *Saikewicz*, 373 Mass. at 751-52, 370 N.E.2d at 431 (quoting *In re Carson*, 39 Misc. 2d 544, 545; 241 N.Y.S.2d 288, 289 (N.Y. Sup. Ct. 1962)).

60 *Bludworth*, 452 So. 2d at 926; see also *Barry*, 445 So. 2d at 370-71; *Spring*, 380 Mass. at 634, 405 N.E.2d at 119; *Saikewicz*, 373 Mass. at 749-55, 370 N.E.2d at 429-32.

The decision-maker is allowed to take past and future incompetency into consideration when attempting to ascertain what the patient would decide. *Saikewicz*, 373 Mass. at 752-53, 370 N.E.2d at 431.

61 *Saikewicz*, 373 Mass. at 752, 370 N.E.2d at 431.

62 See *Severns v. Wilmington Medical Center, Inc.*, 425 A.2d at 158; *Bludworth*, 452 So. 2d at 926; *Eichner v. Dillon*, 52 N.Y.2d at 371-72, 438 N.Y.S.2d at 270, 420 N.E.2d at 68; *Leach v. Akron Gen. Medical Center*, 68 Ohio Misc. at 3-4, 426 N.E.2d at 811. But see *In re Quinlan*, 70 N.J. at 21-22, 355 A.2d at 653.

Three criteria have been suggested to determine the value of the patient’s prior statements: (1) the age and maturity of the patient when the statements were made; (2) the context in which the statements were made; and (3) the connection of the statements to the debilitating event. *Colyer*, 99 Wash. 2d at 131-32, 660 P.2d at 748.

In *Quinlan*, the court accorded little weight to Karen’s prior statements. (1) She was young and immature. (2) The statements were made in casual conversation. (3) They were

Florida Supreme Court stated that a living will was "persuasive evidence" of an incompetent patient's intention and should be given "great weight" by those who substitute their judgment on the patient's behalf.⁶³ While other courts have given credence to a patient's prior expressions,⁶⁴ *Bludworth* is the first case in which the patient had actually executed a living will. Since the court intends to remove itself from the decision to terminate life support, it is necessary that the ultimate decision-makers be given some direction. According substantial weight to living wills is consistent with this goal. Those who exercise an incompetent's right to terminate life support should be guided, if not bound, by the patient's prior expressions in a living will.

The *Bludworth* court, addressing the issue of potential civil or criminal liability,⁶⁵ followed other courts by applying the good faith standard.⁶⁶ But by defining good faith as a lack of "inten[t] to harm

made without serious contemplation that she might soon be in her present condition. 70 N.J. at 21-22, 41, 355 A.2d at 653, 664; see Comment, *In re Storar: The Right to Die and Incompetent Patients*, 43 U. PITT. L. REV. 1087, 1089 (1982).

In *Eichner*, the court found Brother Fox's prior statements dispositive because (1) Brother Fox was an elderly member of a religious order; (2) the statements were made during formal scholarly discussions; and (3) the statements were reaffirmed only a couple of months before Brother Fox's final hospitalization. 52 N.Y.2d at 371-72, 438 N.Y.S.2d at 270, 420 N.E.2d at 68; see Comment, 43 U. PITT. L. REV. at 1094.

In the absence of an express statement by the patient while still competent, the court can be guided by what close relatives infer the patient's desire to be from the patient's general attitudes. See *Colyer*, 99 Wash. 2d at 132, 660 P.2d at 748; see also Comment, 43 U. PITT. L. REV. at 1105-06 (how a decision can be reached when the patient has made no express statements of his wishes prior to incompetency).

63 *Bludworth*, 452 So. 2d at 926. Compare the Florida Supreme Court opinion in *Bludworth*, 452 So. 2d at 926 with the Florida District Court of Appeals opinion in *Bludworth*, 432 So. 2d 611, 620 (1983).

In its holding, the lower court set forth the requirement that any alleged "living will" be proven by testimony or recent affidavit of at least one of two disinterested witnesses to the will. The witness must certify that the document was properly executed while the patient had the mental capacity to do so. The District Court of Appeal said that a "living will" should ordinarily serve as best evidence of the patient's intention. 432 So. 2d at 620. The court then listed four factors which would determine in each case the weight courts would actually accord the document: "(1) the timeliness of its execution, (2) the circumstances under which it was executed, (3) its contents and (4) any evidence of a contrary intention." *Id.*

Since the Florida Supreme Court quashed the decision of the Florida District Court of Appeal, it appears the supreme court did not intend that stringent requirements be applied to living wills.

64 See note 62 *supra*.

65 Most other cases that have specifically addressed this issue have granted civil and criminal immunity. See *Severns v. Wilmington Medical Center, Inc.*, 425 A.2d at 160-61; *Quinlan*, 70 N.J. at 51-52, 54, 355 A.2d at 669-70, 71; *Leach v. Akron Gen. Medical Center*, 68 Ohio Misc. at 13, 426 N.E.2d at 816; cf. *In re Spring*, 380 Mass. at 639, 405 N.E.2d at 122.

66 *Colyer*, an earlier case which expressly utilized a good faith standard, failed to define it.

the patient,"⁶⁷ the *Bludworth* court fails to provide any clear-cut guidelines. When speaking within the context of terminating life support for terminally ill incompetent patients, one wonders what specific type of harm the court anticipates. This is an area in need of further judicial clarification.

The *Bludworth* court placed the decision to terminate life support in the hands of the family after consultation with physicians. The Florida legislature, addressing the same issue, placed heavier emphasis on the patient's intent as expressed in a living will.

B. *Natural Death Acts*

Five days after the Supreme Court of Florida rendered its decision in *Bludworth*, the Governor of Florida signed into law legislation which: (1) recognized a competent patient's right to instruct physicians to withhold or withdraw life prolonging measures, and (2) set forth the means by which the patient could exercise this right if he became incompetent.⁶⁸ Cases such as *Bludworth*, where physicians and health care officials have sought judicial consent before terminating life support, have prompted legislatures to set forth statutory guidelines relieving courts of the burden of difficult decision-making in this area.

Since 1976,⁶⁹ twenty-one states have enacted legislation,⁷⁰ often

Colyer, 99 Wash. 2d at 138, 660 P.2d at 751. *Spring* stated that private medical decisions would be "subject to judicial scrutiny if good faith or due care is brought into question in subsequent litigation . . . with no immunity for action taken in bad faith or action that is previously unreasonable." *In re Spring*, 380 Mass. at 639, 405 N.E.2d at 122.

67 *Bludworth*, 452 So. 2d at 926. The court specifically listed "guardians, consenting family members, physicians, hospitals, [and] their administrators" as coming within the good faith standard.

68 Life-Prolonging Procedure Act of Florida, ch. 84-58, 3 Fla. Sess. Law Serv. 40 (West 1984).

69 California enacted the first natural death act in the United States. CAL. HEALTH & SAFETY CODE §§ 7185-95 (West Supp. 1983) (enacted 1976).

70 Alabama, ALA. CODE §§ 22-8A-1 to 22-8A-10 (Supp. 1982); Arkansas, ARK. STAT. ANN. §§ 82-3801 to 82-3804 (Michie Supp. 1983); California, CAL. HEALTH & SAFETY CODE §§ 7185-95 (West Supp. 1983); Delaware, DEL. CODE ANN. tit. 16, §§ 2501-09 (1983); Florida, Life-Prolonging Procedure Act of Florida, ch. 84-58, 3 Fla. Sess. Law Serv. 40 (West 1984); Georgia, GA. CODE ANN. §§ 31-32-1 to 31-32-12 (Michie Supp. 1984); Idaho, IDAHO CODE §§ 39-4501 to 39-4508 (Michie Supp. 1983); Illinois, ILL. ANN. STAT. ch. 110 1/2, §§ 701-710 (Smith-Hurd Supp. 1984-85); Kansas, KAN. STAT. ANN. §§ 65-28,101 to 65-28,109 (1980); Mississippi, Act of Apr. 16, 1984, ch. 365, 1984 Miss. Law 98; Nevada, NEV. REV. STAT. §§ 449.540 to 449.690 (1983); New Mexico, N.M. STAT. ANN. §§ 24-7-1 to 24-7-11 (1981); North Carolina, N.C. GEN. STAT. §§ 90-320 to 90-323 (1981); Oregon, OR. REV. STAT. §§ 97.050 to 97.090 (1981); Texas, TEX. REV. CIV. STAT. ANN. art. 4590h (Vernon Supp. 1983); Vermont, VT. STAT. ANN. tit. 18, §§ 5251-5262 (Supp. 1984); Virginia, VA. CODE §§ 54-325.8:1 to 54-325.8:13 (Michie Supp. 1984); Washington, WASH. REV. CODE

termed natural death acts or right to die legislation. The Florida act, which is representative of other states' enactments, enables an individual to execute a written document,⁷¹ stating his desire not to have his life artificially prolonged if death becomes imminent and he is unable to speak for himself.⁷² When acting pursuant to a validly executed directive,⁷³ the physician, staff, and hospital are relieved of civil and criminal liability for removing or withholding life sustaining treatment⁷⁴ from an incompetent patient in a terminal condition.⁷⁵

ANN. §§ 70.122.010 to 70.122.905 (West Supp. 1983-84); West Virginia, W. VA. CODE §§ 16-30-1 to 16-30-10 (Michie Supp. 1984); Wisconsin, Act of Apr. 18, 1984, Act No. 202, 2 Wis. Laws 1274 (to be codified at WIS. STAT. ANN. §§ 154.01 to 154.15); Wyoming, WYO. STAT. §§ 33-26-144 to 33-26-152 (Michie Supp. 1984). The District of Columbia also has an act codified at D.C. CODE ANN. §§ 6-2421 to 6-2430 (Michie Supp. 1983). The New York legislature is drafting right to die legislation as this comment goes to print.

71 Florida also recognizes a witnessed oral statement. Life-Prolonging Procedure Act of Florida, ch. 84-58, §§ 3-4, 3 Fla. Sess. Law Serv. 40, 41-42 (West 1984); *see also* VA. CODE § 54-325.8:2 (Michie Supp. 1984).

72 Most natural death acts provide that a competent patient's wishes will supersede the declaration. The declaration is valid only if the patient is incompetent when the decision to remove life support must be made. *See, e.g.*, ALA. CODE § 22-8A-7 (Supp. 1982); ILL. ANN. STAT. ch. 110 1/2, § 707 (Smith-Hurd Supp. 1984-85); KAN. STAT. ANN. § 65-28,106 (1980); W. VA. CODE § 16-30-6 (Michie Supp. 1984).

73 Formalities regarding execution of a declaration vary among enactments. *See, e.g.*, ARK. STAT. ANN. § 82-3802 (Supp. 1983); N.M. STAT. ANN. § 24-7-3 (1981) (both requiring the same formalities as in executing a will); CAL. HEALTH & SAFETY CODE § 7188.5 (West Supp. 1983) (requiring a member of a state agency to be present when a nursing home patient executes the declaration); VA. CODE § 54-325.8:3 (Michie Supp. 1984) (requiring no formalities beyond two subscribing witnesses).

74 Generally, the acts limit their coverage to life sustaining procedures and do not cover curative procedures. The definition of life sustaining procedures varies among jurisdictions. Most acts define life sustaining procedures as a medical procedure or intervention which, by artificial or mechanical means, "only serves to prolong the moment of death." Excluded from the definition of life sustaining procedures in most acts are procedures necessary to provide comfort, care, or to alleviate pain. *See, e.g.*, ALA. CODE § 22-8A-3 (Supp. 1982); CAL. HEALTH & SAFETY ACT § 7187 (West Supp. 1983); Life-Prolonging Procedure Act of Florida, ch. 84-58, § 3, 3 Fla. Sess. Law Serv. 40, 41 (West 1984); IDAHO CODE § 39-4503 (Michie Supp. 1983); KAN. STAT. ANN. § 65-28,102 (1980); NEV. REV. STAT. § 449.570 (1983); TEX. REV. CIV. STAT. ANN. art. 4590h (Vernon Supp. 1983); VA. CODE § 54-325.8:2 (Michie Supp. 1984). Other acts also exclude nourishment or sustenance from the definition of life sustaining procedures. *See, e.g.*, ILL. ANN. STAT. ch. 110 1/2, § 702 (Smith-Hurd Supp. 1984-85); ORE. REV. STAT. § 97.050 (1981); WYO. STAT. § 33-26-144 (Michie Supp. 1984).

75 Many acts define a terminal condition as an incurable condition resulting from illness, disease, or injury which would cause death regardless of the application of life sustaining procedures. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 7186 (West Supp. 1983); N.M. STAT. ANN. § 24-7-2 (1981); OR. REV. STAT. § 97.050 (1981); TEX. REV. CIV. STAT. ANN. art. 4590h § 2 (Vernon Supp. 1983); VT. STAT. ANN. tit. 18, § 5252 (Supp. 1984); WASH. REV. CODE ANN. § 70.122.020 (West Supp. 1983-84); W. VA. CODE § 16-30-2 (Michie Supp. 1984). The words "would cause death regardless of the application of life sustaining procedures" seem to exclude the situation where a person may be kept alive on life support indefinitely.

The *Bludworth* decision differs from the Florida act in the weight accorded to a patient's written instructions to withhold or withdraw life support. Although the *Bludworth* court acknowledged that Francis Landy's living will was persuasive evidence of his intentions,⁷⁶ the court looked to Mr. Landy's family rather than his living will to speak for him. The court stated that a guardian's or family's "substituted judgment"⁷⁷ was the means by which an incompetent could exercise his right to refuse or withdraw life support. Under most natural death acts, however, the patient's declaration governs the decision to terminate life support.⁷⁸ It is only when a patient has failed to execute a valid declaration that some acts authorize a guardian or family member to substitute his judgment and determine if the patient would desire a natural death.⁷⁹

In jurisdictions with right to die legislation, it is questionable what impact the *Bludworth* decision will have in a situation where a patient has validly executed a declaration expressing his intention to die naturally. The *Bludworth* court states that normally the decision to terminate life support should be made within the patient-physician-family relationship.⁸⁰ If the parties disagree, the court suggests that they seek judicial resolution.⁸¹ Although some acts provide that a patient's declaration binds the physician,⁸² most acts do not state that the declaration binds unconsenting family members.⁸³ Since

Other legislatures have avoided this problem by defining a terminal condition as a condition which would cause imminent death if life support was not applied. *See, e.g.*, NEV. REV. STAT. § 449.590 (1983).

76 *Bludworth*, 452 So. 2d at 926.

77 *Id.*; *see also* notes 59-61 *supra* and accompanying text.

78 *See* notes 82-83 *infra*.

79 *See, e.g.*, Life-Prolonging Procedure Act of Florida, ch. 84-58, § 7, 3 Fla. Sess. Law Serv. 40, 45 (West 1984); N.M. STAT. ANN. § 24-7-8.1 (1981); N.C. GEN. STAT. § 90-322 (1981); OR. REV. STAT. § 97.083 (1981); VA. CODE § 54-325.8:6 (Michie Supp. 1984).

80 *Bludworth*, 452 So. 2d at 926.

81 *Id.*

82 Many acts do not impose liability on a physician who refuses to effect a patient's declaration. Some acts, however, state that failure to take reasonable steps to transfer the patient to a physician who will effect the directive will constitute unprofessional conduct. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 7191 (West Supp. 1983); TEX. REV. CIV. STAT. ANN. art. 4590h § 7 (Vernon Supp. 1983); Act of Apr. 18, 1984, Act No. 202, § 154.07, 2 Wis. Laws 1274, 1277.

83 Most acts provide a suggested form of declaration containing the statement "it is my intention that this declaration shall be honored by my family and physician as the final expression of my legal right to refuse medical or surgical treatment and accept the consequences for such refusal." Beyond this request that the declaration be honored and beyond certain penalties imposed upon persons who wilfully destroy, alter, or conceal a declaration or revocation, most acts fail to indicate that the declaration is binding on family members. *See, e.g.*, ALA. CODE § 22-8A-4 (Supp. 1982); CAL. HEALTH & SAFETY CODE § 7188 (West Supp.

most natural death acts do not address the issue, it appears that unconsenting family members may continue to take their grievances to court. This suggestion by the *Bludworth* court, however, contradicts the premise upheld by the same court that a person does not lose his right to refuse life support when he becomes incompetent.⁸⁴ If unconsenting family members take their dispute to court, the patient who expressed his desire to die naturally remains on life support while his right to refuse treatment is delayed, if not destroyed.

While the decision in *Bludworth* illustrates the trend toward reducing judicial involvement in the decision to remove life support, it falls short of fulfilling the patient's desire to die a natural death by focusing on the family's opinion of what the patient desired instead of on the patient's own written statements. Right to die legislation, which does focus on the patient's written desire, fails to address the issue of whether the patient's declaration binds unconsenting family members. Although natural death acts and judicial decisions such as *Bludworth* continue to expand a patient's right to refuse life support, other issues, in particular who may contest a patient's wishes and upon what grounds, will demand resolution in the near future.

IV. Conclusion

The Florida Supreme Court's decision in *Bludworth* reflects the developing trend toward reducing restrictions on the exercise of a patient's right to refuse life support treatment. The decision is one of the first cases which expressly allows consenting family members to exercise the patient's right on his behalf, without court appointment of a guardian. Although, in the legal arena, *Bludworth* is a new step toward expanding a patient's right to refuse treatment, it merely acknowledges what has been practiced in the medical field for years.⁸⁵

1983); ILL. ANN. STAT. ch. 110 1/2, § 703 (Smith-Hurd Supp. 1984-85); KAN. STAT. ANN. § 65-28,103 (1980); NEV. REV. STAT. § 449.610 (1983); TEX. REV. CIV. STAT. ANN. art. 4590h (Vernon Supp. 1983); VA. CODE § 54-325.8:4 (Michie Supp. 1984); WASH. REV. CODE ANN. § 70.122.030 (West Supp. 1983-84); W. VA. CODE § 16-30-3 (Michie Supp. 1984). Many acts, however, provide that a physician who refuses to follow a patient's directive may be liable for failing to transfer the patient to a physician who will effect the declaration. See note 82 *supra*.

84 *Bludworth*, 452 So. 2d at 923.

85 See Kutner, *Euthanasia: Due Process for Death with Dignity: The Living Will*, 54 IND. L.J. 201, 223 (1979) (withdrawal of life-prolonging treatment where biological death is imminent is fairly common in hospital practice); Malcolm, note 36 *supra* (nationwide interviews with hospital personnel indicate that termination of life support without court approval may be increasing in frequency).

In this way, *Bludworth* represents the law finally catching up to reality.

Unfortunately, the decision fails to stipulate that the family members are bound by the patient's previously expressed wishes embodied in a living will. If, as the court states, an incompetent patient has the same right as a competent patient to refuse life sustaining treatment, his prior expression should be upheld. To allow his family the opportunity to decide differently infringes upon this right.

Sharon A. Christie
Mary Lou Howard
Leigh Ann MacKenzie

FEDERAL ELECTION LAW—*FEDERAL ELECTION COMMISSION V. MASSACHUSETTS CITIZENS FOR LIFE*: NON-PROFIT CORPORATION EXPENDITURES IN FEDERAL ELECTIONS.

In June 1984, the United States District Court for the District of Massachusetts decided *Federal Election Commission v. Massachusetts Citizens for Life*.¹ In so doing, the court added yet another link to the growing chain of decisions involving the limits on corporate contributions connected with election campaigns.

In *Massachusetts Citizens*, the court held that a pro-life corporation's printing and distribution of a newsletter urging readers to vote pro-life and listing various candidates' stands on abortion-related issues were not prohibited expenditures under section 441b of the Federal Election Campaign Act.² This section prohibits any corporation from making a contribution or expenditure in connection with a federal election.³ The court attempted to clarify the type of expenditures intended to be prohibited by section 441b, and also provided some guidelines regarding prohibited communications during an election campaign.

This comment first discusses the decision and holding in *Massa-*

1 589 F. Supp. 646 (D. Mass. 1984).

2 2 U.S.C. § 441b (1982).

3 Section 441b reads, in pertinent part:

(a) It is unlawful for . . . any corporation whatever . . . to make a contribution or expenditure in connection with any election at which . . . a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices . . .

(b)(2) For purposes of this section . . . the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value . . . to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include (A) communications by a corporation to its stockholders and executive or administrative personnel and their families . . . (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families . . . and (C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

For a discussion of § 441b and its predecessors, see notes 21-29 and accompanying text. For a more detailed account of this history, see *United States v. International Union United Auto., Aircraft and Agricultural Implement Workers of Am.*, 352 U.S. 567 (1957); Note, *Corporate and Labor Union Activity in Federal Elections: "Active Electioneering" as a Constitutional Standard*, 49 GEO. WASH. L. REV. 761 (1981).

chusetts Citizens. It then briefly sketches the history of legislation limiting corporate contributions connected with federal elections, and examines some of the case law which has grown out of the various statutes in this area. Finally, this comment concludes that the *Massachusetts Citizens* decision is consistent with the legislative intent underlying section 441b, and observes that a like result can be expected in any subsequent cases in which there are expenditures to advocate positions on issues, rather than on candidates.

I. *Federal Election Commission v. Massachusetts Citizens for Life*

Massachusetts Citizens for Life, Inc. (MCFL) is a non-profit corporation formed to "foster respect for human life and to defend the right to life of all human beings, born and unborn."⁴ In September of 1978, just before a primary election involving candidates for the House and Senate, MCFL published a "Special Election Edition" of its newsletter, as it had done before three previous elections. The newsletter listed all candidates in the election, as well as their positions on three "pro-life" issues.⁵ The newsletter also urged readers to "vote pro-life," and carried the pictures of only those candidates whose views were in line with MCFL's.⁶ The newsletter, however, carried the caveat that it did not "represent an endorsement of any particular candidate."⁷

Pursuant to a citizen complaint, the Federal Election Commission (FEC) brought suit against MCFL for violating 2 U.S.C. § 441b, which prohibits corporate contributions or expenditures in connection with a federal election.⁸ The complaint sought a civil penalty of \$5,000.

Section 441b of the Federal Election Campaign Act (FECA) prohibits a corporation from making "a contribution or expenditure in connection with any election" in which Senators or Representatives are to be elected.⁹ The FEC believed that MCFL's expenditures on its special election newsletter fell squarely within section 441b's prohibitions. These prohibitions are intended primarily to prevent corporations from having an undue influence on elections, thus undermining the integrity of, and public confidence in, the elec-

⁴ *Massachusetts Citizens*, 589 F. Supp. at 647.

⁵ *Id.* at 648.

⁶ *Id.*

⁷ *Id.*

⁸ See note 3 *supra*.

⁹ *Id.*

toral process.¹⁰ The court, then, had to decide whether MCFL's newsletter represented such a threat to this election.

The court held, first, that the publication of this newsletter did not constitute a payment or gift on the part of MCFL, and therefore did not fall within the prohibitions of section 441b.¹¹ According to the court, the publication of the newsletter was uninvited by, and uncoordinated with, any candidate's campaign;¹² also, the newsletter expressed no preferences between two opposing candidates on the same side of the issue.¹³ The small amount of money spent per candidate was also a factor in the court's holding.¹⁴

Second, the court found that the newsletters constituted "news story, commentary, or editorial distributed through the facilities of [a] . . . periodical publication."¹⁵ Accordingly, the newsletters were not prohibited by section 441b as they fell within section 431(9)(B)(i) of the FECA, which exempts such publications from the definition of "expenditure."¹⁶

The court therefore concluded that MCFL's expenditures constituted "speaking" rather than "spending," and were not the type of evil Congress meant to prevent when it enacted the federal campaign laws. It stated that if section 441b was intended to prohibit the publication of these newsletters, that prohibition would be unconstitutional.¹⁷ The court based its opinion, first, on the fact that the newsletters were independent of any candidate or party, thus the danger of real or apparent election corruption was nonexistent. Second, MCFL was a non-profit corporation formed for the express purpose of promoting a certain ideological cause, and the court reasoned that the publication of its newsletter was less likely to have been improperly motivated than if it had been published by a capital stock

10 *Buckley v. Valeo*, 424 U.S. 1, 25 (1976).

11 *Massachusetts Citizens*, 589 F. Supp. at 649.

12 *Id.*

13 *Id.*

14 The court found that MCFL's expenditures in this election, when divided by the number of candidates reported, amounted to about \$20 per candidate, or about \$80 per candidate for federal office. In the court's words, these were "hardly the sort of 'large' expenditures . . . which the 1947 amendment to the Federal Corrupt Practices Act was aimed at." *Id.* at 649-50.

15 *Id.* at 650 (quoting 2 U.S.C. § 431(9)(B)(i) (1982)).

16 2 U.S.C. § 431(9)(B)(i) (1982).

17 *Massachusetts Citizens*, 589 F. Supp. at 651. Earlier in its opinion, however, the court admitted that "the facial constitutionality of § 441b is not an open question," *id.* at 648, and expressed its cognizance of the principle that if it could decide the case on non-constitutional grounds, it ought not engage in constitutional analysis. *Id.* at 649.

corporation.¹⁸ Finally, the newsletters were "direct political speech" rather than solicitations for campaign contributions, "speech by proxy",¹⁹ or any other type of communication that would tend to give the appearance of corruption or improper influence.²⁰ Thus, had it chosen to rule on the constitutionality of section 441b as applied to these facts, the court would have ruled in the negative.

II. *Massachusetts Citizens*, Section 441b, and the Case Law

Prohibitions on corporate political contributions had their inception early in this century. In his annual message to Congress in 1905, President Theodore Roosevelt called for a law forbidding "[a]ll contributions by corporations to any political committee or for any political purpose."²¹ Congress responded in 1907 by enacting the Tillman Act, which made it unlawful for "any national bank, or any corporation organized by authority of any laws of Congress, to make a money contribution in connection with any election to any political office."²²

In 1925, the Federal Corrupt Practices Act (FCPA) extended the Tillman Act to prohibit *any* contribution, money or otherwise, by a corporation in connection with federal general elections.²³ Then, in 1947, the Taft-Hartley Act extended the prohibitions to expenditures as well as contributions, labor unions as well as corporations, and primaries and nominating conventions in addition to general elections.²⁴ The purpose of extending the provisions was to prevent corporations and unions from making expenditures to support *particular*

18 *Id.* at 652. The court quoted Mr. Justice White's dissent in *First National Bank v. Bellotti*, 435 U.S. 765, 802 (1978), in which he stated that the communications of profit-making corporations "are not 'an integral part of the development of ideas, of mental exploration and of the affirmation of self.'" *Id.* at 805 (quoting T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 5 (1966)). Justice White noted, however, that where, as here, a corporation is formed solely for the purpose of advancing an ideological cause shared by its members, "association in a corporate form may be viewed as merely a means of achieving effective self-expression. But this is hardly the case generally with corporations operated for the purpose of making profits." *Id.* The *Massachusetts Citizens* court was of the opinion that Justices White, Brennan and Marshall would not have dissented in *Bellotti* had the holding in that case been limited to non-profit corporations. 589 F. Supp. at 652.

19 "[S]peech by proxy" . . . is not the sort of political advocacy . . . entitled to full First Amendment protection." *California Medical Ass'n v. Federal Election Comm'n*, 453 U.S. 182, 196 (1981).

20 *Massachusetts Citizens*, 589 F. Supp. at 648.

21 40 CONG. REC. 96 (1905).

22 Tillman Act of 1907, ch. 420, 34 Stat. 864.

23 Formerly 18 U.S.C. § 610.

24 Labor-Management Relations Act of 1947, ch. 120, § 304, 61 Stat. 159, 159-60.

candidates or parties.²⁵

The enactment of the Federal Election Campaign Act of 1971²⁶ further clarified the law in this area. The so-called "Hansen Amendment" to the FECA exempted certain types of spending from the FCPA's prohibitions. These exemptions encompassed internal communications, separate segregated funds (also known as political action committees or PACs), and non-partisan voter registration and get-out-the-vote drives within a corporation or union.²⁷ Representative Orville Hansen stated that the amendment was in keeping with the basic intent of the Act, which was to "prohibit the use of union or corporate funds for active electioneering directed at the general public."²⁸

In 1976, the anti-corporate contribution provision of the FCPA²⁹ was repealed and incorporated in the FECA, where it became section 441b of that Act.

The *Massachusetts Citizens* court stated that the FEC had never before sought to invoke section 441b's provisions against a noncommercial corporation for making expenditures in connection with a federal election.³⁰ Although none of the previous cases is directly on point, certain relevant ideas emerge from these cases. Most pertinent

25 The following excerpts from the Senate debates on the Act help to illuminate the intent behind these provisions:

Mr. MAGNUSON. . . . Would the provision in any way deny the right of a religious organization to publish pamphlets in behalf of a candidate because, let us say, the organization supported him on moral grounds?

Mr. TAFT. If the organization is a corporation, I assume it could not do so directly. If the organization publishes religious papers that it can sell, that is all right; but the organization cannot take the church members' money and use it *for the purpose of trying to elect a candidate or defeat a candidate, and they should not do so.*

Mr. MAGNUSON. Would the Anti-Saloon League, for example, be prohibited from issuing pamphlets against a political candidate?

Mr. TAFT. As I understand, the League would probably receive contributions from individuals, and it would be like the PAC or any other organization which was organized for political purposes.

Mr. MAGNUSON. The Anti-Saloon League could use the dues paid by its membership to publish a pamphlet in behalf of a certain political candidate?

Mr. TAFT. Mr. President, I must know the circumstances before I can pass upon the question. Different circumstances may arise in different cases. . . . All sorts of questions arise in every case, and I cannot answer without knowing the circumstances.

93 CONG. REC. 6440-41 (1947)(emphasis added).

26 2 U.S.C. §§ 431-455 (1982).

27 Federal Election Campaign Act of 1971, Pub. L. No. 92-225, § 205, 86 Stat. 10, 10.

28 117 CONG. REC. 43,380 (1971).

29 18 U.S.C. § 610.

30 *Massachusetts Citizens*, 589 F. Supp. at 648.

to the *Massachusetts Citizens* case are the ideas that (1) a court should look to the legislative intent underlying section 441b and the facts of the specific case in determining the applicability of section 441b; and (2) certain acts of a corporation do not lend themselves to corruption or the appearance of corruption, and thus do not come within section 441b's reach.

Courts have decided the applicability of section 441b based upon the intent of Congress and the facts of each specific case. In fact, the Supreme Court has not hesitated to resolve a case based upon whether the facts presented the kind of problem Congress meant to solve in enacting section 441b and its predecessors. In one early decision, *United States v. Congress of Industrial Organizations*,³¹ the defendant union published an in-house newsletter, aimed at union members, which urged its readers to vote for a particular candidate. The government contended that this was a violation of section 313 of the FCPA (a predecessor of the current section 441b).³² The Court, however, concluded that Congress did not intend to outlaw this type of publication, and that section 313 did not reach such a use of corporate or union funds.³³ The Court went on to state that it expressed "no opinion as to the scope of [section 313] where different circumstances exist."³⁴ Thus, the Court left the door open to resolve future cases based upon their individual fact patterns. More recently, in *Federal Election Commission v. Central Long Island Tax Reform Immediately Committee*,³⁵ the Court of Appeals for the Second Circuit found that a John Birch Society-sponsored publication, which urged its readers to express their displeasure toward politicians who voted for higher taxes and big government, did not constitute express advocacy

31 335 U.S. 106 (1948).

32 *Id.* at 123.

33 *Id.* at 123-24.

34 *Id.* at 124. In *United States v. International Union of United Auto., Aircraft and Agricultural Implement Workers of Am.*, 352 U.S. 567 (1957), the Court reached the opposite conclusion. The defendant union used its general treasury to pay for television broadcasts endorsing certain candidates for Congress. It was held that this was exactly the type of "indirect contribution" that Congress meant to prohibit. *Id.* at 589. The Court set out certain questions as being pertinent to such cases:

[W]as the broadcast paid for out of the general dues of the union membership or may the funds be fairly said to have been obtained on a voluntary basis? Did the broadcast reach the public at large or only those affiliated with appellee? Did it constitute active electioneering or simply state the record of particular candidates on economic issues? Did the union sponsor the broadcast with the intent to affect the results of the election?

352 U.S. at 592.

35 616 F.2d 45 (2d Cir. 1980).

within the meaning of the FECA.³⁶ Again, the court was willing to interpret the scope of the election laws in light of the facts of the specific case.

Courts have also been willing to decide cases based upon a determination of a specific activity's susceptibility to corruption. In cases involving corporate or union election expenditures, the courts must balance two competing interests. One is the government's interest in preventing corruption in elections and the erosion of public confidence in the electoral process. The other interest is the right of individuals and groups to speak and associate freely under the first amendment. Two reasons stand out as justifying the limits on campaign expenditures. First, these limitations can prevent overwhelming corporate influence on a campaign, and can avoid the political *quid pro quo* that comes from corporate subsidization of politicians' campaigns. Second, these limitations were designed to prevent corporate officers from using shareholders' money to support candidates whom the individual shareholders may not support.³⁷ Of these two, only the former has been held to be constitutionally sufficient to support the prohibition of corporate contributions.³⁸

The Supreme Court has ruled that certain actions taken by corporations are less susceptible to corruption or the appearance of corruption than others. In *First National Bank of Boston v. Bellotti*,³⁹ the Court held that a corporation *may* make expenditures in connection with a referendum. At issue was a Massachusetts statute prohibiting corporations from making contributions or expenditures for the purpose of influencing the vote on any question submitted to the electorate.⁴⁰ The Court held that this statute abridged the appellant corporation's right of expression. In reaching this conclusion, the Court determined that since the first amendment would have protected this speech if made by an individual, it was not unprotected merely because the speaker was a corporation.⁴¹ The Court rejected

36 *Id.* at 53.

37 *See* Federal Election Comm'n v. National Right to Work Comm., 459 U.S. 197 (1982).

38 *See* Buckley v. Valeo, 424 U.S. 1 (1976); *see also* Let's Help Fla. v. McCrary, 621 F.2d 195, 199 (5th Cir. 1980), *aff'd*, 454 U.S. 1130 (1982).

39 435 U.S. 765 (1978), *reh'g denied*, 438 U.S. 907 (1978).

40 *Id.* at 767. The statute in question was MASS. GEN. LAWS. ANN., ch. 55, § 8 (West Supp. 1977).

41 *Id.* at 784; *see also* Citizens Against Rent Control v. Berkeley, 454 U.S. 290 (1981), in which the Supreme Court held that a city ordinance limiting contributions to committees formed to support or oppose ballot measures was an impermissible restraint on both the right of association and speech guarantees in the first amendment. The Court stated that to place a limit on a group of individuals wishing to "band together" to advance their views on a ballot

Massachusetts' contention that the law was needed to prevent the corruption of elections or to protect shareholders; its rejection was based on the fact that the state did not show that the relative voice of corporations had been significant in influencing referenda. The Court took great pains, however, to distinguish referenda from elections of public officers, saying that "[t]he risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue."⁴² Apparently, corporations have greater freedom to speak on issues than on candidates; the distinction between issues and candidates is a crucial one.

The Court drew another constitutional distinction between the FECA's contribution limitations and its expenditure limitations in *Buckley v. Valeo*.⁴³ While this case did not deal specifically with corporate contributions and expenditures, it is important because of its holding that the FECA's *contribution* limitations violated the Constitution, while its *expenditure* limitations did not. The possibility of large individual contributors securing a political *quid pro quo*, and the appearance of impropriety such contributions would give, would be sufficient to justify the government's limiting the amount that can be *contributed* to a campaign. Such considerations, however, are not as compelling in the case of *expenditures*, said the Court, especially expenditures that are uncoordinated with a particular campaign: "Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive."⁴⁴ The primary effect of limiting expenditures, the Court held, is to restrict the quantity of campaign speech by individuals, groups and candidates.⁴⁵ Such restrictions limit political expression "at the core of our electoral process and of the First Amendment freedoms."⁴⁶

measure, without placing similar restrictions on individuals acting alone, was a clear restraint on the right of association. While there are, said the Court, certain activities that are legal when engaged in by one while illegal if performed in concert with others, "political expression is not one of them." *Id.* at 296.

