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Chapman University School of Law Groundbreaking Ceremony Friday, November 21, 1997

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We are here today as witnesses, to observe and celebrate an inaugural act. In material terms, the act itself is trivial. It consists of the movement of a spadeful of earth. But the meaning of the act transcends its physical effects. One might even say that the triviality of the act, in one realm, is deliberately designed to display its immensity in another, in the unseen realm of traditions and commitments. The legal profession is an ancient calling, rich in memory and achievements. This morning, we break ground for a new law library, the heart of a new law school, and by this single simple act link this new school backwards in time to the traditions of the profession whose long history it now joins. The act of groundbreaking gives the Chapman University School of Law a past by making it heir to the traditions of the legal profession. But it also gives the school a future by declaring its commitment to sustain these traditions, whose survival is now as much in Chapman's hands as every other law school's in the country. With a single spadeful of earth, the Chapman University School of Law declares itself the inheritor of the past and the trustee of the future, and enters the realm of traditions and commitments that forms the stream of human time. That is what we are here today to solemnize as witnesses.

The Romans understood with special clarity the meaning of moments such as this. "In no other realm," Cicero observed, "does

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human excellence approach so closely the paths of the gods as it does in the founding of new and in the preservation of already founded communities." Whenever and wherever they built, it was a practice among the Romans to dedicate the site, and to solemnize the occasion, just as we are doing here today. Those who officiated at such dedications were known as augurers, and they formed one of the four great colleges of priests. It was the job of the augurers, on these occasions, to consecrate the place of building, and to interpret the omens that foretold the future of the enterprise there begun. The Latin verb for this forward-looking act of interpretation is *inaugurare*, from which our English word "inaugurate"—a word that has with time acquired an entirely positive meaning, very much like the work "bless"—derives. But the forward-looking act of inauguration also had a backward-looking meaning for the Romans, as their language reveals. For the verb *inaugurare*—to forecast and consecrate the future—can be traced back to an older verbal root, *augere*, which means simply to increase or add to something already present. Our own word "augment" comes from this older root (as does, less obviously but more interestingly, our word "authority"). In the Roman mind, every new beginning, every inauguration, was thus always an augmentation of what had gone before, a rededication to something already underway, the reassumption of earlier ambitions. Every new beginning entailed for the Romans a reunion with the past, and how well and faithfully this reunion was accomplished determined the future prospects of the enterprise, its future being in this regard intimately joined to its past, and its authority dependent upon the preservation of the link between the two. The history and morality and religion of the Roman republic were all shaped by these ideas.

The buildings the Romans constructed have vanished, except for a few fragments here and there. But the ideas with which they built endure, and shape what we do here this morning, thousands of years later on a continent of whose existence the Romans had no knowledge. This morning, we connect the Chapman University School of Law to its past, to the past of the legal profession which this new school augments and extends, and we inaugurate its future, whose prospects depend upon how well this school preserves the link between the past and future of the profession: an endless task, both difficult and inspiring, and the true source of every law school's authority.

The past that Chapman inherits is long and complex and contested. There are different views of what it is and what it means. But at the core of our tradition of legal education there is one idea that no one will dispute. This is the idea that the practice of law is a profession. Every profession is a job. Every professional makes

a living by doing what he does. But not every job is a profession. Not every job is a way of life. The word "profession" suggests a certain stature and prestige. It implies that the activity to which it is attached possesses a special dignity that other jobs do not. For centuries, the practice of law has been considered a profession, both by lawyers and laypeople, and legal education has always been thought of as a form of professional, and not merely vocational, training. What lies behind these ancient assumptions? What makes the law a profession?

My answer to this question has four parts. The practice of law has four characteristic features that make it a profession and that entitle those engaged in it to the special respect this word implies.

The first is that the law is a public calling which entails a duty to serve the good of the community as a whole, and not just one's own good or that of one's clients. In the second chapter of *The Wealth of Nations*, Adam Smith makes the famous observation that "it is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest," and he goes on to explain how each of these, pursuing his business with an eye solely to his own advantage, produces by means of an invisible hand an addition to the public good. With lawyers, it is different. Like the butcher, the brewer or the baker, the lawyer also expects an income from his work. Like them, the lawyer is not motivated by benevolence to do what he does. But in contrast to Smith's tradesmen, it *is* a part of the lawyer's job to be directly concerned with the public good—with the integrity of the legal system, with the fairness of its rules and their administration, with the health and well-being of the community the laws in part establish and in part aspire to create. We say that every lawyer is "an officer of the court." What we mean by this is that lawyers, like judges, are bound by their position to look after the soundness of the legal system and must take steps to ensure its justice—conscious, direct, and deliberate steps, not those indirect and unanticipated ones that lead the butcher and his friends from a preoccupation with their own advantage to the surprising and wholly unintended product of a public good.

This is not to say that lawyers are exclusively concerned with the public good. Of course they are not. Lawyers represent clients and causes whose partisan interests often contribute nothing to the public good and sometimes conflict with it. But a lawyer must always keep at least one eye on the public good, and make sure it is well-protected against the assaults of private interest, including those of his own clients. And a lawyer must do this not just occasionally, not just in the fraction of time he devotes to *pro bono* activities, but constantly and consistently, in every moment he is

practicing law. A lawyer who is doing his job well dwells in the tension between private interest and public good, and never overcomes it. He struggles constantly between the duty to serve his client and the equally powerful obligation to serve the good of the laws as a whole. Adam Smith's tradesmen do the latter automatically and unthinkingly by doing the former, and so never experience a tension between the two. The lawyer does because—unlike the butcher, the brewer, and the baker—he is charged with a conscious trusteeship of the public good that cannot be discharged by any mechanism other than his own direct intervention. This is what is implied by the claim that every lawyer is an officer of the court, and the law a public calling, the first of the four features of law practice that explains its standing as a profession.

The second is the nonspecialized nature of the practice of law. The legal profession remains, to a surprising degree, a generalist's craft, whose possessor can move from one field to another—from criminal law to bankruptcy to civil rights—with only modest readjustments. The law is not a form of technical expertise but a loose ensemble of methods and habits easily transported across doctrinal lines, and a lawyer is not a technician, trained to do things well, but a Jack (or Jill) of all trades.

Here again, the practice of law differs from the other activities that Adam Smith takes as his paradigm of modern economic life, activities like pin-making, which are characterized, Smith says, by the division of tasks into ever finer parts, each the province of a specialist with a tremendously developed but excruciatingly narrow expertise. Lawyers, by contrast, perform a range of different tasks—counseling clients, drafting documents for them, negotiating and litigating on their behalf, touching, in the process, on a dozen different areas of law—and move about among these tasks with a flexibility unthinkable in Adam Smith's pin-making factory.

The education that lawyers receive reflects this. The purpose of a legal education is not to produce experts, as many nonlawyers wrongly believe. It is to train law students, as the saying goes, to think like lawyers, which means: to be attentive to the facts and to know which ones, in any given situation, are important; to be able to tell a story with the facts, to master the power of narration; to recognize what others hope to achieve, even—or especially—when they have a hard time defining their own ambitions; and to appreciate, empathetically, a range of purposes and values and ideals wider than one's own. The man or woman who lacks these qualities will never think like a lawyer, no matter now much doctrinal knowledge he or she possesses. By contrast, the man or woman who possesses these qualities need have only the most elementary knowledge of legal rules and procedures to be well-prepared for

the practice of law, to have the kind of preparation that the best law schools provide. From the standpoint of the pin factory and all the other modern forms of enterprise whose success depends upon the division of labor and the cultivation of a deep but narrow expertise, the fact that the law remains a generalist's craft can only be interpreted as a sign of its dilettantism and amateurish backwardness. But viewed in another light, with pride and not embarrassment, the nontechnical nature of his work constitutes a second enduring source of the lawyer's claim to be a professional with a freedom and range of activity that specialization destroys.

A third source of the lawyer's professionalism is related to this second one. A moment ago I said that the goal of legal education is not to impart a body of technical knowledge but to develop certain general aptitudes or abilities; the ability, for example, to see facts clearly, and to grasp the appeal of points of view one doesn't embrace. To do this requires more than intellectual skill. It also requires the development of perceptual and emotional powers, and hence necessarily engages parts of one's personality other than the cognitive or thinking part. A good legal education is a process of general maturation in which the seeing, thinking, and feeling parts of the soul are reciprocally engaged. It is a big mistake to think that legal training sharpens the mind alone. The clever lawyer, who possesses a huge stockpile of technical information about the law and is adept at its manipulation, but who lacks the ability to distinguish between what is important and what is not and who cannot sympathetically imagine how things look and feel from his adversary's point of view, is not a good lawyer. He is, in fact, a rather poor lawyer who is more likely to do his clients harm than good. The good lawyer—the one who is really skilled at his job—is the lawyer who possesses the full complement of emotional and perceptual and intellectual powers that are needed for good judgment, a lawyer's most important and valuable trait. The process of training to become a lawyer, and the subsequent experience of being one, gather the soul's powers in a way that confirms one's sense of wholeness as a person and sense of being wholly engaged by one's work in contrast to all activities that can be mastered by the mind alone, which often produce, among the technicians who perform them, a sense of partial engagement only. The good lawyer knows that he needs all his human powers to do his job well, and the knowledge that he does gives his work a dignity no expertise, however demanding intellectually, can ever possess. This is the third feature of law practice that entitles us to call it a profession.

The fourth, and last, concerns time, and the location of law within it. Every activity has a past. Every activity therefore has a history, which can be studied and written down in books. I am

sure that even pin-making has been studied by historians. But the law has a special relation to the past. The law's past is not only something that can be observed from the outside; it also possesses value and prestige within the law itself. In pin-making, the fact that pins were made a certain way before is no argument at all for continuing to make them this way now. We may do so, out of habit, but prior practice has no normative force in pin-making, or computer chip-making, or any other line of manufacture. Put differently, precedent is not a value in these activities; at most, it is a fact. By contrast, precedent *is* a value in the law: not always the final or weightiest value, but a value that must always be taken into account. The fact that a law has been in existence for some time is always a reason for continuing to respect it, and this reason must be considered and weighed even when we reject it. The law is internally connected to its past—connected by its own defining norms and values—and not just externally connected, as every enterprise is, through the story an observer might tell about its development over time.

To enter the legal profession is therefore to come into an activity with self-conscious historical depth, to feel that one is entering an activity that has long been underway, and whose fulfillment requires a collaboration among many generations. It is to know that one belongs to a tradition. By contrast, in many lines of work—even those with a long history—all that matters is what is happening now, and the temporal horizon of one's own engagement in the work shrinks down to the point of the present. I imagine the experience of those in the computer industry, which seems to undergo a revolution every two years, to be like this, though I am only guessing. What I do know, from my own experience and from the experience of my students, is that the work of lawyers joins them in a self-conscious colleagueship with the dead and the unborn, and that this widening of temporal outlook is part of what lawyers mean when they describe their work as a profession.

I have now identified the four features of law practice that make it a profession. The practice of law is a public calling and a generalist's craft that engages the whole personality of the practitioner and which links him to a tradition that joins the generations in a partnership of historical proportions. Together, these four features give the practice of law a dignity that is the source of the lawyer's professional pride, of his belief that what he does for a living constitutes a way of life with special worth. But these same four features also explain the special contribution that lawyers make to society as a whole, and the special regard in which the legal profession is held by those outside it.

At this point, you may think that I am joking. "What regard?" you will ask. Everyone knows that lawyers are considered, by

most people, to be a bothersome necessity with as great a claim to respect as a rattlesnake, and for similar reasons. Today, indeed, the prestige of lawyers in America seems to be slipping, though whether it was ever higher in the past is hard to say. In a democratic country like ours, devoted to the rule of law, there will always be a healthy suspicion of those who appear to possess the secret keys to the house of law, and with that a disproportionate share of power. And, of course, there will always be more than enough bad lawyers to give the profession a black eye. But despite these perennial sources of suspicion and reproach, the American people have asked lawyers, since the days of the Revolution, to lead the way and to guide them in arranging their affairs, both public and private. Fearing lawyers and even occasionally loathing them, we Americans have also entrusted our lawyers with great powers and responsibilities, and made them, to a remarkable degree, the stewards of our republic. Behind all the cynicism and fashionable disgust, behind all the complaints—many of them justified—about the excesses of the adversarial system and the partisan exploitation of loopholes and technicalities, lies this basic fact of trust, the huge trust we have placed in our lawyers. We have trusted our lawyers to play a central role in the design and management of our society, and that trust has been well-placed because the four features of law practice that I have identified equip lawyers to play this role in an especially effective way. Let me explain.

We live today in a sprawling, heterogeneous society, the most complex society the world has ever known. The great nineteenth century European sociologists who observed the development and growth of this novel social order were struck by the power of the disintegrative forces within it, and by the need to find a counterweight that would resist them. The forces of disintegration they identified were four. The first was privatization, the tendency in a large free enterprise economy like ours for individuals to concern themselves exclusively with their own private welfare, and to neglect or forget entirely the claims of public life, which the Greeks and Romans had pursued with such memorable passion. The second was specialization, whose inexorable tendency is to separate those in different lines of work and to reduce their fund of shared experience, the common world of similar endeavors. The third was alienation, the sense of detachment from one's work, and secondarily from other human beings, the experience of being only partially engaged by—and hence only partially revealed through—activities that constitute one's living, in a narrow but also in a broader sense. And the fourth disintegrative force that Tocqueville and Marx and Durkheim and Weber identified as a threat to the far-flung interdependencies of modern social life was

forgetfulness, the loss of a sense of historical depth, and the consequent disconnection of the present moment—characterized by the idiocy of material comfort—from all that went before or is to follow, from the pain of the past and the calling of the future. We are witnessing, these thinkers said, the evolution of a form of life more complex and interconnected than any ever seen, but in the heart of this new order lurk forces of disintegration powerful enough to nullify its achievements: the forces of privatization, specialization, alienation, and forgetfulness, and the loss of one's sense of location in time.

You will now see where my argument is going. For the four features of law practice that make it a profession may be paired with these four forces of disintegration, to each of which one aspect of legal professionalism provides a remedy of sorts.

Thus, the lawyer's obligation to promote the public good—the public nature of his calling—is a counterweight against the strictly private concerns of his clients, who for the most part want only to succeed within the framework of the law but take no interest in the well-being of the law itself. Lawyers serve the private interests of their clients, but they also care about the integrity and justice of the legal system that defines the public order within which these interests are pursued. In this way, they provide a link between the realms of public and private life, helping to rejoin what the forces of privatization are constantly pulling apart.

To the disintegrative effects of specialization, the generalist nature of law practice offers valuable resistance. Because they represent clients of many sorts, in many different lines of work, lawyers are in a position to evaluate the social order from broader points of view unrestricted by the narrowing assumptions and experience of any single expertise, and to provide a kind of connective tissue among different forms of enterprise, which lawyers are often called upon to join, through a sort of shuttle diplomacy and the transactional schemes they design. If the publicmindedness of lawyers prepares them to provide a horizontal linkage upwards from the realm of private concerns to that of public values, the fact that theirs is a generalist's craft equips them to provide vertical linkages across the increasingly specialized world of work.

So far as alienation is concerned, it would of course be foolish to suggest that lawyers can combat its spread or soften its effects. We have all experienced, to one degree or another, the sense of separation from the world which the word "alienation" implies, and have known the loneliness associated with it, and there is little that lawyers, or anyone else, can do to change this basic fact of modern life. But to the extent the law remains a profession that engages the whole person, that calls upon all the powers of the soul—perceptual and emotional as well as intellectual—it offers

those who enter it the hope of a completeness of engagement in their work which is the antithesis of alienation, and it provides an image, at least, of what unalienated work can be.

And finally, the historical traditions of the law, which give the lawyers who work in it a self-conscious sense of their location in a continuing adventure with a past and a future as well as a present, are a counterweight against the forgetfulness, the obliviousness to time, which characterize our life today, with its rush of transient moments, each disconnected from the rest, in a contented but timeless present where the partnership among the generations—"the great primeval contract of eternal society," as Burke called it—is literally disintegrated, and forgotten. Much of the shallowness of our life—our fickle fascination with celebrities, for example, and the brevity of their fame—is the result of this loss of a sense of location in time, and all those forms of work for which a sense of historical depth continues to be needed should be valued for the resistance they offer to the temporal flattening of experience. Among these forms of work, the practice of law is especially important.

The four features of law practice that make it a profession are significant, therefore, not only because they justify the status pride of lawyers, but also because each in a different way helps to ameliorate one of the four disintegrating forces which the very developments that have produced our wealth and complex world have themselves unchained. The legal profession is an integrative force in a world of disintegrating powers, and this is why, despite the natural suspicion that lawyers arouse in any democratic culture and the bad behavior of some, they have been entrusted with such large responsibilities and viewed, by the people at large, with such high regard.

Or so, at least, someone looking backward, at the past of the profession, might conclude. But suppose we reverse the direction of our gaze and peer into the future instead. How do things stand there? Can we be confident that the sources of legal professionalism will remain strong, and that lawyers will continue to play the integrative role they have played in the past? I am troubled by doubts. I fear that things are changing rapidly, and for the worse. I am worried that the legal profession is today in danger—deep danger—and I want to end my talk this morning by briefly telling you why. I want to do this not because I am a gloomy man who enjoys spoiling a party. I want to do it because I believe that only an honest assessment of the danger the legal profession is now in can prepare the Chapman University School of Law for the challenges it faces in the years ahead, as a trustee of the profession's values and traditions, bound by a duty to preserve them.

In the last quarter-century, the American legal profession has been transformed by a series of sweeping changes that have compromised each of the four features of law practice that justify its claim to be a profession. In the first place, the commercialization of law practice, especially in its upper reaches, at the country's largest and most prestigious firms, has introduced an element of competitiveness that has caused many lawyers in these firms to view their public responsibilities as a luxury they can no longer afford in the frantic scramble to attract business by appealing to the self-interest of clients. This tendency has been exacerbated, I am bound to say, by the official pronouncements on legal ethics made by the American Bar Association and other organized groups, which increasingly endorse the view that lawyers serve the public good best by serving the private interest of their clients with maximum zeal, in effect treating lawyers like Adam Smith's tradesmen, who count on an invisible hand to transmute their pursuit of private advantage into a benefit for the community as a whole.

At the same time, the pressure of increased specialization in law practice has been growing, and it is doubtful whether this pressure can be resisted much longer. In part, the demand for specialization reflects a change in the relationship of lawyers to clients, who today increasingly expect their lawyers to supply highly specialized instructions for a narrowly defined range of problems, and not the general, all-purpose advice that legal counselors a generation ago were often asked to provide. The sheer increase in the number and complexity of legal rules to which we are now subject has also increased the pressure of specialization. Vast quantifies of new laws are enacted each year, and countless courts issue innumerable opinions construing them. In the expanding world of law, it seems increasingly unrealistic to expect any one lawyer to ever master more than a small portion of it, and so the demand for specialization grows, and with it, the demand for a more specialized law school curriculum.

Today, a higher percentage of lawyers work in large institutions—law firms of fifty or more—than ever before. This shift has meant, inevitably, an increase in bureaucracy and management, something every large organization requires. The result has been the development of a culture—again, most visible in the country's leading firms—marked by the managerial delimitation of assignments and responsibilities, the substitution of teams for individuals, and the emergence of relatively inflexible hierarchies of command in place of the older collegial arrangements that existed even in the largest firms two decades ago. Is it a surprise that the lawyers in these firms—the young lawyers especially—report a growing sense of detachment from their firms, and from the work

they do within them? Is it any surprise they complain, as the workers in every bureaucracy will, about their diminished feeling of personal fulfillment and growing sense of alienation?

And finally, like everything else in our world, the practice of law is today in danger of losing its temporal range and shrinking down to a series of disconnected points. The growing volume of law and the multiplication of decisions interpreting it has weakened the precedential value of each single judgment—since one can now often find many conflicting answers to the very same question—and this weakening of precedent has cut the practice of law off from its normative base in the past. Technology has also, in a different way, foreshortened the temporal horizon of lawyers. The phone (now portable), the fax (now ubiquitous) and the computer (now able to generate documents and changes in documents at the speed of light) have together had the effect of accelerating the practice of law to the point where many lawyers today complain that their clients expect an instantaneous reply to every question and give them no time to think. The result is a fragmentation of experience, and the narrowing of one's temporal frame of reference, an inward state of mind that is outwardly reflected in the growing tendency of lawyers to move from one firm to the next with dizzying speed (a pattern that suggests the weakening of interest in, and attachment to, any institution that outlasts oneself).

In short, lawyers are today less public-spirited and connected to their past, and more specialized and alienated from their work, than they were a quarter-century ago. Each of the four pillars of legal professionalism is presently under assault. No one will deny that the legal profession has made dramatic gains during this same period, most notably on opening doors (part way at least) to groups that had been barred from the profession by a prejudice unworthy of lawyers. But the profession to which these groups have with such justice been admitted is now in danger of losing all of the characteristic features that make it a profession and not just a job. If this happens, it will be a terrible irony for the profession's newest recruits and a blow to the status pride of all lawyers. But more importantly, it will be a blow to America, for the features of legal professionalism that are under such strain today have been a vital integrating force in the construction of our country and our way of life. If the pillars of legal professionalism crumble, we will all be hurt. The disintegrating tendencies of modern life will all meet with less resistance. The common ground on which we all depend will shrink and become less stable.

Today we celebrate the establishment of a new school of law. In doing so we celebrate the tradition to which it is heir. But we also recognize the responsibilities this inheritance conveys. In the best of times, these responsibilities would be heavy, for the law is

a living tradition that demands imagination and renewal to survive. But these are not the best of times for the legal profession. Today the roots of legal professionalism are challenged as never before. Today the survival of the profession demands the clearest possible reaffirmation of the four features that make it such, and a heroic commitment to their protection. This is a great struggle, in which every law school in the country is now engaged. It is a struggle for the soul of the profession. I welcome Chapman to the battle. I know that under Parham Williams' leadership you will bring fresh forces to the fight. And I congratulate you on having the courage to enter the fray when the odds are longest and the need for reinforcements great. You will prosper—I am sure of that—and in prospering you will bring honor to yourself and to the profession whose grand past and uncertain future you acquire this morning with a spadeful of earth.

—Anthony T. Kronman

The Duty to Disclose Geologic Hazards in Real Estate Transactions

*Denis Binder**

INTRODUCTION

Every year witnesses the widespread destruction of property, the limited loss of life, and the infliction of personal injuries during "natural disasters." Many times homes are located in areas geologically unsuitable for habitation. As a result, the residents may be surprised to learn they live in areas facing natural risks, such as avalanches, erosion, fires, floods, hurricanes, landslides, mudslides, tornadoes and volcanoes. Had they only known, the occupants claim, they would not have purchased homes in these vulnerable areas. Therefore, the purchasers contend, the sellers should be liable for failure to disclose the risks to them prior to the purchase.[1]

Such a claim would historically be met by the seemingly hallowed defense of caveat emptor, commonly translated as "let the buyer beware." Caveat emptor stood as a bulwark against suits by purchasers based upon a failure to disclose. Under caveat emptor, the seller has no duty to disclose facts unknown to the purchaser; silence is golden. The purchaser would be left without a legal remedy against the seller or the broker.

The thesis of this article is that caveat emptor no longer precludes relief. The last half of the twentieth century has witnessed a virtual collapse in fact, if not in legal theory, of caveat emptor.[2] The duty to disclose in real estate transactions has undergone a well-documented metamorphosis from caveat emptor to a quasi-caveat vendor. It is fair to state the Property law rule of caveat emptor has been superseded by the Tort law doctrine of a duty to disclose.[3]

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1 One commentator referred to the litigation, which follows landslides in California, as the "California landslide litigation syndrome." Bob Risley, *Landslide Peril and Homeowner's Insurance in California*, 40 UCLA L. REV. 1145, 1148 (1993).

2 *Cf.* Hill v. Jones, 725 P.2d 1115, 1118 (Ariz. Ct. App. 1986).

3 *Cf.* GRANT GILMORE, THE DEATH OF CONTRACTS (Ronald K.L. Collins ed., 2d ed. 1995).

It is also the thesis of this article that natural risks—be it a tornado in Kansas, a blizzard in New York, a volcano in Washington, or an earthquake in California—are foreseeable: foreseeable both in fact and in law. Our purpose is not to debate the desirability of building in geologically fragile areas. The assumption is that society, through the political process, has approved such construction. Rather, the purpose of the article is to posit the premise that the seller, and the seller's agent, owe a duty to disclose to the purchaser all material geologic hazards of which they know or reasonably should know.

This article will look at the history of the caveat emptor doctrine, the exceptions that have developed to it, and the foreseeability of geologic hazards.

History of Caveat Emptor

The phrase "caveat emptor" is of Latin derivation. Thus, one could reasonably assume the doctrine harkens back to ancient Roman law. Yet, in an exhaustive, historical survey, Professor Hamilton traces the phrase to the sixteenth century in a case involving horse trading.[4] The phrase may sound of Roman law, but the origin lies in the common law developed in the late sixteenth century English trading society.[5]

Rationales behind the principle included the premise that the parties to the transaction possessed equal bargaining power, skill and experience. Both parties were equally able to discover the conditions of the land and property.[6] The gist of caveat emptor was that the parties must look out for themselves. Thus, if a purchaser wanted protection, the purchaser should bargain for an express warranty.

In the famous 1873 case of *Peek v. Gurney*,[7] Lord Cairns firmly stated the standard:

> [M]ere nondisclosure of material facts, however morally censurable . . . , would, in my opinion, form no ground for an action in the nature of misrepresentation.[8]

The high point of caveat emptor in the United States came in the late nineteenth century. Indeed, the Supreme Court acknowledged in 1870 that the doctrine had been accepted in all but one jurisdiction.[9] The doctrine tied into the contemporary political

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4 Walter H. Hamilton, *The Ancient Maxim* Caveat Emptor, 40 Yale L.J. 1133, 1164 (1931) (hereinafter Hamilton).

5 *Id.* at 1156-57, 1187.

6 *See, e.g.*, Jane P. Mallor, *Extension of the Implied Warranty of Habitability to Purchasers of Used Homes*, 20 Am. Bus. L.J. 361, 363 (1982).

7 L.R. 6. H.L. 377 (1873).

8 *Id.* at 403.

9 Bernard v. Kellogg, 77 U.S. (10 Wall.) 383, 388 (1870).

philosophy of "laissez faire."[10] Since the government assiduously avoided regulating commerce in general, leaving the parties where they lay in real estate transactions fit into the general approach.[11]

The classic caveat emptor decision in the United States is the famous 1942 case of *Swinton v. Whitensville Savings Bank*,[12] where the seller failed to disclose to the purchaser that the house was infested with termites. The court held the seller had no duty to voluntarily disclose any facts. There was no allegation of false or misleading statements, or even the uttering of a half-truth. The basic allegation was a "mere failure to disclose."[13] The court reasoned:

> If the defendant is liable on this declaration, every seller is liable who fails to disclose any non-apparent defect known to him in the subject of the sale which naturally reduces its value and which the buyer fails to discover. Similarly, it would seem that every buyer would be liable who fails to disclose any non-apparent virtue known to him in the subject of the purchase which materially enhances its value and of which the seller is ignorant.[14]

The court was unwilling to impose upon the frailties of human nature such an idealistic standard.[15] The *Swinton* case has been followed in several decisions.[16] Another example of caveat emptor is *Mercer v. Meinel*,[17] where the Illinois Supreme Court held a vendor was not liable for personal injuries caused by the failure to install a gas heater in compliance with a municipal ordinance.

The strength of caveat emptor can further be illustrated by a 1983 Virginia case, *Kuczmanski v. Gill*.[18] The purchasers discovered, after moving in, the floors of both bathrooms had rotted away, a toilet was supported from underneath by cinder blocks, gutters did not work properly, and many storm windows were

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10 Hamilton, *supra* note 4, at 1183-84, 1187.

11 *Id.* at 1184. One court traced caveat emptor to the "attitude of rugged individualism reflected in the business economy and the law of the 19th century." Ollerman v. O'Rourke Co., Inc. 288 N.W.2d 95, 101 (Wash. 1980).

12 42 N.E.2d 808 (Mass. 1942).

13 *Id.*

14 *Id.* Massachusetts subsequently enacted a Consumer Protection Act, which applies to real estate brokers. MASS. GEN. LAWS ANN. ch. 93A, § 2(a).

15 *Id.* at 808-9.

16 *See, e.g.*, Gegeas v. Sherrill, 147 A.2d 223 (Md. 1958) (termite infestation); Stevens v. Bouchard, 532 A.2d 1028 (Me. 1987); London v. Courdaff, 529 N.Y.S.2d 874 (App. Div. 1988); Oates v. JAG, Inc., 311 S.E.2d 369 (N.C. App. 1984); Nei v. Burley, 446 N.E.2d. 674 (Mass. 1983).

17 125 N.E. 288 (1919).

18 302 S.E.2d 48 (Va. 1983). *See also* Traverse v. Long, 135 N.E.2d 256, 259 (Ohio 1956), where the Ohio Supreme Court held caveat emptor applied if the condition complained of is open to observation, or discoverable upon reasonable inspection, the purchaser had the unimpeded opportunity to examine the premises, and there was no fraud on the part of the vendor.

missing. The purchasers were in a position to discover the problem, but had failed to look. The sellers made no affirmative misrepresentations. Consequently, the purchasers were denied relief.

Contrary to the attention afforded the *Swinton* case, the high-water mark of caveat emptor was actually short-lived. Indeed, it had already developed serious leaks long before 1942. For example, the Washington Supreme Court recognized caveat emptor in 1895,[19] but by 1909 acknowledged the trend to restrict, rather than expand, the doctrine.[20]

In a 1922 case, the Kentucky Court of Appeals acknowledged the rule of caveat emptor, but recognized that it could be relaxed when the seller did something to prevent the prospective purchaser from making a thorough examination to ascertain the property's value, or when the purchaser had no reasonable opportunity to visit and examine the property due to its great distance from the parties to the transaction.[21] In 1926, California held the doctrine was inapplicable to nonjudicial foreclosure sales.[22]

By 1936, Dean Keeton recognized a trend away from nondisclosure: "[I]t would seem that the object of the law in these cases should be to impose on parties to the transactions a duty to speak whenever justice, equity, and fair dealing demand it."[23] Dean Keeton posited that Lord Cairns may well have been expressing nineteenth century law, as shaped by an individualistic philosophy based on freedom of contract, in which morality was not relevant.[24]

In 1941, one year before the Massachusetts opinion in *Swinton*, two California appellate courts held a vendor has a duty to disclose to the purchaser that the lot was on fill. The vendor is bound to disclose facts which, though known to the vendor, are not visible to the purchaser, and the vendor realizes the facts are not within the reach of diligent attention and observation of the vendor.[25]

In 1955 Dean Prosser wrote:

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19 Washington Central Imp. Co. v. Newlands, 39 P. 366, 367 (Wash. 1895) ("[I]t seems to us that parties must exercise ordinary business sense and the faculties which are given to them for the purpose of transacting business, and that they cannot call upon the law to stand in loco parentis to them in the ordinary transactions of business and their ordinary dealings with their fellow men.").

20 Wooddy v. Benton Water Co., 102 P. 1054, 1056 (Wash. 1909).

21 Osborne v. Howard, 242 S.W. 852 (Ky. 1922).

22 Mitchell v. California-Pacific Title Ins. Co., 248 P. 1035 (Cal. 1926).

23 W. Page Keeton, *Fraud-Concealment and Nondisclosure*, 15 TEX. L. REV. 1, 31 (1936).

24 *Id.*

25 Rothstein v. Janss Investment Co., 113 P.2d 465, 467 (Cal. Ct. App. 1941); Clauser v. Taylor, 112 P.2d 661, 662 (Cal. Ct. App. 1941).

> The law appears to be working toward the ultimate conclusion that full disclosure of all material facts must be made wherever elementary fair conduct demands it.[26]

Even though it held against the purchasers on the facts in a case of termite infestation, the Washington Supreme Court stated in 1966 that caveat emptor is not rigidly applied to the complete exclusion of any moral and legal obligations to disclose material facts not readily apparent upon reasonable inspection by the purchaser.[27] Other courts followed the approach of using modern concepts of justice.[28] Professor Freyfogle, in a 1985 article,[29] recognized that California and Colorado took the lead in imposing duties on sellers to disclose matters materially affecting the value of property. This requirement includes disclosure of soil conditions and matters wholly external to the property.[30]

The decline in the caveat emptor doctrine reflects a change in societal mores, whereby the goal of consumer protection has replaced laissez-faire.[31] Professor Roberts noted that caveat emptor did not adversely affect the typical buyer of a new house during the nineteenth century because the then-typical house owner was a middle class purchaser who purchased the lot, and then hired an architect to design the house.[32]

This scenario changed in post–World War II America with the mass-production of homes during the suburbanization of America.[33] Courts accordingly recognized caveat emptor no longer

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26 WILLIAM L. PROSSER, THE LAW OF TORTS 535 (2d ed. 1955). Dean Prosser referred to *Swinton*, and its ilk, as "surely singularly unappetizing cases." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, 738 (5th ed. 1984).

27 Hughes v. Stusser, 415 P.2d 89 (Wash. 1986).

28 *See, e.g.*, Bethahmy v. Bechtel, 415 P.2d 698, 706 (Idaho 1966) (courts are moving to a rule which would "impose on parties to a transaction a duty to speak whenever justice, equity, and fair dealing demand it"); Johnson v. Davis, 480 So. 2d 625, 628 (Fla. 1985) ("The law appears to be working toward the ultimate conclusion that full disclosure of all material facts must be made whenever elementary fair conduct demands it."); Obde v. Schlemeyer, 353 P.2d 672, 675 (Wash. 1960) (a duty to disclose "whenever justice, equity and fair dealing demand it").

29 Eric T. Freyfogle, *Real Estate Sales and the New Implied Warranty of Lawful Use*, 71 CORNELL L. REV. 1 (1985).

30 *Id.* at 25.

31 Moxley v. Laramie Builders, Inc., 600 P.2d 733, 735 (Wyo. 1979); E. F. Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 CORNELL L.Q. 835, 836-7 (1967).

32 Roberts, *supra* note 31, at 836 n.1 (1967).

33 As one court acknowledged:

> The rule of caveat emptor . . . apparently worked well in agricultural societies, as evidenced by its centuries of acceptance. However, the sale of farm acreage cum simple residence—the type of transaction to which caveat emptor originally addressed itself—is very different from the sale of a modern home, with complex plumbing, heating, air conditioning, and electrical systems, which is possibly built on ground considered unsuitable for construction until recent years.

Wilhite v. Mays, 232 S.E.2d 141, 142-43 (Ga. Ct. App. 1976), *aff'd.*, 235 S.E.2d 532 (Ga. 1977).

served the realities of the market place.[34] In the 1974 termite infestation case of *Weintraub v. Krobatsch*,[35] the New Jersey Supreme Court acknowledged that even in property law, the focus is now on the "modern concepts of justice and fair dealing."[36] *Swinton* did not represent this court's sense of justice or fair dealing.[37] Even in real estate transactions, the law should be based on current notions of what is "right and just."[38] Finally, Justice O'Hearn in 1996 quoted precedence for a unanimous New Jersey Supreme Court in *Strawn v. Canuso*, in stating caveat emptor no longer prevails in New Jersey.[39] Some courts advocate full disclosure of all material facts whenever elementary fair conduct demands it.[40]

The apparent severity of caveat emptor was early tempered by exceptions for fraud[41] and express warranty.[42] More recently, exceptions have been created for negligent misrepresentation[43] and latent defects. Standard remedies include a choice of rescission or damages.[44] The common remedies for fraud,[45] fraudulent concealment,[46] innocent misrepresentation,[47] and material misrepresentation[48] are rescission[49] or damages. The concept of fraud, as developed by the courts, is very expansive.

FRAUD

Fraud may consist of an untrue statement or concealment of a material fact, accompanied by an intent to deceive.[50] Clearly,

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34 *See, e.g.*, Chandler v. Madsen, 642 P.2d 1028, 1031 (Mont. 1982).

35 317 A.2d 68 (N.J. 1974). Sellers, as in *Weintraub*, often tried to rely on *Swinton* in arguing no duty existed to disclose insect infestations. Usually they met with judicial disapproval. *See, e.g.*, Obde v. Schlemeyer, 353 P.2d 60 (Wash. 1974).

36 *Id.* at 75.

37 *Id.* at 71.

38 *Id.*; *See also* Schipper v. Levitt & Sons, Inc., 207 A.2d 314, 325 (N.J. 1965).

39 657 A.2d 420, 426, (N.J. 1996) (citing Berman v. Gurwicz, 458 A.2d 1311, 1313 (Ch. Div. 1981)).

40 Johnson v. Davis, 480 So. 2d 625 (Fla. 1985).

41 Brooks v. Ervin Construction Co., 116 S.E.2d 454, 457 (N.C. 1960); Bernard v. Kellogg, 77 U.S. 383, 388 (1870); Averilla v. Boyer, 87 S.E.2d 259 (W. Va. 1915).

42 Bernard v. Kellogg, 77 U.S. 383, 388 (1870). *See generally* Hamilton, *supra* note 4, at 1173.

43 *See, e.g.*, Lyons v. Christ Episcopal Church, 389 N.E.2d 623, 625 (Ill. App. Ct. 1979).

44 *See, e.g.*, Gibb v. Citicorp Mortgage, Inc., 518 N.W.2d 910 (Neb. 1994) (termites).

45 Krall v. Loseke, 461 N.W.2d 67 (Neb. 1990) (termites).

46 *Id.*

47 *See* Miller v. Bare, 457 F. Supp. 1359, 1361 (W.D. Pa. 1978) (boundaries) (citing La Course v. Kiesel, 77 A.2d 877, 879-80 (Pa. 1951)); Cousineau v. Walker, 613 P.2d 608 (Alaska 1980).

48 Mertens v. Wolfboro National Bank, 402 A.2d 1335 (N.H. 1979).

49 Gordon v. Tafe, 428 A.2d 892 (N.H. 1981); Clauser v. Taylor, 112 P.2d 661, 662 (Cal. Ct. App. 1941) (affirming the rescission of a transaction to sell property when the buyer was not informed that the property was filled).

50 *See, e.g.*, Chapman v. Hosek, 475 N.E.2d 593, 598 (Ill. App. Ct. 1985).

fraud includes intentional misrepresentations of a material fact.[51] Thus, statements such as telling the purchaser the property is on a solid lot rather than on nineteen feet of fill constitutes fraud.[52] Fraud can consist of misrepresentations regarding flooding,[53] termite infestations,[54] or soil conditions.[55] A cause of action lies in fraud when the broker fails to disclose that the property flooded. Liability was not precluded even though the information about the flooding was in the public record, and the buyer could have obtained it.[56] Denying the existence of a water problem similarly constitutes fraud.[57] A fraudulent misrepresentation cause of action may also exist with respect to off-site conditions that affect the value of the land involved in the transaction. For example, New York has held the failure to inform the purchaser of an obnoxious business development constitutes fraud.[58]

A claim for fraudulent misrepresentation does not have to be based on defendant's knowing the statement was false, but that the representation was made recklessly and without belief in its truth.[59] A fraudulent misstatement may nullify the defense of caveat emptor even when the misrepresentation occurred after the signing of the purchase and sale agreement, but prior to execution of the contract by conveyance of the property.[60]

Short of fraud in these circumstances, liability might still exist based upon a theory of negligent misrepresentation.[61]

Fraud also consists of fraudulent concealment, such as covering over a defect.[62] Thus, fraud exists when the seller suppresses

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51 Reliance by a purchaser upon a positive, false, material misrepresentation allows the purchaser to recover. Burkett v. J.A. Thompson & Sons, 310 P.2d 56, 58 (Cal. App. 1957). *See also* RESTATEMENT (SECOND) OF TORTS, § 525 (1989).

52 Rothstein v. Janss Invest. Corp., 113 P.2d 465 (Cal. Ct. App. 1941); *See also* Lengyel v. Lint, 280 S.E.2d 66 (W. Va. 1981) (fraudulent misrepresentation as to the quality and type of house and the size of the lot).

53 Burkett v. J.A. Thompson & Son, 310 P.2d 56, 58 (Cal. Ct. App. 1957) (vendor liable for misrepresentation that house was built on original soil rather than fill); Long v. Brownstone Real Estate Co., 484 A.2d 126, 128 (Pa. Super. Ct. 1984) (seller had a duty to disclose since buyer was falsely informed the house had never experienced flooding).

54 Horner v. Ahern, 153 S.E.2d 216 (Va. 1967); Lyons v. McDonald, 501 N.E.2d 1079 (Ind. Ct. App. 1986); May v. Hopkinson, 347 S.E.2d 508 (S.C. Ct. App. 1986); Lynn v. Taylor, 642 P.2d 131 (Kan. Ct. App. 1982).

55 Krause v. Miller, 300 P.2d 855 (Cal. Ct. App. 1956).

56 Chapman v. Hosek, 475 N.E.2d 593 (Ill. App. Ct. 1985).

57 Davis v. Sellers, 443 S.E.2d 879 (N.C. Ct. App. 1994).

58 Coral Gables, Inc. v. Mayer, 271 N.Y.S. 662 (N.Y. App. Div. 1934).

59 *See, e.g.*, Roberts v. James, 85 A. 244 (N.J. Ct. Err. & App. 1912); O'Leary v. Industrial Park Corp., 542 A.2d 333, 336 (Conn. Ct. App. 1988); Ollerman v. O'Rourke, 288 N.W.2d 95, 107 (Wis. 1980).

60 Johnson v. Davis, 480 So. 2d 625, 627 (Fla. 1985).

61 Powell v. Wold, 362 S.E.2d 796 (N.C. Ct. App. 1987).

62 The RESTATEMENT (SECOND) OF TORTS § 555 covers fraudulent concealment:

> One party to a transaction who by concealment or other action intentionally prevents the other from acquiring material information is subject to the same liability to the other, for pecuniary loss as though he had stated the nonexistence of the matter that the other was thus prevented from discovering.

a serious problem with the property which the purchaser would have no reason to suspect.[63] For example, fraudulent concealment can deal with the salinity of the soil.[64] When the potential purchaser asks a question, there is a duty to answer truthfully. Caveat emptor is not a defense to fraudulent concealment.[65]

More significantly, fraud may be based on mere nondisclosure: "silent fraud." Actionable fraud or misrepresentations may exist through concealment or failure to disclose a hidden condition or a material fact where a duty of disclosure exists.[66] Silent fraud has a long heritage. For example, in 1886 the Michigan Supreme Court stated "a fraud arising from the suppression of the truth is as prejudicial as that which springs from the assertion of a falsehood."[67] A 1924 Nebraska case, *O'Shea v. Morris*,[68] held the failure to disclose nonownership of an adjacent vacant lot, upon which the seller's improvements extended, was fraudulent. Failure to disclose known facts, coupled with a request or circumstances which require a duty to speak, may form the essence of fraudulent misrepresentation.[69] In other words, caveat emptor is inapplicable when passive concealment exists.[70]

A purchaser may justifiably rely upon the knowledge, skill and expertise of the vendor.[71] Accordingly, the purchaser should have a reasonable expectation of honesty in the marketplace. The vendor should therefore disclose material facts of which it is aware, and which otherwise are not readily discoverable.[72] The purpose behind this rule is to protect the purchaser, who is in a poor position to discover conditions which are not readily discoverable.[73]

Even if no duty to disclose otherwise exists, a seller must answer truthfully any questions from the buyer, and not engage in partial disclosures. If the seller starts to disclose, he must disclose fully so that the purchaser is not misled by the partial disclosures.[74] A cause of action may exist for misrepresentation even if the seller is acting under an honest mistake without any intent to

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63 Burkett v. J.A. Thompson and Sons, 310 P.2d 56, 58 (Cal. Ct. App. 1957). For example, fraudulent concealment may consist of masking, by deodorizers, the strong odor of dog urine permeating most of the carpets in the house. Campbell v. Booth, 526 S.W.2d 167 (Tex. Civ. App. 1975).

64 Griffith v. Byers Construction Co. of Kansas, Inc., 510 P.2d 198 (Kan. 1973).

65 Loghry v. Capel, 132 N.W.2d 417 (Iowa 1965).

66 Kaze v. Compton, 283 S.W.2d 204, 207 (Ky. 1955).

67 Tompkins v. Hollister, 27 N.W. 651 (Mich. 1886).

68 198 N.W. 866 (Neb. 1924).

69 O'Leary v. Industrial Park Corp., 542 A.2d 333, 337 (Conn. Ct. App. 1988).

70 Holcombe v. Zinke, 365 N.W.2d 507 (N.D. 1985).

71 Ollerman v. O'Rourke, Inc., 288 N.W.2d 95, 107 (Wis. 1980).

72 *Id.*

73 *Id.*

74 Beirman v. Richmond Homes, Ltd., 821 P.2d 913 (Colo. Ct. App. 1991); Catucci v. Ouellette, 592 A.2d 962 (Conn. Ct. App. 1991); Nei v. Burley, 446 N.E.2d 674 (Mass. 1983).

discuss the quality or quantity of the land.[75] Thus, even innocent misrepresentations may render the seller liable to the purchaser.[76]

LATENT DEFECT

A more recent exception to caveat emptor is the duty to disclose latent defects, known to the seller, and which substantially affect the value or habitability of the property, but which are unknown to the purchaser, and would not be discovered by a reasonably diligent inspection.[77] The *Restatement (Second) of Torts* § 353 provides:

> (1) a vendor of land who conceals or fails to disclose to his vendee any condition, whether natural or artificial, which involves unreasonable risk to persons on the land, is subject to liability to the vendee and others . . . , if
> (a) the vendee does not know or have reason to know of the condition or the risk involved, and
> (b) the vendor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the vendee will not discover the condition or realize the risk.[78]

One court listed the following elements as persuasive on the duty to disclose known facts:

> (1) the condition is latent and not readily observable by the purchaser;
> (2) the purchaser acts upon the reasonable assumption that the condition does (or does not) exist;
> (3) the vendor has special knowledge or means of knowledge not available to the purchaser; and
> (4) the existence of the condition is material to the transaction.[79]

Liability for the nondisclosure may extend to both the seller and the seller's broker.[80] The Florida Supreme Court extends the duty to all forms of real property, new and used.[81] The duty to disclose latent defects is especially well established in cases involving termite infestations,[82] soil defects,[83] and construction on filled land.[84]

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75 Tennant v. Lawton, 615 P.2d 1305 (Wash. Ct. App. 1980).

76 Cousineau v. Walker, 613 P.2d 608 (Alaska 1980); Soursby v. Hankin, 763 P.2d 725 (Or. 1988).

77 Miles v. McSwegin, 388 N.E.2d 1367 (Ohio 1979); Thacker v. Tyree, 297 S.E.2d 885, 888 (W. Va. 1982); Lingsch v. Savage, 29 Cal. Rptr. 201 (Ct. App. 1963).

78 RESTATEMENT (SECOND) OF TORTS § 353 (1977).

79 Ollerman v. O'Rourke Co., Inc., 288 N.W.2d 95, 106 (Wis. 1980).

80 Miles v. McSwegin, 388 N.E.2d 1367 (Ohio 1979). Even if not specifically asked, there may be a duty to describe the possibility of termites. Obde v. Schlemeyer, 353 P.2d 672 (Wash. 1960).

81 Johnson v. Davis, 480 So. 2d 625, 629 (Fla. 1985).

82 Miles v. McSwegin, 388 N.E.2d 1367 (Ohio 1979); Hill v. Jones, 725 P.2d 1115, 1120 (Ariz. Ct. App. 1986); Godfrey v. Steinpress, 180 Cal. Rptr. 95 (Ct. App. 1982); Lingsch v.

In addition, for some courts, the nondisclosure of a material fact may constitute fraud[85] or deceit.[86]

IMPLIED WARRANTY OF HABITABILITY

The implied warranty of habitability in the sale of homes has become a well-recognized exception to the rule of caveat emptor.[87] The essence of the warranty is that the seller will transfer to the purchaser a house suitable for habitation.[88] The development of this implied warranty has been breathtaking.[89] The mass production of housing had become analogous to the manufacture and marketing of chattels. Yet, as late as 1965, Professor Haskell found that, except for Louisiana, Colorado, and New Jersey in new construction, there was in essence no implied warranty of "merchantability" in the sale of real property.[90]

Warranties to protect the purchaser of personal property developed early in the twentieth century. The resulting difference in the treatment of personalty and realty resulted in Professor Haskell noticing the law "offer[ed] greater protection to the purchaser

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Savage, 29 Cal. Rptr. 201, 207 (Ct. App. 1963). Recovery may be based upon theories of fraud, Lyons v. McDonald, 501 N.E.2d 1079, 1081 (Ind. Ct. App. 1986); Lynn v. Taylor, 642 P.2d 131, 135 (Kan. Ct. App. 1982); Horner v. Ahern, 153 S.E.2d 216, 221-22 (Va. 1967); consumer fraud and deceptive business practices statutes, Soniat v. Johnson-Rast & Hays, 626 So. 2d 1256, 1258 (Ala. 1993) (failure to fully produce evidence of old termite damage); Warren v. LeMay, 491 N.E.2d 464, 473 (Ill. App. Ct. 1986); and fraudulent concealment, Obde v. Schlemeyer, 353 P.2d 672, 676 (Wash. 1960). In addition to the standard recovery of damages, a court might grant rescission in an appropriate case. *See, e.g.*, Gordon v. Tafe, 428 A.2d 892, 894 (N.H. 1981) (upholding rescission following discovery that house was infested by termites); Weintraub v. Krobatsch, 317 A.2d 68, 74 (N.J. 1974) (reversing summary judgment against rescission where defendant vendor failed to disclose roach infestation).

83 Loghry v. Capel, 132 N.W.2d 417, 419 (Iowa 1965); Cohen v. Vivian, 349 P.2d 366, 367 (Colo. 1960); Hills v. Jones, 725 P.2d 1115 (Ariz. Ct. App. 1986); Brauchitsch v. Cravens, 604 P.2d 379 (Okla. Ct. App. 1979); Sorrell v. Young, 491 P.2d 1312, 1315-16 (Wash. Ct. App. 1971) (even if purchaser might make an inspection of the property).

84 *See, e.g.*, Clauser v. Taylor, 112 P.2d 661, 662 (Cal. Ct. App. 1941); Loghry v. Capel, 132 N.W.2d 417, 419 (Iowa 1965) ("One who sells real estate knowing of a soil defect, patent to him, latent to the purchaser, is required to disclose the soil defect.").

85 Loghry v. Capel, 132 N.W.2d 417, 419 (Iowa 1965); Cohen v. Vivian, 349 P.2d 366, 367 (Colo. 1960); Hills v. Jones, 725 P.2d 1115 (Ariz. Ct. App. 1986).

86 Lingsch v. Savage, 29 Cal. Rptr. 201 (Ct. App. 1963).

87 *See* Conklin v. Hurley, 428 So. 2d 654, 656 n.2 (Fla. 1983), and the cases cited therein.

88 Chandler v. Madsen, 642 P.2d 1028, 1031 (Mont. 1982); Yepsen v. Burgess, 525 P.2d 1019, 1022 (Or. 1974).

89 Changes in property laws have traditionally developed slowly. The adoption of the implied warranty of habitability to home contractors is a phenomenon of the late 1950s and early 1960s. Case Note, Gupta v. Ritter Homes, Inc.: *Extending the Implied Warranty of Habitability to Subsequent Purchasers - An Honorable Result Based on Unsound Theory*, 35 BAYLOR L. REV. 670, 674 (1983).

90 Paul G. Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633 (1965).

of a seventy-nine cent dog leash than it [did] to the purchaser of a $40,000 house."[91]

The leading decision establishing the implied warranty is the 1965 New Jersey case of *Schipper v. Levitt & Sons, Inc.*[92] A child was severely burned by a defective hot water heater. Defendant pioneered the mass production of homes after World War II. The New Jersey Supreme Court expressly rejected caveat emptor as a defense by a builder/vendor:

> Caveat emptor developed when the buyer and seller were in an equal bargaining position and they could readily be expected to protect themselves in the deed. Buyers of mass produced development homes are not in an equal footing with the builder vendors and are no more able to protect themselves in the deed than are automobile purchasers in a position to protect themselves in the bill of sale.[93]

New Jersey subsequently extended *Schipper* to a small-scale builder of new homes in *McDonald v. Mianecki*.[94] The *McDonald* opinion echoed the themes of Professor Haskell and the *Schipper* case by recognizing the purchase of a home is often the most important transaction of a lifetime for the average family.[95] In addition, the parties often possess a disporportionality of bargaining power since the average buyer lacks the skill and expertise necessary to make an adequate inspection.[96] The developer will often possess superior bargaining power, a greater expertise in assessing the risks as well as the expertise necessary to construct a livable dwelling.[97] The *Schipper* case was quickly followed by other jurisdictions,[98] and is now widely adopted in the United States.[99]

For many courts, a key factor in adopting the implied warranty of habitability is that the purchaser may justifiably rely upon the knowledge, skill and expertise of the vendor.[100] Purchas-

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91 *Id.*

92 207 A.2d 314 (N.J. 1965). The trend actually began in the 1957 Ohio case of Vanderschrier v. Aaron, 140 N.E.2d 819 (Ohio 1957), which held the builders of a home owe to the purchaser an implied warranty that the dwelling is fit for human habitation.

