Recent Decisions

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CRIMINAL LAW—PREMENSTRUAL SYNDROME: A CRIMINAL DEFENSE

In People v. Santos, a New York woman charged with child battering raised the defense of premenstrual syndrome (PMS) in a pretrial hearing. Although English courts have recognized PMS as a mitigating factor in sentencing, Santos presented the first opportunity for an American court to consider PMS in a criminal case. Plea bargaining ultimately reduced the felony charge to a misdemeanor and precluded a legal test of the controversial defense. Increased publicity and recognition of PMS in both England and the United States, however, may prompt more criminal defendants to assert the

1 No. IKO46229 (Crim. Ct. N.Y. Nov. 3, 1982).
3 Regina v. Smith, [1982] Crim. L.R. 531 (C.A.); Regina v. Craddock, [1981] 1 C.L. 49; Tybor, Women on Trial: New Defense, NAT'L L.J., Feb. 15, 1982, at 1, col. 1 (discussing the unreported decision of Regina v. English, decided by the Norwich Crown Court on November 10, 1981). Additionally, several commentators have noted that the French legal system recognizes PMS as a form of temporary insanity. None, however, has cited a French authority to support the proposition. See, e.g., Gonzalez, Premenstrual Syndrome: An Ancient Woe Deserving of Modern Scrutiny, 245 J. A.M.A. 1393, 1393 (1981); Sharma, Premenstrual Syndrome, 226 THE PRACTITIONER 1091 (1982); Tybor, supra, at 16. Apparently, Professor Oleck was the first American authority to assert that the French categorize PMS as a form of temporary insanity. Oleck, Legal Aspects of Premenstrual Tension, 166 INT'L REC.'OF MED. & GEN. PRAC. CLINICS 492, 496 (1953). Although Oleck cites no authority to support this statement, article 64 of the French Penal Code provides criminal defenses which could encompass PMS-induced behavior. 1977-78 CODE PENAL, art. 64.
4 Although Santos was the first attempt to use the PMS defense in a criminal case in the United States, premenstrual syndrome and its symptoms have been discussed in several civil cases in the United States. See, e.g., Hoffmann-La Roche, Inc. v. Kleinidist, 478 F.2d 1 (3rd Cir. 1973) (review of federal order to control distribution of drug aimed at relieving premenstrual tension); Crockett v. Cohen, 299 F. Supp. 739 (W.D. Va. 1969) (review of HEW decision disallowing disability benefits to a woman suffering from premenstrual tension); Reid v. Florida Real Estate Comm'n, 188 So. 2d 846 (Fla. Dist. Ct. App. 1966) (reversing Real Estate Commission order which suspended broker's license of woman arrested for shoplifting while suffering from premenstrual tension); Edwards v. Ford, 69 Ga. App. 578, 26 S.E.2d 306 (1943) (wrongful death action in which defense attributed driver's unconsciousness to premenstrual symptoms); Tingen v. Tingen, 251 Or. 438, 446 P.2d 185 (1968) (child custody action in which evidence of PMS symptoms was introduced regarding the mother's competency).
5 Berreby, supra note 2, at 36.
6 For recent discussions within the legal profession, see, for example, Taylor & Dalton, Premenstrual Syndrome: A New Criminal Defense?, 19 CAL. W.L. REV. 269 (1983); Note, Premenstrual Stress Syndrome As A Defense In Criminal Cases, 1983 DUKE L.J. 176; Recent Development, Premenstrual Syndrome, 6 HARV. WOMEN'S L.J. 219 (1983); Tybor, supra note 3. Within the medical profession, see, for example, Reid & Yen, Premenstrual Syndrome, 139 AM. J. OBSTET.
PMS defense. American courts must therefore decide how to respond to PMS in a criminal case.

In this comment we first define PMS and discuss its incidence, cause and treatment. Next, we present the recent cases in which defendants have asserted PMS as a criminal defense, and discuss the judicial reactions to it. We then analyze the ways in which a defendant's claim of PMS might affect the outcome of a criminal trial in the United States. Finally, we discuss several factors which may impede recognition of a PMS defense within the American legal system.

I. The Premenstrual Syndrome

Maureen, a thirty-year old housewife, is a typical PMS sufferer.\(^7\) Doctors first diagnosed Maureen's premenstrual syndrome when she was a teenager. Since then, her condition has progressively worsened. During the seven days before menstruation, Maureen becomes irritable and tense; she "over-reacts" to stress and becomes overly emotional. She is aggressive and violent toward her husband and children. On the first day of menstruation, however, all these symptoms cease and she becomes calm, friendly, and rational. PMS has induced Maureen to attempt suicide on five separate occasions, each on the last day before menstruation. In these attempts, Maureen took aspirin and valium overdoses, slashed her wrists, stabbed herself, and jumped under a train. On one other occasion, Maureen lost her temper and struck her five-year-old daughter simply because she would not stop crying. Maureen was so shocked by her actions that she asked that her children to be taken into protective care.

Maureen's traumas are similar to those which many PMS sufferers experience. Although most women experience discomfort during the paramenstruum,\(^8\) the severity and cumulative effect of PMS symptoms distinguish PMS sufferers from most other women. When the traumas of PMS cause its victims to engage in antisocial behavior, our criminal justice system must become involved.

More than fifty years after the first recognition of PMS in medical literature,\(^9\) medical experts still do not agree on the definition of


\(^{8}\) See note 17 infra.

\(^{9}\) In 1931, R. T. Frank discussed women suffering from "indescribable tension and a desire to find relief by foolish actions difficult to restrain." Frank, THE HORMONAL CAUSES OF

GYNECOL. 85 (1981); Sharma, supra note 3. In the popular press, see, for example, Clausen, Not Guilty Because of PMS?, NEWSWEEK, Nov. 8, 1982, at 111; Henig, Dispelling Menstrual Myths, N.Y. Times, Mar. 7, 1982, § 6 (Magazine), at 65.
PMS. In 1965, Doctors Hamish Sutherland and Iain Stewart synthesized much of the existing PMS research. They defined the syndrome as "any combination of emotional or physical features which occur[s] cyclically in a female before menstruation, and which regress[es] and disappear[s] during menstruation." Dr. Katharina Dalton, who has conducted PMS research in England for more than thirty years, defines PMS as "the presence of monthly recurrent symptoms in the premenstruum or early menstruation with a complete absence of symptoms after menstruation." According to Dalton, the behavioral and psychological symptoms of PMS include irritability, anger, confusion, depression, amnesia and uncontrollable impulses resulting in violence. Other doctors identify the most common physical symptoms as headache, breast swelling and tenderness, abdominal bloating, edema of extremities, fatigue, increased thirst or appetite, acneiform eruptions, and constipation. Although

*Premenstrual Tension*, 26 Arch. Neurol. Psychiatry 1053 (1931). Although the medical profession has only recently begun to systematically study the premenstrual syndrome, recorded descriptions of PMS symptoms date back to the sixth century B.C. Semonides wrote of a likely PMS sufferer:

[She] has two different sorts of mood. One day she is all smiles and happiness . . . . There is no better wife . . . nor prettier. Then another day, there'll be no living with her, you can't get within sight, or come near her, or she flies into a rage and holds you at a distance like a bitch with pups, cantankerous and cross with the world.

Tybor, supra note 3, at 12.

10 Dr. Anthony Clare, a psychiatrist at the University of London's General Practice Research Unit, described any attempt to define PMS as a "nightmare." *Premenstrual Tension Defense Prompts Debate*, Int'l Herald Trib., Dec. 30, 1981, at 1, col. 1. See also O'Brien, *The Premenstrual Syndrome: A Review of the Present Status of Therapy*, 24 Drugs 140, 140-41 (1982); Reid & Yen, supra note 6, at 85-86.


12 Id. at 1182.

13 Dr. Dalton, Director of the Premenstrual Syndrome Clinic at London's University College Hospital, is a pioneer in the study and treatment of PMS. In 1953, Dalton co-authored an article with Dr. Raymond Greene, *The Premenstrual Syndrome*, 1 Brit. Med. J. 1007 (1953), and has subsequently written two books and 51 articles on the subject. Taylor & Dalton, supra note 6, at 270 n.5. Over the past 20 years, Dalton has studied nearly 30,000 PMS cases. She testified as an expert witness in *Smith, Craddock, and English*. Tybor, supra note 3, at 12, 16.

14 K. Dalton, *The Legal Implications of Premenstrual Syndrome* 1 (1982) (unpublished article). Dalton suggests that a diagnosis of premenstrual syndrome is only valid where the PMS symptoms have recurred in at least three consecutive menstrual cycles. Id.

15 Id.

16 Reid & Yen, supra note 6, at 85-86. Dalton has also emphasized the wide range of physical PMS symptoms, noting that "no tissues in the body are exempt from the cyclical changes of the menstrual cycle . . . ." K. DALTON, supra note 7, at 20. Various medical authorities have identified approximately 150 different symptoms associated with PMS. Taylor-
women might experience a number of these symptoms at other times, these symptoms constitute premenstrual syndrome only if they "occur with cyclical regularity at the appropriate time."\(^{17}\)

Medical experts also fail to agree on the cause of the premenstrual syndrome. Doctors have proposed various causal theories, none of which has received unanimous acceptance.\(^{18}\) Among the causes suspected are excesses in estrogen and prolactin; hypoglycemia; fluid retention; and deficiencies in progesterone, vitamin B\(_6\), and vitamin A.\(^{19}\) Two experts recently reviewed these and other causal theories and concluded that a multitude of psychological, neurological, and glandular factors causes PMS.\(^{20}\)

In 1953, Dr. Dalton and Dr. Raymond Greene suggested that the cause of PMS might be an imbalance in the ovarian production of the hormones progesterone and oestradiol.\(^{21}\) Modern tests, however, have failed to confirm this hypothesis.\(^{22}\) Dalton insists that these tests are inconclusive because progesterone is secreted sporadically, making biochemical analyses for the hormone unreliable.\(^{23}\)

Because the specific cause of PMS is unclear, the efficacy of any treatment is neither fully understood nor universally accepted.\(^{24}\) Although researchers have conducted several studies to find the ideal treatment for PMS, these studies have been inconclusive, due partly

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\(^{17}\) K. DALTON, supra note 7, at 20. Diagnosis depends not as much on the specific symptoms as on the time relationship between symptoms and menstruation. Id. See also O'Brien, supra note 10, at 141. Taylor and Dalton identify the "appropriate time" as the paramenstruum: the last four days before menstruation and the first four days of menstruation. Taylor & Dalton, supra note 6, at 272 n.13. Women in the paramenstruum are disproportionately represented among women in car accidents (48%), prison admissions (49%), emergency hospital admissions (53%), and attempted suicides (50%). Henig, supra note 6, at 68, col. 1-2.

\(^{18}\) O'Brien, supra note 10, at 141.

\(^{19}\) See Gonzalez, supra note 3, at 1393; O'Brien, supra note 10, at 141; Reid & Yen, supra note 6, at 86-97.

\(^{20}\) Reid & Yen, supra note 6, at 85.

\(^{21}\) Taylor & Dalton, supra note 6, at 270 n.5; Greene, Letters to the Editor: Premenstrual Tension and Equality, THE TIMES (London), Nov. 19, 1981, at 13, col. 5.

\(^{22}\) See Gonzalez, supra note 3, at 1393-95; Reid & Yen, supra note 6, at 87. Because modern tests have failed to prove Dalton and Greene's original hypothesis that hormonal imbalances cause PMS, Greene has conceded that progesterone deficiencies alone do not cause PMS. Although Greene agrees with Dalton that progesterone injections effectively treat PMS sufferers, he notes that "this no more proves that progesterone deficiency is the cause of the trouble than that aspirin deficiency is the cause of headaches." Greene, supra note 21.

\(^{23}\) Gonzalez, supra note 3, at 1393.

\(^{24}\) O'Brien, supra note 10, at 141; Premenstrual Syndrome, 2 LANCET 1393, 1394 (1981). See generally Reid & Yen, supra note 6.
to difficulties in evaluating the wide range of PMS symptoms.\(^{25}\) Moreover, most studies have lacked sufficient control and rigor to allow for meaningful interpretation of the results.\(^{26}\)

Nevertheless, some doctors have achieved varying degrees of success in treating PMS sufferers.\(^{27}\) Their methods include hormonal therapy, psychotherapy, diuretics, vitamins, and oral contraceptives.\(^{28}\) Dalton has effectively treated PMS for the past thirty years with natural progesterone injections.\(^{29}\) In spite of this history of successful treatment, other doctors have been reluctant to adopt progesterone treatment because there is no consensus as to how or why it works.\(^{30}\)

Medical experts also disagree on the number of women who suffer from PMS. Estimates of the incidence of PMS vary according to the breadth of the definition used.\(^{31}\) One study suggests that nearly twenty percent of all women requires treatment for the syndrome.\(^{32}\) Another study suggests that between seventy and ninety percent of the female population experiences PMS symptoms, while twenty to forty percent suffers temporary mental or physical incapacitation due to PMS.\(^{33}\) Although a majority of menstruating women experiences some physical, psychological, and/or behavioral changes which they regard as tolerable,\(^{34}\) the American legal profession should direct its attention toward those PMS sufferers who require treatment.