⁴² First Nat'l. Bank v. Bellotti, 435 U.S. 765, 790 (1978).

⁴³ 424 U.S. 1 (1976).

⁴⁴ *Id.* at 47. The *Massachusetts Citizens* court cited this, stating that "[t]o the extent that [the newsletter] was distributed beyond defendant's membership, it probably lessened rather than enhanced the prospects of election of candidates subscribing to defendants' platform which, according to public opinion polls, is opposed by most citizens." *Massachusetts Citizens*, 589 F. Supp. at 649.

⁴⁵ *Buckley*, 424 U.S. at 39.

⁴⁶ *Id.* (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)).

The background to *Massachusetts Citizens*, then, shows that a non-profit corporation may:

- 1) distribute materials constituting express advocacy to its members;⁴⁷
- 2) distribute material to the general public regarding a referendum;⁴⁸ and
- 3) engage in any form of protected political speech, as long as the compelling governmental interest in preventing corruption is not a factor.⁴⁹

The *Buckley* and *Bellotti* cases held that certain actions by corporations do not give rise to a suspicion of corruption. Corporations may more freely make *expenditures* than *contributions*, and may make these expenditures to speak out on *issues* but not on particular *candidates*. This is the *Massachusetts Citizens* fact pattern: a corporation making expenditures in order to speak out on the issue of abortion, albeit in the context of an election which involved candidates for public office.

It can be seen, then, that certain shifts in the fact pattern of *Massachusetts Citizens* would likely have altered the result in the case. Had MCFL chosen to openly endorse certain candidates because of their pro-life stances, the court would have found that this constituted express advocacy, and therefore would have been barred by section 441b.⁵⁰ If MCFL was a capital stock corporation, the court would probably have scrutinized its motives more closely.⁵¹ Were MCFL to have encouraged its readers to contribute to the campaigns of "pro-life" candidates, MCFL would have lost the case.⁵² On the other hand, had MCFL not been a corporation, or had they set up a separate, segregated fund or PAC, the cause might never have been brought before the court.⁵³

47 *United States v. Congress of Indus. Org.*, 335 U.S. 106 (1948).

48 *Bellotti*, 435 U.S. 765.

49 *Buckley*, 424 U.S. 1.

50 As it happened, MCFL's newsletter carried the photographs of only those congressional and gubernatorial candidates whose views were consistent with MCFL's. The text, however, carried the caveat that the newsletter did "not represent an endorsement of any particular candidate." The court did not find, nor did the Commission contend, that this constituted express advocacy. 589 F. Supp. at 648.

51 See note 18 *supra*.

52 See note 48 *supra* and accompanying text.

53 In fact, after the suit was brought, MCFL formed a PAC pursuant to 2 U.S.C. § 441b(b)(2)(C). *Massachusetts Citizens*, 589 F. Supp. 646, 647 n.1. Because a civil penalty was sought, the case was not moot.

III. Conclusion

The district court's holding in *Massachusetts Citizens* appears to be consistent with the legislative intent behind the corporate contribution provisions of the FECA. It is difficult to imagine MCFL's newsletter being used to exact political favors from any candidate. Presumably, any "pro-life" candidates in the election held those views before MCFL published its newsletter, not because it did so. Accordingly, it is not likely that the newsletter was designed to influence or corrupt any of the candidates. Rather, it was designed to alert readers to MCFL's point of view on a particular issue, and enable them to vote accordingly. MCFL was promoting its stand on an *issue*, not a particular *candidate*. Thus, given the *Bellotti* distinction between issues and candidates, the court's holding seems well-founded.

Some may think, however, that the court's holding was too broad. The FECA exempts news and editorial comment in a periodical publication from the definition of "expenditure." The court found that MCFL's newsletter fell within this exemption. This was probably a sufficient basis for holding in MCFL's favor. Some may feel that it was unnecessary for the court to have gone further than this in applying section 441b to the facts of this case; or, for that matter, to ever apply section 441b on a case-by-case basis. There is, perhaps, merit in the proposition that section 441b prohibits "any corporation whatever"⁵⁴ from making expenditures in connection with an election. Taken literally, this language does not allow a case-by-case interpretation of section 441b: if a corporation is involved, the expenditures are illegal. Certainly, such a bright line is easier to interpret than having to decide each case involving a corporation on the specific facts presented. This argument is strengthened by the fact that a corporation may form a PAC, as MCFL eventually did,⁵⁵ to which its members may make voluntary contributions and through which the corporation may promote certain views or candidates. If section 441b already provides such a mechanism, should not corporations be encouraged to take advantage of that mechanism, rather than constantly challenge the applicability of section 441b to a particular set of facts? Still, the Supreme Court has not shied away from deciding this type of case on its facts, as it did in the *CIO* case.⁵⁶

54 See note 3 *supra*.

55 589 F. Supp. 646, 647 n.1.

56 *United States v. Congress of Indus. Org.*, 335 U.S. 106 (1948).

If such a literal reading of section 441b had been desired, no doubt the Court would have expressed that desire long ago.

These questions may well be answered shortly. An appeal has been filed, and a decision may be forthcoming as early as the spring of 1985. In the meantime, non-profit corporations such as MCFL might do well to follow its lead and form a PAC for any election-related expenditures.

Thomas S. Nessinger

CRIMINAL LAW—*LEE V. WINSTON*: COURT-ORDERED SURGERY AND THE FOURTH AMENDMENT—A NEW ANALYSIS OF REASONABLENESS?

In *Lee v. Winston*,¹ the United States Court of Appeals for the Fourth Circuit considered the circumstances under which evidence could be surgically removed from a criminal suspect without violating the suspect's rights under the fourth amendment. In *Lee*, the defendant was allegedly shot while attempting to rob a market.² The court of appeals affirmed the denial of the state's motion to compel the surgical removal of the bullet from Lee's chest.³ Accordingly, the court enjoined Virginia from compelling surgery because such an act would violate Lee's fourth amendment right against unreasonable searches.⁴ In reaching this decision, the *Lee* court modified the standard previously used in examining the reasonableness of court-ordered surgery for removing evidence.

This comment will describe the *Lee* court's constitutional analysis of court-ordered surgery and examine the differences between this analysis and that used by previous courts. Part I will describe Supreme Court decisions on bodily intrusion cases, focusing on *Schmerber v. California*. Part II will examine how state and lower federal courts have applied *Schmerber* to surgical searches. Part III will recount the facts of *Lee v. Winston* and part IV will analyze the court of appeal's decision in *Lee*. Finally, part V will discuss the potential impact of *Lee v. Winston*.

I. Bodily Intrusion Cases in the Supreme Court: *Rochin*, *Breithaupt* and *Schmerber*

The United States Supreme Court has considered searches involving the removal of evidence from within the human body on only three occasions. In the first of these cases, *Rochin v. California*,⁵ the police had forcibly entered the defendant's apartment and after unsuccessfully attempting to remove morphine capsules from his mouth, ordered that his stomach be pumped.⁶ The Court reversed

1 717 F.2d 888 (4th Cir. 1983), cert. granted, 104 S. Ct. 1906 (1984).

2 *Id.* at 890.

3 *Id.*

4 *Id.*

5 342 U.S. 165 (1952).

6 *Id.* at 166.

the state court conviction because these methods "shock[ed] the conscience" and therefore violated the due process clause of the United States Constitution.⁷ The Court refused to "legalize force so brutal and so offensive to human dignity"⁸

In *Breithaupt v. Abram*,⁹ a less egregious case, the Supreme Court affirmed a state court conviction based on the results of a blood sample taken from an unconscious drunk driving suspect.¹⁰ The Court held that the taking of a blood sample, without the suspect's consent, did not violate the due process clause of the fourteenth amendment.¹¹ According to the Court, a simple blood test, performed by a doctor in a hospital, was not the type of offensive conduct denounced by *Rochin*.¹² In reaching its decision, the Court balanced the interests of the individual in being free from bodily invasions against society's interest in deterring drunk drivers through the use of "modern scientific methods of crime detection."¹³ The Court concluded that society's interest outweighed that of the individual.¹⁴

In *Schmerber v. California*,¹⁵ unlike *Rochin* and *Breithaupt*, the Supreme Court applied a fourth amendment analysis to a search for evidence within the human body.¹⁶ Based on this analysis, the *Schmerber* Court affirmed a state court conviction based on the results of a blood test taken from a drunk driving suspect.¹⁷ State and federal courts have relied primarily on *Schmerber* when considering the constitutionality of surgical searches.¹⁸

In determining whether the results of the blood test should have been suppressed pursuant to the exclusionary rule, the *Schmerber* Court made two inquiries.¹⁹ First, the Court considered whether the

7 *Id.* at 172.

8 *Id.* at 174.

9 352 U.S. 432 (1957).

10 *Id.* at 434, 437.

11 *Id.*

12 *Id.* at 435.

13 *Id.* at 439.

14 *Id.*

15 384 U.S. 757 (1966).

16 *Id.* at 766. In *Weeks v. United States*, 232 U.S. 383 (1914), the exclusionary rule was adopted for federal prosecutions to protect the fourth amendment right to be free from unreasonable searches and seizures. The rule was first applied to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961). Since both *Rochin* (1952) and *Breithaupt* (1957) were decided before 1961, the exclusionary rule under the fourth amendment of the federal Constitution was not yet applicable to those searches. Since *Schmerber* (1966) was decided after 1961, the exclusionary rule was applicable.

17 384 U.S. at 758-59, 772.

18 See notes 28-30 *infra*.

19 384 U.S. at 768.

police, under traditional fourth amendment law, were justified in requiring the suspect to submit to a blood test. Applying this analysis, the Court determined that, in general, the police must secure a search warrant before forcing a person to submit to a blood test.²⁰ Failure to secure a warrant may be excused, however, if the police officer encounters exigent circumstances.²¹ In *Schmerber*, the Court found such exigent circumstances;²² by the time the officer could have obtained a search warrant, the evidence, the alcohol in the blood, would have dissipated.²³

The Court then considered whether the procedures used to obtain the blood sample were consistent with fourth amendment standards of reasonableness. The Court examined the reasonableness of the procedures in light of the risks to the suspect's health. It found the blood test reasonable because the test effectively determined intoxication, it was performed in a hospital by a doctor using accepted medical procedures, and it involved "virtually no risk, trauma, or pain."²⁴

Although the Court held that a blood test performed without the suspect's consent did not violate the fourth or fourteenth amendment,²⁵ it nevertheless emphasized the high value society places on the integrity of the person.²⁶ The Court concluded: "[t]hat we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions."²⁷

20 *Id.* at 769-70.

21 The exigent circumstances exception developed from a concern that evidence might be destroyed, especially when the evidence is under the immediate control of the accused, *see* *Preston v. United States*, 376 U.S. 364, 367 (1964). Where the evidence is alcohol inside a suspect's body, as in *Schmerber*, the exigency presented is the metabolic elimination of the alcohol, 384 U.S. at 770-71. The question of exigency may also arise in bullet removal cases because lead may deteriorate inside the human body. Although rare, the striation marks on the bullet may deteriorate before the end of the *Crowder* mandated pre-surgical appellate review. Regardless of the exigency, a pre-surgical hearing and appeal are required under *Crowder*; this makes exigency moot. *See* note 125 *infra*.

22 384 U.S. at 770.

23 *Id.* at 770-71.

24 *Id.* at 771.

25 The Court found that its holding in *Breithaupt v. Abram* required the rejection of the defendant's argument under the due process clause. *Id.* at 760.

26 *Id.* at 772.

27 *Id.*

II. Application of the *Schmerber* Analysis

Despite the Court's admonition that its holding in *Schmerber* was fact-specific, the courts in nine states,²⁸ a District of Columbia court,²⁹ and one federal court of appeals,³⁰ have approved court-ordered surgery for the removal of bullets from a criminal defendant.³¹ For example, in *Creamer v. State*,³² the Supreme Court of Georgia broadly interpreted *Schmerber* as permitting a court-ordered surgical intrusion. The court, however, failed to examine whether involuntary surgery differed significantly from an involuntary blood test.³³ Of the courts which have addressed the issue, only the Supreme Court of Indiana has concluded that involuntary surgery, under a court order, to recover a bullet for evidence is per se unreasonable under the fourth amendment.³⁴

A. State Court Application of *Schmerber*

*Creamer v. State*³⁵ first expanded the *Schmerber* decision from the blood test scenario to the surgical removal of bullets. In *Creamer*, the Supreme Court of Georgia upheld a search warrant ordering the removal of a bullet from the chest of a man accused of murder.³⁶ In its analysis, the court cited *Schmerber* as authority for surgical intrusions without distinguishing between a blood test and involuntary sur-

28 Bowden v. State, 256 Ark. 820, 510 S.W.2d 879 (1974); Doe v. State, 409 So. 2d 25 (Fla. Dist. Ct. App. 1981); Creamer v. State, 229 Ga. 511, 192 S.E.2d 350 (1972), *cert. dismissed*, 410 U.S. 975 (1973); Allison v. State, 129 Ga. App. 364, 199 S.E.2d 587 (1973) *cert. denied*, 414 U.S. 1145 (1974); State v. Martin, 404 So. 2d 960 (La. 1981); Hughes v. State, 56 Md. App. 12, 466 A.2d 533 (1983) *cert. denied*, 298 Md. 394, 470 A.2d 353 (1984); State v. Overstreet, 551 S.W.2d 621 (Mo. 1977); State v. Richards, 585 S.W.2d 505 (Mo. Ct. App. 1979); State v. Lawson, 187 N.J. Super. 25, 453 A.2d 556 (N.J. Super. Ct. App. Div. 1982); People v. Smith, 80 Misc. 2d 210, 362 N.Y.S.2d 909 (N.Y. Sup. Ct. Crim. Term 1974); State v. Allen, 277 S.C. 595, 291 S.E.2d 459 (1982).

29 Hughes v. United States, 429 A.2d 1339 (D.C. 1981).

30 United States v. Crowder, 543 F.2d 312 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977).

31 Courts, however, have not approved court-ordered surgery on a non-defendant. See, e.g., State v. Haynie, 240 Ga. 866, 242 S.E.2d 713 (1978) (the court refused to order surgery on a shooting victim, holding that only a defendant may be subjected to such a search).

32 229 Ga. 511, 192 S.E.2d 350 (1972), *cert. dismissed*, 410 U.S. 975 (1973).

33 See text accompanying notes 35-39 *infra*. The Georgia court cited *Schmerber* as authority for its holding that court-ordered surgery was not unconstitutional. It does not appear that the court felt it was expanding the holding of *Schmerber*. See also United States v. Crowder, 543 F.2d 312, 322 (D.C. Cir. 1976) (Robinson, J., dissenting); Note, *Constitutional Law—Search and Seizure—Georgia Supreme Court Expands Upon Extent of Permissible Body Intrusion*, 24 MERCER L. REV. 687 (1973).

34 See text accompanying notes 41-45 *infra*.

35 229 Ga. 511, 192 S.E.2d 350.

36 *Id.* at 518, 192 S.E.2d at 355.

gery.³⁷ One year later, in *Allison v. State*,³⁸ the Court of Appeals of Georgia noted the absence of analysis in the *Creamer* decision. Nevertheless, the court reluctantly ordered surgery to remove a bullet from just below the skin of a defendant who was allegedly shot in the back during a market robbery.³⁹ The *Allison* court indicated that *Creamer* was erroneously decided because *Schmerber* did not include, nor should it be expanded to include, surgery.⁴⁰

The Supreme Court of Indiana, in *Adams v. State*,⁴¹ also recognized the distinction between a *Schmerber*-type blood test and involuntary surgery. Adams was arrested as a suspect in a supermarket robbery.⁴² The court held that the involuntary surgical removal of bullets was per se unreasonable under the fourth amendment.⁴³ Even though the surgery could be performed under local anesthesia and posed little risk to the defendant,⁴⁴ the court concluded that surgery was distinguishable from a blood test and was not constitutional under *Schmerber*.⁴⁵

Within two years after *Creamer*, two other state courts decided bullet removal cases.⁴⁶ The courts in both Arkansas and New York determined court-ordered surgery would be permissible under circumstances other than those presented.⁴⁷ In both cases, the courts refused to order surgery due to the grave medical risks the surgery would pose to the defendant.⁴⁸

37 *Id.* at 514-15, 192 S.E.2d at 352-53. The court merely stated that a minor intrusion is permissible under *Schmerber*. The court then analyzed the issue under the Constitution of Georgia.

38 129 Ga. App. 364, 199 S.E.2d 587 (1973).

39 *Id.* at 364-65, 199 S.E.2d at 588.

40 *Id.* at 365, 199 S.E.2d at 589. Judge Evans stated that "the Georgia Supreme Court misinterpreted *Schmerber v. California* . . . [I]t is very doubtful that the Supreme Court would extend that case further, for a surgical knife is considerable more intrusion into the human body than a mere needle inserted for blood testing." *Id.*

41 260 Ind. 663, 299 N.E.2d 834, (1973), *cert. denied*, 415 U.S. 935 (1974).

42 *Id.* at 664, 299 N.E.2d at 835.

43 *Id.* at 668, 299 N.E.2d at 837.

44 *Id.* at 665, 299 N.E.2d at 836.

45 *Id.* at 668-69, 299 N.E.2d at 837.

46 *Bowden v. State*, 256 Ark. 820, 823, 510 S.W.2d 879, 881 (1974) (doctors testified that the proposed surgery, removing a bullet from the petitioner's spinal canal, would worsen his condition); *People v. Smith*, 80 Misc. 2d 210, 211-12, 362 N.Y.S.2d 909, 911 (N.Y. Sup. Ct. Crim. Term. 1974) (removal of a bullet from behind the rhomboid muscle would require "major surgery" under general anesthesia and, while presenting little danger to his life, the surgery was too involved).

47 256 Ark. at 823, 510 S.W.2d at 881; 80 Misc. 2d at 211-12, 362 N.Y.S.2d at 911.

48 256 Ark. at 823, 510 S.W.2d at 881; 80 Misc. 2d at 211-12, 362 N.Y.S.2d at 911.

B. *Court-ordered Surgery in Federal Courts*

Prior to *Lee v. Winston*, only one federal court of appeals had addressed the constitutional issue of obtaining evidence through court-ordered surgery. In *United States v. Crowder*,⁴⁹ the Court of Appeals for the District of Columbia upheld a warrant ordering surgery under circumstances which did not pose any significant danger to the defendant's health. The *Crowder* court extrapolated a four part test from the Supreme Court's language in *Schmerber*.⁵⁰ The *Crowder* test attempts to define the circumstances under which a bullet can be surgically removed, by court order, without violating the defendant's fourth amendment rights.⁵¹ This test, relied upon by later courts,⁵² requires that in order for court-ordered surgery to be constitutionally valid: (1) the evidence must be relevant and obtainable in no other way; (2) the operation must be minor in that the risk of permanent injury is minimal; (3) the defendant must be given an adversarial hearing before the surgery is performed; and (4) the defendant must be given an opportunity to appeal before the surgery is performed.⁵³

The first prong of the *Crowder* test can be traced to *Schmerber's* requirement that the search actually produce the particular evidence sought and that the method used to recover the evidence be reasonable.⁵⁴ The *Crowder* court clarified this requirement by specifying that the evidence must be relevant⁵⁵ and obtainable in no other way.⁵⁶ Similarly, *Crowder* required a showing of probable cause that the operation would produce the evidence; this is a stricter require-

49 543 F.2d 312 (D.C. Cir. 1976) (en banc) (on rehearing) (5-4 decision) (the court ordered removal of a bullet from Crowder's forearm, but refused to order the removal of the bullet in his thigh due to the possibility of permanent injury), *cert. denied*, 429 U.S. 1062 (1977). The appellate court originally "held that surgery was a major intrusion and therefore prohibited by the guidelines set by the Supreme Court in *Schmerber v. California*." See Note, *Surgery and the Search for Evidence: United States v. Crowder*, 37 U. PITT. L. REV. 429 (1975). This note was written on the original panel opinion of the court of appeals, 513 F.2d 395 (D.C. Cir. 1975). The opinion was withdrawn at the request of the court.

50 See text accompanying notes 54-63 *infra*.

51 543 F.2d at 316. See Note, *Constitutional Law—Search and Seizure—Court-ordered Surgical Removal of a Bullet from an Unconsenting Defendant for Evidentiary Purposes Held Unreasonable Under the Fourth Amendment*. *Crowder v. United States*, 543 F.2d 312 (D.C. Cir. 1976). 55 TEX. L. REV. 147 (1976).

52 See text accompanying notes 64-65 *infra*.

53 543 F.2d at 316.

54 See *Schmerber*, 384 U.S. at 764-70.

55 See *Doe v. State*, 409 So. 2d 25, 27 (Fla. Dist. Ct. App. 1981) (removal not allowed because the bullet had only speculative evidentiary value even though the surgery met the other three tests of *Crowder*).

56 See *People v. Bracamonte*, 15 Cal. 3d 394, 540 P.2d 624, 124 Cal. Rptr. 528 (1975) (the court excluded seven balloons filled with heroin which the defendant swallowed because they

ment than *Schmerber*, which only required that the procedure be reasonably calculated to produce the evidence.

The second prong of the *Crowder* test focuses on medical risk. This emphasis evolved from the *Schmerber* Court's discussion that a blood test posed "virtually no risk, trauma, or pain" and was conducted in a reasonable manner, by a doctor in a hospital environment.⁵⁷ *Crowder* extended the medical risk analysis by requiring the procedure to be a "minor operation"⁵⁸ performed by a skilled surgeon⁵⁹ with minimal risks to the defendant.⁶⁰

A pre-surgical adversarial hearing coupled with an opportunity for appellate review,⁶¹ the third and fourth prongs, are procedural safeguards. The only similar provision in *Schmerber* was the requirement that a search warrant be obtained unless exigent circumstances were present.⁶² By requiring a full adversarial hearing, *Crowder* provides a far greater opportunity for review by a detached magistrate than the mere issuance of a search warrant. This hearing has become a battle of experts attempting to assist the court in determining whether the operation would constitute "minor surgery."⁶³

C. *Decisions After Crowder*

Subsequent to the court of appeal's approval of court-ordered

could have been recovered in a less intrusive manner than a forced intake of an emetic solution).

57 See *Schmerber*, 384 U.S. at 771.

58 See, e.g., *Hughes v. United States*, 429 A.2d 1339 (D.C. 1981) (a search warrant ordering the surgical removal of bullets was upheld since the bullets were close to the skin surface and surgery would be minor); *Creamer v. State*, 229 Ga. 511, 192 S.E.2d 350 (1972) (removal of bullet from defendant's chest permitted when it would be a minor procedure), *cert. dismissed*, 410 U.S. 975 (1973); *State v. Lawson*, 187 N.J. Super. 25, 453 A.2d 556 (N.J. Super. Ct. App. Div. 1982) (removal of bullet from defendant's thigh permitted because the surgery would be minor); *State v. Allen*, 277 S.C. 595, 291 S.E.2d 459 (1982) (removal of bullet superficially below the skin was permitted since it was minor surgery). But see *Bowden v. State*, 256 Ark. 820, 510 S.W.2d 879 (1974) (issuance of a search warrant for removal of a bullet from the defendant's spine was denied since this was medically a major intrusion involving pain and risk to life); *People v. Smith*, 80 Misc. 2d 210, 362 N.Y.S.2d 909 (N.Y. Sup. Ct. Crim. Term. 1974) (major operation to remove bullet from defendant not permitted).

59 *Crowder*, 543 F.2d at 316.

60 See, e.g., *Bowden v. State*, 256 Ark. 820, 823, 510 S.W.2d 879, 881 (1974); *Hughes v. United States*, 429 A.2d 1339, 1340 (D.C. 1981).

61 *State v. Overstreet*, 551 S.W.2d 621 (Mo. 1977) (excluding evidence obtained by minor surgery according to doctor's testimony, because the defendant was not provided with a pre-operative adversary hearing or appellate review).

62 See notes 20-22 *supra* and accompanying text.

63 The difficulty in distinguishing major and minor surgery in the courtroom is demonstrated by the disagreement between the majority and dissenting opinions in *Lee*. Compare 717 F.2d at 900 with *id.* at 905-07 (Widener, J., dissenting).

surgery in *Crowder*, courts in four states ordered surgical removal of bullets.⁶⁴ Two other states favored ordering surgery, but were not presented with the appropriate circumstances.⁶⁵ The courts in each of these states, nevertheless, strictly applied the test enunciated in *Crowder*.

The *Crowder* decision has had significant impact. Prior to *Crowder*, only one of the four state courts faced with bullet removal cases actually ordered surgery.⁶⁶ After *Crowder*, four of six state courts which addressed the issue approved of court-ordered surgery.⁶⁷ Every state court, including the Virginia court which originally heard *Lee*, has applied the *Crowder* analysis in bullet removal cases.⁶⁸ *Lee v. Winston*, only the second bullet removal case to be heard by a federal court of appeals, should have a similar impact.

III. *Lee v. Winston*

In *Lee v. Winston*,⁶⁹ an armed man approached Ralph Watkinson while he was closing his shop.⁷⁰ Watkinson, seeing that the man was armed, drew his own pistol.⁷¹ The ensuing exchange of gunfire left both men injured.⁷² Within twenty minutes, the police found Ru-

64 *Hughes v. State*, 56 Md. App. 12, 466 A.2d 533 (1983) (removal of three bullets from the defendant's abdomen, hip and back was "not constitutionally repugnant"), *cert. denied*, 298 Md. 394, 470 A.2d 353 (1984); *State v. Overstreet*, 551 S.W.2d 621 (Mo. 1977) (did not order removal because of inadequate procedural protections under *Crowder*), *see note 61 supra*; *State v. Richards*, 585 S.W.2d 505 (Mo. Ct. App. 1979) (court ordering a bullet removed from four inches below the surface of the skin held risks of harm or injury were minimal); *State v. Lawson*, 187 N.J. Super. 25, 453 A.2d 556 (N.J. Super. App. Div. 1982) (the removal of a bullet from defendant's thigh was permitted because the surgery would be "minor"); *State v. Allen*, 277 S.C. 595, 291 S.E.2d 459 (1982) (court ordered the removal of a bullet from appellant, but not from a co-defendant based on the differing degrees of risk involved).

65 *Doe v. State*, 409 So. 2d 25 (Fla. Dist. Ct. App. 1981) (removal not allowed because the bullet had only speculative evidentiary value even though the surgery met the other three tests of *Crowder*); *State v. Martin*, 404 So. 2d 960 (La. 1981) (the court approved the appointment of a three-doctor panel to determine the amount of risk involved in the proposed removal of a bullet from the appellant).

66 *See notes 35-48 supra* and accompanying text.

67 *See notes 64-65 supra* and accompanying text.

68 *Hughes v. United States*, 429 A.2d 1339, 1340-41 (D.C. 1981); *Doe v. State*, 409 So. 2d 25, 27 (Fla. Dist. Ct. App. 1981); *State v. Martin*, 404 So. 2d 960, 961-62 (La. 1981); *Hughes v. State*, 56 Md. App. 12, 19, 466 A.2d 533, 536 (1983), *cert. denied*, 298 Md. 394, 440 A.2d 353 (1984); *State v. Overstreet*, 551 S.W.2d 621, 628 (Mo. 1977); *State v. Richards*, 585 S.W.2d 505, 506 (Mo. Ct. App. 1979); *State v. Lawson*, 187 N.J. Super. 25, 29, 453 A.2d 556, 558 (N.J. Super. App. Div. 1982); *State v. Allen*, 277 S.C. 595, 599, 604, 291 S.E.2d 459, 461, 463 (1982).

69 717 F.2d 888 (4th Cir. 1983), *cert. granted*, 104 S. Ct. 1906 (1984).

70 *Id.* at 890.

71 *Id.*

72 *Id.*

dolph Lee suffering from a bullet wound to his chest.⁷³ At the time, he was only eight blocks from the scene of the shooting.⁷⁴ Lee and Watkinson were taken to the same hospital,⁷⁵ and were placed in the same emergency room.⁷⁶ While there, Watkinson immediately identified Lee as his assailant.⁷⁷ Lee was subsequently charged with four felony counts.⁷⁸

The Commonwealth of Virginia filed a motion to compel evidence, seeking to recover the bullet in Lee's chest. Following a series of hearings, the Richmond Circuit Court granted the motion⁷⁹ based on a finding that the surgery would be performed under local anesthesia and involved little risk to the defendant.⁸⁰ Lee appealed the decision;⁸¹ the Supreme Court of Virginia upheld the lower court order to proceed with the surgery.⁸² Lee then brought an action in federal district court under 42 U.S.C. § 1983 "to enjoin the state from proceeding with the surgery."⁸³

The district court examined the validity of the proposed surgery under the fourth amendment.⁸⁴ The court held that the surgery

73 *Id.*

74 *Id.*

75 *Id.*

76 *Id.* Watkinson and Lee were placed in the same emergency room by hospital personnel.

77 *Id.*

78 The four felony counts were malicious wounding, attempted robbery, and use of a firearm in each of the previous offenses. *Lee v. Winston*, 551 F. Supp. 247, 248 (E.D. Va. 1982).

79 717 F.2d at 890.

80 *Id.*

81 *Id.* at 891.

82 *Id.*

83 *Id.* The district court recognized Lee's section 1983 claim. Lee also filed a petition for a writ of habeas corpus which the district court granted. *Id.* The court of appeals held, however, that issuance of the writ was error because Lee was not challenging the propriety of his confinement but was trying to enjoin a search that might violate his fourth amendment rights. *Id.*

84 *Id.* at 891. The district court originally upheld the surgery, but when the doctors took additional x-rays, they discovered the bullet was deeper than they originally thought. The bullet was 2.5-3.0 centimeters below the skin, lodged in the muscle tissue rather than located in the layer of fat tissue 0.5-1.0 centimeter below the skin. The surgery would be performed under general anesthesia.

Upon discovery of this new information, the federal district court remanded the case to the Supreme Court of Virginia. The Virginia court again approved the surgery and Lee brought the case in federal court for a second time. It was at this point that the federal district court reversed the Virginia holding, declaring the proposed surgery under the new circumstances too intrusive.

The district court also faced a collateral estoppel problem under the full faith and credit clause, as the Supreme Court of Virginia had already determined that the proposed surgery did not violate the petitioner's fourth amendment rights. The district court determined that

would be an unreasonable search in violation of the fourth amendment.⁸⁵ On this ground, the district court enjoined the Commonwealth of Virginia from proceeding with the surgery. The United States Court of Appeals for the Fourth Circuit affirmed the district court's decision.⁸⁶

IV. Analysis of *Lee v. Winston*

The reasoning of the court of appeals in *Lee v. Winston* differed from the analysis in other bullet removal cases. Previous cases had relied solely on medical analyses of the physical risks involved in the procedure.⁸⁷ The *Lee* court, however, relied not only on an analysis of the physical risks, but also on a legal analysis of the intrusiveness to personal dignity.⁸⁸ According to the *Lee* court, the issue was "[w]hether the proposed involuntary surgery under general anesthesia would be so invasive that it would constitute a constitutionally unreasonable search of Lee's person."⁸⁹ Before addressing this issue, the court had to define "reasonableness."

Under *Schmerber*, an intrusion is unreasonable if it is more than a minor intrusion.⁹⁰ In determining when a surgical procedure constitutes only a "minor intrusion," the courts have looked to the medical profession for an assessment of the physical risks of surgery.⁹¹ Thus, "minor intrusion" and "minor surgery" seem to be synonymous terms in the courts' view.⁹² Applying this rationale, a minor surgical

the petitioner was not accorded sufficient time to prepare his case after the new location of the bullet was discovered. The court's denial of Lee's request for a continuance violated Lee's fourteenth amendment due process rights, and thus the federal courts were not required to give preclusive effect to the prior state court determination. *Id.*

85 *Id.* at 891.

86 *Id.* at 901.

87 *See* note 58 *supra*.

88 717 F.2d at 900-01. In body cavity searches, however, which are also considered searches beyond the body's surface, a legal analysis of the affront to dignity is made rather than a medical analysis. This is probably due to the lack of any medical risk in a simple body cavity search. *See* *United States v. Cameron*, 538 F.2d 254 (9th Cir. 1976); *Rivas v. United States*, 368 F.2d 703 (9th Cir. 1966); *People v. Scott*, 21 Cal. 3d 284, 293-94, 578 P.2d 123, 127, 145 Cal. Rptr. 876, 880 (1978). The *Scott* court created a complicated balancing test for searches beyond the body's surface: "the more intense, unusual, prolonged, uncomfortable, unsafe, or undignified the procedure contemplated, or the more it intrudes upon essential standards of privacy, the greater must be the showing for the procedure[s] necessity." *Id.*

89 *Id.* at 899.

90 384 U.S. 757 (1966).

91 *See* note 58 *supra*. *See generally* Note, *Nonconsensual Surgery: The Unkindest Cut of All*, 53 NOTRE DAME LAW. 291 (1977).

92 Four courts permitting surgical removal of a bullet from a defendant have termed the procedure "minor surgery" and have cited the *Schmerber* "minor intrusion" standard. Two

procedure usually performed with local anesthesia would be considered a minor intrusion and therefore a constitutionally permissible search under *Schmerber*.⁹³ This analysis seems erroneous, however. The minor surgery/minor intrusion framework departs from *Schmerber's* concern with the personal dignity and the physical well-being of the defendant.⁹⁴ The concept of minor surgery is related to physical well-being, while the concept of a minor intrusion is related to personal dignity. By equating the two concepts, the courts have merged what were two separate analyses under *Schmerber*.

The *Lee* court attempted to return to a *Schmerber* analysis by applying a two step "totality of the circumstances" test.⁹⁵ The court examined both "the extent of the surgical intrusion and the extent of the risks to the subject."⁹⁶ Using this analysis, the court held that although the risks to Lee may be minimal by medical standards, for the purposes of the fourth amendment the risks were too great and the intrusion was too extensive to proceed with the surgery.⁹⁷

This two-pronged analysis is evident in the majority's focus on the use of general anesthesia. The court looked first at the physical risks of putting Lee under general anesthesia. It found those risks to be minimal.⁹⁸ Yet, even though the use of general anesthesia in surgery may be commonplace and relatively risk-free,⁹⁹ the *Lee* court believed that "a medical designation of this procedure as minor surgery is not controlling, because . . . 'a medical term of art [need not

courts refusing to order the surgical removal of a bullet have termed the procedure "major surgery" and have cited the "minor intrusion" standard of *Schmerber*. See note 58 *supra*.

93 See note 58 *supra*.

94 The Supreme Court has stated that "the overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber*, 384 U.S. at 767.

95 *Lee v. Winston*, 717 F.2d at 899, 901.

96 *Id.* at 899. The court initially, albeit briefly, examined the physical risks of the surgical procedure to Lee before examining the legal risks. Testimony at the pre-surgical adversary hearing led the court to determine that Lee was in the group with the lowest risk from general anesthesia. Upon determining the physical risks were minimal, the court proceeded to the second phase of its analysis. It looked at the risks to the defendant's dignity and privacy which would result from allowing the state to render him unconscious and to search within his body for a bullet. They found this procedure so intrusive as to be constitutionally indistinguishable from the "rack and the screw." The risks to Lee's dignity and privacy were simply too great to permit the procedure. "The proposed surgery is too intrusive and presents too great a risk . . . to this defendant and to the privacy interests of a free society . . . to be condoned as permissible police practice." *Id.*

97 *Id.* at 900-01.

98 *Id.* at 900 ("the specific physical risks from putting Lee under general anesthesia may . . . be considered minimal.").