93 *Id.* at 326.

94 398 A.2d 1283 (N.J. 1979).

95 *Id.* at 1292.

96 *Id.* at 1289.

97 *Id.* at 1290.

98 *See, e.g.*, Waggoner v. Midwestern Development, Inc., 154 N.W.2d 803 (S.D. 1967); Humber v. Morton, 426 S.W.2d 554 (Tex. 1968); Rutledge v. Dodenhoff, 175 S.E.2d 792 (S.C. 1970).

99 *See, e.g.*, Crawley v. Terhune, 437 S.W.2d 743 (Ky. 1969).

100 Briarcliffe W. Townhouse Owners Ass'n v. Wiseman Constr. Co., 454 N.E.2d 363, 365 (Ill. App. Ct. 1983); DeRoche v. Dame, 430 N.Y.S.2d, 390 (App. Div.), *app. dismissed* 413 N.E.2d 366 (1980). *See generally* Eric T. Freyfogle, *Real Estate Sales and the Implied Warranty of Lawful Use*, 71 CORNELL L. REV. 1, 19 (1985) (discussing the superiority of the seller's knowledge concerning a property's characteristics and limitations over that of the buyer).

ers of homes, just as purchasers of chattels, expect the purchase to be free of defects. The ordinary purchaser is unable to detect flaws in the construction of modern homes.[101] Similarly, purchasers may often not recognize natural conditions which pose a threat, such as unstable slopes.[102] On the other hand, a reasonable builder should make a site inspection before building and discover the dangers of the area.[103] In addition, the typical family purchasing a house must often do so within tight time constraints imposed by career demands,[104] and thus may not have time to thoroughly inspect the house and its surrounding areas.

The builder/vendor is in a better position to guard against defects in the home, and, if necessary, to protect against potential but unknown defects in the site.[105] Indeed, the developer has the opportunity to examine the suitability of the site for development, the expertise to assess its suitability, and the ability to utilize appropriate construction methods to make it safe for habitation. Liability is also premised upon the superior knowledge, skill and expertise of the developer in the construction of a house.[106]

In reality, the warranty of habitability substantially overlaps basic tort concepts of negligence. For example, builders should use reasonable care in designing and constructing a house on inadequately compacted earth, which results in land subsidence,[107] or upon unstable and filled ground, containing an underground spring, without providing adequate drainage, resulting in landslide damage.[108] The common law corollary to the implied warranty of habitability is that a reasonable builder has to ascertain the soil conditions and water table of a construction site.[109] Failure to provide a safe location for a residential structure may constitute negligence.[110] The builder has a duty to use reasonable care to determine whether lots are fit for their intended use.[111] In short, the developer has a duty to select a safe site for construction.[112]

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101 Conklin v. Hurley, 428 So. 2d 654, 658 (Fla. 1983).

102 *Id.* at 1289. *See also* ABC Builders, Inc. v. Phillips, 632 P.2d 925, 932 (Wyo. 1981).

103 *Id.* at 938.

104 Conklin v. Hurley, 428 So. 2d 654, 659 (Fla. 1983).

105 Elderkin v. Gaster, 288 A.2d 771, 777 (Pa. 1972).

106 George v. Leach, 313 S.E.2d 920, 923 (N.C. Ct. App. 1984).

107 Sabella v. Wisler, 27 Cal. Rptr. 689 (Cal. 1963).

108 Conolley v. Bull, 65 Cal. Rptr. 689, 697 (Ct. App. 1968); House v. Thornton, 457 P.2d 199, 204 (Wash. 1969).

109 *See, e.g.*, McFeeters v. Renollet, 500 P.2d 47, 53 (Kan. 1972); Baranowski v. Strating, 250 N.W.2d 744 (Mich. Ct. App. 1977); Conolley v. Bull, 65 Cal. Rptr. 689 (Ct. App. 1968).

110 ABC Builders, Inc. v. Phillips, 632 P.2d 925, 938 (Wyo. 1981).

111 Beri, Inc. v. Salishan Properties, Inc., 580 P.2d 173, 176 (Or. 1978).

112 *ABC Builders, Inc.*, 632 P.2d at 935.

Similarly, in *Conolley v. Bull*,[113] the California Court of Appeals held a real estate developer liable for building a house on sloping ground. A neighbor had previously warned the developer that a slide had occurred on his property some time earlier, and provided the developer with an engineer's report indicating that underground movement of subsurface water caused slides to occur in the area. A landslide subsequently occurred, resulting in the near loss of the house. The developer was held liable in negligence for failure to carefully investigate the soil conditions before building on hillside lots. For such a cause of action based on negligence, such as negligent construction, caveat emptor would not be a defense.[114]

The duty of reasonable care will often include soil bearing tests.[115] The stability of the foundation is vital to a dwelling.[116] Core drillings and engineering studies can detect slope instability.[117] Similarly, special testing should be performed on lands fronting on inland lakes because the soil is often unsuitable for supporting structures.[118]

An additional reason for adapting the implied warranty of habitability is to encourage developers to utilize due care in siting and construction. In a 1968 decision rejecting caveat emptor in the sale of a new home, the Texas Supreme Court reasoned:

> The caveat emptor rule as applied to new houses is an anachronism patently out of harmony with modern home-buying practices. It does a disservice not only to the ordinary prudent purchaser, but to the industry itself by lending encouragement to the unscrupulous, fly-by-night operator and purveyor of shoddy work.[119]

Thus, in creating an implied warranty of habitability, the question is not one of fault or wrongdoing, but which of two innocent parties is in a better position to prevent the harm.[120] The practical effect of the implied warranty of habitability is often to impose strict liability on the builder.[121] The purpose is to protect the purchaser, who cannot protect himself, such as being unable to dig up the ground to inspect the sewage system.[122]

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113 65 Cal. Rptr. 689 (Ct. App. 1968).

114 Sabella v. Wisler, 377 P.2d 889, 893 (Cal. 1963).

115 Baranoski v. Strating, 250 N.W.2d 744, 747 (Mich. Ct. App. 1977).

116 House v. Thorton, 457 P.2d 199, 203 (Wash. 1969).

117 *See, e.g.*, ABC Builders, Inc. v. Phillips, 632 P.2d 925, 932 (Wyo. 1981).

118 *Id.*

119 Hummer v. Morton, 426 S.W.2d 554, 562 (Tex. 1968).

120 Chandler v. Madsen, 642 P.2d 1028, 1032 (Mont. 1982).

121 *See* Schipper v. Levitt & Sons, Inc., 207 A.2d 314 (N.J. 1965); Patitucci v. Drelich, 379 A.2d 297 (N.J. Super. Ct. 1977) (inadequate septic sewage system).

122 Patitucci v. Drelich, 379 A.2d 297 (N.J. Super. Ct. 1977).

Breach of warranty is established by proof of a defect which substantially impairs the enjoyment of the residence,[123] such as the lack of a potable water supply,[124] insect infestations,[125] or a septic tank or system placed in a high water table.[126]

Furthermore, the implied warranty of habitability covers not only structural defects in the building, but also extends to the unsuitable nature of the site.[127] Liability thereby exists for conditions underlying the property, such as a filled-in quarry,[128] or sanitary landfill and garbage dump.[129] The unsuitability of the site on which the house is built constitutes a breach of warranty.[130] Implied warranties also include the septic system.[131] A duty thereby exists to disclose these conditions to the purchaser.[132]

In *Village Development Co. v. Filice*,[133] the Nevada Supreme Court held the developers liable for failing to warn the buyer of a lot in the Lake Tahoe basin of the risks associated with the lot being in the floodplain of a mountain stream. The opinion relied upon the *Restatement (Second) of Torts* § 353 because the developer had knowledge of the risks involved, but the purchaser could neither discover the condition nor realize the risk.

In *Strawn v. Canuso*,[134] the New Jersey Supreme Court held a duty exists for builder-developers to disclose off-site conditions to purchasers. The developer knew of the existence of a nearby hazardous waste landfill, but refused to disclose the information to prospective purchasers. The court stated in a critical passage:

> We hold that a builder-developer of residential real estate or a broker representing it is not only liable to a purchaser for affirmative and intentional misrepresentation, but is also liable for nondisclosure of off-site physical conditions known to it and unknown and not readily observable by the buyer if existence of those conditions is of sufficient materiality to affect the habitability, use, or enjoyment of the property and therefore, render

123 Waggoner Construction Co. v. Noonan, 403 N.E.2d 1144, 1148 (Ind. 1980).

124 Elderkin v. Gaster, 288 A.2d 771 (Pa. 1972); McDonald v. Mianecki, 398 A.2d 1283 (N.J. 1979); Lyon v. Ward, 221 S.E.2d 727 (N.C. Ct. App. 1976).

125 Weintraub v. Krobatsu, 317 A.2d 68 (N.J. 1974); Oble v. Schlemeyer, 353 P.2d 672 (Wash. 1960).

126 Rutledge v. Dodenhoff, 175 S.E.2d 792 (S.C. 1970).

127 Elderkin v. Gaster, 288 A.2d 771 (Pa. 1972); Jordan v. Talaga, 532 N.E.2d 1174, 1183 (Ind. Ct. App. 1989); Hesson v. Walmsley Constr. Co., 422 So. 2d 943, 944 (Fla. Dist. Ct. App. 1982); Lehmann v. Arnold, 484 N.E.2d 473, 476-77 (Ill. App. Ct. 1985).

128 Sabella v. Wisler, 27 Cal. Rptr. 689 (Cal. 1963) (no compaction of the filled-in pit).

129 Westwood Development Co. v. Esponge, 342 S.W.2d 623 (Tex. Civ. App. 1961).

130 *See* Lehmann v. Arnold, 484 N.E.2d 473, 476 (Ill. App. Ct. 1985).

131 George v. Veach, 313 S.E.2d 920 (N.C. Ct. App. 1984).

132 *See, e.g.*, Sorrell v. Young, 491 P.2d 1312 (Wash. Ct. App. 1954) (lot was developed on fill).

133 526 P.2d 83 (Nev. 1974).

134 657 A.2d 420 (N.J. 1995).

> the property substantially less desirable or valuable to the objectively reasonable buyer.[135]

Strawn deals with professional builders and their brokers, who possess a level of sophistication that most home buyers lack.[136] With that knowledge, the sellers "have a duty to disclose to home buyers the location of off-site physical conditions that an objectively reasonable and informed buyer would deem material to the transaction."[137] Critical to the reasoning in *Strawn* are two factors: the difference in bargaining power between the professional seller of residential real estate and the purchaser of the housing, and the differences in access to information between the seller and the buyer.[138]

The duration of the builder-developer implicit warranty of fitness for habitation is measured by "reasonableness."[139] Some states have taken the implied warranty of habitability to the next level and imposed a standard of strict liability upon builders.[140]

Privity of Contract and Successor Purchasers

Once the warranty of habitability was widely accepted, the next issue became whether the warranty would run with the property, or be limited to the purchaser who lies in privity of contract. The warranty was soon extended to subsequent purchasers.[141] Privity of contract is no longer a limitation on recovery.

In 1977, the Connecticut Supreme Court allowed a subsequent purchaser to bring a negligence suit against the builder for the failure of a septic system.[142] Privity was not a limitation on recovery because the cause of action lay in Tort and not Contract.[143] The Connecticut case has been widely followed.[144]

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135 *Id.* at 431.

136 *Id.* at 432.

137 *Id.* The court also stated: "[I]t is reasonable to extend to . . . professionals a . . . duty to disclose off-site conditions that materially affect the value or desirability of the property." *Id.* at 428.

138 *Id.*

139 Wagner Construction Co. v. Noonan, 403 N.E.2d 1144, 1148 (Ind. 1980).

140 *See, e.g.*, Krieger v. Eichler Homes, Inc., 74 Cal. Rptr. 749 (Ct. App. 1969). An appellate tribunal has recognized emotional distress as an additional remedy in construction defect cases. Salka v. Dean Homes of Beverly Hills, Inc., 22 Cal. Rptr. 2d 902 (Ct. App. 1993) (case involved flooding due to construction on a defective foundation).

141 *See, e.g.*, Moxley v. Laramie Builders, Inc., 600 P.2d 733 (Wyo. 1979); Barnes v. Mac Brown & Co., 342 N.E.2d 619 (Ind. 1976); Gupta v. Ritter Homes, Inc., 646 S.W.2d 168 (Tex. 1983).

142 Coburn v. Lenox Homes, Inc., 378 A.2d 599 (Conn. 1977).

143 *Id.* at 602. *But see* Real Estate Marketing, Inc. v. Franz, 885 S.W.2d 921 (Ky. 1994).

144 Lempke v. Dagenais, 547 A.2d 290 (N.H. 1988) (overruling a decision decided just two years earlier); Ellis v. Robert C. Morris, Inc., 513 A.2d 951 (N.H. 1986); Steinberg v. Coda Robertson Constr. Co., 440 P.2d 798 (N.M. 1968); Oates v. JAG, Inc., 333 S.E.2d 222 (N.C. 1985); Leigh v. Wadsworth, 361 P.2d 849 (Okla. 1961); Terlinde v. Neely, 271 S.E.2d 768 (S.C. 1980); Moxley v. Laramie Builders, Inc., 600 P.2d 733 (Wyo. 1979).

Other courts have extended strict liability protection to subsequent purchasers.[145] The mass production and sale of homes was analogized to the mass production and sale of automobiles.[146] Courts have also utilized other theories to circumvent the ancient privity limitations. For example, in a cause of action in Tort, such as for misrepresentation, privity of contract is not a shield.[147] A false representation may consist of the failure to disclose a material fact which should have been disclosed.[148] Similarly, a cause of action for fraudulent concealment may extend to subsequent purchasers.[149]

Broker Liability

Assuming caveat emptor protects the vendor, a purchaser might seek to hold the broker liable instead. Brokers face a conflict because they have a fiduciary duty to their principal, the owner, to use their best efforts to sell the property at the highest price. In addition, their commission is usually a percentage of the sale price. Disclosure to a potential purchaser of information that could delay the sale, or lower the sale price, could arguably result in a breach of the broker's duty, as well as a reduction in the sales commission. Thus, in the short-run, the broker's self-interest is to maximize the sales price by minimizing the negatives. However, the broker's duty is not unbridled and must be fulfilled in compliance with legal requirements. For example, the broker will be liable for fraud or misrepresentation in consummating a sale.

Nevertheless, brokers, as well as sellers, were protected by the defense of caveat emptor.[150] However, the caveat emptor defense of brokers disintegrated rapidly in the second half of the twentieth century. Indeed, as one commentator remarked:

> Broker liability has increased at nearly an exponential rate as many state courts and consumer protection statutes require a broker to disclose any information that materially relates to a buyer's decision to purchase property.[151]

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145 Blagg v. Fred Hunt Co., Inc., 612 S.W.2d 321 (Ark. 1981); Kreigler v. Eichler Homes, Inc., 74 Cal. Rptr. 749 (Ct. App. 1969).

146 *Id.* at 324.

147 Schnell v. Gustafson, 638 P.2d 850, 852 (Colo. Ct. App. 1981) (failure to disclose uranium mine tailings under the house).

148 *Id.*

149 Barnhouse v. City of Pinole, 183 Cal. Rptr. 881, 893-94 (Ct. App. 1982).

150 *See, e.g.*, Traverse v. Long, 135 N.E.2d 256 (Ohio 1956).

151 Paula C. Williams, *Aids, Ghosts, Murder: Must Real Estate Brokers and Sellers Disclose*, 27 Wake Forest L. Rev. 689 (1992). In reality, brokers are subject to at least the same rules of disclosure as are imposed upon sellers. *See, e.g.*, Cooper v. Jevne, 128 Cal. Rptr. 725 (Ct. App. 1976); Rayner v. Wise Realty Co., 504 So. 2d 1361 (Fla. Ct. App. 1987); Miles v. McSwegin, 388 N.E.2d 1367 (Ohio 1979); Lock v. Schreppler, 426 A.2d 856 (Del. Super. Ct. 1981).

Real estate brokers are often held liable on a variety of theories, including fraud, negligent misrepresentation, innocent misrepresentation, negligence,[152] and consumer fraud and protection statutes.[153]

While we think of a cause of action for fraud being based upon an intentional misrepresentation of a material fact, a case of fraudulent representation may lie against a broker if the broker makes representations without knowledge as to the truth or falsity of the representations.[154] Even half-truths, or partial disclosures, may give rise to liability by a broker.[155] A broker also has a duty to answer truthfully the questions asked by a prospective purchaser.[156]

A broker can be liable for misrepresenting the acreage and amount of road and river frontage of rental property.[157] Liability can be based upon strict liability if the speaker professes, or implies, personal knowledge.[158]

Listing brokers know, or should know, their descriptions will be relied upon by others. Thus, a duty is owed to all those who rely on the listing characterizations. Consequently, if the broker fails to exercise reasonable care in gaining knowledge of defects in the listed property, a cause of action may exist for negligent misrepresentation.[159] If the broker has actual knowledge of a defect, the cause of action may lie in fraud.[160] If negligent misrepresentation is the cause of action, then it is unwise for brokers to communicate or volunteer unverified material information that turns out

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152 Easton v. Strassberger, 199 Cal. Rptr. 383 (Ct. App. 1984); Gouveia v. Citicorp Person-to-Person Fin. Center, 686 P.2d 262 (N.M. Ct. App. 1984); Secor v. Knight, 716 P.2d 790 (Utah 1986).

153 *See, e.g.*, Warren v. Le May, 491 N.E.2d 464 (Ill. App. Ct. 1986).

154 The Ohio Supreme Court has reasoned that where one asserts a fact, when he has insufficient information to justify it, he may be found to have the intent to deceive. Pumphrey v. Quillen, 135 N.E.2d 328, 330 (Ohio 1956); *see also* Luikart v. Miller, 48 S.W.2d 867 (Mo. 1932); Mertens v. Wolfeboro Nat. Bank, 402 A.2d 1335 (N.H. 1974); *see also* Spargnapani v. Wright, 110 A.2d 82 (D.C. Mun. Ct. App. 1954); Ackmann v. Keeney-Joelle Real Estate Co., 401 S.W.2d 483 (Mo. 1966).

155 *See, e.g.*, Revitz v. Terrell, 572 So. 2d 996 (Fla. Ct. App. 1990); Fennell Realty Co. v. Martin, 529 So. 2d 1003, 1005 (Ala. 1988).

156 Bevins v. Ballard, 655 P.2d 757 (Alaska 1982); Fennell Realty Co. v. Martin, 529 So. 2d 1003, 1005 (Ala. 1988).

157 Gauerke v. Rozga, 332 N.W.2d 804 (Wis. 1983).

158 *Id.* at 804.

159 Gouveia v. Citicorp Person-to-Person Financial Ctr., Inc., 686 P.2d 262, 265-66 (N.M. Ct. App. 1984). Section 552 of the RESTATEMENT is critical:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, 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.

RESTATEMENT (SECOND) OF TORTS § 552 (1977).

160 *Gouveia, supra* note 159, at 266.

to be incorrect.[161] Liability may lie for negligent misrepresentation even if the belief is sincere or honest.[162]

Pursuant to the *Restatement (Second) of Torts*,[163] a broker may even be liable for innocent misrepresentations of material facts relied upon by the purchaser.[164] The purchaser has a right to rely upon representations made by the broker.[165] Indeed, the loss should fall on the innocent defendant rather than the innocent victim, who justifiably relied upon the misrepresentation.[166]

A broker also has a duty to disclose material facts of which the broker is aware or should have been aware.[167] Thus, a real estate broker may owe a duty to a prospective buyer of residential property to disclose any material defect which might affect the purchaser's decision to buy the property.[168]

The broker's duty of disclosure may be the same as the seller's. The seller and broker may in turn be jointly and severally liable to the purchaser for the full amount of damages.[169] In addition, if the material misrepresentation is made by the agent, the purchaser has a right of rescission.[170]

EASTON V. STRASSBERGER

The leading case involving a duty to disclose off-site conditions on real estate brokers is the California appellate decision in *Easton v. Strassberger*.[171] The buyer purchased a 3,000 square foot house on an acre of land for $170,000. Shortly after the close

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161 *See, e.g.*, Tennant v. Lawton, 615 P.2d 1305 (Wash. Ct. App. 1980); Mertens v. Wolfboro Nat. Bank, 402 A.2d 1335 (N.H. 1979); *see also* Bevins v. Ballard, 655 P.2d 752 (Alaska 1982).

162 Rodgers v. Johnson, 557 So. 2d 1136 (La. Ct. App. 1990).

163 The RESTATEMENT (SECOND) OF TORTS § 552C(1) provides:

> One who, in a sale, rental or exchange transaction with another, makes a misrepresentation of a material fact for the purpose of inducing the other to act or to refrain from acting in reliance upon it, is subject to liability to the other for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation, even though it is not made fraudulently or negligently.

164 *See, e.g.*, Bevins v. Ballard, 655 P.2d 757 (Alaska 1982); Spargnapani v. Wright, 110 A.2d 82 (D.C. Mun. App. Ct. 1954); Buzzaro v. Bolger, 453 N.E.2d 1129 (Ill. App. Ct. 1983); Berryman v. Riegert, 175 N.W.2d 438 (Minn. 1970); Polk Terrace, Inc. v. Harper, 386 S.W.2d 588 (Tex. Civ. App. 1965); Dugan v. Jones, 615 P.2d 1239 (Utah 1980); Bergmueller v. Minnick, 383 S.E.2d 722 (Va. 1989); Gauerke v. Rozga, 332 N.W.2d 804 (Wis. 1983); Reda v. Sincaban, 426 N.W.2d 100 (Wis. Ct. App. 1988); *app. denied* 430 N.W.2d 918 (Wis. 1988).

165 Berryman v. Riegert, 175 N.W.2d 438, 442-43 (Minn. 1970).

166 *Id.*

167 Johnson v. Geer Real Estate Co., 720 P.2d 660 (Kan. 1986); Connor v. Merrill Lynch Realty, Inc., 581 N.E.2d 196, 201 (Ill. App. Ct. 1981); Roberts v. Estate of Babbagallo, 531 A.2d 1125 (Pa. Super. Ct. 1987) (urea foam formaldehyde insulation.)

168 De Candia v. Barry, 1989 Mass. App. Div. 92, 94-95 (1989).

169 Lingsch v. Savage, 29 Cal. Rptr. 201, 205 (Ct. App. 1963).

170 RESTATEMENT (SECOND) OF AGENCY § 259.

171 199 Cal. Rptr. 383 (Ct. App. 1984).

of escrow, a massive earth movement damaged the property.[172] The sellers had concealed from the buyers and agents two slides over the preceding three years.[173] The slides occurred because portions of the property were on fill that had not been properly engineered and compacted. The house was appraised at $170,000 in undamaged condition, but only $20,000 with the damage. The estimated costs of repair were as high as $213,000.[174] The brokers had inspected the property, but did not notice the slides. However, sufficient clues, "red flags," were available that should have alerted the brokers of the soil problems.[175]

The broker was held liable for negligence. The purchaser did not have to show either intentional misrepresentation or fraudulent concealment, but simple negligence. The court held a broker has a duty to not only disclose known facts, but also to conduct a reasonably diligent inspection of the property:

> [W]e hold that the duty of a real estate broker representing the seller, to disclose facts . . . includes the affirmative duty to conduct a reasonably competent and diligent inspection of the residential property listed for sale and to declare to prospective purchasers all facts materially affecting the value or desirability of the property that such an investigation would reveal.[176]

The court recognized policy arguments for invoking a duty of inspection on the broker. First, the court acknowledged the policy from earlier California cases to protect the buyer from unethical brokers and sellers, and to ensure the buyer is provided sufficient accurate information to make an informed decision.[177] In addition, the law should not create a disincentive for seller's broker to make a diligent inspection.[178] The broker is also most frequently the best situated party to obtain and provide the most reliable information on the property.[179]

Easton was followed by a few jurisdictions.[180] For example, the Minnesota Supreme Court held a broker had a duty to investigate whether there had been a problem from water seepage into

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172 *Id.* at 385.

173 *Id.* at 386.

174 *Id.* at 385.

175 These clues included netting on a slope by the house, and uneven floors in the guest house. *Id.* at 386.

176 *Id.* at 390.

177 *Id.* at 388.

178 *Id.*

179 *Id.*

180 *See, e.g.*, Gouveia v. Citicorp Person-to-Person Fin. Center, 686 P.2d 262 (N.M. Ct. App. 1984); Secor v. Knight, 716 P.2d 790 (Utah 1986). *See also* Gauerke v. Rozga, 332 N.W.2d 804 (Wis. 1983).

the home or property. Such information should be available to an experienced real estate broker.[181]

LEGISLATIVE RESPONSE TO *EASTON*

The California legislature subsequently clarified the broker's duty of inspection and disclosure for dwellings of one to four units:[182]

> It is the duty of a real estate broker . . . to conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to that prospective purchaser all facts materially affecting the value or desirability of the property that such an investigation would reveal . . . .[183]

The inspection need not include areas that are reasonably and normally inaccessible to such an inspection.[184] The requisite standard of care is that which "a reasonably prudent real estate licensee would exercise and is measured by the degree of knowledge through education, experience, and examination, required to obtain a license. . . ."[185]

STATUTORY CONSTRAINTS ON CAVEAT EMPTOR

Caveat emptor also has been severely limited through legislative enactments that require disclosures of specified conditions such as asbestos,[186] lead paint,[187] termites,[188] septic systems,[189] the presence of smoke detectors, and toxic contamination.[190] Many states have also enacted more general disclosure laws.

California led the way in 1985 by enacting the country's first Homeowner Disclosure Act.[191] The California statute requires both the seller and any brokers involved in the transaction to sign the prescribed disclosure form. The brokers must certify they have conducted a reasonably competent and diligent visual in-

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181 Berryman v. Riegert, 175 N.W.2d 438 (Minn. 1970); *see also*, Sawyer v. Tildahl, 148 N.W.2d 131 (Minn. 1967); Long v. Brownstone Real Estate Co., 484 A.2d 126 (Pa. Super. Ct. 1984).

182 CAL. CIV. CODE § 2079.1 (West 1998).

183 *Id.* § 2079.

184 *Id.* § 2079.3.

185 *Id.* § 2079.2.

186 *See, e.g.*, CAL. CIV. CODE § 1102-6(c)(1) (Deering Supp. 1997). A cause of action lies in fraud when the broker failed to disclose that the property was subject to flooding. Chapman v. Hosek, 475 N.E.2d 593 (Ill. App. Ct. 1985).

187 *See* 40 C.F.R. § 745 (1997)

188 *See, e.g.*, FLA. STAT. § 482.226(1) (1998).

189 Massachusetts enacted a statute, commonly referred to as Title V, which requires homeowners with septic systems to meet new inspection standards before they can sell or expand their houses. MASS. REGS. CODE tit. 310, § 15.00 *et seq.* (1997).

190 *See, e.g.*, CAL. HEALTH & SAFETY CODE § 25359.7(a) (1997); CONN. GEN. STAT. §§ 22a-134a-d, 22a-452a (1998).

191 This statute was enacted after the California Court of Appeals decision in *Easton v. Strassberger*. *See* notes 171-180, *supra*, and accompanying text.

spection of the accessible areas of the property.[192] The statute also codifies the disclosure form to be completed by the seller and delivered to the purchaser.[193]

Under the California statute, the seller must disclose known existing defects in fixtures and appliances on the property,[194] known defects in the structure of the home,[195] defects in the property or matters affecting the property,[196] and neighborhood noise problems or other nuisances.[197] The seller must answer "yes" or "no" to a series of questions. If an answer is "yes," then the seller must explain the circumstances. A significant limitation in the statute is that the disclosure requirement applies only to past or existing damage from external geologic causes. The statute does not require disclosure of prospective threats.[198]

The California Court of Appeals in *Alexander v. McKnight*[199] recognized the purpose of the statute requires it to "be liberally interpreted so that a buyer will be fully informed on matters affecting the value of the property to be purchased."[200] The court noted the earlier *Reed v. King*[201] decision to the effect that "the failure to disclose a negative fact when it can reasonably be said to have a foreseeably depressive affect [*sic*] on the value of property is tortious."[202] The court uttered this strong statement about caveat emptor: "If anything, the concept of 'let the buyer beware' is an anachronism in California having little or no application in real estate law."[203]

In light of California's concern over earthquakes, special disclosure rules govern seismic risks:

> A person who is acting as an agent for a seller of real property which is located within a seismic hazard zone . . . or the seller if he or she is acting without an agent, shall disclose to any prospective purchaser the fact that the property is located within a seismic hazard zone . . . .[204]

The disclosure duty may be satisfied through the real estate transfer disclaimer statement, the local option real estate transfer dis-

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192 CAL. CIV. CODE § 1102.6 (1998).

193 *Id.*

194 The required information includes fill, settling from any cause, flooding, drainage, or grading problems, and any major damage caused by fire, earthquake, floods or landslides. *Id.* § 1102.6(c)(6)-(9).

195 *Id.*

196 *Id.*

197 *Id.*

198 *Id.* § 1102.5.

199 9 Cal. Rptr. 3d 453 (Ct. App. 1992).

200 *Id.* at 455.

201 193 Cal. Rptr. 130 (Ct. App. 1983).

202 9 Cal. Rptr. 3d at 456.

203 *Id.*

204 CAL. PUB. RES. CODE § 2694(a) (1993).

claimer statement, or the real estate contract and receipt for deposit.[205] California followed up in 1990 by legislatively creating a statewide seismic hazard and technical advisory program.[206]

A critical provision of the statute provides that, when information on a seismic hazard zone is "reasonably available," the seller, or agent acting for the seller, shall disclose to a prospective purchaser that the property is located within a seismic hazard zone.[207] The phrase "reasonably available" is defined to mean "that for any county that includes areas covered by seismic hazard maps, a notice is posted at the offices of the county recorder, county assessor, and county planning commission identifying the location of the maps and the effective date of the notice."[208]

Many states have followed the California model in enacting homeowner disclosure laws.[209] These disclosure laws now provide the standards and procedures of disclosure in real estate transactions in many states.

The statutes commonly require the seller to provide a detailed description of the condition of the property, including known physical defects in homes, and cover items such as water supply, sewage system, basement/crawl space, structural components, mechanical systems, insect infestation, presence of hazardous substances, code violations, and underground storage tanks. Flooding, drainage, settling or grading problems are often covered by the statutes.

The gist of the statutory scheme is fairly uniform, but variations exist as to the form, the required disclosures, the liability of brokers, and the possibility of a disclaimer. Some states, like California, prescribe the disclosure form.[210] Many provide for an update if a condition changes before the close.[211] The purpose and effect of the property disclosure statutes are that brokers "know" the property they are selling.

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205 *Id.* § 2694(b)(1)-(3).

206 CAL. PUB. RES. CODE § 2691 *et seq.* (1993). The risk zone maps will identify areas where liquifaction and landslides due to earthquakes pose a particular threat.

207 *Id.* § 2694(a).

208 *Id.* § 2694(c)(1).

209 *Id.* § 2694. *See generally* Robert M. Washburn, *Residential Real Estate Condition Disclosure Legislation*, 44 DEPAUL L. REV. 381 (1995).

210 *See, e.g.*, CAL. CIV. CODE § 1102.6 (Supp. 1997); S.D. CODIFIED LAWS § 43-4-44 (1998), TEX. PROP. CODE § 5.008(B) (1998) and WIS. STAT. § 709.03 (1997). The Oregon statute gives the seller the option of providing the disclosure statement or a written disclaimer: "The seller makes no representations or warranties as to the condition of the real property or any improvement therein, and that the buyer will be purchasing the property 'as is,' that is, with all defects, if any." OR. REV. STAT. § 105.465(2) (1996).

211 *See, e.g.*, ALASKA STAT. § 34.70.040 (1996); IND. CODE § 24-4.6-2-7 (1997); IOWA CODE § 558A.3(2)(A) (1998), S.D. CODE LAWS § 43-4-44 (1997); VA. CODE ANN. § 55-522 (Michie 1995).

Under the California statute, the enumeration of items for disclosure does not limit or abridge any other statutory provisions or preclude an action for fraud, misrepresentation or deceit.[212]

The remedy for a statutory violation may be actual damages or rescission if the violation or misrepresentation is due to negligence.[213]

MATERIAL FACTS

Clearly, not all facts have to be revealed to prospective purchasers.[214] Indeed, it is impossible to disclose every "fact" about every inch of a dwelling, its history, underpinnings and surroundings. Consequently, the general rule is that only "material facts" need be disclosed. The *Restatement* defines a material fact as one which "a reasonable [person] would attach importance to its existence or nonexistence in determining . . . [the] choice of action in the transaction in question."[215] In other words, would the other party act differently if made aware of the concealed fact?[216] The *Restatement* definition has been readily adopted by the courts.[217] A variation of the *Restatement* definition is to add that a fact is also material if the vendor knows, or has reason to know, the purchaser regards, or is likely to regard, the matter as important in determining the choice of action, even if a reasonable person would not so regard it.[218]

Another definition of materiality is whether "it probably influenced the making of the contract; that is, whether the plaintiffs would have purchased the property for the price paid had they been apprised of these conditions."[219] Other courts view a fact as material if it affects the value of the property.[220]

For some courts, materiality is not an issue "if the misrepresentation is knowingly made" whereas a fact must be material if it is innocently made.[221] An alternative approach to determining which facts are "material" is to look at specific situations in

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212 CAL. CIV. CODE §1102.8 (1990).

213 *See, e.g.*, S.D. CODE LAWS § 43-4-42 (1997); VA. CODE §§ 55-524B1, 55-524B2 (Michie Ann. 1995).

214 "Minor conditions which ordinary sellers and purchasers would reasonably disregard as of little or no materiality in the transaction would clearly not call for judicial intervention." Weintraub v. Krobatsch, 317 A.2d 68, 74 (N.J. 1974).

215 RESTATEMENT (SECOND) OF TORTS § 538(2)(a) (1977).

216 Chapman v. Hosek, 475 N.E.2d 593, 598 (Ill. App. Ct. 1985).

217 *See, e.g.*, Lynn v. Taylor, 642 P.2d 131, 134 (Kan. Ct. App. 1982); Griffith v. Byers Construction Co. of Kansas, Inc., 510 P.2d 198, 205 (Kan. 1973); Cousineau v. Walker, 613 P.2d 608 (Alaska 1980).

218 Ollerman v. O'Rourke, 288 N.W.2d 95, 107 (Wis. 1980).

219 Kaze v. Compton, 283 S.W.2d 204, 207 (Ky. 1955).

220 Johnson v. Davis, 480 So. 2d 625, 629 (Fla. 1985); Kaze v. Compton, 283 S.W.2d 204, 208 (Ky. Ct. App. 1955).

221 *See, e.g.*, Shane v. C. J. Hoffmann, Jr., 324 A.2d 532, 536 (Pa. Super. Ct. 1974).

which courts have viewed specific facts as material. The list of these material facts include defects in the structural integrity of the property,[222] expansive soil,[223] building a house over a cesspool,[224] the existence of fill,[225] leaky roofs,[226] roach infestations,[227] termite infestations,[228] unstable soil conditions,[229] unstable foundations,[230] defective sewer system,[231] defective septic system,[232] water damage,[233] and the adequacy of the water supply.[234] A material misstatement also exists for stating in a listing that flood insurance is not required.[235] Material facts include not only problems which pose a safety risk, but any material fact affecting the value of the property.[236]

CONSUMER PROTECTION STATUTES

Real estate transactions may also fall under the ambit of state consumer protection statutes.[237] For example, in the New Jersey case of *Strawn v. Canuso*,[238] one cause of action was stated pursuant to the New Jersey Consumer Fraud Act, which prohibits "the knowing concealment, suppression, or omission of any material fact . . . in connection with the sale or advertisement of any merchandise or real estate . . . ."[239] The omission of a material fact with intent that others rely upon the omission is an unlawful

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222 *See, e.g.*, Hill v. Jones, 725 P.2d 1115 (Ariz. Ct. App. 1986).

223 Burkett v. J.A. Thompson & Son, 310 P.2d 56 (Cal. Ct. App. 1957).

224 Weikel v. Sterns, 134 S.W. 908 (Ky. 1911).

225 Barnhouse v. City of Pinole, 183 Cal. Rptr. 881, 891 (Ct. App. 1982); Burkett v. J.A. Thompson & Son, 310 P.2d 56 (Cal. Ct. App. 1957); Buist v. C. Dudley De Velbiss Corp., 6 Cal. Rptr. 259, 263 (Ct. App. 1960); Cohen v. Vivian, 349 P.2d 366 (Colo. 1960); Loghry v. Capel, 132 N.W.2d 417, 419 (Iowa 1965).

226 Johnson v. Davis, 449 So. 2d 344 (Fla. Ct. App. 1984).

227 Weintraub v. Krobatsch, 317 A.2d 68 (N.J. 1974).

228 Hill v. Jones, 725 P. 2d 1115 (Ariz. Ct. App. 1986); Lynn v. Taylor, 642 P.2d 131 (Kan. Ct. App. 1982); Soniat v. Johnson-Ras & Hays, 626 So. 2d 1256 (Ala. 1993) (failure to fully produce evidence of old termite damage); Godfrey v. Steinpress, 180 Cal. Rptr. 95 (Ct. App. 1982); Lingsch v. Savage, 29 Cal. Rptr. 201, 207 (Ct. App. 1963).

229 Barnhouse v. City of Pinole, 183 Cal. Rptr. 881 (Ct. App. 1982).

230 Easton v. Strassberger, 199 Cal. Rptr. 383 (Ct. App. 1986).

231 Shane v. Hoffman, 324 A.2d 532 (Pa. 1974).

232 Catucci v. Ouellette, 592 A.2d 962, 963-64 (Conn. Ct. App. 1991).

233 Barnhouse v. City of Pinole, 183 Cal. Rptr. 881 (Ct. App. 1982).

234 Lyon v. Ward, 221 S.E.2d 727, 729 (N.C. Ct. App. 1976).

235 Chapman v. Hosek, 475 N.E.2d 593 (Ill. App. Ct. 1985); *see also* Revitz v. Terrell, 572 So. 2d 996 (Fla. Ct. App. 1990).

236 *See, e.g.*, Reed v. King, 193 Cal. Rptr. 130 (Ct. App. 1988); Gauerke v. Rozga, 332 N.W.2d 804 (Wis. 1983); Bevins v. Ballard, 655 P.2d 757 (Alaska 1982) (size of property, dry well).

237 *See, e.g.*, Real Estate Marketing, Inc. v. Franz, 885 S.W.2d 921 (Ky. 1994); Beard v. Gules, 413 N.E.2d 448 (Ill. App. Ct. 1980); Gabriel v. O'Hara, 534 A.2d 488 (Pa. Super. Ct. 1987); CONN. GEN. STAT. § 42-110g(a) (1998); LA. CIV. CODE ANN. art. 2545 (West 1998). *But see* State v. First National Bank of Anchorage, 660 P.2d 406 (Alaska 1982) (failure to disclose lots were subject to flooding from Lake George).

238 657 A.2d 420 (N.J. 1995).

239 N.J. STAT. ANN. § 56:8-2 (West 1989).

practice. When applicable, brokers are especially susceptible to liability under these statutes.[240] Actual knowledge may also be a prerequisite to liability.[241]

OFF-SITE CONDITIONS

Upon recognition that a duty might exist to disclose material on-site hazards to the purchaser, it then became obvious that off-site conditions could pose an equal, if not greater, risk to the purchaser.[242] In reality, defects in construction will often have only a minimal impact on the habitability of the structure. However, defects in siting may often be irreparable and result in the destruction of the structure. Consequently, the duty to disclose has been extended to off-site conditions, both of a natural origin and of human origin.

Liability clearly exists if defective construction results in the flooding out of a house.[243] The same risk exists if a home is built in a flood plain. Thus, in one case where the developer knew of the danger of the vendor's home lying within the drainage path of the 5-year storm, the court held the seller had a duty to tell buyer that the lot was situated in a flood plain.[244] Similarly, constructing a residence at the toe of a hillside gives rise to a duty to disclose.[245] Disclosure must also be made of external natural forces that can impact on the property, such as seasonal watercourses.[246] Purchasers on hillsides should also be informed that the drainage sys-

240 *See, e.g.*, Cameron v. Terrell & Garrett, Inc., 618 S.W.2d 535 (Tex. 1981) (misrepresentation of square footage of house); Young v. Joyce, 351 A.2d 857 (Del. Super. Ct. 1975); McRae v. Bolstad, 646 P.2d 771 (Wash. App. 1982); Mongeau v. Boutelle, 407 N.E.2d 352 (Mass. 1980) (misrepresentation as to acreage); Beard v. Gress, 413 N.E.2d 448 (Ill. App. Ct. 1980).

241 For example, the Massachusetts Consumer Protection Act has been construed to require knowledge of hazards before a broker could be held liable under the statute. *See generally* Michael D. Isacco, Comment, *A Massachusetts Real Estate Broker's Duty to Disclose: The Quandary Presented by AIDS Stigmatized Property*, 27 NEW ENG. L. REV., 1211, 1216-20 (1993).

242 By way of analogy, substantial secondary authority exists for the disclosure of off-site environmental dangers. *See, e.g.*, Elizabeth A. Dalberth, *Unfair and Deceptive Acts and Practices in Real Estate Transactions: The Duty to Disclose Off-Site Environmental Hazards*, 97 DICK. L. REV. 153, 176 (1992) (analyzing necessity and impact of consumer protection statutes); Sarah L. Inderbitzin, *Taking the Burden Off the Buyer: A Survey of Hazardous Waste Disclosure Statutes*, 1 ENVT. LAW. 513, 519-20 (1995); Note, *Imposing Tort Liability on Real Estate Brokers Selling Defective Housing*, 99 HARV. L. REV. 1861, 1871-74 (1986) (arguing that duty should be imposed on brokers to inspect and disclose reasonably discoverable defects). *See generally* Frona M. Powell, *The Seller's Duty to Disclose in Sales of Commercial Property*, 28 AM. BUS. L.J. 245, 273-74 (1990) (exploring the recent trend of imposing on sellers a duty to disclose conditions of real property).

243 *See, e.g.*, Wawak v. Stewart, 449 S.W.2d 922 (Ark. 1970).

244 Village Development Co. v. Filice, 526 P.2d 83 (Nev. 1974).

245 ABC Builders, Inc. v. Philips, 632 P.2d 925 (Wyo. 1981) (the house was thereby placed in the path of a potential landslide); *see also* Conolley v. Bull, 65 Cal. Rptr. 689, 697-98 (Ct. App. 1968) which held a developer negligent for building without providing adequate drainage, thereby causing a landslide.

246 Nei v. Burley, 446 N.E.2d 674 (Mass. 1983).

tem is designed to use the streets in front of their houses, thereby posing a risk of overflowing onto the premises.[247]

More recently, the New Jersey Supreme Court held a duty exists to disclose the existence of a town landfill near hundreds of residential homes. Plaintiffs alleged the builder/developer knew of the toxic landfill before considering the site for residential development. The court held the developer and its sales agents are under a duty to disclose off-site conditions which will adversely affect the value and enjoyment of the property. The Environmental Protection Agency had warned against building homes near the landfill, which was suspected of containing toxic waste. In an unanimous opinion, the court stated:

> We hold that a builder-developer of residential real estate or a broker representing it is not only liable to a purchaser for affirmative and intentional misrepresentations, but also for nondisclosure of off-site physical conditions known to it and unknown and not readily observable by the buyer if the existence of those conditions is of sufficient materiality to affect the habitability, use, or enjoyment of the property, and therefore, render the property sufficiently less desirable or valuable to the objectively reasonable buyer. Whether a matter not disclosed by such a builder or broker is of such materiality, and unknown and unobservable by the buyer, will depend on the facts of each case and will be decided by a jury.[248]

NONPHYSICAL PROBLEMS

Some courts have given credence to a duty to disclose conditions that arise from the dwelling itself, such as a house with a history.[249] Such homes may be "stigmatized." These stigmatized properties may have a lower value, or take longer to sell, because of emotional or psychological reactions triggered by the knowledge of homicides,[250] suicides, other crimes,[251] diseases and natural deaths, or ghosts,[252] that have occurred on the premises. The famous California case of *Reed v. King*[253] involved a failure of the seller to inform the purchaser the home had been the site of multiple homicides ten years earlier. In a subsequent New York case involving "poltergeists," the appellate tribunal noted that, while

247 Yox v. City of Whittier, 227 Cal. Rptr. 311 (Ct. App. 1986) and Sheffet v. County of Los Angeles, 84 Cal. Rptr. 11 (Ct. App. 1970); *cf.* Miller v. Los Angeles County Flood Control Dist., 505 P.2d 193 (Cal. 1973).

248 Strawn v. Canuso, 657 A.2d 420 (N.J. 1995).

249 *See* Marianne M. Jennings, *Buying Property from the Addams Family*, 22 REAL ESTATE J. 43 (1993). *See generally* Ross R. Hartog, *The Psychological Impact of AIDS on Real Property and a Real Estate Broker's Duty to Disclose*, 36 ARIZ. L. REV. 757 (1994).

250 Reed v. King, 193 Cal. Rptr. 130 (Ct. App. 1988).

251 *See, e.g.*, Ikeda v. Curtis, 261 P.2d 684, 691 (Wash. 1953) (Bordello).

252 Stambovsky v. Ackley, 572 N.Y.S.2d 672 (Sup. Ct. App. Div. 1991).

253 193 Cal. Rptr. 130 (Ct. App. 1983).

caveat emptor would permit a recovery against the vendor, rescission would be in equity.[254]

Many legislatures reacted to the California and New York decisions by enacting legislation that protects the sellers and their agents from failing to disclose to a purchaser that a property is stigmatized.[255] These "shield laws" preclude a cause of action for nondisclosure of "stigmatized" property. However, the seller must still respond truthfully to a question by the prospective purchaser.[256]

The value of a plot of land or dwelling may also be affected by a nonphysical, off-site problem, such as the presence of a neighborhood nuisance or criminal activity.[257] As with the Ohio case of *Van Camp v. Bradford*,[258] the duty to disclose may include criminal activity in the neighborhood. A renter's daughter was raped in defendant's house on October 30, 1991. On December 30, 1991 another rape occurred in a neighboring house. Defendant listed her house for sale on that day. Plaintiff, a single mother with a teenage daughter, submitted an offer to buy the house on February 4, 1992.

The purchaser inquired about the bars on the basement windows. The seller replied that they were installed sixteen years earlier after a break-in, but no problems currently existed with the residence. The house was broken into two months after the closing. Two additional rapes subsequently occurred in the neighborhood. The court viewed the crime problem as a latent defect, which could not be observed by the purchaser on a walk-through. The court thereby recognized that psychological stigma may therefore constitute a latent defect that renders the doctrine of caveat emptor inapplicable.[259]

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254 Stambovsky v. Ackley, 572 N.Y.S.2d 672 (Sup. Ct. App. Div. 1991).

255 A few statutes require disclosure of psychologically stigmatized property. *See, e.g.*, S.D. CODE LAWS § 43-4-44(IV)(4) (1997); VA. CODE § 55-524A (1995). More common are statutes which provide the sellers and brokers do not have to disclose the previous occupant of the property had AIDS. CAL. CIV. CODE § 1710.2 (1997); COLO. REV. STAT. § 38-35.5-101 (1992); CONN. GEN. STAT. § 20-329dd (1997); D.C. CODE ANN. § 45-1936(f) (1996); FLA. STAT § 689.25 (1994); HAW. REV. STAT. § 467-14(18) (1997); ILL. COMP. STAT. ch. 111, para. 5831.1 (1994); KY. REV. STAT. ANN. § 207.250 (Michie 1991); NEV. REV. STAT. § 40.565 (1996); N.M. STAT. § 47-13-2 (1995); OKLA. STAT. tit. 59, § 858-513 (1996); OR. REV. STAT. § 93.275 (1990); S.C. CODE ANN. § 40-57-270 (Law. Co-op. 1996); TENN. CODE § 66-5-110 (1993); TEX. REV. CIV. STAT. ANN. art. 6573a § 15(C) (West 1991).

256 *See, e.g.*, GA. CODE ANN. § 44-1-16 (1991).

257 Alexander v. McKnight, 9 Cal. Rptr. 2d 453 (Ct. App. 1992). Surrounding land uses can affect the property value of homes. Thus, the Board of Tax Review in Greenwich, Connecticut reduced by 4.7 to 10% the assessed valuation of nine homes located near a halfway house. Dirk Johnson, *Taxes Cut for Neighborhoods in Homes for Mentally Ill*, N.Y. TIMES, Apr. 11, 1985, at B2, cols. 1-6.

258 623 N.E.2d 731 (Ohio Com. Pleas 1993). The sale occurred prior to enactment of the Ohio Disclosure Act, OHIO REV. CODE ANN. § 5302.30 (Anderson 1997) and thus was subject to the common law.

259 *Id.* at 736.

DEFENSES RELATED TO CAVEAT EMPTOR

Merger Clauses

The caveat emptor doctrine was historically strengthened by the "merger clause," whereby only representations contained in the four corners of the deed were recognized. Thus, any oral representations would disappear. Such a clause has also fallen by the wayside in the twentieth century,[260] and is no defense against a cause of action for fraud.[261]

"As Is" Clauses

Another common occurrence was the insertion of an "as is" clause in the sales agreement; i.e., the property is sold in an "as is" condition. After all, a buyer who knowingly purchases a "fixer-upper" should not subsequently complain about defects in the property.

However, builders, developers and sellers started to routinely include "as is" clauses in sales contracts. Once the implied warranty of habitability was recognized in the sale of new homes, courts soon struck down "as is" clauses in the agreement since such a clause would effectively nullify the implied warranty of habitability.[262] As a matter of common sense, no purchaser reasonably expects a new structure to be sold in an "as is" condition.

Courts also increasingly struck the clause down in situations involving defects in the property. Thus, an "as is" clause will not protect the seller against fraud,[263] fraudulent misrepresentation,[264] fraudulent concealment,[265] fraudulent nondisclosure,[266] material misrepresentations of fact,[267] misrepresentation or passive concealment.[268] As one court explained, an "as is" clause allocates the risk of loss arising from conditions unknown to the

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260 *See, e.g.*, Lingsch v. Savage, 29 Cal. Rptr. 201, 206 (Ct. App. 1963).

261 Hill v. Jones, 725 P.2d 1115 (Ariz. Ct. App. 1986).

262 *See, e.g.*, Smith v. Old Warson Development Co., 479 S.W.2d 795 (Mo. 1972); Davies v. Bradley, 676 P.2d 1242 (Colo. Ct. App. 1983); Briarcliff West Townhouse Owners Ass'n v. Wiseman Construction Co., 480 N.E.2d 833 (Ill. App. Ct. 1985). Similarly, an exculpatory clause will not affect an action for fraud. Zimmerman v. Northfield Real Estate Co., 510 N.E.2d 409, 415 (Ill. App. Ct. 1986).

263 Loghry v. Capel, 132 N.W.2d 417 (Iowa 1965); Wagner v. Cutter, 757 P.2d 779 (Mont. 1988); Rayner v. Wise Realty Co. of Tallahassee, 504 So. 2d 1361 (Fla. Ct. App. 1987); Brewer v. Brothers, 611 N.E.2d 492 (Ohio Ct. App. 1992); Lingsch v. Savage, 29 Cal. Rptr. 201, 208-9 (Ct. App. 1963).

264 Gibb v. Citicorp Mortgage, Inc., 518 N.W.2d 910, 917-18 (Neb. 1994).

265 Kaye v. Buehle, 457 N.E.2d 373 (Ohio Ct. App. 1983); Mancini v. Gorick, 536 N.E.2d 5 (Ohio Ct. App. 1987); Lingsch v. Savage, 29 Cal. Rptr. 201 (Ct. App. 1963); Danann Realty Co. v. Harris, 157 N.E.2d 397 (N.Y. Ct. App. 1959).