Although medical experts disagree on the diagnosis, cause, and treatment of PMS, they do agree that the syndrome causes marked

\(^{25}\) O'Brien, supra note 10, at 140.
\(^{26}\) Id. Premenstrual Syndrome, supra note 24, at 1394.
\(^{27}\) See Gonzalez, supra note 3, at 1393-96; O'Brien, supra note 10, at 141-51; Premenstrual Syndrome, supra note 24, at 1394; Reid & Yen, supra note 6, at 86-94; Wallach & Rubin, supra note 16, at 291-96.
\(^{28}\) See Gonzalez, supra note 3, at 1393-96; O'Brien, supra note 10, at 141-51; Premenstrual Syndrome, supra note 24, at 1394; Reid & Yen, supra note 6, at 86-94; Wallach & Rubin, supra note 16, at 291-96.
\(^{29}\) K. DALTON, supra note 7, at 1.
\(^{30}\) Greene regards this reluctance as "understandable but wrong-headed. For centuries we have used remedies that we do not understand. . . . The fact is that progesterone works. We are hoping soon to find out why. Meanwhile its use in treatment can eliminate much unhappiness and even crime." Greene, supra note 21 (emphasis in original).
\(^{31}\) O'Brien, supra note 10, at 140. Sutherland and Stewart concede that their definition would classify approximately 97% of all menstruating women as PMS sufferers. Sutherland & Stewart, supra note 11, at 140.
\(^{32}\) Gonzalez, supra note 3, at 1395.
\(^{33}\) Reid & Yen, supra note 6, at 86.
\(^{34}\) Wallach & Rubin, supra note 16, at 212-13.
These psychological anomalies have significantly affected the behavioral patterns of thousands of women. These women demonstrate the greatest potential for PMS-induced criminal behavior. Medical studies have linked PMS to an increased number of suicide attempts, automobile accidents, and miscellaneous criminal acts. Nonetheless, the legal community has not yet paid sufficient attention to the correlation between PMS and crime.

II. Recent Decisions

In three recent English cases, and one recent American case, defendants asserted PMS as a criminal defense. Each defendant claimed that PMS prevented her from either controlling her behavior or forming the requisite criminal intent. Although the defense met with varying degrees of success, in each case the defendant received a light sentence relative to the crime with which she was originally charged.

In February, 1980, an English jury convicted Sandie Craddock of stabbing to death a fellow barmaid. Craddock, at age twenty-nine, had more than thirty prior convictions and had attempted suicide on at least twenty-five separate occasions. The courts had repeatedly committed her to mental hospitals. Numerous psychiatrists, however, claimed they were unable to help Craddock and released her.

In an effort to establish a cyclical pattern of criminal behavior, Craddock's counsel reviewed diaries which Craddock kept over the years. He discovered that each criminal offense and suicide attempt

35 See, e.g., Brush, The Possible Mechanisms Causing the Premenstrual Tension Syndrome, 4 CURR. MED. RESEARCH OPIN. 9, 12 (Supp. 1977); Wallach & Rubin, supra note 16, at 236.
36 Reid & Yen, supra note 6, at 85; Wallach & Rubin, supra note 16, at 224.
37 Reid & Yen, supra note 6, at 85.
38 K. DALTON, supra note 7, at 4, 144-48; Gonzalez, supra note 3, at 1393; Reid & Yen, supra note 6, at 85; Wallach & Rubin, supra note 16, at 224-32.
39 See notes 1 and 3 supra and accompanying text.
40 Id.
41 Id.
43 Appellant's Perfected Grounds of Appeal at 2, Regina v. Smith, [1982] Crim. L.R. 531 (C.A.). After the decision in Regina v. Craddock, Sandie Craddock changed her name to Sandie Smith. She was charged with a later offense which gave rise to Regina v. Smith. Smith's counsel represented her during both trials and on appeal in Regina v. Smith. He was therefore able to provide the court with Craddock's legal and medical history.
44 Craddock, 1 C.L. at 49.
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occurred at approximately the same time of the month. Dr. Dalton examined Craddock and evaluated the available records of Craddock's past behavior. Dalton noted that the previous criminal acts occurred at intervals of 29.04 ± 1.47 days. The suicide attempts, many of which took place in prison and were meticulously documented by prison officials, occurred at intervals of 29.55 ± 1.45 days. Based on these findings, Dalton diagnosed Craddock as a PMS sufferer and began to treat her with massive doses of progesterone. The treatment radically changed Craddock's personality; she calmed down and her behavior stabilized.

At trial, the Crown reduced its murder charge to manslaughter, due to Craddock's "diminished responsibility." The jury returned a guilty verdict. In light of Dalton's diagnosis and effective treatment, however, the court released Craddock on probation, provided she continue to receive progesterone treatment under Dalton's direction.

Craddock changed her name to Sandie Smith shortly after trial. During the next few months, except for one minor incident in October, 1980, Smith's personality and behavior remained normal.

46 Id.; supra note 14; at 2.
47 Id.
49 Craddock, 1 C.L. at 49.
50 Regina v. Smith, No. 1/A/82, at para. 7 (C.A. Crim. Div. Apr. 27, 1982) (available on LEXIS, Enggen library, Cases file) [hereinafter cited as LEXIS]. "Diminished responsibility", a statutory mitigation in England, grants the judge discretion in sentencing a defendant charged with murder and affected by:

1) an abnormality of the mind, arising from:
   (a) arrested development; or
   (b) inherent causes; or
   (c) disease or injury; and
2) which results in substantial impairment of mental responsibility.

52 Id.
53 Id. at 3. In October, 1980, a Health Services administrative error caused Smith to miss four consecutive progesterone injections. During this period, Smith threw a rock through a window, an offense which she had committed many times in the past. She promptly surrendered herself to the police, and Health Services immediately restored her progesterone treatment. Smith’s solicitors explained Smith's condition to the magistrates. After consulting with the administration of the Central Criminal Court, the magistrates granted Smith a conditional release. Id.

This incident raises a number of related issues which are beyond the scope of this comment. Among these issues are: (1) the liability of a PMS sufferer who negligently fails to seek or continue treatment after becoming aware of her condition; and (2) the liability of a physi-
Her probation officer was completely satisfied with Smith’s behavior and the progesterone treatment’s effectiveness.\textsuperscript{54} Between October and May, however, Dalton began to reduce the dosage and number of Smith’s progesterone injections.\textsuperscript{55} By early June, 1981, Smith was receiving her smallest doses of progesterone since March, 1980.\textsuperscript{56} During her June paramenstruum, Smith twice threatened to kill a police officer because he had insulted her three years earlier.\textsuperscript{57} Shortly after the second threat, police arrested her outside the officer’s station. She was carrying a knife and apparently waiting to attack the officer.\textsuperscript{58} The Crown charged Smith with two counts of threatening to kill the police officer and one count of carrying an offensive weapon in public without authority or excuse.\textsuperscript{59} At trial, the jury returned guilty verdicts on all three counts. The court, however, recognized PMS as a mitigating factor and sentenced Smith to three years probation.\textsuperscript{60}

On appeal, Smith’s counsel urged the court to recognize a new defense of uncontrollable impulse due to the defendant’s medical condition.\textsuperscript{61} He conceded that Smith acted consciously, but maintained that she was suffering from premenstrual syndrome and could not control her behavior.\textsuperscript{62} Smith’s counsel acknowledged that English courts do not recognize a general defense of uncontrollable impulse.\textsuperscript{63} He argued, however, that where an uncontrollable impulse is caused by a specific, identifiable, and remediable medical problem, particularly PMS, for which a defendant is blameless, the court

\textsuperscript{54} Id.
\textsuperscript{55} Some commentators have noted the unpleasantness, inconvenience, expense, and possible side-effects of prolonged progesterone treatment. See, e.g., Brush, supra note 35, at 13; Rome, Letters to the Editor, N.Y. Times, Aug. 26, 1982, at C7, col. 3. Presumably, Dr. Dalton lowered Smith’s progesterone dosage because of similar concerns for Smith’s well-being and the difficulty in determining how much progesterone was necessary to stabilize Smith’s behavior. Dalton testified that the progesterone levels which she administered to Smith were too low, and insufficient to control her PMS-induced behavior: “If the drug [were] withdrawn, she would revert to loss of self-control and to a confused state.” Transcript of Official Shorthand Notes at 9-10, Regina v. Smith, [1982] Crim. L.R. 531 (C.A.) [hereinafter cited as Record].
\textsuperscript{56} Appellant’s Perfected Grounds of Appeal, supra note 43, at 3.
\textsuperscript{57} Smith claimed that the officer had treated her rudely and slapped her across the face. Record, supra note 55, at 5.
\textsuperscript{58} Id. at 4.
\textsuperscript{59} LEXIS, supra note 50, at para. 1.
\textsuperscript{60} Id.
\textsuperscript{61} Appellant’s Perfected Grounds of Appeal, supra note 43, at 7.
\textsuperscript{62} LEXIS, supra note 50, at para. 15.
\textsuperscript{63} Id. at para. 18.
should not hold the defendant responsible for her conduct. He argued that Smith's premenstrual syndrome should therefore provide a substantive defense, absolving her of criminal liability for her conduct.

The English Court of Appeal, however, refused to recognize PMS as a substantive defense, finding it contrary to the purpose of criminal law to allow a defendant to commit a violent act and then be acquitted and discharged while still a threat to society. The court regarded it more appropriate to consider PMS as a mitigating factor in sentencing than as a substantive defense. In this manner, the court reasoned that it could both ensure that the defendant receive the necessary treatment, and monitor her subsequent conduct. Consequently, the court upheld the trial court's three-year probation order.

In a contemporaneous proceeding, another English court also accepted PMS as a mitigating factor in sentencing. In December, 1980, Mrs. Christine Ann English deliberately pinned her lover against a utility pole with her car, killing him. At trial, Dr. Dalton testified that English suffered from PMS which caused her to become irritable and aggressive, and to lose self-control. The defense also introduced medical evidence that suggested English had suffered from PMS since 1966.

The Crown subsequently reduced the initial murder charge to the lesser offense of "manslaughter due to diminished responsibility." English plead guilty to this lesser offense. In sentencing English, the trial judge accepted PMS as a mitigating factor, concluding that English had acted under "wholly exceptional circumstances." The court granted English a twelve-month conditional discharge and banned her from driving for one year.

Shortly following these three English cases, the first American

64 Id.
65 Id.
66 Id. at paras. 16-17.
67 Id.
68 Regina v. English, an unreported criminal case, was decided by the Norwich Crown Court on November 10, 1981, one day after Regina v. Smith. English, the third British case to raise the PMS defense, received considerable coverage in the press. See, e.g., Bennett, Premenstrual Tension: Excuse or Reason?, Police Review, Jan. 29, 1982, at 168; Commentary, Regina v. Smith, [1982] Crim. L.R. 532 (C.A); Premenstrual Tension Defense Prompts Debate, supra note 10, at 1, col. 1; Tybor, supra note 3, at 1-2.
69 Bennett, supra note 68, at 168.
70 Premenstrual Tension Defense Prompts Defense, supra note 10, at 1, col. 3.
71 Id.
72 Id.
criminal case in which a defendant asserted the PMS defense ended without a legal test of the PMS issue. In *People v. Santos*, police arrested Shirley Santos after an emergency medical team diagnosed her daughter as a victim of child abuse. The Brooklyn District Attorney's office initially charged Santos with assault and endangering the welfare of a child, both felonies.

Santos asserted PMS in a pre-trial hearing as a complete defense to her criminal behavior, not as a mitigating factor. She conceded that she beat her child, but maintained that she had blacked out as a result of premenstrual syndrome and did not know what she was doing. Santos argued that she therefore had not formed the necessary criminal intent and should not be held responsible for her actions. The court did not rule on the merits of the PMS defense, but suggested that since psychological disturbances are admissible as evidence relating to criminal intent, physiological disturbances might likewise be admitted. After lengthy negotiations, the prosecutor dropped the felony charges and Santos pleaded guilty to harassment, a misdemeanor. Santos received no sentence, no probation, and no fine, even though her four-year-old daughter spent two weeks in the hospital as a result of the incident.

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74 Clausen, supra note 6.

75 Berreby, supra note 2. See also Benson, supra note 73.

76 Berreby, supra note 2. The pre-trial motion to dismiss was denied without prejudice, but Santos clearly indicated that she would pursue the PMS defense at trial. See also Clausen, supra note 6.