99 *Id.* at 906 (Widener, J., dissenting) (one of Lee's surgeons testified that the "use of general anesthesia in minor surgery is commonplace.").

necessarily] coincide with the parameters of a constitutional standard.'"¹⁰⁰ The court of appeals emphasized this point stating: "the judicial inquiry is not to make the medical estimate in medical terms, but is whether, under the totality of the circumstances presented, the procedure proposed by the state is constitutionally unreasonable."¹⁰¹ In adopting this two step analysis, the court of appeals broke from *Crowder* and its progeny, and returned to a *Schmerber*-type analysis.¹⁰²

Departing from this reasoning, the *Lee* court adopted the two step test because a medical analysis of the "risk of permanent injury" did not sufficiently protect Lee's fourth amendment rights to privacy and dignity.¹⁰³ By also examining surgery as an affront to personal dignity, that is, as a legal intrusion,¹⁰⁴ *Lee* has broadened the application of the fourth amendment and limited *Schmerber's* expansion.¹⁰⁵ This is evident in *Lee* itself. In *Lee*, the surgery would have been ordered under a proper *Crowder* physical risk analysis.¹⁰⁶ Because the court of appeals in *Lee* applied the personal dignity standard in addition to the medical standard, it found the surgery unconstitutionally intrusive.¹⁰⁷

The previous expansion of *Schmerber* had changed the concept of "minor intrusion" from a needle to a knife, thereby increasing "the extent to which the arm of government may reach inside the human body."¹⁰⁸ Although the *Lee* decision represents a contraction, the potential impact of the *Lee* two step analysis may be mitigated considerably by continued ambiguity over what constitutes an affront to

100 *Id.* at 900-01.

101 *Id.* at 901. Indeed, the dissent noted that the court's detailed description of a routine surgical procedure entailing as little risk as crossing the street was wholly designed to portray "the rude insult to the body and to the dignity" of Lee, rather than to evince medical risk. *Id.* at 907 (Widener, J., dissenting).

102 Although *Crowder's* test was a natural extrapolation from *Schmerber* as applied to the new area of bullet removals, *Lee* returned to a stricter, more orthodox *Schmerber* analysis. See notes 50-63 *supra* and accompanying text.

103 See note 94 *supra*.

104 See 717 F.2d at 900-01 (emphasizing that a constitutionally unreasonable search, i.e., one that is legally too intrusive, need not necessarily be medically considered major surgery).

105 *Id.*

106 The fact that the Virginia courts and the district court originally upheld the surgery demonstrates that the surgery would have been ordered under a proper *Crowder* test. It would have been ordered because: (1) the bullet was relevant and obtainable in no other way; (2) medically, the surgery was minor; (3) Lee was given an adversarial hearing before surgery; and (4) Lee was permitted pre-surgical appellate review. See note 53 *supra* and accompanying text. But see 717 F.2d at 909 (Widener, J., dissenting) (the first test of *Crowder*, that the evidence sought was necessary, had not been met satisfactorily).

107 *Id.* at 900-01.

108 *Crowder*, 543 F.2d at 324.

personal dignity.¹⁰⁹

Rochin and *Breithaupt* demonstrate the difficulty in determining what constitutes an affront to personal dignity.¹¹⁰ The *Rochin* and *Breithaupt* Courts recognized that they could not formulate a specific standard that would protect an individual's dignity in all cases.¹¹¹ They simply held that a procedure which "shocks the conscience"¹¹² of the court, or one which fails to abide by community perceptions of "decency and fairness,"¹¹³ is an unconstitutional affront to a person's dignity. These illusive "tests" necessitate ad hoc determinations which are inevitably inconsistent. A particular surgical procedure may shock the conscience of one court and not another.¹¹⁴ Thus, the rights of an individual become subject to the "hard-hearted" nature of some courts and the "fastidious squeamishness" of others.¹¹⁵ It is therefore essential that definite standards be employed for analyzing cases which involve conduct that is not clearly egregious by all standards.

While preserving this discretionary protection,¹¹⁶ *Schmerber* established a physical risk standard to protect fourth amendment rights.¹¹⁷ Under the physical risk test a court should disallow a health-threatening procedure, whether or not the procedure shocks the conscience of that particular court. Yet, a procedure involving no physical risk would also be disallowed if it shocked the conscience of the court.¹¹⁸ *Crowder* provided an even more restrictive test,¹¹⁹ analyzing searches solely under *Schmerber's* fourth amendment physical risk test. Thus, under *Crowder*, if a procedure involved no physical

109 The dissent felt that this ambiguity would lead either to "unprincipled holdings," since no standard to guide other courts was established, or to a per se prohibition of surgery under a general anesthetic. 717 F.2d at 908 (Widener, J., dissenting).

110 See *Breithaupt*, 352 U.S. at 436; *Rochin*, 342 U.S. at 169.

111 352 U.S. at 436; 342 U.S. at 169.

112 352 U.S. at 437; 342 U.S. at 172.

113 352 U.S. at 436; 342 U.S. at 173.

114 717 F.2d at 908 (Widener, J., dissenting).

115 But cf. 342 U.S. at 172 (the conduct must "do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience . . . [It is] bound to offend even hardened sensibilities."); *id.* at 173 (intrusion must conform to "fair play and decency"). Compare *United States v. Cameron*, 538 F.2d 254 (9th Cir. 1976) (involuntary rectal search); *People v. Scott*, 21 Cal. 3d 284, 578 P.2d 123, 145 Cal. Rptr. 876 (1978) (en banc) (involuntary search and seizure of sperm sample); with *Rivas v. United States*, 368 F.2d 703 (9th Cir. 1966) (involuntary rectal search).

116 *Schmerber*, 384 U.S. at 759-60.

117 *Id.* at 770.

118 The procedure should involve "virtually no risk, trauma, or pain." 384 U.S. at 771.

119 See notes 51-63 *supra* and accompanying text.

risks, the court could not find the procedure to be unconstitutional.¹²⁰ *Lee* reincorporated the discretionary protection of *Schmerber* by adding a second step to the *Crowder* physical risk test. Unlike *Schmerber*, however, the *Lee* court incorporates discretionary protection within the framework of the fourth amendment.¹²¹

The dissent in *Lee* charged the majority with subjecting the fourth amendment protections to disparate interpretations of the "shocks the conscience" standard.¹²² This criticism, however, is not entirely valid. By resurrecting a two step analysis, *Lee* has again subjected law enforcement attempts to ad hoc judicial interpretations. *Lee*, however, retains the medical risk standard as a protective floor below which judicial insensitivity cannot fall.¹²³ Thus, under *Lee*, the defendant is provided the same protections which the *Crowder* test ensured, and, additionally, the defendant has whatever protection the courts may feel is necessary to protect personal dignity.

V. Future Applications of *Lee*

One possible application of *Lee's* two step test is a prohibition of court-ordered surgery as being per se unconstitutional. In *Lee*, the use of general anesthesia was held unreasonably intrusive, and therefore a violation of the fourth amendment.¹²⁴ The use of general anesthesia, however, was considered unreasonably intrusive not because of the medical risks involved, but rather, because of its affront to personal dignity. If courts accept *Lee's* prohibition of general anesthesia because it affronts personal dignity, they may also choose to expand that prohibition. The Supreme Court of Indiana in *Adams v.*

120 *Id.* Yet, if the defendant was given no pre-surgical adversarial hearing or appellate review, or the evidence was not relevant or was obtainable in some other way, the surgery would be unconstitutional. This approach furthers *Breithaupt's* policy of allowing society to utilize modern science to protect itself from crime, thereby balancing society's need for law enforcement against the individual's rights. See *Breithaupt*, 352 U.S. at 439 ("Modern community living requires modern scientific methods of crime detection lest the public go unprotected.").

121 717 F.2d at 899-900.

122 *Id.* at 908 (Widener, J., dissenting) ("I do not believe these cases should be decided on [the ground of the insult to the body and dignity of the person] because there is no sufficient stated principle to guide the decisions of the courts.").

123 See *id.* at 899 ("the reasonableness of removing [the bullet] forcibly from a person's body is judged by the extent of the surgical intrusion and the extent of the risks to the subject.").

124 See 717 F.2d at 901.

State,¹²⁵ for example, used the "shocks the conscience" standard in finding all court-ordered surgery unreasonably intrusive.

A more likely application of *Lee*, though, is a per se prohibition of court-ordered surgery which requires the use of general anesthesia.¹²⁶ Such an application is more likely for five reasons. First, the lower courts will attempt to apply both *Lee* and *Crowder*. In so doing, they will probably combine *Crowder's* permissiveness towards minor surgery involving local anesthesia with *Lee's* rejection of minor surgery involving general anesthesia. The logically consistent result is to reject any surgery that involves the use of general anesthesia. Second, the emphasis *Lee* itself placed on the affront to dignity which results from forcibly subjecting an individual to general anesthesia will be accorded great weight by lower courts.¹²⁷ A court, however, might erroneously overemphasize the use of general anesthesia rather than focusing on the affront to dignity. Third, *Lee* may be limited to a ban on court-ordered surgery under general anesthesia due to its unclear language. The court did not clearly distinguish between its analysis of the risk to *Lee's* health and the risk to his dignity.¹²⁸ This lack of clarity and focus is likely to limit the potential impact of *Lee*. Fourth, *Lee* may be limited due to the simplicity of the *Crowder* test. *Lee's* addition of an ad hoc determination of what "shocks the conscience" to *Crowder's* simple four step analysis may not be applied. The courts' desire for a simple test is evident in the widespread application of *Crowder*.¹²⁹ *Lee's* two step analysis frustrates this desire by reincorporating the vague standard of what "shocks the conscience" under *Rochin*. Therefore, courts are likely to apply *Lee* by concluding that general anesthesia violates personal dignity under the fourth amendment. Determining whether a procedure involves the use of

125 260 Ind. 663, 299 N.E.2d 834 (1973) (involuntary surgical removal is per se unreasonable under the fourth amendment).

Another latent argument that could lead to per se prohibitions of involuntary surgical removal of bullets can be seen when one juxtaposes *Crowder's* fourth test (the availability of pre-removal hearing and appellate review) with the fact that a bullet in the human body may deteriorate over time. Since the markings that make a bullet identifiable could deteriorate by the time appellate review has ended, the bullet may no longer be probative in the case. Since *Schmerber* required the evidence be probative, the surgery may become unconstitutional on those grounds. *Lee*, 717 F.2d at 901 n.15; see also *Doe v. State*, 409 So. 2d 25, 26-27 (Fla. Dist. Ct. App. 1982) (on rehearing). But see 717 F.2d at 908 n.3 (Widener, J., dissenting) (medical literature reveals that such deterioration is rare and, when it does occur, yields symptoms of lead poisoning).

126 See 717 F.2d at 907.

127 *Id.* at 900-01.

128 See *id.*

129 See notes 64-65 *supra*.

general anesthesia is far easier than determining whether it "shocks the conscience."¹³⁰ Finally, courts may simply follow the recent trend of allowing bullet removal surgery,¹³¹ rather than utilizing the second step of the *Lee* test.

VI. Conclusion

In an attempt to determine when an involuntary surgical procedure is a "minor intrusion," *Lee v. Winston* applied a legal analysis of the intrusive effect on personal dignity in addition to a standard medical analysis of the physical risks to the defendant. The court found that general anesthesia, while presenting minimal medical risks, was unconstitutionally intrusive to Lee's personal dignity. The probable impact of this case will be to make court-ordered surgery, requiring general anesthesia, per se unreasonable under the fourth amendment. This interpretation, however, would fail to consider the policy behind *Lee's* two pronged test and would neglect the importance of a person's dignity. Such an oversight would be unfortunate.

Blake A. Bailey
Elaine M. Martin
Jeffrey M. Thompson

130 The general/local anesthesia distinction presents courts with a clear choice whereas a determination of what "shocks the conscience" is much more complicated. It is possible, however, that the desire for retrieving evidence might influence the type of anesthetic employed. The doctor in *Lee* testified that the procedure could be performed under local anesthesia, but that it was safer under general anesthesia. Thus, such a distinction may result in surgery performed under local anesthesia when general anesthesia would be safer. 717 F.2d at 905-06.

131 See note 68 *supra*.

TORT LAW—*CANINO v. NEW YORK NEWS, INC.*: NEW JERSEY PERMITS DEFAMATION ACTION TO SURVIVE

At common law, according to the maxim *actio personalis moritur cum persona*,¹ all personal tort actions terminated upon the death of either the plaintiff or the defendant. In order to mitigate the harshness of this rule,² state legislatures enacted survival and abatement statutes which prevent the death of a party from extinguishing certain personal tort actions.³ A majority of jurisdictions, however, continue to apply the common law rule to defamation actions.⁴ In *Canino v. New York News, Inc.*,⁵ the New Jersey Supreme Court departed from the majority view and permitted a libel suit to proceed despite the death of the original plaintiff.

In examining the *Canino* decision, this comment will first outline the principal facts and the holding of the case. Next, it will analyze the reasoning that the *Canino* court and other American courts have employed in deciding whether a defamation action should survive or abate upon the death of one of the parties. After assessing the decision's probable impact in other jurisdictions, this comment concludes that the *Canino* opinion represents the better view because it fosters the remedial purpose of survival statutes.

I. *Canino v. New York News, Inc.*

The *Canino* case involved an article published in the New York

1 Translated, the maxim means "a personal right of action dies with the person."

2 W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 126, at 900 (4th ed. 1971); see also *Hunt v. Authier*, 18 Cal. 2d 288, 169 P.2d 913 (1946) (where the court provides a good discussion of early survival statutes).

3 While no necessary relation exists between the survival of a cause of action and the abatement of a pending action, courts often fail to distinguish between the two distinct questions and confuse them to the extent that it is often impossible to determine whether a particular case refers to one issue or the other. See Annot., 134 A.L.R. 717 (1941) and sources cited therein.

The issue of whether a defamation action survives generally does not depend on which party has died. For example, few courts would hold that a defendant's death terminates a defamation suit while the plaintiff's death does not. Ohio, however, at one time seems to have made this distinction. *Id.* at 724-25.

4 W. PROSSER, *supra* note 2, § 126, at 899. See, e.g., *Blodgett v. Greenfield*, 101 Cal. App. 399, 281 P. 694 (1929); *Chiagouris v. Jovan*, 43 Ill. App. 2d 213, 193 N.E.2d 205 (1963); *Begole v. Ferguson*, 299 Mich. 416, 300 N.W. 146 (1941); *Jones v. Matson*, 4 Wash. 2d 659, 104 P.2d 591 (1940).

5 96 N.J. 189, 475 A.2d 528 (1984).

Daily News reporting that the plaintiffs, James Canino and Alvin Raphael, had "mob connections" and that they had stolen millions in state housing funds.⁶ On October 16, 1980, approximately a year after the article appeared, Raphael and Canino filed suit against the New York Daily News and its reporter for libel, seeking damages for injuries to their reputations and businesses.⁷ The New York Daily News contended that the contents of its publication were constitutionally privileged.⁸

On January 5, 1981, Raphael died. In December of that year, Raphael's widow and executrix, Kathleen Raphael, was substituted as a plaintiff in the action. The defendants subsequently moved to dismiss, citing a 1915 New Jersey Supreme Court case which held that defamation actions abate on the death of the defendant.⁹ The trial court denied the defendants' motion, citing more modern cases to the contrary. The New Jersey Appellate Division affirmed in an unreported opinion¹⁰ and the New Jersey Supreme Court granted leave to appeal.¹¹

The supreme court affirmed, holding that an action for libel or slander does not abate upon the death of the plaintiff.¹² The court based this conclusion on its construction of the phrase "trespass . . . to the person" in the New Jersey survival statute.¹³ In addition, the

6 *Id.* at 190, 475 A.2d at 528.

7 *Id.*

8 *Id.* at 197, 475 A.2d at 532.

9 *Id.* (the defendants relied on *Alpaugh v. Conkling*, 88 N.J.L. 64, 95 A. 618 (Sup. Ct. 1915)).

10 96 N.J. at 191, 475 A.2d at 529.

11 *Id.*

12 *Id.* at 198, 475 A.2d at 533. The court also held that the survival of a defamation action does not conflict with the guarantees of the first amendment, since first amendment concerns are already taken into account in the constitutional limitations on the substantive law governing defamation suits. *Id.* at 197-98, 475 A.2d at 532-33.

13 The statute provides: "Executors and administrators may have an action for any trespass done to the person or property, real or personal, of their testator or intestate against the trespasser, and recover their damages as their testator or intestate would have had if he was living." N.J. STAT. ANN. § 2A:15-3 (West 1952 & Supp. 1984).

Although the *Canino* court expressly held that the death of a plaintiff does not abate a defamation action, presumably the court would also hold that the death of a defendant would not abate a libel or slander suit nor affect its survivability. The *Canino* decision rested on the court's interpretation of the words "trespass to the person" in the New Jersey survival statute. The court decided that defamation was a "trespass to the person" within the meaning of the statute. The same language is employed in the statute governing the survival of an action upon the death of a defendant or potential defendant. The statute states:

Where any testator or intestate shall, in his lifetime, have taken or carried away or converted to his use, the goods or chattels of any person, or shall, in his lifetime, have committed any trespass to the person or property, real or personal, of any

court examined a number of nineteenth century tort cases to determine how lawyers and judges of that time viewed libel and slander. The *Canino* opinion concluded that those courts recognized that libel or slander "was a trespass or, as it was known then and now, a tort."¹⁴ Thus, the court inferred that the New Jersey legislature intended to permit defamation actions to survive.

By holding that the death of a party does not terminate a libel action, the *Canino* court chose not to follow a 1915 New Jersey Supreme Court decision, *Alpaugh v. Conkling*.¹⁵ In *Alpaugh*, the court relied on the general common law rule and held that the New Jersey survival statute did not allow libel actions to survive the death of the defendant.¹⁶ Two modern interpretations of the New Jersey statute had taken the opposite view, however. In *Weller v. Home News Publishing Co.*,¹⁷ a New Jersey Superior Court allowed a libel action to survive the plaintiff's death.¹⁸ A federal district court, in *MacDonald v. Time, Inc.*,¹⁹ also interpreted the New Jersey survival statute as saving a deceased plaintiff's libel claim from abatement.²⁰ Like the courts in *Weller* and *MacDonald*, the *Canino* court found little basis for the general common law rule. The court pointed out that the New

person, such person, his executors or administrators, shall have and may maintain the same action against the executors or administrators of such testator or intestate as he or they might have had or maintained against the testator or intestate, and shall have the like remedy and process for the damages recovered in such an action as are now had and allowed in other actions against executors or administrators.

N.J. STAT. ANN. § 2A:15-4 (West 1952).

14 96 N.J. at 195, 475 A.2d at 531.

15 88 N.J.L. 64, 95 A. 618 (Sup. Ct. 1915).

16 *Id.* at 67, 95 A. at 619. The New Jersey statute has been amended since the *Alpaugh* decision in 1915. The earlier statute and the statute interpreted by the *Canino* court contain substantially similar language though. Both refer to "trespass to the person." The earlier statute read:

That where any testator or intestate shall, in his or her lifetime, have taken or carried away or converted to his or her use, the goods or chattels of any person or persons, or shall, in his or her lifetime, have committed any trespass to the person or property, real or personal, or any person or persons, such person or persons, his or her executors or administrators, shall have and maintain the same action against the executors or administrators of such testator or intestate as he, she or they might have had or maintained against such testator or intestate, and shall have the like remedy and process for the damages recovered in such action as are now had and allowed in other actions against executors or administrators.

2 N.J. COMP. STAT. 2260, § 5 (1911).

17 112 N.J. Super. 502, 271 A.2d 738 (Law Div. 1970) (the defendant newspaper allegedly portrayed the deceased plaintiff as a charity patient at a local hospital).

18 *Id.* at 508, 217 A.2d at 741.

19 554 F. Supp. 1053 (D.N.J. 1983) (the defendant alleged that the deceased plaintiff was involved in criminal activities).

20 *Id.* at 1060.

Jersey survival statute is "highly remedial in its character."²¹ In enacting it, the legislature meant to relieve the harsh injustices of the common law rule that personal tort actions ceased upon the death of either of the parties. Thus, the court rejected the vestiges of an ancient common law rule, stating that "this decision is in accord with our modern values."²²

II. Analysis of the *Canino* Decision

A number of factors led to the majority rule that defamation actions abate upon the death of one of the parties to the suit,²³ including the evolution of tort law. According to Dean Prosser, tort remedies developed as an incident to criminal punishment.²⁴ If the criminal died, no one was left to punish. By analogy, common law courts held that if a defendant to a tort claim died, the action terminated as well.²⁵ In addition, because the early common law courts viewed the recovery of damages as a victim's personal revenge, the death of the plaintiff also abated the action.²⁶

In the first half of the nineteenth century, many state legisla-

21 96 N.J. at 194, 475 A.2d at 531 (quoting *Ten Eyck v. Runk*, 31 N.J.L. 428, 430 (N.J. Sup. Ct. 1866)).

22 *Id.* at 198, 475 A.2d at 533.

23 W. PROSSER, *supra* note 2, § 126, at 900-01.

24 *Id.* at 898; *see also* Winfield, *Death as Affecting Liability in Tort*, 29 COLUM. L. REV. 239 (1929). In *Canino*, the court discussed the nexus between tort remedies and criminal penalties existing at early common law as one of the reasons behind the original common law rule that tort actions abate on the death of one of the parties. The court stated that:

Most agree that the rule came about because tort remedies were adjunct to criminal penalties. If a criminal died, there could no longer be punishment; it was thought by analogy that tort claims terminated at death as well. Since the recovery of damages was viewed as a matter of personal revenge between the victim and wrongdoer, death erased the purpose of a civil action between them: "Death pays all when the criminal has gone. 'The party cannot be punished when he is dead.' And even if he survives, and it is the injured party who has died, surely it is the king and not the representatives who should take up redress." Review of the doctrine's origins should convince us that it bears little relevance to a modern system of justice. "[T]he question is . . . why a fortuitous event such as death should extinguish a valid cause of action."

96 N.J. at 192, 475 A.2d at 529-30 (citations omitted).

25 W. PROSSER, *supra* note 2, § 126, at 898.

26 As one commentator noted:

So long as the recovery of damages was regarded as a matter of personal vengeance and punishment as between the transgressor and his victim, death erased the purpose of a civil action between them. The legal successor of the deceased party was neither the wronged nor the wrongdoer and had no personal involvement in the wrong. . . . [W]hen the function of damages awards came to be recognized as compensatory rather than punitive, the reason for the rule ceased to exist.

Smedley, *Wrongful Death—Bases of the Common Law Rules*, 13 VAND. L. REV. 605, 608-09

tures began enacting survival statutes to change this harsh common law rule which effectively extinguished any remedy.²⁷ Yet some legislatures excluded defamation from statutory coverage presumably because libel, which was criminal in origin, remained "adjunct and incident to criminal punishment."²⁸ Thus, at that time the common law rule against the survival of tort actions had some lingering validity regarding libel and slander suits.

In determining whether a tort action survives, courts have also focused on whether the defendant, as a result of his actions, realized some sort of gain in assets or property.²⁹ For example, in *Jones v.*

(1960), *quoted in* *Harrison v. Loyal Protective Life Ins. Co.*, 379 Mass. 212, 216, 396 N.E.2d 987, 990 (1979).

27 In *Hunt v. Authier*, 28 Cal. 2d 288, 269 P.2d 913 (1946), the court provides a good discussion of early survival statutes. *See also* Comment, *Abatement and Revival: Survival of Actions: Public Liability Insurance*, 18 CAL. L. REV. 44 (1930); Schumacher, *Rights of Action Under Death and Survival Statutes*, 23 MICH. L. REV. 114 (1925).

28 *See, e.g.*, *Moyer v. Phillips*, 462 Pa. 395, 399, 341 A.2d 441, 442-43 (1975). In *Moyer*, the court stated:

In the early nineteenth century survival statutes were enacted, along with wrongful death acts, to modify what was considered the harsh and unjust rule of common law. The history of their development in Pennsylvania is one of gradual expansion by the legislature limited by some narrow interpretation by the courts. . . . [T]he Court read the survival statute as having no application to suits involving less tangible interests in personalty such as malicious prosecution and criminal conversation. As a result, the legislature restated the survival provisions in the Act of 1917 so as to clearly state that all causes of action except libel and slander survived the death of either party. Presumably, libel and slander were excepted because at the time, they were still considered as adjunct and incident to criminal punishment.

Id.

29 Courts have been much less reluctant to allow tort actions for damages to the tangible property interests of a plaintiff to survive the death of one of the parties. *See* W. PROSSER, *supra* note 2, § 126, at 900. At common law, causes of action arising from injuries to less tangible interests, such as reputation, did not survive in most jurisdictions because of a notion that a judgment in such a case is in the nature of a penalty rather than a compensation. Hence, if the defendant did not realize a material gain through his tortious conduct, the action would not survive. *See Survival of Claims For and Against Executors and Administrators*, 19 KY. L.J. 195, 205-06 (1931).

At least one court has read this tangible versus intangible distinction into its interpretation of its state's survival statute.

Among others, we find Section 419 of the code, wherein it is provided that cause of action for . . . injuries to the person or personal property, shall survive. It will be noted that the General Assembly was careful in not including actions for injury to character. An action for libel is one *ex delicto*, and is a personal action. . . . It is clear, therefore, that an ordinary cause of action for libel or slander dies with the person. No matter how wickedly a libel may be made and published, and no matter how serious may be the consequences and the damages suffered by reason of such libel, if the person who utters the libel should die, the injured party has no redress whatsoever in the courts, the cause of action being buried with the decedent.

Carver v. Morrow, 213 S.C. 199, 202-03, 48 S.E.2d 814, 816 (1948).

Matson,³⁰ the Washington Supreme Court distinguished tangible from intangible injuries in deciding that a defendant's death terminated a libel action. The court in *Matson* stated that "actions in tort, where the tort was not connected with contract or the estate of the tort-feasor was not enriched thereby, were originally designed for the punishment of the wrongdoer."³¹ The court stated further that "if the tort-feasor died, his personal representative, not having committed in his personal capacity any wrong, could not be prosecuted for such tort."³² Because defendants to defamation actions rarely realize a financial gain as a result of their actions, the purpose of a libel and slander suit is to punish the defendant, the *Matson* court reasoned. Since a dead defendant cannot be punished, defamation actions cannot survive.³³

Modern tort law, including the law of defamation, is viewed as compensatory rather than punitive in nature;³⁴ courts no longer consider the recovery of damages a matter of personal vindication between the original parties.³⁵ As Sir Frederick Pollock has stated, "once the notion of vengeance has been put aside and that of compensation substituted, the rule *actio personalis moritur cum persona* seems to be without plausible ground."³⁶ The criminal origins of libel therefore have no relevance in a system predicated upon compensation of the injured party rather than punishment of the wrongdoer.

In contrast to the situation in which courts have argued that the defendant's death in a defamation action leaves no one to punish, some courts have also reasoned that a plaintiff's death in such an action leaves no one to compensate. These courts maintain that, since defamation involves an injury of an intangible personal nature, compensation would constitute a windfall to the plaintiff's heirs, who have suffered no injury.³⁷ Other courts have rejected this contention, holding that a deceased plaintiff's family has a strong interest in re-

30 4 Wash. 2d 659, 104 P.2d 591 (1940) (libel allegedly caused a third party to back out of a business deal).

31 *Id.* at 668, 104 P.2d at 595 (quoting *Bartle v. Oxborn*, 155 Wash. 585, 594, 285 P. 425, 429 (1930)).

32 *Id.*

33 *Id.*

34 See note 42 *infra*; see also W. PROSSER, *supra* note 2, § 2 at 7-9; 1 T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES §§ 29-30 (9th ed. 1920).

35 *Moyer*, 462 Pa. at 398, 341 A.2d at 442. See also *Smedley*, *supra* note 26, at 609; F. POLLOCK, THE LAW OF TORTS 61-62 (12th ed. 1923).

36 F. POLLOCK, *supra* note 35, at 62.

37 W. PROSSER, *supra* note 2, § 126, at 901; see also *Menefee v. Columbia Broadcasting Sys., Inc.*, 458 Pa. 46, 329 A.2d 216 (1974) (survival of defamation actions would lead to unwarranted windfalls for the heirs of plaintiffs).

storing the victim's reputation. In *MacDonald v. Time, Inc.*,³⁸ quoted with approval in *Canino*, the court stated:

To say that a man's reputation dies with him is to ignore the realities of life and the bleak legacy which he leaves behind.

There is no valid reason which should deny the family of [the plaintiff] the right to clear his name and seek compensation for its destruction. Why should a claim for a damaged leg survive one's death, where a claim for a damaged name does not. After death, the leg cannot be healed, but the reputation can.

The cases which have held that a defamation claim does not survive death rest on some contrived fiction or technical label. If a man's livelihood has been destroyed because of defamation, why should that claim not survive, while a claim based upon negligence or breach of contract does survive.³⁹

Similarly, the court in *Moyer v. Phillips*⁴⁰ held that termination of a defamation action upon the death of either party unjustly precludes either the victim's estate or the victim himself from restoring his good name.⁴¹ The court noted that, as the Restatement (Second) of Torts indicates,⁴² defamation law serves the purpose of compensation for and restoration of the plaintiff's reputation.⁴³ The Pennsylvania court concluded that a survival statute which fails to encompass defamation actions frustrates this purpose and is contrary to the remedial nature of survival statutes.⁴⁴ Thus, even in defamation actions which involve only an intangible injury, it is arguable that recovery by the victim's survivors, who have an understandable interest in restoring the victim's reputation, does not constitute a

38 554 F. Supp. 1053 (D.N.J. 1983).

39 *Id.* at 1054.

40 462 Pa. 395, 341 A.2d 441 (1975).

41 *Id.* at 401-02, 341 A.2d at 444.

42 According to the RESTATEMENT (SECOND) OF TORTS § 623 Special Note on Remedies for Defamation Other Than Damages (1977), defamation law serves three separate functions: "(1) to compensate the plaintiff for the injury to his reputation, for his pecuniary losses and for his emotional distress, (2) to vindicate him and aid in restoring his reputation and (3) to punish the defendant and dissuade him and others from publishing defamatory statements."

The court in *Moyer* emphasized the first two purposes, stating: "Today a defamation action as any other tort action is punitive only in the sense that it serves the social objective of regulating the conduct of defendant while alive and the conduct of others. Its purpose above all is compensation for and restoration of the victim's good name." 462 Pa. at 401-02, 341 A.2d at 444; see also notes 34-36 *supra* and accompanying text.

43 462 Pa. at 401-02, 341 A.2d at 444.

44 *Id.* at 402, 341 A.2d at 444. The court also held that the exception of defamation actions from the Pennsylvania survival statute is an arbitrary distinction and constitutes a denial of equal protection. See note 64 *infra*.

windfall.⁴⁵

The argument that the intangible character of a defamation action should preclude its survival is further weakened by the recent trend to construe survival statutes liberally,⁴⁶ a trend which has resulted in the survival of other actions which are equally intangible in nature.⁴⁷ In addition, not all defamation actions involve only an intangible interest. In *Moyer*, for example, the plaintiff suffered the loss of his livelihood and was placed on state welfare.⁴⁸ In such instances, financial hardship to the plaintiff or to the plaintiff's survivors may result if the right to recover for such loss is terminated.

Another concern which apparently accounts for the general reluctance of courts to permit defamation actions to survive is the notion that the death of one of the parties creates problems of proof.⁴⁹ Prosser, however, notes that no serious difficulties have arisen with respect to contract or tort actions which presently survive the death of the parties.⁵⁰ Furthermore, several courts have held that difficulties of proof do not justify the complete denial of relief for serious invasions of emotional tranquility⁵¹ or reputation.⁵²

45 Moreover, as the victim's family members may be unable to maintain an action in their own right, exclusion of defamation from actions which survive may very well foreclose all means of remedying an injury which the family has indirectly suffered. *See, e.g., Insull v. New York World-Telegram Corp.*, 172 F. Supp. 615, 636 (N.D. Ill. 1959) (that the plaintiff may have been affected by the libel of his deceased father does not itself afford him an independent cause of action), *aff'd*, 273 F.2d 166 (7th Cir. 1959), *cert. denied*, 362 U.S. 942 (1960); *Kelly v. Johnson Publishing Co.*, 160 Cal. App. 2d 718, 725-26, 325 P.2d 659, 664 (1958) (surviving relatives suffered no injury themselves when their deceased brother was defamed); *Bello v. Random House, Inc.*, 422 S.W.2d 339, 341 (Mo. Sup. Ct. 1968) (no right of action exists in favor of surviving relatives who are not directly defamed).

46 W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 126, at 943 (5th ed. 1984) (hereinafter cited as PROSSER & KEETON).

47 For example, the court in *Harrison v. Loyal Protective Life Ins. Co.*, 379 Mass. 212, 396 N.E.2d 987 (1979), held that the statutory language "damage to the person" encompassed harm to the mind or emotions as well as harm to the body, permitting an action for intentional infliction of emotional distress to survive the death of the plaintiff. *See also Emmanuel v. Bovino*, 26 Conn. Sup. 356, 223 A.2d 541 (1966) (alienation of affections); *Posner v. Koplin*, 94 Ga. App. 306, 94 S.E.2d 434 (1956) (alienation of affections); *Gray v. Wallace*, 319 S.W.2d 582 (Mo. 1958) (malicious prosecution).

48 462 Pa. at 402, 341 A.2d at 444. *See also Matson*, 4 Wash.2d at 660, 104 P.2d at 592 (defamation allegedly caused decedent to lose option to purchase property).

49 W. PROSSER, *supra* note 2, § 126, at 901.

50 *Id.*

51 *Harrison*, 379 Mass. at 217-18, 396 N.E.2d at 990.

52 *MacDonald*, 554 F. Supp. at 1059-60. *See also Moyer*, 462 Pa. at 406-08, 341 A.2d at 446-47 (Roberts, J., concurring). Justice Roberts noted that at common law the testimony of the defendant was particularly crucial in defamation actions. The litigation typically focused upon the defenses of truth and privilege, with the latter involving proof of the defendant's state of mind. As the burden of proof on these issues rested with the defendant, the death of

Courts which follow the traditional majority approach often rely upon the view that statutes which are inconsistent with the common law must be narrowly construed.⁵³ These courts reason that since no personal tort actions survived at common law, survival statutes must be strictly interpreted. This rule has been criticized by one legal commentator who states: "Remedial developments through case law have been hampered because judges have seldom brought common law flexibility into the interpretation of the statutes on . . . survival. They have been blinded by the maxim that statutes in derogation of the common law must be strictly construed."⁵⁴

Not all jurisdictions continue to follow this rule of statutory construction, however. The court in *Harrison v. Loyal Protective Life Insurance Co.*,⁵⁵ concluding that previous narrow interpretations of the survival statute did not control its decision,⁵⁶ stated that the legislature intended the survival statute to be flexible enough to reflect changes in judicial analysis affecting what actions should survive.⁵⁷ At least one court has taken the position that, in order to effect the purpose of the statute, an action must be presumed to survive unless specifically excluded from the statute.⁵⁸ Such interpretations are in accord with the modern trend to extend survival statutes or to construe them liberally⁵⁹ and better accomplish the remedial purpose of these statutes.

Finally, legal commentators have long criticized the termination

the defendant made it difficult for the decedent's estate to defend such an action. 462 Pa. at 406-07, 341 A.2d at 446.

The decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), requiring some showing of fault on the part of the defendant before liability may be constitutionally imposed, effectively shifted the burden of proof in defamation actions. Justice Roberts concluded that, as a practical matter, a plaintiff must now prove falsity, as well as negate the existence of a conditional privilege, in order to establish the necessary element of fault. Thus, in the absence of the former burdens of defending a defamation action brought against a deceased defendant, Justice Roberts argued, the exclusion of defamation from survival statutes is no longer justified. 462 Pa. at 407-08, 341 A.2d at 447.

53 See, e.g., *Catchings v. Hartman*, 178 Miss. 672, 679-80, 174 So. 553, 553 (1937). (In holding that a slander action did not survive the death of the plaintiff, the court confirmed an earlier holding that the Mississippi statute, "being in derogation of the common law, must be strictly construed, and that the term 'personal action' must be interpreted according to its strictly technical meaning.").

54 Miller, *Dead People in Torts: A Second Installment*, 22 CATH. U.L. REV. 73, 74 (1972).

55 379 Mass. 212, 396 N.E.2d 987 (1979).