266 Rather v. Wise Realty Co. of Tallahassee, 504 So. 2d 1361, 1364 (Fla. Ct. App. 1987).

267 Cruse v. Coldwell Banker/Graben Real Estate, Inc., 667 So. 2d 714 (Ala. 1995).

268 Driver v. Melone, 60 Cal. Rptr. 98, 101-2 (Ct. App. 1970).

parties.[269] The clause will not therefore protect the seller against a known defect.

Conversely, an "as is" clause may be upheld if the buyer signs it after being made aware of potential problems in the neighborhood, such as settling and foundation problems.[270] In such a situation though, the purchaser is fully informed of the risks.

As we have seen, the duty to disclose can be triggered by a query by the purchaser.[271] Thus, when the seller answered the buyer's questions about the condition of the electrical system by responding, "You have nothing to worry about," the "as is" clause in the sales contract was nullified.[272]

THE DUTY TO DISCLOSE

A hallowed maxim of the common law is that if the reason for a rule changes, then so too should the rule.[273] Caveat emptor was premised on an equality of knowledge and bargaining power between purchaser and seller. The doctrine was also developed during a time of laissez faire wherein the government promoted, rather than regulated, commerce.

Certainly a major factor in activating the duty to disclose is the difference in access to information between the professional seller of residential real estate and the usual buyer. Much of the reason for abrogating caveat emptor is to protect buyers. The ordinary purchaser is not in a position to discern defects, and must rely upon the builder or developer of a new home.[274] In addition, the ordinary purchaser of existing homes is often unable to ascertain defects.[275] Thus, the purchasers are often unable to protect themselves.

We should not realistically expect a purchaser to check the county clerk's office, the planning and zoning commission files, the Army Corps of Engineers, the United States Geologic Society, the state geologist, other agencies,[276] and the internet,[277] prior to

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269 Lorenzo v. Noel, 522 N.W.2d 724, 726 (Mich. Ct. App. 1994).

270 *See, e.g.*, Leatherwood, Inc. v. Baker, 619 So. 2d 1273 (Ala. 1993).

271 *See* notes 74 and 156, *supra*, and accompanying text.

272 Brewer v. Brothers, 611 N.E.2d 492, 493 (Ohio Ct. App. 1992). ($2,000 to repair the electrical system).

273 *See, e.g.*, CAL. CIV. CODE § 3510 (1872) (causing any rule, for which there is no longer a need, to cease); *see also*, Pierce v. Yakima Valley Memorial Hosp. Ass'n, 260 P.2d 765 (Wash. 1953) (holding that charitable, nonprofit hospitals should no longer be held immune from liability for their employer's negligence).

274 *See, e.g.*, Moxley v. Lorraine Builders, Inc., 600 P.2d 733, 735 (Wyo. 1979).

275 *See, e.g.*, Humber v. Morton, 426 S.W.2d 554, 561 (Tex. 1968).

276 For example, the California Department of Conservation prepares and maintains an inventory of landslide maps, provided for use by local governments as part of the Landslide Hazard Identification Program.

277 For example, California residents can check out the earthquake risks in their homes and neighborhoods at the following websites: <http://www.eqe.com/> and <http://

purchasing a house, much less bringing a building inspector, hydrologist, geologist and meteorologist to the site.

Nor can we reasonably expect a potential purchaser to search for a myriad of potential problems, such as asbestos, carpenter ants, defective septic and sewer systems, dry rot, faulty plumbing, lead paint, radon gas[278] and termites. Some, but not all, of these problems may be observable by an inspector in making the standard inspection prior to the close.[279]

As this survey clearly establishes, the property law doctrine of caveat emptor was already in major decline at the time of the famous 1942 case of *Swinton v. Whittensville Savings Bank*. Through a combination of judicial and legislative actions, caveat emptor no longer retains much viability.

Indeed, the limiting property doctrine of caveat emptor has been supplanted by the expansive tort law concepts of implied warranties and the duty to disclose. Fraud, misrepresentation, warranties of habitability, and especially duties to disclose are all Tort constructs. In addition, caveat emptor does not protect the seller against liability to third parties. The *Restatement (Second) of Torts* § 353 provides liability to a vendor of real estate who either fails to disclose, or conceals, any condition which produces an unreasonable risk to people on the land.[280]

We thereby recognize and posit a tort duty on the part of the seller, and the seller's broker, to disclose material geologic hazards of which the seller, and the seller's broker, know, or reasonably should know. The law should impose, based upon reasonable foreseeability, a duty on developers of new developments, sellers of existing structures, and the selling agents, a duty to disclose to prospective purchasers if the building is located in a geologically fragile area, such as an earthquake or landslide zone. The disclosure statement should include:

1. The nature of the risk;
2. Historical occurrences of the risk in the area;
3. Scientific projections of the risk in the area;
4. The potential magnitude impact should the risk materialize; and
5. The estimated chance of the risk materializing.

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www.homerisk.com/>. Other information web sites on earthquakes are <http://www.scec.org/> and <http://edcwww.cr.wsgs.gov/dclass.html>.

278 Naturally occurring radon contaminated soil is a major problem on the East Coast, with heavy concentrations in the Appalachian Mountains, Florida, New England, New Jersey, New York and Pennsylvania. *See* Frank B. Cross and Paula C. Murray, *Liability for Toxic Radon Gas in Residential Home Sales*, 66 N.C. L. REV. 687, 692 (1988). The buyer should be aware of uranium toxicity under the house. Schnell v. Gustafson, 638 P.2d 850 (Colo. Ct. App. 1981).

279 However, even a building inspection is not designed to discern latent defects or off-site geologic or neighborhood problems.

280 RESTATEMENT (SECOND) OF TORTS § 353 (1965).

Liability in tort law is normally based upon establishing a duty of care. In turn, the duty of care in negligence is based upon a variety of factors, of which the most prominent is the reasonable foreseeability of the risk.[281]

The standard of care is flexible. Duty is proportional to the potential harm. As the risk increases, so does the standard of reasonable care.[282] For example, only slight care might be required with a stock watering pond in an isolated, rural area. Conversely, the highest duty of care, bordering on strict liability, would be involved in designing, constructing, and maintaining a large dam overlooking a major population center.[283]

Tort law has progressively expanded liability during the last half of the twentieth century. Immunities have been abrogated.[284] Long-standing limitations on "duty" have been lifted,[285] new causes of actions recognized,[286] and causation issues addressed.[287]

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281 The California Supreme Court made foreseeability of the risk the major factor in establishing duty in a series of cases in the 1970s and 1980s. *See, e.g.*, Bigbee v. Pacific Tel. & Tel. Co., 665 P.2d 947, 951-53 (Cal. 1983) (presenting all issues of defendant's negligence in context of inquiry whether accident was reasonably foreseeable); Weirum v. RKO Gen. Inc., 119 Cal. Rptr. 191 (1975) (defining foreseeability as "a primary consideration in establishing" duty). *See also* Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 342 (Cal. 1976) (calling foreseeability the most important factor in determining duty). More recent cases revert back to the reasonable foreseeability of the risk. *See, e.g.*, Ann M. v. Pacific Plaza Shopping Ctr., 863 P.2d 207, 213-14 (Cal. 1993) (stating that a landowner has a duty to protect others from third-party acts only when those acts may be reasonably anticipated).

282 This principle was set forth in the germinal negligence case of Brown v. Kendall, 60 Mass. (6 Cush.) 292, 296 (1850). As stated by Prosser and Keeton:

> [I]f the risk is an appreciable one, and the possible consequences are serious, the question is not one of mathematical probability alone. The odds may be a thousand to one that no train will arrive at the very moment that an automobile is crossing a railway track, but the risk of death is nevertheless sufficiently serious to require the driver to look for the train and the train to signal its approach . . . . As the gravity of the possible harm increases, the apparent likelihood of its occurrence need be correspondingly less to generate a duty of precaution.

W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 31, at 171 (5th ed. 1984).

283 *See* Mayor of New York v. Bailey, 2 Denio 433, 440-41 (N.Y. 1845); *see also* Eikland v. Casey, 266 F. 821, 823 (9th Cir. 1920), *cert. denied*, 254 U.S. 652 (1920); Erickson v. Bennion, 503 P.2d 139 (Utah 1972).

284 Charitable immunity, Pierce v. Yakima Valley Memorial Hospital Ass'n, 260 P.2d 765 (Wash. 1953); interspousal immunity, Burns v. Burns, 518 So. 2d 1205 (Miss. 1988); parent-child immunity, Goller v. White, 122 N.W.2d 193 (Wis. 1963); sovereign immunity, Muskopf v. Corning Hospital District., 11 Cal. Rptr. 89 (Cal. 1961).

285 Abrogation of the locality rule in medical malpractice suits, Cobbs v. Grant, 104 Cal. Rptr. 505 (Cal. 1972); guest statutes, Brown v. Merlo, 106 Cal. Rptr. 388 (Cal. 1973); negligent infliction of emotional distress on bystanders, Dillon v. Legg, 441 P.2d 912 (Cal. 1968); owners and occupants of land, Rowland v. Christian, 443 P.2d 561 (Cal. 1968).

286 Dram shop, Kelly v. Gwinnell, 476 A.2d 1219 (N.J. 1984); insurer's bad faith refusal to settle, Crisci v. Security Insurance Co. of New Haven, 58 Cal. Rptr. 13 (Cal. 1967); intentional infliction of emotional distress, State Rubbish Collectors Ass'n v. Siliznoff, 240 P.2d 282 (Cal. 1952); malpractice, Helling v. Carey, 519 P.2d 981 (Wash. 1974); Ybarra v. Spangard, 154 P.2d 687 (Cal. 1944); medical monitoring, Ayers v. Jackson Township, 525 A.2d 287 (N.J. 1987); products liability, Greenman v. Yuba Power Products, 27 Cal. Rptr. 697 (Cal. 1962); wrongful birth, Berman v. Allen, 404 A.2d 8 (N.J. 1979).

Liability in tort law is not based on whether a similar event has occurred before, but whether this particular risk is foreseeable. Past occurrences are a major, but not exclusive, factor in determining the foreseeability of the risk. Foreseeability is not based just on history, but also upon that which science and technology can project into the future. History can tell us which areas have been subjected to forces of nature. Science may predict which regions are subject to such forces in the future. Even if a natural force had not struck a particular location before, liability may still exist if reasonable design, construction, operation, inspection or maintenance should have anticipated and thereby prevented or minimized the risk.

The Tort concept of duty can be very expansive. The California Supreme Court held in 1968 in *Conner v. Great Western Savings & Loan Association* that a bank was liable to the home owners in a subdivision.[288] The homes suffered serious damage from cracking caused by ill-designed foundations that could not withstand the expansion and contraction of adobe soil. The contractor laid slab foundations on adobe soil without taking proper precautions recommended by soil engineers.

The bank had warehoused the land for developers. The bank knew, or should have known, the developers were inexperienced and operating on a dangerously thin capitalization. In addition, the bank knew or should have known, of the expansive soil problem. Yet it failed to require soil tests, examine foundation plans, or recommend changes. Liability would arise if the activity extended outside the scope of normal lending activities or if the lender had been a party to misrepresentation.

As discussed in *Conner*, the purchaser of a home is ill-equipped with experience or financial means to discern structural defects.[289] A home is both a major investment and the only shelter for the buyer.[290]

In *Karoutas v. Homefed Bank*,[291] the California Court of Appeals held the beneficiary, with actual knowledge of facts materially affecting the value of the property, has a duty to disclose these facts to prospective bidders at a trustee's sale. The purchasers paid $173,000 for the property, then discovered soil conditions and other defects in the residence that would cost in excess of $250,000 to repair. The beneficiary's own studies had estimated repairs

287 *See, e.g.*, Sindell v. Abbott Laboratories, 163 Cal. Rptr. 132 (Cal. 1980) (market share liability); Mitchell v. Gonzales, 1 Cal. Rptr. 2d 913 (Cal. 1991) (proximate cause).

288 Conner v. Great Western Savings & Loan Ass'n., 33 Cal. Rptr. 369 (Cal. 1968). The holding was subsequently limited by the legislature to preclude liability for normal lending activities. CAL. CIV. CODE § 3434 (1997).

289 *Id.* at 378.

290 *Id.*

291 283 Cal. Rptr. 809 (Ct. App. 1991).

would cost in excess of $350,000, would not be economically feasible, and recommended the residence be demolished. However, no disclosure was made to the purchasers, who could not inspect the property prior to the trustee's sale. The court recognized caveat emptor does not apply to nonjudicial foreclosure sales.[292]

In *Mortert v. CBL & Associates*,[293] the Supreme Court of Wyoming held a theater operator owed a duty to warn theater goers that flash flood warnings existed and that citizens were advised to stay off the streets.

THE FORESEEABILITY OF THE RISKS

Every year witnesses the loss of human life and the widespread destruction of property due to natural forces, such as floods, earthquakes and hurricanes. Many of these fatalities occur because the dwellings were located in ill-advised geologic settings, subject to the inexorable forces of nature.

There are no natural disasters; human activity invites the resulting tragedy by building in, on, or under areas that are subject to the forces of nature. These forces of nature are natural acts. The tragedies are of human origin.[294]

"Natural disasters" are often the results of a high population density in geologically fragile areas. As civilization, especially an uninformed and unprepared population, encroaches upon geologically fragile areas, the potential for tragedies increases.[295] The

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292 *Id.* at 814.

293 741 P.2d 1090 (Wyo. 1987).

294 *See generally* ANDERS WIJKMAN & LLOYD TIMERLAKE, NATURAL DISASTERS: ACTS OF GOD OR ACTS OF MAN, (1984) (stating that disasters are increasingly man-made political and social events which, although triggered by natural phenomena such as floods or earthquakes, are often preventable). Their thesis states:

> Though triggered by natural events such as floods and earthquakes, disasters are increasingly man-made. Some disasters (flood, drought, famine) are caused more by environmental and resource mismanagement than by too much or too little rainfall. The impact of other disasters, which are triggered by acts of nature (earthquake, volcano, hurricane) are magnified by unwise human actions.

Id. at 6.

295 For example, one of the difficulties in fighting modern forest fires is the problem of "urban interface," in which homes are invading the wilderness. These developmental pressures change the matrix of factors which determine how a fire is to be fought. In the past, some areas would be left to burn themselves out. That option may be effectively hindered by the presence of human habitation. *See* Timothy Egan, *New Hazard in Fire Zones: Houses of Urban Refugees*, N.Y. TIMES, Sept. 16, 1994, at A1 (outlining the hazards of living in potential fire zones); John Kifner, *In Washington, Saving Scenic View Taking on Importance in Firefighting*, N.Y. TIMES, Aug. 8, 1994, at B6 (discussing the difficulties of fighting forest fires in populated areas).

New Orleans is considered especially vulnerable to hurricanes. The city rests six feet below sea level, and is surrounded by water on three sides. It is protected from flooding by an extensive series of levees. In addition, the Army Corps of Engineers has devised a bypass system through the Atchafalaya, to divert floodwaters from the Mississippi River to the Gulf, and the Bonnet Carre spillway into Lake Pontchartrain, thereby substantially reducing the threat of swollen Mississippi River water flooding New Orleans. Conse-

hubris of the human race is that it believes technology can trump nature.[296] This belief, coupled with years of natural quiescence, can lead to false senses of security and resulting catastrophes. Complacency, ignorance and an otherwise casual disregard of the risks can lead to over-development.[297]

Landslide risks are a prime example of human activity intensifying the risk. The most frequent causes of landslide are water from intensive rainfall or human-introduced sources.[298] As with

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quently, the severe 1993 flooding of the Missouri and Upper Mississippi River Basins left New Orleans unscathed. However, the levees and diversion systems will not protect New Orleans against a major hurricane tracking up the Mississippi River from the Gulf of Mexico. In one expert's worst case scenario, "New Orleans could become a lake 20 feet deep." The storm surge would enter Lake Pontchartrain, top the 16-foot levees, and pour into the city. The levees would then serve as dams retaining the storm water in New Orleans, most of which lies at or below sea level. Frances F. Marcus, *Storm Adds Reality to New Orleans Drill*, N.Y. TIMES, May 14, 1995, at 18.

New Orleans has been struck at least nine times by hurricanes. New Orleans experienced hurricanes in 1817, 1837, 1887, 1900, 1915, 1939, 1947, 1965 (the infamous Hurricane Betsy) and 1969 (the equally infamous Hurricane Camille). Other hurricanes struck coastal areas of Louisiana and may have come close to New Orleans. A history of hurricanes striking Louisiana is found at Mark Schleifstein, et al., *Eyeing a Hurricane*, NEW ORLEANS TIMES-PICAYUNE, May 30, 1993, at J1.

296 Two examples will suffice. First, in spite of the devastation caused by the Northridge Earthquake of January 17, 1994 to the greater Los Angeles freeway system, one expert believes that enough is known "about the behavior of structure in earthquakes that we can design them so that they survive intact." Calvin Sims, *Quake Damage Shakes Faith in Overpass Designs*, N.Y. TIMES, Jan. 24, 1994, at A1, A10.

Second, the Mississippi River has a long history of flooding and rechannelling itself. Indeed, Mark Twain wrote:

> "One who knows the Mississippi will promptly aver—not aloud, but to himself—that ten thousand River Commissions, with the monies of the world at their back, cannot tame that lawless stream, cannot curb it or confine it, cannot say to it, Go here, or go there, and make it obey; cannot save a shore which it has sentenced . . . ."

MARK TWAIN, LIFE ON THE MISSISSIPPI, 172-73 (Signet Classic 1961).

Yet, the Chief of Engineers concluded in 1926 that river improvements would prevent the "destructive effects of floods." PETE DANIEL, DEEP'N AS IT COME: THE 1927 MISSISSIPPI RIVER FLOOD 6 (1977).

297 For example, weather patterns are cyclical. Thus, there has been a decrease over the past century in the number of major hurricanes striking the East Coast and Florida peninsula. Eric Morgenthaler, *He's No Blowhard: Dr. Gray Can Predict Atlantic Hurricanes*, WALL ST. J., Aug. 8, 1994, at A1.

However, it is estimated that sooner or later a major hurricane will again strike the northeastern United States. The famous 1938 hurricane which struck Long Island and New England is ranked as the seventh most costly hurricane in United States history, and the worst ever recorded in the Northeast. A hurricane of similar magnitude, striking the Northeast today, could be the costliest in United States history because of the extensive development in the region, inadequate design and construction to withstand hurricanes, and inadequate evacuation and sheltering procedures. William K. Stevens, *Historic Hurricane Could Catch Northeast With Its Guard Down*, N.Y. TIMES, Aug. 23, 1994, at C4.

In spite of the devastation unleashed upon south Florida by Hurricane Andrew in 1992, the National Hurricane Center ranked it as only the third most intense storm to hit land in the United States this century, following Hurricane Camille in 1964, and the 1935 Labor Day hurricane that struck the Florida Keys, killing 600 people. *Hurricane Andrew is Termed Third Worst in This Century*, N.Y. TIMES, Sept. 18, 1992, at A16.

298 Roger R. Olshansky & J. David Rogers, *Unstable Ground: Landslide Policy in the United States*, 13 ECOLOGY L.Q. 939, 943 (1987). Earthslides can often be traced to lack of support in the underlying soil or instability in the soil above.

other natural hazards, landslide damage is intensified because of increased development in hillside areas,[299] and encroachment upon potentially unstable slopes.[300] Landslide risks can be heightened by poor forestry practices, development on improper fill and poor grading.[301] The risks of landslides can be reduced through enforcement of grading ordinances, advanced engineering and earthquake practices. However, landslides will still occur in hillside areas.[302]

A strong argument exists that governmental agencies should never have issued the requisite zoning and building permits. The purpose of this article is not to discuss the potential liability of governmental agencies in issuing permits for such areas as floodplains or earthquake zones. The issuance of a permit does not negate the risk to the uninformed purchaser.

Many forces of nature cannot be controlled. Volcanoes are a classic example. If and when a volcano erupts, the extent of the eruption, and the velocity and direction of the magma flow are not subject to human influences. Predictability is of limited application.[303] Other forces of nature, such as hurricanes, can be tracked, but the precise point of impact on land is still not predictable. Similarly, structural survivability cannot be guaranteed against natural forces, such as earthquakes, fires, hurricanes or tornadoes. Shorelines, seismic zones, and slopes are inherently unstable.

Yet the lack of scientific certainly does not preclude Tort liability. For example, a builder may be liable in negligence for failure to use reasonable construction and design techniques to minimize the foreseeable risks.[304] Even where forces of nature cannot be accurately predicted, controlled or programmed, they can still be detected, measured, observed and be subject to general

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299 *Id.* at 944.

300 *Id.* at 941.

301 *See generally* Nigel Skermer, *Landslides: Acts of God, or Acts of Man*, 50 THE ADVOCATE 931 (1992).

302 Olshansky, *supra* note 298, at 967.

303 *See generally* Kenneth Reich, *On Shaky Ground: Despite High-Tech Tools, Predicting Volcanos' Behavior Is Still a Very Inexact Science*, L.A. TIMES, Jan. 22, 1998, at B2, cols. 1-4.

304 Earthquake technology has sufficiently advanced such that two commentators wrote: "Because cost-effective technology is available to reduce substantial injuries associated with an earthquake, the judicial system should not protect isolated design professionals who ignore or fail to stay abreast of the tribulations." William D. Flatt & Wesley R. Kliner, *When the Earth Moves and Buildings Tumble, Who Will Pay?—Tort Liability and Defenses for Earthquake Damage Within the New Madrid Fault Zone*, 22 MEM. ST. U.L. REV. 1, 22-23 (1991). *See generally* John C. Peck & Wyatt A. Hoch, *Liability of Engineers for Structural Design Errors: State of the Art Considerations in Defining the Standard of Care*, 30 VILLANOVA L. REV. 403 (1985); Matthew S. Steffey, *Negligence, Contract and Architects Liability for Economic Loss*, 82 KY. L.J. 659 (1993-94).

foreseeability.[305] A simple example will suffice. A lightening bolt striking a utility line may be a force of nature not subject to precise predictability as to the point of impact, but failure to ground the line is a human act of negligence.[306]

The real question, which remains after the demise of caveat emptor, is who should have the burden of obtaining the requisite geologic information: the seller or purchaser.[307] In theory, at least, the purchaser could discover almost every risk through title searches, house inspections, checking geologic records, and surfing the net. Such information is recorded in history books, almanacs, newspaper archives, government records,[308] government studies, investigative reports, official studies, and individual memories. The information may even be obtainable on-line through the internet.

However, such a standard would not only place an onerous burden on the purchaser, but would in fact resurrect caveat emptor under a new guise. Similarly, we could hold that the duty to disclose varies depending upon the knowledge, intelligence and experience of the purchaser. Such a standard would be extremely unpredictable and subjective.

Conversely, the seller's broker is a professional with expertise. The brokers, just as developers, know, or reasonably should

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305 Geologists now recognize that dozens of fault lines underlie the Los Angeles Basin. These faults are referred to as blind faults because, unlike major fault lines such as the San Andreas, they are not visible from the surface. Sharon Begley, et al., *A Whole Lot of Shaking Going On*, NEWSWEEK, Jan. 31, 1994, at 34; Frederick Rose, *Beneath Los Angeles, More Earthquakes Are Lurking*, WALL ST. J., Mar. 22, 1994, at B1. One report stated that almost 100 active faults have been identified in the Los Angeles area. James F. Dolan et al., *Prospects for Larger or More Frequent Earthquakes in the Los Angeles Metropolitan Region*, 267 SCI. 199 (1995).

Both the 1989 Loma Prieta Earthquake in northern California and the 1994 Northridge Earthquake in Los Angeles were initiated on previously unidentified faults, but both "occurred in structurally complex and seismically active areas." Thomas L. Holzer, *Predicting Earthquake Effects - Learning from Northridge and Loma Prieta*, 265 SCI. 1182, 1183 (1994). Earlier earthquakes in both areas had alerted scientists to the potential risks in the area. *Id.*

306 Central Ga. Elec. Membership Corp. v. Heath, 4 S.E.2d 700, 702 (Ga. Ct. App. 1934). Similarly, failure to protect against lightning striking oil storage tanks which were not vapor proof, and which had open holes on top, constitutes negligence. Tex-Jersey Oil Corp. v. Beck, 292 S.W.2d 803, 807 (Tex. Civ. App. - Texarkana (1956), *aff'd in part rev'd in part*, 305 S.W.2d 162 (Tex. 1957).

307 *See* Key Sales Co. v. South Carolina Elec. and Gas Co., 290 F. Supp. 8, 27 (D.S.C. 1968) (stating that plaintiff was responsible for not checking the history prior to purchase); Gill v. Marquoit, 525 P.2d 1030, 1032 (Or. 1974) (holding that sellers are entitled to assume that purchasers will inquire about susceptibility of land to flooding). *See also* Fairmont Foods Co. v. Skelly Oil Co., 616 S.W.2d 548, 550 (Mo. Ct. App. 1981) (holding that purchaser had the burden of proving that the undisclosed information was not within its reasonable reach); Brown v. B & D Land Co., 823 P.2d 380, 382 (Okla. Ct. App. 1991) ("The means and knowledge of obtaining the truth regarding the property were readily available to plaintiff upon inquiry.").

308 *See, e.g.*, Chapman v. Hosek, 475 N.E.2d 593, 599 (Ill. App. Ct. 1985) (finding that an action for fraud existed even though information that showed the property flooded, was in the public record).

know, of the potential geologic problems with the property because of their duty, responsibility, and knowledge of the area.

Science has identified the major geologic fault lines,[309] mapped floodplains[310] and landslide zones,[311] recognized the vulnerability of coastal zones and barrier islands,[312] and distinguished dormant from extinct volcanoes. Tort law clearly imposes a duty "to anticipate the usual weather of the vicinity, including all ordinary forces of nature."[313] Such foreseeable forces of nature

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309 Congress adopted the Earthquake Hazard Reduction Act of 1977, in which it was recognized that all 50 states are vulnerable to earthquakes. Thirty-nine states are considered at risk for moderate to major earthquakes. Although earthquakes in California get most of the publicity, earthquakes have occurred in all 50 states. Major fault lines include the San Andreas in California, the Cascadia in Washington, the Wasatch in Utah, and the New Madrid in the Mississippi Valley. In fact, three of the largest earthquakes in United States history occurred during the winter of 1811-1812 on the New Madrid Fault. U.S. GENERAL ACCOUNTING OFFICE, FEDERAL BUILDING: MANY ARE THREATENED BY EARTHQUAKES, BUT LIMITED ACTION HAS BEEN TAKEN 15 (May 1992).

310 Federal maps highlighting floodplains are available at city and county government offices and the Federal Emergency Management Agency (FEMA). The U.S. Army Corps of Engineers has been mapping floodplains of the United States for decades.

311 The United States Geologic Survey and several state agencies have undertaken landslide mapping. Robert Olshansky & J. David Rogers, *Unstable Ground: Landslide Policy in the United States*, 13 ECOLOGY L.Q. 939, 952-54 (1987). For example, studies indicated slides have occurred in a section of Anaheim Hills for decades. Surveyors and engineers reported substantial levels of ground water in the hills in the early 1950s. The city allowed construction in the 1970s and early 1980s. In the winter of 1993 almost 29 inches of rain fell in the area, resulting in the earth sliding 12 inches in some areas.

About 240 homeowners have filed suit against the city, county, metropolitan water district and several private concerns. *See* Ann Pepper, *El Nino Haunts Those in '93 Slide Zone*, ORANGE COUNTY REGISTER, Oct. 20, 1997 at p.1, col.1.

These studies are precisely the type of information potential purchasers should be aware of in making an informed decision. States with major landslide risks include Alabama, California, Colorado, Illinois, New York, North Carolina, Ohio, Oregon, Tennessee, Texas, Utah and Washington. Richard L. Meehan et al., *The Battered Exclusion: Who Pays How Much for Landslides*, 29 FOR THE DEFENSE 19, 22 (1987).

California initiated a Landslide Hazard Identification Program in 1985.

312 Congress enacted the Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464, to protect the nation's coastal resources and to encourage states to promulgate coastal zone management plans. Reappraisals of the wisdom of developing the coastal zone and barrier islands on the Atlantic and Gulf coasts occur after every major hurricane. *See, e.g.* Peter Applebome, *After Hugo, a Storm Over Beach Development*, N.Y. TIMES, Sept. 24, 1989, at A1. The devastation inflicted by Hurricane Hugo gave rise to the restrictions invalidated in Lucas v. South Carolina, 505 U.S. 1003 (1992). These risks deal with erosion. A less common, but more dangerous, risk to certain coastal areas are tsunamis, commonly referred to as tidal waves. Over 50,000 people have been killed by tsunamis around the world over the past century. Scott McCredie, *When Nightmare Waves Appear Out of Nowhere to Smash the Land*, SMITHSONIAN, Mar. 1994, at 32. Hawaii is the most vulnerable of the 50 states. *Id.* at 33. Hilo, Hawaii is struck by tsunamis more often than any other place in the United States. *Id.* at 39. "In Hilo, Hawaii, every telephone book has maps that show tsunami inundation zones and safe areas." *Id.* This information could easily be made available to real estate purchasers.

313 W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS, § 44, at 304 (5th ed. 1984).

include avalanches,[314] blizzards,[315] erosion, expansive soil,[316] fires, floods, landslides,[317] high winds[318] and rain.[319]

The purpose of disclosure is to give the purchaser an informed choice, analogous to informed consent in medical procedures, full disclosure in securities law, and warnings in product liability cases.[320] Personal autonomy then allows the individual to make a personal assessment of the risks and benefits of the contemplated transaction. The informed, potential purchaser may then disre-

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314 In 1975 the Supreme Court of Washington held the State of Washington may have assumed a common law duty of care to warn of an avalanche danger. Although the court had difficulty understanding the facts, and had to deal with a "hypothetical" factual background, it held that a cause of action would exist against the state if it had negligently misled others. Brown v. MacPherson's, 545 P.2d 13 (Wash. 1975).

315 *See* McKinley v. Hines, 215 P. 301, 303 (Kan. 1923); Diamond Cattle Co. v. Clark, 74 P.2d 857 (Wyo. 1937).

316 For example, parts of Colorado contain "expansive soil," which expands when wet. Steve Raabe, *Soiled Homeowners Sue Developer Over Damage From Expanding Ground*, CHI. TRIB., Feb. 25, 1996, § 16, at 5L, col. 5.

317 Some states, such as California and Colorado, require communities to consider landslide risks in formulating their land use plans. CAL. GOV'T CODE § 65302(g) (West 1998) and COLO. REV. STAT. § 24-65.1-103(8)(a) (1990). Landslide litigation in a state such as California may give rise to liability under a number of theories, such as strict liability, Avner v. Longridge Estates, 77 Cal. Rptr. 633 (Ct. App. 1969); implied warranty against the builders and graders, Pollard v. Saxe & Yolles Dev. Co., 525 P.2d 88 (Cal. 1974), and negligence against neighboring property owners, Sprecher v. Adamson Cos., 636 P.2d 1121 (Cal. 1981). Unsettled coastal soil, continental-edge geography and hilly geography are prime territory for landslides in California. Stuart M. Gordon & Diane R. Crowley, *Earth Movement and Water Damage Exposure: A Landslide in Coverage*, 1983 INS. COUNS. J. 418.

318 *See, e.g.*, Naxera v. Wathan, 159 N.W.2d 513 (Iowa 1968); Jacobson v. Suderman & Young, Inc., 17 F.2d 253, 254 (5th Cir. 1927) (noting that wind may be an expected occurrence depending on knowledge of local weather conditions for certain times of the year); Cachick v. United States, 161 F. Supp. 15, 19 (S.D. Ill. 1958) (holding that where strong winds should be expected the act of God defense does not excuse negligent construction); Fairbrother v. Wiley's, Inc., 331 P.2d 330, 337 (Kan. 1958) (ruling that if defendant should have anticipated strong and gusty winds liability will attach regardless of the natural phenomenon).

319 *See, e.g.*, Garret v. Beers, 155 P. 2, 4 (Kan. 1916) (holding that the fact that heavy rains had occurred "many times before" rendered defendant liable for failing to adequately safeguard against flooding); Webb v. Platte Valley Pub. Power & Irrigation Dist., 18 N.W.2d 563, 568 (Neb. 1945) (holding that although a rainfall may be extraordinary if it is such that has occasionally occurred, it should be foreseen by reasonable person); Fairbury Brick Co. v. Chicago R.I. & Pac. Ry. Co., 113 N.W. 535, 537 (Neb. 1907) (holding that earlier rainfalls of the same magnitude, although unusual, render a defendant responsible for reasonable precautions); Cottreu v. Marshall Infirmary, 24 N.Y.S. 381, 382-83 (N.Y. Sup. Ct. 1893) (holding that a similar rainfall in 1869 demonstrated that such rainfalls that washed away defendant's dam were not so phenomenal as to absolve defendant of liability); Gulf, C. & S.F. Ry. Co. v. Pomeroy, 3 S.W. 722, 724 (Tex. 1887) (holding that history of such flooding made flooding foreseeable and, thus, left defendant liable); Holter Hardware Co. v. Western Mortgage & Warranty Title Co., 149 P. 489 (Mont. 1915); Milton D. Taylor Constr. Co. v. Ohio Dep't of Transp., 572 N.E.2d 712, 715 (Ohio Ct. App. 1988) (holding that when rainfall is reasonably expected one cannot claim such as unforeseeable and beyond the control of the party).

320 *See* RESTATEMENT (SECOND) OF TORTS § 402a, cmt. K (1979) (a proper warning nullifies liability in cases of unavoidably unsafe products).

gard the warnings, walk away from the deal, or negotiate a lower price.[321]

The purpose of the warning is not to change the decision of individuals.[322] We should not realistically expect large numbers of individuals to change their behavior when society collectively decides to develop these geologically fragile lands. Indeed, population growth will necessitate an increased development and spillover into geologically fragile areas.

For example, the population of the Los Angeles and San Francisco metropolitan areas continues to increase despite the well recognized risks of being near the San Andreas and other faults.[323]

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321 For example, mudslides in the Big Rock Mesa area of Malibu, and Pasadena Glen, occurred in areas that had been identified by California Department of Conservation geologists as susceptible to landslides during heavy winter rain. BUS. WIRE, Feb. 9, 1994 (available on WestLaw at 2/9/94 B WIRE). The Big Rock Mesa landslide in 1983 damaged or destroyed 250 expensive homes overlooking the Pacific Ocean. The litigation against Los Angeles County and the California Department of Transportation was settled for $97 million. Mark Thompson, *Big Rock is Big No More*, CAL. LAW., Mar. 1989, at 32.

The Big Rock Mesa slide gave rise to extensive litigation, including an attempt to revoke the real estate license of a broker. *See* Vaille v. Edmonds, 6 Cal. Rptr. 2d 1 (Ct. App. 1991). A 1982 geologic report discussing slide dangers was provided to the buyers in 1983. A second report was prepared in 1983. The purchaser then intended to conduct a visual inspection, but had trouble reaching the property because of a landslide on the Pacific Coast Highway, just east of the property. The geologist told the purchaser "about the steady erosion on the property, but this did not seem to trouble him, and he joked that he would be dead before the bluff eroded all the way to the house." *Id.* at 4. Several other warnings were provided prior to the close of escrow. The house was subsequently lost in a slide. The purchaser then testified "they would not have purchased the house if they had been aware of a groundwater or landslide danger." *Id.* at 7.

An Oakland, California resident, who lives along the Hayward Fault, stated: "Living here is a considered risk. . . . But I love this area, and I'd rather live to be 50 in the Bay Area than 100 in Kansas." *With Fault Like Kobe, Fears Rise in Oakland*, N.Y. TIMES, Jan. 23, 1995, at A11.

Mammoth Mountain is a major ski resort east of Los Angeles. It has been rocked by scores of volcanic induced earthquakes with magnitudes of 3 and 4+. One condo owner stated: "It just makes your vacation more interesting . . . . If you're gonna go, how would you rather go? In a freeway accident on the I-5 or chased down Mammoth by a wall of lava? No contest. Let's hit the mountains." Esther Schrader, *Mammoth Skiers Are Taking Quakes in Stride*, L.A. TIMES, Jan. 2, 1998, at A22, col. 1.

322 Warnings are not always effective in changing behavior, witness the large number of people who still smoke. *See, e.g.*, Tara Parker-Pope, *Danger: Warning Labels May Backfire*, WALL ST. J., April 28, 1997, at B1, col. 3; Steven Waldman, *Do Warning Labels Work? Their Increasing Use May Carry a Risk of Overkill*, NEWSWEEK, July 18, 1988, at 40; Michael de Courcy Hinde, *As Warning Labels Multiply, Messages Are Often Ignored*, N.Y. TIMES, Mar. 5, 1988, at 1, col. A3.

The purpose of warnings in real estate transactions will be to give the purchaser an informed choice, not necessarily to change behavior.

323 For example, the population of the United States increased 9.8% between 1980 and 1990, from 226,545,805 to 248,709,873. However, California's population rose 25.7%, from 23,667,902 to 29,760,021, and Florida's population increased 32.7%, from 9,746,324 to 12,937,926. 1995 INFORMATION PLEASE ALMANAC, ATLAS AND YEARBOOK 828 (48th ed. Houghton Mifflin Co. 1995). Most of California's population resides in geologically fragile areas. The Los Angeles-Riverside-Orange county complex had 15,047,772 people as of July 1, 1992, and the San Francisco-Oakland-San Jose area had an additional 6,409,891 people. *Id.* at 827. Of the ten metropolitan statistical areas and consolidated metropolitan statistical areas that had the largest population gains between 1990 and 1996, the Los Angeles-

The population of the Puget Sound region is rapidly growing in spite of earthquake and volcanic risks.[324] Furthermore, people continue to build along the Atlantic shoreline in spite of warnings and knowledge the ocean is clearly reclaiming beaches. In the words of one commentator:

> There is the familiar barrier beach tale of hope against hope, trust that shoreline engineering can fool Mother Nature, reliance in the great faucet of Government disaster aid and cheap storm insurance and ultimately, denial of the obvious—that is, that all up and down the Atlantic Coast, the sea, aided by storms and hurricanes, is slowly but inexorably rolling up and over beaches.[325]

CLEAR, OPEN, AND OBVIOUS HAZARDS

A close look at many of the cases which "validate" caveat emptor reveals consent in a contractual sense or assumption of risk in a tort context. Purchasers should not be able to consciously blind themselves to apparent dangers and then claim ignorance.[326] Thus, a purchaser, given the opportunity to undertake a physical inspection of the property, should not be heard to complain of defects that reasonably should have been discovered during such an inspection. An understandable hesitancy exists to grant judicial rights to parties unwilling to look out for themselves. Even the California Court of Appeals in the landmark case of *Easton v. Strasberger* stated:

> Cases will undoubtedly arise in which the defect in the property is so clearly apparent that as a matter of law a broker would not be negligent for failure to expressly disclose it, as he could reasonably expect that the buyer's own inspection of the premises would reveal the flaws.[327]

Riverside-Orange County area led with an increase of 963,626. Number nine was San Francisco-Oakland-San Jose, followed by Seattle-Tacoma-Bremerton. Steven A. Holmes, *Immigration Is Fueling Cities' Strong Growth, Data Shows*, N.Y. TIMES, Jan. 1, 1998, at A1, col. 5 (nat. ed.).

324 Mt. Rainier is a dormant, but far from extinct, volcano which majestically towers over the Puget Sound region. It is but one of several volcanoes which form the Pacific Rim of Fire. Mt. Rainier is an active volcano, which last blew 150 years ago. Experts cannot estimate when it might erupt again. *See* Jon Krakauer, *Geologists Worry About Danger of Living "Under the Volcano,"* SMITHSONIAN, July 1996, at 33. The potential risks, if Mt. Rainier erupts, vastly exceed the damages inflicted by its neighboring volcano, Mt. St. Helens, in its eruption of May 18, 1980, which destroyed plant and animal life for 150 square miles. *Id.* at 33, 34. The potential mudflow zones, should Mt. Rainier erupt, have been charted. It is estimated that over 100,000 people live in homes built in debris washed down the mountain by catastrophic debris flows (known to geologists as "lahars"). *Id.* at 34.

325 B. Drummond Ayres, Jr., *Sea Threatens Costly Building, Reviving a Debate*, N.Y. TIMES, Dec. 24, 1997, at A7, col. 1.

326 *See, e.g.*, Zack Cheek Builders, Inc. v. McLeod, 597 S.W.2d 888 (Tenn. 1980).

327 199 Cal. Rptr. at 391.

Oregon has held no duty exists to disclose land is susceptible to flooding.[328] The Oregon Supreme Court noted that river flooding is a matter of common knowledge—so common in fact that a seller may ordinarily assume a purchaser knows, or will discover, the phenomenon.[329] Thus, in Oregon, no duty exists to disclose geologic hazards which are obvious. Oregon has similarly held no implied warranty of habitability exists with the potential risk of erosion of oceanfront lots.[330] Recovery has also been denied when the purchaser could have easily discovered the property was located in a floodplain.[331]

Thus, the owners of a building known as the "Under the Hill Club," which rested at the base of a tall, near vertical bluff overlooking the Mississippi River, should not have been surprised when a large section of the bluff collapsed on the building during a mudslide[332] caused by excessive rainfall.

These cases do not stand up to close scrutiny, though, when dealing with the ordinary purchaser of a home. These purchasers are not architects, engineers, fire marshals, geologists, hydrologists or meteorologists. Many hazards, such as avalanches, blizzards, erosion, fire, floods, geologic faults, hurricanes, insect infestations, psychic impairment and latent defects, and tornadoes, may not be readily observable to the reasonable home buyer. If observed, the full risk might not reasonably be appreciated.[333]

Some hazards may seem well known and obvious.[334] However, in light of today's highly mobile population, such an assumption may be invalid. Natural geologic forces, such as weather patterns, may ebb and flow in cycles over millennia, but the

328 Gill v. Marquoit, 525 P.2d 1030 (Or. 1974); *see also* Nei v. Burley, 446 N.E.2d 674 (Mass. 1983) (no duty to disclose existence of seasonal watercourse across property).

329 *Id.* at 1032. Conversely, a Texas case held flood hazards are not a fact of which brokers should have known. Ozuna v. Delaney Realty, Inc., 600 S.W.2d 780 (Tex. 1980).

330 Beri, Inc. v. Salishan Properties, Inc., 580 P.2d 123 (Or. 1978).

331 Brown v. B&D Land Co., 823 P.2d 380 (Okla. Ct. App. 1991).

332 O'Malley v. United States Fidelity & Guaranty Co., 776 F.2d 494 (5th Cir. 1985). The section which collapsed was estimated to be about 50' by 30' by 10', and weighed 800,000 to 1,000,000 pounds.

333 As expressed in *Schipper v. Levitt & Sons*, 207 A.2d 314, 324 (N.J. 1965), "While the evidence may indicate that Messrs. Kreitzer and Schipper had become aware of the absence of a mixing valve, they may not have fully appreciated the extraordinary nature of the risk and, in any event, any omissions or contributing fault on their part would not preclude a finding that Levitt had been negligent and was to be held responsible to others who foreseeably might be injured as a result of its negligence."

334 In the famous California case of *Sprecher v. Adamson*, 636 P.2d 1121, 1122 (Cal. 1981) the downslope land was subject to landslide risks from the upslope property. The risk has been evident since the turn of the century. Yet people developed the area anyway. *See also* Easton v. Strassburger, 199 Cal. Rptr. 383 (Ct. App. 1984) (discussing soil problems and landslides in Diablo, California); Connor v. Great W. Sav. & Loan Ass'n, 73 Cal. Rptr. 369 (Cal. 1968) (discussing foundational problems due to expanding and contracting adobe soil in Ventura County, California); Oakes v. The McCarthy Co., 73 Cal. Rptr. 127 (Ct. App. 1968) (discussing improper grading and filling of real estate lots in Los Angeles County).

human reality is often limited to a short time span. Indeed, wherever someone new moves into an area, that person's framework of reality starts anew because of unfamiliarity with the natural perils.[335] People may move into an area during the dry cycle, and then be totally surprised by the wet cycle.

For example, the natural beauty of beachfront communities in Southern California may issue a "siren" call to new residents, who are unfamiliar with the risks of earthquake, fire, erosion, wind, flooding, landslides and ocean storms. Similarly, a person buying a house in a Southern California canyon may be unaware of the cycle of drought, wind, fire and floods that plague these seemingly beautiful, placid settings.[336] However, these dangers are well-known to community planners, real estate developers and environmentalists. Such dangers should also be communicated to the purchaser.

In addition, even long-term residents, who may have experienced the risks in the past, may have been lured into a false sense of security by decades of geologic quiescence. Geologic "stability" or quiescence leads to complacency. For example, landslides are not a major problem during drought years. Residents may also rush to rebuild on the assumption that it either cannot happen again or that improved construction techniques will prevent a recurrence.[337]

Even a knowledge of a general risk may be insufficient to warrant a finding of specific knowledge.[338] For example, there is obviously a general knowledge of earthquake risks in California, but these risks are actually pervasive throughout the country. The

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335 For example, a court noted that a resident of New York City could not be expected to have familiarity with the folklore of Nyack, New York. Plaintiff was, thus, unaware he contracted to purchase a haunted house, "widely reputed to be possessed by poltergeists." Stambovsky v. Ackley, 572 N.Y.S.2d 672, 674 (App. Div. 1991).

336 *See* Charles Fleming et al., *A Flammable Mix of Man and Nature*, NEWSWEEK, Nov. 8, 1993, at 55 (discussing the effect of the Santa Ana winds on fires in the Los Angeles Basin area). The Santa Ana winds blow in from the east, carrying the heat of the deserts. If the dry hillsides catch on fire when the Santa Ana winds are blowing, the fires rapidly spread and become more difficult to fight. Conversely, excessive, but rare, precipitation sometimes causes flash floods. *See, e.g.*, First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) (demonstrating damage and problems caused by flash floods in Los Angeles County). For a graphic portrayal of the fire-flood cycle in the San Gabriel Mountains outside Los Angeles, *see* JOHN MCPHEE, THE CONTROL OF NATURE 183-272 (1989). The chapter is aptly entitled "Los Angeles Against the Mountains."

337 A year after a levee broke in California's Central Valley, a person moved his trailer into the shadow of the dike that broke. He stated: "I figure, it can't happen again." Phil Garlington, *Living Along the Levees*, ORANGE COUNTY REGISTER, Dec. 28, 1997, at News 12, col. 1.

338 A Homeowners' Guide to Earthquake Safety may be delivered to the purchaser of real property in California. CAL. BUS. & PROF. CODE § 10149 (1997). An additional publication by the California Department of Real Estate, ENVIRONMENTAL HAZARDS—A GUIDE FOR HOMEOWNERS AND BUYERS (1991), is also made available. These brochures deal with general risks and do not address the need for a disclosure of specific risks in individual transactions.

specific risks in California vary by region, soil condition and contractors' methods. The differences in risks will often not be observable to the naked eye.[339]

A general risk of hurricanes exists for the Atlantic and Gulf Coasts, Puerto Rico, Hawaii and Guam. Yet no specific risk exists until a specific threat to a specific area has been identified. Similarly, almost any building can catch on fire, but some methods of construction, such as shake roofs, and landscaping, such as (dry) foliage close to an abode, are high risk in fire prone canyons of California. Prospective purchasers may also notice cracks, flaking, bulges, or peeling, but may not be able to assess the significance of these phenomena.

Geologic instability, such as with landslide areas, may be visible to observers.[340] Yet, the purchaser may reasonably rely upon the issuance of permits by the public agencies, the expertise of the developer and builder, and perhaps decades of "no problem," in acquiring the property. The purchaser is also probably unable to assess the stability of a slope.[341]

The collective knowledge of risks transcends individual knowledge. Thus, the risks posed by the New Madrid Fault may not be fully appreciated by residents of St. Louis, Little Rock or Memphis, but these risks are known to the scientific community. We expect architects, engineers and contractors to take these risks into consideration in exercising reasonable care in designing and constructing an edifice.[342] The standard of reasonable care at a minimum requires compliance with building codes, but more significantly, to apply the standard of a reasonable architect or engineer under the circumstances.

The geologic information that is reasonably available to the construction industry is just as available to the real estate industry. There is no hidden magic in ascertaining the presence of flood-

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339 A recent article in the Los Angeles Times indicates the living room of the house made famous by the famous TV family of Ozzie and Harriett Nelson lies astride the Hollywood fault. Philip Fradkin, *Fractured Dreams*, L.A. TIMES MAG. 16, 37 (Jan. 25, 1998).

340 As one law review commentator has written: "Malibu: Where the Slide Meets the Tide," Rob Risley, *Landslide Peril and Homeowners' Insurance in California*, 40 UCLA L. REV. 1145 (1993).

341 Even experts may have difficulty predicting the location and probability of a landslide. Robert B. Olshansky & J. David Rogers, *Unstable Ground: Landslide Policy in the United States*, 13 ECOLOGY L.Q. 939, 944 (1987).

342 For example, an Arkansas statute provides:

> Hereafter, neither the state, any county, city, township, village or private entity shall construct, add to, alter, retrofit, or remodel any public structure unless the structural elements are designed to resist the anticipated forces of the designated seismic zone in which the structure is located. . . .

1991 Ark. Acts 1100 § 4 (Arkansas Environmental Resident Design Act).

plains, avalanche perils, canyons, volcanoes, seismic fault lines and similar geologic hazards.[343]

CONCLUSION

As we enter the twenty-first century, the time has come to formally inter caveat emptor, an anachronistic doctrine of the sixteenth century. The reasons justifying the doctrine have long since been superseded by twentieth century developments. The New Jersey Supreme Court has led the way in *Strawn v. Canuso*.

Instead, we should formally adopt the Tort concept of a duty to disclose material geologic hazards in real estate transactions. Tort concepts of fraud, misrepresentation, and warranties have effectively rendered caveat emptor a shell of its former self. Statutory disclosure legislation has further diluted caveat emptor.

Expanding population pressures have increasingly settled in geologically fragile areas. Living in such areas therefore increases the risk that a "natural disaster" will result in loss of life and substantial property damage. The prospective residents should therefore be apprised of the risks before purchase.

343 For an example of the lack of warning by real estate brokers to purchasers of properties in the Los Angeles hills, *see* JOHN MCPHEE, THE CONTROL OF NATURE 251-54 (1989).

Our Constitutionalized Adversary System*

*Monroe H. Freedman***

In its simplest terms, an adversary system resolves disputes by presenting conflicting views of fact and law to an impartial and relatively passive arbiter, who decides which side wins what. In the United States, however, the phrase "adversary system" is synonymous with the American system for the administration of justice—a system that was constitutionalized by the Framers and that has been elaborated by the Supreme Court for two centuries. Thus, the adversary system represents far more than a simple model for resolving disputes. Rather, it consists of a core of basic rights that recognize and protect the dignity of the individual in a free society.

The rights that comprise the adversary system include personal autonomy, the effective assistance of counsel, equal protection of the laws, trial by jury, the rights to call and to confront witnesses, and the right to require the government to prove guilt beyond a reasonable doubt and without the use of compelled self-incrimination. These rights, and others, are also included in the broad and fundamental concept that no person may be deprived of life, liberty, or property without due process of law—a concept which itself has been substantially equated with the adversary system.[1]

An essential function of the adversary system, therefore, is to maintain a free society in which individual human rights are central.[2] In that sense the right to counsel is "the most precious" of

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1 GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 122 (1978).

2 MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble:

> The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

rights, because it affects one's ability to assert any other right.[3] As Professor Geoffrey Hazard has written, the adversary system "stands with freedom of speech and the right of assembly as a pillar of our constitutional system."[4] It follows that the professional responsibilities of the lawyer within such a system must be determined, in major part, by the same civil libertarian values that are embodied in the Constitution.

CRITICISMS OF THE ADVERSARY SYSTEM

In recent years, attacks upon the adversary system have been unprecedented in their breadth and intensity, and at times have been "scathing [and] venomous."[5] For example, at a conference of twenty-five of the country's "professional elite"[6] (most of them lawyers and judges) the adversary system was "thoroughly savaged."[7] Efforts by the conferees to produce an acceptable alternative to the adversary system ended unsuccessfully on a "note of resignation."[8]

It is not coincidental that these attacks on the adversary system have taken place in the context of critical analyses of lawyers' ethics. Critics concerned with the negative aspects of zealous, client-centered advocacy have recognized that the reforms they believe necessary in lawyers' ethics can come about only through a radical restructuring of the adversary system itself.