77 Santos did not protest her arrest, but repeatedly attempted to explain: “I don't remember what happened. I would never hurt my baby... I just got my period.” Id. Compare this statement to testimony given by Dr. Dalton at the Smith trial one year earlier. Dalton compared a woman suffering from PMS to a baby batterer. In both instances, an otherwise loving mother can act as if in an alcoholic stupor, with no memory of it afterwards. “They do not know what they are doing. They have no intent at all. They have not planned it out before. It is not premeditated.” Record, supra note 55, at 11.

78 Clausen, supra note 6.

79 Berreby, supra note 2.

80 Id. The District Attorney's Office claimed that the plea bargain proved that PMS is a meritless defense. Santos's attorney argued, to the contrary, that the potency of the defense ultimately persuaded the District Attorney's Office to negotiate for a lesser plea. Id. See also Benson, supra note 73.

81 Berreby, supra note 2. In a contemporaneous proceeding, however, a family court stripped Santos of custody of the child. Id.
III. Legal Analysis: Substantive Defense or Mitigation?

_Craddock, Smith, English_, and _Santos_ may indicate a trend toward recognition of PMS in criminal cases. American courts must decide how to respond. Two alternatives seem most realistic. First, the courts could recognize PMS as a substantive defense. Thus, courts might analogize PMS to one of the various insanity rules or recognize a new defense of “automatism caused by premenstrual syndrome.” Second, American courts could follow the developing English practice and accept PMS as a mitigating factor in sentencing.

A. PMS as a Substantive Defense

Generally, criminal law is designed to punish only those individuals who have committed morally culpable acts which the law prohibits.\(^{82}\) The law recognizes, however, that certain individuals, such as the legally insane, have a limited ability to reason and exercise free choice.\(^{83}\) Most courts therefore recognize legal insanity as a substantive defense to criminal conduct.\(^{84}\) The behavioral manifestations of premenstrual syndrome are similar to those of legal insanity.\(^{85}\) Because of this similarity, American courts might analogize PMS to legal insanity and provide PMS sufferers with a substantive defense to criminal behavior.

Each jurisdiction in the United States has adopted one or more tests to determine whether or not an individual is legally insane, therefore deserving special exclusion from criminal liability.\(^{86}\) Common to each test are two basic requirements. The defendant must

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84 See, e.g., Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).
85 See Reid & Yen, supra note 6, at 85.
86 American courts have recognized four primary variations of the insanity defense. W. LaFave & A. Scott, Criminal Law §§ 37-38 (1972). The majority of jurisdictions rely upon the traditional M'Naghten rule. This rule states that a defendant shall not be held criminally liable if, at the time of the offense, he was suffering under a mental disease or defect and such condition prevented him from knowing the nature and quality of his act, or that his act was wrong. _Id._ § 37.

Approximately one-third of the jurisdictions supplement the M'Naghten rule with the “irresistible impulse” test which excuses liability if the defendant had a mental disease which prevented him from controlling his conduct. _Id._

A few jurisdictions follow the Durham-McDonald test which excuses criminal liability if the defendant's conduct was the “product” of a mental disease or defect. _Id._ § 38.

The Model Penal Code recommends a fourth test. This test excuses criminal conduct which is the result of a mental disease or defect if the defendant lacked “substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.” _Id._ See also A. Goldstein, The Insanity Defense 45-88 (1967); Dutile & Singer, What Now For The Insanity Defense?, 58 Notre Dame L. Rev. 1104 (1983).
prove: (1) that he or she suffers from a mental disease or defect, and (2) that a causal nexus exists between the mental disease or defect and the criminal conduct.\(^8\)

Strictly speaking, the premenstrual syndrome fails to meet any of the insanity tests. PMS is not a disease or defect of the mind, but a physiological disorder.\(^8\) It therefore fails to meet the first requirement of all legal insanity tests—a mental disease or defect.\(^9\) Women suffering from PMS are not "insane." To classify them as such would distort the insanity defense and fail to responsively address the pressing legal and medical issues peculiar to PMS.

Because PMS is not a disease or defect of the mind, it might fit more appropriately within the automatism defense.\(^9\) The automatism defense excuses criminal conduct committed while the defendant is in an unconscious or semiconscious state.\(^9\) The automaton acts involuntarily and therefore without intent, exercise of free will, or knowledge of the act.\(^9\) Although some forms of automatism result from mental illness or deficiency, physiological anomalies also cause automatism in individuals with healthy minds.\(^9\) Similarly, the phys-

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87 Wallach & Rubin, supra note 16, at 238.
88 See generally Brush, supra note 35. Although there is considerable disagreement within the medical profession as to the precise cause of PMS, most experts now agree that PMS is a physiological disorder and not a disease or defect of the mind. See text accompanying notes 18-23 supra. See also Henig, supra note 6, at 75, col. 1, where the author states: "[F]or all the emotional manifestations of the premenstrual syndrome, a consensus is building that it is indeed physiological in origin."
89 Consequently, it is not necessary to consider the second requirement, a causal nexus between the mental disease or defect and the criminal conduct.
90 See Regina v. Quick, [1973] 3 All E.R. 347, 350, where the defendant, a male nurse who assaulted a patient, asserted automatism resulting from diabetic hypoglycemia as a defense. The court described the defendant's insulin imbalance in terms parallel to the hormonal imbalance of a PMS sufferer:

[T]he higher functions of the mind are affected. As the effects of the imbalance became more marked, more and more mental functions are upset. . . . In the later stages of mental impairment a sufferer may become aggressive and violent without being able to control himself or without knowing at the time what he was doing. However, it should be noted that the Court of Appeal in Regina v. Smith considered Quick and concluded that "there is no question of automatism providing a defense in this case." LEXIS, supra note 50, at para. 12. The court reasoned that, even though Smith was unable to control her behavior, she consciously intended to act as she did. Id. at para. 14.
91 In England and the United States, the courts have defined automatism as "the state of a person who, though capable of action, is not conscious of what he is doing. . . . It means unconscious involuntary action and it is a defense because the mind does not go with what is being done." Bratty v. Attorney-General for Northern Ireland, [1963] A.C. 386, [1961] 3 All E.R. 523. See also Fulcher v. State, 633 P.2d 142, 145 (Wyo. 1981).
92 Fulcher, 633 P.2d at 145.
iological anomalies of PMS cause behavior in women which American courts might classify as automatistic.

Several American jurisdictions have recognized automatism, sometimes called unconsciousness, as a complete, affirmative defense. These jurisdictions hold that automatism is a separate and distinct defense from legal insanity. In contrast to a defendant found not guilty by reason of insanity, who may be committed to a mental institution, a defendant who successfully pleads automatism will be acquitted and released. Mental institutions serve no rehabilitative value for an automatistic defendant. These institutions treat individuals with psychological disorders, not physiological anomalies. Similarly, the traditional reasons for imprisonment do not apply to automatons. Imprisonment serves no rehabilitative, deterrent, or retributive value for an automatistic defendant. Society generally imprisons only those who are morally blameworthy, not those who are unable to control their actions. For these reasons, several American courts have determined that an automaton should not suffer criminal liability for his or her conduct.

American courts might find it equally appropriate to exclude PMS-induced conduct from the reach of the criminal law. Although a PMS sufferer may be conscious of her actions and devoid of any mental disease or defect, she is no more able to control her actions than the automaton or the legally insane. Physiological anomalies render the PMS sufferer unable to control her actions during the short time PMS symptoms surface. These symptoms surface, however, at regular, predictable intervals which doctors can effectively control under appropriate medical supervision.

If the PMS sufferer is morally blameless, she should not suffer the stigma and indignity of being branded a criminal. It would therefore be appropriate to treat PMS as a substantive defense.


95 See, e.g., Fulcher, 633 P.2d at 146.

96 Id.

97 Legal scholars generally identify these three values as representative of the traditional purposes of punishment in the criminal law. See, e.g., S. KADISH, S. SCHULHOFER, & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 181-210 (4th ed. 1983).

98 See note 94 supra.

99 This argument was unsuccessfully advanced by Smith on appeal. The court concluded that, under English law, the PMS victim falls "into the grey medical area . . . between insanity and automatism." LEXIS, supra note 50, at paras. 14-15.

100 See, e.g., Reid & Yen, supra note 6, at 85-86; Sharma, supra note 3, at 1091.
However, if American courts choose to recognize PMS as a substantive defense, they must ensure the availability of a mechanism to supervise and treat the PMS sufferer. Without such a mechanism, the courts could not ensure that the PMS sufferer receives the necessary treatment and that society is protected from future antisocial behavior. Presently, however, such a mechanism is not uniformly available. Furthermore, the development of such a mechanism may be impeded by the inability of the medical profession to agree on the definition, cause, and treatment of PMS.

B. PMS and Mitigation

In Craddock, Smith, and English, English courts have recently recognized PMS as a mitigating factor in sentencing. In Smith, the court explained that by recognizing PMS as a mitigating factor instead of as a substantive defense, a court could retain control over an individual who may still be a danger to those around her. A substantive defense of PMS, on the other hand, would compel the courts to release a defendant unsupervised, with all of the consequent risks to society.

Until there is a sufficient mechanism available to eliminate these risks through supervision and treatment of the PMS sufferer, the law must choose between the PMS sufferer's moral blamelessness and protecting society from further violence and unlawful behavior. For the present, mitigation provides a workable compromise between completely rejecting PMS as a legal issue and recognizing it as a substantive defense to crime. Furthermore, mitigation allows courts some flexibility to tailor the PMS sufferer's sentence to the

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101 Some states have adopted civil commitment statutes which closely resemble the mechanism needed to ensure both the supervised treatment of the PMS sufferer and the protection of society from future violent acts. Generally, however, these statutes provide only for the civil commitment of individuals suffering from a mental disease or defect. They do not allow for the commitment of individuals whose antisocial behavior is caused by physiological disorders such as PMS. See, e.g., CAL. WELF. & INST. CODE § 5150 (West Supp. 1982) ("When any person, as a result of mental disorder, is a danger to others, or to himself or herself, or gravely disabled, a peace officer . . . may, upon probable cause, take . . . the person into custody . . . ."); N.Y. CRIM. PROC. § 330.10 (2) (McKinney Supp. 1982) ("Upon a verdict of not responsible by reason of mental disease or defect, . . . § 330.20 will govern subsequent commitment proceedings."). Other states have adopted more broadly-worded statutes which could encompass physiological disorders such as PMS. See, e.g., ILL. ANN. STAT. ch. 91½, § 3-607 (Smith-Hurd Supp. 1982) ("When . . . any court has reasonable grounds to believe that a person appearing before it is subject to involuntary admission and in need of immediate hospitalization to protect such person or others from physical harm, the court may enter an order for the temporary detention and examination of such person.").

102 See notes 3 and 39-41 supra and accompanying text.

103 LEXIS, supra note 50, at paras. 16-17.
degree of her affliction. Mitigation remains inadequate, however, because it results in labeling the PMS sufferer a criminal, contrary to her moral blamelessness. Furthermore, to the extent that some courts might use PMS merely to reduce prison sentences, mitigation is unacceptable. The sentence imposed must reflect the need to treat, not to punish, the PMS sufferer. Under no circumstances should courts punish a defendant for PMS-induced conduct.

IV. Impediments to the PMS Defense

Several factors may impede both the recognition of PMS by the American courts and the incorporation of the PMS concept into the criminal law. These factors include: the differences of opinion within the medical profession; fears that criminal defendants will abuse the PMS defense; and concerns that recognition of an exclusively female defense will promote sexism.

As discussed previously, the medical profession’s inability to arrive at universally accepted theories on the definition, cause, and treatment of the premenstrual syndrome has impeded unanimous recognition of PMS by the legal profession. Because of this medical uncertainty, critics caution that the use of PMS as a legal defense is premature. To postpone recognition for this reason, however, is neither fair to women afflicted with PMS nor necessary. In a criminal case in which the deleterious effects of PMS are well-documented, the court should receive and consider this evidence. Furthermore, the law cannot wait until the medical profession reaches unanimous agreement on the definition, cause, and treatment of PMS. As has been the case with legal insanity, the process of reaching unanimous agreement might be interminable. Countless PMS sufferers may have already been unjustly imprisoned because the law has not yet recognized their disorder.

Additionally, the legal profession should be aware of fears among the public that all women charged with crimes could escape liability merely by asserting the PMS defense. Such abuse could exculpate the blameworthy and throw the concept of premenstrual syndrome into disrepute, potentially forcing women who legitimately suffer from PMS to go unaided. Even Dr. Dalton has warned that courts must remain suspicious of women who plead the PMS

104 See text accompanying notes 9-35 supra.
105 See, e.g., Newman, Letters to the Editor, N.Y. Times, Nov. 20, 1982, at 22, col. 6; Clausen, supra note 6; Tybor, supra note 3, at 17.
106 See, e.g., Bennett, supra note 68, at 170; Clausen, supra note 6; Tybor, supra note 3, at 17.
defense.¹⁰⁷

Members of the medical and legal professions could minimize the possibility of abuse if they properly perform their respective duties. PMS is a quantifiable, scientifically provable affliction¹⁰⁸ which courts should subject to heavy burdens of proof.¹⁰⁹ Dr. Dalton proposes that courts require a detailed charting of the woman’s menstrual cycle and a thorough diary of her past symptoms and erratic behavior.¹¹⁰ In addition, other experts have recommended that a successful PMS plea require the expert testimony of both an endocrinologist and a psychiatrist.¹¹¹

The possibility of abuse inheres in many areas of the law. Generally, American courts have successfully safeguarded against potential abuses. Because of the quantifiable physical manifestations of PMS, courts should encounter no problems unique to managing PMS evidence and detecting spurious claims.