56 *Id.* at 214, 396 N.E.2d at 989.

57 *Id.* at 215, 396 N.E.2d at 989.

58 *Reinhard v. City of New Haven*, 23 Conn. Supp. 321, 324, 182 A.2d 925, 927 (1961).

59 See PROSSER & KEETON, *supra* note 46, § 126, at 943 (stating that modern courts tend to extend survival statutes or construe them liberally in case of doubt).

of any tort action upon the death of one of the parties as a remnant of an archaic common law rule.⁶⁰ One legal scholar has maintained that the most satisfactory statute would provide for the survival of all actions.⁶¹ Similarly, Prosser notes:

[T]he modern trend is definitely toward the view that tort causes of action are as fairly a part of the estate of either plaintiff or defendant as contract debts, and that the question is rather one of why a fortuitous event such as death should extinguish a valid action. Accordingly, survival statutes gradually are being extended; and it may be expected that ultimately all tort actions will survive to the same extent as those founded on contract.⁶²

Thus, while *Canino* represents a departure from traditional views, its position is in accord with persuasive authority and the recent trend of the courts.

III. The Impact of the *Canino* Decision

The effect which *Canino* may have upon other jurisdictions will largely depend upon the language of each jurisdiction's survival statute. For instance, statutes in a number of states expressly prohibit the survival of defamation actions.⁶³ Absent further legislative action, those jurisdictions will remain unaffected by *Canino*.⁶⁴

Canino will not go unnoticed, however, in those states whose statutes employ relatively broad language. The provisions of such statutes vary considerably from state to state.⁶⁵ Even in those

60 Sir Frederick Pollock described the effect which the death of either party has upon liability for a wrong as "one of the least rational parts of our law." F. POLLOCK, *supra* note 35, at 60. See also *Inadequacies of English and State Survival Legislation*, 48 HARV. L. REV. 1008, 1008 (1935), which contends that most survival statutes "invite criticism of both their limited scope and their frequently unfortunate draftsmanship. That considerable portions of the rule expressed in the maxim *actio personalis moritur cum persona* still exist is explicable only by the antipathy of legislatures and courts to change."

61 F. HARPER, A TREATISE ON THE LAW OF TORTS § 301, at 675 (1933).

62 W. PROSSER, *supra* note 2, § 126, at 901.

63 See, e.g., ARIZ. REV. STAT. ANN. § 14-3110 (1975); ILL. ANN. STAT. ch. 110 1/2, § 27-6 (Smith-Hurd Supp. 1984); MD. CTS. & JUD. PROC. CODE ANN. § 6-401 (1984).

64 The Pennsylvania survival statute similarly excluded defamation actions until the court in *Moyer v. Phillips*, 462 Pa. 395, 341 A.2d 441 (1975), held that such a distinction constitutes a denial of equal protection under both the United States and Pennsylvania Constitutions. Similarly, the court in *Thompson v. Estate of Petroff*, 319 N.W.2d 400 (Minn. 1982), declared that the statutory exception of intentional torts from Minnesota's survival statute violates the equal protection clause of the Minnesota Constitution. Such judicial approaches are apparently unique, however. In the absence of legislative reform, therefore, even the strongest policy arguments seem unlikely to override the express language of such statutes.

65 See, e.g., CONN. GEN. STAT. ANN. § 52-599 (West Supp. 1984) (all causes of action

jurisdictions whose statutes contain similar language, the results are anything but uniform.⁶⁶ Whether these jurisdictions will choose to depart from the majority position and adopt the approach taken by the *Canino* court will ultimately depend upon the continued validity of traditional distinctions between defamation and other tort actions. Courts have recently displayed some tendency to extend survival statutes in general,⁶⁷ and distinctions between tangible and intangi-

survive); MISS. CODE ANN. § 91-7-233 (1972) ("personal actions" survive); N.Y. EST. POWERS & TRUSTS LAW § 11-3.2 (McKinney 1967 & Supp. 1982) (through reference to its general construction law, N.Y. GEN. CONSTR. LAW § 37-a (McKinney 1951), expressly allows libel and slander to survive); TEX. REV. CIV. STAT. ANN. art. 5525 (Vernon 1958) (actions for "injuries to the reputation" survive); W. VA. CODE § 55-7-8a (1981) (actions for "injuries to the person" survive).

66 For example, Georgia and South Carolina have survival and abatement statutes which contain similar language. Both statutes provide that causes of action which result in "injury to person" survive:

Causes of action for and in respect to any and all injuries and trespasses to and upon real estate and any and all injuries to the person or to personal property shall survive both to and against the personal or real representative, as the case may be, of a deceased person and the legal representative of an insolvent person or a defunct or insolvent corporation, any law or rule to the contrary notwithstanding.

S.C. CODE ANN. § 15-5-90 (Law. Co-op. 1976).

No action for a tort shall abate by the death of either party, where the wrongdoer received any benefit from the tort complained of; nor shall any action or cause of action for the recovery of damages for homicide, injury to the person, or injury to property abate by the death of either party. The cause of action, in case of the death of the plaintiff and in the event there is no right of survivorship in any other person, shall survive to the personal representative of the deceased plaintiff. In case of the death of the defendant, the cause of action shall survive against said defendant's personal representative. However, in the event of the death of the wrongdoer before an action has been brought against him, the personal representative of the wrongdoer in such capacity shall be subject to the action just as the wrongdoer himself would have been during his life, provided that there shall be no punitive damages against the personal representative.

GA. CODE ANN. § 3-505 (Supp. 1982).

The two states interpret the phrase "injury to the person" differently, however. In *Carver v. Morrow*, 213 S.C. 199, 48 S.E.2d 814 (1948), the court interpreted the South Carolina statute as not permitting defamation actions to survive.

In contrast, Georgia courts have allowed defamation actions to survive. In *Johnson v. Bradstreet*, 87 Ga. 79, 13 S.E. 250 (1891), the court, in interpreting the statute to permit the survival of defamation actions, stated that "there is no good reason to conclude that [the legislature] intended to use [the words "injury to the person"] in such a restricted sense as would confine them alone to bodily or physical injuries." *Id.* at 83, 13 S.E. at 251.

In a subsequent case, however, the Georgia Supreme Court held that an executor is not liable in damages for allegedly libelous material contained in a will. *Citizens' & S. Bank v. Hendricks*, 176 Ga. 692, 168 S.E. 313 (1933). *Hendricks* was distinguished by a Georgia appeals court in *Posner v. Koplin*, 94 Ga. App. 306, 94 S.E.2d 434 (1956), on the grounds that the *Hendricks* case "was not pending at the time of the defendant's death, although the right had accrued." 94 Ga. App. at 310, 94 S.E.2d at 437.

67 PROSSER AND KEETON, *supra* note 46, § 126, at 943.

ble interests are gradually being discarded.⁶⁸ Some courts and commentators have also rejected strict rules of statutory construction which often preclude the survival of defamation actions.⁶⁹ In light of these developments, *Canino* may very well provide guidance for those jurisdictions whose survival statutes may reasonably be interpreted to encompass defamation actions.

IV. Conclusion

The *Canino* decision is significant because it represents a departure from a traditional common law view which continues to prevail in a majority of jurisdictions. While the majority position may have some justification, it is based, at least in part, on anachronistic historical distinctions. The *Canino* opinion is in accord with the goals of defamation law, compensation for and restoration of the victim's reputation. Furthermore, the remedial purpose of survival statutes is better effectuated under *Canino*. In defamation suits, as in any other tort action included in survival statutes, either the victim or his representatives should have the right to seek compensation for both the tangible and intangible harm suffered.

Joseph C. Chapelle
Karen L. Sterchi

68 See note 47 *supra* and accompanying text.

69 See notes 54-58 *supra* and accompanying text.

CRIMINAL LAW—UNITED STATES V. LYONS: ABOLISHING THE VOLITIONAL PRONG OF THE INSANITY DEFENSE

Under Anglo-American criminal law, legal insanity, if proved, is an effective criminal defense. The rationale is that the blameworthy should be punished and the legally insane are not blameworthy.¹ The key question, of course, is: What constitutes "legal insanity"?² For decades, courts have struggled to answer this question and to fashion a standard which will distinguish those who are legally insane and thus entitled to be relieved from criminal responsibility from those who are not.³ Although this defense has always aroused disagreement, several widely publicized trials have injected new fervor into the controversy.⁴

The test which most of the federal courts currently use⁵ has received much attention in the wake of the outcome of the Hinckley trial.⁶ Most agree that reform of the insanity defense, and specifi-

1 As the District of Columbia court stated in *Holloway v. United States*, "our collective conscience does not allow punishment where it cannot impose blame." 148 F.2d 665, 666-67 (D.C. Cir. 1945); see also I. Kaufman, *The Insanity Plea on Trial*, N. Y. TIMES MAG., Aug. 8, 1982, at 1, col. 1, (reprinted in *Insanity Defense in Federal Courts: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 448 (1982) [hereinafter cited as *Insanity Defense in Federal Courts*]).

2 A. GOLDSTEIN, *THE INSANITY DEFENSE* 10 (1967).

Legal insanity differs from a psychiatric determination of insanity. The language of the test used to determine legal insanity is crucial. See notes 13-29 *infra* and accompanying text. Scholars have extensively evaluated and criticized the particular language of the various tests that have been used because the test chosen determines who will or will not be found insane and relieved of criminal responsibility. For another scholarly work on the insanity defense see generally R. GERBER, *THE INSANITY DEFENSE* (1984).

3 See notes 13-29 *infra* and accompanying text.

4 The trial and acquittal of John Hinckley aroused public furor. When the jury returned with their verdict acquitting the defendant of attempting to assassinate President Reagan, the public demanded reform of the defense.

In San Francisco, Dan White, a member of the board of supervisors, an ex-policeman and former fireman, shot and killed the mayor of San Francisco and a city supervisor in their offices at city hall. After many experts testified as to the defendant's mental state, the jury found the defendant guilty of a lesser included offense: two counts of manslaughter. Again the public questioned the use of the insanity defense. See W. WINSLADE, *THE INSANITY PLEA* 21-51 (1983) for lengthier descriptions of these events.

5 This is the American Law Institute Model Penal Code test [hereinafter ALI], discussed in detail at notes 25-29 *infra* and accompanying text.

6 See note 4 *supra*. As a preface to their comments, witnesses testifying in congressional hearings on the insanity defense cited the public furor resulting from the Hinckley verdict as a provocation to change the insanity defense. See generally *Insanity Defense in Federal Courts*, *supra* note 1; *The Insanity Defense: Hearings on S. 2572 Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982) [hereinafter cited as *The Insanity Defense: Hearings*].

cally the test to determine insanity, is necessary. The recommendations, however, are as numerous and varied as the groups proposing these changes.⁷ While Congress has never legislated in this area, many of these proposed changes have been formulated into bills and introduced into the United States Congress.⁸

Recently, the United States Court of Appeals for the Fifth Circuit, on its own initiative,⁹ changed the insanity test used in its jurisdiction. In *Lyons v. United States*,¹⁰ the court, which had previously

7 Recommendations for reform of the insanity defense can be broken down into three general categories. The first type proposes abolishing the insanity defense as it is used today, but allowing evidence of a mental disorder to raise a reasonable doubt as to the lack of the required mens rea for the offense. See *The Insanity Defense: Hearings supra* note 6, at 9-16 (statement of Sen Orrin G. Hatch); *The Insanity Defense: Hearings, supra* note 6, at 71-76 (statement of David Robinson); H.R. 6718, *Insanity Defense in Federal Courts, supra* note 1, at 117 (statement of Peter Areneus).

The second type of reform proposals redefines the insanity test by placing the burden of proving insanity by a preponderance of the evidence on the defendant, and in some cases proposes limiting psychiatric testimony. AMERICAN BAR ASSOCIATION, STANDING COMMITTEE ON ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, PROPOSED CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-6.9 (1984) [hereinafter cited as ABA STANDARDS]; see also STATEMENT ON THE INSANITY DEFENSE 12-13 (American Psychiatric Association 1982) [hereinafter cited as APA Statement].

The final type of recommendations provides for a fourth possible verdict of "guilty but mentally ill." H.R. REP. NO. 577, 98th Cong., 2d Sess. 8-9 (1984) [hereinafter cited as HOUSE REP.]; see also ABA STANDARDS, *infra*, at 386-88; APA STATEMENT, *infra*, at 9-10.

8 S. 818, 97th Cong., 1st Sess. (1981) (limit insanity defense); S. 1106, 97th Cong., 1st Sess. (1981) (reform insanity defense); S. 1558, 97th Cong., 1st Sess. (1981) (amend title 18 to limit the insanity defense and to establish a verdict of not guilty only by reason of insanity); S. 1995, 97th Cong., 1st Sess. (1981) (remedy procedural and structural defects in the criminal justice system); S. 2572, 97th Cong., 2d Sess. § 701 (1982) (abolish insanity defense and adopt mens rea test); S. 2658, 97th Cong., 2d Sess. (1982) (delimit insanity defense); S. 2669, 97th Cong., 2d Sess. (1982) (amend title 18 and limit insanity defense). For a discussion of these bills, see *Limiting the Insanity Defense: Hearings before the Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 3-85 (1982); H.R. 6716, 97th Cong., 2d Sess. (1982) (create verdict of guilty but insane). H.R. 6783, 97th Cong., 2d Sess. (1982) (limit expert testimony); see generally *Insanity Defense in Federal Courts, supra* note 1; S. 1762 and H.R. 2151 (limit insanity defense and shift the burden of persuasion to the defendant to prove insanity by clear and convincing evidence). These proposals are part of the Comprehensive Crime Act of 1983, S. 1762, 98th Cong., 1st Sess. (1983); H.R. 2151, 98th Cong., 2d Sess. (1984). See *Reform of the Federal Insanity Defense: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983); see also Note, *The Proposed Federal Insanity Defense: Should the Quality of Mercy Suffer for the Sake of Safety?*, 22 AM. CRIM. L. REV. 49 (1984) [hereinafter cited as Note, *The Proposed Federal Insanity Defense*].

9 The court could have disposed of the case without reaching the question of the adequacy of the insanity test in its jurisdiction. See 731 F.2d 243, 250 (5th Cir. 1984) (Rubin, Williams, J.J., dissenting) (Politz, Tate, Higginbotham, J.J., concurring in part, dissenting in part).

10 731 F.2d 243 (5th Cir. 1984).

used the American Law Institute Model Penal Code test (ALI test),¹¹ abolished the volitional prong of the test.¹² This note will discuss the holding and reasoning of *Lyons* and its impact on the insanity defense. Part I provides an historical background to the various tests used by American courts. Part II discusses the particular facts of *Lyons* and analyzes the court's justifications for abolishing the volitional prong. Part III discusses the impact of this decision on the federal insanity test.

I. Historical Background

The first insanity test adopted by American courts was the M'Naghten Rule.¹³ This test requires proof that

at the time of committing the act, the party accused was laboring under such a defect of the mind as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.¹⁴

Soon after its formulation, the M'Naghten test attained acceptance in most American jurisdictions.¹⁵ In spite of its widespread use,

11 *Blake v. United States*, 407 F.2d 908 (5th Cir. 1969); For the text of the ALI test see text accompanying note 25 *infra*.

12 The phrase "cognitive prong" refers to the portion of the test that concerns the defendant's capacity to appreciate the criminality or wrongfulness of his conduct. The phrase "volitional prong" refers to the portion of the test which speaks to the defendant's capacity to conform his conduct to the requirements of the law.

13 This rule was borrowed from an 1843 opinion of the House of Lords given after the acquittal of Daniel M'Naghten for the murder of Prime Minister Robert Peel's private secretary. M'Naghten believed that the Prime Minister of England was conspiring against him. In an attempt to assassinate the Prime Minister, M'Naghten mistakenly shot and killed the Prime Minister's private secretary, Drummond. M'Naghten's trial became the battleground for the medical profession and the law. Nine medical witnesses testified that M'Naghten was insane. The medical evidence was so persuasive that the trial court judge virtually directed a verdict for the accused. He stated to the jury,

I cannot help remarking that the whole of the medical evidence is on one side and that there is no part of it which leaves any doubt in the mind. . . . We feel the evidence, especially that of the last two medical gentlemen who have been examined, and who are strangers to both sides and only observers of the case, to be very strong, and sufficient to induce my learned brother and myself to stop the case.

The Queen v. Daniel M'Naghten, 4 State Trials, N.S. 847, 924 (1843). Following M'Naghten's acquittal, Queen Victoria expressed concern over the verdict and asked the House of Lords to examine the case. In response to questions regarding criminal responsibility, Lord Chief Justice Tindal articulated what has come to be known as M'Naghten's Rule. *Id.* at 730-52. For a lengthier description of this case, see R. GERBER, *supra* note 2, at 22-24.

14 M'Naghten's Case, House of Lords, 10 Cl. and F. 200, 8 Eng. Rep. 718 (1843).

15 New Hampshire promulgated its own test, similar to the *Durham* test, discussed in notes 22-24 *infra* and accompanying text. *State v. Pike*, 49 N.H. 399 (1869). In 1967, 30 states used the M'Naghten test alone. For a complete list of all jurisdictions, see A. GOLDSTEIN, *supra* note 2, at 241 n.1; see also Weiner, *Not Guilty By Reason of Insanity: A Sane Approach*, 56

commentators have criticized the test for focusing exclusively on the cognitive functions of the mind, claiming that it represents a far too restrictive rule.¹⁶

Agreeing with the criticism, some courts supplemented the M'Naghten standard with the irresistible impulse test.¹⁷ This test is perhaps misnamed because no exact formulation or particular language including the phrase "irresistible impulse"¹⁸ is used by the courts which have apparently adopted it. Generally stated, however, the jury is instructed to acquit a defendant if they find the defendant suffered from a mental disease or defect which kept him from controlling his actions.¹⁹

The M'Naghten-irresistible impulse combination also has been criticized.²⁰ Nevertheless, the M'Naghten-irresistible impulse combination remained the predominant standard in the United States for determining insanity until the 1950's.²¹

In 1954, the United States Court of Appeals for the District of Columbia Circuit announced a different insanity standard in *Durham*

CHICAGO-KENT L. REV. 1057, 1084 (1980). For a list of jurisdictions currently using the M'Naghten test alone, see Note, *The Proposed Federal Insanity Defense*, *supra* note 8, at 52 n.24.

16 The test divides the mind into separate cognitive, emotional and control components, thus ignoring current psychological thought which views the mind as an integrated unit. A. GOLDSTEIN, *supra* note 2, at 46-47.

Moreover, because this approach refers to intellectual awareness and cognition alone, it does not relieve individuals of criminal responsibility who may know that what they are doing is wrong but are unable to control their actions. Kuh, *The Insanity Defense — An Effort to Combine Law and Reason*, 110 U. Pa. L. Rev. 771, 782 (1962). See note 52 *infra* and accompanying text.

17 In 1967, eighteen states and the federal system supplemented the M'Naghten Rule with the irresistible impulse test. For a complete list of all jurisdictions, see A. GOLDSTEIN, *supra* note 2, at 241 n.1. Today, only a few states use both the M'Naghten Rule and the irresistible impulse test: Alabama (*Lokos v. State*, 278 Ala. 586, 179 So.2d 714 (1965)); Colorado (COLO. REV. STAT. § 16-8-101 (1973)); Georgia (GA. CODE ANN. §§ 26-702, 703 (1978)); New Mexico (*State v. White*, 58 N.M. 324, 270 P.2d 727 (1954)); Virginia (*Davis v. Commonwealth*, 214 Va. 681, 204 S.E.2d 272 (1974)); Wyoming (*Reilly v. State*, 496 P.2d 899 (Wyo. 1972)).

18 A. GOLDSTEIN, *supra* note 2, at 69.

19 *Parsons v. State*, 81 Ala. 577, 2 So. 834 (1887).

20 Like the M'Naghten Rule, the irresistible impulse test is criticized for its compartmentalization of thought processes. A. GOLDSTEIN, *supra* note 2, at 76. Commentators also focus on the test's requirement of a sudden, impulsive loss of control, which ignores the possibility of long-term, gradual loss of control. R. GERBER, *supra* note 2, at 39. Finally, critics state that the test broadens the insanity test too far. A. GOLDSTEIN, *supra* note 2, at 77.

21 H. FINGARETTE, *THE MEANING OF CRIMINAL INSANITY* 12 (1972). New Hampshire remained the only jurisdiction to reject the M'Naghten Rule, the irresistible impulse test or some combination of the two. It applied a "product" test much like the *Durham* test later adopted by the District of Columbia Circuit. See notes 22-24 *infra* and accompanying text.

v. United States.²² Using as its fundamental principle that thought processes are an integrated, functional unit, the court stated that: "an accused is not criminally responsible if his unlawful act was the *product* of mental disease or mental defect."²³

Although the Durham test never received widespread acceptance,²⁴ the break from the traditional M'Naghten test encouraged legal scholars and the courts to explore other approaches to the insanity defense. Most notable among these approaches is the American Law Institute proposal:

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law.²⁵

The ALI test has received wide acceptance; it has been adopted in all but one of the federal circuits.²⁶ Proponents argue that the ALI test is more consistent with the available medical testimony regard-

22 214 F.2d 862 (D.C. Cir. 1954).

23 *Id.* at 874-75 (emphasis added).

24 Commentators attribute this to the lack of definition for "product," the notion that a mental disease can cause an act, and the conclusory effect that psychiatric testimony seems to have on a jury. H. FINGARETTE, *supra* note 21, at 246-47. See also R. GERBER, *supra* note 2, at 43-48; A. GOLDSTEIN, *supra* note 2, 82-86.

25 MODEL PENAL CODE § 4.01(1) (Official Draft 1962).

26 The United States Court of Appeals for the First Circuit is the only circuit which has not adopted any variation of the ALI Model Penal Code test. The United States Court of Appeals for the Third Circuit, on the other hand, adopted only the volitional prong of the ALI test (a defendant must have lacked substantial capacity to conform his conduct to the requirements of the law) in *United States v. Currens*, 290 F.2d 751 (3d Cir. 1961) (see note 68 *infra*). The National Association of Criminal Defense Lawyers argues that the Court of Appeals for the First Circuit also adopted the *Currens* approach in *Beltran v. United States*, 302 F.2d 48 (1st Cir. 1962). Brief Amicus Curiae of the National Association of Criminal Defense Lawyers at 18, 731 F.2d 243 (5th Cir. 1984). This is a rather liberal interpretation of the *Beltran* opinion, however. Justice Aldrich, in his decision, stated that the record was insufficient to pass on the issue of the proper insanity standard to apply. He merely "commended" the trial court's consideration of cases such as *Currens*. He did not expressly adopt this approach.

See *Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1983) (en banc) (the court in *Bonner* held that the decisions of the fifth circuit prior to September 30, 1981 are "binding as precedent" in the Eleventh Circuit. 661 F.2d at 1207); *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972); *Wade v. United States*, 426 F.2d 64 (9th Cir. 1970); *United States v. Smith*, 404 F.2d 720 (6th Cir. 1968); *United States v. Chandler*, 393 F.2d 920 (4th Cir. 1968); *Pope v. United States*, 372 F.2d 710 (8th Cir. 1968); *United States v. Shapiro*, 383 F.2d 680 (7th Cir. 1967); *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966); *Wion v. United States*, 325 F.2d 420 (10th Cir. 1963), *cert. denied*, 377 U.S. 946 (1964). The Court of Appeals for the Fifth Circuit adopted the ALI test in *Blake v. United States*, 407 F.2d 908 (5th Cir. 1969). This has been overruled by *Lyons*.

ing insanity,²⁷ is less rigid,²⁸ and is simpler for a jury to apply and understand than other tests.²⁹ While some courts still use other tests, the majority have adopted some version of the ALI standard. Thus, the action of the Court of Appeals for the Fifth Circuit in *Lyons* represents a major event in the evolution of the insanity defense.

II. The *Lyons* Decision

In *Lyons v. United States*,³⁰ a grand jury had indicted Lyons on twelve counts of knowingly and intentionally securing controlled narcotics by misrepresentation, fraud, deception and subterfuge in violation of 21 U.S.C. § 843(a)(1976) and U.S.C. § 2 (1976).³¹ Before his trial, Lyons indicated that he planned to rely on the insanity defense.³² To support his claim, Lyons offered to present expert testimony which would show he had become involuntarily addicted to narcotics and that this involuntary addiction had rendered him incapable of conforming his conduct to the requirements of the law.³³

27 The ALI test requires that a defendant lack substantial capacity to conform his conduct to the law, while the M'Naghten standard requires total incapacitation. *Blake v. United States*, 407 F.2d 908, 914 (5th Cir. 1969); *United States v. Smith*, 404 F.2d 720, 727 (6th Cir. 1968); *United States v. Shapiro*, 383 F.2d 680, 685 (7th Cir. 1967). "The extremity of these conceptions is . . . the point that poses largest difficulty to psychiatrists when called upon to aid in their administration." MODEL PENAL CODE § 4.01 comment 4 (Proposed Official Draft 1955). The Model Penal Code views the mind as a "unified entity" and appreciates the numerous ways which a mental disease or defect can impair the mind's functioning. *United States v. Freeman*, 357 F.2d 606, 622 (2d Cir. 1966). It also balances the mind's cognitive and volitional functions in the two prongs of the test. Combining both a cognitive prong (lack of substantial capacity either to appreciate the criminality (wrongfulness) of his conduct) and a volitional prong (inability to conform conduct to the requirements of the law), the test allows for an inquiry into the defendant's entire personality to determine his criminal responsibility. *United States v. Chandler*, 393 F.2d 920, 926 (4th Cir. 1968).

28 A defendant need only lack substantial capacity, not be totally incapacitated. *Wade v. United States*, 426 F.2d at 71; *United States v. Freeman*, 357 F.2d at 622. As the Model Penal Code states, "[t]he law must recognize that when there is no black and white it must content itself with enforcing different shades of gray." MODEL PENAL CODE § 4.07 comment 4 (Proposed Official Draft 1955).

29 *United States v. Shapiro*, 383 F.2d at 685; *United States v. Freeman*, 357 F.2d at 623. The terms of the Model Penal Code test are precise and readily comprehensible. *United States v. Smith*, 404 F.2d at 727; *United States v. Freeman*, 357 F.2d at 623. The test is structured so that despite the expert testimony, the ultimate issue of fact is still within the province of the jury. 357 F.2d at 623; see also *United States v. Chandler*, 393 F.2d at 926, *Wion v. United States*, 325 F.2d at 430.

30 731 F.2d 243 (5th Cir. 1984).

31 *Id.* at 243.

32 *Id.* at 244.

33 *Id.* Lyons was basing his defense on the standard then used in the Fifth Circuit, the ALI test. See note 11 *supra* and accompanying text. Lyons' proffer of evidence appears in full at 704 F.2d at 744-47.

The trial court excluded all evidence relating to Lyons' drug addiction.³⁴ Lyons was convicted and appealed the court's ruling regarding the exclusion of the evidence of his drug addiction.³⁵ On appeal, the Court of Appeals for the Fifth Circuit, en banc,³⁶ summarily disposed of the precise question on appeal³⁷ and proceeded to reexamine³⁸ the insanity test in its jurisdiction.³⁹ In doing so, the court abolished the volitional prong of the ALI Model Penal Code test.⁴⁰

34 731 F.2d at 244.

35 *Id.*

36 While neither the panel decision, 704 F.2d 743 (5th Cir. 1984), nor the en banc court cite the trial court's justification for excluding evidence, that justification appears to have been based on the general rule that intoxication is not a mental disease or defect for the purpose of sustaining the insanity defense. The court, en banc, cites the following cases in support of the general rule: *Bailey v. United States*, 386 F.2d 1, 3-4 (5th Cir. 1967), *cert. denied*, 392 U.S. 946 (1968); *accord*, *United States v. Coffman*, 567 F.2d 960, 963 (10th Cir. 1977); *United States v. Moore*, 486 F.3d 1139, 1181 (D.C. Cir.) (en banc), *cert. denied*, 414 U.S. 980 (1973); *United States v. Stevens*, 461 F.2d 317, 321 (7th Cir. 1972); *Gaskins v. United States*, 410 F.2d 987, 989 (D.C. Cir. 1967); *Green v. United States*, 383 F.2d 199, 201 (D.C. Cir. 1967); *cert. denied*, 390 U.S. 961 (1968); *United States v. Freeman*, 357 F.2d 606, 625 (2d Cir. 1966); *Berry v. United States*, 286 F. Supp. 816, 820 (E.D. Pa. 1968), *rev'd on other grounds*, 412 F.2d 189 (3d Cir. 1969).

37 Initially, a panel of the Fifth Circuit had reversed the trial court's ruling, holding that whether drug addiction constituted a mental disease or defect presented a question for the jury. The court subsequently decided to rehear the issue en banc. 731 F.2d at 245.

38 Initially, the question on appeal was whether the trial court properly excluded the evidence of Lyons' drug addiction. The panel of the court of appeals stated that the question whether Lyons' involuntary addiction constituted a mental disease or defect was a matter to be considered by the jury. 704 F.2d at 744. On rehearing, en banc, the court considered that very question and, following the general rule, held that drug addiction, voluntary or involuntary, is not a mental disease or defect for legal purposes. 731 F.2d at 246; *see note 36 supra*.

39 The Court of Appeals for the Fifth Circuit, en banc, claimed that new policy considerations justified the reexamination. The only policy consideration that the court alluded to, however, was the court's disappointment in psychiatry's inability to support the test then being used in that jurisdiction. In his dissenting opinion, Justice Rubin discussed what he thought were the principal bases for consideration: (1) the potential threat to society of offenders manipulating the criminal justice system through the use of the volitional prong and (2) factfinders, especially juries, may be confused and manipulated by the vagueness of legal standards and the notorious "battle of the experts." 739 F.2d 994, 995-96 (Rubin, J. dissenting). In Justice Rubin's dissent, however, he criticized the court for even taking up the issue of the test for insanity in the *Lyons* case, because this was not the issue on which the appeal was taken. 731 F.2d at 250 (Rubin, J. dissenting).

40 Until *Lyons*, the Court of Appeals for the Fifth Circuit had used the ALI Model Penal Code test, *see note 25 supra* and accompanying text, which it had adopted in *Blake v. United States*, 407 F.2d 908 (5th Cir. 1969). At that time, the court believed it better reflected the current state of knowledge regarding behavioral science. In the court's words, the ALI Model Penal Code test would "serve as a vehicle to enable the court and jury to give effect to the defense of insanity in terms of what is now known about the mind." *Id.* In reexamining its position and evaluating the present state of science, the court in *Lyons* admitted that it may have been premature in concluding that the current state of knowledge in the medical and behavioral health fields would provide enough data for jurors using the ALI test to effectively evaluate a defendant's sanity. 731 F.2d at 248.

The court of appeals held that "a person is not responsible for criminal conduct on the grounds of insanity only if at the time of that conduct, as a result of a mental disease or defect, he is unable to appreciate the wrongfulness of that conduct."⁴¹ Thus, in the Fifth Circuit, the insanity defense is not available to a criminal defendant on the sole basis that he was unable "to conform his conduct to the requirements of the law."⁴²

The *Lyons* court abolished the volitional prong, first, because it felt that the volitional prong did not comport with current medical and scientific knowledge.⁴³ In the 1950s, a growing optimism developed in the ability of the psychiatric profession to evaluate a person's volitional capacity.⁴⁴ This ability, according to the court, has not materialized.⁴⁵ Lack of knowledge regarding volition has led some authorities to argue that the volitional prong is too broad since it would categorize someone as insane who is "fundamentally rational."⁴⁶ Thus, the critics object to any standard for relieving criminal responsibility based on a defendant's inability to control his conduct.⁴⁷

Despite the critics' objections, neither the lack of knowledge regarding volition nor the difficulty in distinguishing the impulse which could not be resisted from the one which merely was not resisted⁴⁸ justifies the court's abolition of the volitional prong. The *Lyons* court does not argue that individuals can always control their

41 731 F.2d at 249. The court also modified the test by using the phrase "is unable" as opposed to "lacks substantial capacity" to simplify the standard and reduce the possibility of a "loose" interpretation by the jury. *Id.*; see ABA STANDARDS, *supra* note 7, at 334.

42 MODEL PENAL CODE § 4.01(l) (Official Draft 1962).

43 731 F.2d at 248; see also Stansfiel, *The Questionable Sanity of the Insanity Defense*, 8 BARRISTER 19, 48 (Spr. 1981).

44 ABA STANDARDS, *supra* note 7, at 330. The court left open the possibility that it might reinstate the volitional prong if the scientific evidence were available to apply it. 731 F.2d at 248 n.9.

45 ABA STANDARDS, *supra* note 7, at 330; see also APA STATEMENT, *supra* note 7, at 11; *Insanity Defense in the Federal Courts*, *supra* note 1, (Statement of Stephen J. Morse, Professor of Law and Psychiatry and the Behavioral Sciences, University of Southern California Law Center and School of Medicine) [hereinafter cited as Morse]; Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194, 196 (1983) [hereinafter cited as Bonnie].

46 Morse, *supra* note 45, at 232.

47 The APA argues that "[t]he line between an irresistible impulse and an impulse not resisted is probably no sharper than that between twilight and dusk." APA STATEMENT, *supra* note 7, at 11. "It is not possible to establish with sufficient consistency with scientific precision whether an individual was able to exercise meaningful choice in the commission of a socially harmful act." Stansfiel, *supra* note 43, at 48. Therefore, it follows that providing a defense based on the defendant's inability to exercise meaningful choice would be quite problematic. Morse, *supra* note 45, at 233.

48 R. GERBER, *supra* note 2, at 38.

conduct and therefore the volitional prong is superfluous. Rather, the court only states that psychiatry cannot accurately measure capacity for self-control.⁴⁹ Thus, it is entirely possible that a defendant who could not make a meaningful choice as to his conduct would be held morally and legally responsible for it under the *Lyons* court's new test.

The *Lyons* court also eliminated the volitional prong because mistakes as to the moral blameworthiness of a defendant are most likely to occur when a jury is asked to speculate on the issue of a defendant's control.⁵⁰ The court implies that this narrower test would achieve morally correct results more often.⁵¹ The objective of the law, however, should not be to achieve morally correct results more often, but rather to avoid morally incorrect results at all times. Historically, criminal law has been based on the idea that it is better to let ten guilty persons go free than to convict one innocent person. By eliminating the volitional prong, the court infers that it is willing to accept mistakes as to the moral blameworthiness of defendants who truly cannot control their conduct. The court's opinion admits that persons such as this do exist,⁵² but it makes no provision for them.

The *Lyons* court's third basis for abolishing the volitional prong was that psychiatric testimony regarding the volitional prong was more confusing to jurors than testimony relating to the cognitive test.⁵³ This occurs because there is a stronger scientific basis for evaluating a person's cognitive capacity than his volitional capacity.⁵⁴ Also, psychiatric testimony relating to volition generally is combined with vague or broad interpretations of the term "mental disease or defect."⁵⁵ This combination forces a jury to evaluate a great volume of expert opinion⁵⁶ of a highly speculative nature. Since both sides

49 731 F.2d at 248.

50 *Id.*; see also Bonnie, *supra* note 45, at 196.

51 See 731 F.2d at 249; HOUSE REP., *supra* note 7, at 10-11.

52 See 731 F.2d at 249 ("most psychotic persons who fail a volitional test would fail a cognitive test.") This implies that there are people who would fail only the volitional test.

53 *Id.*

54 *Id.*

55 ABA STANDARDS, *supra* note 7, at 329; see also APA STATEMENT, *supra* note 7, at 11.

56 The Model Penal Code supported the widespread use of expert testimony in applying the insanity standard. The Official Comment to § 4.07 states that

a psychiatric expert who has examined the defendant will have an opportunity to state and explain his diagnoses of the defendant's mental condition at the time of the conduct charged, and his opinion as to the extent of the defendant's mental impairment at that time, without such a witness being restricted to the latter testimony alone and without his having to state his opinion in hypothetical form.

generally have several experts testify, it is not difficult to understand why the court was concerned with the possibility of juror confusion.