For example, former Federal Judge Marvin Frankel has proposed significant restrictions on confidentiality that would subordinate clients' interests to those of nonclients.[9] Mr. Frankel acknowledges that his proposals are "radical"[10] and that they would effect an "appreciable revolution" in procedure, in lawyer-client relations, and in the lawyer's self-image.[11] Significantly, although he professes "a profound devotion to a soundly adversary mode of reaching informed decisions,"[12] Mr. Frankel concedes that his reforms will be impossible "until or unless the adversary ethic comes to be changed or subordinated."[13] Indeed, an entire chapter of his book is entitled *Modifying the Lawyer's Adversary Ideal*,[14] and another chapter closes with a hope for "wiser, more

3 Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1957), *quoted with approval in* United States v. Cronic, 466 U.S. 648, 654 (1984).

4 HAZARD, *supra* note 1, at 123.

5 Jethro K. Lieberman, Book Review, 27 N.Y.L. REV. 695 (1981).

6 J.N. Green, *Foreword* to HAZARD, *supra* note 1, at ix.

7 HAZARD, *supra* note 1, at 123.

8 *Id.* at 126.

9 MARVIN E. FRANKEL, PARTISAN JUSTICE (1980).

10 *Id.* at 83.

11 *Id.*

12 *Id.* at 9.

13 *Id.* at 18.

14 *Id.* ch. 6.

effective ideas for breaking the adversary mold . . . ."[15] Thus, the adversary system has become a battleground on which fundamental issues of lawyers' ethics are being fought out.[16]

THE ADVERSARY SYSTEM AND INDIVIDUAL DIGNITY

It is not surprising to find a sharp contrast in the role of a criminal defense lawyer in a totalitarian society. As expressed by law professors at the University of Havana, "the first job of a revolutionary lawyer is not to argue that his client is innocent, but rather to determine if his client is guilty and, if so, to seek the sanction which will best rehabilitate him."[17] Similarly, a Bulgarian attorney began his defense in a treason trial by noting that "[i]n a Socialist state there is no division of duty between the judge, prosecutor, and defense counsel . . . . The defense must assist the prosecution to find the objective truth in a case."[18] In that case, the defense attorney ridiculed his client's defense, and the client was convicted and executed.[19] (Sometime later the verdict was found to have been erroneous, and the defendant was "rehabilitated.")

A Chinese lawyer, Ma Rongjie, has described the role of counsel in similar terms.[20] Lawyers are "servants of the state."[21] The function of the defense lawyer in criminal cases is, at most, to plead mitigating circumstances on behalf of clients whose guilt is largely predetermined.[22] Mr. Ma represented Jiang Qing, widow of Mao Tse Tung, in the trial of the "Gang of Four." Jiang Qing had requested a lawyer who would assert her innocence, but such a request was impossible to honor, Mr. Ma said. On the contrary, in representing "the criminals" (as Mr. Ma referred to his clients) he and the other defense lawyers conducted no investigations of their own, objected to no prosecution questions, cross-examined no prosecution witnesses, and called no witnesses themselves. Nor did the defense attorneys even meet with their clients. "There

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15 *Id.* at 100.

16 *See also* Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Post-Modern, Multi-Cultural World*, 38 WM. & MARY L. REV. 5 (1996); Monroe H. Freedman, *The Trouble with Post-Modern Zeal*, 38 WM. & MARY L. REV. 63 (1996).

17 JOHN KAPLAN, CRIMINAL JUSTICE 264-65 (1973); Jesse Berman, *The Cuban Popular Trials*, 69 COLUM. L. REV. 1317, 1341 (1969).

18 *Id.* KAPLAN at 264-65.

19 In the trial of anti-Hitler bomb plotters in July 1944, the court-appointed lawyer for one of the defendants "expressed horror at his client's actions and closed by demanding the death penalty for him." V.R. Berghahn, *The Judges Made Good Nazis*, N.Y. TIMES BOOK REV., Apr. 28, 1991, at 3 (reviewing I. MULLER, HITLER'S JUSTICE (Harvard 1991)).

20 *Chinese Lawyer Has High Hopes For His Country*, N.Y. TIMES, Jan. 6, 1982, at B5 [hereinafter *Chinese Lawyer*].

21 *See, e.g.*, MODEL RULES OF PROFESSIONAL CONDUCT Preamble (The phrases used in the United States to convey a similar notion is "officers of the court" or "officers of the legal system."

22 *Chinese Lawyer*, *supra* note 20.

was no need to talk to them," Mr. Ma explained. "The police and the prosecutors worked on the case a very long time, and the evidence they found which wasn't true they threw away."[23]

Commenting on a similar legal system in the Soviet Union, Alexander Solzhenitsyn wrote sardonically:[24]

> On the threshold of the classless society, we were at last capable of realizing the conflictless trial—a reflection of the absence of inner conflict in our social structure—in which not only the judge and the prosecutor but also the defense lawyers and the defendants themselves would strive collectively to achieve their common purpose.

Under the American adversary system, a trial is not "conflictless," because the lawyer is not the agent or servant of the state. Rather, the lawyer is the client's "champion against a hostile world"[25]—the client's zealous advocate against the government itself. Unlike Mr. Ma, therefore, the American defense lawyer has an obligation to conduct a prompt investigation of the case.[26] All sources of relevant information must be explored, particularly the client.[27] Rather than accepting the government's decision to preserve or destroy evidence, the defense lawyer has a duty to seek out information in the possession of the police and prosecutor.[28] Defense counsel has those duties, moreover, even though the defendant has admitted guilt to the lawyer and has expressed a desire to plead guilty.[29] As explained by the ABA *Standards for Criminal Justice*, the client may be mistaken about legal culpability or may be able to avoid conviction by persuading the court that inculpatory evidence should be suppressed; also, such an investigation could prove useful in showing mitigating circumstances.[30]

Such rules, reflecting a respect for the rights even of the guilty individual, are a significant expression of the political philosophy that underlies the American system of justice. As Professor Zupancic has observed, "[i]n societies which believe that the individual is the ultimate repository of existential values, his status vis-a-vis the majority will remain uncontested even when he is

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23 *Id.* (A decade later, the Chinese system remained the same). *See also* Sheryl WuDunn, *In Murky Trials, China Buries Tiananmen Affair*, N.Y. TIMES, Jan. 20, 1991, at L10 (describing the trials of the leaders of the 1989 democracy movement).

24 ALEKSANDR I. SOLZHENITSYN, GULAG ARCHIPELAGO 374 (Thomas P. Whitney trans., Harper & Row, 1974), *quoted in* Ralph J. Temple, *In Defense of the Adversary System*, 2(2) ABA LITIGATION, 43, 44 (Winter 1976).

25 *See* STANDARDS RELATING TO THE DEFENSE FUNCTION 146 (ABA Approved Draft, 1971).

26 STANDARDS FOR CRIMINAL JUSTICE 4-4.1 (ABA 1979).

27 *Id.* at 4-3.2, 4-4.1.

28 *Id.* at 4-4.1.

29 *Id.*

30 *Id.* Commentary to Standard 4-4.1.

accused of crime. He will not be an object of purposes and policies, but *an equal partner in a legal dispute . . . .*"[31]

THE ADVERSARY SYSTEM AND INDIVIDUAL RIGHTS

There is also an important systemic purpose served by assuring that even guilty people have rights. Jethro K. Lieberman has made the point by putting forth, and then explaining, a paradox:[32]

> The singular strength of the adversary system is measured by a central fact that is usually deplored: The overwhelming majority of those accused in American courts are guilty. Why is this a strength? Because its opposite, visible in many totalitarian nations within the Chinese and Russian orbits, is this: Without an adversary system, a considerable number of defendants are prosecuted, though palpably innocent. . . . In short, the strength of the adversary system is not so much that it permits the innocent to defend themselves meaningfully, but that in the main it prevents them from having to do so.

Lieberman concludes that "[o]nly because defense lawyers are independent of the state and the ruling political parties and are permitted, even encouraged, to defend fiercely and partisanly do we ensure that the state will be loathe to indict those whom it knows to be innocent." This benefit, however, is largely invisible. "We rarely see who is not indicted, we never see those whom a prosecutor, or even a governor or president might like to prosecute but cannot."[33]

There is another systemic reason for the zealous representation that characterizes the adversary system. Our purpose as a society is not only to respect the humanity of the guilty defendant and to protect the innocent from the possibility of an unjust conviction. Precious as those objectives are, we also seek through the adversary system "to preserve the integrity of society itself . . . [by] keeping sound and wholesome the procedure by which society visits its condemnation on an erring member."[34]

In an insightful article, Professor John B. Mitchell has explained how defense counsel serves to make our criminal procedures consistent with our ideals.[35] By providing a vigorous defense, even for someone the lawyer knows is guilty, Mitchell

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31 Bostjan M. Zupancic, *Truth and Impartiality in Criminal Process*, 7 J. CONTEMP. L. 39, 133 (1982) (emphasis added).

32 Lieberman, *supra* note 5.

33 *Id.*

34 Lon L. Fuller, *The Adversary System*, *in* TALKS ON AMERICAN LAW 35 (Harold Berman ed., 1960) (In more down-to-earth language, John Condon, a Buffalo criminal defense lawyer, once commented that he is "an expert in quality control.").

35 John B. Mitchell, *The Ethics of the Criminal Defense Attorney*, 32 STAN. L. REV. 293 (1980).

says, defense counsel "makes the screens work."[36] Mitchell's screens are the procedures and standards that we use to protect individual rights in the criminal process (and to protect those who should not become entangled in the criminal process). These standards include reasonable suspicion for a stop on the street, probable cause for an arrest, prosecutorial discretion to indict and go to trial, and guilt beyond a reasonable doubt at trial. Mitchell shows how zealous defense tactics have served to make the screens work as they should, for example, by improving the professionalism of police work.[37] In one community, defense counsel argued in narcotics cases that the prosecution had presented only the uncorroborated testimony of a single police officer. After four acquittals in such cases, the police began to corroborate drug buys with concealed transmitters and marked money. In other cases, acquittals resulted from the failure of investigators to dust for fingerprints; thereafter, a suspect tentatively identified as a robber was not tried because the fingerprints found on the cash drawer were not his. Also, the quality of eyewitness identifications has been improved by defense attacks on suggestive pretrial identification procedures.

Professor Lawrence H. Tribe has added that "procedure can serve a vital role as . . . a reminder to the community of the principles it holds important."[38] He explains:

> The presumption of innocence, the rights to counsel and confrontation, the privilege against self-incrimination, and a variety of other trial rights, matter not only as devices for achieving or avoiding certain kinds of trial outcomes, but also as affirmations of respect for the accused as a human being—affirmations that remind him and the public about the sort of society we want to become and, indeed, about the sort of society we are.

These rights to which Professor Tribe refers are essential components of the adversary system as it has evolved in American constitutional law.

The False Metaphor of Warfare

A familiar device of those who denigrate the adversary system is the metaphor and rhetoric of war, complete with "battlefield," "weapons," "ammunition," and lawyer-mercenaries who "marshal

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36 *Id.* at 298.

37 *Id.* at 306-7.

38 Laurence H. Tribe, *Trial by Mathematical Precision and Ritual in the Legal Process*, 84 Harv. L. Rev. 1329, 1391-92 (1971).

the forces" for a "grimly combative" engagement.[39] "We set the parties fighting," says Mr. Frankel.[40]

The true picture is rather different from the physical violence that is conjured up by that rhetoric. People who have grievances against one another come to lawyers as an alternative to fighting it out physically. "We" don't set the parties fighting. Rather, society, through the legal system, channels people's grievances into socially controlled, nonviolent means of dispute resolution. We—the lawyers—play an indispensable part in that constructive societal process.

A dramatic illustration of violence transformed into peaceable dispute resolution occurred in the 1960s, when a major social concern was to "get them out of the streets and into the courtrooms." The reference was to members of a racial minority with severe and longstanding grievances against American society. Riots, with arson, looting, and serious assaults, took place in several cities, including our national capital. With remarkable efficiency, and giving most citizens a sense that justice was indeed being done, the adversary system was put to work to further the ideals of equal protection of the laws and other fundamental concepts of our constitutional democracy.[41]

We are sometimes told that other countries, like Japan, are superior to the United States because they have fewer lawyers and less litigation.[42] But in place of a "litigation explosion,"[43] Japan has suffered a violence explosion. In addition to familiar crimes like illegal drugs, organized crime in Japan provides an extortion service known to police there as "intervention in civil affairs."[44] As reported in the *New York Times*, a factor in the strength of the yakuza, or organized criminals, is that the number of lawyers is limited. "Thus, many people with grievances, like victims of traffic accidents, hire yakuza to obtain damage pay-

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39 MARVIN E. FRANKEL, PARTISAN JUSTICE 11 (1980).

40 *Id.* (quoting C.P. CURTIS, IT'S YOUR LAW 1 (1954)). Mr. Curtis was sometimes careless in language and superficial in arguments in defense of adversarial ethics, which makes him a favorite target of critics. *See, e.g.*, John T. Noonan, Jr., *Other People's Morals: The Lawyer's Conscience*, 48 TENN. L. REV. 227 (1981).

41 *See* Frank I. Michelman, *The Supreme Court and Litigation Access Fees*, 1973 DUKE L.J. 1153, 1974 DUKE L.J. 527.

42 *See, e.g.*, V. P. Dan Quayle, Speech to the American Bar Association (Aug. 13, 1991) (this was a recurrent theme).

43 *See, e.g.*, Marc S. Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986) (The "explosion" of tort litigation in the United States is a myth.); Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) about Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); Kenneth I. Chesebro, *A Galileo's Retort: Peter Huber's Junk Scholarship*, 42 AMER. U. L. REV. 1637 (1993); Coyle & MacLachlan, *Business Cases Clog Courts*, NAT'L L.J. 1, Aug. 7, 1995 (business cases, not tort cases, are crowding the federal court docket).

44 Steven R. Weisman, *Is Big Business Getting Too Cozy with the Mob?* N.Y. TIMES, Aug. 29, 1991, at A4.

ments [in exchange for] a percentage of the payment." The yakuza offer their services openly, some from storefront offices. In effect, "the mob in Japan . . . fills a function played by lawyers in other societies."[45] In place of the metaphorical violence of American litigation, therefore, the paucity of lawyers in Japan has resulted in violence in fact.

THE ADVERSARY SYSTEM IN CIVIL LITIGATION

The adversary system has also been instrumental, principally in civil litigation, in mitigating the grievances of several minorities, women, consumers, tenants, citizens concerned with health and safety in our environment, and others. As one who celebrates these advances in individual rights and liberties (and those in criminal justice too), I view with concern and some suspicion the calls for basic changes in adversarial zeal. Of course, it is preferable to negotiate a satisfactory resolution of a dispute. Experience teaches, however, that those in power do not ordinarily choose to negotiate unless there is a credible threat of successful litigation.

In a report to his Board of Overseers in 1983, Harvard President Derek Bok decried "the familiar tilt in the law curriculum toward preparing students for legal combat," and called instead for law schools to train their students "for the gentler arts of reconciliation and accommodation."[46] These are themes long associated with retired Chief Justice Warren Burger.[47]

In response to such critics, Professor Owen Fiss has observed that they see adjudication in essentially private terms. Viewing the purpose of civil lawsuits to be the resolution of discrete private disputes, they find the amount of litigation we encounter to be evidence of "the needlessly combative and quarrelsome character of Americans."[48] Fiss, on the other hand, sees adjudication in more public terms. That is, civil litigation is "an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals."[49] Thus, we turn to courts not because of some quirk in our personalities, but because we need to, and we train our students in the tougher arts not because we take a special pleasure in combat, but to equip them to secure all that the law promises.[50] Fiss concludes:[51]

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45 *Id.*

46 *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984), *citing* Derek C. Bok, *A Flawed System*, HARV. MAG. 45 (May-June, 1983), *reprinted in*, N.Y. ST. B.J. 8 (Oct. 1983), N.Y. ST. B.J. 31 (Nov. 1983); *excerpted in*, 33 J. LEGAL EDUC. 579 (1983).

47 *Id. citing* Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982); Warren E. Burger, *Agenda for 2000 A.D.—A Need for Systemic Anticipation*, 70 F.R.D. 83, 93-96 (1976).

48 Fiss, *supra* note 46, at 1089-90.

49 *Id.*

50 *Id.*

> To conceive of the civil lawsuit in public terms as America does might be unique. I am willing to assume that no other country . . . has a case like *Brown v. Board of Education*, in which the judicial power is used to eradicate the caste structure. I am willing to assume that no other country conceives of law and uses law in quite the way we do. But this should be a source of pride rather than shame. What is unique is not the problem, that we live short of our ideals, but that we alone seem willing to do something about it. Adjudication American-style is not a reflection of our combativeness but rather a tribute to our inventiveness and perhaps even more to our commitment.

Comparing "adjudication American-style" with that in England, Ralph Temple has noted[52] that there are no lawsuits in Britain challenging the legality of an oppressive law, no injunctions against illegal government actions, and no class actions to protect civil liberties. British law "has yet to discover the principle flowing from *Marbury v. Madison* . . . , that a healthy legal system requires that the courts have the power to declare unlawful those acts of the majority, through its legislature or its executive, which are abusive."[53] Mr. Temple notes that there is no greater animosity between Irish Protestants and Catholics than there was between Southern whites and blacks. Nevertheless, the bitterness has been deeper and the violence greater in Ireland because the British legal system is "incapable of producing social revolution and justice through its legal system—incapable of producing a *Brown v. Board of Education*, a *Baker v. Carr*, or a *United States v. Richard Nixon*."[54] That is, through our constitutional adversary system, "[t]ime and again the heat of our social struggles has been effectively transmuted into courtroom battles, and our society is the stronger for it."[55]

As indicated by their citation of *Brown v. Board of Education* and other cases of national import, Professor Fiss and Mr. Temple are directing their attention principally to civil litigation in which the outcome of the particular case is an expression of public policy that extends beyond the interests of the immediate parties. The point they make is of broader significance, however, and is not limited to the overtly "political" case or even to the leading case that establishes the new rule.

For example, a case might hold for the first time that a tenant has a right, apart from the express terms of her lease, to safe and habitable premises, or that a consumer can avoid an unconsciona-

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51 *Id.*

52 Ralph J. Temple, *In Defense of the Adversary System*, 2(2) A.B.A. LITIG. 43, 47 (Winter 1976).

53 *Id.*

54 *Id.*

55 *Id.*

ble sales-financing agreement, or that an employee under a contract terminable at will can sue for wrongful discharge, or that an insurance company can be held liable in punitive damages for arbitrarily withholding benefits due under a policy. Such a case, establishing new rights and deterrents against harmful conduct through civil litigation, is also "a tribute to our inventiveness," using "state power to bring a recalcitrant reality closer to our chosen ideals." If the leading case is to have meaning, however, it will come to fruition in the series of everyday cases that follow and apply it, cases that will truly make the ideal into reality.

In that sense, even ordinary personal injury litigation is an expression, procedurally and substantively, of important public policies. Through the adversary system we provide a social process through which a person with a grievance against another can petition the government for redress in a peaceable fashion. Echoing Professor Fiss and Mr. Temple, therefore, the Supreme Court has noted that "[o]ver the course of centuries, our society has settled upon civil litigation as a means for redressing grievances, resolving disputes, and vindicating rights."[56] The Court added: "That our citizens have access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride."[57]

The Civil Trial and the Constitution

Rights like trial by jury and the assistance of counsel—the cluster of rights that comprise constitutional due process of law—are most important when the individual stands alone against the state as an accused criminal. The fundamental characteristics of the adversary system also have a constitutional source, however, in our administration of civil justice. Just as a judge in criminal litigation must be impartial,[58] a judge in a civil trial "best serves the administration of justice by remaining detached from the conflict between the parties."[59] A judge who departs from the essentially passive role that is characteristic of the adversary system deprives civil litigants of due process of law.[60] Also, proper representation in civil as well as criminal cases demands that attorneys take an active role in investigating, analyzing, and advocating their clients' cases. This is "the historical and the necessary way in which lawyers act within the framework of our system of juris-

56 Zauderer v. Office of Disciplinary Counsel, 105 U.S. 626, 642-43 (1985).

57 *Id.* at 643.

58 United States v. Marzano, 149 F.2d 923, 926 (2d Cir. 1945) ("[The trial judge] must not take on the role of a partisan; he must not enter the lists; he must not by his ardor induce the jury to join in a hue and cry against the accused. Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge.").

59 Gardiner v. A.H. Robins Company, Inc., 747 F.2d 1180, 1192 (8th Cir. 1984).

60 *Id.* at 1183, 1191.

prudence to promote justice and to protect their clients' interests."[61]

The Supreme Court has held that the Due Process Clauses protect civil litigants who seek recourse in the courts, either as plaintiffs attempting to redress grievances or as defendants trying to maintain their rights.[62] Due process in civil cases is not identical, of course, to due process in serious criminal cases. For example, as in criminal cases not involving imprisonment, the individual's right to an opportunity to be heard does not necessarily mean that the state has an obligation to provide counsel to a civil litigant at state expense.[63] The Supreme Court has recognized, however, that in civil cases as well as criminal, due process would be denied if a court were arbitrarily to refuse to hear a party through retained counsel.[64] Also, the right to trial by jury in the traditional common law manner is guaranteed in civil actions at law by the Seventh Amendment[65] and by similar state constitutional provisions.

It is misleading to suggest, therefore, that the adversary system is part of our constitutional tradition in the administration of criminal, but not civil, justice. In fact, the adversary system in civil litigation has played a central role in fulfilling the constitutional goals "to . . . establish Justice, insure domestic Tranquillity, . . . promote the general Welfare, and secure the Blessings of Liberty . . . ."[66] This has been recognized by the Supreme Court in its holdings that civil litigation is part of the First Amendment right to petition, through the courts, for redress of grievances.[67] That right is not limited to political issues or litigation against the gov-

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61 Hickman v. Taylor, 329 U.S. 495, 511 (1947) (Jackson, J., concurring).

62 Logan v. Zimmerman Rush Co., 455 U.S. 422, 429 (1982). *See also* James R. Pielemeier, *Due Process Limitations on the Application of Collateral Estoppel Against Nonparties to Prior Litigation*, 63 B.U. L. REV. 383, 397-401 (1983).

63 Lassiter v. Department of Social Services, 452 U.S. 18 (1981); *compare*, however, Santosky v. Kramer, 455 U.S. 745 (1982); In Matter of the Appeal in Gila County Juvenile Action, 637 P.2d 740 (Ariz. 1981).

64 Powell v. Alabama, 287 U.S. 45, 69 (1932); Goldberg v. Kelley, 397 U.S. 254, 270 (1970).

A plurality opinion in *Walters v. National Association of Radiation Survivors*, 473 U.S. 305 (1985), upheld a 120-year-old statute (since repealed) that put a $10 limit on lawyers' fees in applications for benefits before the Veterans Administration. The plurality found the procedures consistent with due process because veterans' groups make trained advocates available to veterans free of charge, the veterans' applications are unopposed by any adversary, and the veterans' burden of proof is less than a preponderance of the evidence.

Despite those unique factors, Justice Stevens is correct in concluding that the plurality opinion "does not appreciate the value of individual liberty." 473 U.S. 305, 358 (Stevens, J., dissenting). *See also* Linda Himelstein, *This Is One Court with a Shortage of Lawyers—Judge Lets It Be Known: Veterans Need Legal Help, Fast*, LEGAL TIMES, May 4, 1992, at 1.

65 Sartor v. Arkansas Natural Gas Co., 320 U.S. 620, 627 (1944); Stevens v. Howard D. Johnson, 181 F.2d 390, 394 (4th Cir. 1950).

66 U.S. CONST. preamble.

67 Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 741 (1983); United Mine Workers v. Illinois Bar Association, 389 U.S. 217, 223 (1967).

ernment, but embraces "any field of human interest" and any controversy, including even personal injury cases between private parties.[68]

The line of cases establishing the constitutional foundations of civil litigation begins, appropriately, with a civil rights case, *NAACP v. Button*.[69] The State of Virginia had sought to prohibit NAACP lawyers from soliciting clients to litigate school desegregation cases. The state's position was that it had a legitimate, traditional interest in proscribing solicitation by lawyers who have a financial interest (as the NAACP lawyers did)[70] in stirring up litigation.

Interestingly, even in dissenting in *Button*, Justice Harlan made the same point that Professor Fiss was later to make:

> We have passed the point where litigation is regarded as an evil that must be avoided if some accommodation short of a lawsuit can possibly be worked out. Litigation is often the desirable and orderly way of resolving disputes of broad public significance, and of obtaining vindication of fundamental rights.[71]

The majority also saw the case in terms of broad public policy. In the context of NAACP objectives, litigation is "not a technique of resolving private differences"; rather it is a "means for achieving the lawful objectives of equality of treatment by . . . government," and "a form of political expression" that may well be "the sole practical avenue open to a minority to petition for redress of grievances."[72]

Button was followed a year later by *Brotherhood of Railroad Trainmen v. Virginia*.[73] That case involved a union practice of soliciting job-related personal injury litigation on behalf of lawyers selected by the union. The two dissenting Justices pointed out that, unlike *Button*, the *Brotherhood* case did not involve "a 'form of political expression' to secure, through court action, constitutionally protected civil rights."[74] On the contrary, they noted, "[p]ersonal injury litigation is not a form of political expression, but rather a procedure for the settlement of damage claims."[75] The Court nevertheless held, following *Button*, that "in regulating the practice of law a State cannot ignore the rights of individuals secured by the Constitution."[76] The Court recognized that the sub-

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68 United Mine Workers v. Illinois Bar Association, 389 U.S. 217, 223, *quoting* Thomas v. Collins, 323 U.S. 516, 531 (1945).

69 NAACP v. Button, 371 U.S. 415 (1963).

70 *See id.* at 457 (Harlan, J., dissenting).

71 *Id.* at 453.

72 *Id.* at 429.

73 Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1 (1964).

74 *Id.* at 10 (Clark, J., dissenting) (quoting NAACP v. Button, 371 U.S. at 429).

75 *Id.* (Clark, J., dissenting).

76 *Id.* at 6.

stantive (personal injury) rights involved had been conferred by Congress in the Safety Appliance Act and the Federal Employers' Liability Act, "statutory rights which would be vain and futile" if workers, through a selected spokesperson, could not receive counsel regarding civil litigation.[77]

The next case in the *Button* line is *United Mineworkers of America v. Illinois State Bar Association*,[78] where the union had employed a lawyer on salary to represent members in litigating workers' compensation claims. The state enjoined the union activity as unauthorized practice of law, distinguishing *Button* as being concerned chiefly with "litigation that can be characterized as a form of political expression."[79]

The Supreme Court responded, however, that its decisions in *Button* and *Brotherhood of Railroad Trainmen* cannot be so narrowly limited. Although the litigation in question was not "bound up with political matters of acute social moment," the First Amendment extends beyond political activity. "Great secular causes, with small ones," are protected, and are "not confined to any field of human interest."[80] Subsequently, in response to a further effort to limit the scope of these cases, the Supreme Court reiterated in *United Transportation Union v. State Bar of Michigan* that the union's activity "undertaken to obtain meaningful access to the courts [in personal injury cases] is a fundamental right within the protection of the First Amendment."[81]

The underlying substantive rights in the union cases had been established by federal statute, but that fact is not controlling. On the contrary, the right to petition for redress of grievances in a tort case in a state court is protected even if the state litigation has a chilling effect on federal statutory rights. For example, in *Bill Johnson's Restaurants, Inc. v. NLRB*,[82] an employer had sued a waitress in state court for libel and other torts, demanding relief that included $500,000 in punitive damages. The alleged libel had been committed during efforts to organize a union. The employer had threatened to "get even" with the picketers "if it's the last thing I do," and he had warned the waitress's husband that he would hurt the couple financially.[83] After a four-day hearing, an NLRB administrative law judge found that the employer had filed the state civil action to retaliate against the employee's exercise of rights under the National Labor Relations Act, and also found that the allegedly libelous statements were

77 *Id.* at 5-6.
78 United Mine Workers v. Illinois Bar Association, 389 U.S. 217 (1967).
79 *Id.* at 221.
80 *Id.* at 233 (quoting Thomas v. Collins, 323 U.S. 516, 531 (1945)).
81 United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 585 (1971).
82 Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983).
83 *Id.* at 733.

truthful. Relying upon those findings, the NLRB enjoined the employer from prosecuting the state action, and the Ninth Circuit affirmed the Board's order.

The Supreme Court acknowledged that the broad, remedial provisions of the National Labor Relations Act were intended to guarantee employees the right to engage in concerted activity without fear of restraint or interference from the employer.[84] The Court also recognized the chilling effect on that right of a state lawsuit, particularly when filed against an hourly-wage waitress who lacks the backing of a union.[85] Nevertheless, the Court unanimously reinstated the state tort action.

In doing so, the Court relied in part on an earlier holding that the antitrust laws do not prohibit filing of a lawsuit, regardless of the plaintiff's anticompetitive motive in doing so, unless the suit is a "mere sham."[86] Thus, as long as litigation has a "reasonable basis," as distinguished from being "baseless litigation," the First Amendment right to petition for redress of grievances through civil litigation prevails over legislative policy.[87] Not only does the party to a labor dispute have a constitutional right to seek local judicial protection from tortious conduct, but the state has "a compelling interest in maintaining domestic peace"[88]—a fundamental social goal that is fostered by civil litigation.

Bill Johnson's Restaurants was reaffirmed in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*[89] The Court explained that the First Amendment right to litigate cannot be overcome by the "sham" exception unless the lawsuit is "objectively baseless" or "objectively meritless."[90] To satisfy that test, the litigation must be "so baseless that no reasonable litigant could realistically expect to secure favorable relief."[91] All that is necessary is an objective "chance" that a claim "may" be held valid.[92] In that event, the First Amendment right is secure, even if the litigant has no subjective expectation of success and is acting maliciously.[93]

The union cases discussed earlier—*Brotherhood of Railroad Trainmen, United Mine Workers*, and *United Transportation*

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84 *Id.* at 740.

85 *Id.* at 741.

86 California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 511 (1972). (This rule is often referred to as the *Noerr* doctrine, from Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).).

87 *Bill Johnson's Restaurants*, 461 U.S. at 744.

88 *Id.* at 741.

89 Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 59 (1993).

90 *Id.* at 60.

91 *Id.* at 62.

92 *Id.*

93 *Id.*

Union—involved associational activity. That is, union members had joined together to protect common interests, including the right to petition for redress of grievances through the courts. Those opinions therefore discuss both the right of association and the right to petition, each of which is separately protected by the First Amendment. The right to petition, however, is not granted solely to associations. Indeed, the Court in *Brotherhood of Railroad Trainmen* expressed its concern with "the rights of individuals" to petition for redress of grievances.[94] Moreover, it would be anomalous if an individual were to have a lesser right than a group to seek redress in the courts.[95]

The Jury as an Aspect of the Adversary System

Another constitutional element of our adversary system is the jury. In criminal cases the right to trial by jury is guaranteed by Article III, section 2, of the Constitution and by the Sixth Amendment; in civil cases at law, trial by jury is required by the Seventh Amendment. State constitutions have similar provisions.

The jury serves in criminal cases to prevent oppression by the government.[96] As observed by Justice Lewis F. Powell, Jr. (who was neither a radical nor a cynic):[97]

> Judges are employees of the state. They are usually dependent upon it for their livelihood. And the use of economic pressure to express displeasure with decisions unfavorable to those in power is not novel. Congress' exclusion of the Justices of the Supreme Court from the general pay increase for other federal judges [in 1965] is an unfortunate example . . . .

Justice Powell went on to note that reprisals against jurors for verdicts disagreeable to those in power are less likely because they

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94 Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 6 (1964). *See also* Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983).

95 The fact that an association was involved cannot have been the controlling factor. Efforts to secure low-cost medical care may be subject to state interference, despite the fact that an association is involved. Garcia v. Texas State Board of Medical Examiners, 421 U.S. 995 (1975), *aff'g* 384 F. Supp. 434 (W.D. Tex. 1974). However, a dictum in a plurality opinion in *Walters v. National Association of Radiation Survivors* says of the union cases that "the First Amendment interest at stake was primarily the right to associate." 473 U.S. 305, 335 (1985). The entire dictum is one paragraph in a 19-page opinion. Moreover, the *Walters* plurality dictum does not discuss the right to petition for redress of grievances, nor does it cite the Court's opinion in *Bill Johnson's Restaurants*, unanimously upholding the right to petition. In addition, one of the strongest arguments for the defendant waitresses in *Bill Johnson's Restaurants* was that the state litigation had been brought by their employer for the purpose of chilling their constitutional and statutory rights to associate in a union; even so, it was the employer's right to petition, not the employees' right of association, that prevailed. It seems unlikely, therefore, that the plurality opinion in *Walters* signals an overruling of the cases upholding the First Amendment right to petition for redress of grievances.

96 Duncan v. Louisiana, 391 U.S. 145, 155 (1968).

97 Justice Lewis F. Powell, Jr., *Jury Trial of Crimes*, 23 Wash. & Lee L. Rev. 1, 9-10 (1966).

would involve far greater political risks.[98] As the Supreme Court has held, therefore, the jury provides "an inestimable safeguard against the . . . compliant, biased, or eccentric judge."[99]

Trial by jury is particularly important in criminal litigation, but its value in civil trials is considerable. As noted by Alexander Hamilton in *The Federalist No. 83*, the most effective argument against adoption of the Constitution without a Bill of Rights was the absence of a requirement of trial by jury in civil cases.[100] The Supreme Court has therefore recognized that the civil jury is "so fundamental and sacred" that it should be "jealously guarded" by the courts.[101]

One of our most respected federal trial judges, William G. Young, has emphasized the effect of the jury in democratizing the law:[102]

> Without juries, the pursuit of justice becomes increasingly archaic, with elite professionals talking to others, equally elite, in jargon the elegance of which is in direct proportion to its unreality. Juries are the great leveling and democratizing element in the law. They give it its authority and generalized acceptance in ways the imposing buildings and sonorous openings cannot hope to match.

Thus, the American jury system is "our most vital day-to-day expression of direct democracy," in which "citizens are themselves the government."[103] In this governmental role, juries have the power to nullify legislation—to "limit . . . the power of legislatures who eventually must countenance the non-enforceability of [criminal] laws which citizens are unwilling to enforce."[104] Similarly, jurors can bring the moral sense of the community to bear in civil cases in finding for plaintiffs or defendants and in assessing damages.

Also, as Chief Justice Rehnquist has reiterated, the "very inexperience [of jurors] is an asset because it secures a fresh perception of each trial, avoiding the stereotypes said to infect the

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98 *Id.* at 10. *See U.S. Judge Retracts Criticism of a Juror*, N.Y. TIMES, Feb. 10, 1987, at B1. The judge publicly apologized for criticizing the sole juror who had held out for acquittal after a two-week trial, thereby causing a mistrial. On its editorial page the *Times* denounced the criticism of the juror as an "outrage." N.Y. TIMES, Feb. 12, 1987, at A30.

99 *Duncan*, 391 U.S. at 156.

100 THE FEDERALIST No. 83 (Alexander Hamilton), *cited in In re* U.S. Financial Securities Litigation, 609 F.2d 411, 420 n.29 (9th Cir. 1979).

101 Jacob v. City of New York, 315 U.S. 752, 752-53 (1942), *quoted in In re* U.S. Financial Securities Litigation, 609 F.2d at 421. *See also* Dimick v. Schiedt, 293 U.S. 474, 485-86 (1935); Beacon Theatres v. Westover, 359 U.S. 500 (1959).

102 WILLIAM G. YOUNG, TRYING THE HIGH PROFILE CASE, text at note 26 (1984).

103 *Id.* text at note 20.

104 Paul D. Carrington, *Trial by Jury*, DUKE L. MAG. 13 (vol. 5, no. 1, 1987). *See also*, Alan W. Scheflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972); PATRICK DEVLIN, TRIAL BY JURY 160 (1956); NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW (Harvard, 1995).

judicial eye."[105] Dean Paul Carrington adds the pungent comment that juries are "a remedy for judicial megalomania, the occupational hazard of judging."[106]

THE SEARCH FOR AN ALTERNATIVE SYSTEM

In both criminal and civil cases, therefore, the adversary system of justice comprises a constitutional system that includes the right to retained counsel, trial by jury, and other processes that are constitutionally due to one who seeks to redress a grievance through litigation. It is not surprising, therefore, that those who urge fundamental changes in the adversary system typically ignore the constitutional impediments to their proposals.

In one of the most important critiques of the adversary system, for example, Marvin Frankel acknowledges that the adversary system is "cherished as an ideal of constitutional proportions" in part because "it embodies the fundamental right to be heard."[107] He recognizes too that his proposals for change run counter to constitutional interests in "privacy, personal dignity, security, autonomy, and other cherished values."[108] His book, however, includes barely a paragraph describing in positive terms the right to counsel,[109] refers only in passing to the privilege against self-incrimination,[110] and makes scant if any reference to privacy, personal dignity, autonomy, and other fundamental rights that gain vitality from the adversary system. Although the thesis of his book is that the adversary system too often sacrifices truth to "other values that are inferior, or even illusory,"[111] Mr. Frankel does not identify which of our "cherished rights" are in fact inferior or illusory, nor does he suggest how those rights are to be subordinated without doing violence to the Constitution.

Those who would either replace or radically reform the adversary system must ultimately sustain the burden of showing how their proposals can be reconciled with constitutional rights. Even before that point is reached, however, they must demonstrate, in their own utilitarian terms, that the adversary system is inferior to the proposed alternatives. To the contrary, however, the available evidence suggests that the adversary system is the method of dispute resolution that is most effective in determining truth, that

105 Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 355 (1979) (Rehnquist, J., dissenting) (quoting HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY (1966)).

106 Carrington, *supra* note 104.

107 MARVIN E. FRANKEL, PARTISAN JUSTICE 12 (1980).

108 *Id.*

109 *Id.* at 5-6.

110 *Id.* at 76.

111 *Id.* at 12.

gives the parties the greatest sense of having received justice, and that is most successful in fulfilling other social goals as well.

One system of justice that recently received serious although brief consideration is the way in which trials are conducted under autocratic regimes like the Soviet Union and China, where lawyers are "servants of the state." For example, at the conference of "members of the country's professional elite" referred to earlier,[112] the discussants considered whether the United States should adopt "the system of adjudication used in the countries that describe themselves as socialist," including the (then-Communist) Soviet Union.[113] Specifically, the advocate would not be chosen by and owe primary allegiance to a party to the litigation; rather, each lawyer would be a member of the court's staff, responsible to the court for investigating and presenting an "assigned" side of the case.[114] This proposed abandonment of the traditional ideal of the right to counsel was not limited to civil cases; indeed, it was being contemplated principally for criminal cases.[115] The discussants concluded, however, that despite the "perversions" of client-centered advocacy, "the detachment of advocate from client might beget worse."[116] It was on that "note of resignation" that the discussion of alternatives to the adversary system "died out."[117]

More sophisticated (and more persevering) critics have turned to the inquisitorial systems of continental European democracies for an alternative to the adversary system.[118] The central characteristic of the inquisitorial model is the active role of the judge, who is given the principal responsibility for searching out the relevant facts. In an adversary system the evidence is presented in dialectical form by opposing lawyers; in an inquisitorial system the evidence is developed in a predominantly unilateral fashion by the judge, and the lawyers' role is minimal.[119]

One contention of those who favor the inquisitorial model is that the adversary system limits the factfinder to two sources of data or to one of two rival factual conclusions.[120] Frequently, of course, there is no need for more than two submissions, for example, if the sole issue is whether one car or the other ran the red light, or whether the defendant was the man who had the gun. In

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112 HAZARD, *supra* note 1.

113 *Id.* at 125-26.

114 *Id.*

115 *Id.*

116 *Id.* at 126.

117 *Id.*

118 *See, e.g.*, JOHN H. LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY (1977); LLOYD L. WEINREB, DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES (1977).

119 *See* Mirjan Damaska, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083, 1087-90 (1975).

120 Peter Brett, *Legal Decisionmaking and Bias: A Critique of an Experiment*, 45 U. COLO. L. REV. 1, 23 (1973).

such a case, it is ordinarily appropriate for the factfinder to rely upon two sets of conflicting data, which may come, of course, from numerous sources.

Where there truly are more than two sides of a case, however, the adversary system provides a variety of devices for presenting them. Such procedures include joinder of plaintiffs and defendants, impleader, interpleader, intervention, class actions with more than one class representative and with subclasses, and amicus presentations. To take a relatively simple illustration, a single adversary proceeding may involve the following diverse submissions of fact: (a) D1 was negligent in driving; (b) D2 was negligent in repairing the brakes; (c) D3 manufactured a car with a faulty brake-system design; (d) D4 supplied the car manufacturer with brakes that had a latent defect; (e) P was actually the only party at fault; and (f) P was contributorily negligent.

Effectiveness in the Search for Truth

Those who favor the inquisitorial model also contend that it produces a larger body of relevant information for the decisionmaker than does an adversarial system. For example, Professor Peter Brett argues that the inquisitorial system is preferable because the judge is not limited to the material that the opposing parties choose to present. Rather, the judge "may if he wishes" actively search out and incorporate in his decision materials that neither party wishes to present.[121] All other considerations, Professor Brett asserts, "pale into insignificance beside this one."[122] Unfortunately, however, just as the inquisitorial system "allows the fact-finder free rein to follow all trails,"[123] it also allows the fact-finder to ignore all trails but the one that initially appears to be the most promising. It does so, moreover, without the corrective benefit of investigation and presentation of evidence by active adversaries.

This concern was expressed in a prominent thesis that was put forth by Professor Lon L. Fuller and adopted by a Joint Conference of the American Bar Association and the Association of American Law Schools.[124]

> What generally occurs in practice is that at some early point a familiar pattern will seem to emerge from the evidence; an accustomed label is waiting for the case and without awaiting further proofs, this label is promptly assigned to it. It is a

121 *Id.* at 9.

122 *Id.* at 22.

123 *Id.*

124 Lon L. Fuller, *The Adversary System*, *in* Talks on American Law 34 (Harold Berman ed., 1971); *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159 (1958).

> mistake to suppose that this premature cataloguing must necessarily result from impatience, prejudice or mental sloth. Often it proceeds from a very understandable desire to bring the hearing into some order and coherence, for without some tentative theory of the case there is no standard of relevance by which testimony may be measured. But what starts as a preliminary diagnosis makes a strong imprint on the mind, while all that runs counter to it is received with diverted attention.
>
> An adversary presentation seems the only effective means for combating this natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known.

As suggested by its adoption by the Joint Conference, Professor Fuller's thesis is undoubtedly shared by the overwhelming majority of American lawyers and judges, on the basis of both intuition and practical experience.

The validity of the Fuller thesis can be considered in both theoretical and practical contexts. If the inquisitorial judge is to pursue the truth of a particular matter, where does she start? The "most sophisticated modern view" in Europe recognizes an inescapable "circularity" in the inquisitorial judge's role: "You cannot decide which facts matter unless you have already selected, at least tentatively, applicable decisional standards. But most of the time you cannot properly understand these legal standards without relating them to the factual situation of the case."[125] In addition, "[i]t stands to reason that there can be no meaningful interrogation [of witnesses by the judge] unless the examiner has at least some conception of the case and at least some knowledge about the role of the witnesses in it."[126]

The solution in Europe to the inquisitorial judge's "circularity" problem is the investigative file, or dossier. The dossier is prepared by the police, who, in theory, act under the close supervision of a skilled and impartial judge or examining magistrate. "The practice, however, is in striking contrast to [this] myth."[127] The examining magistrate's investigative and supervisory role is minimal. The dossier—on which the trial judge relies to decide what facts and law are relevant to the case—is little more than a file compiled by the police.[128] "The plain fact is that examining magistrates are no more likely than comparable American officials to leave their offices, conduct prompt interrogations of witnesses or

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125 Damaska, *supra* note 119, at 1087.

126 *Id.* at 1089.

127 Abraham S. Goldstein and Martin Marcus, *The Myth of Judicial Supervision in Three 'Inquisitorial' Systems: France, Italy, and Germany*, 87 YALE L.J. 240, 248 (1977); *See also* Thomas Weigand, *Continental Cures for American Ailments, in* 2 CRIME AND JUSTICE 381 (Norval Morris & Michael Tonry eds., 1980); Edward A. Tomlinson, *Nonadversarial Justice: The French Experience*, 42 MD. L. REV. 131 (1983).

128 Goldstein and Marcus, *supra* note 127, at 247-50, 259.

of accused persons, or engage in searches or surveillance. For such tasks, they rely almost entirely upon the police."[129] The trial judge, in turn, tends to rely heavily upon the police-developed dossier.[130]

The prosecutorial bias that inevitably results from this process is confirmed by the personal experience of Bostjan M. Zupancic. Professor Zupancic clerked for several investigating magistrates in the Circuit Court of Ljubljana, Yugoslavia. "One cannot start from the presumption of innocence" under an inquisitorial system, he writes:[131]

> In purely practical terms, if one opens a file in which there is only a police report and the prosecutor's subsequent request for investigation and develops one's thought processes from this departing point—one cannot but be partial. A clear hypothesis is established as to somebody's guilt, and the investigating magistrate's job is to verify it. But just as a scientist cannot start from the premise that his hypothesis is wrong, so the investigating magistrate cannot start from the premise that the defendant is innocent.

Professor Zupancic found that, as a result, prosecutorial bias on the part of the inquisitorial judge is not a matter of probability; it is a certainty.[132]

Meanwhile, the prosecutor plays a distinctly secondary role to the police and the judge, and defense counsel is "particularly inactive."[133] "Rarely does [the defense attorney] conduct his own investigation in preparing for trial. Even if his client should suggest someone who he thinks will offer testimony favorable to the defense, he often passes the name on to the prosecutor or judge without even troubling first to interview the witness himself."[134] Very likely, European defense lawyers do not conduct the kind of thorough interview of a potential witness that is professionally required in the United States, because they could be charged with a criminal offense or with professional impropriety for obstructing justice if they did so.[135]

Only in the rare case in which the defense lawyer assumes an active—that is, an adversarial—role, is there an exception to the typical situation in which the inquisitorial judge follows the course plotted out by the police.[136] In those few cases, "genuine

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129 *Id.* at 250.
130 *Id.* at 266.
131 BOSTJAN M. ZUPANCIC, CRIMINAL LAW: THE CONFLICT AND THE RULES 54 n.45.
132 *Id.* at 54-63 & n.45.
133 *Id.* at 265.
134 *Id.*
135 Damaska, *supra* note 119, at 1088-89.
136 Goldstein and Marcus, *supra* note 127, at 265-66.

probing trials" do take place.[137] The European experience itself seems to confirm, therefore, that adversarial presentation by partisan advocates is more effective in developing relevant material than is unilateral investigation by a judge.

Our constitutional adversary system is based in part on the premise that the adversary system is more effective in the search for truth. As the Supreme Court has reiterated in an opinion by Justice Powell:[138]

> The dual aim of our criminal justice system is "that guilt shall not escape or innocence suffer," . . . . To this end, we have placed our confidence in the adversary system, entrusting to it the primary responsibility for developing relevant facts on which a determination of guilt or innocence can be made.

In the criminal process there are special rules, particularly the exclusionary rules, that recognize values that take precedence over truth. The adversary system should be even more effective in determining truth in the civil process, therefore, where such values are not ordinarily applicable. A study of civil litigation in Germany conducted by Professor Benjamin Kaplan (later a Justice in the Supreme Judicial Court of Massachusetts) found the judge-dominated search for facts in German civil practice to be "neither broad nor vigorous," and "lamentably imprecise."[139] Professor Kaplan concluded that the adversary system in this country does succeed in presenting a greater amount of relevant evidence before the court than does the inquisitorial system.[140]

There is support for that conclusion in experiments conducted by members of the departments of psychology and law at the University of North Carolina.[141] One study[142] tested the thesis, which I had put forward, that the most effective means of determining

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137 *Id.* at 265.

138 United States v. Nobles, 422 U.S. 225, 230 (1975) (quoting Berger v. United States, 295 U.S. 78, 88 (1935), and citing United States v. Nixon, 418 U.S. 683, 709 (1974)); Williams v. Florida, 399 U.S. 78, 82 (1970); Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).

139 Benjamin Kaplan, *Civil Procedure—Reflections on the Comparison of Systems*, 9 BUFF. L. REV. 409, 420-21 (1960).

140 *Id.*

141 The first of those studies purports to validate the Fuller thesis. John Thibault et al., *Adversary Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386 (1972). The researchers conclude: "The adversary mode apparently counteracts judge or juror bias in favor of a given outcome and thus indeed seems to combat, in Fuller's words, a 'tendency to judge too swiftly in terms of the familiar that which is not yet fully known.'" *Id.* at 401. However, the methodology of that study has been subjected to devastating criticism. *See* Mirjan Damaska, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083 (1975); Peter Brett, *Legal Decisionmaking and Bias: A Critique of an Experiment*, 45 U. COLO. L. REV. 1 (1973). Although those criticisms destroy the usefulness of the study, they do not, of course, invalidate the Fuller thesis. Also, the subsequent studies, which are discussed below, have avoided the methodological errors of the first study.

142 E. Allan Lind et al., *Discovery and Presentation of Evidence in Adversary and Nonadversary Proceedings*, 71 MICH. L. REV. 1129 (1973).

truth is to place upon a skilled advocate for each side the responsibility of investigating and presenting the facts from a partisan perspective.[143] Although that proposition is related to the Fuller thesis, its focus is different. Professor Fuller was concerned with the fact-finder and with her mental processes in developing a working hypothesis and then unconsciously becoming committed to it prematurely. The second thesis focuses on the adversaries and on their incentive to search out and to present persuasively all material that is useful to each side, thereby providing the fact-finder with all parts of the whole.

The study produced conclusions that tend to confirm both the Fuller thesis, regarding the judge's psychological risk of premature commitment to a theory, and the second thesis, regarding the adversaries' incentive to investigate diligently. First, as soon as they become confident of their assessment of the case, inquisitorial fact investigators tend to stop their search, even though all the available evidence is not yet in.[144] Second, with one exception of major importance, even adversary investigators have a similar but lesser tendency to judge prematurely.[145]

Third (the crucial exception), when adversary fact investigators find the initial evidence to be unfavorable to their clients, they are significantly more diligent than are inquisitorial investigators in seeking out additional evidence.[146] The researchers concluded, therefore, that the adversary system "does instigate significantly more thorough investigation by advocates initially confronted with plainly unfavorable evidence."[147] That is, in those situations of "great social and humanitarian concern" the adversary system maximizes the likelihood that all relevant facts will be ferreted out and placed before the ultimate fact finder.[148]

Another finding, which surprised the researchers, is that the opponent of an adversarial lawyer transmits more facts that are unfavorable to her own client. Apparently, awareness that one has an adversarial counterpart is a significant inducement to candor.[149]

I do not mean to suggest that these studies prove that the adversary system is preferable as a means to determine truth. Such experimental efforts to replicate real life and to quantify it statistically are surely limited in their usefulness. On the other

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143 The proposition was taken from Monroe H. Freedman, *Professional Responsibilities of the Civil Practitioner*, *in* EDUCATION IN THE PROFESSIONAL RESPONSIBILITIES OF THE LAWYER 151, 152 (Donald T. Weckstein ed., 1970)

144 Lind et al., *supra* note 142, at 1141.

145 *Id.* at 1141-43.

146 *Id.*

147 *Id.* at 1143.

148 *Id.*

149 *Id.* at 1136.

hand, the research that has been done provides no justification for preferring the inquisitorial search for truth or for undertaking radical changes in our adversary system.

The Flawed Analogy to Nonlitigation Settings

Opponents of an adversarial model sometimes argue that "others searching after facts—in history, geography, medicine, whatever—do not emulate our adversary system."[150] That proposition, even if accurate, hardly demonstrates that an adversary system is not preferable when society seeks to resolve disputes that have arisen between contesting parties. There are inevitable differences between, say, a scientist seeking a cure for cancer, and two parties who blame each other for an automobile accident. The laboratory is not a courtroom, where each contesting party is asserting her truth as exclusive of the other's and each is demanding her due.

Moreover, in the case of the research scientist, truth is ultimately knowable in an absolute sense—either a cure works or it doesn't. In most litigation, however, we can rarely be certain that a verdict is synonymous with "truth." This is so, unhappily, even when the verdict is based on scientific evidence and guilt has been determined "beyond a reasonable doubt."[151]

The modes of inquiry, therefore, tend to reflect the kind of "truth" that is being sought and the manner in which the issue has been presented for resolution.

Also, the accuracy of the proposition that other disciplines do not follow some form of adversary process is highly doubtful, at least in the breadth in which it is stated.[152] Moreover, to the extent that other disciplines do not use adversarial or dialectical techniques in attempting to resolve disputed issues, they suffer for it.