The American legal profession should also be aware of the concerns of many feminists that acceptance of PMS as a legal defense could lead to an erosion of the advances women have made toward social equality.¹¹² Some feminists reason that throughout history, men have pointed to the indisposing qualities of the menstrual cycle, pregnancy, and childbirth to support self-assumed superiority over women.¹¹³ Recognition of the PMS defense, they reason, would fuel those prejudices and promote further untenable exploitation of female physiology.¹¹⁴

The legal profession must not overemphasize these concerns, however, and ignore the legitimate needs of PMS sufferers. Women who commit antisocial acts because PMS rendered them unable to control their behavior deserve recognition of this fact in the courts. PMS sufferers require medical attention, not punishment.

¹⁰⁷ Tybor, supra note 3, at 17.
¹⁰⁸ See, e.g., Henig, supra note 6, at 79, col. 1.
¹⁰⁹ See, e.g., K. Dalton, supra note 14, at 1.
¹¹⁰ Id.; Tybor, supra note 3, at 17.
¹¹² See, e.g., Gonzalez, supra note 3, at 1396; Recent Development, Premenstrual Syndrome, 6 HARV. WOMEN’S L.J. 219, 226-27 (1983); Tybor, supra note 3, at 17.
¹¹⁴ Sybil Shainwald, head of the National Women's Health Network, has warned that a PMS defense could be used to discriminate against women: "To use PMS as a legal defense would be a giant step backward. It is clearly an anti-feminist move." Henig, supra note 6, at 78, col. 4.
V. Conclusion

The premenstrual syndrome is a physiological disorder which, until recently, has been dismissed or trivialized as simply a part of a woman’s lot in life. Today, however, an increasing amount of evidence indicates a causal nexus between PMS and criminal behavior. Although the legal profession has remained indifferent toward this disorder in the past, recent decisions indicate a growing trend toward recognition of PMS in the courts. American courts must develop a systematic approach to the PMS issue.

We have suggested two approaches which stress the importance of medical attention for, not punishment of, the PMS sufferer. The first approach, recognizing PMS as a substantive defense, is desirable because it acknowledges the PMS sufferer’s lack of moral culpability. This approach would be unwise and inappropriate, however, until society establishes sufficient means to treat PMS sufferers and ensures that the public is protected from future PMS-induced violent behavior. Presently, however, no such mechanism exists. The second approach, recognizing PMS in mitigation, enables the courts to retain control over the PMS sufferer and supervise the necessary treatment. However, because mitigation fails to acknowledge the PMS sufferer’s moral blamelessness, some courts might use mitigation to reduce prison sentences instead of ordering medical supervision. Mitigation is an appropriate approach only insofar as the courts use it to supervise medical treatment of the PMS sufferer.

Although compelling reasons suggest delaying acceptance of the PMS defense until the medical profession reaches a consensus as to the precise cause of PMS, such a consensus may not be readily forthcoming. In the meantime, countless PMS sufferers may be punished for acts over which they had no control. The American legal system must incorporate the PMS concept into the criminal law to avoid this injustice.

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* The authors researched and wrote this comment while studying at The University of Notre Dame Concannon Programme of International Law in London. We wish to thank Mr. Keith Evans for his generous contributions to our research. Mr. Evans represented Sandie (Craddock) Smith at trial and on appeal. He is both a barrister at London’s Gray’s Inn and a member of the California bar.
LABOR LAW—LIMITING AN EMPLOYER’S LIABILITY FOR FIRING A SUPERVISOR FOR UNION ACTIVITY

In 1982 the National Labor Relations Board (NLRB or the Board) overturned fifteen years of precedent by deciding in Parker-Robb Chevrolet, Inc.,¹ that an employer does not violate section 8(a)(1) of the National Labor Relations Act (NLRA or the Act)² when the employer discharges a supervisor as an integral part of a pattern of conduct designed to curtail union activities among protected employees. In a number of decisions before Parker-Robb, the NLRB had held that the discharge of a supervisor by an employer as part of a pattern of conduct aimed at coercing employees in the exercise of their section 7 rights constituted a violation of the Act.³

In reaching its decision in Parker-Robb, the NLRB determined that the critical inquiry when deciding whether the firing of a supervisor violated the Act was not whether the employer intended to intimidate employees by the firing, but rather whether the firing interfered with the right of employees to exercise their own rights under the Act.⁴ The Board’s decision rested on a determination to implement the Labor Management Relations (Taft-Hartley) Act’s (LMRA) specific exclusion of supervisors from protection, despite the union’s argument. The union argued that the “pattern of conduct” cases helped to implement the NLRA’s prohibition of unfair labor practices by employers against employees.⁵ Recently the United States Court of Appeals for the District of Columbia Circuit upheld

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² Section 8(a)(1) of the NLRA reads:
   (a) It shall be an unfair labor practice for an employer: (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.
³ The historical development of the rule can be seen in the following cases: Pioneer Drilling Co., Inc., 162 N.L.R.B. 918 (1967), enforced in material part, 391 F.2d 961 (10th Cir. 1968); Krebs & King Toyota, Inc., 197 N.L.R.B. 462 (1972); Fairview Nursing Home, 202 N.L.R.B. 318, enforced mem., 486 F.2d 1400 (5th Cir. 1973), cert. denied, 419 U.S. 827 (1974); Production Stamping, 239 N.L.R.B. 1183 (1979); Nevis Industries, Inc., 246 N.L.R.B. 1053 (1979), enforcement denied in material part, 647 F.2d 905 (9th Cir. 1981); Downslope Industries, Inc., 246 N.L.R.B. 948 (1979), enforced, 676 F.2d 1114 (6th Cir. 1982); DRW Corp., 248 N.L.R.B. 828 (1980); Sheraton Puerto Rico Corp., 248 N.L.R.B. 867 (1980), enforcement denied, 651 F.2d 49 (1st Cir. 1981). See also note 19 infra.
⁴ 262 N.L.R.B. No. 58, slip op. at 9. See also note 43 infra and accompanying text.
⁵ Automobile Salesmen’s Union Local 1095 v. N.L.R.B., No. 82-2264, slip op. at 2 (D.C. Cir. June 30, 1983). See also note 37 infra and accompanying text. Some restrictions on the
the Board’s decision, and subsequent cases have applied *Parker-Robb* with little discussion or analysis. But *Parker-Robb* and these subsequent cases have left several questions unanswered, including whether an employer’s intent may still be a factor in determining whether the firing of a supervisor violates the NLRA.

Part I of this recent decision traces the history of the NLRB’s protection of supervisors. Part II discusses the *Parker-Robb* decision, and Part III suggests some possible ramifications of the NLRB’s decision to abandon fifteen years of labor law.

I. Historical Background

The Taft-Hartley Act (the Labor Management Relations Act or LMRA) altered the status and the protection that the National Labor Relations Act (the NLRA) had previously afforded supervisors. Before Congress passed the LMRA, supervisors were not specifically excluded from the NLRA’s definition of employee, and the NLRB had recognized and protected supervisors’ rights to organize and to bargain collectively. The Supreme Court had upheld the Board’s position protecting supervisors’ rights to organize and bargain in ability of an employer to fire a supervisor still remain, and rank-and-file employees are still protected. *See* notes 22-25 *infra* and accompanying text.

6 Automobile Salesmen’s Union Local 1095 v. N.L.R.B., No. 82-2264 (D.C. Cir. June 30, 1983).


10 This definition read:

(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.


11 *See* H.R. REP. No. 245, 80th Cong., 1st Sess. 13-14 (1947), *reprinted in* 1 N.L.R.B. LEG...
In some cases, however, the supervisors’ unions were connected to the unions of rank-and-file employees. This situation created both a conflict of interest for supervisors and an uneasiness among employers.

Declaring that the recognition of supervisors’ unions was “inconsistent with the purpose” of the NLRA, Congress in the LMRA specifically excluded supervisors from the definition of employee and included a new definition of supervisor. The change was necessary, Congress stated, in order to ensure that goods flowed smoothly through the marketplace, that employees’ activities were not controlled or disrupted by supervisors, and that management had loyal supervisors who were free of conflicts of interest.

The LMRA gave rights to supervisors, but it also stripped them of protection the NLRA had previously provided. Supervisors retained the right to join unions, but employers were not required to regard union activities among supervisors as protected. Supervisors

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**ISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 304-05 (1948) [hereinafter cited as 1 N.L.R.B. LEGISLATIVE HISTORY].**

12 330 U.S. 485 (1947). The Court reasoned:

Though the foreman is the faithful representative of the employer in maintaining a production schedule, his interest properly may be adverse to that of the employer when it comes to fixing his own wages, hours, seniority rights or working conditions. He does not lose his right to serve himself in these respects because he serves his master in others. And we see no basis in this Act whatever for holding that foremen are forbidden the protection of the Act when they take collective action to protect their collective interest.

*Id.* at 489-90. Working under a “circumscribed” standard of review, the Court affirmed the Board. *Id.* at 491.


14 1 N.L.R.B. LEGISLATIVE HISTORY at 305.

15 See note 10 supra for the prior definition. Congress, in drafting the LMRA, deleted the period and added “, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.” 29 U.S.C. § 152(3) (1976).

16 This definition reads:

(11) The term ‘supervisor’ means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.


17 1 N.L.R.B. LEGISLATIVE HISTORY at 305-07.

18 The LMRA added this provision:

(a) Supervisors as union members
were thus denied the protection of sections 7\textsuperscript{19} and 8(a)(1)\textsuperscript{20} of the NLRA. Employers could therefore discharge supervisors for union activities without committing an unfair labor practice.\textsuperscript{21}

In spite of this exclusion, the NLRB recognized, and continues to recognize, that under certain circumstances the firing of a supervisor could violate section 8(a)(1) of the NLRA. These circumstances include firing a supervisor (1) for testifying at an NLRB hearing or otherwise participating in the processing of a grievance,\textsuperscript{22} (2) for refusing to commit an unfair labor practice,\textsuperscript{23} (3) for failing to prevent unionization,\textsuperscript{24} and (4) as a pretext for dismissing the supervisor's pro-union crew.\textsuperscript{25} In these circumstances supervisors are protected under section 8(a)(1), even though they are not statutory employees.\textsuperscript{26} Under all of these circumstances, however, the NLRB stated

\begin{footnotes}
\item[19] Section 7 reads:
\begin{quote}
Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.
\end{quote}
\end{footnotes

\begin{footnotes}
\item[20] See note 2 supra.

\item[21] The Supreme Court supported this position. See, e.g., Beasley v. Food Fair of North Carolina, Inc., 416 U.S. 653 (1974) (holding that § 164(a) applies to federal, state, and local laws, and that a supervisor may be dismissed for union activity).

\item[22] See, e.g., Oil City Brass Works, 147 N.L.R.B. 627 (1964), enforced, 357 F.2d 466 (5th Cir. 1966) (an employer violated § 8(a)(1) by firing a supervisor who had testified at an N.L.R.B. hearing); Rohr Industries, Inc., 220 N.L.R.B. 1029 (1975) (a supervisor was terminated for signing a statement used in an employee's grievance process).

\item[23] See, e.g., Gerry's Cash Markets, Inc., 238 N.L.R.B. 1141 (1978), enforced, 602 F.2d 1021 (1st Cir. 1979) (a supervisor was dismissed for refusing to commit the unfair labor practice of enforcing an invalid no-solicitation rule); Belcher Towing Co., 238 N.L.R.B. 446 (1978), enforced, 614 F.2d 88 (5th Cir. 1980)(same).

\item[24] See, e.g., Talladega Cotton Factory, 106 N.L.R.B. 295 (1953), enforced, 213 F.2d 209 (5th Cir. 1954) (supervisors were dismissed for failing to prevent the unionization of a mill).

\item[25] See, e.g., Pioneer Drilling Co., Inc., 162 N.L.R.B. 918 (1967), enforced in material part, 391 F.2d 961 (10th Cir. 1968) (two supervisors were dismissed as a pretext for dismissing their pro-union crews); Downslope Industries, Inc., 246 N.L.R.B. 948 (1979), enforced, 676 F.2d 1114 (6th Cir. 1982) (a supervisor's dismissal was part of the employer's plan to curtail concerted activities).