Although this may be an excellent argument for limiting the admissibility of certain expert evidence,⁵⁷ it is not a valid justification for eliminating the volitional prong of the insanity defense. The ultimate question to be answered by the judge or jury is not whether the "choice" of the defendant was determined by his mental disorder,⁵⁸ but whether this defendant should be held accountable for his "choice."⁵⁹ In this respect, the insanity defense is much like the defenses of mistake, duress, and necessity.⁶⁰ The focus is whether the

MODEL PENAL CODE §4.07 comment 4 (Proposed Official Draft 1955).

The Federal Rules of Evidence tend to support the Model Penal Code position. Rule 702 states that an expert may testify as to scientific, technical or other specialized knowledge if it will assist the factfinder in determining a fact in issue. This testimony may be in the form of an opinion. *See* FED. R. EVID. 702. Rule 704 states that opinion testimony is admissible even if it "embraces an ultimate issue to be decided by the trier of fact." FED. R. EVID. 704. These rules, in effect, allow a psychiatrist to testify as to the criminal responsibility of a defendant in terms of sanity or insanity. *See* FED. R. EVID. 704 advisory committee note.

57 Recently, the ABA, the APA, and the House Judiciary Committee have recommended that the rules regarding expert testimony in insanity cases be limited. The APA believes that the psychiatrist should present "medical information and opinion about the defendant's mental state and motivation and to explain in detail the reason for his medical-psychiatric conclusions." *See* APA STATEMENT, *supra* note 7, at 14. But, were a psychiatrist asked to give his opinion as to the ultimate issue of fact, he would no longer testify as to medical concepts. *Id.* Rather, he would testify as to the "probable relationship between medical concepts and legal or moral constructs. . . ." *Id.* This is an issue of fact which is to be decided by a jury.

Professor Morse suggests that psychiatric testimony be limited even further. He believes that the expert should testify only as to the defendant's behavior, and not as to diagnoses or speculations about the causes. Morse, *supra* note 45, at 235.

Professors Bonnie and Slobogin disagree with Professor Morse. In a recent article they argue that in certain instances diagnoses can be useful information to a jury. Bonnie & Slobogin, *The Role of Mental Health Professionals in the Criminal Process*, 66 VA. L. REV. 427, 473 (1980). Although Bonnie and Slobogin admit that in many cases diagnoses will provide little or no help, they state that diagnoses can yield "insights that are both probative and valuable to the fact finder on the 'mental disease' issue." *Id.* at 468. Without these opinions, they conclude, the factfinder would be left with the description of mere symptoms and his own conceptions of mental illness to aid in his interpretation. *Id.* at 468-69.

The House Judiciary Committee appears to support the position of Professors Bonnie and Slobogin. In its report on H.R. 3336, 98th Cong., 1st Sess. (1983), the Committee expressed the idea that an expert witness should testify neither as to the ultimate issue of fact (whether the defendant was able to appreciate the wrongfulness of his conduct) nor as to whether the defendant had the requisite mental state for the crime. HOUSE REP., *supra* note 7, at 16.

58 Hermann, Book Review, 51 GEO. WASH. L. REV. 329, 338 (1983) (reviewing N. Morris, MADNESS AND THE CRIMINAL LAW (1982)) [hereinafter Hermann]. Expert testimony would be necessary to resolve this question as it deals with a deterministic relationship between a mental disorder and an act.

59 Hermann, *supra* note 58, at 338.

60 *Id.*

defendant, *but for* his excuse of insanity, should be held accountable for an otherwise criminal act.⁶¹ Thus, expert testimony in this instance would be limited to the issue of the defendant's mental condition at the time of the criminal act.⁶² The jury would then be asked to determine whether the defendant's choice should be excused.

The court further justified its decision on the grounds that the existence of the volitional prong increases the risk that a defendant may fabricate a claim of insanity.⁶³ The lack of scientific knowledge regarding volition further increases this risk.⁶⁴ Since a defendant's self-control, or lack thereof, cannot be proved, nothing discourages an insanity defense based on the volitional prong of the ALI test.

The fear of fabrication, however, does not support the abolition of the volitional prong.⁶⁵ The problem is not the volitional prong itself, but rather the confusing and conflicting expert testimony which accompanies the defendant's invocation of the volitional prong. Thus, the solution is not to abolish the volitional prong, but rather to amend the rules of evidence so as to limit the type of expert testimony in insanity cases.⁶⁶

Finally, the *Lyons* court felt that the volitional test was unnecessary.⁶⁷ The court stated that a considerable overlap existed between the volitional and cognitive prongs of the ALI test and that most psychotic persons who would fail the volitional test would also fail the cognitive test.⁶⁸ The key phrase in the court's reasoning is "*most* psychotic persons."⁶⁹ Since only "*most*" would fail both tests, there is still the problem of the few who would fail only the volitional test.

61 *Id.* at 338-39.

62 "The availability of expert testimony and the probative value of such testimony are basically evidentiary problems that can be accommodated within the existing test." *United States v. Lyons*, 739 F.2d 994, 998 (5th Cir. 1984) (Rubin, J., dissenting); *see note 57 supra*.

63 731 F.2d at 249.

64 *Id.*; *see also* ABA STANDARDS, *supra* note 7, at 330; Bonnie, *supra* note 45, at 196.

65 *See note 57 supra*.

66 *See notes 57-62 supra* and accompanying text.

67 731 F.2d at 249.

68 *Id.* *Contra* *United States v. Currens*, 290 F.2d 751, 774 n.32 (3d Cir. 1961) (the court held that the cognitive prong should be eliminated as it overemphasizes the cognitive element in criminal responsibility and therefore is superfluous).

69 731 F.2d at 249 (emphasis added); *see note 52 supra* and accompanying text; Professor Morse also notes:

In fact, however, a strong impulse to offend *almost always* will be the result of some cognitive irrationality. For instance, in the case of a defendant who feels he 'must' kill because he delusionally believes the Lord commanded him to do so (or because it is necessary to foil a plot against him), the impulse arises from the crazy belief, and thus the situation can be dealt with by a cognitive test.

Morse, *supra* note 45, at 231 (emphasis added).

The new test formulated by the court fails to provide for the person who genuinely could not control his conduct. Thus, under the new test, it is possible that certain defendants will be convicted even though they are not morally or legally blameworthy. This offends a basic concept of our criminal justice system. Accordingly, the *Lyons* court's decision to eliminate the volitional prong of the ALI Model Penal Code test cannot be justified.

III. Impact and Conclusion

The decision of the court of appeals in *Lyons* is not a sound judgment. It eliminates a viable and necessary prong of the insanity defense⁷⁰ without considering less drastic alternatives.⁷¹ In abolishing the volitional prong, the court seems to have responded to recent demands for reform of the insanity defense. As a result of the court's decision, the number of insanity pleas will decrease, along with the number of "moral mistakes" as to a defendant's blameworthiness. Although the public may be satisfied, the court, nevertheless, eliminated a vital prong of the insanity defense, thereby potentially allowing for the conviction of persons deserving acquittal.⁷²

The federal courts soon may all be forced to eliminate any claim of insanity based on the volitional test. Congress currently is consid-

70 *But see* HOUSE REP., *supra* note 7, at 11. "[T]he volitional portion of the ALI test is contrary to the 'free-will' premise of the Anglo-American criminal justice system—that an adult, with an accurate knowledge of a factual situation, can freely choose between right and wrong, and can therefore be held morally blameworthy (and criminally responsible) for anti-social conduct."

The ABA argues that if a defendant were able to appreciate the wrongfulness of his conduct, he should be held morally responsible regardless of his ability to control his conduct. Brief Amicus Curiae of the American Bar Association at 11-12, *United States v. Lyons*, 731 F.2d 243 (5th Cir. 1984); *see also* Bonnie, *supra* note 45, at 196-97.

71 Six weeks after the fifth circuit decided *Lyons*, the United States Court of Appeals for the Second Circuit had the opportunity to reconsider its standard for insanity in *United States v. Torniero*, 735 F.2d 725 (2d Cir. 1984). The *Torniero* court narrowed the definition of the volitional prong but did not eliminate it. The Second Circuit now requires, in terms of the volitional test, that a defendant show that his alleged disorder is a mental disease or defect and that there is a relevant connection between the disorder and the defendant's inability to control his conduct. *Id.* at 731-32.

According to Justice Rubin, dissenting in *Lyons*, a defendant must show (1) "that respected authorities in the field share the view that the disorder is a disease or defect that could have impaired the defendant's ability to desist from the offense charged . . . and (2) the alleged disease or defect must be relevant to the crime charged." 739 F.2d at 998 (Rubin, J. dissenting).

Professor Morse also suggested that the volitional prong could be retained if it were written so narrowly as to "excuse only those who were utterly overwhelmed by their impulses." Morse, *supra* note 45, at 233.

72 *See* note 52 *supra* and accompanying text.

ering bills which eliminate the volitional prong and further restrict the definition of "mental disease or defect."⁷³ This movement to eliminate the volitional prong and narrow the definition of "mental disease or defect" is also advocated by organizations such as the ABA and APA and by certain notable scholars.⁷⁴

With this strong base of support, the law on the insanity defense is likely to change.⁷⁵ Whether other courts will follow the lead taken by the *Lyons* court is uncertain. Nonetheless, the chief impact of the *Lyons* case will not be in limiting the number of insanity pleas and verdicts, but rather in calming the fervor which presently surrounds the insanity defense. Since the insanity plea is rarely used anyway,⁷⁶ it is unrealistic to assume that the *Lyons* decision will have a dramatic impact on the number of insanity pleas. Granted, the *Lyons* decision may limit the use of the insanity defense to some extent within the Fifth Circuit, but not to the extent which the public expects.⁷⁷ Thus, to the public, *Lyons* represents an effort, by one court, to do something about the "John Hinckleys" of this world.

Judith A. Morse
Gregory K. Thoreson

Addendum

On October 12, 1984, President Reagan signed into law the Comprehensive Crime Control Act of 1983. This act amends 18 U.S.C. § 20(a) to read as follows:

Affirmative Defense— it is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of mental disease or defect,

73 See notes 7-8 *supra*.

74 See note 45 *supra*.

75 See addendum *infra*.

76 In New Jersey in fiscal year 1982, 0.16% of all adult defendants pleaded insanity. In Virginia the figure was less than 1%. New York's rate was less than 2%. California had a rate of 1.3%, and in Wyoming only 0.47% of all felony indictments resulted in insanity pleas. HOUSE REP., *supra* note 7, at 5 n.7.

77 Justice Rubin cited a Wyoming study which examined the public's perceptions of the insanity defense. Estimates of the frequency for which the defense was invoked ranged from 13% to 57% of the time. The actual figure was 0.47%. Estimates regarding the success rate ranged from 19% to 44%, whereas less than 1% actually succeeded. 739 F.2d at 995 n.8 (citing Pasewark, *Insanity Plea: A Review of the Research Literature*, 9 J. PSYCHIATRY & L. 357, 360-61 (1981)).

was unable to appreciate the nature and quality or the wrongfulness of his acts. Mental disease or defect does not otherwise constitute a defense.

This test, which is essentially the same standard for insanity that the Lyons court enunciated, is now the standard for legal insanity in the federal system. The arguments against the validity of the Lyons rationale apply equally to the new federal standard, and should be considered by state courts faced with a question similar to that presented in Lyons.

TORT LAW — *KELLY v. GWINNELL*: THE SOCIAL HOST AND HIS VISIBLY INTOXICATED GUEST: JOINT LIABILITY FOR INJURIES TO THIRD PARTIES AND PROPER EVIDENTIARY TESTS

On June 27, 1984, in *Kelly v. Gwinnell*,¹ the New Jersey Supreme Court held:

[A] host who serves liquor to an adult social guest, knowing both that the guest is intoxicated and will thereafter be operating a motor vehicle, is liable for injuries inflicted on a third party as a result of the negligent operation of a motor vehicle by the adult guest when such negligence is caused by the intoxication.²

Many jurisdictions have imposed criminal and civil liability upon licensees who furnish alcoholic beverages to either minors or visibly intoxicated adults.³ Few jurisdictions, however, have extended civil liability to social hosts for injuries related to their providing liquor to minors. Even fewer jurisdictions have extended liability where the consumer is an adult.⁴ The *Kelly* decision represents the forefront of imposing liability on social hosts.

This comment examines the *Kelly* court's imposition of liability on the social host for the negligent acts of the host's intoxicated guest. The first section analyzes the court's decision. The second section discusses the viability of the *Kelly* decision as opposed to a legislative response. The third section addresses evidentiary problems which may arise with this expansion of social host liability.

I. *Kelly v. Gwinnell*

On the evening of January 11, 1980, Catherine and Joseph Zak served their guest, Donald Gwinnell, several drinks.⁵ Mr. Zak then

1 476 A.2d 1219 (N.J. 1984).

2 *Id.* at 1224.

3 *See Drunk Driver*, 70 A.B.A. J. 31 (Sept. 1984):

Nineteen states have dram shop statutes and 17 others have case law on the subject, said Ronald Beitman, editor of *Dram Shop and Alcohol Reporter* and a Falmouth, Mass., lawyer who represents drunk driving victims. Although many of the statutes have been in place for many years, they are being used much more now. Beitman said dram shop case filings in the first half of 1984 ran 300 percent ahead of the same period last year. The laws generally hold servers liable for injuries that follow after alcohol is served to persons who are visibly intoxicated.

4 *See generally* Annot., 97 A.L.R. 3d 528 (1980).

5 476 A.2d at 1220. After unsuccessfully trying to extricate Joseph Zak's truck from the mud, Gwinnell joined Mr. and Mrs. Zak for a couple of drinks at the Zaks' home. According to the Zaks and Gwinnell, Gwinnell had only two or three drinks of scotch.

accompanied Gwinnell to his car and watched as Gwinnell drove off to go home.⁶ On the way home, Gwinnell's car collided head-on with a car driven by Marie Kelly. Kelly suffered serious injuries in the accident.⁷ After the accident police gave Gwinnell a blood test which indicated a blood alcohol concentration of 0.286 percent.⁸ Upon phoning Gwinnell's home to see if he had arrived safely, Mr. Zak was informed of the accident by Mrs. Gwinnell.⁹

Kelly initially sued only Gwinnell, but subsequently amended her complaint to include the Zaks as defendants.¹⁰ The Zaks filed a motion for summary judgment, and the trial court held as a matter of law that a social host was not liable for the negligence of his guests who drove after becoming intoxicated at the host's home.¹¹ The Appellate Division affirmed the trial court's final judgment in favor of the Zaks, noting that its own precedent, as well as virtually every other jurisdiction's case law, supported this result.¹²

In a 6-1 decision, the New Jersey Supreme Court reversed the Appellate Division and specifically held that a social host, who serves alcohol to an adult guest with knowledge both that the guest is intoxicated and will soon be driving, is liable to third parties who are injured by the guest's negligent driving when intoxication is the cause of his negligence.¹³ The court, while declaring that many of the traditional bases for tort liability were present,¹⁴ acknowledged that

6 *Id.*

7 *Id.*

8 *Id.* This level is significantly higher than New Jersey's statutory level of 0.10 percent which subjects a driver to criminal liability for driving while under the influence of intoxicating liquor. N.J. STAT. ANN. § 39:4-50 (West 1973), amended by N.J. STAT. ANN. § 1983, c. 444 (West Supp. 1984-85). At trial, plaintiff's expert testified that this level indicated consumption of approximately thirteen drinks, rather than the two or three drinks to which defendants testified. 476 A.2d at 1220; *see* note 5 *supra* and note 91 *infra*.

9 476 A.2d at 1220.

10 *Id.*

11 *Kelly v. Gwinnell*, 190 N.J. Super. 320, 325-26, 463 A.2d 387, 390-91 (1983). The trial court entered final judgment on this order pursuant to N.J. Court Rules 4:42-2 to allow immediate appeal of this order. 476 A.2d at 1221.

12 463 A.2d at 390. Moreover, the appellate court, stating that New Jersey had not imposed liability on a social host in this situation, specifically declined to expand this field on its own initiative. *Id.* Thus, the Supreme Court was squarely faced with the opportunity to do so, if it wished.

13 476 A.2d at 1224; *see* text accompanying note 2 *supra*.

14 476 A.2d at 1221. The *Kelly* court stated that "[w]hen negligent conduct creates such a risk, setting off foreseeable consequences that lead to plaintiff's injury, the conduct is deemed the proximate cause of the injury." The court felt that a reasonable person in the Zaks' position, observing a severely intoxicated person to whom he had served many drinks, could foresee the likelihood of the person's injuring someone by his inability to drive his car carefully. Therefore, "[t]he usual elements of a cause of action for negligence [were] clearly

the imposition of such a duty to third parties represented a change.¹⁵ The court gave three major reasons for its decision: (1) the trend of past New Jersey decisions pointed clearly to this result;¹⁶ (2) few factors distinguished social hosts from licensees on whom liability already had been imposed;¹⁷ and (3) strong public policy reasons favored imposing liability.¹⁸

First, the court noted that New Jersey courts have gradually widened the scope of liability for providers of alcoholic beverages where intoxicated drivers subsequently injured third parties. New Jersey first imposed liability on the provider of alcohol in *Rappaport v. Nichols*,¹⁹ where a tavern owner, who had served alcohol to a minor, was held liable to a member of the general public subsequently injured by the intoxicated minor. Later, the court extended the duty to hold a tavern owner liable for injuries to third parties caused by either intoxicated minor customers or intoxicated adult customers.²⁰ The appellate court subsequently imposed liability on a social host

present: an action by defendant creating an unreasonable risk of harm to plaintiff, a risk that was clearly foreseeable, and a risk that resulted in an injury equally foreseeable." 476 A.2d at 1222.

This reasoning is a departure from the common law rule, however, which stated that the proximate cause of the injury in drunken driving cases was the consumption, not the provision of alcohol. See Annot., *supra* note 4, at 533; see, e.g., *Klien v. Raysinger*, 470 A.2d 507, 510 (Pa. 1983) (social host not liable for providing alcohol to a visibly intoxicated guest because the proximate cause is the consumption, not the provision of alcohol); *Nevin v. Carlasco*, 130 Mont. 512, 515-16, 365 P.2d 637, 639 (1961) (tavern owners not liable for selling alcoholic beverages to intoxicated patron who pushes another patron to the floor since the "proximate cause is the act of [he] who imbibes the liquor").

15 476 A.2d at 1229. California and Oregon had previously extended liability, but the legislatures of these states modified the rule. See note 65 *infra*. Otherwise, courts have not held a social host liable. See Annot., *supra* note 4, at 568-71, 574-77.

16 476 A.2d at 1222.

17 *Id.* at 1224.

18 *Id.* The court stated that it "impose[d] this duty on the host to the third party because [it] believe[d] that the policy considerations served by its imposition far outweigh those asserted in opposition." *Id.*

19 31 N.J. 188, 156 A.2d 1 (1959). The court in *Rappaport* also based its decision on common law negligence. The tavern owner sold alcohol to a minor who was then involved in an auto accident in which the plaintiff's decedent was killed. The court established that the licensee owed a duty to members of the general public. Rejecting the common law rule, the court stated that the proximate cause of the accident was furnishing alcohol, thus making the tavern owner liable. *Id.* at 203-04, 156 A.2d at 9.

20 *Sorenen v. Olde Milford Inn, Inc.*, 46 N.J. 582, 218 A.2d 630 (1966). In *Sorenen*, an adult patron in a bar became intoxicated, fell, and killed himself. New Jersey had a statute making it illegal to sell alcoholic beverages to intoxicated people. But the court stated, "[i]f despite the regulation, Frei wrongfully served Sorenen though he then knew or should have known of Sorenen's intoxicated condition, Frei and the Olde Milford Inn subjected themselves to common law negligence claims for damages proximately resulting from the wrongful service." *Id.* at 587, 218 A.2d at 633.

who served liquor to a visibly intoxicated minor, knowing the minor would be driving, if the minor then injured a third party.²¹ Thus, given this precedent, the *Kelly* court felt that imposing a duty represented a logical and foreseeable extension of liability.²²

Second, the court could not logically reconcile extending liability to a tavern keeper who provided liquor to an obviously intoxicated adult but not to a social host.²³ The court noted that the duty not to serve alcohol to intoxicated persons existed independently of any statute, and thus a social host "guilty of the same wrongful conduct [should not have immunity] merely because he is unlicensed."²⁴ Thus, a social host could not avoid liability by arguing that liability is derived from a statute and that the statute applies only to tavern

21 *Linn v. Rand*, 140 N.J. Super. 212, 356 A.2d 15 (1976). The appellate court stated "[t]he forward-looking and far-reaching philosophy expressed in *Rappaport* should also be applicable to negligent social hosts and should not be limited to holders of liquor licenses and their employees." *Id.* at 216, 356 A.2d at 17-18. The court never specifically stated that the decision applied only to minors, but rather said that each case must "be decided on a case by case basis." *Id.* at 220, 356 A.2d at 19. The *Kelly* court explicitly endorsed the *Linn* decision. 476 A.2d at 1223.

22 476 A.2d at 1222. Moreover, in noting each case, the court mentioned that the decisions were not restricted to the facts of the cases. *Id.* at 1223. In addition, the court analogized the *Kelly* situation to the situation where car owners lend their vehicles to intoxicated persons and are held liable for any injuries such people cause. *Id.* at 1224; *see generally* Annot., 19 A.L.R. 3d 1175 (1968).

23 Courts, however, have had many reasons for drawing a distinction between imposing liability on a tavern owner but not on a social host. First, a tavern owner may purchase insurance to cover his liability. *See* Comment, *California Finds Social Host Can Be Liable to Third Parties For Intoxicated Guest's Negligent Acts*, 12 CREIGHTON L. REV. 945, 968-69 (1979); *see also* notes 32-33 *infra* and accompanying text. Also, because of a tavern owner's daily association with customers, a tavern owner can better judge when someone is intoxicated than can a social host. *See, e.g., Kelly v. Gwinnell*, 476 A.2d 1219, 1233 (N.J. 1984) (Garibaldi, J., dissenting); *Edgar v. Kajet*, 84 Misc. 2d 100, 103, 375 N.Y.S.2d 548, 552 (1975), *aff'd*, 55 A.D.2d 597, 389 N.Y.S.2d 631 (1976) (court, in considering extending liability to a social host, questioned how a host will know a guest is intoxicated); *see also* notes 87-95, 125-35 *infra* and accompanying text. Finally, courts fear that imposing liability on a social host would restrict social interactions because individuals might be less inclined to entertain if they felt they had a duty to monitor their guests. 476 A.2d at 1224. In response, the *Kelly* court felt that the benefits outweighed the problems:

[G]iven society's extreme concern about drunken driving, any change in social behavior resulting from the rule will be regarded ultimately as neutral at the very least, and not as a change for the worse; but then in any event if there be a loss, it is well worth the gain.

Id.

24 476 A.2d at 1223-24 (quoting *Linn v. Rand*, 140 N.J. Super. 212, 217, 356 A.2d 15, 18 (1976)). In some states, tavern owners are liable because of dram shop acts. *See* Annot., *supra* note 4, at 545-51. For a brief history of dram shop acts *see* Note, *Social Host Liability for Injuries Caused By the Acts of an Intoxicated Guest*, 59 N.D.L. REV. 445, 448-51 (1983). In New Jersey, however, the courts established the liability of tavern keepers judicially in *Rappaport*. *See* note 19 *supra*. For the law in other states, *see* Annot., *supra* note 4, at 535-66.

keepers. In addition, the *Kelly* court dismissed the proposition that a tavern owner who derives a profit from providing alcohol should be held liable, but a social host should not.²⁵ Finally, the court stated that the narrower duty of a social host will compensate for the differences which exist between a social host and a licensee. The tavern keeper is liable whenever he serves an intoxicated patron.²⁶ The social host, however, must personally serve alcohol to someone whom he knows will drive.²⁷ But in both cases, the courts hold the provider liable for foreseeable injuries.

Finally, the court relied on a public policy argument for imposing the duty.²⁸ The court observed that public concern for the problem has grown.²⁹ While recognizing the social importance of drinking,³⁰ the court believed the benefits of this social behavior were outweighed by the "added assurance of just compensation to the victims of drunken driving as well as the added deterrent effect of the rule on such driving."³¹ Furthermore, the court stated that present insurance policies would protect the homeowner from excessive financial hardship.³² Insurance would spread the cost throughout society.³³ Imposing all costs on the victim, which would occur in the

25 476 A.2d at 1224. The court focused on the fact that both parties are providers of alcohol and as such are responsible for such provision, stating that "the provider has a duty to the public not to create foreseeable, unreasonable risks by this activity." *Id.* Also, the profit that a tavern owner receives relates more to the insurance issue. For a discussion of this, see notes 32-33 *infra* and accompanying text.

26 This level of duty is reflected in *Sorenen v. Olde Milford Inn Inc.*, 46 N.J. 582, 218 A.2d 630 (1966), where the court held that the tavern keeper is liable "when he knows or should know that the patron is intoxicated." *Id.* at 587, 218 A.2d at 633.

27 The *Kelly* court emphasized this point several times. See notes 84-86 *infra* and accompanying text. The court stated "we decide only that where the social host directly serves the guest and continues to do so even after the guest is visibly intoxicated, knowing that the guest will soon be driving home, the social host may be liable for the consequences of the resulting drunken driving." 476 A.2d at 1228. The court states that it will consider other cases as they come before it. *Id.*

28 See note 18 *supra*.

29 476 A.2d at 1222.

30 476 A.2d at 1224. For a general overview of the social aspects of drinking, see Snyder & Pittman, *Drinking and Alcoholism*, 4 INT'L. ENCYCLOPEDIA OF SOC. SCI. 265, 268-74 (1968).

31 476 A.2d at 1224. The dissent argues that New Jersey auto insurance policies would cover all situations. *Id.* at 1232. In the event the victim is a pedestrian and the driver has no insurance, however, the victim would be left with all of the costs. As the *Kelly* majority indicates, it seems unfair to burden the innocent injured third party with the costs instead of the negligent social host. *Id.* at 1225.

32 *Id.* at 1225. See Note, *Social Host Liability For Furnishing Liquor-Finding a Basis for Recovery in Kentucky*, 3 N. KY. ST. L.F. 229, 245 (1976). The costs to raise liability limits would be minimal. See Note, *Extension of the Dram Shop Act: New Found Liability of the Social Host*, 49 N.D.L. REV. 68, 81 n. 74 (1972).

33 476 A.2d at 1229. Since this new liability would probably increase homeowner's insur-

case of an uninsured driver, would be unfair.

The court's reasoning is sound. Undoubtedly drunken driving has become a serious problem.³⁴ The *Kelly* court was willing to extend liability to effect social change and deter drunken driving.³⁵ Although there is no empirical evidence that imposing liability will deter drunken driving,³⁶ logic supports the conclusion that holding two parties liable, rather than only one, will persuade more people to act responsibly.³⁷

The *Kelly* court relied heavily on public policy to impose the social host's duty to third parties. The next section, however, addresses whether the judiciary is the proper branch to establish public policy, such as the one established in this case.

II. *Kelly* and the Legislature

By extending the liability of social hosts to third parties for the negligent provision of alcohol to adults, the New Jersey Supreme Court realized it could be criticized for acting legislatively.³⁸ Indeed, legislation proposed immediately after the announcement of the *Kelly* decision would abrogate the court's holding.³⁹ To determine

ance rates, *see* note 32 *supra*, the cost of social drinking will be imposed on all homeowners with policies.

34 "According to the Department of Transportation, 250,000 Americans were killed in alcohol-related accidents in the past 10 years, one every 20 minutes, and more than 700,000 are injured in such accidents each year." N.Y. Times, Dec. 14, 1983, at A24, col. 1. Public concern with the problem increased in recent years. *See Kraft, The Drive to Stop the Drinker From Driving: Suggested Civil Approaches*, 59 N.D.L. REV. 391, 391-92 (1983). Citizens throughout the country are forming groups to combat drunken driving. Some of these groups include Truckers Against Drunk Drivers, Students Against Driving Drunk, Physicians Against Drunk Driving, Mothers Against Drunk Driving, Dealers Against Drunk Driving, Citizens For Safe Drivers, and Remove Intoxicated Drivers. N.Y. Times, Aug. 9, 1983, at A12, col. 1. Extension of liability is another step in trying to alleviate the problem of drunken driving. 476 A.2d at 1222.

35 476 A.2d at 1229. The court states that this decision reflects "the upheaval of prior norms by a society that has finally recognized that it must change its habits and do whatever is required, whether it means but a small change or a significant one, in order to stop the senseless loss inflicted by drunken drivers." *Id.*

36 Even the court admitted that imposing liability on a social host gives "no assurance that it will have any significant effect" in deterring drunken driving. *Id.* at 1226.

37 Indeed, the likelihood that it will deter drunken driving is reflected in the dissent's argument that the holding will put a "heavy burden [on hosts] to monitor and regulate guests." *Id.* at 1230. In noting the possible change in social events where alcohol is served, the dissent must assume that fewer alcoholic beverages will be served. Thus, if less alcohol is served, fewer alcohol related accidents will occur.

38 *Id.* at 1226-29.

39 New Jersey Assembly Resolution 43 (1984) reads as follows:

An Act concerning the Service of Alcoholic Beverages and Supplementing Title 33 of the Revised Statutes. Be it enacted by the Senate and General Assembly of the

whether the courts or the legislature should decide the issue, two questions must be answered. Is the imposition of such liability a proper function of the judiciary? Moreover, even if this is a proper function of the judiciary, should the courts nevertheless defer to the legislature because of the nature of the problem? The *Kelly* court focused on the question of power;⁴⁰ other courts and critics have focused on the question of deference to the legislature.⁴¹

In *Kelly*, the New Jersey Supreme Court defended the propriety of its judicial determination on two grounds: 1) determining the scope of liability in negligence actions traditionally has been a judicial function;⁴² and 2) the legislature previously acquiesced to judicial expansion of liability to third parties for the negligent provision of alcohol.⁴³

To support its contention that the judiciary has traditionally determined the scope of liability in negligence actions, the court cited numerous cases where it "decided many significant issues without prior legislative study."⁴⁴ These decisions included the limitation of a plaintiff's recovery under the Comparative Negligence Act,⁴⁵ the abrogation of the state's sovereign immunity from tort claims,⁴⁶ the abrogation of charitable immunity,⁴⁷ and the abrogation of inter-

State of New Jersey: 1. No person, other than a person licensed according to the provisions of title 33 of the Revised Statutes to sell alcoholic beverages, who furnishes any alcoholic beverage to a person at or over the age at which a person is authorized to purchase and consume alcoholic beverages shall be civilly liable to any person or the estate of any person for personal injuries or property damage inflicted as a result of intoxication by the consumer of the alcoholic beverages. 2. This act shall take effect immediately.

40 In other words, the court's inquiry is limited to whether it has the authority in a constitutional sense to "legally" impose liability in this instance. Once this question is answered in the affirmative, the court does not elaborate on whether it *should* exercise this authority. 476 A.2d 1226-29; see Bischoff, *The Dynamics of Tort Law: Court or Legislature?*, 4 VT. L. REV. 35, 38 (1979).

41 The dissent in *Kelly*, as well as most of the courts which have left the question for the legislature, do not address the problem in terms of whether the court has the authority to impose social host liability. Instead, these courts look to see which body is capable of making a better decision. See notes 68-77 *infra* and accompanying text. Thus, the majority and the dissent are really arguing different issues. Both issues, however, are discussed in this comment.

42 476 A.2d at 1226.

43 *Id.*

44 *Id.* at 1227-28. These cases were also cited to support the proposition that the legislature is free to act in these areas as well. For the discussion of this issue, see notes 57-67 *infra* and accompanying text.

45 *Van Horn v. Blanchard Co.*, 88 N.J. 91, 438 A.2d 552 (1981).

46 *Willis v. Department of Conservation and Economic Dev.*, 55 N.J. 534, 264 A.2d 34 (1970).

47 *Dalton v. St. Luke's Catholic Church*, 27 N.J. 22, 141 A.2d 273 (1958); *Collopy v.*

spousal⁴⁸ and parent-child⁴⁹ immunity in automobile negligence cases. Each of these holdings determined the scope of a duty in a negligence action.⁵⁰ Few authorities argue that these decisions were not within the proper function of the judiciary.⁵¹ The court concluded that just as it could competently decide those prior issues, it could properly resolve the issue in *Kelly*.⁵²

The approaches in other jurisdictions support the *Kelly* court's position.⁵³ Similarly, commentators have observed that such determinations are commonly involved in negligence cases.⁵⁴ Thus, this type of determination falls within the scope of the judiciary's proper function.⁵⁵

Additionally, the *Kelly* court felt justified in imposing social host liability because of the legislature's acquiescence to judicial activism in this area of tort law.⁵⁶ Legislative inaction is an important consideration because the power of the courts to decide a question properly within the judicial function⁵⁷ can only be removed by legislative ac-

Newark Eye & Ear Infirmary, 27 N.J. 29, 141 A.2d 276 (1958); *Benton v. Y.M.C.A.*, 27 N.J. 67, 141 A.2d 298 (1958).

48 *Immer v. Risko*, 56 N.J. 482, 267 A.2d 481 (1970).

49 *France v. A.P.A. Transport Corp.*, 56 N.J. 500, 267 A.2d 490 (1970).

50 See Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1030 (1928). Professor Green characterizes the determination of duty as "the judgment required of a judge in giving or denying the protection of government to the interest involved." Each of these cases involves the court's giving or denying the protection of the government to the plaintiff's interest where the other elements of a cause of action exist.

51 "Proper function" refers to legitimate authority. See, e.g., *Bischoff*, *supra* note 40, at 38; Green, *The Duty Problem in Negligence Cases: II*, 29 COLUM. L. REV. 255, 279-84 (1929); see also note 54 *infra*.

52 476 A.2d at 1228.

53 See, e.g., *Rampone v. Wanskuck Bldgs., Inc.*, 227 A.2d 586 (R.I. 1967) (expanding the landlord's duty to persons on the premises with the tenant's consent); *Cohen v. Kaminetsky*, 36 N.J. 276, 176 A.2d 483 (1961) (expanding the duty of a driver to a guest passenger); *Dini v. Naiditch*, 20 Ill.2d 406, 170 N.E.2d 881 (1960) (expanding the duty of an occupier of land to firemen). For an exhaustive list of "overruling decisions," see R. KEETON, *VENTURING TO DO JUSTICE* 169-79 app. (1969). While *Kelly* does not overrule a previous decision, the same reasoning applies whether the decision overrules an earlier one or is instead a case of first impression. See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON THE LAW OF TORTS* § 3 (5th ed. 1984).

54 See, e.g., Green, *supra* note 51, at 279-84; Green, *The Submission of Issues in Negligence Cases*, 18 MIAMI L. REV. 30, 36-37 (1963); James, *Scope of Duty in Negligence Cases*, 47 NW. U. L. REV. 778, 814-16 (1953).

55 See *Bischoff*, *supra* note 40, at 38. The courts' power to decide such issues is not often questioned except when a statute is involved. It must be examined, however, because it is on this basis that the *Kelly* court defends its choice not to defer to the legislature. See note 40 *supra* and accompanying text.

56 476 A.2d at 1226-27.

57 See note 40 *supra* and accompanying text.

tion.⁵⁸ As the *Kelly* court indicated, it had been expanding liability in this area since 1959.⁵⁹ The only legislative activity in the area was an approval of the *Linn*⁶⁰ holding.⁶¹ Thus, in the development of law imposing liability for the negligent provision of alcohol, both the New Jersey legislature and the courts seem to feel that the courts can competently resolve problems in this area.⁶²

The impact of *Kelly* may differ in other jurisdictions; some courts do not have the same relationship with the legislature that the New Jersey courts have. First, in states which have dram shop acts, the courts may be precluded from further expansion of liability.⁶³ Second, in states with more active legislatures that have not actually foreclosed judicial action, a court, nevertheless, may wish to avoid the subsequent abrogation or restriction⁶⁴ of its holding. The *Kelly* dissent noted that in California and Oregon this situation exists.⁶⁵

58 For a good discussion of this issue, see *Cory v. Shierloh*, 29 Cal. 3d 430, 629 P.2d 8, 174 Cal. Rptr. 500 (1981).

59 476 A.2d at 1226. See notes 19-21 *supra* and accompanying text.