Assume, for example, a historian trying to determine whether Richard III ordered the murder of the princes in the Tower, or whether it was militarily justifiable for the United States to devastate Nagasaki with an atomic bomb. Obviously, the historian's inquiry would not be conducted in a courtroom, nor would con-

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150 Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. Pa. L. Rev. 1036 (1975). *See also* Brett, *supra* note 141, at 23.

151 *See, e.g.*, Monroe H. Freedman, *Pale Horse, Pale Justice*, Legal Times, Mar. 23, 1992.

152 A professor of biological sciences and dean of Columbia College has explained "the process of scientific investigation" in part as follows:

> We scientists love to do experiments that show our colleagues to be wrong and, if they are any good, they love to show us to be wrong in turn. *By this adversarial process*, science reveals the way nature actually works.

Robert E. Pollack, *In Science, Error Isn't Fraud*, N.Y. Times, May 2, 1989, at A25 (emphasis added).

testing advocates be available to appear and present their cases. However, the conscientious historian's search for truth ideally would start from a position of neutrality and would necessarily include a careful evaluation of evidence marshaled in conflicting memoirs of those who were involved or by other historians and commentators strongly committed to differing views.

Unfortunately, though, even scholarly historians (like judges and magistrates) are not always neutral in their search for truth and are not always truthful in their use of research data. For example, the prominent military historian, S.L.A. Marshall, wrote a book purporting to show that 75 percent of infantrymen will not fire their weapons when engaging the enemy.[153] The book has been described as "fundamental" and has had a "profound influence" in military education.[154] Nevertheless, three historians have concluded, more than four decades later, that "[t]he systematic collection of data that made Marshall's ratio of fire so authoritative appears to have been an invention."[155] Another scandal raising questions of methodology in historical research has related to the role of German industrialists in supporting Hitler. The controversy has involved charges and counter-charges of ideological bias, professional jealousy, and even fraudulent use of sources.[156] As a consequence of this fiercely adversarial debate, historians are "learning [a lesson] very fast . . . . [T]hey are checking their quotations and footnotes thrice over."[157] Apparently, therefore, historical research and analysis has gained in reliability as a result of adversarial challenge.

In medicine there is ordinarily less partisanship than in historical research, because there is less room for the play of political ideology. There is also less personal interest and bias than in the typical contested lawsuit. Nevertheless, anyone about to make an important medical decision for oneself or one's family would be well advised to get a second opinion. And if the first opinion has come from a doctor who is generally inclined to perform radical surgery, the second opinion might well be solicited from a doctor who is generally skeptical about the desirability of surgery. According to one study, about 20 percent of surgical operations have been unnecessary.[158] A bit more adversariness in the decision-

153 S.L.A. MARSHALL, MEN AGAINST FIRE (1947).

154 Richard Halloran, *Pivotal S.L.A. Marshall Book on Warfare Assailed as False*, N.Y. TIMES, Feb. 19, 1989, at A1.

155 *Id.*

156 *A Quarrel Over Weimar Book*, N.Y. TIMES, Dec. 23, 1984, at A1; *Academic Fraud Inquiry Dropped*, N.Y. TIMES, Jan. 3, 1985, at C22.

157 V.R. Berghahn, *Hitler's Buddies*, N.Y. TIMES BOOK REV., Aug. 2, 1987, at 12 (reviewing DAVID ABRAHAM, THE COLLAPSE OF THE WEIMAR REPUBLIC, 2d ed. (1987)).

158 Nancy Hicks, *A Second Opinion Reduces Surgery*, N.Y. TIMES, June 19, 1973, at 21.

making process might well have saved a gall bladder here or a uterus there.[159]

Moreover, it is well established in our law that the extent of due process—meaning adversary procedures—properly varies depending upon what is at stake in the litigation.[160] In medical research, prior to World War II, the material rewards of biological research were small, and scientific chicanery was limited.[161] Since then, however, publication of discoveries has become essential to professional advancement and to obtaining large grants of money for research.[162] The resultant scandals in the search for scientific truth—including those at the Sloan-Kettering Institute, the University of Cincinnati, Emory University, the University of Utah, M.I.T., and Harvard University—have become sufficiently numerous[163] to warrant editorial comment in the *New York Times*.[164] One result is that scientists have come to recognize the need for an adversarial check in the form of replication of research by a skeptical colleague.[165]

In addition, the National Institutes of Health established an Office of Scientific Integrity to adjudicate charges of scientific fraud.[166] The office was originally designed by scientists "who wanted to keep lawyers and legal procedure out of their affairs."[167] But the methods of scientists proved to be a "recipe for disaster"

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159 *See, e.g.*, Gina Kolata, *Rate of Hysterectomies Puzzles Experts*, N.Y. TIMES, Sept. 20, 1988, at C1.

160 C. BLACK, CAPITAL PUNISHMENT 32-35 (1974).

161 Ernest Borek, *Cheating in Science*, N.Y. TIMES, Jan. 22, 1975, at L39. Nevertheless, recent scholarship has raised serious questions about the integrity of such figures as Louis Pasteur. A Princeton professor maintains, among other things, that Pasteur, to head off competitors, purposely withheld reporting a method he used to prepare the chicken cholera vaccine. Lawrence K. Altman, M.D., *Revisionist History Sees Pasteur As Liar Who Stole Rival's Ideas*, N.Y. TIMES, May 16, 1995, at C1, (discussing G.L. GEISON, THE PRIVATE SCIENCE OF LOUIS PASTEUR). *See also* Dinitia Smith, *Scholar Who Says Jung Lied Is at War with Descendants*, N.Y. TIMES, June 3, 1995, at L1.

162 *Id.*

163 Philip J. Hilts, *Misconduct in Science Is Not Rare, a Survey Finds*, N.Y. TIMES, Nov. 12, 1993, at A22; *Scientist Fined for Killing Cells Created in Lab by a Colleague*, N.Y. TIMES, Aug. 31, 1994, at A16; Lawrence K. Altman, M.D., *The Doctor's World; Her Study Shattered the Myth that Fraud in Science is a Rarity*, N.Y. TIMES, Nov. 23, 1993, at C3; Ernest Borek, *Cheating in Science*, N.Y. TIMES, Jan. 22, 1975, at L39; *Harvard Scientists Retract Publications on Medical Findings*, N.Y. TIMES, Nov. 22, 1986, at L9; *Study Accusing Researchers of Inaccuracies Is Published*, N.Y. TIMES, Jan. 15, 1987, at A18; *Fraud and Garbage in Science*, N.Y. TIMES, Jan. 29, 1987, at A26; *Cholesterol Researcher Is Censured for Misrepresenting Data in Article*, N.Y. TIMES, July 18, 1987, at L8; Malcolm W. Browne, *Physicists Debunk Claim of a New Kind of Fusion*, N.Y. TIMES, May 3, 1989, at A1; *Inquiry to Reopen in Science Dispute*, N.Y. TIMES, Apr. 30, 1989, at L29. *See also* Murray Levine, *Scientific Method and the Adversary Model: Some Preliminary Thoughts*, 29 AM. PSYCHOLOGIST 661, 669-76 (1984).

164 *Credit and Credibility in Science*, N.Y. TIMES, July 26, 1987, § 4, at 26.

165 *Id.*

166 *See* Gina Kolata, *Inquiry Lacking Due Process*, N.Y. TIMES, June 15, 1996, at C3.

167 *Id.*

when applied to adjudication.[168] The OSI irreparably damaged reputations and careers.[169] As the scientist who first headed up the office acknowledged, he had had no notion of the importance of "fair play and all that."[170] The former director of NIH said that she was "horrified" by the results. "I came full circle to thinking that an adversarial system was necessary," she said, to avoid "a hideous travesty of justice."[171]

In anthropology, "checks and balances" to "control subjectivity" are now recognized as essential.[172] The controversy over a recent book critical of Margaret Mead's work on Samoa illustrates the problem. Professor Derek Freeman has contradicted Professor Mead's highly influential conclusions regarding child raising, sexual promiscuity, competitiveness, violent behavior, psychological disturbances, and jealousy. He attributes her alleged errors to factors familiar to any adversary cross-examiner: lack of opportunity to observe accurately (she was unfamiliar with the language and lived with expatriate Americans rather than in a Samoan household) and bias (she was intent upon proving that culture controls the character of individuals and societies).[173] Professor Freeman, on the other hand, is known to have strong ideological biases of his own.[174]

As for the merits of the disputed issues, "anthropologists suspect that, as often turns out to be the case, neither [Professor Mead nor Professor Freeman] is totally right or totally wrong."[175] That is, Professor Freeman's critical approach has corrected and supplemented Professor Mead's work, which still provides correction and supplementation to his.

Even the field of fossil history—where political or social ideology would appear to have scant influence—has produced evidence that the inquisitorial system is a flawed one for seeking truth. Some of the most influential geological findings in the past quarter century have recently produced charges of "willfully tr[ying] to dupe the scientific community" and "the biggest paleontological fraud of all time." These charges have been met with countercharges of "lies," "malicious bias," "professional jealousy," and "trying to cash in."[176]

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168 *Id.*

169 *Id.*

170 *Id.*

171 *Id.*

172 N.Y. TIMES, Feb. 6, 1973, at E8.

173 Edwin McDowell, *New Samoa Book Challenges Margaret Mead's Conclusions*, N.Y. TIMES, Jan. 31, 1983, at A1 and C21.

174 *Id.* at C1.

175 *Id.* at A1.

176 William E. Stevens, *Scientist Accused of Faking Findings*, N.Y. TIMES, Apr. 23, 1989, § 1, at 24.

In short, probably any search for truth can benefit from "checks and balances" to "control subjectivity." That is particularly true when, as in legal disputes, there are conflicting versions of fact, disagreements over policy, and uncertainty resulting from personal interest and bias.

A Paradigm of the Inquisitorial Search for Truth

One final illustration. There is considerable concern with the broad, unsupervised prosecutorial discretion that pervades American criminal justice and that produces a large proportion of negotiated guilty pleas. Suppose, then, that we wanted to find out whether judicial supervision of prosecutions, which is characteristic of the inquisitorial systems in France, Italy, and Germany, successfully avoids the problems associated with prosecutorial discretion and plea bargaining.

If we followed an inquisitorial mode of investigation, we might seek out one of the country's leading authorities on criminal law and procedure, whose background includes experience in law practice, service as a consultant to a presidential crime commission, and scholarship in the field. In short, we might turn to Abraham S. Goldstein, Sterling Professor of Law at Yale University, and provide him with grants to employ the assistance of several qualified investigators. If we did, Professor Goldstein could be expected to produce a lengthy, scholarly, and carefully reasoned article in the *Yale Law Journal* entitled, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*.[177]

We might also expect this paradigm of inquisitorial investigation and fact-finding to settle the issue, but we would be disappointed. In the best adversarial tradition, two other scholars, also with impressive credentials, would write a response to Professor Goldstein and his co-author. The response would charge that the authors had "misinterpreted the most important characteristics of the procedures they intended to describe" and that "their descriptions are substantially misleading," because they were "preoccupied with their own false model" and "captives of the myths they seek to explode."[178]

The irony, of course, is that the scholars who adopted an adversarial posture to challenge Professor Goldstein's inquisitorial findings are two of the leading proponents of the inquisitorial system as a means for determining truth. If we cannot trust that system successfully to seek out the truth in the ideal circum-

177 Goldstein and Marcus, *supra* note 127, at 240.

178 John H. Langbein and Lloyd L. Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 Yale L.J. 1549, 1550, 1552, 1567 (1978).

stances of Professor Goldstein's study, however, how much confidence can we have in the inquisitorial system in the courtroom?

The discussion thus far has focused principally on the relative effectiveness of the adversarial and inquisitorial systems in determining truth. The conclusion advanced is that the adversary system is superior, because it mitigates the decisionmaker's tendency to judge prematurely and uses the incentive of the contesting parties to search out relevant facts, policies, and authorities. At the very least, however, I think it is fair to say that the proponents of an inquisitorial system have not made their case, on grounds of truth-seeking, for abandoning the adversary system in favor of the inquisitorial system.[179]

INDIVIDUALIZED DECISIONMAKING VERSUS BUREAUCRACY

There is more to the adversarial–inquisitorial dispute, however, than efficacy in the search for truth. There is also an underlying difference in basic attitudes towards official power and individual rights. The conservative political philosopher, Ernst van den Haag, once described the genius of American democracy, in which official power is subject to checks and balances, as "institutionalized mutual mistrust." It has been observed similarly that "a cornerstone of our adversary system . . . is distrust of bureaucratic and rigidly controlled decisionmaking."[180] That is, the adversary system reflects not only respect for the individual, but also a lesser respect for bureaucratic authority.

A tennis anecdote helps to illustrate the point. In the 1937 Wimbledon Tournament, Don Budge won a decisive break point in

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179 Moreover, the proposals for adopting the inquisitorial system in this country seem so academic as to be out of touch with reality. An indefatigable proponent of the German system, Professor John H. Langbein, candidly admits that if he had to choose between the German procedure that he praises, and the American procedure that he denigrates, he might have qualms about choosing the German system. John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 853 (1985). The reason is that he probably would be litigating in Cook County, Illinois, where "judges are selected by a process in which the criterion of professional competence is at best an incidental value." *Id.* Professor Langbein then implies that he would take his chances with a random choice among federal judges, but he is not clear that he would. I, surely, would not.

To institute the inquisitorial system in this country, with a judiciary properly trained on the German model for its special functions, would require that we would first have to restructure our educational system. Career judges would have several years of legal education, pass a first state examination, and apprentice for two and one-half years. *Id.* at 848-49. (With which judges in Cook County would they apprentice?) After a second examination, a judicial career would begin in the lowest courts; promotion would be based upon an "efficiency rating" determined by such criteria as caseload discharge rates, reversal rates, and evaluation by other judges. *Id.* at 850 (By which judges in Cook County would they be evaluated?) Entirely apart from the formidable constitutional difficulties, therefore, the institution of the inquisitorial system in the United States does not seem imminent for purely practical reasons.

180 Stephen A. Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 VA. L. REV. 1, 19 (1978).

his semifinals match because an official called his opponent's ball out when, as Budge knew, it was in. Budge therefore gave back the point by making an obvious error in returning the next serve. After Budge had won the match, he was approached by Baron Gottfried von Cramm, the German star, whom he was to play in the finals. To Budge's surprise, von Cramm criticized Budge for having engaged in unsportsmanlike conduct. It is preferable, von Cramm explained, for a player to suffer an injustice than for an official to be embarrassed by exposure of the erroneous call that caused the injustice.[181] As that anecdote suggests, there are political, social, and humanist values that are expressed in the American preference for a system in which there is relatively greater regard for the individual litigant and less for the bureaucratic decisionmaker.

One of the ways in which our constitutionalized adversary system controls the bureaucratic tendencies of a professional judiciary is through trial by jury.[182] As discussed earlier, the jury system serves several crucial functions—preventing governmental oppression, countering compliant, biased, or eccentric judges, leveling and democratizing the law, bringing a fresh perspective to familiar fact patterns, and governing by direct democracy. Achievement of those goals requires an independent jury that could not exist under the judicial control that is characteristic of an inquisitorial judge.[183] The judge would investigate the facts; the judge would select the witnesses; the judge would conduct virtually all of the examination of witnesses; and, then, the judge would instruct the jury. In short, the trial would most closely resemble the presentation of evidence by a prosecutor to a grand jury. Although the grand jury was conceived as a safeguard against government abuse, it has become so dominated by the prosecutor that there are frequent suggestions that it be abolished as useless. In an inquisitorial system, we could expect a similar fate for the petit jury.

Professor Damaska provides another perspective on the greater tolerance in continental Europe for bureaucratic justice. He has found in Anglo-American law a striving for "the just result" in the light of the particular circumstances of the individual case.[184] He contrasts this traditionally strong attachment to "individualized justice" with the relatively greater concern of continental decisionmakers for "uniformity and predictability: they are

181 Bodo, *Whatever Happened to Sportsmanship?* EASTERN REV. 29 (Oct. 1983).

182 WILLIAM G. YOUNG, TRYING THE HIGH VISIBILITY CASE (1984), text at notes 18-26; Saltzburg, *supra* note 180, at 19.

183 In fact, the "episodic" nature of investigation and presenting evidence in Germany makes a jury a practical impossibility. Kaplan, *supra* note 139, at 418-19.

184 Damaska, *supra* note 119, at 1103-4.

much more ready than the common-law adjudicator to neglect the details of the case in order to organize the world of fluid social reality into a system."[185] For anyone trained in the American constitutional system, there is something chilling about a bureaucratic determination to organize the world of fluid social reality into a uniform and predictable system, without regard to the particular cases of individuals.

The Sense of Having Been Treated Fairly

The concept of individualized justice connotes two related but distinct ideas. First, there is individualized justice in the sense of respect for the individual in the light of his or her particular circumstances. Second, there is the idea of individual autonomy—that each of us should have the greatest possible involvement in, if not control over, those decisions that affect our lives in significant ways. With regard to the latter, the empirical studies that have been done suggest, again, a preference for the adversary system over the inquisitorial.

In one such study,[186] the experimenters sought to use the insight of John Rawls[187] that individuals who are ignorant of their own status of relative advantage or disadvantage will choose ideal principles of justice. Subjects in one experimental group were told the details of a dispute, which strongly favored one party, but they were not told which side they would ultimately have to assume. Thus, the subjects were kept behind a Rawlsian "veil of ignorance" regarding their tactical interest in the procedure that might be used to resolve the dispute. Subjects in another experimental group were told about the same dispute but were informed at the outset which side they would be on. The subjects of the study were thus in three groups—those who were ignorant of what their status would be, those who knew that they would have the advantageous position, and those who knew that they would be in the disadvantageous position.

Members of each group were next presented with various models of hearing procedures, ranging from inquisitorial to adversarial, with mixed procedures in between; that is, the procedural models were designed to provide dispute resolution choices ranging from maximum decisionmaker control to maximum party control. The subjects were then asked to express their preferences among the procedural models.

"One of the clearest findings in our data," the researchers concluded, "is that the adversary procedure is judged by all of our

185 *Id.* at 1104.
186 John Thibault et al., *Procedural Justice as Fairness*, 26 Stan. L. Rev. 1271 (1974).
187 John Rawls, A Theory of Justice (1971).

subjects—both those in front of and behind the veil of ignorance—to be the most preferable and the fairest mode of dispute resolution."[188] More significantly, those subjects who were seeking the fairest procedural model in ignorance of what their own status would be were the most strongly in favor of the adversary system.[189]

Similar results were obtained in further studies conducted in the United States and Germany.[190] One conclusion of the experiment in Germany is that the results in the United States were not significantly affected by cultural bias.[191] Most important, when the ultimate decisional power is in a third party, "participants in both Hamburg and Chapel Hill prefer to use an adversary procedure," in which their control over the presentation of the case is highest.[192]

Researchers also have conducted studies to determine whether a litigant's acceptance of the fairness of the actual decision is affected by the litigation system used. Their conclusion is that "the perception of the fairness of an adversary procedure carries over to create a more favorable reaction to the verdict for persons who directly participate in the decisionmaking process."[193] This is true "regardless of the outcome."[194] Therefore, "the attorney should see himself as the agency through which the client exercises salutary control over the process. In this client-centered role, the attorney best functions as an officer of the court in the sense of serving the wider public interest."[195]

The Problem of Socioeconomic Unfairness

There is, nevertheless, a troubling question, about the fairness of a client-centered adversary system in which the wealth of the contending parties—and, therefore, the quality of the representation—may be seriously out of balance. "How much justice can you afford?" the lawyer in a *New Yorker* cartoon pointedly asked a client.

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188 Thibault et al., *supra* note 186, at 1287-88.

189 *Id.* at 1288-89.

190 Stephen LaTour et al., *Procedure: Transnational Perspectives and Preferences*, 86 Yale L.J. 258 (1976).

191 Assuming that there is a culturally determined bias in the United States in favor of an adversary system, that would be a reason to retain that system. Also, Professor Hazard has suggested another perspective on the cultural aspects of procedural models. In our political culture, he notes, "the interrogative system of trial could well turn out to resemble congressional hearings." Hazard, *supra* note 1, at 128.

192 LaTour et al, *supra* note 190, at 282.

193 Laurens Walker et al., *The Relation Between Procedural and Distributive Justice*, 65 Va. L. Rev. 1401, 1416 (1979).

194 *Id.* at 1417.

195 *Id.*

One response is that unequal justice is one of the costs of the American economic system. How much food, housing, clothing, education, or other basic needs can one afford? Sadly, equal justice may be far down on the list for a major portion of our citizens. The criticism is not of an adversary system but of a capitalist one.

Yet an expressed purpose of the Constitution is to "establish Justice,"[196] the judiciary is one of the three branches of our constitutional structure, and due process of law and equal protection under the law are explicitly guaranteed to all persons.[197] If another system of justice were likely to reduce significantly the unfairness caused by an imbalance in litigation resources, without introducing comparable unfairness, one would have to embrace it.

There is no persuasive evidence, however, that the inquisitorial system does that job. At least in personal injury cases, the contingent fee is a great equalizer of legal resources between rich and poor, as demonstrated after the industrial disaster in Bhopal.[198] Legal clinics and prepaid legal plans also mitigate the problem. Moreover, if we are sufficiently concerned about unequal advocacy to revolutionize our system of justice, a more sensible course would be a genuine effort to equalize advocacy through a vastly expanded system of government-supported legal aid.[199]

In any event, it is doubtful that we would be better off with a system of inquisitorial judges instead of zealous advocates. As long as we maintain a capitalist society (or something approximating one) the judges will come predominantly from the upper socioeconomic classes. The judges will also be interested in advancing their careers. One need not be a Marxist to expect class, political, and other bias to play a significant part in inquisitorial judging.[200] Even in the face of superior resources, therefore, representation by one's own advocate before a jury of one's peers seems a safer choice.

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196 U.S. CONST. preamble.

197 U.S. CONST. amends. V, XIV.

198 After thousands of people were killed and injured by the release of toxic gas in Bhopal, India, lawyers from the United States took on a multinational corporation on behalf of the impoverished victims. MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 255 (1990).

199 FRANKEL, *supra* note 107, at ch. 9.

200 Inquisitorial judging by professional magistrates does not seem to have solved those problems in Belgium. According to the *New York Times*, the vast majority of Belgians consider their judicial system to be corrupt. Tina Rosenberg, *Barbarity in Belgium*, Oct. 21, 1996, at A16. There is a "tradition of cronyism" in which "[political party] loyalty weighs more heavily than competence." Marlise Simons, *Sex, Lies and the Courts: A Fury Rises in Belgium*, N.Y. TIMES, Oct. 19, 1996, at L3. An editorial in the Belgian newspaper *De Morgen* said: "Incompetent magistrates are not punished, the promotion of cronies is not questioned, unsolved crimes are accepted as destiny, [and] investigations are shelved in dubious ways . . . ." *Id.*

CONCLUSION

The adversary system, like any human effort to cope with important and complex issues, is sometimes flawed in execution. It is both understandable and appropriate, therefore, that it be subjected to criticism and reform. The case for radically restructuring it, however, has not been made. On the contrary, based upon reason, intuition, experience, and some experimental studies, there is good reason to believe that the adversary system is superior in determining truth when facts are in dispute between contesting parties.

Even if it were not the best method for determining the truth, however, the adversary system is an expression of some of our most precious rights. In a negative sense, it serves as a limitation on bureaucratic control. In a positive sense, it serves as a safeguard of personal autonomy and respect for each person's particular circumstances. The adversary system thereby gives both form and substance to the humanitarian ideal of the dignity of the individual. The central concern of a system of professional ethics, therefore, should be to strengthen the role of the lawyer in enhancing individual human dignity within the adversary system of justice.

A Rare First Edition: J.W. Towner, Orange County's Original Superior Court Judge

*Thomas F. Crosby, Jr.**

In this inaugural number of the law review of the nascent Chapman University School of Law, it is fitting to reflect on the remarkable life of a pioneer of the legal profession in Orange County.[1] He was a lawyer and a judge; but he was also a teacher, businessman, soldier, itinerant preacher, religious cultist, communist,[2] and advocate and practitioner of free love, among other things. Seemingly, given some of these activities and interests, this man never could have achieved prominence as a founder and leading citizen of the bucolic, close-knit county that was, not so much later, to produce a President of the United States and such benign and celebrated landmarks as the Crystal Cathedral, Knott's Berry Farm, and Disneyland—but he did.

James William Towner was that man. Governor Robert W. Waterman appointed him one of the five members of the Board of Commissioners to form the proposed new County of Orange.[3] It

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1 A sketch of this article has previously appeared. Thomas F. Crosby, Jr., *Judge not, lest . . .*, 39 ORANGE COUNTY LAWYER, at 12 (Dec. 1997).

2 The word "communist" was widely used in the 19th century Utopian movement and quite commonly in Towner's correspondence; but it did not then carry the connotation of oppressive dictatorship and state-ownership of the means of production, as was the case after the Soviet Union, China, and other countries attempted implementation of the theories of Marx and Engels. Instead of "communist," for present purposes it is perhaps more accurate to interchange "communard" or "communalist" to indicate membership in a local community run on varying principles of common striving, common ownership, and close social bonds.

3 A copy of the appointment, dated March 14, 1889, is in the author's files, a courtesy of the owner of the original. A.B. Cauldwell, John Kellom, William McFadden, and R.Q. Wickham were the other commissioners. JAMES SLEEPER, TURN THE RASCALS OUT! 107 (Trabuco Canyon 1973) [hereinafter SLEEPER]. They elected Towner to head the Commission at the first meeting on March 22. Leo J. Friis, Speech to the Orange County Bar (c. 1960) (available at the Santa Ana Central Public Library, Biography Envelope 38) [hereinafter Friis, Speech]. Spencer Olin states, though, that Towner "was appointed by the governor . . . to serve as chairman of the committee that organized Orange County." Spencer

would be severed from Los Angeles County in a June 4, 1889 election, if two-thirds of the local electors so voted. (The final tally was 2,509 to 500 in favor, despite Anaheim, Buena Park, and Fullerton voting heavily against.)[4] Towner was easily elected Orange County's first superior court judge over two opponents in the same year, serving until he retired in January 1897.[5] We revisit that period in his life anon.

Judge Towner was surprisingly adaptable and mobile and a remarkably free spirit for his, or most any, time. One historian labeled him a "[19th] century drifter" whose "abilities were great, his intelligence acute and his capacity for self-renewal enormous."[6] In addition to practicing a number of trades and professions, Towner lived for substantial periods in the East, Midwest, and West. He saw parts of the South, too, during Civil War service.

Towner was born in Willsboro in upstate New York, on August 18, 1823.[7] John Adams and Thomas Jefferson were still alive

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Olin, *Bible Communism and the Origins of Orange County,* CALIFORNIA HISTORY, vol. LVIII, no. 3, at 221 (California Historical Society 1979) [hereinafter Olin]. In this rare instance, however, Olin is wrong. Towner's appointment from the governor carries no such notation; and the official records of the Commission show that it held its organizational meeting on March 22, 1889, at Towner's law office and he was unanimously elected President of the Commission and Wickham was unanimously elected Secretary. (Record of the Proceedings of the Board of Orange County Commissioners, March 22-June 10, 1889, Orange County Archives.)

4 LEO J. FRIIS, ORANGE COUNTY THROUGH FOUR CENTURIES 97 (Santa Ana 1965) [hereinafter FRIIS]; PAMELA HALLAN-GIBSON, THE BENCH AND THE BAR 27 (Chatsworth 1989) [hereinafter HALLAN-GIBSON]. (Concerning the latter work, see Thomas F. Crosby, Jr., *The Bench and the Bar: A Centennial View of Orange County's Legal History,* 18 WEST. ST. L. REV. 873 (1991).)

The lead story of the June 8, 1889 *Santa Ana Standard* trumpeted, "'The Query is Where on Earth [the no] Votes Against it [the division] Came From?'" SLEEPER, *supra* note 3, at 104. The answer, as the *Standard* well knew is: The opposition in the north part of the proposed new county was based on a dislike for the designated boundary line with Los Angeles County because it placed Santa Ana in the center of the polity and made it the likely site of the county seat; failed schemes previously put forth in the Legislature drew the line further north. HALLAN-GIBSON, *supra* note 4, at 27. Friis explains, "Realizing that it could not become the county seat, Anaheim led the opposition to county division. Santa Ana was, of course, its energetic advocate . . . . Dan Baker [editor] of the [*Santa Ana*] *Standard* sneeringly remarked, 'Our Anaheim friends reason thus: if we can get the county seat, division is a grand blessing to the county and we favor the County of Orange. If we can't get it, county division is suicidal and ruinous.'" FRIIS, *supra* note 4, at 97. The publisher of the *Fullerton Star*, W. Clarke Hogaboom, replied, "'Yes, but our Santa Ana friends reason thus: if we can get division the county seat will be the greatest kind of blessing to us and who cares for the rest of them?'" FRIIS at 97, and SLEEPER, *supra* note 3, at 100.

5 SLEEPER, *supra* note 3, at 111 ("Ultimately Towner was a shoo-in for the office, and pious Orange County had an ex-leader of the famous Oneida [Community] as its first chief magistrate").

6 Robert S. Fogarty, *Nineteenth Century Utopian*, 16 PACIFIC HISTORIAN, at 70 (Fall 1972) [hereinafter Fogarty].

7 JAMES W. TOWNER, A GENEALOGY OF THE TOWNER FAMILY 144 (Los Angeles 1910). (This 244-page family history was prepared over many years and apparently published as a vanity book.) SAMUEL ARMOR, ed., HISTORY OF ORANGE COUNTY CALIFORNIA WITH BIO-

then (and both lived a while longer, until they expired on the same day, July 4, 1826). A few months before the judge himself died in 1913 in Santa Ana, Richard Nixon was born in Yorba Linda.

Towner had little formal schooling, only a "single term at the Franklin Academy, in Malone, N.Y.," but in his words, "was early inclined to study and books."[8] He became a teacher at 17, and during summers earned wages variously as a farmhand and sailor on Lake Erie. In 1840, he moved to Cleveland, where he took up theology. Towner tells us nothing else about this near-decade in his life, only that he eventually entered the Universalist ministry in 1849, preaching in the Westfield area of northern Ohio.[9] As we shall see, this incidence of omission would repeat itself later in his vague description of his life in Ohio after the Civil War and the eight or so years he spent in New York before he moved to Santa Ana—and probably for similar reasons, the likelihood being that Towner wished to keep certain of his activities from public scrutiny, activities that would be highly controversial even in these enlightened times.

In 1850, Towner married a 26-year-old Ohioan, Cinderella Sweet; and they would produce two sons and a daughter (Arthur, Frederick, and Lillian).[10] Cinderella died in Santa Ana during her husband's service on the superior court, just three days short of their 44th anniversary.[11]

In his family history, Judge Towner wrote of his antebellum Ohio ministry that he "took the anti-slavery side of the issues then forming on that subject, which caused division in his church, and this, with failing lungs, led him to discontinue . . . public speaking."[12] In 1854, the Towners moved "nearly to the frontier of settlement," Fayette County, Iowa, and he helped build a steam-driven sawmill there.[13]

During his stint in the lumber business, Towner began to read law "for business and political information"[14] and wrote several articles in 1857 for the *Social Revolutionist*, a publication of the Berlin Heights Society, an Ohio communal and free love

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GRAPHICAL SKETCHES 26 (Los Angeles 1911) [hereinafter ARMOR]. (The information in the latter volume, a sort of "Who's Who," appears to have been supplied by Towner himself or his writings—or perhaps his family, given that he turned 88 in 1911.)

8 TOWNER, *supra* note 7, at 144.

9 *Id.*

10 *Id.* at 144-46.

11 *Id.* at 144.

12 *Id.* "Mr. Towner was an anti-slavery advocate of the Gerrit Smith type, and cast his first ballot for James G. Birney, the Liberty party candidate for president." ARMOR, *supra* note 7, at 26.

13 TOWNER, *supra* note 7, at 144.

14 *Id.*

group.[15] He was admitted to the Iowa Bar in 1859, and practiced in the town of West Union.[16]

When the Civil War began Towner quickly enlisted and was elected Captain of Company F of the 9th Iowa Volunteer Infantry, which was formed in Dubuque in August 1861.[17] In northern Arkansas on March 7, 1862, he lost his left eye to a bullet in the Battle of Pea Ridge[18] (yclept the Battle of Elkhorn Tavern by the Confederacy).[19]

Colonel William Vandever, commander of the Second Brigade of the 4th Division, which included the 9th Iowa and the 25th Missouri, commended Towner in his after-action report: "Lieutenant Tisdale, of Company F, deserves especial mention for his gallantry while in command of the company after the fall of Captain Towner and Lieutenant Neff, both of whom acted with distinguished bravery until disabled by painful wounds."[20]

The Second Brigade, dead-tired after a forced march, was in the midst of the fighting all day on March 7; and Vandever and the 25th Missouri's Colonel John C. Phelps had four horses shot out from under them.[21] Jacob Platt, another officer of Towner's outfit, the 9th Iowa, later wrote, "I charged the battlements of Vicksburg . . . and assisted in driving the Confederates from their almost impregnable position of Missionary Ridge . . . but in all my army experience I did not see any fighting compared with the plain open field conflict that occurred in and around the Elkhorn Tavern on March 7, 1862."[22]

Pea Ridge was the largest battle fought west of the Mississippi. It has been called "perhaps the most decisive of the Civil War in the Trans-Mississippi West . . . a Federal victory, hurling back the Confederacy's last serious threat to Missouri and saving that state for the Union. It came at a time when the North, frustrated by General McClellan's inaction in Virginia, had little else

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15 Fogarty, *supra* note 6, at 70.

16 TOWNER, *supra* note 7, at 144.

17 *Id.*; National Archives, Veterans Records, General Reference Branch (NNRG-P), Wash. D.C.

18 TOWNER, *supra* note 7, at 145; National Archives, Veterans Records (copies in possession of the author of medical certificates and correspondence between Captain Towner and various senior officers).

19 CLAIRE N. MOODY, BATTLE OF PEA RIDGE OR ELKHORN TAVERN iii (Little Rock 1956) ("The tavern around which much of the two day's fighting took place got its name from a pair of unusually large elk horns that were placed on the ridge pole of the two-story, wide, double-verandahed building").

20 Rebellion Records, 47th Cong., 2d Sess. H. Misc. Docs., vol. 6, n.27, at 266-68.

21 WILLIAM L. SHEA & EARL J. HESS, PEA RIDGE, CIVIL WAR CAMPAIGN IN THE WEST 176 (Chapel Hill & London 1992) [hereinafter SHEA & HESS].

22 *Id.* at 186. The 9th Iowa, commanded by Lt. Colonel Francis J. Herron, suffered 38 dead, 176 wounded, and four missing in action at Pea Ridge. *Id.* at 173-74, 332 (app. 2).

to cheer about."[23] The battle was a relative rarity also, in that the South had a large advantage in numbers but was short, for once, on inspired leadership. The casualties were great, about 10 percent of the some 26,000 troops involved on both sides, including two Confederate generals, killed.[24]

Captain Towner resumed his command in July and saw action at Chickasaw Bayou, Mississippi on December 30, 1862, and Arkansas Post, Arkansas on January 12, 1863. He resigned his commission in Company F in 1863, with the consent of General Grant, based on an army surgeon's certification that he was in poor health and his right eye had been weakened by the loss of the other.[25] He was discharged from active service in February 1863 at Youngs Point, Louisiana.[26]

Towner received a letter from his men, which is proudly reproduced in his genealogy:

> Learning with regret that you are about to leave us, we your old company who have shared with you the hardships of the march, and the dangers of the battlefield, would tender you our warmest regards, and assure you that you will hold a place in our hearts around which will cluster the brightest memories. You have, captain, our prayers and best wishes.[27]

Captain Towner served several more years in the Invalid Corps, a reserve organization, and was discharged in Michigan in 1866.[28] After his military service, he returned to the practice of law, this time in Cleveland.[29] He served as judge of the city crimi-

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23 *Id.* at 270; ALVIN M. JOSEPH, THE CIVIL WAR IN THE AMERICAN WEST 322 (New York 1991). Pea Ridge was noteworthy for something else: "Not only had the Confederates used Indians—Cherokees from Indian Territory—against the Northern troops, but the tribesmen, according to the Union commander, Brigadier General Samuel R. Curtis, had scalped, tomahawked, and mutilated the bodies of Federal wounded and dead during and after the fighting . . . ." *Id.*; SHEA & HESS, *supra* note 21, at 320 (app. 1). Confederate Brigadier General Albert Pike, who was in charge of the Indians, issued an order prohibiting such practices and sent a copy to the Union lines under a flag of truce. *Id.* at 322-23.

24 National Park Service, *Pea Ridge: Official Map and Guide* (1994). The Confederate generals were Brigadiers Ben McCulloch and James McIntosh, who replaced McCulloch and was shot 15 minutes later. WEBB GARRISON, CIVIL WAR CURIOSITIES 199 (Nashville 1994).

25 TOWNER, *supra* note 7, at 145; National Archives, Veterans Records (copies in possession of the author). One source states Captain Towner was a "decorated hero" (Olin, *supra* note 3, at 225), but this could not be verified.

26 Declaration for Pension executed by James W. Towner, June 17, 1912, in Santa Ana. National Archives, Veterans Records (copy in possession of the author).

27 TOWNER, *supra* note 7, at 145.

28 Declaration for Pension, *supra* note 26.

29 Towner handled one reported case that made it to the Ohio Supreme Court. There he represented a client who had been convicted of manslaughter but was issued a general pardon by the governor. The question was whether the scope of the pardon covered the court costs assessed against Towner's client after his conviction. The court held the governor had the power to forgive the costs, but had not done so there. Libby v. Nicola, 21 Ohio St. 414 (1871).

nal court.[30] The Towners also took up with the Berlin Heights Society, as they apparently had done at some time before they moved to Iowa.

Whether Berlin Heights was very Utopian *or* very religious is open to dispute, but there is no doubt the community was devoted to free love. One historian puts it this way: "Located in Ohio, fifty miles west of Cleveland, Berlin Heights was a loose grouping of families whose members practiced free love, switching partners as the spirit (or the flesh) moved them. Sex at Berlin Heights had nothing to do with God and was completely unregulated, couples casually changing partners as nature moved them."[31] Another historian added, "Berlin Heights was like a great number of communal settlements in that its origins were obscure, its life short, and its history turbulent."[32]

Towner had long wished to join another group, the Oneida Community, near Syracuse, New York, an impressive and unusual example of the 19th-century Utopian movement. Oneida was a splendid experiment that the greatest Utopians, Plato, Thomas More, and Charles Fourier, might have approved, at least in large part. Spencer Olin, a student of Utopian societies, calls it "the most radical social experiment in American history."[33] The Community was founded in 1848 by Reverend John H. Noyes, "the most successful of all [19th] century Utopian experimenters," and practiced "Bible Communism."[34]

The Community built its social structure around an institution called "complex marriage," which was "Noyes' ingenious solution to the perplexing theological problem of how to reconcile earthly marriage with the need to be both sinless and spiritually committed to God."[35] A shorthand explanation of complex marriage, or pantagamy, is that all the adults were viewed as married to all the others.[36] Their sex lives were dictated by Noyes and his wife and sister, and the members' sleeping arrangements would be frequently rearranged in the individual bedrooms of the Community's large "Mansion House."[37]

The children were raised communally in an adjacent structure, the "Children's House." Noyes, or occasionally a trusted advisor in the later years, undertook the presumably divine duty of

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30 TOWNER, *supra* note 7, at 145.

31 SPENCER KLAW, WITHOUT SIN 326 (New York 1993) [hereinafter KLAW].

32 Fogarty, *supra* note 6, at 71.

33 Olin, *supra* note 3, at 221.

34 Fogarty, *supra* note 6, at 72; Olin, *supra* note 3, at 221.

35 Olin, *supra* note 3, at 221.

36 Leo J. Friis, *The One-Eyed Captain*, BIBLIO-CAL NOTES, II, iv, at 4-5 (So. Cal. Lib. Council for Cal. and Local History, Oct. 1968) [hereinafter cited as Friis, *The One-Eyed Captain*]; Olin, *supra* note 3, at 222.

37 KLAW, *supra* note 31, at 54-67, 167-72, 183-89, 223-31.

initiating the young girls sexually. The teenage boys were eventually allowed to participate, but generally only with the older women.[38]

More than just a free love Berlin Heights-style colony, though, the Community openly practiced eugenics, called "stirpiculture" at Oneida.[39] The breeding of human beings was a subject that fascinated Noyes. Ordinary love-making in the Community, guided by Noyes, was governed by male continence, the men responsible to avoid ejaculation during intercourse.

Permission of the Community was required to attempt procreation. Olin notes, "The effectiveness of the Oneidans' practice of [m]ale [c]ontinence is evidenced by the birth of only two children per year to some forty couples of reproductive age."[40] The reverend's son, Pierrepont, wrote, "Of the fifty-four children born in the community between 1869 and 1880 (of which I was one) the parentage of all but six was planned in advance by a committee. We were not born according to law and were not brought up by our parents."[41] Whether the careful breeding of the children or the vigorous communal system of raising them in the Children's House was the key, a Johns Hopkins Medical School doctor reported favorably on the resulting offspring in 1891.[42]

The Community, which grew to some 300 members under Noyes's leadership, produced its own food and a surplus for market and canned food as well. Oneida was also a leading manufacturer of animal traps, in an era when the demand for them was considerable, and produced silverware and silk, too.[43]

The Community did, of course, operate on socialist principles. No work, regardless of quality, quantity, or difficulty was rewarded more than any other, and all members were equally entitled to their food, clothing, shelter, and other necessities.[44] But it should be remembered that the Community was about much more than the *business* of living: "The members believed . . . they were

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38 *Id.* at 180-81.

39 The Community also employed a form of group therapy encounter sessions, so-called "Mutual Criticism," that Olin calls "the central form of governance at Oneida." Olin, *supra* note 3, at 221. These interminable nightly meetings might more accurately be viewed as Noyes's instrument of governance. Klaw explains, "As he had made clear to his followers again and again, Noyes was no constitutionalist when it came to the government of Oneida." KLAW, *supra* note 31, at 246. However, research supports Olin's observation that "few areas of social concern escaped the attention of the Oneida Community. Its members dealt equally forthrightly and creatively with eugenics . . . , child-care, parent-child relations, sex education, nutrition and dietetic problems, the relationship between mind and body, and ecology." Olin, *supra* note 3, at 222.

40 *Id.*

41 PIERREPONT B. NOYES, MY FATHER'S HOUSE 215 (New York 1937) *quoted in* Friis, *The One-Eyed Captain*, *supra* note 36, at 4-5.

42 KLAW, *supra* note 31, at 210-11.

43 Olin, *supra* note 3, at 225.

44 KLAW, *supra* note 31, at 104.

enlisted in a spiritual adventure of high significance, and they wanted the world to know about it."[45]

As early as 1866, then-Captain Towner wrote the following to Reverend Noyes:

> I wish to visit you for the purpose of observing the working of communism as illustrated by you. I believe in Christ, and in communism as the legitimate fruit of faith in Him, but I'm not decided whether . . . it is best now to join organized efforts such as yours . . . . I wish to leave the military service, and having no permanent . . . home, I wish before choosing one, to visit and live with you for a while at least, if it be consistent with your view and interests. I believe that myself and my wife are measurably free from the bondage of the marriage spirit; she has worn the short dress most of the time since our marriage . . . .[46]

Whatever the phrase "the short dress" meant,[47] acceptance of the Towners was not then consistent with the "view and interests" of Reverend Noyes; and the couple was put off for a number of years. Noyes regarded the Berlin Heights Society as licentious and unsavory,[48] although he did strike up a friendship by correspondence with Towner.[49] Finally, though, Cinderella and the judge were accepted after Towner repented and praised the Oneida Community and Bible Communism in an 1873 letter. He wrote that he had accepted "the idea that only as a means of glorifying God is [sexual] intercourse permissible, [and] I have come to hate and abominate even the virtues, as well as the vices, if I may so speak, of my former sexual life of passional indulgence, as of the devil himself."[50]

With the move to Oneida, Towner's family history turns decidedly vague again, just as it did concerning the pre-and post-Civil War years in Cleveland. The following is all the judge reports of his intimate involvement over most of a decade with the astonishing social experiment at the Oneida Community: "In 1874 [I] went to New York, and being engaged in important patent and other cases, spent the next eight years in that State and Con-

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45 *Id.* at 295.

46 Fogarty, *supra* note 6, at 73.

47 The usually knowledgeable Leo J. Friis could only comment, "I don't know what that means; maybe you do." Friis, Speech, *supra* note 3, at 24.

48 KLAW, *supra* note 31, at 194; Olin, *supra* note 3, at 225.

49 Friis, *The One-Eyed Captain*, *supra* note 36, at 6. Friis explains,

> In 1867 the [C]ommunity was in difficulty. It had accepted into membership a young man called Charles Guiteau who later withdrew from the group and demanded $9,000 for labor performed in the [C]ommunity over a six year period. Hearing of the problem, Towner wrote a letter to Noyes advising him to let the court settle the matter, assuring him that there were ample judicial precedents to support his [Noyes's] view. Guiteau's claim fizzled out. He gained notoriety in later years as the assassin of President Garfield.

Id.; *see* Fogarty, *supra* note 6, at 73.

50 Fogarty, *supra* note 6, at 73.

necticut, chiefly in [this] profession; and in September, 1882, moved to Santa Ana . . . ."[51]

The truth is the Towners and 11 others from the old Berlin Heights experiment joined the Oneida Community. They paid $14,000 to expedite the approval of their memberships.[52] Towner initially contributed to the Community with his business and legal knowledge, as he had done previously by mail; but he was eventually to form part of the first strong clique in opposition to Noyes's leadership, "The Townerites."[53] And his "role in the destruction of the [Community] was not a minor one as he became the leader of a major group of dissidents."[54] It has been alleged with considerable corroboration that Towner was, at bottom, disgruntled by the closed system of initiating the young ladies and dictating who slept with whom.[55]

Noyes could not tolerate dissent, though. After more than 30 years of building his unique religious Utopia into at least a lasting economic success, he fled north, never to return. His motivation may not have been just the bickering within, however. The ever-present possibility of prosecution for adultery and statutory rape may also have contributed to Noyes's decision to adopt Canadian exile.[56]

The institution of complex marriage was abandoned (even before Noyes's departure because of the internal difficulties posed by the dissidents), and the communal business was reorganized into a corporation that has endured to this day as the world's leading manufacturer of silverware and as a producer of a variety of other consumer products.[57] Monogamous marriages became the rule. Some were performed by Towner. The former socialist members were issued shares and became employees of a capitalist enterprise.[58]

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51 TOWNER, *supra* note 7, at 145-46. Towner did handle some patent matters. One such case involved the Community's infringement of a patent dealing with "the process of manufacturing silver-plated spoons and forks, from homogeneous steel." Wallace v. Noyes and others, 13 F. 172 (Cir. Ct., D. Conn. 1882). The court's opinion demonstrated a remarkable judicial understanding of the art of manufacturing silverware, and the Community lost.

52 Fogarty, *supra* note 6, at 74.

53 Olin, *supra* note 3, at 225. The Community may already have been drifting toward the "Breakup," as it was called, when Towner arrived. Fogarty says that "[b]y 1874 the [C]ommunity had split into warring factions over the management of the experiment as the young clashed with the old, the scientists with the millennialists. Because of his legal background and past service to the [C]ommunity, Towner was initially welcomed by the leaders. But it soon developed that some of the dissidents in the [C]ommunity saw in Towner a man of vital and magnetic influence." Fogarty, *supra* note 6, at 73-74.

54 Fogarty, *supra* note 6, at 74.

55 KLAW, *supra* note 31, at 237-238.

56 *Id.*

57 *Id.* at 290.

58 Fogarty, *supra* note 6, at 74.

Towner lost a decisive "showdown vote in 1880,"[59] concerning the make-up of the administrative council, by a count of 105 of the departed Noyes's loyalists to 49 Townerites.[60] And he, too, departed, relocating with his family and a number of followers to Santa Ana.[61] Olin explains that the move was no haphazard operation: "[S]everal contingents of Townerites departed Oneida for Southern California in 1881 and 1882. They settled in the small frontier town of Santa Ana which had population of approximately 1,200 people . . . ."[62] The lessons of the past were not lost: "By combining their limited financial resources, as they had done for so many years, the former Oneidans were able to raise $26,200 for purchasing a substantial block of land soon after their arrival in Santa Ana."[63] They bought a 458-acre tract, including what is now most of the land beneath the Santa Ana Civic Center, and then divided it among the partners. Resales were usually for small sums among Townerites, but for market value to others.[64]

What their new community knew of the Townerites and whether they imported any of the Oneida practices to Orange County are questions lacking satisfactory answers. To be sure the

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59 Friis, *The One-Eyed Captain*, *supra* note 36, at 7.

60 KLAW, *supra* note 31, at 264.

61 According to Olin, *supra* note 3, at 232 n.17,

Oneida Community migrants to Southern California in the 1880s (most lived in Santa Ana, while others resided in Los Angeles and Riverside) included:

George D. Allen
Lillian (Towner) Allen
Jared Allen (b.1884)
Rodney Allen (b. 1890)
Harley Hamilton
Harriet Mallory Hatch
Julius Hawley
Sarah Mallory Hawley
Roswell Hawley
Ida Blood Hawley
Alfred Hawley
Elizabeth Mallory Hawley
Ralph Hawley
Arline Hawley
Otto Hawley
John P. Hutchins
Fanny Parker Hutchins
Mary Blood Parker Hutchins
Ellen F. Hutchins
Ransom Reid, Jr. (son of Ellen F. Hutchins)
Edward P. Inslee
Isabelle B. Inslee
Frederick A. Marks
Martha J. (Hawley) Marks
Allan Van Velzer (son of Martha Marks)
Emerson J. Marks
Ernest Marks (b. 1887)
Edwin S. Nash
Martha (Towner) Reeve Nash
Evan Rupert Nash
D. Edson Smith
Stella Worden Smith
Eugene Deming Smith
Henrietta Sweet
James W. Towner
Cinderella Sweet Towner
Arthur Towner
Augusta Hamilton Towner
Esther (Abbott-Hamilton) Towner
Heber Frederick Towner (b. 1882)
Rutherford Towner
Xarifa Towner

James Towner had several sisters, two of whom were part of the Berlin Heights group. Martha went with him to Oneida, where she married Gaylord W. Reeve and, later Edwin S. Nash (with whom she came to Santa Ana). Maria stayed at Berlin Heights and married John Parker Lasley with whom she moved to Santa Ana in 1887. They were accompanied by their five children: Emerson James, Chloe Frances, John Towner, Everett Parker, and Mary Elizabeth.

62 *Id.* at 225.

63 *Id.* at 226.

64 *Id.* at 228-29.

locals were suspicious, at the outset at least. The *Santa Ana Weekly Standard* reported on June 9, 1882, on newly arrived "'anti-religious' elements in the community."[65] The editorial writer was clearly on to something: "'It is difficult to figure this thing out—whether it is another "Oneida Community" business or a "Mormon outfit." At any rate it will be a good idea for parents to keep their eyes on their daughters and husbands on their weak wives . . . .'"[66]

Other authors are convinced that the public remained completely ignorant of the background of their new neighbors.[67] Noting that the Oneida Community had become a national symbol for free love, Olin observes, "Under such circumstances, the Townerites would have been foolish to flaunt their deviant ways at the same time that they were trying to integrate themselves in a new environment."[68] County historian Jim Sleeper states the locals did not know of the judge's socialist past.[69] Maybe, but that was surely the least of it. As Olin suggests, if knowledge had been widespread of the "goings-on" between the ladies and gents at Berlin Heights and Oneida, the new arrivals would have hardly accomplished the successes they did, of which Towner is but one example.[70]

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65 *Id.* at 226.

66 *Id.*

67 Fogarty, *supra* note 6, at 74; Friis, *The One-Eyed Captain*, *supra* note 36, at 7. Friis related this interesting anecdote:

> [W]hen Towner arrived in Santa Ana, he turned his back on the past. He made no mention of the beacon chapters of his past life. Apparently he was successful in keeping them well hidden from his new neighbors and friends. I once asked James A. McFadden . . . if he knew that Towner was once a member of the Oneida Community. Yes, he said, he did. He said he learned it from a small boy who had come with his family to Santa Ana along with Towner, and this boy had become his playmate and he told him many things about the Oneida Community. [¶] I then asked Mr. McFadden if he thought that the people of Santa Ana knew of Towner's past, and after some thought he said, 'Come to think of it, I don't believe they did.'