\item[26] "Statutory employees" are employees as defined by 29 U.S.C. § 152(3) (1976). See notes 10 and 15 supra.
\end{footnotes}
that its goal was not to extend statutory protection to supervisors, but rather to insure that rank-and-file employees were not deprived of their section 7 rights through indirect coercion of their supervisors. By recognizing and enforcing these exceptions, the NLRB refused to allow employers to coerce statutory employees into curtailing union activities by making an example of a supervisor.\(^{27}\)

Prior to the PARKER-ROBB decision, the NLRB also recognized that an employer violated section 8(a)(1) if he discharged a supervisor, who had participated in union activities, as an integral part of a pattern of conduct designed to discourage union activities among statutory employees.\(^ {28}\) The NLRB determined that the discharge of a supervisor was an unfair labor practice if the employer intended the firing to coerce statutory employees to curtail union activities.\(^ {29}\) As with the other exceptions, the NLRB's ultimate goal in the pattern of conduct cases was to protect the rights of statutory employees. Thus when the Board considered whether or not the firing of a supervisor violated 8(a)(1), the extent of the supervisor's involvement in the protected activities was less important than the employer's motivation for firing the supervisor.\(^ {30}\) If the employer intended to discourage

\(^{27}\) See Annot., 50 A.L.R. 2d 866 (1980).

\(^{28}\) The seminal case in this area of NLRB policy is Pioneer Drilling Co., Inc., 162 N.L.R.B. 918 (1967), enforced in material part, 391 F.2d 961 (10th Cir. 1968), in which the firing of two pro-union supervisors violated § 8(a)(1) because, due to industry customs, it resulted in the dismissal of the supervisors' pro-union crews. See also note 3 supra.

\(^{29}\) See Brod, The NLRB in Search of a Standard: When Is the Discharge of a Supervisor in Connection With Employees' Union or Other Protected Activities an Unfair Labor Practice?, 14 IND. L.R. 727, 738 (1981).

\(^{30}\) These cases became increasingly difficult to distinguish from cases in which a supervisor had been legitimately discharged. See Brod, supra note 29, at 732-38. Brod summarizes the situation this way:

Although many decisions since Pioneer Drilling have resulted in a finding that the discharge of a supervisor violated section 8(a)(1) there have been many cases where the Board has rejected the contention that such a discharge was illegal. In these cases, the supervisor's discharge was held not to violate section 8(a)(1) for one or more of the following reasons: the supervisor sided with employees in their economic dispute with the employer; the supervisor engaged in union activities or other conduct inconsistent with his status; the employer did not embark on a pattern of misconduct aimed at rank-and-file employees; or the supervisor's discharge did not have the adverse impact on the employees' exercise of statutory rights prescribed by section 8(a)(1). These cases are not surprising because they follow from the majority's view that the employer's motivation (generally shown by the context in which the supervisor's discharge occurred) is the determinant of the legality of the supervisor's discharge under the 'integral part of a pattern of misconduct' rationale.

*Id.* at 737-38 (footnotes omitted).
union activity among statutory employees by the firing, the firing violated 8(a)(1), or it did until *Parker-Robb*.

II. *Parker-Robb*: Fifteen Years of Precedent Notwithstanding

In *Parker-Robb*, the NLRB overruled the pattern of conduct line of cases, finding them incompatible with the LMRA’s statutory exclusion of supervisors. In *Parker-Robb*, a number of auto salesmen, along with two of their supervisors, attended a union organizational meeting. At the meeting the supervisors were told they were not eligible to join the union. Subsequently, some of the employees were fired, allegedly for economic reasons. Two of them immediately informed their sales crew chief, Terry Doss, of their discharge. Doss was one of the two supervisors who had attended the organizational meeting. Doss angrily questioned *Parker-Robb*’s used car sales manager, and then the new car sales manager, about the reason for the discharges. Both told him that the firings were for economic reasons. Finally, when Doss persisted in demanding an explanation, he too was discharged.

The Administrative Law Judge (ALJ) found that the supervisor’s discharge was part of a pattern of conduct intended to coerce employees in the exercise of their rights to union or concerted activity. Thus, following previous Board precedent, the ALJ found that the discharge violated section 8(a)(1) of the Act, and ordered the supervisor’s reinstatement. On appeal, the NLRB found that the discharge was indeed part of such a pattern of conduct. However, the Board also found that the line of cases upon which the ALJ based his decision had been incorrectly decided. Consequently, the NLRB overruled these precedents, and reversed the ALJ’s decision on this point. The United States Court of Appeals for the District of Columbia Circuit recently denied a petition for review of the Board’s

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31 See note 5 *supra* and accompanying text.
32 262 N.L.R.B. No. 58, slip op. at 2.
33 Specifically, the Board relied upon DRW Corp., 248 N.L.R.B. 828 (1980). See also cases cited in note 3 *supra*.
34 The ALJ also found the employees’ discharges to have been unlawful. Accordingly, he ordered their reinstatement. 262 N.L.R.B. No. 58, slip op. at 11.
35 262 N.L.R.B. No. 58, slip op. at 1 n.1. Member Howard Jenkins, Jr. concurred in the result. However, he maintained that there was insufficient evidence that Doss had been discharged for concerted activity. Consequently, he argued that *Parker-Robb* did not present for review the principle enunciated in the pattern of conduct cases. *Id.* at 18-20.
36 *Id.* at 10. The Board affirmed the ALJ’s decision regarding the employees. See note 34 *supra*.
decision.\footnote{Automobile Salesmen's Union Local 1095 v. N.L.R.B., No. 82-2264, slip op. at 2 (D.C. Cir. June 30, 1983). The court of appeals' opinion is very straightforward. The court noted that its standard of review was quite narrow, i.e., that it must enforce the Board's construction so long as it was "reasonably defensible." The court summarized its analysis as follows: Petitioner argues that the 'pattern of conduct' line of cases properly implements the Act's prohibition of unfair labor practices by employers against employees. The Board responds that it is necessary to overturn that line of cases to implement the Act's specific exclusion of supervisors from protection. Given that Congress has not indicated which interpretation it intended, that the courts have allowed the Board broad discretion in applying the general provisions of the Act to specific situations, that the Board's application of those provisions to this case is a reasonable exercise of that discretion, and that the Board has adequately explained its reasons for reversing its policy, we deny the petition for review.} \footnote{Id. at 2.}

At first blush, the Board's reasoning appears straightforward and simple. Supervisors are expressly excluded, through the LMRA, from the Act's protection. Therefore, the discharge of a supervisor may violate the Act only in those exceptional circumstances where that discharge also directly affects employees' rights. For example, the discharge of a supervisor for his adverse testimony at a hearing is unlawful because it impinges upon the rights of employees to have their grievances heard.\footnote{See note 22 supra and accompanying text.} Similarly, in the \textit{Pioneer Drilling}-type situation,\footnote{Pioneer Drilling Co., 162 N.L.R.B. 918 (1967), enforced in material part, 391 F.2d 961 (10th Cir. 1968). In \textit{Pioneer Drilling}, two driller/supervisors were fired, purportedly for refusing to accept transfers. Each of their respective crews was attempting to organize a union. The NLRB found that in the drilling industry it was customary for each driller to hire his own crew. The crew remained employed only so long as its driller was employed. Consequently, the Board found that the discharge of the drillers was merely a ploy to discharge their pro-union crews. The Board therefore ordered reinstatement.} the discharge of a supervisor is merely a pretext for the discharge of his own pro-union crew. The supervisor's discharge is thus unlawful, since it effectively denies the employees their rights to engage in union activity.\footnote{See note 25 supra and accompanying text. In addition, the NLRB noted in \textit{Parker-Robb} that the unlawfulness of discharging a supervisor for refusing to commit an unfair labor practice prevents even those employees who are not protected by the Act from being "coerced into violating the law." 262 N.L.R.B. No. 58, slip op. at 9.}

In contrast, in \textit{Parker-Robb} the NLRB determined that the discharge of a supervisor for his own union or concerted activity has only an "incidental or secondary effect on the employees."\footnote{262 N.L.R.B. No. 58, slip op. at 9.} The Board reasoned that since employees are statutorily protected from reprisal for engaging in similar activities they should not be intimidated by the example. Accordingly, the Board found that this type
of discharge does not violate the Act.\textsuperscript{42}

In reaching its decision that Parker-Robb's discharge of a supervisor did not violate the NLRA, the Board employed a test under which the critical inquiry in determining whether a supervisor's discharge violates the Act is whether the discharge has a direct effect on employees' rights.\textsuperscript{43} Prior to Parker-Robb, the NLRB's inquiry in such cases focused on whether or not the employer intended to stifle employee rights by the firing of a supervisor.\textsuperscript{44} Thus, under Parker-Robb,

\textit{[I]t is irrelevant that an employer may have hoped, or even expected, that its decision to terminate a supervisor for his union or concerted activity would cause employees to reconsider . . . their own concerted or union activity. No matter what the employer's subjective hope or expectation, that circumstance cannot change the character of its otherwise lawful conduct.}\textsuperscript{45}

It is clear that the Board's decision in Parker-Robb is predicated upon a fundamental shift in philosophy. As discussed below, the Board's analysis of effect versus intent does not adequately support its distinction between types of supervisor discharges. Rather, the Board's holding is better understood simply as a new, bright line distinction.

The Board claims to differentiate between lawful and unlawful supervisor discharges according to their effect upon employees. But these effects are never measured. There is no provision for weighing, on a case by case basis, the actual effects of a given discharge upon given employees. Rather, the effects of each type of discharge are defined \textit{a priori}. Thus, it is presumed that the effects upon employees of a discharge for adverse testimony, for example, are \textit{always} greater than the effects of a discharge for concerted activity. Situations where the opposite would be true are not difficult to imagine. For instance, if a given group of statutory employees were unaware of the distinction the LMRA makes between supervisors and employees, the discharge of a supervisor for concerted activity might \textit{actually} have a great effect on their own willingness to engage in concerted activity. Similarly, the discharge of a supervisor for adverse testi-

\textsuperscript{42} Id.
\textsuperscript{43} Id. at 10. The Board stated that the critical inquiry in supervisor discharge cases is whether the discharge "interferes with the right of employees to exercise their rights under Section 7 of the Act." Id. See also note 19 supra.
\textsuperscript{44} See, e.g., DRW Corp., 248 N.L.R.B. 828 (1980); Downslope Industries, Inc., 246 N.L.R.B. 948 (1979), enforced, 676 F.2d 1114 (6th Cir. 1982); Nevis Industries, Inc., 246 N.L.R.B. 1053 (1979), enforcement denied in material part, 647 F.2d 905 (9th Cir. 1981).
\textsuperscript{45} 262 N.L.R.B. No. 58, slip op. at 9.
mony might actually have a very small effect on employees' rights—particularly where the value of his testimony is slight. Yet, under Parker-Robb, the effects of this latter type of discharge would be presumed to be greater than those of the former.\textsuperscript{46} Judgment would be entered accordingly.

The Board also claims to propound an objective test which will obviate the subjective inquiry into whether or not an employer intended to coerce his employees by the discharge of a supervisor. But what of those cases where the situation is ambiguous and it is unclear whether a supervisor was lawfully discharged in retaliation for concerted activity, or unlawfully discharged for some other reason? How should the ambiguity be resolved? Since the relative effects of each type of discharge are already defined at fixed levels, the question would appear to turn on the employer's motive. Against which supervisory activity did the employer intend to retaliate? Concerted activity? Then the discharge is lawful. Adverse testimony? Then the discharge is unlawful. Parker-Robb has not eliminated the question of intent, but merely shifted it.

At least one decision subsequent to Parker-Robb has noted the intent issue. In \textit{Humana of West Virginia, Inc.},\textsuperscript{47} a head nurse was fired, admittedly for union activity. The ALJ, following Parker-Robb, held that this was lawful. The ALJ also found, however, that the employer had impliedly requested that the nurse question her subordinates about their union activities—an unfair labor practice—and that she was fired for refusing to do so.\textsuperscript{48} The ALJ ordered her reinstated. The Board reversed this finding, stating that the evidence was insufficient to establish that the employer had an unlawful motive.\textsuperscript{49} The Board did not, however, flinch at the question of motive. Indeed, the Board stated that had the evidence established an unacceptable motive on the part of the employer, the case clearly would have fallen within a recognized exception.\textsuperscript{50}

The new test which the NLRB enunciated in Parker-Robb neither really measures the effect of the discharge, nor necessarily eliminates

\textsuperscript{46} \textit{Id.} at 8-9. The Board's determination that the effects of a discharge for concerted activity are "incidental or secondary," while the effects of other types of discharges are presumably "primary," is equally unhelpful. It assumes that all secondary effects are necessarily less coercive than are primary ones.

\textsuperscript{47} 265 N.L.R.B. No. 126, [1982-83 Transfer Binder] NLRB Dec. (CCH) ¶ 15,484 (1982).

\textsuperscript{48} See note 23 supra and accompanying text.