60 140 N.J. Super. 212, 356 A.2d 15 (1976).

61 476 A.2d at 1226.

62 This is in regard to the history of liability to third parties for the negligent provision of alcohol in New Jersey. If the legislature abrogates the holding of *Kelly*, see note 39 *supra*, this would obviously signal a change from the past practices in New Jersey.

63 As the court in *Kelly* points out:

Whether mentioned or not in these opinions, the very existence of a Dram Shop Act constitutes a substantial argument against expansion of the legislatively-mandated liability. Very simply, when the Legislature has spoken so specifically on the subject and has chosen to make only licensees liable, arguably the Legislature did not intend to impose the same liability on hosts. See, e.g., *Edgar*, 375 N.Y.S.2d at 551-52.

476 A.2d at 1227; see also *Manning v. Andy*, 454 Pa. 237, 310 A.2d 75 (1973).

64 See 476 A.2d at 1231 (Garibaldi, J., dissenting). But see *id.* at 1227 n.13, where the majority stated:

The dissent's reference to Oregon statutes as abrogating or restricting a prior judicial determination in favor of the cause of action, *post* at 1231 is incorrect. The Oregon statute accepted the judicial determination similar to that made in this case; its effect . . . was only to prevent further expansions of liability beyond that allowed by this court today.

It seems that the majority's characterization is more accurate. See note 65 *infra*.

65 476 A.2d at 1231 (Garibaldi, J., dissenting). In California, the courts entered this area in *Vesley v. Sager*, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971). In *Vesley* the California Supreme Court abrogated the common law rule and held that the furnishing of alcohol to an intoxicated person may be the proximate cause of injuries inflicted by the intoxicated person upon a third person as a statute imposed a duty upon licensees. In *Bernhard v. Harrah's Club*, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976), the same court noted that, "although *Vesley* relied upon section 25602 of the Business and Professions Code to support its holding, nevertheless, 'the clear impact of our decision was there was no bar to civil liability under modern negligence law.'" *Cory v. Shierloh*, 29 Cal. 3d 430, 434, 629 P.2d 8, 10, 174 Cal. Rptr. 500, 502 (1981) (citation omitted). In *Coulter v. Superior Court*, 21 Cal.

Where dram shop acts are in force, the court's power to act is called into question.⁶⁶ Nevertheless, even where the legislature is active in this area, an anticipated legislative reaction to a court's decision does not indicate that the holding exceeded the court's proper function. As Professor Keeton states:

A court, then, should not refrain from correcting outmoded doctrine for fear of being chastised by the legislature's enactment of a statute restoring the old doctrine. Even in the unlikely event that a statute fully and unqualifiedly restores the overruled doctrine, its enactment should not be seen as a slap on the court's wrist or as an incident in a power struggle, but simply as a proper manifestation of the political will through the institution designed for such expressions.⁶⁷

3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978), the California court held that a social host who provides alcohol to an obviously intoxicated person (including adults), where the risk of harm to third persons is a reasonably foreseeable result of such provision, may be liable to third parties who are injured when such harm, in fact occurs.

Shortly after the decision in *Coulter*, the California legislature amended section 25602 of the Business and Professions Code to exempt both social hosts and commercial vendors from civil liability. The new sections state:

(b) No person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage pursuant to subdivision (a) of this section shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage.

(c) The Legislature hereby declares that this section shall be interpreted so that the holdings in cases such as *Vesely v. Sager* (5 Cal.3d 153), *Bernhard v. Harrah's Club* (16 Cal.3d 313) and *Coulter v. Superior Court* (— Cal.3d —) be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person.

CAL. BUS. & PROF. CODE § 25602 (West 1978).

In *Weiner v. Gamma Phi Chapter of Alpha Tau Omega*, 258 Or. 632, 485 P.2d 18 (1971), the Oregon Supreme Court held that the direct involvement of a host in serving alcohol to a minor may raise a duty "to refuse to serve alcohol to a guest when it would be unreasonable under the circumstances to permit him to drink." *Id.* at 643, 485 P.2d at 23.

The court also stated that the guest's age and the host's knowledge that the guest would be driving after the party were facts from which the jury might conclude that the host had acted unreasonably.

In 1979, the Oregon legislature enacted OR. REV. STAT. § 30.955 which states: "No private host is liable for damages incurred or caused by an intoxicated social guest unless the private host has served or provided alcoholic beverages to a social guest when such guest was visibly intoxicated."

66 If the legislature has specifically preempted the field, the court is without power to act absent constitutional considerations. See W. KEETON, D. DOBBS, R. KEETON, & D. OWEN, *supra* note 53, at 19; see also *Cory v. Shierloh*, 29 Cal. 3d 430, 629 P.2d 8, 174 Cal. Rptr. 500 (1981).

67 R. KEETON, *supra* note 53, at 19-20; see also Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265, 285-93 (1963). The *Kelly* court specifically noted the legislature's power to abrogate its holding. 476 A.2d at 1227.

The principal arguments against the judicial imposition of social host liability rely on the strengths of the legislative process and the weaknesses of the judicial process.⁶⁸ These arguments do not focus upon which body has the power to decide the question.⁶⁹ Instead, the arguments first assume that both the legislature and the judiciary have the power to address the question and then seek to determine which body is better equipped to decide the question.⁷⁰

As the dissent and many of the cases cited in *Kelly* point out, the legislature usually can investigate complex problems and balance conflicting interests better than a court can.⁷¹ Furthermore, the legislature has broader and more flexible remedial powers than a court. As one author remarked:

Their [the courts'] preeminent shortcoming is looking at one small part of a total social problem — the aspect brought to them by the litigants — and arriving at a solution for that piece of the problem out of the context of the total social system in which the problem exists. Unless all classes who could be adversely affected have their advocates in court, there is a good chance that their interests will not be brought to the court's attention.⁷²

The courts, it is argued, cannot adequately evaluate the broad implications of holding social hosts liable to third parties for the negligent provision of alcohol to adults.⁷³

These characteristics of the judicial and legislative process suggest that the courts should leave this question to the legislature. Yet, these characteristics present only part of the total picture. When the weaknesses of the legislature are also considered, the legislature's theoretical superiority in these areas disappears.⁷⁴

Although legislatures possess broader investigatory and remedial powers, they are unlikely to use these powers, especially in an area such as social host liability.⁷⁵ Various factors which influence the

68 See 476 A.2d at 1231-32 (Garibaldi, J., dissenting) citing *Cartwright v. Hyatt Corp.*, 460 F. Supp. 80, 82 (D.D.C. 1978); *Runge v. Watts*, 180 Mont. 91, 94, 589 P.2d 145, 147 (1979); *Olsen v. Copeland*, 90 Wis.2d 483, 491, 280 N.W.2d 178, 181 (1979); *Holmes v. Circo*, 196 Neb. 496, 505, 244 N.W.3d 65, 70 (1976); *Edgar v. Kajet*, 84 Misc. 2d 100, 103, 375 N.Y.S.2d 548, 552 (Sup. Ct. 1975), *aff'd*, 55 A.D.2d 597, 389 N.Y.S.2d 631 (1976); *Manning v. Andy*, 454 Pa. 237, 239, 310 A.2d 75, 76 (1973).

69 See notes 40-41 *supra* and accompanying text.

70 *Id.*

71 See note 68 *supra*.

72 R. NEELY, *HOW COURTS GOVERN AMERICA* 207 (1981).

73 See 476 A.2d at 1230-36 (Garibaldi, J., dissenting).

74 See R. NEELY, *supra* note 72, at 46.

75 See Peck, *supra* note 67, at 296; see also Satter, *Changing Roles of Courts and Legislatures*, 85 CASE & COMMENT 18, 21 (July-Aug. 1980).

legislative process contribute to this inactivity.⁷⁶ Regardless of the usefulness of these influences in other areas, they nonetheless reduce the legislature's effectiveness in addressing certain problems.⁷⁷ Thus, in practice, the courts are just as capable as the legislature to effectively decide the questions that arise in the context of social host liability.⁷⁸

The area of social host liability is a proper area for the exercise of judicial power, unless the legislature has preempted the field.⁷⁹ Furthermore, political reality suggests the courts can deal with the problem as effectively as the legislature can.⁸⁰ Although implementation of judicially imposed liability in this area will obviously pose some problems,⁸¹ the legal system has solved similar problems in the past.⁸²

Where the judiciary properly addresses the duty of a social host, the courts should also set guidelines for trial courts to resolve the significant evidentiary issues present in these cases. The *Kelly* court failed to provide this guidance.⁸³

III. Evidentiary Considerations

With the pronouncement of New Jersey's new social host duty, the *Kelly* court established a dual-knowledge standard, requiring that the plaintiff prove that the host knew both that the guest would drive after drinking and that his guest was intoxicated when the host served him the liquor.⁸⁴ The first element presents relatively simple

76 See Peck, *supra* note 67, at 268-85. Professor Peck discusses five factors which influence the legislative process: (1) legislative indifference; (2) the motivations, personalities, and working conditions of legislators; (3) legislative committees and committee hearings; (4) legislative service agencies; and (5) lobbies and pressure groups.

77 *Id.* at 296.

78 Even where the courts are unable to provide an optimal remedy, they may push the legislature into action. In this way, the strengths of these two branches of government may be combined to solve a problem. See *id.* at 296-302.

79 See note 66 *supra*.

80 Courts do have limitations. But, if we assume that courts share the legitimate authority to decide the issue with the legislature, the only reason a court should refrain from deciding the issue is if the legislature is clearly able to make a better decision. Such is not the case here.

81 See notes 83-135 *infra* and accompanying text.

82 See R. KEETON, *supra* note 53, at 18-24 (discussing the fashioning of a remedy through interaction between courts and legislatures); see also Bischoff, *supra* note 40, at 84-85 (same).

83 See *Drunk Driver* 70 A.B.A. J. 31 (Sept. 1984): "The [*Kelly*] holding is unpopular with trial judges. . . . 'Judges felt that it went too far but was not specific enough.'"

84 476 A.2d at 1224. The court stressed several times the dual-knowledge aspect of *Kelly*'s cause of action. See *id.* at 1224-25, 1228, and 1230. Thus, although the court gives only a cursory treatment to these knowledge elements, they are prerequisites to imposing

problems of proof.⁸⁵ Generally, the fact that the host knew or should have known that the guest would drive can be easily inferred from the circumstances of the case.⁸⁶ The second element, however, is much more problematic. The court did not establish specific guidelines to determine the host's knowledge of his guest's intoxication. Failure to provide such guidelines may have a serious impact on the application and influence of the *Kelly* decision.⁸⁷ This section focuses on the evidentiary problems involved in proving that the host knew his guest was intoxicated and examines the two analyses generally used: 1) the blood alcohol concentration ("BAC") test, and 2) the "totality of the evidence" approach.⁸⁸

In imposing the new duty, the *Kelly* majority "decide[d] only that . . . the social host [who] directly serves the guest [liquor] . . . even after the guest is *visibly intoxicated*" will incur liability.⁸⁹ Except

liability upon the social host. Other courts require the same dual-knowledge standard in dealing with tavern owner liability. See, e.g., *Chartrand v. Coos Bay Tavern, Inc.*, 683 P.2d 139 (Or. App. 1984); *Hutchins v. Hankins*, 63 N.C. App. 1, 303 S.E.2d 584 (1983); *Young v. Caravan Corp.*, 99 Wash. 2d 655, 663 P.2d 834 (1983); see Appleman, *Pleading, Evidence, and Procedure Under the Dram Shop Act*, 1958 U. ILL. L.F. 219 (1958).

85 Modern social hosts cannot expect their guests who arrive by automobile to return home by another method of transportation. Thus, unless the host establishes that the guest came with another driver or expressed a believable intent not to drive, any protestations by the host that he did not know the guest would be driving should be unpersuasive.

86 See, e.g., *Campbell v. Carpenter*, 279 Or. 237, 566 P.2d 893 (1977) (current use of automobiles is so common that it is reasonably foreseeable that tavern customers will leave in automobiles).

87 The trial court will feel the first effect of the decision. In determining whether the Zaks knew that Gwinnell was intoxicated, this court will have to apply either a subjective or an objective test. The Supreme Court's standard appears to call for a subjective analysis in that the Zaks are not liable unless they directly served Gwinnell beyond the point at which he was "visibly intoxicated," 476 A.2d at 1220, 1221-22; 1227 n.13, and 1228, but the principal evidence before the court was the objective evidence of Gwinnell's blood alcohol concentration and the expert's interpretation of this evidence. See 476 A.2d at 1220; see also 476 A.2d at 1233 (Garibaldi, J., dissenting).

88 These approaches are not explicitly referred to in the cases. Rather, they are approaches gleaned from a reading of the cases in the areas of dram shop and social host liability wherein the plaintiff must establish that the provider of the liquor served the drinker with knowledge of his intoxicated state.

89 476 A.2d at 1228 (emphasis added); see note 87 *supra*. The "visibly" or "obviously" intoxicated standard has been widely applied in civil actions under dram shop acts, alcoholic beverages control acts, or common law negligence theories. The cases usually, though not always, involved commercial vendors of alcohol. See, e.g., *Chartrand v. Coos Bay Tavern, Inc.*, 683 P.2d 139 (Or. App. 1984); *Halligan v. Pupo*, 678 P.2d 1295 (Wash. App. 1984); *Johnson v. Mobey*, 334 N.W.2d 411 (Minn. 1983); *Hutchins v. Hankins*, 63 N.C. App. 1, 303 S.E.2d 584 (1983); *Young v. Caravan Corp.*, 99 Wash.2d 655, 663 P.2d 834 (1983); *Couts v. Ghion*, 281 Pa. Super. 135, 421 A.2d 1184 (1980); *Seeley v. Sobczak*, 218 N.W.2d 368 (Minn. 1979); *Cartwright v. Hyatt Corp.*, 460 F. Supp. 80 (D.D.C. 1978); *Connelly v. Ziegler*, 251 Pa. Super. 521, 380 A.2d 902 (1977). Other courts have required that the vendor have "notice"

for its initial discussion of the facts,⁹⁰ where the court devoted a paragraph to the objective evidence of Gwinnell's BAC,⁹¹ the court did not deal explicitly with the complex evidentiary problems involved

that the consumer is intoxicated. *See, e.g.,* Elsperson v. Plump, 446 N.E.2d 1027 (Ind. App. 1983); McNally v. Addis, 65 Misc. 2d 204, 216, 317 N.Y.S.2d 157, 170 (1970) ("[T]he seller must have notice of a consumer's near-intoxicated condition, by means of objective outward appearances. . . .") (emphasis added). The "visibly" or "obviously" intoxicated standard has been applied in jurisdictions which have held a social host liable for injuries caused by adult guests. *See* Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978) (subsequently abrogated, *see* note 65 *supra*); OR. REV. STAT. § 30.955 (1979), *supra* note 65 (limiting social host liability to cases wherein the host served or provided alcoholic beverages to a social guest when such guest was "visibly intoxicated"). Additionally, this standard has been applied in cases involving employer liability for serving alcohol to employees who subsequently cause injury to third parties. *See, e.g.,* Chastain v. Litton Systems, Inc., 694 F.2d 957 (4th Cir. 1983); Otis Eng'g Corp. v. Clark, 668 S.W.2d 307 (Tex. 1983); Dickson v. Edwards, 682 P.2d 971 (Wash. App. 1984).

Although the issue of whether the same standards that apply to employers and tavern keepers should be imposed on social hosts is, in general, beyond the scope of this comment, for a discussion of this issue, *see* Stanner, *Liability of Social Host for Off Premises Negligence of Inebriated Guest*, 68 ILL. B.J. 396 (1980); Graham, *Liability of the Social Host for Injuries Caused by the Negligent Acts of Intoxicated Guests*, 16 WILLAMETTE L. REV. 561 (1980); Note, *supra* note 24; *see also* note 23 *supra*.

90 486 A.2d at 1220.

91 As the court stated:

After the accident Gwinnell was subjected to a blood test, which indicated a blood alcohol concentration of 0.286 percent. Kelly's expert concluded from that reading that Gwinnell had consumed not two or three scotches [as the defendants claimed] but the equivalent of thirteen drinks; that while at Zak's home Gwinnell *must have been showing unmistakable signs of intoxication*. . . . (emphasis added; footnote omitted).

Id. at 1220. The court noted that under present New Jersey law, "a person who drives with a blood alcohol concentration of 0.10 percent or more violates" the New Jersey "statute concerning driving while under the influence of intoxicating liquor." *Id.* at 1220 n.1. *See* note 8 *supra*. The Kelly court may have been impressed by the fact that Gwinnell's BAC was significantly higher than the legal standard for drunken driving. But, the criminal standard is not direct evidence of visible intoxication in civil actions; moreover, courts have indicated that the civil and criminal standards are not to be confused. *See, e.g.,* Chartrand v. Coos Bay Tavern, Inc., 683 P.2d at 141-42, where the court stated:

[The Oregon] standard for civil liability to third parties [is] being "visibly intoxicated," which is not necessarily the same as being "under the influence of intoxicating liquor." The officer's testimony concerning the blood alcohol standard for being under the influence of intoxicating liquor was never tied to the principal element of the alleged negligence in this case, i.e., serving alcohol to a "visibly" intoxicated person. The testimony is not relevant. A similar difficulty is presented by the instruction. The instruction that plaintiff must prove that defendant served its customer when she was "visibly intoxicated," followed by the instruction objected to that "a person whose blood alcohol content is more than .10 percent is under the influence of intoxicating liquor," confuses two unrelated standards, and the latter is not the standard for civil liability in this action. Together the instructions are confusing and misleading. It was error to admit the officer's testimony and to give the instruction (footnotes omitted).

in the "visibly intoxicated" standard.⁹² Because the court emphasized "the availability of clear objective evidence establishing intoxication"⁹³ and the expert's analysis of Gwinnell's BAC,⁹⁴ the majority implicitly supported the use of the BAC test in determining whether the host knew his guest was intoxicated.⁹⁵ The *Kelly* court's implicit reliance on the BAC test raises the critical issue of whether this test represents the best guideline for the "visibly intoxicated" requirement.

The BAC test is based upon certain prevalent, although often disputed, assumptions about the way the body reacts to alcohol.⁹⁶

92 The majority addresses the question of proof only once. 476 A.2d at 1230. Here, the court merely states that "[t]he availability of clear objective evidence establishing intoxication will act to weed out baseless claims and to prevent this cause of action from being used as a tool for harassment." This does not provide an answer to the overriding question of what evidence will establish that the host *knew* that his guest was intoxicated when he last served him liquor.

93 See note 92 *supra*.

94 See note 91 *supra*.

95 There was other evidence from which the court could have reasoned that the Zaks knew that Gwinnell was intoxicated (e.g. Mr. Zak's phone call to Mrs. Gwinnell, see note 9 *supra* and accompanying text), but the court only discussed Gwinnell's BAC; see notes 90-92 *supra* and accompanying text. The procedural stage of the case, however, may explain the court's cursory treatment of the facts. The *Kelly* majority merely ruled that "[v]iewing the facts most favorably to plaintiff (as we must, since the complaint was dismissed on a motion for summary judgement), one could reasonably conclude that the Zaks must have known that their provision of liquor was causing Gwinnell to become drunk . . ." 476 A.2d at 1221. In addition to the phone call, the court was aware that Gwinnell had not eaten since lunch, 190 N.J. Super. 320, 321, 463 A.2d 387, 388, and that he was not served any food by the Zaks. Brief for Appellant at 4-5, *Kelly v. Gwinnell*, 476 A.2d 1219 (N.J. 1984). But the *Kelly* court did not draw any noticeable inference from the phone call and did not even mention the fact that Gwinnell had not eaten.

96 See Radlow & Hurst, *Delayed Blood Alcohol Determinations in Forensic Applications*, 2 CRIM. JUST. J. 281 (1979); Fitzgerald & Hume, *The Single Chemical Test for Intoxication: A Challenge to Admissibility*, 66 MASS. L. REV. 23 (1981); Comment, *Driving With 0.10% Blood Alcohol: Can the State Prove It?*, 16 U.S.F.L. REV. 817 (1982).

Most of the available studies deal with BAC evidence in criminal cases. They usually refer to BAC testing conducted near the levels upon which drunken driving is presumed by state statutory law. See note 8 *supra*. There is a notable absence of BAC research in the area of civil liability which is probably due to widespread acceptance of the evidentiary standards established in the criminal arena. See, e.g., Behner, *Some Practical Aspects of Dram Shop Litigation*, 51 N.Y. ST. B.J. 286, 288 (1979) (experts are assumed competent to render accounts of "the blood alcohol level of the intoxicated person at various stages of alcohol consumption throughout the evening and to state what visible effect, if any, these levels of alcohol would have on the intoxicated persons at specific times throughout the evening"). Since civil liability often involves higher BAC levels than does criminal culpability, see *Ewing v. Cloverleaf Bowl*, 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978), (suggesting a BAC level of .20% for civil liability based on "obvious intoxication"), there is a need for research on the effects of alcohol on behavior at specific BAC levels if courts are going to rely on BAC evidence.

The first assumption is that the body absorbs all the alcohol into the blood very quickly, within as little as fifteen minutes, after the individual consumes the drink.⁹⁷ Second, experts conclude that the individual's peak or maximum BAC occurs soon after he stops drinking.⁹⁸ Based upon these two assumptions, the expert then calculates the individual's BAC for a precise time prior to the time the test was performed.⁹⁹ For example, the expert will say that an individual with a BAC level of 0.14% at the time of the test had a BAC level of 0.18% when he was involved in an accident two hours earlier. This calculation, or extrapolation, of past BAC is based on a third assumption that after alcohol is absorbed into the bloodstream and the individual attains his peak BAC, the BAC level declines steadily at a rate fairly uniform for all persons.¹⁰⁰ Given this uniform rate of alcohol elimination, it is *theoretically* possible to calculate the prior BAC any time after the individual reached his peak BAC and his BAC began to decline. The fourth assumption, and perhaps the most significant one in the social host situation, is that *every* individual with an extrapolated BAC will exhibit characteristic and unmis-

97 See Fitzgerald & Hume, *supra* note 96, at 25; see also R. DONIGAN, CHEMICAL TESTS AND THE LAW 44-50 (1966); AMERICAN MEDICAL ASSOCIATION, *Alcohol and the Impaired Driver* (1968); R. ERWIN, DEFENSE OF DRUNK DRIVING CASES § 15 (3d ed. 1981). This assumption often arises in drunken driving cases. See, e.g., *People v. Schriever*, 45 Cal. App. 3d 917, 922, 119 Cal. Rptr. 812, 814 (1975) (court rejected the defendant's contention that his BAC rose between the time of his driving and the time of the test; court inferred that BAC peak level is reached within 15 to 20 minutes after consumption).

98 Fitzgerald & Hume, *supra* note 96, at 24-25:

Police chemists and technicians will often testify, for example, that the alcohol will be absorbed within about twenty minutes after each drink and that, therefore, the peak BAC will be reached within twenty minutes after the last drink is taken. Sometimes that period is more generously stated to be fifteen to thirty minutes, and we also frequently hear that the maximum period for absorption of all alcohol after the last drink is forty-five minutes. In any event, *it is generally assumed that the peak BAC is reached quickly* (footnotes omitted; emphasis added).

99 *Id.* at 28-31; see also Comment, *supra* note 96, at 821. Thus in *Kelly* the plaintiff's expert used Gwinnell's BAC at the time of the test (after the accident) to calculate his BAC at the time that the Zaks served him liquor. 476 A.2d at 1220-21. The expert could not focus merely on Gwinnell's BAC at the time of the accident. Rather, the expert had to establish Gwinnell's BAC at the time that the Zaks served him liquor in order to conclude that at this level of BAC, Gwinnell must have shown unmistakable signs of intoxication.

Extrapolation of such BAC levels, thus, involves one step more than the calculation of BAC at the time of the accident. This step is crucial; if the guest's BAC level rose significantly during the time after he consumed the liquor but before he was involved in the accident, then the host may never have observed any signs of the guest's intoxication and would not, under the *Kelly* holding, be liable to the plaintiff. See notes 83-86 *supra* and accompanying text.

100 Fitzgerald & Hume, *supra* note 96, at 28-31. The rate at which the alcohol is eliminated is called the alcohol elimination or clearance rate. See, Radlow & Hurst, *supra* note 96, at 282; Comment, *supra* note 96, at 820.

takeable behavior, i.e., visible signs of intoxication.¹⁰¹

Although many courts approve of testimony based on these assumptions,¹⁰² recent studies reveal that the basic assumptions underlying the inferred, or calculated, BAC estimates are not correct.¹⁰³ These studies indicate that serious problems arise from using the BAC level at the time of the test as the basis for evaluating either prior BAC levels or prior behavior.¹⁰⁴

101 See, e.g., *Otis Eng'g Corp. v. Clark*, 668 S.W.2d at 308 (medical examiner testified that given a BAC of 0.268% as determined after an accident the drinker must have "ingested a substantial quantity of alcohol. . . [such that] one hundred percent of persons with that much alcohol exhibit signs of intoxication observable to the average person." (emphasis added)).

Thus, in *Kelly*, the plaintiff's expert testified that given Gwinnell's BAC as determined one hour and twenty-one minutes after the accident, Brief for Appellant at 5, *Kelly v. Gwinnell*, 476 A.2d 1219 (N.J. 1984), Gwinnell must have been showing "unmistakeable signs and symptoms" of intoxication at the time the Zaks served him drinks, some two hours and fifteen minutes earlier. *Id.*; see also 476 A.2d at 1221-22.

102 See, e.g., *Chartrand v. Coos Bay Tavern, Inc.*, 683 P.2d at 140, where the court observed: "An expert testified that subjects with blood alcohol levels of 0.13 to 0.14 show visible signs of intoxication. Suffice it to say that there is ample evidence from which the jury could find that defendant served beer to [the driver] after she was visibly intoxicated." See also *Ewing v. Cloverleaf Bowl*, 20 Cal. 3d 389, 143 Cal. Rptr. 13, 572 P.2d 1155 (1978) (court accepted expert testimony that "casual observer" will detect visible intoxication if a person's BAC level exceeds .20%).

In *Campbell v. Carpenter*, 279 Or. 237, 566 P.2d 893 (1977), a professor of toxicology testified that although a tavern patron with a BAC of .25% would be showing "outward symptoms of intoxication" after she left the tavern, he "would not say" whether she was visibly intoxicated before she left. *Id.* at 242, 566 P.2d at 895. Nevertheless, the court held that the "trial court could have properly found . . . [that] defendant's bartenders had continued to serve" the patron after she was "visibly" intoxicated. There was testimony that she had had up to eight beers in a period of two hours and the expert was willing to say that she "would probably show 'outward symptoms' of intoxication" because after "even five and one-fourth beers [she] would build up a blood alcohol level of .24 percent . . ." (emphasis added). *Id.* There was no mention of how long it would take for the BAC to rise to .24 percent. Moreover, there was some evidence that the patron had taken valium, a tranquilizer, as well. As to the latter, the court said that "[t]he trial court was not required to believe that evidence." *Id.*

103 NATIONAL HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEPT. OF TRANSP., METHODS FOR ESTIMATING BLOOD ALCOHOL CONCENTRATION (1980) (available through the National Technical Information Service, Springfield, Va. 22161, Pub. No. DOT-HS-805-563) [hereinafter cited as ESTIMATING BAC]; Radlow & Hurst, *supra* note 96; Fitzgerald & Hume, *supra* note 96; Radlow & Conway, *Consistency of Alcohol Absorption in Human Subjects* (presented at the American Psychological Association Convention, 1978). The first three of these studies are analyzed in the Comment, *supra* note 96, on BAC and the California drunken driving statutes. The last source is referred to in Radlow & Hurst, *supra* note 96, at 282, wherein the authors state that "[t]he highly oversimplified analysis typically employed in courtroom testimony tends to provide misleading information which could materially affect the accuracy of the inferred BAC estimate. Both constitutional (physical) and situational factors must be considered."

104 See also Taylor, *Blood-Alcohol Presumptions: Guilty Until Proven Innocent*, 53 CAL. ST. B.J. 170, 175 (1978) (The blood alcohol "test can only indicate a suspect's condition at the time of testing, not at the time of arrest in the field. Considerable biological change can occur in the interim period.").

The following specific problems with the BAC test approach reveal its unreliability. First, alcohol absorption rates vary not only from individual to individual,¹⁰⁵ but also for a given individual depending on innumerable factors.¹⁰⁶ These factors include the individual's sex, body type, diet, body weight, speed of drinking, drinking history, body chemistry, anger, fear, stress, nausea, intestinal condition, stomach wall condition, and the type of alcohol consumed.¹⁰⁷ One critical factor is food.¹⁰⁸ Not only is the amount of food important but also how much time — if any — elapsed between eating and drinking and what type of food (carbohydrate, protein, or fat) was consumed.¹⁰⁹ Even the time of day when an individual drinks noticeably affects blood alcohol absorption.¹¹⁰ All these factors combine to undermine the BAC test which rests on the assumption that all individuals have a rapid and uniform alcohol absorption rate.

Second, elimination rates, correlated to absorption rates, vary from individual to individual, as well as from day to day for *an* indi-

105 Recent studies indicate that contrary to most expert testimony, different individuals may have peak BACs anywhere from 15 minutes to two hours or more after the drinkers consume their last drinks. ESTIMATING BAC, *supra* note 103, at 3, 41-44, 54-55 and 59-60; Fitzgerald & Hume, *supra* note 96, at 28-31; *see also* Radlow & Hurst, *supra* note 96, at 282-84 where the authors reported:

[I]t is common to understate the time required to reach peak BAC after drinking. According to most published reports, it takes approximately an hour and a half for an individual to reach peak BAC after drinking on an *empty* stomach. Individuals who eat while drinking take materially longer.

. . . [T]he variability in rate of absorption varies enormously from individual to individual. Some people take half an hour or less to reach peak BAC after drinking on an empty stomach, while others take two and a half hours or more under the same conditions. Failure to take this inter-individual variability into account could result in substantially inaccurate inferences about the defendant's BAC at the time of the [driving] . . . (footnotes omitted).

106 ESTIMATING BAC, *supra* note 103, at 14, 20, 41-44, 60-61. Two commentators noted: The same amounts of alcohol if consumed as gin, vodka, whiskey, dessert wine, table wine, or beer gave peak BAC values [for one and the same individual] that range from 0.10% to less than 0.05%, and the time needed to reach peak is seen to vary from about fifteen minutes to an hour and a half.

Fitzgerald & Hume, *supra* note 96, at 30.

107 Comment, *supra* note 96, at 824-25; *see also* ESTIMATING BAC, *supra* note 103, at 2; Radlow & Hurst, *supra* note 96, at 282-83; Fitzgerald & Hume, *supra* note 96, at 28-31; NATIONAL INST. ON ALCOHOL ABUSE & ALCOHOLISM, U.S. DEPT. OF HEALTH & HUMAN SERVICES, FACTS ABOUT ALCOHOL & ALCOHOLISM 7-8 (1981) (Pub. No. (ADM) 80-31); *see also* note 106 *supra*; Y. ISRAEL & J. MARDONES, BIOLOGICAL BASIS OF ALCOHOLISM (1971).

108 *Id.*

109 ESTIMATING BAC, *supra* note 103, at 2 *passim*.

110 Radlow & Hurst, *supra* note 96, at 285 (citing Sturtevant, *Chronopharmacokinetics of Ethanol, I. Review of the Literature and Theoretical Considerations*, 3 CHRONOBIOLOGIA 237 (1976)).

vidual, and cannot be accurately estimated.¹¹¹ In a recent government study,¹¹² the individuals tested had clearance rates which varied from 0.40% to 0.000% (no noticeable change) per hour.¹¹³ Since experts usually apply a standard elimination rate set between these values,¹¹⁴ they will improperly evaluate any individual's BAC elimination rate that deviates from that standard. Based upon the guest's extrapolated BAC, the expert will argue that the social host must have witnessed visible signs of the guest's intoxication.¹¹⁵ This testimony will prejudice the host's case because the focus rests on the individual's BAC at the time of the accident.¹¹⁶ Since the critical time in the social host context is prior to the accident, the test's emphasis upon the time of the accident undermines the reliability of the BAC test.

In discussing BAC extrapolation, commentators have offered two possible solutions to the problems. The first suggestion is to conduct multiple tests on the driver after the accident, instead of only one test. Multiple testing arguably would provide better results than

111 ESTIMATING BAC, *supra* note 103, at 54-55; Fitzgerald & Hume, *supra* note 96, at 30-31.

112 Estimating BAC, *supra* note 103.

113 *Id.* at 54. None of the tested individuals had the same rates from day to day nor did an individual have a constant elimination rate on any day. *Id.* at 54-56; *see also* Comment, *supra* note 96, at 826, 837. Compare these findings with what experts typically testify to when evaluating a tested BAC:

For normal, healthy adults, the average rate of conversion is a decrease of 0.015% per hour. It is often assumed, and commonly testified to by law enforcement officers, that after absorption is complete, all persons will show a decrease in BAC equal to 0.015% per hour. That figure is then sometimes used to estimate the BAC at a prior time by adding 0.015% to the value found in the test for each hour elapsed between the time of vehicle operation and the time of the sample. A number of studies have shown that, in fact, the rates for individuals vary greatly: the normal range is between 0.01% to 0.02% per hour and values as high as 0.04% and as low as 0.006% have been observed. The result is that even if we know in a given case that the vehicle operation and test occurred after the peak BAC, the attempt to state accurately the earlier BAC would be imprecise without specific knowledge of that person's elimination rate.

Fitzgerald & Hume, *supra* note 96, at 31.

114 *See* note 113 *supra*.

115 *See* note 113 *supra*, *see also* text accompanying notes 96-101 *supra*. Other findings further manifest the unreliability of the BAC approach. Some BAC levels were found to rise immediately after drinking but then to fall for a time before rising even further. *See* ESTIMATING BAC, *supra* note 103, at 60-61. Food appears to be the chief factor in causing these changes. But elimination rates were not constant even with individuals who had not eaten. *Id.* at 54. Moreover, some individuals had multiple peak values which give a ridge-like appearance to a curve of their blood alcohol absorption and elimination rates. *Id.* None of this conforms with current expert testimony.

116 *See* Fitzgerald & Hume, *supra* note 96; Radlow & Hurst, *supra* note 96; Comment, *supra* note 96; Taylor, *supra* note 104.

the single test method.¹¹⁷ Although this "multiple testing" approach may provide a more accurate estimate of the driver's BAC at the time of the accident and his actual rate of elimination (or increase, if his BAC is still rising),¹¹⁸ this approach would not eliminate the problems surrounding what the driver's BAC was *at the time the host served him liquor*. Since an individual may have undergone more than one peak prior to testing,¹¹⁹ establishing a steadily declining BAC at the time of the accident does not indicate either when the individual's first peak occurred or what his level was when the host last served him. Thus, even multiple testing would not eliminate the inherent unreliability of the BAC approach in the social host liability context.

The second proposed solution requires laboratory analysis of the driver himself to determine his specific absorption and elimination rates.¹²⁰ This approach directly addresses the problems encountered in the current extrapolation methods. Given an accurate determination of the driver's personal rates, an expert may calculate more accurately the guest's actual BAC at the time he was drinking.

The application of this approach, however, may create insurmountable practical problems. Proponents of this "individual" solution agree that this approach would require a laboratory setting that completely duplicates all the physical and psychological conditions which existed at the time and place the driver was drinking.¹²¹ Even assuming that an individual has constant absorption and elimination rates each day,¹²² it is unlikely that all of the necessary factors can be reproduced.¹²³ Moreover, if the driver dies in the accident or is otherwise unable or unwilling to undergo the analysis, this approach becomes impossible to execute. Furthermore, considering the current public "get tough" attitude toward the drinking driver,¹²⁴ any method which furnishes alcohol to these drinkers will probably be unpopular.