Friis, Speech, *supra* note 3, at 26.

68 Olin, *supra* note 3, at 226.

69 SLEEPER, *supra* note 3, at 111.

70 Olin states,

> [O]ther former Oneida colleagues actively worked in politics, the Unitarian Church, agriculture, citrus farming, ranching, and commerce. Alfred E. Hawley, Edwin S. Nash, and D. Edson Smith played prominent roles in Socialist Party politics in Orange County in the early twentieth century. When Hawley became head of the Party, the county central committee met regularly in his retail store. D. Edson Smith and Arthur Towner, James Towner's son, joined the Pomological and Agricultural Society of Orange County and in the late 1880s published an article in the *Rural Californian* entitled 'How to Make a Living from Ten Acres.' Smith himself farmed nine acres of deciduous fruits on the outskirts of Santa Ana. In addition, Harley Hamilton, the half-brother of Augusta Hamilton Towner, served as musical director of the Los Angeles Symphony Orchestra for nearly twenty years from 1894 to 1913, and Ransom Reid, Jr., born in Oneida in 1865, was responsible for establishing the city's water and sewer system and served as Santa Ana Water Superintendent from 1900 to 1920.
>
> Throughout their lives, the Townerites in California remained loyal to each other, and relations between them and the Oneida Community continued for many

As to the question of the expatriates' life-style in their new community, Olin concludes,

> It seems unlikely that the Townerites would have completely abandoned the social and sexual behavior they practiced so long at Berlin Heights and at Oneida. Highly principled, not frivolous, people, they were well accustomed to criticism from 'conventional' society. Towner, in particular, had adamantly argued during the final months of the Oneida Community that Complex Marriage should be continued even in the face of virulent public attacks. [¶] Nevertheless, these practices, even if continued in Santa Ana, were never publically espoused.[71]

When Towner's genealogy resumes after the omission of the Berlin Heights and Oneida experiences, he merely lists these Santa Ana events: his practice of law, election as the new county's first superior court judge, and marriage to Emily Van Scotten of Denver, Colorado in 1894, fewer than six months after Cinderella's death.[72] Judge Towner had also been the first City Attorney of Santa Ana;[73] and Leo J. Friis reports:

> [I]t should be pointed out that Judge Towner is remembered as a good jurist. A.W. Rutan of Santa Ana, who was admitted to the bar in the first decade of the new century, stated, "I knew Judge Towner after his retirement and I have talked to attorneys who appeared before him when he was on the bench. I never heard anything against him, which indicates that he must have been a pretty good judge. I have, of course, heard the story that occasionally a lawyer, disgruntled upon losing a suit before him, would [s]ay, 'what can you expect? He's only got one eye. He can't see but one side of the case!'"[74]

Another local historian, Charles Swanner, had this to say of him:

> Our first Superior Court Judge was J.W. Towner, who was elected when the County was formed in 1889. Prior to being

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years. Indeed, they were often referred to affectionately at Oneida as 'the California Colony.' Through extensive landholdings, intermarriage, and common social, political, agricultural, commercial, and religious activities, if not through group living and publically-espoused pantagamy, the Townerites' former communal ties persisted in the Far West.

Olin, *supra* note 3, at 229-30.

71 Olin, *supra* note 3, at 226.

72 TOWNER, *supra* note 7, at 146.

73 Towner maintained a private practice. In one case the California Supreme Court rejected his client's appeal of the probate court's denial of a motion to continue the hearing on final distribution of an estate. *In re* Oxhart's Estate, 78 Cal. 109, 20 P. 367 (1889). In another the court upheld his client's judgment obtained after service by publication. Perkins v. Wakeham, 86 Cal. 580, 25 P. 753 (1890).

74 Friis, *The One-Eyed Captain*, *supra* note 36, at 4, 7-8 (quoting a conversation with Rutan). James B. Tucker, a Utah Superior Court Judge, joined Rutan in 1936 to form Orange County's best known home-grown law firm, Rutan and Tucker. HALLAN-GIBSON, *supra* note 4, at 80.

> elected Judge he had practiced law in Santa Ana for several years. Judge Towner presided at one of the most interesting and important cases ever tried in Orange County. That was the case of Bathgate versus Irvine [126 C. 135 (1899)]. The Supreme Court in its decision held that an upper riparian owner could not take water from a stream and conduct it to non-riparian land to the damage of the lower riparian owners. The decision involved a point of water law in California that had not theretofore been ruled upon and the case has been affirmed and referred to with approval by many subsequent decisions.[75]

Towner's local judicial career commenced with trials in his Fourth Street law office and later in the old Santa Ana City Hall.[76] In addition to the *Bathgate* case, he presided over the Orange County Superior Court's first jury trial.[77] The jury acquitted an accused horse thief.[78] One of the last lynchings in California also occurred on Towner's watch in 1892 (from a telegraph pole at the northeast corner of Fourth and Sycamore in Santa Ana), but he was vacationing in San Diego County at the time.[79]

Towner's most colorful and probably most poignant case was that of Modesta Avila, Orange County's first convicted felon. She died in San Quentin after serving two years of the three imposed by the judge. Her alleged crime was obstructing and delaying a train in San Juan Capistrano with her Monday morning washing,[80] or a railroad tie perhaps—accounts vary.

Avila was angry with the California Central Railway, a Santa Fe subsidiary. The train was noisy, dirty, disturbed her laying chickens; and the railway refused to compensate her for crossing land she had inherited. Although it is claimed she told the stationmaster of her action and the obstruction was removed before the train arrived, she was charged anyway. The jury deadlocked 6-6 after the first trial; but by the time of the second, the rumor

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75 CHARLES D. SWANNER, FIFTY YEARS A BARRISTER IN ORANGE COUNTY 19 (Santa Ana 1965); James Irvine, Jr., owner of the Irvine Ranch, was the defendant. Friis explains that in 1893, he "built a dam across the Santiago Creek at a place where the creek flowed through his land. He diverted the water from the stream to land situated beyond the natural watershed of the creek. This diversion was, of course, highly detrimental to the riparian owners below the dam and greatly affected the residents of El Modena and the members of the Serrano and Carpenter Water Companies. Two hundred seventy-five persons brought suit to enjoin Irvine from diverting water out of the watershed." FRIIS, *supra* note 4, at 28. Towner issued a limited injunction prohibiting the use of the diverted water for irrigation purposes, and the California Supreme Court upheld and broadened the injunction to prohibit the watering of livestock as well. *Id.*

76 SLEEPER, *supra* note 3, at 123-24.

77 In the California Supreme Court reports spanning his judicial career, Towner was affirmed about two dozen times and reversed a little more than half that number, respectable numbers for a busy trial judge.

78 SLEEPER, *supra* note 3, at 129.

79 *Id.* at 205-7.

80 *Id.* at 150.

was about that the single lady was a pregnant prostitute. She was convicted on retrial.[81]

The *Evening Standard* made light of her demise: "'Modesta, a well known favorite of the Santa Ana boys, died in the penitentiary this week at San Quentin. She had served two years of her time and was getting along finely when she was stricken down in the prime of her usefulness. Those who are without sin throw the first stone.'"[82]

Judge Towner died in 1913, age 90, of prostate cancer and was the subject of a laudatory front page send-off by the *Santa Ana Evening Blade*.[83] After a life filled with enough off-beat religious and sexual activities to fill a novel or two, there was no mention that Orange County's first superior court judge had ever practiced Bible Communism or free love or been a part of a grand social experiment.[84] Maybe the newspaper was also ignorant of or had forgotten those facts, or maybe the press was kinder and gentler in those days.[85]

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81 HALLAN-GIBSON, *supra* note 4, at 30.

82 SLEEPER, *supra* note 3, at 150.

83 Fogarty, *supra* note 6, at 74, *quoting* the *Blade*: "he had 'engaged in important patent and other cases' [in New York]."

84 Towner himself never forgot. He directed that his ashes be buried at the Oneida Community, and that is where they are. (Conversation with Helene "Nina" Towner, the family historian and the judge's great-great-granddaughter. Feb. 17, 1998.)

85 Fogarty puts it this way: "Towner's neighbors in Santa Ana never knew of his past activities as the move from central New York to southern California was enough to bury old sins." Fogarty, *supra* note 6, at 74. Well, maybe.

A Lawyer's Ethical Duty to Represent the Unpopular Client

*Stephen Jones**

> Now it is difficult for any man, however wise or eloquent, to speak for himself, when fortune, reputation, happiness, life itself are in jeopardy and rest on the decision of strangers, sworn before God to find an impartial verdict from the evidence brought before them. Hence has arisen the honourable and necessary profession of the advocate; it is indeed a high and responsible calling; for into his keeping are entrusted the dearest interests of other men. His responsibility is wider in its scope than a physician's, and more direct and individual than that of a statesman; he must be something of an actor, not indeed playing a well-learned part before painted scenery, but fighting real battles on other men's behalf, in which at any moment surprise may render all rehearsal and preparation futile . . . .
>
> . . . .
>
> The advocate must have a quick mind, an understanding heart, and charm of personality. For he has often to understand another man's life-story at a moment's notice, and catch up overnight a client's or a witness's lifelong experience in another profession; moreover, he must have the power of expressing himself clearly and attractively to simple people, so that they will listen to him and understand him. He must, then, be histrionic, crafty, courageous, eloquent, quick-minded, charming, great-hearted.
>
> —Edward Marjoribanks[1]

Following an impressive term of service in World War II, James Daniel Gilliland attended law school at Wake Forest College. Upon graduation in 1948, he returned to his native town in Warren County, North Carolina to practice law. Not long after his

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* Stephen Jones was the court-appointed lead attorney for Timothy James McVeigh, who was charged with and convicted of the bombing of the Alfred P. Murrah Federal Building in Oklahoma City on April 19, 1995. One hundred sixty-eight known victims died, 500 were injured, and $751 million worth of property damage was inflicted. Mr. Jones is a graduate of the University of Oklahoma Law School, 1966, having completed his undergraduate education at the University of Texas at Austin. He was admitted to the Bar in 1966. He currently resides in Enid, Oklahoma, where he is engaged in the private practice of law. Mr. Jones wishes to acknowledge the assistance of Alicia Carpenter, a graduate of the University of Missouri Law School, Columbia, 1996, for research in the preparation of this essay.

1 EDWARD MARJORIBANKS, FAMOUS TRIALS OF MARSHALL HALL 9-10 (1989).

arrival, Gilliland found himself Commander of the local American Legion post, an officer in the Veterans of Foreign Wars, secretary of the Lion's Club, master of the Masonic Lodge, approved for membership in local country clubs, and solicitor in the local recorder's court. Unfortunately, his popularity quickly plummeted following two incidents that would scar his legal career forever. First, he was asked to expound upon and explain the landmark *Brown v. Board of Education*[2] decision for his fellow Lion's Club members. He supported the Court's decision and proceeded to display his approval. Soon after, he defended eleven alleged Communists in Charlotte, North Carolina on charges of un-American activities. The response from the residents of Warren County to these two incidents was prompt and harsh. Gilliland was immediately stripped of both the Lion's Club and the country club memberships and his solicitor responsibilities. In addition, disbarment proceedings were initiated against Gilliland, founded upon accusations of questionable tactics regarding two divorce cases he had handled. The final retaliatory blow came when the North Carolina State Bar Association demanded his disbarment. Fortunately, following an appeal to the North Carolina Supreme Court, he was "awarded" a jury trial and granted an acquittal.[3]

The treatment of attorneys, such as James Daniel Gilliland, has too often chilled the desire as well as the willingness of most attorneys to accept controversial clients. The inevitable, but unfortunate, result is a compromise of the constitutional rights that are to be guaranteed to each and every criminal defendant. In order to curtail these consequences, and to prevent the failing of constitutional guarantees, the American Bar Association has instituted definite and applicable stipulations to guide the conduct of attorneys and more specifically, to emphasize and articulate their obligations and their duties as participants in the American judicial system.

I. CONSTITUTIONAL GUARANTEES

> It is a right which all freemen claim, and are entitled to complain when they are hurt; they have a right publicly to remonstrate against the abuses of power in the strongest terms, to put their neighbors upon their guard against the craft or open violence of men in authority, and to assert with courage the sense they have of the blessings of liberty, the value they put upon it, and their resolution at all hazards to preserve it as one of the greatest blessings heaven can bestow.
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> —Andrew Hamilton[4]

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2 Brown v. Board of Education of Topeka, 347 U.S. 483 (1954)

3 Daniel H. Pollitt, *Counsel for the Unpopular Cause: The "Hazard of Being Undone,"* 43 N.C. L. REV. 9, 10 (1964).

4 WILLIAM M. KUNSTLER, THE CASE FOR COURAGE 40 (1962).

Before analyzing the ABA's methods of safeguarding these rights, a brief reference to the constitutional source is helpful. Initially, and most fundamentally, each defendant has a Sixth Amendment right to counsel:[5] "An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases 'are necessities, not luxuries.'"[6] This foundational assertion is further supported through Justice Stevens' *Cronic* opinion: "Without counsel, the right to a trial itself would be 'of little avail,' as this court has recognized repeatedly. 'Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.'"[7] The noble premise for this guarantee is, of course, the quest for the truth, and the best means to achieve this end is to discover "powerful statements on both sides of the question."[8] Only the adversarial system can effectuate the search for the truth. The alternative is a nonadversarial society whereby one being accused is the equivalent of one being convicted. If criminal defense lawyers do not "put the government to its proof whenever necessary or whenever the client requires it, then we are close to those totalitarian states where accusation equals guilt or the criminal defense lawyers are but an adjunct prosecutor expected to make the client confess and aid in his or her rehabilitation."[9] Hence, if criminal defendants are not represented, the foundation of the judicial system is eroded and the lawyers become the judges of guilt or innocence by their very decision to accept or reject those criminal clients. After all, pronounces John W. Davis, "since the law, however, is a profession and not a trade, I conceive it to be the duty of the lawyer, just as it is the duty of the priest or the surgeon, to serve those who call on him unless, indeed, there is some insuperable obstacle in the way."[10]

II. ABA STANDARDS

Coupled with the aforementioned constitutional guarantees, are standards promulgated by the American Bar Association to further ensure the defendant's right to counsel is secure. How-

5 "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

6 United States v. Cronic, 466 U.S. 648, 653-54 (1984) (quoting Gideon v. Wainwright, 372 U.S. 335, 344 (1963)).

7 *Id.* at 654 (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932), and Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)).

8 *Id.* at 655 (quoting Irving R. Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 A.B.A. J. 569 (1975)).

9 JOHN WELSLY HALL, JR., PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL LAWYER § 9:12, at 297-98 (2d ed. 1996).

10 WILLIAM H. HARBAUGH, LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS 199 (1973).

ever, the implementation of these particular standards lies in the discretion of each respective jurisdiction. These standards can be instituted as the law, as rules of practice, or as simple guidelines for attorneys to look to in their everyday practice. Regardless of their treatment in each jurisdiction, the ABA standards should nonetheless be regarded by all attorneys as governing standards by which to judge their conduct.

Therefore, according to ABA Defense Function Standard 4-1.2(a), "Counsel for the accused is an essential component of the administration of criminal justice. A court properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge (and jury, where appropriate), counsel for the prosecution, and counsel for the accused." The lawyer's function, consequently, is to present the case at law, and to leave to the judges and the juries of the system the ultimate responsibility of determining whether the client has acted consistently or inconsistently with our system of justice.[11] The lawyer is simply, but pivotally, "an equalizer, cutting down to legal size the man 'above the law,' increasing the stature of the man who doesn't 'know' anybody, so that each may approach the law as an ordinary man."[12]

III. The Unpopular Client

The issue becomes exponentially more complicated and more critical, though, when the defendant is one who is decidedly unpopular. When confronted with this situation, attorneys should adhere to the standard set forth in ABA Defense Function Standard 4-1.6(b), that "all . . . qualified lawyers should stand ready to undertake the defense of an accused regardless of public hostility toward the accused or personal distaste for the offense charged or the person of the defendant."

A. Ethical Considerations of the Model Code of Professional Responsibility

Furthermore, the Canons of the Model Code of Professional Responsibility, although referenced as "norms," nonetheless prescribe conduct that is expected of lawyers in their relationships with the public and with the legal system. Specifically, the Model Code stipulates "a lawyer should assist the legal profession in fulfilling its duty to make legal counsel available."[13] This guideline is supported by several ethical considerations, commonly referred to

11 "The function of the lawyer then is not to condemn men but to put into practice for all of us what we have decided on as abstract principle, that no man 'be put from that he ought to have by the law.'" David Mellinkoff, The Conscience of a Lawyer 157 (1973).

12 *Id.*

13 Model Code of Professional Responsibility Canon 2 (1981).

as "EC's," which present objectives toward which every member should strive. The considerations also prescribe specific guidance as to the obligation of lawyers to take on controversial or unpopular clientele. EC 2-26 states: "A lawyer is under no obligation to act as advisor or advocate for every person who may wish to become his client; but in furtherance of the objective of the bar to make legal services fully available, a lawyer should not lightly decline proffered employment. The fulfillment of this objective requires acceptance by a lawyer of his share of tendered employment which may be unattractive both to him and the bar generally."[14] EC 2-27 provides further encouragement for attorneys to abide by this legal responsibility: "History is replete with instances of distinguished and sacrificial services by lawyers who have represented unpopular clients and causes. Regardless of his personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse."[15] Not only is this responsibility condoned, but those attorneys who are faithful to these considerations are given the utmost esteem by members of the ABA: "[o]ne of the highest services the lawyer can render to society is to appear in court on behalf of clients whose causes are in disfavor with the general public."[16]

Although accepting unpopular clients seems meritorious, the ethical considerations of the Code imply that, essentially, there is no realistic choice available for lawyers in these circumstances. EC 2-29 stipulates that "when a lawyer is appointed to defend an unpopular client by a court, a 'compelling reason' that might justify the lawyer's asking to be excused from the appointment does not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case . . . ." Therefore, the lawyer's claim that there would be a potential threat of "antagonizing powerful adversaries or others is not a good reason."[17] The ethical considerations of the Model Code address this behavior as well and warn against any attorney that would decline employment for fear of "rocking the boat."[18]

At first glance, EC 2-29 seems to be irreconcilable with EC 2-30, which warns that a lawyer should not accept employment "if the intensity of his personal feeling, as distinguished from a community attitude, may impair his effective representation of a pro-

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14 *Id.* at EC 2-26.

15 *Id.* at EC 2-27.

16 Lon L. Fuller and John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 43 A.B.A. J. 1159, 1216 (1958).

17 CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 10.2, at 577 (1986).

18 EC-2-28 condemns this conduct: "The personal preference of a lawyer to avoid adversary alignment against judges, other lawyers, public officials, or influential members of the community does not justify his rejection of tendered employment." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-28 (1981).

spective client. . . ."[19] The distinction created between EC 2-29 and EC 2-30 is grounded upon the issue of repugnancy—essentially, if the lawyer is able to represent the client effectively, despite the repugnancy of the cause, then the attorney has no "good reason" to decline employment. According to the Code of Professional Responsibility, the attorney now has a definite obligation to accept the employment and to defend the rights of the unpopular client. Mellinkoff accentuates this point—that the lawyer has one duty that is of paramount importance regarding the unpopular client: to defend the client's rights and not to investigate or to judge the morality of the alleged misconduct.

> It is the lawyer's important task to see to it that the principle is adhered to despite public excitement, and without regard to personal enthusiasm or hate for the particular litigant . . . . The lawyer who does his duty advises by the law of the land, seeing to it that his clients receive that measure of shelter the law says they are entitled to. This is a large and essential assignment . . . as a lawyer his expertise is law not morality, and it is the client who must live and die with the client's conscience.[20]

While the attorney is pursuing this lofty goal of discarding his own moral opinions of his client, he must simultaneously be exerting every effort and expending every bit of energy in pursuit of his client's cause. This behavior is articulated appropriately in Canon 15:[21]

> The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense . . . .

Edward Bennett Williams, the famous trial lawyer, who defended the likes of Jimmy Hoffa, Senator Joe McCarthy and Frank Costello, and who most assuredly did not allow a fear of unpopularity to discourage him from ensuring that his clients were provided with "every remedy and defense that is authorized by law," felt he was upholding his obligation as a criminal lawyer because

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19 *Id.* at EC 2-30.

20 DAVID MELLINKOFF, THE CONSCIENCE OF A LAWYER 157 (1973).

21 Canon 15 was included in the original ABA Canons of Professional Ethics which consisted of 32 rule-like Canons that were adopted by the ABA in 1908 and subsequently supplemented and amended. The 1908 Canons are no longer enforced in their original form in any jurisdiction, but continue to be applied through the Canons in the Model Code.

he was protecting the disadvantaged.[22] Williams illustrated through his career the critical need for criminal defense attorneys. He was a trailblazer in the judicial battle against unchecked police power in the 1950s and 1960s, and was given credit as the individual who initially discovered the illegal acts of the FBI—the acts that prompted the demise of J. Edgar Hoover.[23] The criminal defense lawyers of Williams' era also felt they were doing their duty by upholding and defending several constitutional rights: the 6th Amendment right to counsel, the 4th Amendment freedom from search and seizure, and the 5th Amendment right against incrimination. Williams espoused these motives for defending the accused in a 1957 speech given to the New York State Bar Association. Because he felt there was an epidemic of "guilt by client," he warned of the "insidious identification (that) would scare off lawyers from standing by the unpopular and degraded. When a doctor takes out Earl Browden's appendix, nobody suggests that the doctor is a Communist. When a lawyer represents Browden (head of the American Communist Party), everybody decides that lawyer must be a Communist, too."[24][25]

B. Model Rules of Professional Conduct

The ABA's Model Rules of Professional Conduct (adopted in 1983) also lend support to the cause of the unpopular client.[26] Model Rule 6.2 reiterates the importance of lawyers accepting any and all appointments. "A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause . . . ."[27] The comment to Rule 6.2 espouses: "All lawyers have a

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22 "Williams held himself out as the protector of the down-trodden . . . . By giving the poor all the legal protection enjoyed by the rich, a criminal defense lawyer works against alienation and class resentment and thus fosters respect for the 'system.'" EVAN THOMAS, THE MAN TO SEE 121 (1991).

23 *Id.* at 17.

24 Consequently, the ABA attempts to rescue the defense attorney from this erroneous assumption through its promulgation of Model Rule 1.2(b): "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(b) (1994).

25 EVAN THOMAS, THE MAN TO SEE 122 (1991).

26 Although the Model Rules did not enjoy the same universal acceptance as that of the Code of Professional Responsibility, they have been adopted by approximately 75% of the states. JOHN WESLEY HALL, JR., PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL LAWYER 5 (1996).

27 Good cause could consist of factors such as (a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law; (b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.2 (1994).

responsibility in providing pro bono publico service . . . .[28] An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services."[29] While the Code of Professional Responsibility did not attempt to establish rules that would impose discipline or civil liability on those who chose not to abide by them,[30] the Rules of Professional Responsibility impose disciplinary ramifications.

C. The Duty to Rescue versus The Duty to Represent

In order to more clearly define this responsibility, duty, or obligation, owed to the unpopular client, Charles W. Wolfram, in *The Good Lawyer,* draws a comparison with the duty to rescue. In determining if there is indeed a duty to rescue, or a duty to represent, a number of considerations exist; (1) the capacity to rescue—is the lawyer competent to handle the legal service which has been asked of him?; (2) the risk to the rescuer and others—is there an economic risk that the attorney will be taking upon acceptance of the client?; and (3) the danger to the victim—is there a high likelihood of imminent danger?[31] In other words, are there many other lawyers available and willing to handle this case; if other lawyers, for economic or morally objectionable reasons cannot accept the employment, it would appear to increase the danger to the client. The small likelihood that other lawyers would be available and willing to accept a particular unpopular client creates a stronger obligation for the attorney to accept such employment. According to Wolfram, even though this increase in danger is created because of other lawyers' neglect of their moral duty, "the duty to represent a necessitous client exists even when a professional regulation or custom states that there is no duty of representation. It is the client's need, and not the third-party cause of it, that generates a duty to act."[32]

The significance of the "repugnancy" of the issue is revisited by Wolfram, who distinguishes between this term as attached to the client himself, or as attached to the legal right that is being pursued. The Nazi client may be pursuing a legitimate constitutional right—the pursuit of which is not repugnant. Therefore, it is essential to make this distinction, for the need for available and

28 *See* Model Rule 6.1, which provides a lawyer should aspire to render at least 50 hours of pro bono service per year.

29 MODEL RULES OF PROFESSIONAL CONDUCT Rule 6.2 cmt. (1994).

30 MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1981)

31 Charles W. Wolfram, *The Good Lawyer, in* A LAWYER'S DUTY TO REPRESENT CLIENTS, REPUGNANT AND OTHERWISE 219-22 (D. Luban ed., 1984).

32 *Id.* at 222.

willing criminal defenders becomes crucial when there are legitimate human needs being advocated.[33] Justice Marshall, in his concurring opinion in *Ohralik v. Ohio State Bar Ass'n*,[34] simply looked at the issue from the perspective that if the client was in need, then the obligation was present: "The obligation of all lawyers, whether or not members of an association committed to a particular point of view, to see that legal aid is available 'where the litigant is in need of assistance, or where important issues are involved in the case,' has long been established."[35]

The consequence, Wolfram asserts, as a result of continual refusals by lawyers to accept unpopular clients, will be a misplacement of the "uniform judgment of lawyers in a position of veto over the considered judgment of public officials—those who promulgated the legal right . . . . The resulting 'lawyers' trump' replaces official judgments and policies with private moral ones."[36] In effect, unless there is some mechanism that exists that would test lawyers' opinions by a court of review, the resulting system would be "informal and, arguably, illegitimate in a representational democracy."[37]

Ultimately, the effectiveness of these constitutional guarantees is contingent upon the conduct of attorneys, and whether they are willing to respect or whether they will neglect those guarantees. The lawyer's function is to defend the rights that are guaranteed to every American individual. The lawyer is neither awarded, nor allowed, the luxury of determining the guilt or innocence of any client. The constitutional rights of every individual are at risk when they are stripped from even one criminal defendant no matter how unpopular the defendant may be. If the system allows lawyers to determine the fate of an accused by denying the defendant the constitutional right of representation by counsel, then the system lies precariously in unworthy and unconstitutional hands.

If the lawyer fulfills these professional responsibilities, then the legal system has a fighting chance of securing those rights which it purports to secure. A client pursues an attorney to defend rights, not to judge guilt or innocence, or even to weigh the client's rights. The client is entitled to say to counsel "I want your advocacy, not your judgment; I prefer that of the court."[38]

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33 *Id.* at 229-31.

34 Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).

35 *Id.* at 470.

36 Wolfram, *supra* note 31, at 232.

37 *Id.*

38 DAVID MELLINKOFF, THE CONSCIENCE OF A LAWYER 157 (1973) (quoting Johnson v. Emerson, L.R. 6 Ex. 329, 367 (1871)).

The great British advocate, Norman Lord Birkett, in a remarkable series of addresses on the BBC Radio, which were then republished by him as *Six Great Advocates*,[39] expressed the following:

> Many, I know, regard the law as something of a mystery, and I am quite conscious of the prejudice against the advocate which exists in the mind of many members of the public. I cannot hope to remove that prejudice, but I am sure I ought to try to do so. From the moment that I was called to the Bar I have been brought face to face with the widespread misconception of the true function of the advocate in our courts of law and of his place in our way of life. There cannot be any member of the Bar who has not been faced at some time or other with the old and familiar question: "How can you possibly defend a guilty man?" or some question of a similar kind. Such questions were asked at Athens in the days of Demosthenes and at Rome in the days of Cicero and they have been asked at every stage of our legal history.[40]

They were asked of me, "How could you possibly defend a man charged with killing 168 individuals, including 19 children?"

I quite realize how strange and, indeed, wrong it must seem to the ordinary citizen that a lawyer, who may be respected among his fellow citizens, should defend a client whom the lawyer must know in his heart to be guilty of the crime charged, and further to be paid for doing so:[41] "How is it possible . . . for an advocate to resist an argument that appears to be founded on truth, and to seek to make the worst appear the better reason?"[42] Or, to put it quite starkly, many people believe the advocate cannot possibly be sincere, or indeed, honest in fulfilling the conduct of his profession; for the ordinary citizen only espouses a cause because "he believes in it, but the advocate espouses a cause because he is paid to do so, whether he believes in it or not."[43]

> In practice, if there are good reasons why an advocate should not undertake a certain case, then [the lawyer] can quite easily decline it. But, as Erskine so eloquently said, "if the advocate refuses to defend from what he may think of the charge or the defence (sic), he assumes the character of the judge . . . and puts the heavy influence of perhaps a mistaken opinion into the scale against the accused, in whose favour the benevolent principles of English Law makes all presumptions."

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39 NORMAN BIRKETT, SIX GREAT ADVOCATES (1961).

40 *Id.* at 97-98.

41 *See generally id.* at 98-99 (this paragraph and the two which follow include direct quotes and paraphrases of Lord Birkett's book, with thoughts from the author intermixed).

42 *Id.* at 98.

43 *Id.*

> Still, the charge against the advocate remains and was put into [caustic] form by that strange and erratic genius, Dean [Jonathan] Swift, in *Gulliver's Travels*, when he said of the Bar that "they were a society of men bred up from their youth in the art of proving by words multiplied for the purpose, that white is black and black is white according as they are paid."[44]

Now, the plain truth is that the advocate is not pleading, stating or advocating personal views and indeed, has no right whatever to do so. Indeed, lawyers are bound by very strict rules of conduct and an equally strict code of honor, especially designed to allow them to discharge their duties in the administration of justice without being false to themselves or their conscience, and without failing in their duty to the community in which they live. The function of the advocate is to present one side of the case with all the skill available so that the judge, or the judge and jury can compare counsel's presentation with that of the advocate on the other side, and then decide, after full investigation, where the truth lies. This pursuit of justice is the essence of the adversarial system.

And what is the duty of the advocate who shoulders the heavy burden of defending a prisoner such as Mr. McVeigh on this most horrible and gravest of all charges, involving the largest terrorist act in American history: 168 people dead, 500 injured, and $751 million worth of damage in an act that disrupted the social fabric of Oklahoma's capital city and for which tens of thousands otherwise have suffered emotionally, physically and financially. My duty was to devote myself completely to this task, whatever I may have thought of the charges, and to lay aside every other duty, so that I could act constantly in the interest of the accused, and to say for Tim McVeigh all that he would wish to say for himself, were he able to do so. The purpose of this procedure in our law is not that a guilty person shall escape, but to make certain, so far as human fallibility can do so, that no innocent person shall suffer.

Once the defense of such an individual as Tim McVeigh has been undertaken in a high-profile case, the interest of the media will be aroused. In the defense of Mr. McVeigh, Chief Judge Matsch, the trial judge, in an order[45] in the case specifically recognized the right of Mr. McVeigh's lawyers to address public issues concerning the case. He wrote: "The Supreme Court has recognized that in circumstances such as those surrounding this case, the function of defense counsel includes representation 'in the court of public opinion.'"[46]

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44 *Id.* at 98-99.

45 *See* Order of the Court, filed March 17, 1997, *in* United States v. Timothy McVeigh, No. 96-CR-68-M, 1997 WL 117369 (D. Colo.).

46 *Id.* at *2 (quoting Gentile v. State Bar of Nevada, 501 U.S. 1030, 1043 (1991)).

Judge Matsch also addressed the issue of attorney's fees and costs in the same order:

> Foundational fairness requires that the person accused has legal counsel with the skill, competence, experience and courage to provide him with effective representation of his interest at all stages of the proceedings. When counsel are appointed, they must be given adequate resources to support a separate and independent investigation, including technological tools and the expertise of those who have relevant knowledge and experience to assist in preparing the challenge the charges made against the defendant . . . . There can be no doubt about the foundational fairness provided for the defendant in this case. He has lead counsel who had consistently demonstrated his skill and experience as an advocate with a complete and dedicated commitment to his professional responsibility in the representation of Timothy McVeigh. Mr. Jones has the assistance of other capable and responsible lawyers, selected by him for particular assignments.[47]

Of course, this license must be exercised professionally and appropriately. The purpose of public exposure in defending the unpopular client is not for the lawyer to be mesmerized by the press or to engage in self-aggrandizement or grandstanding or to subvert the due course of justice. Rather, the lawyer's duty is to stand as a guardian and protector of the trial rights of the accused, and ultimately the safety of the community itself, by explaining in calm, dispassionate tones in as summary a form as possible what is factually occurring in the case. To do so, of course, runs the risk of criticism from the media, and perhaps others. On the one hand, if counsel appears too frequently, the media or the public will accuse the attorney of self-promotion. Conversely, if the lawyer fails to respond to the media's questions, then the accusation of "hiding" will arise. One cannot please the media, nor should one try. In the final analysis, in defending an unpopular cause or client, the lawyer must be true to his own personal sense of honor and conscience, and professional responsibility. If the lawyer truly believes he is doing the right thing, then he should not be anxious. The advocate needs to know, however, that because of the rules of confidentiality he may never be able to explain the reason for individual acts or exercises of judgment.

When I agreed to represent Mr. McVeigh, I felt it important that a trial lawyer from the Oklahoma bar be ready to accept the court's appointment. If no competent or experienced trial lawyer in Oklahoma was willing to defend Mr. McVeigh, it would have been a black mark not only against justice but against the bar

47 *Id.* This quote is from the portion of Judge Matsch's order relating to defense costs that must be incurred so that defense counsel is fully prepared.

association and ultimately our state and society. No inconsistency exists in being a good citizen and accepting the court's appointment.

Nor did I seek the appointment nor use it to advance my own cause or interest. When the case was over, I returned to Oklahoma to live, practice and work much as I did before that terrible day in April 1995, which became the standard by which all Oklahomans measure time. In conclusion, let me quote Reverdy Johnson:

> [B]y education, character and profession (the advocates) are especially qualified by their example to influence the public sentiment of their states, and to bring those states to the complete conviction which, it is believed, they must largely entertain—that to support and defend the Constitution of the United States . . . is not only essential to their peoples' happiness and freedom, but it is a duty to their country and their God.[48]

48 WILLIAM M. KUNSTLER, THE CASE FOR COURAGE 156 (1962).

Insider Trading and *United States v. O'Hagan*: The Supreme Court Reinstates Securities Fraud Convictions Based on the Misappropriation Theory

Rachel Goldstein

It can begin with an innocent conversation. It can happen any time, any place, in public or behind closed doors. It has been known to involve Wall Street executives,[1] stockbrokers,[2] doctors,[3] lawyers,[4] lottery directors,[5] New York City's finest,[6] and even print shop employees.[7] What is it? It is insider trading.

In the absence of a statutory definition, insider trading has, by default, been defined by case law; the law of insider trading has been extensively developed by the courts. The landmark case of

1 Securities & Exch. Comm'n v. Boesky, Fed. Sec. L. Rep. (CCH) ¶ 92,991 (S.D.N.Y. 1986); Securities & Exch. Comm'n v. Levine, 689 F. Supp. 317 (S.D.N.Y. 1988); Securities & Exch. Comm'n v. Siegel, Fed. Sec. L. Rep. (CCH) ¶ 93,123 (S.D.N.Y. 1987).

2 United States v. Newman, 664 F.2d 12 (2d Cir. 1981) (convicting securities trader of Rule 10b-5 violation for trading on inside securities information obtained from employees of stock brokerage); United States v. Chestman, 947 F.2d 551 (2d Cir. 1991) (reversing conviction on Stockbroker's Rule 10b-5 due to absence of a showing of a fiduciary relationship existing between stockbroker's client and client's wife regarding inside information pertaining to client's wife's family business).

3 Securities & Exch. Comm'n v. Willis, 777 F. Supp. 1165 (S.D.N.Y. 1991), *later proceeding*, 825 F. Supp. 617 (S.D.N.Y. 1993) (convicting psychiatrist of securities fraud for giving his stockbroker inside information he obtained from his patient, the wife of a corporate executive). In 1995, a psychotherapist admitted guilt to insider trading resulting from investing in his patient's company after being tipped by the patient, an aerospace company executive, about the company's planned merger with another company. Jeff Cole, *Executive's Therapist Pleads Guilty to Fraud in Trading of Lockheed Stock*, WALL ST. J., Dec. 14, 1995, at B5.

4 United States v. O'Hagan, 117 S. Ct. 2199 (1997); United States v. Reich, 661 F. Supp. 371 (S.D.N.Y. 1987) (denying motion to reduce 366-day sentence for crime of securities fraud). In 1987, a 34-year-old lawyer was convicted of 38 counts of insider trading after he tipped family and friends to invest in a company that the lawyer learned through his law firm was planning a corporate restructuring. James Sterngold, *Lawyer, 34, Is Convicted of Passing Insider Tips*, N.Y. TIMES, Aug. 19, 1987, at D1, D2.

5 United States v. Bryan, 58 F.3d 933 (4th Cir. 1995).

6 In 1983, the Securities and Exchange Commission charged four New York police officers, along with five other New York residents, with illegally earning over $1.2 million from trading on inside information regarding tender offers they obtained from a New York law firm that was working on the offers. Richard L. Hudson and Tim Metz, *SEC Charges That 4 Policemen, 5 Others Earned $1.2 Million on Insider Trading*, WALL ST. J., Jan. 12, 1983 at 8.

7 Chiarella v. United States, 445 U.S. 222 (1980).

Securities and Exchange Commission v. Texas Gulf Sulphur Co.[8] defined "insider" as referring to "employees as well as officers, directors and controlling stockholders who are in possession of material undisclosed information obtained in the course of their employment."[9] Material information was defined as information "which in reasonable and objective contemplation might affect the value of the corporation's stock or securities . . . ."[10] Furthermore, material information was also extended to include information which, if known, would clearly affect "investment judgment,"[11] or which directly bears on the intrinsic value of a company's stock.[12]

The significance of *Texas Gulf Sulphur* lies not only in its useful definitions of insider trading, but also in its far-reaching decision regarding the prohibition on insider trading. In *Texas Gulf Sulphur*, officers, directors and employees of a large minerals company secretly profited from trading on material, nonpublic information they received regarding the company's successful exploratory mining activities in Canada.[13] Instead of refraining from acting on this information until it was released to the shareholders and to the public, the defendants secretly purchased shares of company stock, enabling these insiders to enjoy tremendous profits once the information was publicly released. The company also published misleading press releases informing the public that its exploratory mining activities were inconclusive at a time when defendants already knew the company's mining activities had been tremendously successful in yielding valuable copper deposits.[14]

The court held two of the defendants had committed securities trading violations under Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934.[15] In essence, the court held that these defendants violated the law by trading on material, nonpublic information. The case set an important precedent for future cases involving classic "insiders" and illegality of insider trading based on Section 10(b) and Rule 10b-5.

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8 Securities & Exch. Comm'n v. Texas Gulf Sulphur Co., 258 F. Supp. 262 (S.D.N.Y. 1966), *aff'd in part and rev'd in part en banc*, 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

9 *Id.* at 279 (citing *In re* Cady, Roberts & Co.,40 S.E.C. 907, 912 (1961) (pointing out that Section 10(b) refers to an "insider" as "any person," which includes persons who are not directors, officers or major stockholders)).

10 *Id.* at 280 (quoting List v. Fashion Park, Inc., 340 F.2d 457, 462 (2d Cir. 1965), *citing* Kohler v. Kohler Co., 319 F.2d 634, 642 (7th Cir. 1963)).

11 *Id.* at 280 (citing *In re* Cady, Roberts & Co., 40 S.E.C. at 911).

12 *Id.* at 280 (referring to Kardon v. National Gypsum Co., 73 F. Supp. 798 (E.D. Pa. 1947); Speed v. Transamerica Corp., 99 F. Supp. 808 (D. Del. 1951); Ward LaFrance Truck Corp., 13 S.E.C. 373 (1943)).

13 *Id.* at 262.

14 *Id.*

15 *Id.* at 287 n.23.

In addition, *Texas Gulf Sulphur* dealt with insiders known as tippers.[16] A tipper is "a person who possesses material inside information, and who makes selective disclosure of such information for trading or other personal purposes."[17] Inside information is regarded as company information that is not publicly disclosed and could be used to facilitate personal market transactions.[18] Possession of material inside market information may give rise to a duty to either reveal that material inside information prior to trading on it, or refrain from trading on the basis of the material inside information altogether.[19]

The duty to disclose or abstain[20] from trading on the basis of nonpublic material information does not arise from the mere possession of inside information.[21] Instead, it arises from the existence of a fiduciary relationship between the parties.[22] A fiduciary relationship is one involving an individual or entity who "is under a duty to act for or to give advice for the benefit of the other party upon matters within the scope of the relation."[23] The term "insider" presumes a fiduciary duty is owed by the insider to the person from whom the insider receives material, undisclosed information.[24]

Insider trading can also refer to the act of receiving material information from insiders and then using that information to the recipient's benefit, without disclosing that information.[25] These individuals are commonly referred to as "tippees."[26] In the securities law area,[27] a tippee is "a person who acquires material non-

16 Insiders are not the focus of the misappropriation theory; they are the focus of the classical theory, which is beyond the topic of this case note. *See generally* Chiarella v. United States, 445 U.S. 222 (1980); Dirks v. Securities & Exch. Comm'n, 463 U.S. 646 (1983).

17 BLACK'S LAW DICTIONARY 1484 (6th ed. 1990).

18 Gregory R. Andre, Note, *Constructive Insider Liability and the Arm's Length Transaction Under Footnote 14 of Dirks*, 52 GEO. WASH. L. REV. 872, 872 n.1 (1984).

19 Securities & Exch. Comm'n v. Texas Gulf Sulphur Co., 258 F. Supp. 262, 280 (S.D.N.Y. 1966), *aff'd in part and rev'd in part en banc*, 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

20 The duty to disclose or abstain originated with the recognition of "[a]n affirmative duty to disclose material information [, which] has been traditionally imposed on corporate 'insiders,' particularly officers, directors, or controlling stockholders. We, and the courts, have consistently held that insiders must disclose material facts which are known to them by virtue of their position but which are not known to persons with whom they deal and which, if known, would affect their investment judgment." The duty arises from (i) the existence of information only intended to be used for corporate purposes, and (ii) the unfairness of allowing a corporate insider to benefit from trading on that information without prior full disclosure. *In re* Cady, Roberts & Co., 40 S.E.C. 907, 911-12 (1961), *cited in Chiarella*, 445 U.S. at 227.

21 *Dirks*, 463 U.S. at 646.

22 *Id.* at 646 (citing *Chiarella*, 445 U.S at 222).

23 RESTATEMENT OF TORTS § 874 cmt. a (1939), Andre, *supra* note 18, at 875.

24 Securities & Exch. Comm'n v. Cherif, 933 F.2d 403, 409 (7th Cir. 1991).

25 *Chiarella*, 445 U.S. at 230.

26 *Id.* at 230 n.12.

27 BLACK'S LAW DICTIONARY 1484 (6th ed. 1990).

public information from another who enjoys a fiduciary relationship with the company to which such information pertains."[28] Tippees are generally distinguished from "outsiders." Outsiders are viewed as neither insiders of companies, nor tippees of insiders.[29] While a tippee may differ from an outsider, in some instances an outsider may be considered to owe the same fiduciary duty as a tipper because of the outsider's fiduciary relationship to the tippee.[30]

Tippees generally do not possess the kind of independent fiduciary relationships with respect to the corporation and its shareholders that tippers have.[31] However, certain relationships, such as those between attorneys (tippees) and their clients (tippers), where confidential client company information may be shared with other attorneys in the firm (outsiders), may cause the outsider with whom that confidential information is shared to be regarded not only as a tippee, but also as a fiduciary.[32] In this context, an outsider who uses the confidential information to the outsider's sole benefit should, therefore, be regarded as breaching his or her fiduciary duty to the company's shareholders because of his or her fiduciary relationship to the tippee. The United States Supreme Court confronted this issue in the insider trading case, *United States v. O'Hagan*.[33]

O'Hagan addresses the conduct of an "outsider" under Section 10(b) and accompanying Rule 10b-5 of the Securities Exchange Act of 1934.[34] James Herman O'Hagan was an attorney, who secretly profited from investing in a takeover target of his firm's corporate clients after learning about the proposed takeover from

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28 *Id.*

29 Securities & Exch. Comm'n v. Clark, 915 F.2d 439, 442 (9th Cir. 1990).

30 For example, an attorney who is in-house counsel for a client is an insider because he is also an employee of that client. If that attorney acts on nonpublic, material information obtained from the client, that attorney becomes a tippee. An attorney who is not affiliated with a client's business but is acting on behalf of the client is generally considered an outsider. Even as an outsider, however, the attorney still owes a fiduciary duty to the attorney's client because of the fiduciary relationship that exists between attorneys and clients. When an attorney is a partner in a law firm, that attorney also owes a fiduciary duty to the other attorneys in the law firm and to those attorneys' clients. Therefore, an attorney who acts on nonpublic, material information obtained from another attorney in that firm and which belongs to a firm client, may also be viewed as a tippee. Supreme Court Justice Ginsburg elaborated on the distinction between O'Hagan and Pillsbury, the takeover target of a Dorsey & Whitney client, "Although an 'outsider' with respect to Pillsbury, O'Hagan had an intimate association with, and was found to have traded on confidential information from, Dorsey & Whitney, counsel to tender offeror Grand Met." United States v. O' Hagan, 117 S. Ct. 2199, 2221 n.5 (1997).

31 Dirks v. Securities & Exch. Comm'n, 463 U.S. 646, 655 (1983).

32 *Id.*

33 *O'Hagan*, 117 S. Ct. at 2199.

34 15 U.S.C. § 78j(b) (1997). Regulation of insider trading is primarily federal in nature. The SEC regulates deception requirements under the Securities Exch. Act of 1934 through Section 10(b) and disclosure requirements through antifraud provisions such as Rule 10b-5. 17 C.F.R. 240.10b-5 (1997).

the client's attorney in the firm. The critical issue was whether O'Hagan, a partner in the law firm which represented the bidder of a takeover target, could be held liable for trading on and profiting from the takeover information he obtained by talking with another attorney in the firm. O'Hagan was originally convicted on securities fraud, mail fraud and money laundering charges.[35] However, his convictions were overturned on appeal, based on the court of appeal's narrow interpretation of Section 10(b) and Rule 10b-5.[36] The long-standing conflict[37] among the lower courts in interpreting whether the scope of the statutory language of Section 10(b) and Rule 10b-5 of the Securities Exchange Act extends to insider trading cases such as *O'Hagan* culminated in the need for the Supreme Court's resolution of the issue.

The specific issue was whether O'Hagan's securities fraud convictions could be sustained under the "misappropriation theory," which allows a broad prohibition against insider trading. The misappropriation theory is one of two theories created under Section 10(b)'s proscription of deception.[38] The older theory is known as the classical theory. The classical theory, based on *Texas Gulf Sulphur*, is the original basis upon which insider trading has been proscribed.[39] This theory pertains only to an insider, including a tippee of the insider, who has a fiduciary or similar relationship to the company shareholders in whose stock the insider traded.[40] Under the classical theory, an "insider owes a fiduciary duty to the corporation's shareholders not to trade on inside information for his personal benefit."[41]

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35 Securities Exch. Comm'n v. O' Hagan, 901 F. Supp. 1461 (D. Minn. 1995).

36 United States v. O' Hagan, 92 F.3d 612, 619 (8th Cir. 1996).

37 Circuit courts which have applied the misappropriation theory to securities fraud cases include: the Second Circuit, *see, e.g.*, United States v. Newman, 664 F.2d 12 (2d Cir. 1981), Securities & Exch. Comm'n v. Materia, 745 F.2d 197 (2d Cir. 1984); the Third Circuit, *see, e.g.*, Rothberg v. Rosenbloom, 771 F.2d 818 (3d Cir. 1985); the Seventh Circuit, *see, e.g.*, Securities & Exch. Comm'n v. Cherif, 933 F.2d 403 (7th Cir. 1991), Securities & Exch. Comm'n v. Maio, 51 F.3d 623 (7th Cir. 1995); and the Ninth Circuit, *see, e.g.*, Securities & Exch. Comm'n v. Clark, 915 F.2d 439 (9th Cir. 1990). Circuit courts that have rejected the misappropriation theory in securities fraud cases include: the Fourth Circuit, *see, e.g.*, United States v. Bryan, 58 F.3d 933 (4th Cir. 1995); and the Eighth Circuit, *see, e.g.*, O'Hagan, 92 F.3d at 612.

38 *O' Hagan*, 92 F.3d at 616.

39 *Id.* at 616. The Eighth Circuit refers to *Chiarella*, 445 U.S. 222, 233 (1980), as the germinal case outlining the classical theory approach to the prohibition on insider trading. "[T]he duty to disclose arises when one party has information that the other party is entitled to know because of a fiduciary or other relationship of trust and confidence between them." *Chiarella*, 445 U.S. at 226-35 (citing RESTATEMENT (SECOND) OF TORTS § 551(2)(a) (1976)).

40 *Clark*, 915 F.2d at 443.

41 *O'Hagan*, 92 F.3d at 616 (quoting *Cherif*, 933 F.2d at 409). The classical theory focuses solely on corporate "insiders"; that is, those within the corporation who personally benefit by secretly trading on inside information they receive from the corporation regarding the corporation's shares. The misappropriation theory, on the other hand, extends the reach of the prohibition against insider trading to those traders who exhibit the same pro-

O'Hagan was neither an insider of the company whose shares were being traded, nor a tippee of any insider. Therefore, he falls outside the reach of the classical theory.[42] Thus, even though O'Hagan traded securities based on material, nonpublic information, he owed no fiduciary duty to the shareholders of the company in whose stock he traded.[43] However, O'Hagan is within the reach of the misappropriation theory, which specifically extends the prohibition against insider trading to trading by outsiders, such as O'Hagan.[44] The misappropriation theory "extends the reach of Rule 10b-5 to outsiders who would not ordinarily be deemed fiduciaries of the corporate entities in whose stock they trade . . . ."[45]

While it is clear that the classical theory does not apply to *O'Hagan*, the Supreme Court's recent decision to reverse the Eighth Circuit's ruling and uphold O'Hagan's convictions now makes it equally clear that the misappropriation theory applies to cases involving outsiders who trade on privileged information. The Supreme Court's decision is consistent with several prior circuit court decisions[46] that have applied the misappropriation theory in insider trading cases. The decision puts an end to inconsistent holdings made by some of the lower courts in applying the misappropriation theory. The Supreme Court has now established a long awaited definitive ruling for insider trading cases coming under this previously undefined area of securities law.

This case note will analyze the merits of the misappropriation theory and set forth the reasons justifying the Supreme Court's recent decision to apply the misappropriation theory in *O'Hagan*. Part I will discuss the background and facts surrounding *O'Hagan*. Part II will discuss the origins of the misappropriation theory, particularly the language of Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934. Part III will present the arguments in support of the theory, looking specifically at previously decided cases which have applied and rejected the misappropriation theory as a basis for Section 10(b) and Rule 10b-5 liability and compare them to *O'Hagan*. Part IV will address the policy

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scribed conduct, but who would not otherwise be liable because they are outsiders. The misappropriation theory turns on the existence of a fiduciary duty between the misappropriation and the lawful possessor of that misappropriated information and whether a breach of that duty occurred. *Id.*

42 *Clark*, 915 F.2d at 442.

43 *O' Hagan*, 92 F.3d at 617 n.5.

44 *Cherif*, 933 F.2d at 408.

45 *Id.* at 409.

46 Circuit courts that have applied the misappropriation theory to securities fraud cases include the Second Circuit, *see, e.g.*, United States v. Newman, 664 F.2d 12 (2d Cir. 1981), Securities & Exch. Comm'n v. Materia, 745 F.2d 197 (2d Cir. 1984); the Third Circuit, *see, e.g.*, Rothberg v. Rosenbloom, 771 F.2d 818 (3d Cir. 1985); the Seventh Circuit, *see, e.g.*, *Cherif*, 933 F.2d 403, Securities & Exch. Comm'n v. Maio, 51 F.3d 623 (7th Cir. 1995); and the Ninth Circuit, *see, e.g.*, *Clark*, 915 F.2d 439 (9th Cir. 1990).

considerations behind the misappropriation theory and Part V will state the conclusion.