\textsuperscript{50} \textit{Id.}
the question of intent. Instead, it simply makes a new, bright line
distinction between types of supervisor discharges. What was the
Board's motive for making the change? Perhaps it was pragmatic.
As the Board points out, some of the previous decisions which ap-
plied the subjective standard were not without difficulty.\footnote{51} More
probably, however, it was a deliberate effort to draw "a new line
between the employee's and employer's rights that attempts to ac-
commodate both."\footnote{52} That is, the Board may have sought deliber-
ately to give more emphasis to the employer's right to demand
loyalty from his supervisors.

III. Ramifications of \textit{Parker-Robb}

The Board has not yet wavered from the new guidelines an-
nounced in \textit{Parker-Robb}, and any reconsideration seems unlikely, at
least for the present time.\footnote{53} All the future ramifications are not yet
clear. But, the consequences to supervisors and employees are seri-
sous; employers, however, benefit from the Parker-Robb guidelines.

Supervisors will be afforded less protection under the new guide-
lines. While \textit{Parker-Robb} took no statutory protection away from su-
pervisors, it eliminated, without warning, what had been for fifteen
years a recognized exception to an employer's power to dismiss a su-
pervisor for his participation in union activities.\footnote{54} Although this
remedy for supervisors is gone, the Board's goal of protecting the
rights of statutory employees remains. These employees should get
some assurance that their right to engage in union activities is pro-
tected. Rank-and-file employees may not realize that supervisors
have no statutory protection, and they may fear for their own secur-
ity if their rights are not explained. Employers who fire supervisors
for engaging in union activities should be required to notify employ-
ees that they cannot be fired for similar activities. Otherwise, em-
ployers may effectively curtail union activities among statutory
employees simply by firing a supervisor.

\footnote{51}{262 N.L.R.B. No. 58, slip op. at 8 n.15.}
\footnote{52}{Automobile Salesmen's Union Local 1095 v. N.L.R.B., No. 82-2264, slip op. at 8 (D.C.
Cir. June 30, 1983).}
\footnote{53}{The current makeup of the Board renders any reconsideration unlikely. Member
Howard Jenkins, Jr., who registered the only reservation in \textit{Parker-Robb}, no longer sits on the
Board.}
\footnote{54}{The United States Court of Appeals for the District of Columbia Circuit states plainly
that the "issue is the Board's decision to overturn fifteen years of precedent." Automobile
Salesmen's Union Local 1095 v. N.L.R.B., No. 82-2264, slip op. at 2 (D.C. Cir. June 30,
1983).}
If supervisors now need any protection, they must rely solely on the exceptions to an employer's ability to dismiss a supervisor that are still recognized and enforced by the Board. These protections remain since the circumstances underlying the exceptions are presumed to have a coercive effect on the activities of statutory employees. Because Parker-Robb eliminated the pattern of conduct exception, aggrieved supervisors will likely resort to the remaining exceptions more often in the future. In particular, they may try to assert that they were dismissed for refusing to commit an unfair labor practice or for failing to prevent unionization. The standard for determining whether a particular fact situation fits into one of these exceptions is unclear. The standard may be the actual coercive effect achieved on the employees' activities by the employer through firing the supervisor, or it may be the employer's intent to achieve a coercive effect on the employees' activities by firing the supervisor, regardless of whether that effect is in fact achieved.

Parker-Robb has not yet been thoroughly analyzed and applied by the NLRB or courts. However, the Board's decision to reverse a liberal interpretation of the law may indicate a trend toward a narrow reading and interpretation of the law in the area of employer-supervisor relations. If so, the balance of power will swing further toward employers.

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55 See notes 22-25 supra and accompanying text.
56 Realistically, practitioners seeking relief for their aggrieved clients will have little choice but to rely on these remaining exceptions.
57 Humana of West Virginia, Inc., 265 N.L.R.B. No. 126 (1982), [1982-83 Transfer Binder] NLRB Dec. (CCH) ¶ 15,484, raises the possibility that the employer's intent may still be an issue. See note 49 supra and accompanying text.
58 See, e.g., Comet Fast Freight, 262 N.L.R.B. No. 40, 110 L.R.R.M. 1321 (1982), in which the Board held that a truck driver's dismissal did not violate § 8(a)(1) because his complaint about an unsafe truck did not constitute concerted activity. Board Member Jenkins expressed reservations (as he did in Parker-Robb), asserting that the Board was reversing precedent. For a fuller discussion of this precedent, see id. at 1321-23 nn.3-5, 12-14.
TORT LAW—THE ENLARGING SCOPE OF AUDITORS’ LIABILITY TO RELYING THIRD PARTIES

“If liability for negligence exists, a thoughtless slip or blunder . . . may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class.”1 With this statement in Ultramares Corp. v. Touche,2 Judge Cardozo limited accountants’ liability for negligence to only those persons in privity of contract with the auditor. While Ultramares was strong precedent for many years and is still followed in a number of jurisdictions,3 the Ultramares privity limitation has been criticized by both courts4 and legal commentators.5 Those courts which have rejected Ultramares have generally accepted some variant of the Restatement’s position which permits recovery for only those plaintiffs who are actually foreseen.6 A new standard may be emerging, however. In two 1983 deci-

2 225 N.Y. 170, 174 N.E. 441 (1931).
4 See cases cited in note 6 infra.
6 Restatement (Second) of Torts § 552 (1981) provides:

(1) One who, in the course of his business [or] profession . . . supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) [T]he liability stated in Subsection (1) is limited to loss suffered (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction. See, e.g., Haddon View Investment Co. v. Coopers & Lybrand, 70 Ohio St. 2d 154, 436 N.E.2d 212 (1982); White v. Guarente, 43 N.Y.2d 356, 372 N.E.2d 315, 401 N.Y.S.2d 474 (1977); Shatterproof Glass Corp. v. James, 466 S.W.2d 873 (Tex. Civ. App. 1971); Ryan v. Kanne, 170 N.W.2d 395 (Iowa 1969); Rusch Factors, Inc. v. Levin, 284 F. Supp. 85 (D.R.I. 1968) (applying Rhode Island state law); Annot., 46 A.L.R. 3d 979, 1001 (1972).
sions, *H. Rosenblum, Inc. v. Adler*\(^7\) and *Citizens State Bank v. Timm, Schmidt & Co.*,\(^8\) New Jersey and Wisconsin departed from both the *Ultramares* privity requirement and the Restatement position and applied standards based on foreseeability. By eliminating the anachronistic privity barrier, the Wisconsin and New Jersey Supreme Courts have drawn accountants' liability for negligence in their states in line with that of other negligent tortfeasors.

This comment, in Part I, discusses the privity defense in the context of auditors' liability and the recent trend away from recognizing this defense. Part II presents the two recent decisions in which state supreme courts departed from the *Ultramares* rule. Finally, Part III examines the policy justifications for these recent decisions and contrasts them with those of *Ultramares* and its progeny.

### I. The Defense of Privity: An Historical Perspective

The common law defense of privity of contract originated in 1848 in *Winterbottom v. Wright* in which the court limited recovery for negligence to the contracting parties.\(^9\) The defense survived untouched for years, but in 1916, the New York Court of Appeals, in *MacPherson v. Buick Motor Co.*,\(^10\) undercut the privity defense, holding that the defense was unavailable to a manufacturer of defective products. Six years later, the New York Court of Appeals, in *Glanzer v. Shepard*,\(^11\) again addressed the privity issue. In *Glanzer*, a bean seller hired the defendant, a public weigher, to certify the weight of 905 bags of beans that were to be sold to the plaintiff.\(^12\) The defendants

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\(^7\) 461 A.2d 138 (N.J. 1983).
\(^8\) 335 N.W.2d 361 (Wis. 1983).
\(^9\) 152 Eng. Rep. 402 (1842). In *Winterbottom*, the defendant contracted with the postal service to maintain the coaches in a safe and secure condition. *Id.* at 402. The plaintiff, a mail coach driver, suffered personal injury when his coach broke down due to the defendant's negligent repair. *Id.* at 402-03. The court disallowed recovery because the plaintiff was not a party to the contract. It feared that extending liability beyond the contracting parties would allow the "most absurd, and outrageous consequences" to ensue. *Id.* at 405.

\(^10\) 217 N.Y. 382, 111 N.E. 1050 (1916). In *MacPherson*, the New York Court of Appeals held the manufacturer of a defective automobile liable in negligence to the ultimate user of the automobile. *Id.* at 389, 111 N.E. at 1053. The defendant claimed that its liability for negligence extended only to the retail dealer with whom it had contracted, and not to that dealer's customers. Judge Cardozo, writing for the court, discarded the notion that liability for negligence flows exclusively from the contract: "We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else." *Id.* at 390, 111 N.E. at 1053. Therefore, at least with regard to personal injury torts, the negligent tortfeasor's liability extends beyond those in privity of contract. His duty extends to the foreseeable plaintiff.

\(^11\) 233 N.Y. 236, 135 N.E. 275 (1922).
\(^12\) *Id.* at 238, 135 N.E. at 275.
negligently overstated the weight of the beans; consequently, the plaintiff overpaid. Judge Cardozo, writing for the majority, permitted the plaintiff to recover in spite of the lack of contractual privi- 

The court noted that the defendant had a duty to the buyer as well as the seller, because the buyer’s use of the weight certificate was the “end aim of the transaction.” The court thus expanded liability in two ways: first, the court imposed liability for purely economic loss and second, imposed that liability on a third party not in privity with the contracting parties.

With decisions like MacPherson and Glanzer shattering the protective shield of privity, the accounting profession feared the worst as Ultramares Corp. v. Touche proceeded through the New York courts. In Ultramares, the Fred Stern Co. had retained the accounting firm Touche Niven to prepare audited financial statements. Although the statements reported a substantial surplus, Stern Co. was actually insolvent. Ultramares Corporation, relying on the inaccurate financial statements, loaned money to Stern Co. When unable to collect on the loans, Ultramares sued Touche Niven for negligence and fraud. The trial court dismissed Ultramares’ fraud claim. After a jury verdict for Ultramares, however, the court also dismissed the negligence claim. The Appellate Division affirmed the dismissal of the fraud claim, but reinstated the jury verdict on the negligence claim. After it had circumvented the privity barrier in MacPherson and Glanzer, the New York Court of Appeals, in Ultramares, unexpectedly absolved the accountants of any liability for negligence to relying third parties, saying that “[i]f liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class.”

In Ultramares, the plaintiff relied upon Glanzer to support his ar-

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13 Id.
14 Id. at 238-39, 135 N.E. at 275. Because the plaintiff’s identity was known to the contracting parties, the court, as an alternative basis for supporting its holding, analogized the situation to that in Lawrence v. Fox, 20 N.Y. 268 (1859). In Lawrence, the intended third party beneficiary of a contract recovered from the breaching party. 233 N.Y. at 241, 135 N.E. at 277.
15 255 N.Y. at 173, 174 N.E. at 442.
16 Id. at 175, 174 N.E. at 442.
17 Id. at 171, 174 N.E. at 442.
18 Id. at 179, 174 N.E. at 444. This language of Cardozo in Ultramares is similar to that of Lord Abinger in Winterbottom. Curiously, Cardozo mentioned but ignored Winterbottom’s rationale in MacPherson. 217 N.Y. at 392-93, 111 N.E. at 1054.
argument that liability for negligent words extends to foreseeable recipients, regardless of contractual privity. In rejecting this argument, the Ultramares court distinguished Glanzer, noting that the negligent weigher in Glanzer supplied information to the bean seller and the bean purchaser, which was the "end aim of the transaction." In contrast, the public accountants in Ultramares delivered the report only to their client for use "in the operation of its business as occasion might require." Therefore, the court found the two cases clearly distinguishable: Glanzer involved a foreseen user of the report, while Ultramares involved one of many foreseeable users.

The court posited two policy reasons for relieving accountants of liability for negligence. The court's first and overriding concern was that, if held liable for negligence, accountants would be exposed to enormous financial liability based not on the culpability of their error, but on the extent to which the erroneous reports were circulated. This concern was undoubtedly valid at that time. Public accounting was not the multi-national, multi-million dollar industry that it is today, but rather a weak, fledgling profession. Also, given the status of the industry and the state of the law in 1922, accountants probably could not procure malpractice insurance. The court's second, and less convincing, policy consideration was their desire to punish fraud (intentional misrepresentation) more severely than negligent misrepresentation. According to Cardozo, imposing liability on the accountant in negligence would make negligence nearly coterminous with fraud.

Neither of these reasons are valid today. First, an accounting firm can plan for future liability; malpractice insurance is readily obtainable and commonplace. Moreover, as with product-liability in-

20 This distinction has been adopted in Restatement (Second) of Torts § 552. See note 6 supra and accompanying text.
21 255 N.Y. at 179, 179 N.E. at 444.
22 Hawkins, Professional Negligence Liability of Public Accountants, 12 VAND. L. REV. 797, 797 (1959); see generally, J. CAREY, THE RISE OF THE ACCOUNTING PROFESSION (1969). One commentator has remarked:

"The accounting profession today needs little sympathy and should be treated as any other business. Price, Waterhouse & Co., for example, earned gross income in the United States of over $200 million in each of the five years [preceding 1979]. Its worldwide revenue grew from nearly $400 million in 1975 to $635 million in 1979."