The third and final problem in evaluating expert testimony regarding BAC and behavior arises from the assumption that everyone

117 See Fitzgerald & Hume, *supra* note 96, at 31-35; Radlow & Hurst, *supra* note 96, at 285.

118 *Id.*

119 See note 115 *supra*.

120 Radlow & Hurst, *supra* note 96, at 285-86; see also Comment, *supra* note 96, at 826-27.

121 Radlow & Hurst, *supra* note 96, at 285.

122 This is probably not the case. See ESTIMATING BAC, *supra* note 103, at 56 n.1 ("Time of occurrence of peak BAC varied between subjects and between sessions.") (emphasis added).

123 See text accompanying notes 107-10 *supra*.

124 Kraft, *supra* note 34, 391-92; see note 34 *supra*.

with a certain BAC level will appear visibly intoxicated.¹²⁵ Visible intoxication is the crux of the case against the social host.¹²⁶ Courts disagree about whether BAC alone reliably indicates a person's appearance at a time prior to testing.¹²⁷ These courts apply either the BAC test approach or the "totality of the evidence approach."¹²⁸

The main criticism of the assumption that all persons with a certain BAC will appear intoxicated is that alcohol affects each per-

125 See notes 96-100 *supra* and accompanying text.

126 See notes 87-89 *supra* and accompanying text. If Gwinnell did not appear intoxicated, then, regardless of how high Gwinnell's BAC level might have been, the Zaks cannot be held liable. *Id.*

127 Compare *Harden v. Seventh Rib, Inc.*, 247 N.W.2d 42 (Minn. 1976) (evidence of .18% BAC was not sufficient in and of itself to establish obvious intoxication at the time driver was served) and *Jaros v. Warroad Municipal Liquor Store*, 227 N.W.2d 376 (Minn. 1975) (evidence of .28% BAC although sufficient to establish a strong *prima facie* case of intoxication was insufficient to establish intoxication as a matter of law) and *Cartwright v. Hyatt Corp.*, 460 F. Supp. 80 (D.D.C. 1978) (evidence of .29% BAC along with post-accident observations as to driver's intoxicated state was not enough to overcome eyewitness testimony that the driver did not appear visibly intoxicated when she was served liquor) with *Ewing v. Cloverleaf Bowl*, 20 Cal. 3d 389, 143 Cal. Rptr. 13, 572 P.2d 1155 (1978) (court accepted expert's opinion that even casual observers will observe signs of intoxication in persons with .20% BAC) and *Chartrand v. Coos Bay Tavern, Inc.*, 683 P.2d 139 (Or. App. 1984) (court accepted expert's opinion that persons with BAC of from .13 to .14% would show visible signs of intoxication) and *Otis Eng'g Corp. v. Clark*, 668 S.W.3d 307 (Tex. 1983) (court accepted expert's opinion that 100% of persons with BAC of .268 would exhibit signs of intoxication).

128 See note 88 *supra*. The phrase "totality of the evidence" is taken from *Elsperman v. Plump*, 446 N.E.2d 1027 (Ind. App. 1983). In *Elsperman*, the parents of a child killed in an accident, in which the mother and child were struck by a car driven by a drunken driver, brought a wrongful death action against the bar (Moose Lodge) which served the driver alcoholic beverages and against the driver (Ewers) and bartender (Plump). Ewers admitted that he was liable and reached a settlement with the plaintiffs. But Moose Lodge and Plump denied that they had been negligent and the case proceeded to trial on the issue of their liability only. After the jury returned a verdict for the parents, the trial court granted judgment on the evidence in favor of the Moose Lodge and Plump. The Indiana Court of Appeals reversed, ruling that the "totality of the evidence" constituted "sufficient evidence of probative value from which the jury could have inferred that Ewers was intoxicated and that Plump served him alcoholic beverages *knowing of his intoxicated condition . . .*" (emphasis added). 446 N.E.2d at 1032. What is notable about the case is that *Ewers had refused to undergo a BAC test after the accident*. Thus the court was forced to determine the issue of whether the bartender knew that Ewers was intoxicated without BAC evidence. The "totality" was as follows:

Viewing the totality of the evidence in this case - the amount of alcoholic beverages consumed, the loud and boisterous conduct, the coughing spell and staggering to the bathroom, the offer of [a Moose Lodge employee] to drive Ewers home, the admission of Plump that Ewers was a "little intoxicated", the fact that Plump followed Ewers out and observed him drive away, and Plump's admonition to [the Moose Lodge employee] to keep his mouth shut—we believe that there is sufficient evidence . . .

Id. This "totality" approach does not exclude BAC evidence; rather, BAC, when present, is one factor to be considered in evaluating whether the drinker was "visibly intoxicated."

son differently.¹²⁹ Although almost all individuals will have impaired driving skills when their BAC rises above 0.10%, such individuals still may not appear "visibly intoxicated."¹³⁰ Indeed, "it is possible for a person to appear more intoxicated with a rising blood level of 0.14% than when his level has reached 0.19% an hour or two later."¹³¹ The crucial determination for the host is whether his guest appears intoxicated; but if the guest's BAC is steady or declining — although objectively high — the host may not see signs of intoxication in his guest's behavior. Moreover, some drinkers, especially alcoholics and habitual drunkards, do not appear intoxicated because they have a high tolerance to alcohol. Thus, a "heavy drinker may still not appear intoxicated even with a blood level of 0.20%," whereas "the occasional or moderate drinker most frequently will be found under the table."¹³² If the host's guest is not found "under the table," the host will be held liable under the BAC approach, even though the guest was not "visibly" or "obviously" intoxicated.

Many courts' decisions reflect a dissatisfaction with the BAC approach.¹³³ These courts rely on the total evidentiary picture. Al-

129 476 A.2d at 1233 (Garibaldi, J., dissenting) citing Perr, *Blood Alcohol Levels and "Diminished Capacity,"* 3 J. LEGAL MED. 28 (April 1975); Comment, *Social Host Liability for Furnishing Alcohol: A Legal Hangover?*, 10 PAC. L.J. 95 (1978).

130 Perr, *supra* note 129, at 29 (citing AMERICAN MEDICAL ASSOCIATION, *Alcohol and the Impaired Driver* (1968)); see also Taylor, *supra* note 104, at 176-77 where he wrote:

No matter how much society tries to standardize and equalize, human beings will continue to be unique individuals. Individual tolerance is a crucial factor in accurately determining whether a given person is under the influence of alcohol, yet it is totally ignored by the blood-alcohol readings. Does anyone seriously contend that all human beings react the same way to the same intake of alcohol? That everyone has the same tolerance for alcohol?

131 BOSTON UNIVERSITY LAW-MEDICINE INSTITUTE, *THE LEGAL ISSUES IN ALCOHOLISM AND ALCOHOL USAGE* 76 (1965) (referring to the "Mellenby phenomenon"); see E. MELLANBY, *ALCOHOL: ITS ABSORPTION INTO AND THE DISAPPEARANCE FROM THE BLOOD UNDER DIFFERENT CONDITIONS* (1919) (Gr. Brit. Med. Research Council, Special Rep. Ser., No. 31, H.M. Stat. Off., London).

132 Perr, *supra* note 129, at 29, quoting BOSTON UNIVERSITY LAW-MEDICINE INSTITUTE, *supra* note 131; see also Comment, *supra* note 129, at 103.

133 See note 127 *supra*; see also *Wilson v. Steinbach*, 98 Wash. 2d 434, 439, 656 P.2d 1030, 1033 (1982) ("[A] person's sobriety must be judged by the way she appeared to those around her, not by what a blood alcohol test may subsequently reveal.") (emphasis added; BAC was .19%) followed by *Dickinson v. Edwards*, 682 P.2d 971 (Wash. App. 1984) (BAC was .17%). In *Cartwright v. Hyatt Corp.*, 460 F. Supp. at 83-84 the court observed:

Outward manifestations of intoxication, other than perhaps breath, obviously vary from individual to individual. Further, a person's physical reaction to alcohol may be affected by such conditions as, for example, *leaving a heated room for the outside, or proceeding to drive an automobile*. Even [the plaintiff's expert] went no further than to speculate that [the defendant's] . . . symptoms "probably" existed in the lounge, and he gave no opinion as to when they became manifest [even though the defend-

though the courts do not exclude BAC evidence, they do not regard this evidence as conclusive. Thus, even where the BAC evidence shows that the drinker probably had a very high BAC level at the time he imbibed the alcohol, if eyewitnesses testify that the drinker was not visibly intoxicated, these courts will not overturn a verdict for the alcohol provider.¹³⁴ The courts will not upset the verdict even though they admit that a high BAC is *prima facie* evidence of intoxication.¹³⁵

This "totality" approach provides more flexibility than the BAC emphasis because it does not rely solely on expert testimony, and thus, avoids the scientific problems involved in extrapolation of prior BAC. Nevertheless, the totality approach creates its own set of problems. For example, if the only other available evidence is the host's self-serving statement that his guest did not appear intoxicated,¹³⁶ no matter which test is applied, evidentiary problems will arise. The *Kelly* court aggravated this situation by failing to provide any guidelines for its jurisdiction to follow in determining the host's

ant had a BAC of .29% as determined two and one-half hours after the accident]. In the absence of specific evidence, it is simply *not reasonable to deduce from* [the defendant's] *condition after the accident not merely that she was intoxicated earlier but further that her intoxication must have been apparent to the host who ordered and the cocktail waitress who served her the last drink* (emphasis added).

134 See, e.g., *Seeley v. Sobczak*, 281 N.W.2d 368 (Minn. 1970). *Seeley* involved a BAC of 0.269% revealed from an autopsy on the drinker-driver. Douglas Seeley had been drinking at a tavern over a period of six hours. On his way home, he lost control of his truck, crashed, and was killed. His wife brought a wrongful death suit under the Minnesota Civil Damages Act (MINN. STAT. § 340.14, subd. 1a (1974)). The trial court entered judgment for the defendant-tavern owner after a jury returned a verdict in the defendant's favor. Mrs. Seeley appealed and asked the Minnesota Supreme Court to hold that a BAC level of .269% was proof of "obvious intoxication" *as a matter of law*. Seeley's wife and daughter had testified that Seeley "sounded intoxicated" when he called them while at the tavern. The court refused to hold that a BAC of .269% established that a person was "obviously intoxicated" as a matter of law. In so doing they said that, although such a high BAC presents strong *prima facie* evidence of intoxication, other evidence supported the jury's verdict. Viewing the totality of the evidence, the jury could have properly relied upon the "five witnesses . . . [who] testified that it was not apparent that Seely was intoxicated" at the time he was served by the tavern. 281 N.W.2d at 369-71.

135 *Id.* (citing *Jaros v. Warroad Municipal Liquor Store*, 227 N.W.3d 376 (Minn. 1975)).

136 Not surprisingly, neither of the Zaks admitted to observing any signs of intoxication in Gwinnell's behavior. 190 N.J. Super. 320, 321, 463 A.2d 387, 388. In spite of this, they called his home to see if he had arrived safely. 476 A.2d at 1220. Perhaps such an apparent conflict of testimony is best left to the jury. One solution to the evidentiary problem might come from a practical handling of this problem. The court could allow the jury to hear all of the evidence but instruct them that an extrapolated BAC level is not enough in itself to establish that the defendants observed the driver while he was "visibly intoxicated." Rather, the jury can decide whether or not to believe the defendants when they say that although they did not know that their guest was intoxicated, they still wanted to call to find out whether he arrived home safely.

knowledge. If the social host duty established in *Kelly* is adopted in other jurisdictions, their courts must still adequately address the evidentiary considerations.

IV. Conclusion

The most important factor in determining a social host's liability for injuries caused by an intoxicated guest should be whether liability will deter drunken driving. The *Kelly* ruling should deter drunken driving at the source because the host will be less likely to allow his guest to become intoxicated or to drive if intoxicated. Thus, having two legally responsible parties should ameliorate the drunken driving problem.

Moreover, courts are competent to make the determination to impose liability in this area. Indeed, the *Kelly* court's imposition of the social host's duty is comparable to judicial extension of liability in many other areas of tort law. Unless the legislature has preempted the field, courts should feel free to decide the issue, and avoid a misplaced deference to an inactive legislature which would only leave the problem unresolved.

If courts do impose this new duty upon the social host, however, they also should provide guidelines for analyzing the novel evidentiary problems related to the elements of the duty. In particular, the evidence which establishes that the host served his guest with knowledge of the guest's intoxication must be reliable. A great degree of unreliability pervades the current blood alcohol concentration extrapolation methods. Thus, courts should carefully examine an expert's conclusion that a host witnessed signs of visible intoxication in his guest's behavior when the conclusion is based upon the results of a blood alcohol concentration test taken after the accident. Usually the court should require other evidence confirming that the host knew his guest was intoxicated. If eyewitness evidence contradicts an expert's conclusions, then the eyewitness testimony—if credible—should control.

The *Kelly* decision reflects society's growing concern with those who promote drinking and driving. If the social host duty effectively deters drunken driving, this deterrence will outweigh slight increases in homeowner's insurance rates. Other courts and legislatures facing the issue should carefully consider the policy reasons favoring imposition of the duty and determine whether the costs to society outweigh the benefits of following New Jersey's lead. As the injuries and

deaths caused by drunken drivers increase, the *Kelly* court's reasoning becomes even more compelling.

James T. Landenberger
Edward A. Murphy
Robert R. Orellana

CRIMINAL LAW—*CALIFORNIA V. CARNEY*: FASHIONING A “MOTOR HOME EXCEPTION” TO THE WARRANT RULE

The fourth amendment proscription against unreasonable searches and seizures¹ has provoked heated debate among Supreme Court Justices for almost a century.² One school of thought addresses whether police searches or seizures are unreasonable in light of the circumstances underlying the action. A second, and more recently developed school of thought, views any warrantless search or seizure as per se unreasonable unless specifically exempted by one of several judicial doctrines.³ The disagreement centers primarily on two competing concerns: the desire to foster fair and efficient law enforcement procedures by flexibly addressing the case-by-case circumstances surrounding warrantless intrusions and the desire to protect individual privacy interests by establishing procedural rules limiting such intrusions.⁴

In *People v. Carney*,⁵ the Supreme Court of California weighed these two concerns in a case where government agents searched a private motor home without a warrant. In *Carney*, the California court equated the privacy expectations in a motor home with those associated with a fixed home.⁶ As a result, the court held that the fourth amendment protects the motor home just as it does a private

1 The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

2 See, e.g., *Boyd v. United States*, 116 U.S. 616, 641 (1886) (Waite, C.J., Miller, J., concurring).

3 See, e.g., *Texas v. Brown*, 460 U.S. 730 (1983), in which Justice Rehnquist lists the following judicial exceptions to the per se warrant rule: (i) hot pursuit; (ii) exigent circumstances; (iii) automobile search; (iv) search of person and surrounding area incident to an arrest; (v) search at border or “functional equivalent.” He also recognizes the following “less severe” intrusions: (i) stop and frisk; (ii) seizure for questioning; (iii) roadblock. *Id.* at 735, 736; see also *United States v. Mapp*, 476 F.2d 67, 76 (2d Cir. 1973) which includes searches made in “plain view.” Justice Rehnquist, however, notes that “plain view” is merely an extension of a prior legitimate warrantless intrusion. See *Brown*, 460 U.S. at 739 (citing *Coolidge v. New Hampshire*, 403 U.S. 443 (1971)).

4 See 1 W. RINGEL, *SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS* § 1.1 (1984).

5 34 Cal. 3d 597, 668 P.2d 807, 194 Cal. Rptr. 500 (1983), cert. granted sub nom. *California v. Carney*, 104 S. Ct. 1589 (1984).

6 *Id.* at 607-10, 668 P.2d at 813-14, 194 Cal. Rptr. at 506-07.

dwelling.⁷ Applying the per se warrant rule of the United States Supreme Court,⁸ the California court rejected the government's reliance on the "automobile exception" to the warrant requirement to justify the warrantless intrusion.⁹ In the court's opinion, that exception rested primarily upon the diminished privacy expectation in automobiles.¹⁰ Since no such diminution of privacy existed in motor homes, the court found the automobile exception inapplicable.

First, this comment briefly reviews the Supreme Court's development of the automobile exception to the fourth amendment warrant clause. This comment then examines the California Supreme Court's decision in *Carney* and highlights the practical deficiencies which the *Carney* decision failed to address. Finally, this comment suggests an alternative to the *Carney* approach which is designed to remedy these deficiencies and establish a rule consistent with the Supreme Court's fourth amendment jurisprudence.

I. The Supreme Court's Fourth Amendment Analysis

The United States Supreme Court established the "automobile exception" to the fourth amendment warrant clause almost sixty years ago in *Carroll v. United States*.¹¹ There, federal prohibition agents unexpectedly encountered a vehicle suspected of being used to transport contraband. Rather than obtaining a search warrant, and perhaps losing the opportunity to search, the agents immediately searched the vehicle at the roadside and discovered concealed liquor.¹² In light of these circumstances, the Court held that "if the search and seizure without a warrant are made upon probable cause . . . that an automobile or other vehicle contains that which by law

7 *Id.*

8 See note 3 *supra* and note 90 *infra*.

9 *Carney*, 34 Cal. 3d at 610, 668 P.2d at 814, 194 Cal. Rptr. at 507.

10 *Id.* at 606, 668 P.2d at 811, 194 Cal. Rptr. at 504.

11 267 U.S. 132 (1925). The type of protection offered by the fourth amendment has long been recognized at common law. Early cases such as *Entick v. Carrington*, 95 Eng. Rep. 807 (1765), stood in opposition to searches conducted pursuant to overbroad warrants. For an interesting and concise account of these cases and the historical development of the fourth amendment, see Yackle, *The Burger Court and the Fourth Amendment*, 26 U. KAN. L. REV. 335, 337-54 (1978).

12 Under the National Prohibition Act, the defendants were subject to arrest only after officers discovered the intoxicants. *Carroll*, 267 U.S. at 144. *Carroll* arose because of the unique nature of the Prohibition Act. As Justice Marshall observed in his dissent in *United States v. Ross*, 456 U.S. 798 (1982), the situation is not often encountered today because, where police have probable cause to believe a car contains contraband, the suspected offense is now usually felonious and the police, therefore, may arrest the suspects without having observed the commission of the offense. *Id.* at 836 n.6 (Marshall, J., dissenting).

is subject to seizure and destruction, the search and seizure are valid."¹³ In striking what it considered a proper balance between public and private interests,¹⁴ the Court recognized that mobility creates certain exigencies which make it impracticable to obtain a warrant.¹⁵

During the next several decades, however, the Court referred to *Carroll* only occasionally.¹⁶ Generally, warrantless automobile searches were upheld on the "search incident to arrest" theory.¹⁷ But in 1967, *Chimel v. California*,¹⁸ limited the "search incident to arrest" doctrine, and *Carroll* was viewed with renewed interest as providing a justification for automobile searches.¹⁹

13 *Carroll*, 267 U.S. at 149.

14 In support of its holding, the Court observed that "the Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted. . . ." *Id.* Accordingly, the Court focused on those congressional acts enacted soon after the adoption of the fourth amendment which permitted warrantless searches of vehicles. The Court then concluded:

We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a *necessary* difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant *because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.*

Id. at 153 (emphasis added).

The Court, however, did not distinguish between types of vehicles such as "ships" which may have residential indicia lacking in smaller "boats". But compare *United States v. Cadena*, 588 F.2d 100 (5th Cir. 1979), where the court determined that the increased privacy interest in ships which serve as residences "mandates careful scrutiny both of probable cause for the search and the exigency of the circumstances excusing the failure to secure a warrant." *Id.* at 102. Similarly, motor homes may have residential indicia otherwise absent in automobiles. Read broadly then, *Carroll* could be construed to permit warrantless searches of motor homes. See note 84 *infra*. But see notes 26-40 *infra* and accompanying text.

15 In *Chambers v. Maroney*, 399 U.S. 42 (1970), the Court elaborated:

Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search. *Carroll* . . . holds a search warrant unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained.

Id. at 51. But see note 26 *infra*.

16 See, e.g., *Chimel v. California*, 395 U.S. 752 (1969); *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968); *Preston v. United States*, 376 U.S. 364 (1964); *Henry v. United States*, 361 U.S. 98 (1959); *Brinegar v. United States*, 338 U.S. 160 (1949); *Scher v. United States*, 305 U.S. 251 (1938); *Husty v. United States*, 282 U.S. 694 (1931).

17 See 2 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 7.2, at 511-12 (1978).

18 395 U.S. 752 (1969).

19 See 2 W. LAFAVE, *supra* note 17, at 512; see generally Note, *Chimel v. California: A Poten-*

Thus, in cases such as *Chambers v. Maroney*,²⁰ which involved the warrantless search of an impounded vehicle, the Court decided, without elaboration, that an immediate roadside search would have been justified under *Carroll*.²¹ Yet, the Court in *Chambers* entertained a question not addressed in *Carroll*: given the preference for a magistrate's judgment, should police who have seized a vehicle refrain from searching it until securing a warrant?²² The Court felt that this distinction was constitutionally meaningless. Since seizing and holding the vehicle could be just as intrusive as searching it immediately, it made no difference which path police chose.²³ Yet, in the former instance, a vehicle, like the one in *Chambers*, is effectively immobilized. Absent are the exigencies created by mobility which were seemingly intrinsic to the *Carroll* decision.²⁴ In their place, however, the Court recognized the potential threat presented by a vehicle's inherent mobility.²⁵ In essence, *Chambers* authorized a warrantless search even though the actual threat of mobility, which justified the initial warrantless seizure, no longer existed.²⁶

tial Roadblock to Vehicle Searches, 17 U.C.L.A. L. REV. 626 (1970). But see *New York v. Belton*, 453 U.S. 454 (1981), where the Court upheld a search of an automobile's interior under *Chimel*.

20 399 U.S. 42 (1970). In *Chambers*, police stopped the vehicle, arrested the occupants for armed robbery, and then hauled the vehicle to the station. The Court noted that due to unfavorable conditions at the roadside, "it was not unreasonable in this case to take the car to the station house." *Id.* at 52 n.10. Conditions which prevented a safe search at the scene were thought to be a precondition to a later search at the station. See note 12 *supra*. In *Texas v. White*, 423 U.S. 67 (1975) (per curiam), however, the Court upheld a later search at the station where the initial encounter was in midafternoon under apparently safe conditions.

21 399 U.S. at 52.

22 *Id.*

23 The Court reasoned that the nature of this distinction could vary depending on the circumstances. *Id.* at 52, 53. For example, the inconvenience caused by making someone wait until police secured a warrant might be more intrusive than an immediate search. Justice Harlan disagreed. He felt that seizing a vehicle was, almost always, a lesser intrusion than an immediate search and, in his view, police should generally delay searching until securing a warrant. Justice Harlan noted that when the occupants are taken into custody, which is often the case, immobilization of the vehicle is not all that intrusive. He also recognized that the occupants were always free to consent to an immediate search. *Chambers*, 399 U.S. at 63, 64. Accord *Katz*, *United States v. Ross: Evolving Standards for Warrantless Searches*, 74 J. CRIM. L. & CRIMINOLOGY 172, 183 n.80 (1983).

24 See generally Note, *Misstating the Exigency Rule: The Supreme Court v. The Exigency Requirement in Warrantless Automobile Searches*, 28 SYRACUSE L. REV. 981 (1977); see also Note, *Warrantless Vehicle Searches and the Fourth Amendment: The Burger Court Attacks the Exclusionary Rule*, 68 CORNELL L. REV. 105 (1982).

25 399 U.S. at 52. The Court used the term "inherent mobility" in *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976).

26 The Court has since acknowledged this distinction even in the circumstances of *Carroll*. As the Court pointed out in *Ross*:

Subsequent cases make clear that the decision in *Carroll* was not based on the fact

In a later series of automobile search cases, beginning with *Cardwell v. Lewis*,²⁷ the Supreme Court developed an additional rationale to support such warrantless intrusions: the diminished expectation of privacy in automobiles. In *Cardwell*, which involved the warrantless search of the defendant's impounded car,²⁸ the Court stated that "insofar as Fourth Amendment protection extends to a motor vehicle, it is the right to privacy that is the touchstone of our inquiry."²⁹ In the Court's opinion, the privacy expectation in automobiles is not as great as that existing in a dwelling or an office. Since a diminished expectation of privacy is associated with automobiles, the added protection provided by a warrant was unnecessary.³⁰ The opinion in

that the only course available to the police was an immediate search. As Justice Harlan later recognized, although a failure to *seize* a moving automobile believed to contain contraband might deprive officers of the illicit goods, once a vehicle itself has been stopped the exigency does not necessarily justify a warrantless search.

456 U.S. at 807 n.9 (emphasis in original) (citing *Chambers v. Maroney*, 399 U.S. 42, 62-64 (1970) (Harlan, J., concurring in part, dissenting in part)). Recently, the Court has reaffirmed this viewpoint. In *Michigan v. Thomas*, 458 U.S. 259 (1982) (per curiam), the Court stated:

It is . . . clear that the justification [for] a warrantless search does not vanish once the car has been immobilized; nor does it depend upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant.

Id. at 261.

Hence, although actual mobility justifies a warrantless seizure, the Court acknowledges that it is not necessarily a justification for a warrantless search. In addition to reasoning that an immediate search could be less intrusive than waiting for a warrant, the Court has also relied upon justifications other than mobility to support a probable cause warrantless search. See text accompanying notes 27-40 *infra*.

27 417 U.S. 583 (1974). Police seized the automobile from a commercial parking lot where the defendant had parked it on his way to report for questioning at the police station.

28 417 U.S. at 588. The "search" in *Cardwell* consisted of a technician taking paint samples and tire casts from the defendant's impounded car.

29 417 U.S. at 591. This is not to say that the Court abandoned the mobility rationale in *Cardwell*; it asserted: "An underlying factor in the *Carroll-Chambers* line of decisions has been the exigent circumstances that exist in connection with movable vehicles . . ." *Id.* at 590. In fact, the seizure in *Cardwell* was justified on this ground even though the Court dealt with the search in terms of privacy expectations. As stated by the Court: "Here, as in *Chambers v. Maroney*, the automobile was seized from a public place where access was not meaningfully restricted. This is, in fact, the ground upon which the *Coolidge* plurality opinion distinguished *Chambers*." *Cardwell*, 417 U.S. at 593. (citations omitted). The Court went on to say: "The fact that the car in *Chambers* was seized after being stopped on a highway, whereas *Lewis'* car was seized from a parking lot, has little, if any, legal significance. The same arguments and considerations of exigency, immobilization on the spot, and posting a guard obtain." *Id.* at 594, 595. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), involved the seizure of the defendant's car from his private driveway. The warrantless search of the car's interior at the station was held unconstitutional; the Court determined that a search at the point of seizure would not have been justified under *Carroll*. *Id.* at 463, 464.

30 417 U.S. at 590. The Court generalized that all individuals have lesser expectations of

Cardwell, along with those in *Cady v. Dombrowski*³¹ and *South Dakota v. Opperman*,³² set forth various factors which subsequently have been recognized as reducing privacy expectations. These factors were finally addressed collectively in *United States v. Chadwick*.³³

In *Chadwick*, the Court rejected the government's contention that a warrantless luggage search paralleled the automobile exception, noting that the factors which led to diminished privacy in automobiles simply did not apply to luggage.³⁴ Specifically, the Court stated: "[an automobile's] function is transportation and it seldom serves as one's residence or as the repository of personal effects. . . . It travels public thoroughfares where both its occupants

privacy in their automobiles. In essence, the Court, in assessing society's viewpoint, is reasoning that the expectations are not reasonable enough to deserve the protection of a warrant. This parallels Justice Harlan's approach in *Katz v. United States*, 389 U.S. 347 (1967), where he stated: "My understanding of the rule that has emerged from prior decisions is that there is a two fold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361 (Harlan, J., concurring). For a criticism of the reduced privacy determination in *Cardwell* see Yackle, *supra* note 11, at 410-11.

31 413 U.S. 433 (1973); see note 36 *infra*.

32 428 U.S. 364 (1976). In *Opperman*, the Court considered the constitutionality of a warrantless "inventory" search of a vehicle impounded because of multiple parking violations. Ultimately, the Court upheld the search even though no probable cause existed. The Court observed that the impoundment was justified as part of the policemen's "community caretaking function." *Id.* at 368, 374. Once impounded, the car could be routinely inspected in accordance with a prescribed procedure. Given the "benign" nature of the intrusion, the standard police warrantless inventory search was deemed reasonable under the circumstances. *Id.* at 370-71, 376.

In both *Opperman* and *Cardwell*, the Court discussed the diminished privacy interest rationale in connection with impounded vehicles, situations in which the mobility rationale was inapposite. Justice Marshall highlighted the importance of this distinction in *Ross*, 456 U.S. 798 (1982):

In many cases . . . the police will, prior to searching the car, have cause to arrest the occupants and bring them to the station for booking. In this situation, the police can ordinarily seize the automobile and bring it to the station. Because the vehicle is now in the exclusive control of the authorities, any subsequent search cannot be justified by the mobility of the car. Rather, an immediate warrantless search of the vehicle is permitted because of the second major justification for the automobile exception: the diminished expectation of privacy in an automobile.

Id. at 830 (Marshall, J., dissenting).

33 433 U.S. 1 (1977). In *Chadwick*, the defendant matched a profile used to alert police of possible drug dealers and users. Police had made this determination when the defendant boarded a train in San Diego. After the defendant arrived in a Boston train station, a police dog detected marijuana in the defendant's footlocker. Although they had probable cause to arrest the defendant at that time, the police waited until Chadwick and a companion placed the footlocker in the trunk of Chadwick's car. The police arrested the defendant and seized the footlocker, taking them both to the Federal Building where police later searched the footlocker without securing a warrant.

34 *Id.* at 13.

and its contents are in plain view.”³⁵ Moreover, automobiles are subject to government regulations regarding their condition and use,³⁶ they are subject to official inspections and “are often taken into police custody in the interests of public safety.”³⁷ Since a greater expectation of privacy is associated with luggage, the Court required that a warrant be obtained prior to a search. Finally, the Court in *Chadwick* observed that, unlike luggage, safely securing automobiles may present practical administrative problems.³⁸

The Court reiterated these practical concerns several years later in *United States v. Ross*.³⁹ In addition, the Court implied that it had

35 *Id.* at 12 (quoting *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion)).

36 *Chadwick*, 433 U.S. at 13 (citing *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973)). In *Cady*, Wisconsin police took the defendant's wrecked car into custody. In its discussion, the Court recognized that motor vehicles were subject to extensive regulation which, along with vehicle mishaps, resulted in frequent police contact. This frequent contact apparently diminishes privacy expectations.

37 *Chadwick*, 433 U.S. at 13 (quoting *South Dakota v. Opperman*, 428 U.S. 364, 368, 369 (1976)). In the Court's opinion, these regulation and use factors significantly reduced privacy expectations. Furthermore, language in the Court's recent *Ross* opinion might be construed to find another factor diminishing privacy. After addressing the legal history concerning warrantless searches of automobiles, the Court in *Ross* noted: “In light of this established history, individuals *always had been on notice* that movable vessels may be stopped and searched on facts giving rise to probable cause that the vehicle contains contraband, without the protection afforded by a magistrate's prior evaluation of those facts.” 456 U.S. at 806 n.8 (emphasis added). Should this creation of precedent ultimately reduce privacy expectations? Cases such as *Entick v. Carrington*, 95 Eng. Rep. 807 (1765), and the actions of the constitutional Framers, demonstrate that it was not enough that the King just speak the word—no matter how often he asserted it. See note 11 *supra*.

38 *Chadwick*, 433 U.S. at 13 n.7. Problems of safely securing vehicles after seizure stem in part from the size of the vehicles and their inherent mobility. In *Arkansas v. Sanders*, 442 U.S. 753 (1979), a case similar to *Chadwick*, the Court pointed out that requiring police to seize and hold vehicles pending issuance of a warrant would impose extreme burdens on many police departments due to inadequate storage facilities. As a result, automobiles are treated differently from items such as luggage. *Id.* at 763 n.10, 765 n.14. Yet, this rationale has been criticized. Consider, for example, the comments of Judge Wilkey in *United States v. Ross*, 655 F.2d 1159 (D.C. Cir. 1981), *rev'd*, 456 U.S. 798 (1982):

With all due respect, this explanation of the impracticality is itself most impractical and theoretical. For surely we can assume that any police department, no matter how small or rural, can transport and impound vehicles illegally parked or abandoned in hazardous locations. Tow trucks are available everywhere and it is common experience that police are prepared to resort to them. A “boot” on one wheel and one officer to watch over the car would be entirely sufficient to preserve immobile the auto and its contents.

Id. at 1200 (Wilkey, J., dissenting).

Additionally, the Court has pointed out that even if police are faced with greater administrative difficulties, this is not necessarily dispositive. In *Mincey v. Arizona*, 437 U.S. 385 (1978) the Court asserted that greater police efficiency alone cannot justify a sacrifice of fourth amendment warrant protection. *Id.* at 393; *accord, Ross*, 456 U.S. at 842 (Marshall, J., dissenting).

39 456 U.S. 798 (1982); see note 38 *supra* and note 64 *infra*.

not abandoned mobility under *Carroll* and *Chambers* as a rationale supporting the automobile exception. This exception, the Court concluded, expressed the "reasoned application of the more general rule that if an individual gives the police probable cause to believe a vehicle is transporting contraband, he loses the right to proceed on his way without official interference."⁴⁰

In *People v. Carney*,⁴¹ the Supreme Court of California addressed whether the "automobile exception" applied to motor homes. In so doing, it examined privacy interests associated with a quasi-residence, an issue which the United States Supreme Court has not yet addressed. The *Carney* court, however, misconstrues the Supreme Court's formulation of the automobile exception. While strongly protecting individual privacy interests, the California court neglects the practical law enforcement concerns which the Supreme Court found persuasive in formulating that exception.⁴²

II. The California Rule: *People v. Carney*

Acting on information provided by a private citizens' group called WeTIP,⁴³ Robert Williams of the Drug Enforcement Administration (DEA) observed Charles Carney approach a Mexican boy in downtown San Diego.⁴⁴ Consistent with this information, Williams observed Carney and the boy go into a motor home matching WeTIP's description.⁴⁵ After about seventy-five minutes the boy left the vehicle and Agent Williams, along with San Diego narcotics officer James Clem, approached him. The youth confirmed WeTIP's information, telling the officers that the "older man" in the motor home gave him marijuana in exchange for sexual favors.

40 *Id.* at 807 n.9. The scope of this interference is where the controversy lies.

41 34 Cal. 3d 597, 668 P.2d 807, 194 Cal. Rptr. 500 (1983), *cert. granted sub nom.* California v. Carney, 104 S. Ct. 1589 (1984).

42 See notes 15-38 *supra* and accompanying text.

43 WeTIP is the acronym for a private organization called "We Turn in Pushers." *Carney*, at 602, 668 P.2d at 809, 194 Cal. Rptr. at 502. That organization receives anonymous phone calls regarding information about drug dealers and then relays this information to nearby law enforcement personnel. WeTIP is known to the DEA, but its informants are not. See *People v. Carney*, 117 Cal. App.3d 36-51 n.2, 172 Cal. Rptr. 430, 432 n.2 (1981) (hereinafter only the unofficial reporter will be cited; the official reporter has not published the appellate opinion but has allotted space for the decision).

44 *Carney*, Cal. 3d at 602, 668 P.2d at 809, 194 Cal. Rptr. at 501-02. Agent Williams actually intended to observe a suspected drug dealer named Lee Bowman. Subsequent observations, however, led Williams to believe that Bowman had either been replaced by Carney or that Bowman and Carney were collaborating. See *Carney*, 34 Cal. 3d at 602, 603, 668 P.2d at 808, 809, 194 Cal. Rptr. at 502.