I. BACKGROUND AND FACTS

A. *State v. O'Hagan*

O'Hagan, an attorney and partner with the Minneapolis law firm of Dorsey and Whitney, was convicted in a Minnesota state court of misappropriating client trust funds between October 1986 and March 1988.[47] These criminal charges resulted from the firm's discovery that O'Hagan had taken money out of two client trust fund accounts to pay off his personal bank loans.[48]

O'Hagan claimed during the state trial that he understood that temporarily taking money from a client's account was allowable at the discretion of the client's attorney. However, it later became clear that O'Hagan unlawfully took the money when both clients at trial denied giving O'Hagan permission to take the money from their accounts.[49] O'Hagan was subsequently disbarred[50] and convicted of misappropriation.[51]

B. *Securities and Exchange Commission v. O'Hagan*

1. The Facts and the Charges

In the summer of 1988, O'Hagan received material, nonpublic information from another partner in the firm, Thomas Tinkham.[52] The information concerned a tender offer[53] about to be made by the firm's client, Grand Met PLC, for the common shares of a target company, Pillsbury. Shortly thereafter, O'Hagan purchased a total of 7,500 shares in Pillsbury: 5,000 shares of common stock[54]

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47 State v. O' Hagan, 474 N.W.2d 613 (Minn. Ct. App. 1991).

48 *Id.* at 616-17. The two trust accounts consisted of settlement money that had been obtained for two of O'Hagan's clients; the Mayo Clinic and Northrup King & Co.

49 *Id.* at 615-16.

50 *In re* O'Hagan, 450 N.W.2d 571 (Minn. 1990).

51 State v. O'Hagan, 474 N.W.2d at 615. Therefore, by the time federal securities charges were later filed by the Securities and Exchange Commission against O'Hagan, he already had one conviction on his record. He had displayed a tendency toward misconduct by significantly deviating from the firm's standard practice of not allowing attorneys to take money out of clients' accounts for their personal use.

52 No charges were filed against Mr. Tinkham, who was said to have been unaware of O'Hagan's intent on acquiring Pillsbury stock. Brief for Appellee at 9, United States v. O'Hagan, 92 F.3d 612 (8th Cir. 1996) (Nos. 94-3714 and 94-3856).

53 "A tender offer is a public announcement by a company or individual indicating that it will pay a price above the current market price for the shares 'tendered' of a company it wishes to acquire or take control of." BLACK'S LAW DICTIONARY 1468 (6th ed. 1990). In general, see Denis Binder, *The Securities Law of Contested Tender Offers,* 18 N.Y.L.F. 569 (1973).

54 Common stock is a class of stock that allows for ultimate or residual ownership of the corporation. BLACK'S LAW DICTIONARY 278 (6th ed. 1990).

and an additional 2,500 shares on a call option contract[55] basis. Immediately after the takeover was announced in the fall of 1988, O'Hagan sold these shares, realizing a profit of over $4 million. The Securities and Exchange Commission (SEC) charged O'Hagan with misappropriating insider information in violation of Section 10(b) and Rule 10b-5 of the Securities Exchange Act.[56] The SEC also charged O'Hagan with perpetrating securities fraud in violation of Section 14(e) and Rule 14e-3 promulgated under Section 14(e).[57] O'Hagan was convicted in a Minnesota district court in 1994 of 57 counts of securities fraud, mail fraud and money laundering.[58] The court also ordered a disgorgement of O'Hagan's profits, and permanently enjoined him from engaging in any securities trading.[59] O'Hagan appealed his securities fraud convictions on the grounds that the government's use of the misappropriation theory was an inapplicable theory of Section 10(b) liability on which to convict him.[60]

2. The Reversal

After reviewing the language of the Section 10(b), which explicitly requires "deception," the Eighth Circuit Court of Appeals determined that "deception" is not a necessary component of the misappropriation theory.[61] The court then proceeded not only to reverse O'Hagan's securities fraud convictions, but also to overturn his mail fraud and money laundering convictions, which were predicated on the securities fraud convictions.[62] The court also ordered the forfeiture of O'Hagan's profits. The court further noted in its opinion that "[N]either the Supreme Court nor this court has yet determined whether the misappropriation theory is a permissible basis upon which to impose 10(b) liability."[63]

In reversing O'Hagan's securities fraud, mail fraud and money laundering convictions,[64] the Eighth Circuit joined the

55 "A call option is a negotiable instrument whereby writer of option, for a certain sum of money (the 'premium'), grants to the buyer of option the irrevocable right to demand, within a specified time, the delivery by the writer of a specified number of shares of a stock at a fixed price (the 'exercise' or 'striking' price)." BLACK'S LAW DICTIONARY 204 (6th ed. 1990).

56 15 U.S.C. § 78j(b) (1985); 17 C.F.R. 240.10b-5 (1998). Taken from *O'Hagan*, 92 F.3d at 615.

57 *O'Hagan*, 92 F.3d at 625. 15 U.S.C. § 78n(e) (1985); 17 C.F.R. 240.14e-3(a) (1998). This case note does not address Section 14 or Rule 14.

58 *O'Hagan*, 92 F.3d 612; Securities & Exch. Comm'n v. O'Hagan, 901 F. Supp. 1461, 1474 (D. Minn. 1995).

59 *O'Hagan*, 901 F. Supp at 1472.

60 *O'Hagan*, 92 F.3d at 622.

61 *Id.* at 617.

62 *Id.* at 628.

63 *Id.* at 617.

64 *Id.* at 612.

Fourth Circuit,[65] the only other federal circuit which has expressly refused to base a securities fraud conviction on the misappropriation theory.[66] The rulings of the Eighth and Fourth Circuit courts stand in sharp contrast to those of the Second,[67] Third,[68] Seventh[69] and Ninth[70] Circuit courts, all of which have embraced the misappropriation theory, and welcomed its application to securities fraud cases.

C. U.S. Supreme Court Applies Misappropriation Theory in *United States v. O'Hagan*

The government's efforts to reinstate O'Hagan's prior convictions in an en banc hearing by the Eighth Circuit were unsuccessful.[71] However, the denial was followed by a granting of certiorari by the U.S. Supreme Court.[72] The Court reinstated O'Hagan's prior convictions based on the misappropriation theory.[73] The decision settles the long-standing dispute regarding the application of the misappropriation theory in securities fraud cases.[74] The Court's official endorsement of the misappropriation theory in securities fraud cases also sends a resounding new warning throughout the securities world: "Outsiders" who trade on misappropriated information are just as liable under the misappropriation theory for insider trading as "insiders" are under the classical theory.

II. Origins of Misappropriation

A. Section 10(b) and Rule 10b-5

An understanding of the origins of the misappropriation theory requires a closer look at the background of Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934. Section 10(b) of the Securities Exchange Act of 1934 originated as part of the

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65 United States v. Bryan, 58 F.3d 933, 949 (4th Cir. 1995).

66 The misappropriation theory was first used by the government in *Chiarella v. United States*, 445 U.S. 222, 235 (1980), *cited in* Securities & Exch. Comm'n v. Clark, 915 F.2d 439, 444 (9th Cir. 1990). The theory was first adopted by the court, however, in *United States v. Newman*, 664 F.2d 12 (2d Cir. 1981), *cited in Bryan*, 58 F.3d at 954.

67 *Newman*, 664 F.2d at 12; Securities & Exch. Comm'n v. Materia, 745 F.2d 197 (2d Cir. 1984).

68 Rothberg v. Rosenbloom, 771 F.2d 818 (3d Cir. 1985), *on remand*, 628 F. Supp. 746 (E.D. Pa. 1986), *rev'd and remanded*, 808 F.2d 252 (3d Cir. 1986), *cert. denied*, 481 U.S. 1017 (1987).

69 Securities & Exch. Comm'n v. Cherif, 933 F.2d 403 (7th Cir. 1991); Securities & Exch. Comm'n v. Maio, 51 F.3d 623 (7th Cir. 1995).

70 *Clark*, 915 F.2d at 439.

71 United States v. O'Hagan, 92 F.3d 612 (8th Cir.), *reh'g en banc denied* (8th Cir. 1996), *cert. granted*, 117 S. Ct. 759 (1997).

72 *Id.*

73 United States v. O'Hagan, 117 S. Ct. 2199 (1997).

74 Jonathan E.A. ten Oever, Note, *Insider Trading and the Dual Role of Information*, 106 Yale L.J. 1325 (1997).

New Deal legislation regulating securities exchanges.[75] In 1942, the Securities and Exchange Commission promulgated Rule 10b-5.[76] Section 10(b) prohibits deceptive conduct,[77] while Rule 10b-5 proscribes fraudulent conduct.[78]

A proper analysis of Section 10(b) and Rule 10b-5 requires a close look at the statutory language.[79] The language of these provisions lays the foundation for the misappropriation theory.

Section 10(b), in part, states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange . . .
>
> . . . .
>
> b) To use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.[80]

Rule 10b-5, in part, states:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme or artifice to defraud, [or]
>
> . . . .
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.[81]

An important difference exists in the language of Section 10(b) and Rule 10b-5. Both Section 10(b) and Rule 10b-5 speak of "deception"[82] in the same context of "in connection with the purchase or sale of any security."[83] The key difference is that Sec-

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75 Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 727-28 (1975).

76 *Id.* at 729.

77 *O'Hagan*, 92 F.3d at 616.

78 *Id.* at 615.

79 "*Ernst & Ernst* makes clear that in deciding whether a complaint states a cause of action for 'fraud' under Rule 10b-5, 'we turn first to the language of § 10(b), for "[t]he starting point in every case involving construction of a statute is the language itself."'" Santa Fe Indus. v. Green, 430 U.S. 462, 472 (1977) (citing Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197 (1976) (quoting Blue Chip Stamps, 421 U.S. at 756 (Powell, J., concurring))).

80 15 U.S.C. § 78j(b) (1985).

81 17 C.F.R. 240.10b-5 (1998).

82 "The act of deceiving; intentional misleading by falsehood spoken or acted." BLACK'S LAW DICTIONARY 406 (6th ed. 1990).

83 *O'Hagan*, 92 F.3d 612, at 615.

tion 10(b) refers to a prohibition of "manipulation,"[84] whereas Rule 10b-5 refers to a prohibition of "fraud."[85] Section 10(b) bans only that which the Securities Exchange Commission specifically proscribes, namely manipulation and/or deception in connection with the purchase or sale of a security.[86] However, Rule 10b-5, which was specifically created as an addendum to Section 10(b),[87] introduces a proscription against fraud, which is not specifically included in the proscription on manipulation and deception as defined by Rule 10(b). At the same time, however, it has been declared that Rule 10b-5 does not extend liability beyond that conduct which Section 10(b) specifically prohibits.[88]

Rule 10b-5 has been said to require the element of scienter or intent in wrongdoing,[89] while Section 10(b) has been described as a general antifraud statute.[90] Section 10(b) has also been referred to as the "catch-all" section.[91] The statute was originally worded to protect only brokers and dealers involved in securities purchases from deceptive conduct, while the rule was added to extend protection against intentional fraudulent conduct to anyone in connection with the purchase or sale of securities.[92]

By proscribing intentional fraudulent conduct, Rule 10b-5 closed a gap in coverage that the language of Section 10(b) had

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84 *Id.* Manipulation has been defined to be a term of art within the securities market context, referring to practices such as wash sales, matched orders, or rigged prices to intentionally mislead the investing public by artificially influencing market prices. *Id.* at 615 n.4 (citing Santa Fe Indus. v. Green, 430 U.S. 462, 476 (1977) (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199 (1976))).

85 "A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury." BLACK'S LAW DICTIONARY 660 (6th ed. 1990).

86 Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 177 (1994).

87 *Ernst & Ernst*, 425 U.S. at 214 n.32.

88 *Id.* at 214 (1976). In *United States v. O'Hagan*, the Eighth Circuit extrapolated the restricted interpretation of Rule 10b-5 from the Supreme Court's narrow interpretation of Section 10(b) in *Central Bank of Denver*: "With respect . . . to . . . the scope of conduct prohibited by Section 10(b), the text of the statute controls our decision." *O'Hagan*, 92 F.3d at 616. However, *Central Bank's* ruling pertains to an aiding and abetting charge, not to insider trading activities. While Section 10(b) and accompanying Rule 10b-5 were intended to proscribe activities in connection with the purchase or sale of securities, they were not intended to cover aiding and abetting charges.

89 *Ernst & Ernst*, 425 U.S. at 214.

90 United States v. Chestman, 947 F.2d 551, 559 (2d Cir. 1991).

91 *Ernst & Ernst*, 425 U.S. at 202. The term "catch-all," however, belongs to Thomas G. Corcoran, the spokesman for the drafters of Section 10(b). *Id.*

92 "The Securities & Exch. today announced the adoption of a rule prohibiting fraud by any person in connection with the purchase of securities. The previously existing rules against fraud in the purchase of securities applied only to brokers and dealers." SEC Release No. 3230 (May 21, 1942) (issued by the Securities and Exchange Commission concurrent with the adoption of Rule 10b-5), *quoted in Ernst & Ernst*, 425 U.S. at 214 n.32.

previously left open.[93] However, the Eighth Circuit's narrow interpretation of "fraud" in Rule 10b-5 ignored the purpose of the Rule. The specific language at issue in the Eighth Circuit's review of the *O'Hagan* case involved the word "deception" as an element of Section 10(b) and the term "fraud" in Rule 10b-5. The court understood "fraud" was used to define the scope of "deception."[94] The Eighth Circuit concluded that "fraud" as used in Rule 10b-5, could not be construed to refer to a prohibition that was broader than what "deception" referred to in Section 10(b) because Rule 10b-5 grew out of Section 10(b).[95] Therefore, despite the rule's purpose in extending coverage to reach fraudulent securities conduct, the Eighth Circuit narrowly construed Rule 10b-5 within the confines of the statutory language set forth in Section 10(b).

The Eighth Circuit's decision resulted from the refusal to broaden the statutory language of "deception" to encompass the meaning of "fraud" as used in Rule 10b-5. This strict construction caused the Eighth Circuit to conclude that the misappropriation theory did not provide the requisite "deception" element upon which Section 10(b) liability could be based. Furthermore, there was no basis for finding "deception" "in connection with the purchase or sale of any security."[96]

The Supreme Court, on the other hand, found O'Hagan met the "deceptive" element within the meaning of Section 10(b) when he intentionally failed to disclose to Dorsey & Whitney, and its client, Grand Met, that he planned to trade on the confidential, material information he received from a Dorsey and Whitney partner regarding Pillsbury: "Concretely, it was O'Hagan's failure to disclose his personal trading to Grand Met and Dorsey, in breach of his duty to do so, that made his conduct 'deceptive' under Section 10(b)."[97]

Furthermore, the Supreme Court found the "in connection with the purchase or sale of a security" element had been established when O'Hagan purchased and sold his Pillsbury stock without the knowledge of Dorsey & Whitney or Grand Met: "This

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93 "The new rule closes a loophole in the protection against fraud administered by the Commission by prohibiting individuals or companies from buying securities if they engage in fraud in their purchase." *Id.*

94 *O'Hagan*, 92 F.3d at 615. Deception within the language of Section 10(b) has been defined as "the making of a material misrepresentation or the nondisclosure of material information in violation of a duty to disclose." United States v. Bryan, 58 F.3d 933, 945 (4th Cir. 1995) (quoting Santa Fe Indus. v. Green, 430 U.S. 462, 474 (1977)).

95 *O'Hagan*, 92 F.3d at 615.

96 *Id.* at 617.

97 United States v. O'Hagan, 117 S. Ct. 2199, 2211 (1997). Justice Ginsburg also points out that when the trader owes a fiduciary duty to more than one person, as in a relationship involving a lawyer, his law firm and the client, the trader's disclosure to only one of the parties may still not shield the trader from liability under the misappropriation theory. *Id.* at 2209 n.7.

element is satisfied because the fiduciary's fraud is consummated not when the fiduciary gains the confidential information, but when, without disclosure to his principal, he uses the information to purchase or sell securities."[98]

B. Interpretation of the Statutory Language

The Eighth Circuit cited several cases which supported its conclusion that the language of the statute cannot be more broadly construed than what the words explicitly state.[99] At the same time, other courts have also acknowledged tremendous concern for ensuring fairness and integrity of conduct within the securities markets; a concern which underlies the securities laws.[100]

Clearly the scope of Rule 10b-5 cannot exceed the power of the Commission under Section 10(b).[101] However, some courts had chosen to narrowly interpret the statutory language.[102] The Eighth Circuit sided with a narrow interpretation of Section 10(b), thereby reversing O'Hagan's convictions based on the intent expressed by the explicit statutory language of Section 10(b).[103]

In reviewing the statutory language more closely, however, another logical inference may be made. The framers of Rule 10b-5 intended to expand coverage over proscribed conduct that was implicitly but not expressly prohibited by Section 10(b). Little purpose is served in including the word "fraud" in Rule 10b-5 if its meaning is restricted by the preexisting meaning of "deception" in Section 10(b). While fraud is a vehicle by which one can deceive,[104] fraud and deceit are not synonymous in meaning. Fraud comprises all acts, omissions and concealments involving a breach of a legal or equitable duty and resulting in damage to another.[105] The inclusion of "fraud" in Rule 10b-5 was not simply to restate the meaning of "deception." Otherwise, "deception" would have been inserted in Rule 10b-5 as well. A logical inference is that the in-

98 *Id.* at 2209.

99 *O'Hagan*, 92 F.3d at 615 (citing Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 174 (1994) and Santa Fe Indus. v. Green, 430 U.S. 462, 472 (1977) (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 197 (1976)); *See also* Chiarella v. United States, 445 U.S. 222, 234-35 (1980) (citing Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979) (quoting SEC v. Sloan, 436 U.S. 103, 116 (1978))).

100 United States v. Carpenter, 791 F.2d 1024, 1027 (2d Cir. 1986). This concern is echoed in the majority opinion rendered by the Supreme Court in the *O'Hagan* case: "The theory is also well-tuned to an animating purpose of the Exchange Act: to ensure honest securities markets and thereby promote investor confidence." *O'Hagan*, 117 S. Ct. at 2210.

101 Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 472-73 (1977) (quoting *Ernst & Ernst*, 425 U.S. at 214).

102 United States v. Newman, 664 F.2d 12, 17 (2d Cir. 1981).

103 "It is inconsistent with settled methodology in § 10(b) cases to extend liability beyond the scope of conduct prohibited by the statutory text." *O'Hagan*, 92 F.3d at 617 (citing *Central Bank of Denver*, 511 U.S. at 177).

104 *Id.* at 615 n.4.

105 BLACK'S LAW DICTIONARY 660 (6th ed. 1990).

sertion of "fraud," which has a broader meaning than "deception," is supportive of an expansive rather than a narrow interpretation of the statutory language of Section 10(b).

C. The Misappropriation Theory

The misappropriation theory was born out of a need to reach those who previously could not be held liable under Section 10(b) and Rule 10b-5. The theory allows for Section 10(b) and Rule 10b-5 violations for fraud when a person "(1) misappropriates material nonpublic information (2) by breaching a duty arising out of a relationship of trust and confidence and (3) uses the information in a securities transaction, (4) regardless of whether he owed any duties to the shareholders of the traded stock."[106] The misappropriation theory does not involve a requisite showing of a defrauded party, or that the party from whom the misappropriator obtained the material nonpublic information was even involved in any securities transaction.[107] The theory merely requires a showing of a breach of fiduciary duty between the misappropriating securities trader and the party from whom the information was obtained.[108] At the same time, the misappropriation theory specifically addresses misappropriators operating in the area of securities transactions.[109]

D. Outsiders and Fiduciary Duties

The Eighth Circuit dismissed the argument that O'Hagan owed a duty to Pillsbury because he was an outsider in relation to Pillsbury.[110] Similarly, in *United States v. Bryan*,[111] the Fourth Circuit criticized *Moss v. Morgan Stanley*[112] for misinterpreting a footnote in *United States v. Newman*[113] to mean an outsider owed

106 Securities & Exch. Comm'n v. Clark, 915 F.2d 439, 443 (9th Cir. 1990).

107 United States v. Bryan, 58 F.3d 933, 944 (4th Cir. 1995).

108 *O'Hagan*, 92 F.3d at 616 (citing *Bryan*, 58 F.3d at 944, quoting *Clark*, 915 F.2d at 443).

109 United States v. O'Hagan, 117 S. Ct. 2199, 2209 (1997).

110 While no standard definition exists for "outsider," it has been thought to refer to both tippees and recipients of information by insiders who breach a fiduciary duty in doing so. Andre, *supra* note 18, at 874. Andre also refers to List v. Fashion Park, Inc., 340 F.2d 457, 463 (2d Cir. 1965).

111 *Bryan*, 58 F.3d at 956 n.23.

112 Moss v. Morgan Stanley, Inc., 719 F.2d 5, 12 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984).

113 United States v. Newman, 664 F.2d 12, 15 n.1 (2d Cir. 1981). The *Bryan* court criticized the *Moss* court's interpretation of footnote 1 of the *Newman* opinion, which reads as follows: "In two instances the targets themselves were clients of the investment banking firms. The Government belatedly suggests that the indictment should be construed to alleged securities laws violations in these two instances, on the theory that the defendants, by purchasing stock in the target companies, defrauded the shareholders of those companies. Whatever validity that approach might have, it is not fairly within the allegations of the indictment, which allege essentially that the defendants defrauded the investment banking firms and the firms' takeover clients." *Id.* at 15. The *Bryan* court found the *Moss*

a duty to a target company that was not a "client" of the outsider's company.[114] Further, the *Bryan* court criticized *Moss* for its failure to show whether or how the defendant outsider owed a duty to the "non client" target company.[115]

O'Hagan was neither an employee nor a current shareholder of the target company, Pillsbury, prior to his sudden purchases of the Pillsbury stock. However, he was a partner of the firm engaged by Grand Met, which confidentially disclosed to the firm its intent to make a tender offer for Pillsbury stock. Even though Grand Met may not have been O'Hagan's particular client, Grand Met was a client of O'Hagan's law firm. A partner in a law firm is an agent who acts not only on behalf of its clients, but also on behalf of the other partners.[116] Grand Met could also then be regarded as a client of O'Hagan's. Therefore, O'Hagan owed a fiduciary duty to Grand Met and its shareholders not to act upon the material nonpublic information he indirectly obtained from Grand Met without first disclosing his intentions to Grand Met. O'Hagan also owed a duty to his law firm partnership not to act on this nonpublic information without prior disclosure to the partnership. A partnership, by definition, requires that each partner owes a fiduciary duty not only to his or her client, but also to fellow partners.[117]

Pillsbury was admittedly not a "client" of the law firm, per se. However, O'Hagan could still be shown to indirectly owe a fiduciary duty to Pillsbury's shareholders through his firm's direct association with its client. Grand Met initially disclosed the confidential information regarding Pillsbury, which O'Hagan later used for his sole advantage. In doing so, O'Hagan caused injury to Pillsbury's shareholders who did not have the same trading ad-

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court's interpretation to be flawed for two reasons: first, because the footnote did not attempt to "limit" the holding of the case; and second, because the footnote failed to address "whether or how" Newman and his accomplices could have owed a duty to the target company, which was not a client of the accomplices' employer, Morgan Stanley. *Bryan*, 58 F.3d at 956 n.23.

114 *Bryan*, 58 F.3d at 956 n.23.

115 *Id.*

116 Section 9(1) of the Uniform Partnership Act of 1914 states: "Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership . . . ."

117 "The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections (b) and (c)." Uniform Partnership Act, § 404(a), *cited in* Allan W. Vestal, *The Disclosure Obligations of Partners Inter Se Under The Revised Uniform Partnership Act of 1994: Is the Contractarian Revolution Failing?*, 36 WM. & MARY L. REV. 1559, 1631 n.16 (1995), *reprinted in* 36 CORP. PRAC. COMMENTATOR 923 (1995).

vantage O'Hagan possessed through the material, nonpublic information.[118]

The Eighth Circuit viewed O'Hagan's purchase of Pillsbury's stock as a legitimate arm's-length transaction.[119] This premise would be valid if O'Hagan had not known the confidential information regarding the identity of Grand Met's tender offer target, but had simply deduced it[120] based on financial expertise or through some other legitimate means. However, O'Hagan gained a tremendous financial windfall by using nonpublic material information he had intentionally obtained directly from a Dorsey and Whitney partner and indirectly from a firm client. In doing so, he not only gained an unfair advantage over ordinary investors, but he also breached a fiduciary duty explicitly owed to the firm and a duty implicitly[121] owed to the client.

III. Application of the Misappropriation Theory

A. *United States v. Newman*

The Second Circuit was the first appellate court to apply the misappropriation theory. In *Newman*, the Second Circuit used the theory to reverse a United States District Court's prior dismissal of charges for illegal insider trading activity which did not involve a direct relationship between the parties.[122] James Mitchell Newman, a securities trader and manager of a brokerage firm's over-the-counter trading department, misappropriated inside information he received from two employees of two investment banking firms, Morgan Stanley & Co., Inc. and Kuhn Loeb & Co., regarding proposed mergers and acquisitions. He and two co-conspirators[123] purchased stock in the target companies of the proposed

118 This unfair trading advantage forms the basis for the policy considerations underlying the misappropriation theory of Rule 10b-5: "[T]he Rule is based in policy on the justifiable expectation of the securities marketplace that all investors trading on impersonal exchanges, have relatively equal access to material information." Securities & Exch. Comm'n v. Texas Gulf Sulphur Co., 401 F.2d 833, 848 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

119 This inference is based on a statement made by Chief Justice Burger in his famous *Chiarella* dissent, "As a general rule, neither party to an arm's-length business transaction has an obligation to disclose information to the other unless the parties stand in some confidential or fiduciary relation." Chiarella v. United States, 445 U.S. 222, 239-40 (1980). An arm's-length transaction is understood to be a complete transaction between two unrelated parties acting in their own interest. Andre, *supra* note 18, at 872.

120 The Court in *Chiarella* used the word "deduced" to describe how Vincent Chiarella determined the identities of the target companies. *Chiarella*, 445 U.S. at 224.

121 A fiduciary relationship implies that an individual entering into one will not use any revealed confidential information to that individual's advantage. Securities & Exch. Comm'n v. Cherif, 933 F.2d 403, 410 (7th Cir. 1991) (citing Securities & Exch. Comm'n v. Clark, 915 F.2d 439, 448 (9th Cir. 1990)).

122 United States v. Newman, 664 F.2d 12, 16 (2d Cir. 1981).

123 While additional defendants were named in the indictment as co-conspirators, only Newman was within the district court's jurisdiction. *Newman*, 664 F.2d at 15.

mergers and takeovers and shared the profits with the two employees. The Second Circuit held Newman's conduct "could be found to constitute a criminal violation of Section 10(b) and Rule 10b-5, despite the fact neither Morgan Stanley or Kuhn Loeb, nor their clients, were at the time purchasers or sellers of the target company securities or in any transaction with any of the defendants."[124] The court based the requisite finding of fraud on Newman's use of material, nonpublic information, contrary to an implicit agreement not to do so.[125]

O'Hagan also profited from gaining access to confidential, material information from an insider. Newman and O'Hagan both received confidential information from tippers. However, unlike Newman's tippers, O'Hagan's tipper did not share in the profits. *Newman* involved a knowing tipper. In *O'Hagan*, Tinkham was an unknowing tipper and, in fact, also appeared to be suspicious of O'Hagan after disclosing the material nonpublic information to O'Hagan.[126]

Newman had no direct relationship with the company in whose stock his clients traded. O'Hagan also had no direct relationship with the company in whose stock he traded. Newman did not hold a fiduciary position with his company. O'Hagan, on the other hand, held a fiduciary position within his firm. Therefore, unlike Newman, O'Hagan owed a duty to the firm's clients. The fiduciary status may have entitled him to certain officer perks. However, any perks no more included insider trading and profiting from misusing a client's nonpublic material information than they would have allowed him to embezzle money out of client trust funds to pay his personal loans.[127]

Even though Newman did not have a fiduciary relationship with Morgan Stanley or Kuhn Loeb or their clients, he was still found to owe a duty to the shareholders of these investment banking companies and the target companies.[128] As a fiduciary, O'Hagan is held to an even higher standard than a nonfiduciary like Newman. In light of the holding in *Newman*, O'Hagan should

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124 *Id.* at 16.

125 *Clark*, 915 F.2d at 445 (citing *Newman*, 664 F.2d at 17-18).

126 Tinkham's suspicions concerning O'Hagan began with the conversation initiated by O'Hagan in the doorway of Tinkham's office regarding the Pillsbury takeover. Tinkham believed O'Hagan's interest in Pillsbury to be of a highly irregular nature. Brief for Appellee at 8-9, United States v. O' Hagan, 92 F.3d 612 (8th Cir. 1996) (Nos. 94-3714 and 94-3856). Later, Tinkham was observed by O'Hagan's secretary to be going through O'Hagan's mail while O'Hagan was away in Europe. Confirmation slips of purchases of Pillsbury options were among the mail pieces. Brief for Appellant at 9, *O'Hagan* (No. 94-3714).

127 O'Hagan had previously been convicted of "theft by temporary taking" in a Minnesota state criminal trail for unlawfully taking money out of his clients' trust fund accounts at Dorsey and Whitney. State v. O'Hagan, 474 N.W.2d 613 (Minn. Ct. App. 1991).

128 *Newman*, 664 F.2d at 16.

be held liable for his actions. O'Hagan stood in closer proximity as fiduciary to the shareholders of Pillsbury and Grand Met than Newman in relation to the shareholders of Morgan Stanley and Kuhn Loeb or their clients. Such inconsistency in declaring that one who is clearly in a greater fiduciary position is not liable, while another who owes a lesser duty is liable, gives rise to an inexplicable result. The Supreme Court's decision in *O'Hagan* restores consistency and logic to the scenario.

B. *Chiarella v. United States*

The *Newman* holding, which is the most widely accepted view of the misappropriation theory to date,[129] stands in sharp contrast to the Supreme Court's holdings in *Chiarella v. United States*[130] and *Dirks v. Securities and Exchange Commission*.[131] The Supreme Court set forth the first restriction in *Chiarella*, holding liability under Section 10(b) and Rule 10b-5 could only be imposed based on a relationship of trust and confidence between the parties to disclose, material nonpublic information. A mere possession of material nonpublic information is insufficient.[132] Vincent Chiarella, a print shop employee, had deduced the identities of takeover target companies from the announcements his employer received from the acquiring companies. Even though Chiarella was in possession of nonpublic information, he was found to owe no duty to the sellers of the stocks he purchased, based on the absence of any special relationship with them.

O'Hagan is clearly distinguishable from *Chiarella*. Chiarella merely deduced the identities of the target companies prior to purchasing their stock, where O'Hagan intentionally elicited the target company's identity from another attorney in his firm. No relationship existed between Chiarella and the target companies. However, O'Hagan was indirectly tied as a fiduciary partner to Pillsbury and its shareholders through his firm's fiduciary relationship with Grand Met.

Both the concurring and dissenting opinions in *Chiarella* stated that the question of whether the defendant breached a duty he owed others, including the acquiring corporation and his employer, had not been presented. If it had, the Court may have upheld Chiarella's securities fraud convictions.[133] However, the Court noted the conviction could not rest on a theory which had not been presented to the jury. As Justice Powell remarked,

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129 *Clark*, 915 F.2d at 445.
130 Chiarella v. United States, 445 U.S. 222, 235 (1980).
131 Dirks v. Securities & Exch. Comm'n, 463 U.S. 646, 667 (1983).
132 *Chiarella*, 445 U.S. at 235.
133 Securities & Exch. Comm'n v. Cherif, 933 F.2d 403, 409 (7th Cir. 1991).

> [T]he United States offers an alternative theory to support petitioner's conviction. It argues that petitioner breached a duty to the acquiring corporation when he acted upon information that he obtained by virtue of his position as an employee of a printer employed by the corporation . . . . We need not decide whether this theory has merit for it was not submitted to the jury.[134]

Justice Powell's comment also served as a reminder that a theory which is not introduced at trial cannot be argued on appeal.

In *Chiarella*, misappropriation assumed an appropriately negative connotation in being equated with stealing. As dissenting Chief Justice Burger stated in *Chiarella*, "In sum, the evidence shows beyond all doubt that Chiarella, working literally in the shadows of the warning signs in the print shop, misappropriated—stole to put it bluntly—valuable nonpublic information entrusted to him in the utmost confidence."[135] Like Chiarella, O'Hagan had also been accused of stealing.

As a partner in a law firm, O'Hagan was obligated to refrain from misusing confidential client information. O'Hagan specialized in the area of securities law. His duty as a partner and his knowledge as an expert in the area of securities law caused him to be fully aware of the illegality of misappropriating clients' nonpublic material information. He, therefore, knowingly broke the law by trading in material, nonpublic information.

O'Hagan's obligations to his firm and his clients were even greater than those of a printing shop employee. While O'Hagan's status as a partner entitled him to certain rights, it also held him to a higher standard of accountability for his actions. A partners' core rights and obligations are status-based, unamendable and broadly construed.[136] O'Hagan's partnership status placed him on a more intimate basis with the firm's clients than Chiarella's employee status placed him with his employer's clients. Thus, there was even less room for O'Hagan to escape liability under the misappropriation theory than there was for Chiarella, because of the difference in the fiduciary obligations that accompanied their relative positions within the hierarchical framework of their companies.

C. *Dirks v. Securities and Exchange Commission*

In *Dirks v. Securities and Exchange Commission*,[137] the Supreme Court overturned the Section 10(b) and Rule 10b-5 se-

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134 *Chiarella*, 445 U.S. at 235-36.

135 *Id.* at 245.

136 Larry E. Ribstein, *A Mid-Term Assessment of the Project to Revise the Uniform Partnership Act*, 46 BUS. LAW. 111, 113 (1990), *cited in* Vestal, *supra* note 117.

137 Dirks v. Securities & Exch. Comm'n, 463 U.S. 646 (1983).

curities fraud conviction of Raymond Dirks, an insurance securities investment analyst. Dirks had disclosed to investors, including his clients, information he received from a former officer of an insurance securities company. This information concerned the company's fraudulent conduct. The Supreme Court relied on *Chiarella* in holding Dirks could not be found guilty of misappropriating nonpublic material information because he owed no fiduciary duty to the insurance company's stockholders.[138]

Dirks undoubtedly stood to improve his future client dealings by giving clients the nonpublic material information he received. However, Dirks neither went looking for this information, nor did he personally trade on the information. He disclosed the material, nonpublic information in an effort to expose the insurance company's fraudulent conduct. An attempt to expose this fraud was, in fact, stated to be the motivating reason behind the tipper's behavior in approaching Dirks with the information.[139] At one point, Dirks even stepped in to investigate and expose the fraudulent activity on his own after all other investigative efforts had failed.[140]

O'Hagan, on the other hand, unlawfully withheld secret[141] information that he actively solicited[142] from another partner in the firm. He then acted on this information, even though he knew it gave him at an unfair advantage over other investors. In *Chiarella*, dissenting Chief Justice Burger noted a Section 10(b) and Rule 10b-5 conviction should stand when "an informational advantage is obtained, not by superior experience, foresight, or industry, but by some unlawful means."[143]

Dirks was accused of disclosing nonpublic material information to his clients, while O'Hagan was tried for profiting from not disclosing material, nonpublic information. Clearly, Dirks would not be convicted under the misappropriation theory, unlike O'Hagan, simply on the basis of the traditional "duty to disclose or refrain" rule set forth in *In Re Cady, Roberts & Co.*[144]

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138 *Id.* at 667.

139 *Id.* at 666.

140 *Id.* at 649.

141 The word "secret" was a bone of contention between O'Hagan's attorneys and the government's attorneys. O'Hagan's attorneys argued the use of the word "secret" was misleading, based on the absence of any alleged "secret" information. Brief for Appellant at 13, 14, 18-19, United States v. O'Hagan, 92 F.3d 612 (8th Cir. 1996) (No. 94-3714). The government argued that the information O'Hagan had gleaned from pumping Tinkham about the Pillsbury takeover deal was nonpublic at that time and, therefore, constituted "secret" information. Brief for Appellee at 18, 29, *O'Hagan* (Nos. 94-3714 and 94-3856).

142 Brief for Appellee at 8-9.

143 Chiarella v. United States, 445 U.S. 222, 240 (1980).

144 "The obligation to disclose or refrain derives from [a]n affirmative duty to disclose material information [, which] has been traditionally imposed on corporate 'insiders,' particularly officers, directors, or controlling stockholders. We, and the courts have consistently held that insiders must disclose material facts which are known to them by virtue of

Dirks spoke out while O'Hagan remained silent. While Dirks shared his information with others, O'Hagan concealed his information from others. Silence may constitute a fraudulent act when there is a duty to speak, especially within the context of securities trading.[145]

D. Classical Theory v. Misappropriation Theory

The holdings of *Dirks* and *Chiarella* suggest that liability under Section 10(b) and Rule 10b-5 must also be predicated upon a finding that the buyer or seller of the securities has been defrauded by the alleged misappropriator.[146] These cases, however, also operate under the classical theory of liability which enables corporation insiders and tippees of those insiders to come within the language set forth under Rule 10b-5.[147] Even later cases appear to have based their holdings on a narrow Section 10(b) interpretation intended to specifically encompass fraudulent conduct.[148]

The misappropriation theory does not require showing the buyer or seller of securities has been defrauded.[149] Unlike the common law elements of fraud,[150] upon which Section 10(b) and Rule 10b-5 liability is based under the classical theory, the misappropriation theory does not narrowly focus only on the purchaser or seller in a securities transaction. Instead, it extends the prohibition of deception to protect anyone in rightful possession of the material, nonpublic information, even if that possessor is neither an investor nor a market participant.[151] Also, unlike the classical

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their position but which are not known to persons with whom they deal and which, if known, would affect their investment judgment." *Id.* at 227 (quoting *In re* Cady, Roberts & Co., 40 S.E.C. 907, 911 (1961)).

145 "The American Law Institute recognizes that 'silence when there is a duty to . . . speak may be a fraudulent act.'" *Id.* at 228 n.9 (quoting ALI, Federal Securities Code § 262(b) (Prop. Off. Draft 1978)).

146 Michael Kenny & Theresa Thebaut, *Misguided Statutory Construction to Cover the Corporate Universe: The Misappropriation Theory of Section 10(b)*, 59 ALB. L. REV. 139 (1995) (citing United States v. Chestman, 947 F.2d 55, 566 (2d Cir. 1991) (en banc), *cert. denied*, 503 U.S. 1004 (1992)).

147 Securities & Exch. Comm'n v. Cherif, 933 F.2d 403, 408 (7th Cir. 1991).

148 Kenny & Thebaut, *supra* note 146, at 139, 151. The authors cite to the following cases: Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976); Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994); Aaron v. Securities & Exch. Comm'n, 446 U.S. 680 (1980); *Chiarella*, 445 U.S. at 222; Dirks v. Securities & Exch. Comm'n, 463 U.S. 646 (1983); and Bateman, Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299 (1985).

149 United States v. Carpenter, 791 F.2d 1024, 1029 (2d Cir. 1986) (citing United States v. Newman, 664 F.2d 12, 17 (2d Cir. 1981)).

150 "Elements of a cause of action for 'fraud' include false representation of a past or present fact made by defendant, action in reliance thereupon by plaintiff, and damage resulting to plaintiff from such misrepresentation." BLACK'S LAW DICTIONARY 660 (6th ed. 1990) (quoting Citizens Standard Life Ins. Co. v. Gilley, 521 S.W.2d 354, 356 (Tex. Civ. App. 1975)).

151 *Carpenter*, 79 F.2d at 1029.

theory, which requires a showing of deception, the misappropriation merely requires a breach of fiduciary duty.[152] The Seventh Circuit in *Securities and Exchange Commission v. Cherif* stated, "The misappropriation theory focuses not on the insider's fiduciary duty to the issuing company or its shareholders, but on whether the insider breached a fiduciary duty to any lawful possessor of material, nonpublic information."[153]

1. *Securities and Exchange Commission v. Cherif*

In *Securities and Exchange Commission v. Cherif*,[154] the Seventh Circuit upheld Danny Cherif's securities fraud convictions on the basis of the misappropriation theory, despite the absence of a fiduciary duty owed to shareholders of corporations which were the subject of the misappropriated information. Cherif, a former Chicago bank employee, continued to use his identification card after his employment was terminated. By doing so, he was able to access confidential bank information regarding proposed tender offers and leveraged buy-outs of four companies in whose stock he used to trade. Cherif owed no fiduciary duty to the shareholders of those companies. However, his continued use of his identification card, as well as his use of specific, confidential bank information, was found to be a clear breach of a continuing fiduciary duty to his former employer.[155]

The Seventh Circuit held Rule 10b-5 was compatible with the misappropriation theory. Specifically, the court ruled that an employee's breach of a fiduciary duty to his employer constituted a Rule 10b-5 violation, even if the employee or his employer was not found to owe a fiduciary duty to the shareholders of the company from whom the employee purchased the shares as an inside trader.[156] In the same vein, even if O'Hagan was found not to have owed a fiduciary duty to Pillsbury, he clearly owed a fiduciary duty to his partnership, Dorsey and Whitney, and then to Grand Met, one of the firm's clients. In *Cherif*, liability was affirmed, despite the fact that Cherif's inside trading activities occurred after he no longer worked for his employer. O'Hagan purchased stock in Pillsbury while a partner at Dorsey and Whitney. Furthermore, he purchased the stock while Dorsey and Whitney were retained by Grand Met to plan the takeover of Pillsbury.[157]

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152 United States v. Bryan, 58 F.3d 933, 950 (4th Cir. 1995).

153 Securities & Exch. Comm'n v. Cherif, 933 F.2d 403, 409 (7th Cir. 1991).

154 *Id.* at 410.

155 *Id.* at 411.

156 *Id.* at 409.

157 Brief for Appellee at 11, United States v. O'Hagan, 92 F.3d 612 (8th Cir. 1996) (Nos. 94-3714 and 94-3856).

A case which is very similar to *O'Hagan* is *Securities and Exchange Commission v. Clark*.[158] In *Clark*, the Ninth Circuit affirmed the prior conviction of John Naylor Clark III, a former medical supplies company president, who had been charged with violating Section 10(b) and Rule 10b-5 in misappropriating material nonpublic information gained from his employer.[159] Clark learned of his company's confidential plans to acquire a surgical glove company after soliciting an associate in his office. Clark used that nonpublic information to engage in insider trading. Like O'Hagan, Clark profited from misusing material, nonpublic information he obtained after initiating conversation about the nonpublic information with an associate he knew was privy to the information. Clark was convicted of securities fraud under the misappropriation theory. Clark's convictions were later affirmed by a circuit court that, like the U.S. Supreme Court, broadly construed the statutory language of Section 10(b) and Rule 10b-5 in order to promote a level playing field in the area of securities law.

2. *United States v. Carpenter*

Another case analogous to *O'Hagan* is *United States v. Carpenter*,[160] which involved employees who engaged in insider trading using knowledge gained from their employer while they were still employed. The employees were found to have breached a fiduciary duty owed to their employer.[161] R. Foster Winans, a reporter for the *Wall Street Journal*, was convicted of misappropriating material, nonpublic information he gained from the *Wall Street Journal* during his employment, regarding stock information he received from stockbrokers in preparing his column, "Heard on the Street." Kenneth Felis, a stockbroker with Kidder Peabody, was convicted of conspiring to commit securities fraud, and David Carpenter, a news clerk for the *Journal*, was convicted of aiding and abetting.[162] The Second Circuit held "[S]ection 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 proscribe an employee's unlawful misappropriation . . . of material nonpublic information . . . ."[163] While *Carpenter* did not involve information that was unavailable to the public, and the *Wall Street Journal* was not involved in trading securities,[164] the court upheld the misappropriation theory as a basis upon which to affirm a securities fraud conviction.[165] The court's ruling in *Car-*

158 Securities & Exch. Comm'n v. Clark, 915 F.2d 439 (9th Cir. 1990).
159 *Id.* at 448.
160 United States v. Carpenter, 791 F.2d 1024, 1035 (2d Cir. 1986).
161 *Id.* at 1028.
162 *Id.* at 1024.
163 *Id.* at 1025.
164 *Clark*, 915 F.2d at 446.
165 *Id.*

penter further substantiates the application of the misappropriation theory to securities fraud cases, such as *O'Hagan*.

The ruling in *Carpenter* reinforces the Supreme Court's decision to apply the misappropriation theory in other insider trading cases, such as *O'Hagan*, which also involved a breach of fiduciary duty. While *O'Hagan* bears some similarity to *Chiarella* and *Dirks*, the Supreme Court in *Chiarella* and *Dirks* refused to apply the misappropriation theory because the defendants were not found to owe a fiduciary duty. The breach of a fiduciary duty lies at the core of the misappropriation theory. Therefore, the existence of a fiduciary relationship is the critical factor needed to sustain a conviction under the misappropriation theory.

This fiduciary relationship was not fully addressed in *Chiarella*,[166] and it was never established in *Dirks*. However, a fiduciary relationship was shown to exist in *Newman*, *Cherif*, *Clark* and *Carpenter*, where the misappropriation theory was applied to support a conviction. Furthermore, these fiduciary relationships all bore a striking similarity to the type of fiduciary relationships that existed in *O'Hagan*. As in these four cases, O'Hagan owed a fiduciary duty which he breached when he traded on inside information he received during the course of business. The outcome of *O'Hagan*, therefore, should be no different than the outcome of each of these four cases, all of which involved the breach of fiduciary relationship and the application of the misappropriation theory.

IV. Policy Considerations

A. Policy Arguments

Prior to the Supreme Court's recent decision in *O'Hagan*, there had been a split among the lower courts in determining whether to narrowly or broadly construe the statutory language underlying the misappropriation theory. The debate concerning the application of the misappropriation theory in securities fraud cases had been additionally fueled by policy arguments on both sides. Criticism against a broad statutory construction of Section 10(b) and Rule 10b-5 has been based on the inability to clearly distinguish between the types of fiduciary or similar relationships that apply and do not apply under the misappropriation theory.[167] In *Bryan*, the Fourth Circuit stated, "[i]ndeed, although fifteen years have passed since the theory's inception, no court adopting the misappropriation theory has offered a principled basis for dis-

166 Chiarella v. United States, 445 U.S. 222, 236 (1980).

167 Note, *Securities Law—Insider Trading—Fourth Circuit Rejects Misappropriation Theory of Rule 10b-5 Fraud Liability*, 109 Harv. L. Rev. 536, 538 (1995) (citing United States v. Bryan, 58 F.3d 933, 951 (4th Cir. 1995)).

tinguishing which types of fiduciary or similar relationships of trust and confidence can give rise to Rule 10b-5 liability and which cannot."[168] The Fourth Circuit's ruling essentially declared that this inability to distinguish these types of relationships prevented the misappropriation theory from offering much guidance for market participants in knowing exactly what types of information were unlawful for trading purposes.[169]

Support for a narrow 10(b) statutory construction has also been reflected in the exercise of judicial restraint. A broad interpretation would consist of judicial legislation, which would arguably extend the statute's application beyond what the drafters intended.[170] In a few prior cases, the Supreme Court looked at the specific language used in Section 10(b) and Rule 10b-5 as a basis for hesitating to broadly construe the language. For example, in *Santa Fe Indus., Inc. v. Green*, the Supreme Court concluded that the use of the words "manipulative" and "deceptive" showed Congress's intent to narrow rather than expand the application of the 10(b) statute.[171] The Supreme Court reasoned that, if Congress had intended to prohibit other types of conduct under the statute, that prohibited conduct would have been expressly stated.[172]

In past cases, the Supreme Court has not only examined the specific language in Section 10(b) and Rule 10b-5, but also its meaning. In *Blue Chip Stamps v. Manor Drug Stores*,[173] the Supreme Court looked specifically at the meaning of the language in Section 10(b) and Rule 10b-5 and concluded that construing the fraud language to apply not just to purchasers and sellers, as it expressly states, but to the world at large, is stretching the language too far.[174] The Supreme Court also expressed concern in *Blue Chip Stamps* for the potentially excessive litigation that would undoubtedly arise under a broader construction of the statutory language.[175]

It may be difficult to distinguish which fiduciary relationships apply under the language of Section 10(b). Also, the language of Rule 10b-5 perhaps should prohibit what is only expressly stated

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168 *Id.*

169 *Id.*

170 *Chiarella*, 445 U.S. at 235.

171 Santa Fe Indus. v. Green, 430 U.S. 462, 473 (1977) (quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 214 (1975), "When a statute speaks so specifically in terms of manipulation and deception . . . and when its history reflects no more expansive intent, we are quite unwilling to extend the scope of the statute . . . .").

172 *Id.*

173 Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).

174 *Id.* at 733. The narrow construction of Rule 10b-5's fraud language was held to refer only to purchasers or sellers of securities. This interpretation, also known as the *Birnbaum* rule, was based on the court's holding in *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461, 462-63 (2d Cir. 1952).

175 *Id.* at 740.

in the 10(b) statute. Furthermore, there may be a valid cause for concern regarding the excessive litigation that a broad construction of the statute permits.

However, a tremendous concern for fairness and integrity of conduct within the securities markets underlies the need for a more expansive construction of the statutory language in Section 10(b) and Rule 10b-5.[176] Primary concern for the maintenance of a level playing field among securities traders was declared early on to be the basis for the policy considerations underlying Rule 10b-5.[177] The concern for ensuring honesty and integrity within the securities markets was recently reiterated by Justice Ginsburg in rendering the majority's opinion in *O'Hagan*: "Because undisclosed trading on the basis of misappropriated, nonpublic information both deceives the source of the information and harms members of the investing public, the misappropriation theory is tuned to an animating purpose of the Exchange Act: to ensure honest markets, thereby promoting investor confidence."[178]

This same concern previously caused several lower courts to also argue against a narrow interpretation of the statutory language. In *Newman*, the Second Circuit stated, "[t]he courts, not the Congress, have limited Rule 10b-5 suits for damages to the purchasers and sellers of securities . . . a plaintiff need not be a defrauded purchaser or seller in order to sue for injunctive relief under Rule 10b-5."[179] In *Newman*, the court's decision to endorse the application of 10b-5 liability beyond mere purchasers and sellers of securities is further supported because the Supreme Court has never held that the statute's sole purpose is to protect only purchasers and sellers.[180] The statute protects against misappropriation of nonpublic securities information which can also involve an individual who is not engaged in the business of buying or selling securities, but who secretly trades on that information knowing that particular information will give him a financial windfall.

The rule set forth in *Texas Gulf Sulphur* also expanded the scope of a Section 10(b) violation by regulating insider trading based on the nature of the material possessed by a misappropriating trader, rather than on how the misappropriating trader obtained it.[181] The rule allows for the mere use of material,

176 United States v. Carpenter, 791 F.2d 1024, 1027 (2d Cir. 1986).

177 "The Rule is based in policy on the justifiable expectation of the securities marketplace that all investors trading on impersonal exchanges have relatively equal access to material information." Securities & Exch. Comm'n v. Texas Gulf Sulphur Co., 401 F.2d 833, 848 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

178 United States v. O'Hagan, 117 S. Ct. 2199, 2204-5 (1997).

179 United States v. Newman, 664 F.2d 12, 16-17 (2d Cir. 1981).

180 Note, *supra* note 167, at 541.

181 Troy Cichos, *The Misappropriation Theory of Insider Trading: Its Past, Present, and Future*, 18 PUGET SOUND L. REV. 389, 395 (1995).

nonpublic information to constitute fraudulent conduct in the trading of securities. No showing is required of the misappropriating trader's prior agreement not to use the information for personal gain.[182]

The absence of clear statutory language placed a heavy burden on the courts to make their own policy judgments regarding the scope and objectives of the statute and the rule.[183] The absence of clear statutory construction also gave rise to a constant debate among the lower courts as to whether the underlying intent of the statute or its narrow language should govern. It is, therefore, of little surprise that the courts had previously split in interpreting the language of Section 10(b) and Rule 10b-5. Also, historically, the Supreme Court has stayed out of Section 10(b) and Rule 10b-5 cases, allowing the Second Circuit to lead the way. Only in the past 10 to 15 years has the Supreme Court become more extensively involved in this area. As a result of its increasing involvement, the Supreme Court has now resolved a long-standing conflict in favor of a broad statutory interpretation of the misappropriation theory. The theory now unquestionably applies to individuals like James Herman O'Hagan, who trade on inside information, and who are neither "insiders" nor persons who are found to owe a fiduciary duty to the shareholders of the securities in which that person has traded. The Supreme Court decision validates most of the circuit court decisions which favored the theory's application to cases bearing striking similarity to *O'Hagan*.