23 See Wiener, supra note 5, at 236.
24 255 N.Y. at 185, 174 N.E. at 447.
insurance, society as a whole, rather than accounting firms, carries the burden of malpractice insurance through increased product costs attributable to a firm's insurance premiums. Second, although the court's desire to punish intentional wrongdoers more severely than negligent wrongdoers is a viable concern, imposing additional, punitive damages on the intentional wrongdoer is a better solution. After all, the third party's pecuniary loss is the same whatever the nature of the tortfeasor's conduct.

Regardless of the validity of its policy arguments today, the _Ultramares_ decision became the leading authority on the negligence liability of accountants to third parties.\(^{25}\) The _Ultramares_ decision may also be partly responsible for the judicial limitation of accountants' liability under the Securities Exchange Act of 1934.\(^{26}\) Section 14A of that act authorizes the Securities and Exchange Commission to promulgate rules pertaining to proxy solicitation.\(^{27}\) Rule 14a-9, promulgated pursuant to that authority, forbids proxy solicitations which contain false or misleading facts or omit material facts that would make the proxy statement not misleading.\(^{28}\) Since 1964, when the United States Supreme Court implied a private cause of action based on Rule 14a-9\(^ {29}\), injured shareholders have brought several cases against officers and directors of corporations.\(^ {30}\) In these cases, courts have uniformly held that the plaintiff need only show negligence by the defendant officer or director, not an intent to deceive.\(^ {31}\) Yet in the single case brought under Rule 14a-9 against public accountants, _Adams v. Standard Knitting Mills, Inc._,\(^ {32}\) the United States Court of Appeals for the Sixth Circuit required that the plaintiff prove scienter in

\(^{25}\) H. Rosenblum, _Inc. v. Adler_, 461 A.2d at 144. "Whether due to the compelling logic of the holding, the status of Cardozo, concern for the fledgling profession of accountancy, or a combination of each, the _Ultramares_ holding remained intact for many years in every jurisdiction where the issue was raised." Wiener, _supra_ note 5, at 236. _See also_ Mess, _supra_ note 5, at 842; Comment, _Accountants' Liability for Fake and Misleading Financial Statements_, 67 COLUM. L. REV. 1437, 1439 (1967); Comment, _Negligence or Scienter—The Appropriate Standard of Liability for Outside Accountants for Misleading Proxy Statements under Section 14(a) of the Securities Exchange Act of.1934_, 7 U. DAYTON L. REV. 437, 457 (1982).


\(^{28}\) 17 C.F.R. § 240.14a-9(a) (1980).

\(^{29}\) J. J. Case Co. _v._ Borak, 377 U.S. 426 (1964).


\(^{31}\) Gould, 535 F.2d at 777; Gerstle, 478 F.2d at 1299.

\(^{32}\) 623 F.2d 422 (6th Cir. 1980).
order to recover. The court justified its decision by, among other reasons, the lack of privity between the accountant and the stockholders and the potential "enormous" liability for "relatively minor mistakes" to which a negligence standard would subject accountants. Although the court did not specifically mention *Ultramares* in its opinion, these policy considerations echo Cardozo in *Ultramares*.

*Rusch Factors, Inc. v. Levin* illustrates the Restatement position, the most frequently encountered alternative to the *Ultramares* privity doctrine. In *Rusch Factors*, the United States District Court of Rhode Island adopted the Restatement position and extended accountants' liability for negligence to "actually foreseen" users, or members of an actually foreseen limited class of users. Since reporting to the plaintiff was the "end aim of the transaction," the court analogized the case to *Glatzer*. The *Rusch Factors* court criticized the *Ultramares* holding for forcing the innocent reliant party to "carry the weighty burden of an accountant's professional malpractice." Extending the circle of liability for accountants' negligence beyond the bastion of privity, the court argued, would stimulate improved accounting techniques and force accounting firms to insure against such liability. Ultimately, this insurance cost would be passed on to their clients in the form of higher fees, thereby more fairly distributing the risk.

On one hand adopting the Restatement position is commendable inasmuch as it represents a step away from the antiquated privity defense. Yet, on the other hand, one must question the wisdom of

33 Id. at 428.
34 Id. Similarly, the United States Supreme Court, in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), held that accountants were not liable in negligence under rule 10(b) of the Securities Exchange Act of 1934.
37 284 F. Supp. at 93.
38 Id.
39 Id. at 91. See text accompanying note 24 supra.
40 284 F. Supp. at 91.
41 Id.
arbitrarily distinguishing between "foreseen" and "foreseeable" users. The single justification for this distinction pertains to limiting the auditor's liability. As posited earlier, this contingency can be adequately insured against. Furthermore, the whole threat of indeterminate liability is arguably overstated. Parties who detrimentally rely on inaccurate financial statements will be limited to their damages occasioned by the misstatement. Secondly, the fact that plaintiffs must comply with the statute of limitations, which generally starts to run at the point of reliance, is a limitation. Lastly, plaintiffs are subject to the defense of contributory negligence.

There is apparently no reason for preferring a foreseen user over a foreseeable one. Neither party pays for the audit, and neither party is owed a greater duty of care from the accountant. Since modern auditors fully expect third parties to rely on their opinions, the distinction is simply indefensible. Worse yet, a clever accountant could circumvent the Restatement provision by asking his client not to reveal the intended users of the statements.

The Restatement position implies that an auditor should be more careful when he knows of the user's, or limited class of user's, identity. This is an implication that any auditor would refute.


Against this backdrop of transition from Ultramares to Rusch Factors, the Supreme Court of New Jersey considered the Rosenblum case. Giant, a publicly-owned corporation, acquired two privately-held businesses, H. Rosenblum, Inc. and Summit Gift Galleries, Inc., from the Rosenblums in return for shares of Giant stock. The Rosenblums relied on five years of Giant's financial statements in deciding to accept Giant's offer. An unqualified opinion from Touche Ross & Company, Giant's auditors, accompanied each set of financial statements. Giant had falsified its books, however, adding fictitious

42 See text accompanying note 88 infra.
44 Id. at 417-18.
46 461 A.2d at 141.
47 Id.
48 Id. The fact that the opinions were "unqualified" is inferred from the statement that "it had examined the statements of earnings and balance sheets 'in accordance with generally accepted auditing standards' and that the financial statements 'present[ed] fairly' Giant's
assets and omitting substantial accounts payable. Consequently, the 1971 and 1972 financial statements were inaccurate. The fraud was discovered in 1973, and the trading of Giant stock was immediately suspended. Giant then filed for bankruptcy, leaving the Rosenblums with worthless stock. The Rosenblums filed suit against Touche Ross, and each of its individual partners, alleging fraudulent misrepresentation, gross negligence, negligence, and breach of warranty. Touche Ross moved for partial summary judgment, and the trial court granted the motion on the negligence claim, but only with respect to the 1971 audit. The Appellate Division affirmed.

On appeal, the New Jersey Supreme Court reversed. The New Jersey court rejected the Ultramares privity doctrine and stated that accountants who issue opinions without distribution limitations in the certificates have a duty to exercise ordinary care to a broad class of users. The court first considered the privity defense itself. The court noted that both the Ultramares privity doctrine and the Restatement position require at least some relationship between the auditor and the relying third party. The court, analyzing these positions in terms of a products liability action based on negligence, stated that

financial position.” *Id.* Opinions are given at the conclusion of the audit and express “an opinion on the fairness with which the financial statements present financial position, results of operations, and changes in financial position in conformity with generally accepted accounting principles.” Statements on Auditing Standards, 1 AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, PROFESSIONAL STANDARDS, § 110.01 (1972). See also Wiener, supra note 5, at 237.

49 461 A.2d at 141.

50 *Id.* at 141-42. Touche Ross’ entire motion for partial summary judgment sought to dismiss the negligence claim regarding the 1971 financial statements and the negligence, gross negligence, and fraud claims regarding the 1972 audit and financial statements. *Id.* The trial court granted the first part of the motion, but denied the motion with respect to the 1972 financial statements. *Id.* The Appellate Division denied leave to appeal the trial court’s decision on the 1972 financial statement claim, but the New Jersey Supreme Court granted leave to appeal. *Id.* Thus, the supreme court reviewed the entire disposition of Touche Ross’ motion.

51 461 A.2d at 156.

52 461 A.2d at 144-45. The Rosenblum court grouped the Restatement position into the same category as Ultramares:

The only extension in the Restatement beyond Ultramares and Glanzer appears to be that the auditor need not know the identity of the beneficiaries if they belong to an identifiable group for whom the information was intended to be furnished. . . . Both Ultramares and the Restatement demand a relationship between the relying third party and the auditor. Unless some policy considerations warrant otherwise, privity should not be, and is not [in this jurisdiction], a salutary predicate to prevent recovery.

*Id.* at 145. Thus, the court appears to have characterized the Restatement position as establishing a privity requirement. Courts that have accepted the Restatement position after rejecting privity would probably disagree.
they had “long ago discarded the privity requirement in products liability cases based on negligence.”\textsuperscript{53} The court also observed that products liability damages include compensation, not only for physical injury, but also for economic loss.\textsuperscript{54} On this basis, the court decided that plaintiffs could maintain a negligence action for economic loss against accountants, despite a lack of privity.\textsuperscript{55}

The court next considered the scope of the duty owed by accountants to third parties. The court held that unless accountants limited the distribution of their financial statements by a statement on the certificates,\textsuperscript{56} their duty of care extended to those reasonably foreseeable recipients of the statements who (1) received the statements from the company for proper business purposes, and (2) relied on the statements pursuant to those business purposes.\textsuperscript{57} The court recognized that this rule would not protect institutional managers, portfolio managers, and stockholders who do not obtain financial statements directly from the company, but said that such cases were not before it and reserved judgment on the issues.\textsuperscript{58} Notably, the Rosenblum decision is framed, not in terms of the extent of an accountant’s liability, but in terms of an accountant’s duty. Thus, when the court considers a case involving institutional and portfolio

\textsuperscript{53} Id. The court cites precedent for holding persons liable for misrepresentations in products liability cases despite of a lack of privity. \textit{Id.} at 145-47.

\textsuperscript{54} \textit{Id.} at 146. The issue of only having economic loss has been a sticking point in tort law where recovery has frequently been denied if only economic harm was suffered. Fortunately, the distinction is less important today, for the harm caused by an accountant’s negligence is essentially always economic. \textit{Id.}

\textsuperscript{55} \textit{Id.} at 146-47.

\textsuperscript{56} \textit{Id.} at 152. The court stated that “auditors could in some circumstances, such as when auditing a privately owned company, expressly limit in their certificates the persons or class of persons who would be entitled to rely upon the audit.” \textit{Id.} Given the nature and purpose of audits, one would not expect accounting firms to frequently use disclaimers. After all, audited reports are designed for persons to rely on in making business decisions. One would anticipate that the courts will scrutinize such disclaimers as they do a manufacturer’s disclaimer of implied warranties. The court here stated that “[i]n the final analysis the injured party should recover damages due to an independent auditor’s negligence from that auditor. This would shift the loss from the innocent creditor or investor to the one responsible for the loss.” \textit{Id.} The court’s concern with providing relief to injured parties runs contrary to a broad ability to limit the dissemination of the financial statements and consequent reliance upon them.

\textsuperscript{57} \textit{Id.} at 153. In addition to these requirements, the court enunciated further limits. First, recovery is limited to the actual loss flowing from the reliance. Second, the amount of recovery is governed by the Comparative Negligence Act, 2A N.J. STAT. ANN. § 15-5.1 (West Supp. 1983). Third, the accounting firm can seek indemnity or contribution from the audited company and the “blameworthy” officers and employees. \textit{Id.} at 152. This limitation actually provides accountants little help, however, for the accountant is usually sued only after the company has become insolvent.

\textsuperscript{58} 461 A.2d at 153. \textit{See} text accompanying note 89 \textit{infra}.
managers or stockholders, the court could easily extend the duty of
care to cover these parties as well.