45 34 Cal. 3d at 602, 668 P.2d at 809, 194 Cal. Rptr. at 502.

The youth then accompanied the agents back to the vehicle and asked Carney to step outside. When Carney stepped out, Agent Clem stepped into the vehicle to see whether anyone else was inside.⁴⁶ He observed in plain view a scale, two bags of marijuana, and other drug paraphernalia.⁴⁷ The agents arrested Carney and impounded his motor home. Subsequently, narcotics agents conducted a warrantless inventory search of the vehicle and discovered more marijuana in the cupboards and refrigerator.⁴⁸

The trial court denied Carney's motions to suppress the evidence gathered from the warrantless searches and to dismiss the case.⁴⁹ The California court of appeals affirmed,⁵⁰ determining that, under the circumstances known to the officers at the time of Carney's arrest, Clem's initial intrusion into the vehicle was justified as a protective sweep search.⁵¹ This legitimate intrusion, according to the court, val-

46 The trial transcript suggests that Agent Clem stood in the motor home doorway and peered inside the vehicle, while the opinion of the Supreme Court of California suggests a somewhat greater physical intrusion. Compare Joint Appendix at 15-16, *People v. Carney*, 34 Cal. 3d 597, 668 P.2d 807, 194 Cal. Rptr. 500 (1983), cert. granted sub nom. *California v. Carney*, 104 S.Ct. 1589 (1984) [hereinafter cited as Joint Appendix] with *People v. Carney*, 34 Cal. 3d 597, 602, 668 P.2d 807, 809, 194 Cal. Rptr. 500, 502 (1983).

The trial record contains the following cross examination of Agent Williams:

Q: Did you then ask [Mr. Carney] to face you?

...

A: I believe as Mr. Carney stepped out, Agent Clem stepped up on the steps, looked in, stepped back out and told me what was observed, to the best of my knowledge.

Q: And the first step is inside the van, is it not?

A: Yes, sir. Well

Q: In other words, there is an exterior door on the van, is there not?

A: Yes, it is probably an exterior step that would be outside the van. Whether it was down or not, I don't know. From what I remember, Agent Clem stepped in where the door would have locked, stepped on that step and looked in.

Q: So he had his body and feet inside the van at that time when he looked, did he not?

A: I believe so. You would have to ask agent Clem.

Joint Appendix, *supra*, at 20-21.

47 *Carney*, 34 Cal. 3d at 602, 668 P.2d at 809, 194 Cal. Rptr. at 502.

48 *Id.*

49 *Id.* at 603, 668 P.2d at 809, 194 Cal. Rptr. at 502.

50 *Carney*, 172 Cal. Rptr. 430 (1981).

51 *Id.* at 434. The court of appeals determined that Agent Clem reasonably inferred from the Mexican boy's statement that "the older man" inside the vehicle offered him drugs, that more than one man was inside the motor home. *Id.* Moreover, it is significant to recall that Agent Williams initially had been looking for Lee Bowman. See note 44 *supra*. Thus, the boy's statement arguably took on even greater significance moments before Agent Clem's "sweep search." According to the court of appeals, the police intrusion, therefore, was justified for safety reasons. *Carney*, 172 Cal. Rptr. 434.

idated Clem's subsequent "plain view"⁵² seizure of the marijuana.⁵³

The Supreme Court of California reversed,⁵⁴ rejecting both the government's protective sweep theory and the automobile exception theory. The court rejected the first theory because, in its view, the police had no "reasonable belief" that Carney had confederates inside the vehicle.⁵⁵ The court rejected the second theory because it felt that the automobile exception was inapplicable to the motor home.⁵⁶

52 The "plain view" doctrine creates a secondary exception to the fourth amendment warrant clause. The doctrine rests on the policy that once police have lawfully intruded into an otherwise constitutionally protected area, they may seize obvious evidence of criminal activity as long as they do not have prior *knowledge* of its presence. *See, e.g., Coolidge v. New Hampshire*, 403 U.S. 443, 464-72 (1971). *See also* note 3 *supra*.

The Supreme Court has succinctly stated these elements as follows: "First, the police officer must lawfully make an 'initial intrusion,' . . . Second, the officer must discover incriminating evidence 'inadvertently,' . . . Finally, it must be 'immediately apparent' to the police that the items they observe may be evidence of a crime, contraband, or otherwise subject to seizure." *Texas v. Brown*, 460 U.S. 730, 737 (1983) (interpreting *Coolidge v. New Hampshire*, 403 U.S. 443 (1971)).

53 The court of appeals recognized that some courts accorded people's privacy interest in motor homes greater protection than automobiles. In particular, the court referred to *United States v. Williams*, 630 F.2d 1322, 1326 (9th Cir. 1980), for the general proposition that privacy expectations are greater in motor homes than ordinary automobiles. *Carney*, 172 Cal. Rptr. at 434. The court of appeals observed that the Ninth Circuit's analysis was based on a general reasonableness inquiry rather than a *per se* rule. In *Williams*, exigencies other than those associated with the automobile search validated a warrantless intrusion into the motor home. Using a similar analytical approach, the court of appeals found that the privacy protections associated with the motor home merely altered judicial inquiry into what constituted a "reasonable" search under the circumstances. The presence of Carney's motor home in a downtown San Diego parking lot, within three blocks of that city's commercial center, suggested the strong likelihood of the exigency of mobility under *Carroll v. United States*, 267 U.S. 132 (1925). The court held that under the circumstances, this exigency was sufficient to permit the warrantless search. *Carney*, 172 Cal. Rptr. at 435.

Finally, the California appellate court found that the "plain view" discovery of the contraband and drug paraphernalia gave the police sufficient probable cause to search the motor home after impoundment. *Id.* at 436. Since the custodial intrusion was no greater than if the police had made the further search in the parking lot, it too was reasonable under the fourth amendment. *Id.*; *cf. Chambers v. Maroney*, 399 U.S. 42, 51-52 (1970).

54 *People v. Carney*, 34 Cal. 3d 597, 668 P.2d 807, 194 Cal. Rptr. 500 (1983).

55 *Id.* at 613, 668 P.2d at 817, 194 Cal. Rptr. at 510. The Supreme Court of California determined that the State had the burden of showing that the officers "were aware of specific, articulable facts from which they could reasonably infer other suspects were in the motor home." *Id.* at 612, 668 P.2d at 816, 194 Cal. Rptr. at 509. In the court's view, the officers' reliance on the Mexican boy's implied reference to "another man" inside Carney's motor home was unpersuasive. "Had the officers been truly concerned for their safety, it would have been elementary for them to have asked the [boy] . . . how many people were inside [the motor home]." *Id.*

56 The Supreme Court of California stated ultimately that "a motor home is fully protected by the Fourth Amendment and is not subject to the 'automobile exception.'" *Id.* at 610, 668 P.2d at 814, 194 Cal. Rptr. at 507. In its view, the exigencies associated with that

Specifically, the court reasoned that the exception rested on two bases: vehicular mobility and a diminished expectation of privacy.⁵⁷ Although the Supreme Court has relied upon both rationales, the *Carney* court rejected the mobility rationale by reasoning that the exception's "prime" justification rested upon the "diminished expectation of privacy . . . surround[ing] the automobile."⁵⁸ The California court next concluded that the diminution of privacy in automobiles flowed from that vehicle's primary use as transportation. Since motor homes commonly serve as temporary residences, and are thus more like "homes" than "motor vehicles," no primary transportation function exists to diminish the occupants' privacy expectations. In the court's view, such occupants are protected at least to the same extent as travelers temporarily renting motel rooms.⁵⁹ Finally, unlike a car, a motor home's interior rarely is exposed to the public's plain view. Thus, in *Carney*, no diminution of privacy existed sufficient to apply the automobile exception to the motor home.

The *Carney* court redefined the automobile exception as resting primarily on a diminished privacy expectation in automobiles.⁶⁰ And, by equating motor homes with fixed private residences for fourth amendment purposes,⁶¹ the *Carney* court found the automobile

exception were insufficient to overcome the strong presumption of privacy in motor homes—a presumption which did not exist in automobiles. Although other exigencies might arise to permit warrantless searches, those associated with the automobile exception are inapposite in cases involving motor homes. *Id.* n.8.

57 *Id.* at 605-06, 668 P.2d at 811, 194 Cal. Rptr. at 504.

58 *Id.*

59 The California Supreme Court noted expressly that "[m]otor homes are generally designed and used as residences; their essential purpose is to provide the occupant with living quarters" *Id.* at 606, 668 P.2d at 812, 194 Cal. Rptr. at 505. The motor home creates a setting "that could accommodate most private activities normally conducted in a fixed home." *Id.* This configuration, combined with the vehicle's use for personal purposes, convinced the California Supreme Court to treat motor homes as "structures" worthy of greater fourth amendment protection.

In arriving at its conclusion, the court curiously labeled the *motor home* a "structure" under the California Code definition which states explicitly that a *mobilehome* is "a structure transportable in one or more sections . . . to be used with or without a foundation system." CAL. HEALTH AND SAFETY CODE § 18008 (West 1984) (emphasis added). But that section also states that a mobilehome "does not include a recreational vehicle." Yet, the Code classifies a single chassis, self-propelled motor home as a recreational *vehicle* with residential indicia. *See id.* at § 18010. In defining the "motor home," then, the California Code leaves out any "structure" terminology. Thus, as the California Supreme Court employed the state code in *Carney*, the court's reliance is misplaced.

60 *See* notes 33-38 *supra* and accompanying text.

61 According to the court in *Carney*, "in the case of a motor home as with a fixed house the issue is whether the occupant manifests an objectively reasonable expectation of privacy in the interior." 34 Cal. 3d at 608, 668 P.2d at 813, 194 Cal. Rptr. at 506. Thus, insofar as *Carney's* motor home "would have alerted a reasonable person to believe it was likely to be

exception inapplicable to motor homes.⁶² Although *Carney* follows the Supreme Court's recent trend of formulating "bright line" rules for police officials in fourth amendment cases,⁶³ by redefining the automobile exception the *Carney* court apparently ignores the Supreme

serving as at least a temporary residence, it was entitled to the protections traditionally given to a home." *Id.* at 609, 668 P.2d at 814, 194 Cal. Rptr. at 507. Moreover, in the court's view, even where the occupant's residential use of the motor home is not apparent, the motor home's furnishings or "other residential accoutrements" are sufficient to indicate residential status for fourth amendment purposes. *Id.* at 609 n.7, 668 P.2d at 814 n.7, 194 Cal. Rptr. at 507 n.7.

62 *Carney*, 34 Cal. 3d at 608, 668 P.2d at 813, 194 Cal. Rptr. at 506 (relying on *United States v. Williams*, 630 F.2d 1322, 1326 (9th Cir. 1980)).

63 Perhaps Justice Blackmun has been the most vociferous Supreme Court Justice to stress the necessity of formulating clear law enforcement guidelines in fourth amendment cases. In *Arkansas v. Sanders*, 442 U.S. 753 (1979), Justice Blackmun suggested that, rather than protecting luggage as a special container sometimes found in automobiles, "it would be better to adopt a clear-cut rule to the effect that a warrant should not be required to seize and search any personal property found in an automobile that may in turn be seized and searched without a warrant pursuant to *Carroll* and *Chambers*." *Id.* at 772 (Blackmun, J., dissenting); cf. *United States v. Chadwick*, 433 U.S. 1, 21-22 & n.3 (Blackmun, J., dissenting). In Justice Blackmun's view, *Carroll* permits all containers within an automobile to be searched for contraband without a warrant. *Sanders*, 442 U.S. at 769 (Blackmun, J., dissenting).

Justice Powell has also stressed the need for "bright line" rules in this area of fourth amendment cases. In *Robbins v. California*, 453 U.S. 420 (1981) (plurality opinion), he stressed the need to balance "marginal" privacy interests in automobiles with the need to protect both police officers and destructible evidence. *Id.* at 430-31 (Powell, J., concurring).

Recently, the Supreme Court's decision in *United States v. Ross*, 456 U.S. 798 (1982) established the most dramatic bright line rule to date in these fourth amendment cases. Under *Ross*, where police have probable cause to believe generally that a motor vehicle contains contraband, any container which is capable of concealing that contraband may be searched pursuant to the *Carroll* doctrine. *Id.* at 820-24. The Court finally established a workable "bright line" rule to provide both courts and constables "specific guidance" in automobile search cases. See *id.* at 825 (Blackmun, J., concurring); *id.* at 826 (Powell, J., concurring).

In the opinion of one commentator, the appropriate judicial approach to fourth amendment cases should follow a simple "bright line" approach applying the warrant requirement exclusively. This would eliminate the "incomprehensible categories" of privacy expectations created by the Court in its fourth amendment cases replacing them with a standard warrant rule, the exceptions to which would be established through a "common sense analysis of exigent circumstances." See Bloom, *Warrant Requirement—The Burger Court Approach*, 53 U. COLO. L. REV. 691, 740-43 (1982). Professor Bloom suggests that "[i]t makes more sense to review the facts of an individual case to determine whether or not it was practical to secure a warrant . . . than to review the abstract distinctions necessitated by the Court's attempt to apply a diminished expectation of privacy rationale." *Id.* at 742. The practical consequence of adopting this view would be for the Court to reject the unnecessary rules fostered by its *Chambers* decision and return instead to the standard *Carroll* mobility analysis, predicated on exigent circumstances.

The Supreme Court of California in *Carney* apparently has opted for an approach similar to that suggested by Professor Bloom. See e.g., 34 Cal. 3d at 610 & n.8, 668 P.2d at 814 & n.8, 194 Cal. Rptr. at 507 & n.8. In *Carney*, the court eschewed the abstract privacy analysis regarding motor homes and adopted a "bright line" warrant requirement to protect all motor home occupants.

Court's recent discussion in *Ross*, which emphasized that practical considerations of mobility are still important in analyzing warrantless search cases.⁶⁴ But *Carney* should not be read as totally ignoring "mobility." Rather, in light of *Ross*, the decision should be read to mean that mobility permits police to seize but not search motor homes.

In *Ross*, the Supreme Court did more than reaffirm its prior reliance on actual mobility to justify the automobile exception. In a footnote, the Court distinguished warrantless seizures from warrantless searches.⁶⁵ The Court admitted that its decision in *Carroll* was not based solely on the necessity for an immediate search.⁶⁶ Rather, the Court acknowledged that *Carroll* was justified for two reasons. First, a warrantless seizure was necessary to curtail the exigencies present there. Second, the search was permitted since, as the Court explained in *Chambers*, no meaningful distinction in the level of intrusiveness exists between warrantless seizures and warrantless searches of automobiles.⁶⁷

64 The Supreme Court of California stated that "courts have recognized that mobility is no longer the prime justification for the automobile exception; rather, 'the answer lies in the diminished expectation of privacy which surrounds the automobile.'" 34 Cal. 3d at 605, 668 P.2d at 811, 194 Cal. Rptr. at 504 (quoting *United States v. Chadwick*, 433 U.S. 1, 12 (1977)). In a footnote, the California Supreme Court noted that its reasoning was not undermined by the Supreme Court's decision in *Ross*. In its view, *Ross* dealt only with the scope of the automobile exception once that exception applied, not whether it applied. Therefore, the California court found that the only part of *Ross* relevant to its inquiry in *Carney* was that which reaffirmed the importance of privacy expectations. The court in *Carney*, however, seemingly ignored the fact that the *Ross* opinion emphasized the importance of mobility and its reference to the practical problems presented after seizure. See *Ross*, 456 U.S. at 805, 806. See also *id.* at 807 n.9, 812 n.16, 813 n.18, 816 n.21, 820, 821 n.28; *id.* at 830 n.2, 832, 838 (Marshall, J., dissenting). Contrary to the *Carney* court's understanding of *Ross*, then, the Supreme Court's opinion in *Ross* reaffirms the need to address practical law enforcement problems, as well as individual privacy expectations, in balancing fourth amendment interests.

65 456 U.S. at 807 n.9. The fourth amendment addresses both warrantless searches and warrantless seizures. In cases involving motor vehicle stops, the police must stop and "seize" the vehicle before they "search" it. In *Chambers v. Maroney*, 399 U.S. 42 (1970), the Court recognized that police could prevent the removal of evidence transported in cars by seizing the car temporarily in order to secure a warrant. *Id.* at 51-52. And in *United States v. Ross*, 456 U.S. 798 (1982), the Court observed that a seizure was really sufficient to curtail the exigencies presented in *Carroll*. *Id.* at 807 n.9. Arguably, only the warrantless seizure should be permitted under *Carroll* and the search be allowed only by consent of a vehicle's occupants or where circumstances make it impracticable to immobilize the car in order to obtain a warrant. See *Chambers*, 399 U.S. at 64 & n.9 (Harlan, J., concurring in part, dissenting in part).

66 See *Ross*, 456 U.S. at 807 n.9.

67 *Id.* (citing *Chambers v. Maroney*, 399 U.S. 42, 52 (1970)). In *Ross*, the Supreme Court made clear that a warrantless "seizure" in *Carroll* would have been sufficient to curtail the exigencies caused by vehicular mobility. See note 26 *supra*. Analytically, a warrantless "search" in *Carroll* was unnecessary. *Ross*, 456 U.S. at 807 n.9. The Court was able to justify

In roadway stops involving motor homes, however, a different approach is required. Motor home occupants do not expose themselves freely to the public view.⁶⁸ Moreover, as the Ninth Circuit noted in *United States v. Williams*,⁶⁹ the residential indicia attaching to motor homes suggests that those occupants have a "significantly greater" expectation of privacy than in a car. In that court's view, although actual mobility, under some circumstances, may still be a factor sufficient to overcome an occupant's privacy interests in a motor home,⁷⁰ where that vehicle is rendered immobile because its occupants are under arrest, no actual emergency exists permitting a warrantless search.⁷¹ This analysis suggests that the Ninth Circuit in *Williams* rejected the Supreme Court's *Chambers* rationale regarding impoundment searches,⁷² for once the threat of actual mobility ceases, the fourth amendment prohibits custodial searches of motor homes.

Similar to the approach in *Ross*, *Carney* seems to draw a distinction between warrantless seizures and warrantless searches.⁷³ And,

the *Carroll* "search," however, under its rationale in *Chambers*. There, the Court refused to distinguish between warrantless searches and warrantless seizures where automobiles were involved. The diminished privacy expectations surrounding automobiles were insufficient to support a different result.

When *Carney* erected a privacy distinction between automobiles and motor homes, however, the *Chambers* justification fell. Thus, the only legitimate warrantless intrusions into motor homes seemingly would be the warrantless "seizure" discussed in *Ross*. Under this analysis, the *Carney* decision accommodated the *Carroll* scenario insofar as it allowed agents Williams and Clem to seize Carney's motor home without a warrant.

68 See, e.g., *United States v. Chadwick*, 433 U.S. 1, 12-13 (1977); *Cardwell v. Lewis*, 417 U.S. 583, 590-91 (1974).

69 630 F.2d 1322 (9th Cir. 1980).

70 The Ninth Circuit in *Williams* impliedly acknowledged the legitimacy of the government's argument that the motor home's inherent mobility placed that vehicle within the scope of the automobile exception. Ultimately, the Ninth Circuit rejected this argument as employed in that case, however, because the facts in *Williams* suggested that "there was no chance that the motor home would disappear in the short amount of time it would have taken the agents to obtain a warrant." *Id.* at 1326.

71 *Id.*

72 *Id.*

73 The Ninth Circuit in *Williams* distinguished between automobiles and motor homes. "Whatever expectations of privacy those travelling in an ordinary car have, those travelling in a motor home have expectations that are significantly greater." *Id.* In light of the residential indicia in motor homes, the Ninth Circuit found the differences between automobiles and motor homes too great to let the automobile exception support the warrantless police search once the vehicle was immobilized. The meaning of the Ninth Circuit's language at this point in its opinion is somewhat unclear. The court suggests that privacy interests in motor homes are "significantly greater" than those in automobiles even when actual mobility attaches. The *Carney* court took this language to mean that personal privacy interests in motor homes outweighed any warrantless search justifications created by actual mobility. But the Ninth Circuit's language in *Williams* could be read to the contrary. Indeed, *Williams* seems to view

like the Ninth Circuit in *Williams*, *Carney* impliedly rejected the *Chambers* rationale that a warrantless search could be a lesser intrusion than a warrantless impoundment.⁷⁴ Because of the greater expectation of privacy associated with a motor home, an immediate warrantless search is decidedly more intrusive than holding the vehicle until a warrant is obtained. To decide otherwise would render the Supreme Court's emphasis on privacy expectations meaningless. Thus, the *Carney* court properly rejected the Supreme Court's "lesser intrusion" rationale.⁷⁵ Viewed in this manner, *Carney* does not reject warrantless seizures under *Carroll*.⁷⁶ Rather, *Carney* holds only that circumstances justifying legitimate warrantless seizures will not always justify immediate searches in cases involving motor homes.

But while *Carney* may be reconciled with part of the Supreme Court's recent analysis in *Ross*,⁷⁷ it still ignores the practical law enforcement problems uniquely associated with motor homes.⁷⁸ For example, in *United States v. Wiga*⁷⁹ the Ninth Circuit recognized that:

While a motor home may afford its occupants a higher expectation of privacy than does an ordinary passenger automobile, it also raises the possibility of certain exigencies which are not present in the case of the ordinary automobile stop. A motor home may shield from the view of officers unknown occupants who could either present a threat to the officers' safety or destroy or secrete contraband while the driver is being interrogated.⁸⁰

In *Wiga*, the Ninth Circuit went on to suggest that in some cir-

both this intrinsically greater privacy interest and the actual use (i.e., the absence of actual mobility) as elements critical to its decision not to apply the automobile exception to motor homes. *But see* *United States v. Wiga*, 662 F.2d 1325, 1329 (9th Cir. 1981) (interpreting *Williams* to hold categorically that the automobile exception is inapplicable to the motor home).

74 This reasoning assumes, of course, that privacy expectations in motor homes are not sufficiently diminished by government regulation and use in public thoroughfares so as to preclude protections against warrantless intrusions. This assumption follows directly from the Court's opinion in *Delaware v. Prouse*, 440 U.S. 648 (1979). There, the Court stated: "An individual operating or traveling in an automobile does not lose all reasonable expectations of privacy simply because the automobile and its use are subject to government regulation." *Id.* at 662. Since the Court in *Prouse* stated that regulation alone could not justify a warrantless seizure, this Comment presumes that neither should such regulations justify the "more intrusive" warrantless search.

75 *See, e.g., Chambers*, 399 U.S. 42 at 51-52.

76 *See* notes 64, 67 *supra*.

77 *Carney* holds that warrantless seizures are permitted in cases involving motor homes. This is consistent with the Supreme Court's analysis of *Carroll* in the *Ross* case. *See* notes 64, 67 *supra*.

78 *See* note 64 *supra*.

79 662 F.2d 1325 (9th Cir. 1981).

80 *Id.* at 1329.

cumstances exigencies associated with fixed structures might also attach to motor homes.⁸¹ Moreover, the motor home's inherent mobility may provide unseen occupants with an avenue of escape.⁸² Taken together, these examples evidence dangers to police safety and restrictions on effective law enforcement practices in motor home cases.⁸³

III. Recommendations

In order to deal with these and other exigencies which may arise when police stop a motor home, the cases present several avenues for analysis. At one extreme, courts might apply warrant standards according to a vehicle's use just before the search. At the other extreme, courts might apply the automobile exception to *any* vehicle, regardless of its character or actual use. Also, courts might balance actual vehicle use with the presumed privacy interests in motor homes.

The *Ross* opinion seems to endorse the first approach, focusing on the vehicle's use which is apparent to police at the time of the stop.⁸⁴ Thus, where a motor home is used for transportation pur-

81 *Id.*

82 This "inherent exigency" rationale prompted the California court of appeals in *Carney* to note that "the [motor home] possibly contained other suspects and, unless the fact of their absence was immediately established, the safety of the officers could be endangered, the vehicle driven away and the evidence lost or destroyed." *Carney*, 172 Cal. Rptr. 430, 434 (1981).

Moreover, the possibility of threats from a party within the motor home but unknown to the police officers has also prompted other courts to recognize the need for flexible judicial analysis in protective sweep search cases. *See, e.g.*, *State v. Francoeur*, 387 So. 2d 1063 (Fla. App. 1980) (where the police searched a vehicle referred to as a "mobile home," "camper home," and "van," they were justified in conducting a warrantless search for other occupants after discovering weapons and narcotics on the driver); *State v. Mower*, 407 A.2d 729 (Me. 1979) (where the court upheld a protective sweep search when a lone police officer stopped a converted bus/camper suspected of being used in a theft).

83 Permitting law enforcement officers to conduct a warrantless intrusion sufficient to protect their safety or destructible evidence is not new. *See Terry v. Ohio*, 392 U.S. 1 (1968). And, although the Ninth Circuit in *Wiga* refused to apply the automobile exception to motor homes because of its prior decision in *Williams*, *see note 73 supra*, it found that several circuits upheld warrantless "protective sweep searches" where police had some reasonable suspicion that unforseen agents were within a premises. *Wiga*, 662 F.2d at 1330-31. For a discussion of differing standards of "cause to search" applied throughout the circuits, *see Note, Criminal Law in the Ninth Circuit: Recent Developments*, 16 LOY. L.A.L. REV. 707, 784-85 nn.607, 610 (1983).

84 According to the Supreme Court in *Ross*, "if an individual gives the police probable cause to believe a vehicle is transporting contraband, he loses the right to proceed on his way without official interference." *Ross*, 456 U.S. at 807 n.9 (emphasis added). Thus, assuming a motor home is classified as a "vehicle," *Ross* could endorse the exception's application to motor homes where motor homes were used to "transport" contraband. *Cf. United States v. Holland*, 740 F.2d 878 (11th Cir. 1984); *see also note 14 supra*.

poses, the automobile exception under *Carroll* would apply.⁸⁵ The problem with this approach, however, is that police have little guidance in determining "apparent" use. Rarely will the clear *Carroll-Chambers* scenarios present themselves. More likely, a motor home's "use" will combine both residential and transportation purposes.⁸⁶ Then, the question arises how police officers, "engaged in the often competitive enterprise of ferretting out crime,"⁸⁷ are to balance their own law enforcement needs against the privacy expectations of individuals.

To avoid this characterization problem, a second approach may

85 See *United States v. Holland*, 740 F.2d 878 (11th Cir. 1984), where the court refused to follow the view established in *Carney*. Instead of announcing categorically any rule placing mobile homes within or without the automobile exception, the court held that a vehicle's "use," rather than its configuration, controlled the exception's application. *Id.* at 880.

In *Holland*, the defendants rented two Winnebago motor homes specifically to transport a large cache of marijuana. Since the defendants used the motor homes as they might use trucks, the "residential appurtenances" which the *Carney* court relied on became mere incidentals to the overall use. The *Holland* court thus rejected the *Carney* holding which barred the automobile exception from cases involving motor homes. The *Holland* court found, instead, that the applicable fourth amendment standard of reasonableness was that attaching to ordinary trucks.

86 The following hypothetical situation illustrates this problem. Dan is driving his motor home coast-to-coast along an interstate highway. His wife, Lisa, sleeps periodically on the bed of their motor home. Unknown to Lisa, Dan has agreed with a friend to transport controlled substances inside the bed's mattress. During the trip, Lisa and Dan stop periodically to rest and cook within their motor home. Because the mattress is "lumpy," Dan and Lisa decide to spend several nights in motels along the way. If police stop Dan and Lisa several days later at a rest stop, how should they decide whether transportation or residential uses attach? Since Dan and Lisa are traveling coast-to-coast, they certainly are using their vehicle for transportation. But since they are also using their vehicle as a place in which to stop, cook, and rest, they are using it equally as a residence. Moreover, at the beginning of the trip they slept overnight in the motor home. Assuming the arresting officers are aware of all these facts through a special law enforcement information "network," should they consider this detail? On the other hand, does stopping at the motels strip away the residential protection from the motor home because Dan and Lisa's "residential intent" was somehow incomplete? If Dan and Lisa fall asleep together at a rest stop and police arrive, is the motor home a "residence" then? Does it lose any residential character if Dan awakens before Lisa and quietly resumes their journey?

87 The classic statement of the policy underlying the warrant requirement of the fourth amendment is that of Justice Jackson in *Johnson v. United States*, 333 U.S. 10 (1948):

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers.

Id. at 13-14 (footnotes omitted).

be adopted, applying the automobile exception regardless of the vehicle's actual use or configuration. But while *Carney* would protect personal privacy at a cost to efficient law enforcement, this second approach would promote an entirely opposite result. It would treat the motor home just like an automobile under the *Carroll-Chambers* cases, eschewing any separate privacy analysis. Thus, any privacy expectation arising from the residential use of motor homes would be left "secure only in the discretion of police officers."⁸⁸

Both of these approaches are unsatisfactory in a society which prides itself on protecting liberty interests.⁸⁹ The Supreme Court has announced repeatedly that warrantless searches are per se unreasonable unless they fall within certain narrow and jealously guarded exceptions.⁹⁰ Expanding the automobile exception this radically would give the Court's pronouncements a hollow ring.

Yet, as *Ross* illustrates, courts should not forsake practical law enforcement concerns. In light of these concerns, courts might adopt a third approach, permitting police to conduct a limited automatic sweep search where they have probable cause to believe a motor home contains contraband or other destructible evidence, or where they otherwise act pursuant to a legitimate highway arrest.⁹¹ This approach would accommodate the *Carroll-Chambers* scenarios without

⁸⁸ *Id.* at 14.

⁸⁹ In *Boyd v. United States*, 116 U.S. 616 (1886), the Supreme Court acknowledged that the principles behind the fourth amendment "affect the very essence of constitutional liberty and security." *Id.* at 630 (commenting on Lord Camden's judgment in *Entick v. Carrington*, 95 Eng. Rep. 807 (1765)). "It is not the breaking of [a man's] doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . ." *Id.*

⁹⁰ A recent statement regarding this per se rule was announced in *Ross*. There, the Court stated:

The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967).

Ross, 456 U.S. at 825 (quoting *Mincey v. Arizona*, 437 U.S. 385, 390 (1978)); see also note 3 *supra*.

⁹¹ One commentator recently has reviewed the protective sweep doctrine. See Joseph, *The Protective Sweep Doctrine: Protecting Arresting Officers from Attack by Persons Other than Arrestees*, 33 CATH. U.L. REV. 95 (1983). In Professor Joseph's view, the courts should not address whether police have "reasonable cause" or "probable cause" to believe a suspect is within a premises before they search. *Id.* at 129. Rather, he proposes a narrowly-drawn per se rule allowing protective sweep searches pursuant to valid arrests. *Id.* at 140-43.

Professor Joseph would dispense with the need for prior probable cause and permit an automatic sweep search whenever a suspect is arrested in a motor home, apartment, or other premises. The scope of such searches, however, would be confined to briefly entering a room

totally forsaking increased personal privacy interests in motor homes. It would also modify the *Carney* holding to accommodate the minimum practical needs of law enforcement officials.

This sweep search should be permitted, however, only to foreclose dangers associated with motor homes. For example, since a motor home provides opportunities for persons to hide from police in a manner unlike an automobile, there *always* exists a threat to police safety. The sweep search, then, would be limited to those reasonable actions necessary to protect police officers and secure the vehicle.⁹² Thus, in the case of a motor home, a warrantless impoundment search would be foreclosed as a "greater intrusion" than in the case of an automobile.⁹³ Once the police secure the motor home through

and scanning for "other persons who could pose a threat to the officers during the course of the arrest." *Id.* at 141 (emphasis in original).

Professor Joseph's analysis is confined to dwellings and other fixed structures. Moreover, he would not advocate intrusions into closets—even "walk in" closets—absent "reasonable suspicion" to believe a dangerous party is within. *Id.* at 144. Nor would he advocate such intrusions when the arrest occurs outside the premises. Such intrusions are, in his view, only justified where "probable cause" and exigent circumstances validate the action. *Id.* at 145.

The view advanced in this Comment rejects Professor Joseph's limitations in the case of motor homes. As a practical matter, people are not arrested inside their motor homes. They are arrested outside their vehicles. Nonetheless, the risks to officer safety in the context of valid highway stops are indistinguishable from those in the context of valid arrests inside a fixed home.

92 See *Chambers*, 399 U.S. at 61-64 (Harlan, J., concurring in part, dissenting in part).

93 This result is consistent with this Comment's interpretation of the *Carney* decision. See notes 74-76 *supra* and accompanying text. In Professor LaFave's opinion, courts should avoid flexible fourth amendment analysis as much as possible. In his view, the courts can only uphold the policies behind the fourth amendment by "articulating reasonable and understandable limits upon police authority . . ." See LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307, 361 (1982). In this fashion, courts must adopt and apply carefully conceived "bright lines" whenever feasible. *Id.*

But such "bright lines" should not be drawn haphazardly. In particular, Professor LaFave cautions courts to resist the temptation to draw "[n]ew, supposedly 'bright' lines" when existing doctrine is, in fact, sufficient to handle problems encountered through day-to-day practice. Quoting Karl Llewellyn, he suggests that courts should take a less myopic view of problems associated with individual cases; instead, "they need 'to see in the round rather than the flat, and to gain some understanding of the whole in action.'" *Id.* at 333 (quoting K. LLEWELLYN, *THE COMMON LAW TRADITION—DECIDING APPEALS* 263 (1960)).

In order to achieve these results, Professor LaFave suggests four inquiries essential to rationally determining a bright line's efficacy:

- (1) Does [the rule] have clear and certain boundaries, so that it in fact makes case-by-case evaluation and adjudication unnecessary?
- (2) Does it produce results approximating those which would be obtained *if* accurate case-by-case application of the underlying principle were practicable?
- (3) Is it responsive to a genuine need to forego case-by-case application of a principle because that approach has proved unworkable?
- (4) Is it not readily subject to manipulation and abuse?

a limited roadway sweep search, further intrusions should be conducted pursuant to a warrant.

Applying this rule to *Carney*, the initial sweep search in the parking lot would be justified even if the agents lacked a reasonable belief that Carney had confederates within the motor home. Once the motor home was secured, however, the police should have obtained a search warrant before invading the vehicle's cupboards and refrigerator.

IV. Conclusion

The United States Supreme Court granted the California Attorney General's petition for certiorari in *Carney* on March 19, 1984.⁹⁴ Because of the need to balance public interests in law enforcement and personal interests in privacy within the motor home, *Carney* may now force the Court to delineate some uniform rationale underlying the automobile exception. The Court might address whether the exception is based on mobility, diminished privacy expectations, practical law enforcement considerations, or other factors.

Significantly, the Supreme Court in *Ross* suggested that the "automobile exception" is actually a general "vehicle exception."⁹⁵ Indeed, this is the thrust of the State's argument to the Court on certiorari review.⁹⁶ But, if the Court adopts such a broad generalization, it will impliedly reject personal privacy expectations as the "touchstone" of its inquiry, in favor of law enforcement concerns. Such an extreme rationale justifying the automobile exception will fail to properly accommodate the numerous scenarios and competing interests with which the law must deal. Allowing an automatic sweep search to the extent necessary to protect the police and secure the vehicle balances these competing interests. Such a limited search would provide clear guidance to police in conducting "reasonable" warrantless intrusions into motor homes. It would also accommodate legitimate practical law enforcement concerns by promoting police safety. Finally, it would protect the personal privacy interests of in-

Id. at 325-26 (emphasis in original). The rule which this Comment suggests parallels Professor LaFave's suggested analysis.

94 *California v. Carney*, 104 S. Ct. 1589, 1590 (1984).

95 See note 84 and accompanying text.

96 See Brief for Petitioner at 15-17 n.4, 18-21, *California v. Carney*, 104 S. Ct. 1589 (1984).

dividuals—interests which are paramount to the “ordered liberty” of a free society.⁹⁷

Arthur H. Abel
Donald E. Moore

⁹⁷ See *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949). See also *Gouled v. United States*, 255 U.S. 298, 303-04 (1921).