Shortly after the *Rosenblum* decision was announced, the Wisconsin Supreme Court, in *Citizens State Bank*, found accountants liable for negligence to an even broader class of plaintiffs.\(^59\) *Citizens State Bank* presented the same basic issues as *Rosenblum*. The accounting firm of Timm, Schmidt & Company prepared financial statements for Clintonville Fire Apparatus, Inc. (CFA) for the years 1973-1976 and issued unqualified opinions on the 1974-1976 statements.\(^60\) After reviewing CFA's financial statements, Citizens State Bank loaned CFA a total of $380,000. While preparing the 1976 statements, Timm Schmidt found that errors in the 1974 and 1975 statements had significantly overstated CFA's assets.\(^61\) Timm Schmidt corrected the errors and informed Citizens State Bank.\(^62\) The bank subsequently called all of the CFA loans due. CFA was unable to repay the loans, went into receivership, and was liquidated and dissolved. Citizens State Bank sued Timm Schmidt and its malpractice insurance company for the unpaid balance of the loans. Timm Schmidt made a motion for summary judgment which the Wisconsin trial court granted, finding that Timm Schmidt's negligence did not extend to Citizens State Bank even under Restatement Section 552.\(^63\) The Court of Appeals affirmed.\(^64\)

On review, the Wisconsin Supreme Court concluded that the lack of privity with an accountant should not bar recovery by an injured third party who relied on the accountant's statements.\(^65\) The court recognized that previous decisions rejecting the *Ultramares* privity doctrine had usually embraced the Restatement position, but also noted that the Restatement does not extend liability to all foreseeable users of the financial statements.\(^66\) The court concluded that

\(^{59}\) 335 N.W.2d 361, 366 (Wis. 1983).
\(^{60}\) 335 N.W.2d 361, 362.
\(^{61}\) Id. According to the statement of the facts, the errors, taken together, totalled over $400,000. Id.
\(^{62}\) Id.
\(^{63}\) Id. at 363-64. In an apparent effort to avoid liability under the Restatement position, each accountant of the firm who worked on the CFA audit submitted an affidavit that he had no knowledge that CFA either had obtained or was intending to obtain loans from Citizens State Bank. The affidavit of the president also indicated that no one informed him that CFA intended to use the statements to acquire loans from any source. Id.
\(^{64}\) Id. at 364.
\(^{65}\) Id. at 365. See also text accompanying notes 77-82 infra.
\(^{66}\) 335 N.W.2d at 366. The court concluded: "The Restatement's statement of limiting liability to certain third parties is too restrictive a statement of policy factors for this court to
[A]ccountants’ liability to third parties should be determined under the accepted principles of Wisconsin negligence law. Liability will be imposed on . . . accountants for the foreseeable injuries resulting from their negligent acts unless, under the facts of [the] particular case, as a matter of policy to be decided by the court, recovery is denied on grounds of public policy.67

The court thus adopted the most expansive scope of liability for accountants’ negligence to date. However, the court did say that this liability would be limited by public policy considerations on a case-by-case basis.68 These case-by-case policy considerations are those normally applied in negligence cases, and not special factors applied only to accountants.

Both the Rosenblum and Citizens State Bank positions extend liability beyond the Restatement position in that both decisions extend the auditor’s duty of reasonable care to plaintiffs who are foreseeable, while the Restatement limits liability to foreseen plaintiffs. There is a distinction between Rosenblum and Citizens State Bank, as well. The Rosenblum decision extends a duty of care only to a sub-class of all foreseeable plaintiffs: those who receive financial statements from the company and rely on them pursuant to a proper business purpose. On the other hand, Citizens State Bank extends the duty of reasonable care to all foreseeable plaintiffs, in line with general negligence liability.

III. Case Analysis

Several factors influenced the Rosenblum court’s decision to broaden the accountants’ scope of negligence liability. First, the court recognized that the auditor’s function has changed over the years from that of a management tool to that of an independent evaluator of the accuracy of financial statements issued by manage-
ment and used by third parties not in privity with the auditor.69 This transition makes the auditor's function fit Glanzer's "end aim of the transaction" rationale and undercuts the rationale used by the Ultramares court to distinguish Glanzer.70 Second, the court dismissed the Ultramares "financial catastrophe" objection to a broad duty of care for accountants. The court noted that, under the Securities Act of 1933 and the Securities Exchange Act of 1934, auditors and others were liable for certain damages resulting from erroneous financial statements, and that they were already covering themselves through insurance and other means.71 The court reasoned that accountants could obtain similar malpractice insurance for an extended duty of care.72 By answering this objection, the court eliminated the major policy reason supporting Ultramares limited liability: potential "indeterminate liability."73

Third, the court found an expanded duty could result in stricter auditing standards and more thorough reviews, thus reducing the incidence of negligent audits.74 Increased fees for this work and increased insurance costs would not preclude these changes since the costs could be passed on to the business being audited, and ultimately to the consuming public. Finally, the court felt that innocent third parties required some protection from erroneous financial statements.75 Both the third and final reasons echo the Rusch Factors rationale, where these same reasons were used to impose liability as

69 Id. at 149. The Securities & Exchange Commission has commented on the public accountant's responsibility as follows:

The responsibility of a public accountant is not only to the client who pays his fee, but also to investors, creditors and others who may rely on the financial statements which he certifies. . . . The public accountant must report fairly on the facts as he finds them whether favorable or unfavorable to his client. His duty is to safeguard the public interest, not that of his client.

In the Matter of Touche, 37 S.E.C. 629, 670-71 (1957). The first sentence in the AICPA's Code of Ethics says that a distinguishing mark of a professional is his acceptance of responsibility to the public. Thereafter the Code refers to the shift in responsibility to the public caused by the increased number of investors and government regulations. Fiffis, Current Problems of Accountant's Responsibilities to Third Parties, 28 VAND. L. REV. 31, 105-07 (1975), see also Mess, supra note 5, at 506; Wiener, supra note 5, at 250-51.

70 See text accompanying notes 19-20 supra.

71 461 A.2d at 151. The court gave a brief yet detailed discussion of certain liabilities already imposed upon auditors. The actions allowed are not limited to cases involving fraud; some even require a showing, by the auditor, of freedom from negligence.

72 Id. This reasoning appears to be well founded. See, e.g., Comment, supra note 5, at 415 & n. 81.

73 See text accompanying notes 22-23 supra.

74 461 A.2d at 152. See also Mess, supra note 5, at 856; Note, Public Accountants and Attorneys: Negligence and the Third Party, 47 NOTRE DAME L. 588, 605-06 (1972).

75 461 A.2d at 152.
expressed by the Restatement, in spite of a lack of privity.\textsuperscript{76}

Likewise, the Wisconsin Supreme Court based its decision in \textit{Citizens State Bank} on a number of the same policy factors. In its opinion, after tracing the role of privity through the accountants’ liability cases,\textsuperscript{77} the court considered \textit{Auric v. Continental Casualty Co.},\textsuperscript{78} a legal malpractice case it had decided earlier in 1983. The court considered the policy of making attorneys more diligent in their work important in reaching that decision.\textsuperscript{79} The \textit{Citizens State Bank} court thought the \textit{Auric} policy well-suited to the accountants in the \textit{Citizens State Bank} case.\textsuperscript{80} Extending liability for accountants’ negligence would make accountants more careful in their work. The court also reasoned that if liability were not imposed, third parties would not be protected and accountants’ negligence would go undeterred.\textsuperscript{81} These last two reasons are reminiscent of the \textit{Rusch Factors} and \textit{Rosenblum} courts’ policy considerations. \textit{Rusch Factors} and \textit{Rosenblum} obviously affected the Wisconsin Supreme Court’s thinking, and both cases are referred to in the \textit{Citizens State Bank} opinion.\textsuperscript{82}

After concluding that the absence of privity should not bar a negligence action against accountants, the court next turned to the scope of liability: Again, the policy factors were decisive. The court rejected the Restatement’s restricted scope of liability as “too restrictive a statement of policy factors for this court to adopt.”\textsuperscript{83} In this instance, however, the court did not elaborate on the specific policy reasons. The statement is in the context of the declaration that “[t]he fundamental principle of Wisconsin negligence law is that a tortfeasor is fully liable for all foreseeable consequences of his act except as those consequences are limited by policy factors.”\textsuperscript{84} The court may well have reasoned that there was no reasonable basis for applying a lesser duty of care to auditors than to other persons; therefore, the same duty should be applied. This reasoning would not be

\textsuperscript{76} See text accompanying note 41 supra.

\textsuperscript{77} The court examined \textit{Ultramas} and \textit{Rusch Factors} as well as \textit{Ryan v. Kanne}, 170 N.W.2d 395 (Iowa 1969), in which the Iowa Supreme Court applied Restatement (Second) of Torts § 552 to find accountants liable for negligence to a foreseen third party.

\textsuperscript{78} 111 Wis. 2d 507, 331 N.W.2d 325 (1983). In that case, the court found an attorney liable to a will beneficiary for negligently supervising the execution of a will. \textit{Id.} at 514, 331 N.W.2d at 330.

\textsuperscript{79} \textit{Id.} at 513, 331 N.W.2d at 329. See \textit{Citizens State Bank v. Timm, Schmidt & Co.}, 335 N.W.2d 361, 365.

\textsuperscript{80} 335 N.W.2d at 365.

\textsuperscript{81} \textit{Id.}

\textsuperscript{82} \textit{Id.} at 364-66. See notes 41, 74-75 supra and accompanying text.

\textsuperscript{83} 335 N.W.2d at 366. See notes 66-67 supra and accompanying text.

\textsuperscript{84} 335 N.W.2d at 366. See note 68 supra.
without merit. Negligence liability is normally based on a duty of reasonable care founded on foreseeability; this was established long ago in *Palsgraf*.85 One can view *Ultramares* as limiting an auditors duty of care from that expressed three years earlier in *Palsgraf* because of the existence of the policy factors expressed by Cardozo. Today however, those policy factors are no longer valid, no new policies support such a limitation, and there are no definite policy reasons supporting a full duty of care. Therefore, auditors should revert to "normal" status and have a duty of reasonable care to all foreseeable plaintiffs.

Because *Rosenblum* and *Citizens State Bank* were cases of first impression, the New Jersey and Wisconsin Supreme Courts could freely examine the policy issues behind *Ultramares* and the Restatement before deciding what position to adopt. In both cases, the courts examined the *Ultramares* privity concept and the Restatement position, and found both unconvincing. Instead, the courts adopted positions based primarily on foreseeability considerations.

The courts correctly rejected the *Ultramares* privity standard. The policy factors used to support the decisions are valid and convincing. The spectre of financial catastrophe to accountants is no longer a valid concern. As the critics have pointed out, the accounting field is no longer a weak, fledgling industry,86 and insurance for professional negligence is readily available. Further, the transition of the modern auditor’s function has moved him squarely into the *Glanzer* rationale87 since his product—the financial statements and his opinion—are intended not only for management, but also for third parties. In addition, an innocent third party who relies on an accountant's audit to his detriment should not be so quickly left without a remedy.

Furthermore, the courts correctly extended accountants’ liability for negligence beyond the Restatement position. Once again, an innocent third party should not pay for the consequences of an accountant’s negligence. No valid policy reasons justify contracting an accountant’s liability for negligence to something less than the normal scope of tort liability, foreseeability. Chief Justice Sheran of the Supreme Court of Minnesota strongly criticized such intermediate-level positions:

86 See note 22 supra.
87 See notes 69-70 supra and accompanying text. See also Wiener, *supra* note 5, at 250 & n.89.
If [an accountant’s] liability is to be drawn somewhere short of forseeability, it must be drawn on pragmatic grounds alone. Once it is admitted that a certain number of people have been injured as a result of an accountant’s malpractice, there is no logical justification for denying any of them relief based on the “limited” or “unlimited” nature of their “class,” or whether the reliance of the particular party was or was not “specifically forseeable.”

IV. Conclusion

Evaluating whether the Rosenblum standard is better than the Citizens State Bank standard is impossible. Each standard represents a particular court’s attempt to balance the burden of enlarging the circle of liability for negligent accountants against the burden of the economic injury suffered by third parties who rely on an accountant’s defective product. Since the New Jersey Supreme Court in Rosenblum expressly withheld an opinion on the duty of care owed to persons not receiving financial statements directly from the company, liability to such persons remains undecided. After the New Jersey Supreme Court decides such a case, the final positions of the two states may not differ significantly.

Both decisions still provide accountants some protection from unlimited liability. The Rosenblum standard is more of a bright-line decision. The prerequisites, acquisition of an accountant’s report directly from the company and a proper business purpose, provide a special safeguard against unlimited liability. The Citizens State Bank standard is less definite, requiring more case-by-case analysis by both jury and judge. Since it uses the same type of analysis already applied as an integral part of general negligence law, the standard is simply an application of the public policy considerations generally applied to negligence cases. Given these limitations, both standards should be workable.

The persuasive authority of Ultramares has greatly diminished, and more courts will now move further away from the Ultramares privity standard. For years, the area of accountants’ liability for negligence has been an anachronism, hanging on to the last vestiges of the privity doctrine. Courts in general have framed the duty of care in other negligence cases in accord with another famous Cardozo

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88 Bonhiver v. Graff, 311 Minn. 111, 129-30, 248 N.W.2d 291, 302 (1976). Bonhiver did not purport to establish a general rule for accountants’ liability in negligence to third parties; rather, it simply decided that given the particular facts of the case, the accountants had a duty to the particular party involved.

89 461 A.2d at 153.
phrase: "[t]he risk reasonably to be perceived defines the duty to be obeyed."90 Perhaps now, with the decisions of *Rosenblum* and *Citizens State Bank*, the gap between these two standards will close. Surely, the time has come.

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