B. Eighth Circuit's Rejection of the Misappropriation Theory is Unfounded

The Eighth Circuit rejected the misappropriation theory in *O'Hagan* because "it permits the imposition of Section 10(b) liability without a particularized showing of misrepresentation or nondisclosure."[184] The Eighth Circuit reasoned that the statutory language of Section 10(b) explicitly requires a showing of misrepresentation or nondisclosure and that the statute cannot be construed more expansively than what the statutory words say.[185] In rendering its decision, the Eighth Circuit relied primarily on the Fourth Circuit's rationale in *Bryan*.[186]

In *Bryan*, the defendant, Elton E. Bryan, was a Virginia state lottery director accused of manipulating state advertising and

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182 *Id.*

183 Note, *supra* note 167, at 538.

184 United States v. O'Hagan, 92 F.3d 612, 618 (8th Cir. 1996).

185 "As we have emphasized before, the 1934 Act cannot be read more broadly than its language and the statutory scheme reasonably permit." *Id.* (quoting Chiarella v. United States, 445 U.S. 222, 234 (1980)).

186 *O'Hagan*, 92 F.3d at 620; United States v. Bryan, 58 F.3d 933, 944 (4th Cir. 1995).

video lottery gaming contracts, and secretly profiting from investing in those companies that engaged in business with the Virginia state lottery. The Fourth Circuit held the government's misappropriation theory was inapplicable because the specific statutory language set forth in Section 10(b) explicitly required a showing of deception. The language in Rule 10b-5 further supported the statutory intent of Section 10(b), while prior Supreme Court rulings consistently held the statutory language of Section 10(b) could not be construed more broadly than the language itself.[187]

However, *Bryan* was wrongly decided. Instead of ruling on the basis of whether Bryan's conduct fell within the conduct proscribed by Section 10(b), which the Fourth Circuit conceded it did,[188] the Fourth Circuit concerned itself with only addressing whether conduct deemed criminal under the language of Section 10(b) and Rule 10b-5 could also be declared criminal under the language of the misappropriation theory.[189] Instead of applying the misappropriation theory as other circuit courts had done previously,[190] the Fourth Circuit not only refused to apply the misappropriation theory, but declared the theory invalid.[191] The Fourth Circuit set a precedent which the Eighth Circuit was quick to follow.

In addition to following the Fourth Circuit's reasoning in *Bryan*, the Eighth Circuit also based its ruling in *O'Hagan* on prior Supreme Court holdings. The Eighth Circuit specifically referred to the Supreme Court holdings in *Santa Fe Indus., Inc. v. Green*[192] and *Central Bank of Denver v. First Interstate Bank of Denver*.[193] The court asserted that a contrary ruling would contradict those holdings.[194]

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187 *Bryan*, 58 F.3d at 944. The Fourth Circuit commented that, unlike the statutory language of Section 10(b) which requires "only the use of deception, in the form of material misrepresentations or omissions . . . , the misappropriation theory authorizes criminal convictions for simple breaches of fiduciary duty and similar relationships of trust and confidence, whether or not the breaches entail deception within the meaning of Section 10(b) and whether or not the parties wronged by the breaches were purchasers or sellers of securities, or otherwise connected with or interested in the purchase or sale of securities." *Id.*

188 *Id.* at 945.

189 *Id.*

190 Circuit courts which have applied the misappropriation theory to securities fraud cases include: the Second Circuit *see, e.g.*, United States v. Newman, 664 F.2d 12, 16 (2d Cir. 1981); Securities & Exch. Comm'n v. Materia, 745 F.2d 197, 199 (2d Cir. 1984); the Third Circuit *see, e.g.*, Rothberg v. Rosenbloom, 771 F.2d 818, 823 (3d Cir. 1985); the Seventh Circuit *see, e.g.*, Securities & Exch. Comm'n v. Cherif, 933 F.2d 403 (7th Cir. 1991); Securities & Exch. Comm'n v. Maio, 51 F.3d 623 (7th Cir. 1995); and the Ninth Circuit *see, e.g.*, Securities & Exch. Comm'n v. Clark, 915 F.2d 439 (9th Cir. 1990).

191 *Bryan*, 58 F.3d at 948 n.12.

192 United States v. O'Hagan, 92 F.3d 612, 618 (8th Cir. 1996) (citing Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977)).

193 *Id.* (citing Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994)).

194 *Id.*

In *Santa Fe Indus.*, a Delaware corporation's parent company and majority stockholder received board approval to merge with its subsidiary. To facilitate the merger, the parent company exercised Delaware's short-form merger statute which enabled it to offer to buy out the minority shareholders' stock interests at an independently appraised fair market value.[195] Minority shareholders, unwilling to accept the price, were told they could petition the Delaware court for a court-appointed fair market value appraisal. Instead, the minority shareholders filed suit against the parent company to prevent the merger and recover the value of the stock they alleged was worth more that what the parent company offered them. The Supreme Court held charges of fraud and fiduciary breach, absent a showing of material misrepresentation or nondisclosure, constituted insufficient grounds for imposing Section 10(b) and Rule 10b-5 liability under the misappropriation theory.[196]

In *Central Bank of Denver*, $26 million in bonds were issued by the plaintiff, Colorado Springs-Stetson Hills Public Authority, for construction of public improvements on Stetson-Hills, a combined residential and commercial development in Colorado.[197] Central Bank was the trustee for the bond issues.[198] Landowner assessment liens covering a total of over 522 acres were used for the bond issues.[199] The bond provisions dictated the property tied to those liens be worth a minimum of 160 percent of the bonds' outstanding principal and interest.[200] The bond provisions also required the project's developer to provide Central Bank with an annual appraisal to show compliance with the 160 percent requirement. The developer's 1988 appraisal provided to Central Bank remained unchanged from the 1986 appraisal, despite information from the bond's senior underwriter that showed a decrease in Colorado land values. Central Bank agreed to the developer's request to delay obtaining an outside appraisal. In the interim, the Authority defaulted on the bonds, and Central Bank was held liable. The Supreme Court held the aiding and abetting charges, absent a showing of manipulation or deception, did not fall within the statutory language of Section 10(b).[201]

Santa Fe Indus. and *Central Bank of Denver* are clearly distinguishable from *O'Hagan*. In *Santa Fe Indus.*, the Supreme

195 Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977).

196 *Id.* at 475.

197 *Central Bank of Denver*, 511 U.S. at 164.

198 *Id.* at 171.

199 *Id.*

200 *Id.*

201 With respect to aiding and abetting another who commits a manipulative, deceptive act, the Supreme Court stated: "The proscription does not include giving aid to a person who commits a manipulative, deceptive act." *Id.* at 177.

Court addressed the question of whether Section 10(b) and Rule 10b-5 applied to a fiduciary breach between majority and minority stockholders. *Santa Fe Indus.* did not involve allegations of misrepresentation or nondisclosure,[202] either one of which must be included in bringing Section 10(b) and Rule 10b-5 violation charges under the misappropriation theory. Under the misappropriation theory, no liability can attach to full disclosure because of the absence of deception.[203] The absence of nondisclosure, coupled with the particular facts of the case, made the misappropriation theory inapplicable to *Santa Fe Indus.*[204]

In *Central Bank of Denver*, the issue was whether Section 10(b) and Rule 10b-5 applied to aiding and abetting charges. However, *Central Bank of Denver* did not involve charges of manipulation or deception,[205] either one of which is required to bring Section 10(b) and Rule 10b-5 violation charges. The Supreme Court refused to extend liability under Section 10(b) and Rule 10b-5 to one who did not directly engage in manipulative or deceptive conduct, even though the accused may have aided another who directly engaged in manipulative or deceptive conduct.[206]

Unlike *Santa Fe Indus.* and *Central Bank of Denver*, *O'Hagan* involved evidence of nondisclosure and, therefore, deception. In *Santa Fe Indus.*, the parent company fully disclosed its merger plans and its stock price purchase offers to the minority shareholders.[207] O'Hagan failed to disclose to shareholders his intent to trade on a client's takeover target. Furthermore, O'Hagan's failure to disclose his intent to trade on Pillsbury stock was deceptive.[208] Central Bank was only indirectly charged with manipulation and deception through an aiding and abetting charge. As the Supreme Court correctly pointed out, there is no aiding and abetting language in Section 10(b) or Rule 10b-5.[209] O'Hagan was directly charged with deceiving his firm's clients and

202 Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 474 (1977).

203 United States v. O'Hagan, 117 S. Ct. 2199, 2225 (1997). The majority states: "Similarly, full disclosure forecloses liability under the misappropriation theory. Because the deception essential to the misappropriation theory involves feigning fidelity to the source of information, if the fiduciary discloses to the source that he plans to trade on the nonpublic information, there is no 'deceptive device' and thus no Section 10(b) violation . . . ." *Id.*

204 Note, *supra* note 167, at 539 n.25.

205 Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 177-78 (1994). The majority commented: "We cannot amend the statute to create a liability for acts that are not themselves manipulative or deceptive within the meaning of the statute." *Id.*

206 *Id.*

207 *O'Hagan*, 117 S. Ct. at 2225.

208 *Id.*

209 The majority commented: "If, as respondents seem to say, Congress intended to impose aiding and abetting liability, we presume it would have used the words 'aid' and 'abet' in the statutory text. But it did not." *Central Bank of Denver*, 511 U.S. at 177.

the firm by trading on material nonpublic information. The Supreme Court further clarified in *O'Hagan*, contrary to the Eighth Circuit's reading, the statutory phrase "in connection with the purchase or sale of any security" does not mean the duty extends only to identifiable purchasers or sellers of securities.[210]

In essence, the Eighth Circuit justified its decision in *O'Hagan* based on two prior Supreme Court cases that involve aspects of the misappropriation theory which bear little resemblance to *O'Hagan*. It was, therefore, unreasonable for the Eighth Circuit to dismiss the merits of the misappropriation theory in *O'Hagan*.

V. CONCLUSION

O'Hagan did not make a substantial purchase of the Pillsbury securities[211] because of his financial expertise,[212] but because he breached a fiduciary duty in obtaining inside information. O'Hagan had also previously been found guilty of misappropriation. His first misappropriation conviction concerned the taking of client trust fund money. The trust fund accounts constituted confidential information which O'Hagan used for his own purposes, unbeknownst to his clients. Furthermore, O'Hagan deceived his clients and breached their trust by unlawfully taking their money. A fiduciary's deceitful misappropriation of confidential information by theft, conversion or breach of trust, has generally been held to be unlawful.[213]

O'Hagan's misappropriation of client funds constitutes a long-established violation of the law. However, his insider trading activities were not as clear a violation of the law. As an "outsider," O'Hagan's insider trading activities did not fit within the proscribed conduct traditionally reserved for "insiders" under the classical theory. An additional problem has been the lack of any explicit definition of insider trading in the securities laws.[214] Without the misappropriation theory, "outsiders" who engage in insider trading such as O'Hagan would otherwise be allowed to fall

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210 *O'Hagan*, 117 S. Ct. at 2233.

211 O'Hagan purchased a total of 2,500 Pillsbury call option contracts which, according to one options analyst, made O'Hagan at that time the world's largest single purchaser of Pillsbury call options. Brief for Appellee at 16, 17, *O'Hagan*, 92 F.3d 612 (Nos. 94-3714 and 94-3856).

212 O'Hagan had an investment portfolio valued at over $5 million prior to his Pillsbury profit. Brief for Appellant at 2, *O'Hagan*, 92 F.3d 612 (No. 94-3714). Prior to purchasing the Pillsbury contracts, O'Hagan had been known to purchase call option contracts on only one other occasion (this was stock in a high technology company, not stock in a corporate takeover target), preferring to keep to a strategy of avoiding such high risk stocks. Brief for Appellee at 10, *O'Hagan*, 92 F.3d 612 (Nos. 94-3714 and 94-3856).

213 United States v. Newman, 664 F.2d 12, 18 (2d Cir. 1981).

214 James B. Stewart, *Law Is Still a Bit Murky on Matter of What Constitutes Insider Trading*, WALL ST. J., July 21, 1989, § 1, at 6.

through the crack, and benefit tremendously, merely because of their status as "outsiders." The significance of the Supreme Court's recent ruling in *O'Hagan* is that courts can now use the misappropriation theory to reach "outsiders" who trade on inside information just as effectively as they have been using the classical theory to convict "insiders" of insider trading. The Supreme Court's endorsement of the misappropriation theory in *O'Hagan* also marks the Supreme Court's official adoption of an expansive interpretation of Section 10(b) and Rule 10b-5.

O'Hagan's conduct was patently unconscionable and called out for judicial retribution. O'Hagan secretly profited from the use of the material, nonpublic information he had gained from another partner regarding the tender offer of Pillsbury stock. Furthermore, he breached the legal duty he owed his firm and his firm's client in knowingly failing to disclose his intention to trade on that information. He intentionally misused this information to profit at the expense of both the Pillsbury and the Grand Met stockholders. Such action constitutes deceptive and fraudulent conduct. It was on those grounds that the Supreme Court held O'Hagan's conduct to be unlawful.[215] An outsider's taking and profiting from the use of nonpublic securities information in breach of a fiduciary relationship is now proscribed under the misappropriation theory. The Supreme Court's decision to reinstate O'Hagan's fraud convictions based on the misappropriation theory, therefore, sends a clear and final warning that everyone should heed: anyone who trades on nonpublic securities information in breach of a fiduciary relationship can be held liable under the misappropriation theory.

215 United States v. O'Hagan, 117 S. Ct. 2199 (1997).

When Playing the Game of College Sports, You Should Not Be Playing "Monopoly"

Lisa M. Bianchi & Bryan S. Gadol

I. INTRODUCTION

College sports appeal to a variety of individuals for a multitude of reasons. From ambitious young athletes and their loyal fans packing the stadiums, to television producers and sponsors who bring the games into people's homes, society as a whole has a special affinity for collegiate competition. Associated with any competition, however, is the need for rules and regulations to establish a cohesive structure, designate uniform rules, and promulgate fairness.

The National Collegiate Athletic Association (NCAA)[1] is the organization responsible for setting the standards for collegiate athletics throughout the country. The NCAA tries to establish a balance between the athletic and educational experiences of student athletes. Every college and university becomes a member if they wish to compete in intercollegiate athletics. The NCAA functions as a centralized regulatory authority with the power not only to set its own standards, but also to enforce its rules through a variety of sanctions. Sanctions range from simple reprimands to multiyear bans from competition.[2]

The NCAA's ability to regulate every facet of college sports has far-reaching consequences. For example, the NCAA may ap-

1 The NCAA is a national association of universities and colleges that has "adopted and promulgated playing rules, standards for amateurism, standards for academic eligibility, regulations concerning recruitment of athletes, and rules governing the size of athletic squads and coaching staff." National Collegiate Athletic Ass'n v. Board. of Regents of the Univ. of Okla., 468 U.S. 85, 88 (1984) (hereinafter *Board of Regents*). The NCAA national headquarters are located at 6201 College Boulevard in Overland Park, Kansas. Steve Rushin, *Inside the Moat*, SPORTS ILLUSTRATED, Mar. 3, 1997, at 68.

2 In 1985, the NCAA placed SMU on three years' probation, stripping the school of 45 football scholarships for rule violations. Jim Lassiter, *Alumni Bucks Are Creating Big Problems*, THE DAILY-OKLAHOMAN, Sept. 26, 1985, *available in* 1985 WL 4385954. The NCAA "handed the University of Miami's football program a post season bowl ban and three years of probation." Alan Schmadtke, *NCAA Clears FSU Football Program of Major Rules Violation*, FORT LAUDERDALE SUN-SENTINEL, Jan. 24, 1996, at A1. "The [University of Washington] Huskies were outlawed from bowl games for two years while Miami, Texas A&M and Alabama lost one year. Washington lost revenue from TV games for one season and was limited to four appearances in another while Miami lost no revenues or exposure." Blaine Newham, *Recent Penalties Against Peers Stoke UW's Fire*, THE SEATTLE TIMES, Dec. 7, 1995, at C1.

ply sanctions at its discretion that potentially could destroy an entire athletic program. Teams in contention for a national championship in a major sport generate enormous revenues for their universities. In addition, the NCAA allows universities to make money that might otherwise go in part to the players. The problem is the student athletes are not offering their services in a free market, unlike professional athletes, but to a cartel that substantially restricts the compensation for their services. In general, the same package of benefits is offered to recruit athletes, while the universities reap tremendous revenues and prestige from their athletic performances.[3] Instead of receiving high-priced contracts, exceptional college athletes receive a tradeoff. Schools supply scholarships and act as a de facto farm system to catapult players to professional sports instead of compensating the individual athletes for their performance. However, with control should come responsibility. Any time a nongovernmental organization completely controls an industry, the potential for abuse is dramatically increased. In the case of the NCAA, the organization serves as the investigator, judge, jury and executioner.

In recent years, both the Pacific 10 Conference (Pac-10)[4] and the NCAA have been attacked on antitrust grounds. The application of antitrust laws to associational agreements among the NCAA member colleges and universities has created much controversy. The courts balance the procompetitive aspects of organized collegiate competition against the restraints imposed by extensive regulation. Courts recognize the NCAA is necessary to bring amateur sports to the market and give deference to its decisions accordingly.

In *Hairston v. Pacific 10 Conference*,[5] former and current University of Washington (UW) football players sued the conference alleging violations of § 1 of the Sherman Antitrust Act[6] after the NCAA sanctioned the university for rule violations. The sanctions imposed included a two-year ban from college football bowl games. The United States District Court for the Western District of Washington summarily dismissed the action because the players

3 The University of Michigan athletic department revenue for football in 1995-96 was $20,731,000. David Shepardson and Wayne Wooley, *U-M Gridiron Success Felt Far Beyond the Football Field*, THE DETROIT NEWS, Dec. 8, 1997, at A1. It was estimated that an Orange Bowl game against Notre Dame could make the University of Miami as much as $3 million profit. *Sports*, THE BOSTON GLOBE, Nov. 29, 1995, *available in* 1995 WL 5964098.

4 The Pac-10 is a member institution of the NCAA. Its constituents are 10 western universities: the University of Washington, Washington State University, University of Oregon, Oregon State University, University of California, Berkeley, Stanford University, University of California, Los Angeles, University of Southern California, Arizona State University and the University of Arizona. Hairston v. Pacific 10 Conference, 101 F.3d 1315, 1317 n.1 (9th Cir. 1996).

5 *Hairston*, 101 F.3d at 1317.

6 Sherman Antitrust Act, 15 U.S.C. § 1 (1996).

failed to show the NCAA's procompetitive objectives could be achieved in a substantially less restrictive manner. The court held the sanctions did not constitute an unreasonable restraint of trade under § 1 of the Sherman Antitrust Act.[7] On appeal, the Ninth Circuit considered if the sanctions imposed were disproportionate to the rule violations and thus constituted an unreasonable restraint. The court examined the restraint at issue and balanced whether the procompetitive objectives outweighed the restraint's harm. Ultimately, the court decided that, although there was a contract, combination, or conspiracy affecting interstate commerce, the players failed to provide sufficient evidence the Pac-10 objectives could have been achieved in a "substantially less restrictive manner."[8]

The Ninth Circuit and other courts have recognized the necessity of the NCAA to bring amateur sports to the market. However, the courts have been unwilling to provide a forum to rectify problems with the current organization without legislative direction. Part I of this note focuses on the history of the antitrust laws as applied to the NCAA. Emphasis will be on the NCAA by analogy, since the Pac-10 operates as a division member of the organization. Part II examines the facts and opinion of *Hairston*. Part III analyzes the rule of reason approach as applied to NCAA sanctions. The courts' current preference is to focus on the procompetitive effects of the extensive NCAA regulations instead of on the restraints imposed. *Hairston* illustrates the judicial reluctance to closely scrutinize the powerful role of the NCAA. This note concludes with a description of the problems associated with this type of judicial deference and proposes athletes with legitimate claims should have antitrust legal recourse to voice their grievances.

II. Antitrust Laws and the NCAA

A. The Sherman Antitrust Act and Sports

The Sherman Antitrust Act was enacted to protect trade and commerce against monopolies. Section 1 of the Sherman Antitrust Act outlaws contracts, combinations, or conspiracies that result in an unreasonable restraint of trade in interstate commerce.[9] Every contract, to a greater or lesser extent, restrains trade. However, in order to establish a claim under § 1 of the Act, plaintiffs must demonstrate the existence of a contract, combination, or conspiracy which unreasonably restrains trade. An essential step

7 Hairston v. Pacific-10 Conference, 893 F. Supp. 1495, 1496 (W.D. Wash. 1995).

8 *Hairston*, 101 F.3d at 1318-19.

9 Section 1 of the Sherman Antitrust Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1996).

in antitrust analysis is to determine whether an alleged violation constitutes a per se[10] rule of illegality or falls into the rule of reason[11] category. In a rule of reason analysis, the fact-finder examines the restraint at issue to determine whether the restraint's harm to competition outweighs the restraint's procompetitive effects.[12]

A restraint of trade is per se unreasonable,[13] as a matter of law, for any contract or agreement that involves price fixing,[14] horizontal division of the market,[15] vertical price fixing,[16] group boycotts,[17] or tying arrangements.[18] Per se violations are inherently pernicious and considered illegal by their very nature. Typically, these types of agreements are found to be anticompetitive without conducting any further inquiry into the industry and its practices.[19] If an activity does not constitute a per se violation, the rule of reason approach is applied.

Although distinguishing between per se and rule of reason cases may seem clear, problems arise in applying labels to practices which do not clearly fit into either category, or which are novel. Courts recognize that, if § 1 of the Sherman Act is read literally, all private contracts could be outlawed.[20] Therefore, in non per se cases, the rule of reason analysis is applied to scrutinize the impact on competition to determine if the restriction is valid. In these cases, the agreements are analyzed with consideration given to the particular industry and the historical implications of the imposition.[21]

The distinct characteristics of amateur and professional sports do not neatly fit into the per se categories. Professional baseball is favored with a complete exemption from antitrust

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10 *See* United States v. Topco Assocs., Inc., 405 U.S. 596, 607 (1972); 7 PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1510, at 414 (1986); THOMAS V. VAKERICS, ANTITRUST BASICS ¶ 1.03[3] (1997); Susan Marie Kozik, Note, National Collegiate Athletic Ass'n v. Board. of Regents of the Univ. of Okla. and Univ. of Georgia Athletic Ass'n, 104 S. Ct. 2948 (1984), 61 CHI-KENT L. REV. 593, 595 nn.19-25 (1985); Christopher L. Chin, Comment, *Illegal Procedures: The NCAA's Unlawful Restraint of the Student Athlete*, 26 LOY. L.A. L. REV. 1213, 1219-20 (June 1993).

11 The Supreme Court developed the rule of reason analysis in *Standard Oil v. United States*, 221 U.S. 1, 94 (1911).

12 National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978).

13 *Supra* note 10. *See also*, Chin *supra* note 10, at 1220; Kozik, *supra* note 10, at 595.

14 "Thus for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense." United States v. Socony-Vacuum Oil, Co., Inc., 310 U.S. 150, 218 (1940).

15 United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972).

16 Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

17 Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959).

18 Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9 (1984).

19 National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. at 692.

20 *Id.* at 687-88.

21 *Id.* at 692.

laws. In a famous 1922 decision written by Justice Holmes, the Supreme Court held baseball could not be considered interstate commerce.[22] In spite of substantial criticism, this decision has never been overturned. As late as 1972, in *Flood v. Kuhn*,[23] the Court followed precedence and left the issue for Congress to decide. Yet, no other professional sport receives exemption from the antitrust laws without a specific congressional exemption. The courts have consistently held professional sports constitute trade or commerce subject to the antitrust laws.[24]

Collegiate sports, however, operate in a distinctly different environment from professional organizations. Amateur players are not paid for their performances. Therefore, teams have recognized that, in order to play on a level playing field, they must abide by an agreement to determine the rules of amateur competition.[25]

B. The NCAA

The NCAA was formed to regulate the interscholastic athletic departments of its member universities. The organization is run as a nonprofit institution comprised of 902 colleges and universities.[26] The purpose of the association[27] is to create rules for amateur[28] athletic programs to facilitate fair competition. The members within the divisions[29] have the ability to compete pursuant to uniform rules applicable to all competitors. In recent years, the NCAA has been subject to criticism for the precise reasons it was formed. Many member institutions have been sanctioned for rules violations, which have resulted in severe restraints on the competitiveness of their athletic programs.[30] Although harsh sanctions have stifled many programs and resulted in millions of

22 Federal Baseball Club v. National League, 259 U.S. 200 (1922).

23 Flood v. Kuhn, 407 U.S. 258, 282 (1972). The Court relied on *stare decisis* and upheld baseball's exemption from antitrust. Only Congress may now change baseball's antitrust status.

24 For a detailed list of the analysis of professional sports and antitrust litigation *see* Joseph P. Bauer, *Antitrust and Sports: Must Competition on the Field Displace Competition in the Marketplace?*, 60 TENN. L. REV. 263 n.19 (Winter 1993).

25 Due to dishonorable activities and brutally violent competitions, the Intercollegiate Athletic Association of the United States was formed in 1906. The name was changed to the NCAA in 1910. *See* Chin, *supra* note 10, at 1215.

26 Rushin, *supra* note 1.

27 According to the 1992-93 NCAA Manual, Article 1 of the Constitution states the organizations purpose is "to promote and develop educational leadership, physical fitness and sports participation as recreational pursuit." Chin, *supra* note 10, at 1213 n.6.

28 Rule 2.9 states the principle of amateurism as "participation [which] should be motivated primarily by education and the physical, mental and social benefits to be derived." *Gems from the NCAA Manual*, SPORTS ILLUSTRATED, Mar. 3, 1997.

29 The members are separated into divisions based upon their size and scope of their athletic departments. Division I-A and I-AA, are colleges with major athletic programs. Division II and III have less extensive athletic programs. *Board of Regents*, 468 U.S. at 89.

30 *Supra* note 2.

dollars in lost revenues, few sanctioned universities have filed suit against the NCAA. Some of the NCAA's rules restricting competition have been found violative of the antitrust laws.[31]

Most of the response to the harsh sanctions has come from affected players, coaches, cheerleaders, fans, concessionaires, alumni, and boosters who brought actions against the NCAA.[32] Courts invariably use the rule of reason analysis to evaluate the justifications for the restraint, followed by a dismissal of the claims. The courts reason the NCAA sanctions do not violate the antitrust laws because the rules are procompetitive and the applied sanctions are reasonable.

One of the most significant decisions against the NCAA resulted when two universities challenged the NCAA's control of television broadcasting of football games in the 1984 United States Supreme Court case of *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma.*[33] The NCAA required its members to abide by a television contract with two major broadcast networks that limited the number of games any given team could televise and the amount of revenue each member could receive per game. When the petitioning universities contracted with another broadcaster, the NCAA threatened sanctions if the universities proceeded with the contract.[34] The Court held the NCAA restrictions involved horizontal price fixing and output limitations, which are characteristics of a traditional cartel deemed illegal per se.[35]

However, the Court refused to apply a strict per se analysis. The rule of reason approach was deemed more appropriate than the per se test because horizontal restraints were essential for the

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31 In Hennessey v. National Collegiate Athletic Ass'n, 564 F.2d 1136, 1152 (5th Cir. 1977), the court recognized the NCAA is not granted a total exemption from the antitrust laws; however, it did not find the imposed restraint unreasonable. Yet, in *Board of Regents*, 468 U.S. 85 (1984), the Court found the NCAA unreasonably restrained trade for the broadcasting rights of member football games.

32 *See* McCormack v. National Collegiate Athletic Ass'n, 845 F.2d 1338 (5th Cir. 1988) (group of alumni, football players, and cheerleaders); *Hennessey*, 564 F.2d 1136 (coaches); Gaines v. National Collegiate Athletic Ass'n, 746 F. Supp. 738 (M.D. Tenn. 1990) (football player); Jones v. National Collegiate Athletic Ass'n, 392 F. Supp. 295 (D. Mass. 1975) (hockey player); Banks v. National Collegiate Athletic Ass'n, 746 F. Supp. 850 (N.D. Ind. 1990) (football player); Justice v. National Collegiate Athletic Ass'n, 577 F. Supp. 356 (D. Ariz. 1983) (student athlete players).

33 The University of Oklahoma and University of Georgia entered into a separate contract with another network to broadcast their football games. Since the NCAA required broadcasting games within their approved plans, they threatened sanctions on the universities if they complied with the contract. The universities filed suit alleging violations of the Sherman Antitrust Act. *Board of Regents*, 468 U.S. 85 (1984).

34 One of the arguments the NCAA advanced in support of the regulation was the adverse effect on live attendance at the games. However, this argument has been disproved. In 1994, football fans set a record attendance of 36,459,896. Ray Waddell, *College Football Attendance Tops 36 Million for 1st Time*, AMUSEMENT BUS., Feb. 13, 1995, at 14.

35 *See* Chin, *supra* note 10, at 1220; Kozik, *supra* note 10, at 595. *See also* Broadcast Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 8 (1984).

existence of amateur athletics.[36] The Court recognized the special nature inherent in collegiate sports and reasoned that a governing organization such as the NCAA is necessary to provide rules and agreements among competitors in order to bring the unique product of college football to the marketplace.[37] Since the NCAA plays a vital role in the market for consumer choices as well as the market for college athletes, the benefit of the procompetitive effects outweighed the restraints.

The Supreme Court in *Board of Regents* focused on the commercial aspect of NCAA rules. It did not decide whether any specific noncommercial rule was subject to antitrust analysis.[38] Rather, the Court expressly distinguished the television contract restrictions from eligibility rules, contest rules, and the manner in which the joint venture operates.[39] The procompetitive effects were deemed insufficient to justify the restraint on the free market.[40] The Court stated the restrictions on game broadcasting were not essential to creating a competitive field and ultimately decided the restraint was inconsistent with the goal of antitrust law. Members in a competitive marketplace could have individually responded to consumer demand. Instead the number of games was restricted while prices were inflated.

The Fifth Circuit followed this distinction in *McCormack v. National Collegiate Athletic Association*, by indicating there is "some support in the case law"[41] that the NCAA's rules, which have primarily noncommercial objectives, are not subject to antitrust analysis. The Court directed its inquiry to the NCAA rules enforcing the benefits awarded to student athletes. Without deciding whether the rules were amenable to antitrust analysis, the

36 The Court stated, "[W]hat the NCAA and its member institutions market in this case is competition itself—contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed." *Board of Regents*, 468 U.S. at 101.

37 *Id.* at 117. "It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics."

38 In *McCormack v. National Collegiate Athletic Ass'n*, 845 F.2d 1338, 1344 (5th Cir. 1988), the court assumed the eligibility rules are subject to antitrust laws, applied the rule of reason analysis and found the restrictions imposed were reasonable under the circumstances. On May 4, 1998, a jury awarded $22 million in back wages, penalties and legal fees to 1900 assistant coaches. The verdict was then trebled to $66 million under antitrust law. Kirk Johnson, *Assistant Coaches Win N.C.A.A. Suit; $66 Million Award,* N.Y. TIMES, May 5, 1998, at A1.

39 *Board of Regents*, 468 U.S. at 117.

40 A 1995 statistical analysis of the effects of the *Board of Regents* decision suggested the universities and the consumer benefited from the free marketability of televised games. D. Kent Meyers and Ira Horowitz, *Private Enforcement of the Antitrust Laws Works Occasionally: Board of Regents of the University of Oklahoma v. NCAA, A Case in Point*, 48 OKLA. L. REV. 669 (Winter 1995).

41 *McCormack*, 845 F.2d at 1343 (citing *Justice*, 577 F. Supp. at 383 and *Jones*, 392 F. Supp. at 303).

Fifth Circuit found the rules were reasonable and did not constitute an antitrust violation.

Most case law alleging restraint of trade against the NCAA primarily involves plaintiffs other than the member colleges or universities. Traditionally, parties other than actual members have not been able to establish an antitrust claim because the parties who are directly harmed, if at all by the NCAA's actions, are the universities and colleges,[42] not the athletes or the fans. The universities are acutely aware of the NCAA's powerful role and its ability to shut down their athletic programs. Their reluctance to make a claim may possibly be due to a fear of repercussions.[43] The attacks on NCAA sanctions have, therefore, been brought indirectly by third parties rather than by the directly impacted institutions.

The courts have consistently applied a rule of reason analysis with regard to noncommercial restraints.[44] In the past, the courts

42 When alumni, football players and cheerleaders challenged the NCAA suspension penalty, the court noted it was a worthwhile college try, however, "SMU. . . remains the party most directly harmed by the NCAA's actions." *McCormack*, 845 F.2d at 1342-43.

43 Sanctioned colleges and universities may not sue because of a fear that it is unwise to further upset a regulatory body, whether private or governmental, which possesses tremendous control over their fate. Consequently, in a famous case, coach Jerry Tarkanian of the University of Nevada at Las Vegas sued his employer seeking injunctive relief to preclude it from enforcing the proposed NCAA sanctions. He alleged violations of his federal civil rights and subsequently added the NCAA to the complaint. In 1977, the NCAA initially concluded coach Tarkanian committed several rules violations. The United States Supreme Court held in 1988 the NCAA could not be held liable under 42 U.S.C. § 1983 because its actions did not constitute state action. National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988). Tarkanian filed a second suit alleging unfair prosecution when he was forced to resign from UNLV. In 1998, the NCAA agreed to pay Tarkanian $2.5 million dollars to settle the dispute. The press considered the settlement a victory for Tarkanian and a blow to the NCAA, "whose authority over college sports has eroded over the last several decades." The association's executive director, Cedric Dempsey, stated "it 'regrets the 26-year ongoing dispute' with Tarkanian." Additionally, Dempsey said "the settlement was made for practical reasons: the cost of trial, the likelihood of appeals, the failure to remove the case out of Las Vegas and losses during several mock trials." However, Dempsey stated, "All of us need to recognize that our investigative procedures are continually evolving." "Nevertheless, Dempsey acknowledged that the long case had produced changes in the association's investigative procedures." Richard Sandomir, *Maverick Coach Wins Battle and Collects From N.C.A.A.*, N.Y. TIMES, Apr. 4, 1998, at A1. Tarkanian made the statement, "I learned you never want to fight an organization that powerful. They control the press. They spend more money on public relations in one month than I make in a lifetime." Tarkanian felt the settlement signified that the NCAA did not have any evidence to substantiate their claim. He stated, "We had some minor violations, which everybody has, things we weren't aware of. The way the rules are, they're so complex, everybody has violated them." Larry Stewart, *Tarkanian, NCAA Settle for $2.5 Million*, L.A. TIMES, Apr. 2, 1998, at C1.

44 Courts applying the rule of reason analysis to § 1 antitrust claims for NCAA rule sanctions include: Banks v. National Collegiate Athletic Ass'n, 746 F. Supp. 850 (N.D. Ind. 1990) (Notre Dame football player seeking an injunction for reinstatement after becoming ineligible to play because of entering the pro-football draft); Hennessey v. National Collegiate Athletic Ass'n, 564 F.2d 1136 (5th Cir. 1977) (rule requiring reduction of particular coaches to part-time status with severe reduction in pay); *McCormack*, 845 F.2d at 1338 (SMU alumni, players and cheerleaders protesting penalties imposed for scholarship violations).

have focused on whether the procompetitive effect in promoting college sports outweigh the anticompetitive effects in the market.[45] In looking at the noncommercial rules, the lower courts have applied antitrust regulations to the NCAA's involvement in interstate business.[46]

The results of litigation have allowed the NCAA to promulgate and regulate its own rules free of substantive judicial review.[47] Plaintiff's have been hard-pressed to overcome the burden of proving that the rules' adverse effects on the free competitive market outweigh their procompetitive benefits. The inability to overcome this hurdle is reflected by the courts' reluctance to enter into the arena of college sports unless there is substantial evidence of an abuse of commercial power. The Ninth Circuit's 1996 decision in *Hairston v. Pacific 10 Conference* exemplifies this trend.

III. *HAIRSTON V. PACIFIC 10 CONFERENCE*

A. The Facts of the Case

Appellants are former and current University of Washington football players. Appellee, the Pacific-10 Conference,[48] is an unincorporated association of ten universities situated in California, Arizona, Oregon and Washington. Newspaper reports by the *Se-*

45 Courts have found the restrictions are reasonable in deciding whether the restraint enhanced competition under the rule of reason analysis. *See, e.g., McCormack*, 845 F.2d at 1338. The NCAA mandated a new by-law where assistant football coaches were relegated to part-time status with a drastic decrease in pay. Two coaches brought an action to invalidate the new by-law. The court held the rules were not an unreasonable restraint of trade. *Hennessey*, 564 F.2d at 1149. *See also supra* note 38.

46 Although the NCAA is a nonprofit organization, "when presenting amateur athletics to a ticket-paying, television-buying public, [it is] engaged in a business venture of far greater magnitude than the vast majority of 'profit making' enterprises." *Hennessey*, 564 F.2d at 1149. The *Gaines* court is in agreement with the position of the *Hennessey* court and recognized the NCAA had an annual multimillion dollar budget. Citing *Hennessey*, the court noted the business function of the NCAA, recognizing they are not exempt from antitrust regulation simply because their "objectives are educational and . . . carried on for the benefit" of amateur sports. *Gaines*, 746 F. Supp. at 744.

47 A football player requested an injunction to enjoin the NCAA from enforcing a rule which made him ineligible to play football in his senior year because he entered the professional draft. The court stated, "[T]he NCAA rules benefit both players and the public by regulating college football so as to preserve its amateur appeal. Moreover, this regulation makes a better 'product' available by maintaining the educational underpinnings of college football and preserving the stability and integrity of college football programs." The court denied the player's claim because the NCAA had legitimate business justifications for the rules in question. The case involved a § 2 monopolization claim. The court likened its analysis to the rule of reason approach for a § 1 claim. *Gaines*, 746 F. Supp. at 746.

48 The Pac-10 is a member of the NCAA. The conference is composed of 10 universities on the west coast. The association establishes athletic programs, administers athletic events, and stages conference tournaments. The primary purpose of the conference is to make certain the members abide by the rules which are promulgated by the NCAA and the Pac-10. Hairston v. Pacific 10 Conference, 893 F. Supp. 1485, 1488 (W.D. Wash. 1994).

attle Times and the *Los Angeles Times*[49] caused an investigation to be initiated into the football program at UW.[50] The Pac-10 and UW began investigating the alleged infractions of the NCAA rules.

The *Seattle Times* reported on November 5, 1992 that star quarterback Billy Joe Hobert received $50,000 in loans from an Idaho businessman.[51] Within the following month, the *Los Angeles Times* followed up with a series of reports exposing various other NCAA rules violations.[52] After the eight-month investigation by the UW[53] and the Pac-10, officials found violations had occurred. Hobert was suspended by the university and subsequently barred from eligibility to play amateur football.[54]

The investigation[55] resulted in the Pac-10 sanctioning the UW football team for recruiting violations. The following penalties were imposed: "(1) a two-year bowl ban covering the 1993 and 1994 seasons; (2) a one-year television revenue ban; (3) a limit of 15 football scholarships for the 1994-95 and the 1995-96 academic years; (4) a reduction in the number of permissible football

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49 For a chronological listing of the events leading to the Pac-10 penalties, *see Pacific 10 Sanctions Washington*, L.A. TIMES, Aug. 23, 1993, at C8.

50 The UW football team is known as the Huskies. *Washington Penalties May be Compounded*, L.A. TIMES, May 7, 1994, at C1.

51 Charles Rice, a nuclear engineer with no affiliation to the UW, made the loan to Hobert. He was asked by his son-in law to help out a friend. A contract was formed without assets as collateral or a regular payment schedule, but a full demand payment could be called at any time. Hobert blew the money in three months on paying existing bills, entertaining friends, and purchasing a stereo system, cars and guns. Although Hobert had led the team to a Rose Bowl victory at the time he signed the loan, the ensuing year's performance was mediocre. Tom Farrey and Eric Nadler, *Huskies' Hobert Got $50,000 Loan—Money from Businessman Spent in Spree,* THE SEATTLE TIMES, Nov. 5, 1992, at A1.

52 The major violations found were: "Improper employment of football and basketball players by boosters during summers and holidays. Improper unsecured loans of $50,000 received by then starting quarterback Billy Joe Hobert, now a rookie with the Los Angeles Raiders. Free meals and excessive wages provided to football players by boosters. Illegal recruiting inducements by boosters. Illegal recruiting contracts by boosters. Improper use of meal expenses by student hosts on official recruiting visits." Therefore, the allegations evidenced "a lack of institutional control over the football program." Elliott Almond, *Washington Huskies Get Tough Pac 10 Penalties*, L.A. TIMES, Aug. 23, 1993, at A1.

53 The UW hired attorneys Mike Glazier and Rick Evrard, from Overland Park, Kansas, to conduct an independent review. Glazier and Evrard formerly worked in the NCAA enforcement department. Danny Robbins and Elliot Almond, *Washington Admits to Violations*, L.A. TIMES, Aug. 6, 1993, at C1.

54 The loan Hobert received was a violation of the rule that did not allow athletes to obtain benefits that were not available to other students. The rule states "a student-athlete may not receive preferential treatment, benefits or services for his or her athletics reputation or skill or payback potential as a future professional athlete." Farrey and Nadler, *supra* note 51.

55 The conference alleged 24 violations. Tom Farrey, *No Bowl Play for Huskies*, THE SEATTLE TIMES, Aug. 22, 1993, at A1. The Pac-10 reviewed the violations and imposed their own sanctions. The NCAA conducted its own review of the case to determine if it would impose stricter penalties. Although, the NCAA cannot reduce the sanctions it usually ratifies the conference penalties. Almond, *supra* note 52.

recruiting visits from 70 to 35 in 1993-94 and to 40 in 1994-95; and (5) a two-year probationary period."[56]

In an attempt to have the sanctions lifted, players and fans filed a complaint against the Pac-10. The players' complaint alleged violations of the antitrust laws under § 1 of the Sherman Act and breach of contract. The players asked the court for injunctive relief and damages, arguing the sanctions imposed were not proportionate to UW's violations of the NCAA rules. Additionally, the players claimed the sanctions were based on a conspiracy by the Pac-10 to shut down the UW football program, thereby creating a competitive edge for the remaining teams.

The Pac-10 filed a motion to dismiss on the grounds that the players lacked constitutional and antitrust standing. The district court disallowed the breach of contract claim because the "players were not intended third-party beneficiaries of the contract between and among Pac-10 member schools."[57] However, the court denied the Pac-10's motion on the standing issue.[58]

The Pac-10 subsequently moved for summary judgment, claiming there was insufficient evidence of the players' conspiracy allegation. In support of its motion, the Pac-10 claimed the players lacked antitrust standing to bring the lawsuit. Because the players had failed to establish an antitrust violation, the court found it unnecessary to decide the antitrust standing issue.[59] The ruling relied on the players' failure to state specific facts of an anticompetitive conspiracy between the member teams or the Pac-10 and the NCAA. The district court dismissed the players' claim, granting the Pac-10's motion for summary judgment. The court held, after completion of discovery, the players failed to provide any evidence the penalties were excessively harsh.[60]

B. The Majority Opinion

The Ninth Circuit Court of Appeals affirmed the lower court's decision on the grounds that the players had failed to establish a violation of the antitrust laws. The court based its ruling on its earlier decision in *Bhan v. NME Hospitals,* which held a § 1 claim requires: "1) that there was a contract, combination, or conspiracy; 2) that the agreement unreasonably restrained trade under

56 Hairston v. Pacific 10 Conference, 101 F.3d 1315, 1317 (9th Cir. 1996).

57 *Id.* at 1318.

58 Hairston v. Pacific 10 Conference, 893 F. Supp. 1485, 1492 (W.D. Wash. 1994).

59 Areeda and Hovenkamp have observed: "When a court concludes that no violation has occurred, it has no occasion to consider [antitrust] standing." 2 Phillip E. Areeda and Herbert Hovenkamp, Antitrust Law, ¶ 360f (rev. ed. 1995).

60 *Hairston*, 893 F. Supp. at 1496.

either a per se rule of illegality or a rule of reason analysis; and 3) that the restraint affected interstate commerce."[61]

A horizontal restraint exists when the NCAA members create an agreement as to how they will compete against each other.[62] The court cited the Supreme Court decision in *Board of Regents* to support its conclusion. The contract, combination, or conspiracy requirement is the agreement between the member schools. The parties also did not dispute the restraint affected interstate commerce, therefore fulfilling another requirement. Thus, the court focused on the final requirement: whether the penalties imposed constituted an unreasonable restraint of trade.

The rule of reason analysis was applied to analyze the sanctions imposed on the UW. The harm to competition by the sanctions was balanced against the procompetitive effects of the rules. Initially, the plaintiff bears the burden of showing that the restraint produces significant anticompetitive effects within the relevant sport and geographic markets. If the plaintiff meets this burden, the defendant must then come forward with evidence of the restraint's procompetitive effects. Upon a reasonable showing by the defendant, the plaintiff must prove legitimate objectives could have been achieved in a substantially less restrictive manner.[63]

Initially, the players showed the restraint of being banned from participating in future bowl games had significant anticompetitive effects on college football and the geographic market. However, the Pac-10 produced evidence to support the procompetitive effects of requiring certain guidelines and sanctions for rule violations. Therefore, it was up to the players to produce evidence the sanctions could have been imposed in a substantially less restrictive manner.

Even if the penalties were grossly disproportionate to the UW's violations, the players could not meet their burden by showing the penalties were disproportionate. They were further required to provide an appropriate alternative solution. The players relied on evidence from a report by Robert Aronson, a University of Washington professor, who conducted an analysis of the sanctions in comparison to other institutions. However, the court concluded his testimony actually supported the premise that the penalties were appropriate. In addition, when the NCAA subsequently reviewed the violations, they reported the Pac-10 sanctions were too lenient. The court concluded the players failed to

61 Bhan v. NME Hosp., Inc., 929 F.2d 1404, 1410 (9th Cir. 1991).

62 The Court found the members of the NCAA formed a horizontal restraint, since there was an agreement among competitors. *Board of Regents*, 468 U.S. at 99.

63 *Bhan*, 929 F.2d at 1413.

show how the sanctions imposed on the UW amounted to an unreasonable restraint of trade.

The players' claim for breach of contract as third-party beneficiaries also failed. In order for the players to have been considered third-party beneficiaries to the contract, Washington law requires a showing that the Pac-10 "intended" to assume a direct obligation to the players at the time the contract was formed.[64] "[T]he test of intent is an objective one; the key is not whether the contracting parties had an altruistic motive or desire to benefit the third party, but rather 'whether [the] performance under the contract would necessarily and directly benefit' that party."[65] The players also relied on the Pac-10 Constitution in support of their argument that a contract was formed. The court cited to the Pac-10 Constitution which states its purpose is "to enrich and balance the athletic and educational experiences of student-athletes at its member institutions, [and] to enhance athletic and academic integrity among its members."[66] Relying on the district court's conclusion that the language of the league Constitution was "vague, hortatory pronouncements,"[67] the court concluded the contract was created between the conference and its members, not between the conference and the players.

C. The Concurring Opinion

The majority opinion concluded there was no evidence of an antitrust violation. Judge Trott argued, although the majority was correct in its analysis of the failed antitrust claim, the issue of the players' standing was not resolved.[68] The concurring opinion stated that leaving the district court decision as it stood would encourage antitrust lawsuits "every time a player feels injured by a conference sanction."[69] Judge Trott did not want to invite lawsuits from those who argued the Pac-10 should have imposed different penalties. Although the players were unable to play in the bowl games, the UW incurred the direct injury inflicted by the sanctions. Therefore, only the UW should have been allowed to assert the claim.

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64 Postlewait Constr. Inc. v. Great Am. Ins., 720 P.2d 805, 806 (Wash. 1986).

65 *Id.* at 806-7.

66 Hairston v. Pacific 10 Conference, 101 F.3d 1315, 1320 (9th Cir. 1996).

67 The vague and hortatory language referred to is in the Pac-10's general statement extolling the values of academics along with the high standards for the mission of achieving the reputation and integrity of the athletic programs. *Id.*

68 The concurrence relied on the district court's conclusion. *Id.* at 1320-21.

69 *Id.* at 1321.

IV. RULE OF REASON

A. The Court Defers to the Pac-10 Rules as Reasonable

The Ninth Circuit dismissed the antitrust issue with perfunctory ease. The court offered no precedence to support its determination regarding the NCAA and similar amateur associations.[70] Instead, the decision is indicative of the judicial reluctance to meaningfully balance the positive objectives of the NCAA with the possible resulting erroneous harms. As in many previous decisions, the judiciary views the Pac-10 as a traditional organization vital to collegiate sports.

The Ninth Circuit succinctly concluded the sanctions were reasonable. The court neither analyzed the role of the Pac-10 or the NCAA, nor supported its ruling with an analysis of the procompetitive effects of the association. Instead, the court relied on the established premise of the association's procompetitive effects in a footnote reference to *Board of Regents*.[71] In analyzing the issue, the court cited the *Board of Regents'* conclusion, "the integrity of the 'product' cannot be preserved except by mutual agreement . . . ."[72] The Supreme Court recognized cooperation is essential if the competition the "member institutions seek to market is to be preserved."[73]

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70 *See, e.g.*, McCormack v. National Collegiate Athletic Ass'n, 845 F.2d 1338 (5th Cir. 1988) (SMU alumni, players and cheerleaders failed in antitrust claim under rule of reason analysis); Justice v. National Collegiate Athletic Ass'n, 577 F. Supp. 356 (D. Ariz. 1983) (court did not find the group boycott amounted to a per se antitrust claim, but must be looked at by the rule of reason analysis because rules are essential if sports are to survive); *Jones*, 392 F. Supp. 295 (players suit against the NCAA eligibility rules failed where the rules were held not subject to antitrust scrutiny); Banks v. National Collegiate Athletic Ass'n, 746 F. Supp. 850 (N.D. Ind. 1990) (rules were found to have procompetitive effects since they promote college football as an amateur sport); Gaines v. National Collegiate Athletic Ass'n, 746 F. Supp. 738 (M.D. Tenn. 1990) (although players claims were based on § 2 of the Sherman Act, the rules were deemed overwhelmingly procompetitive); Hennessey v. National Collegiate Athletic Ass'n, 564 F.2d 1136, 1152 (5th Cir. 1977) (assistant coaches reduced to part-time status did not establish an unreasonable restraint).

71 The quote cited in footnote 4 has been used in similar cases involving the NCAA. *See Hairston*, 101 F.3d at 1319 n.4 and *McCormack*, 845 F.2d at 1344.
The Court in *Board of Regents* stated:

> [T]he NCAA seeks to market a particular brand of football—college football. The identification of this "product" with an academic tradition differentiates college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice—not only the choices available to sports fans but also those available to athletes—and hence can be viewed as procompetitive.

Board of Regents, 468 U.S. at 101-2.

72 468 U.S. at 102.

73 *Id.* at 117.

When a claim is based on an analysis of the NCAA noncommercial rules and sanctions, courts have not found an unreasonable restraint of trade. The Supreme Court expressly addressed this issue when it stated, "[I]t is reasonable to assume that most of the regulatory controls of the NCAA are [a] justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics."[74] Therefore, noncommercial regulatory rules, such as contest conditions and participant eligibility, are justifiable since they fit into the procompetitive mold of enhancing the appeal of college sports to the public.[75]

There are several reasons why the courts defer to the NCAA. Procompetitive effects are evidenced in the organization of rules, which brings the game of college football to the marketplace. The NCAA is recognized as promulgating the rules of competition by which members must abide. In *McCormack v. National Collegiate Athletic Association,* the Fifth Circuit stated the NCAA would not be able to market the "contests between competing institutions" without defining and agreeing upon rules.[76] Without a means of bringing these teams together on a level playing field, there would be chaos in intercollegiate competitions. The court focuses on the NCAA's goal of creating similar competitive advantages for divisional teams, so that there will not be a dominant faction created by unfair advantage.

In *Hairston,* the court should have analyzed the Pac-10 situation in greater depth than that of the NCAA. The Pac-10 has more potential than the NCAA for actually violating the antitrust laws by using league discipline as a screen to disadvantage successful competitors. Unlike the NCAA, the Pac-10 member schools directly benefit by having the sanctions applied. Prior to the sanctions, the UW was a ranking champion. Once the sanctions were imposed the remaining teams had a greater likelihood of achieving a Rose Bowl bid or possibly a national championship, because the UW would be temporarily ineligible and would be at a competitive disadvantage for years to come.[77] Instead, the court analogized the Pac-10 to the NCAA without any further inquiry.

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74 *Id.*

75 *Id.*

76 In *McCormack*, 845 F.2d at 1342, the court cited *Board of Regents*, 468 U.S. at 101.

77 The NCAA sanctions have an impact on competitions for years to come. "NCAA would better serve college football by making disparate judgments. For instance, Miami, with its loss of 24 football scholarships for the next two years, is paying a much higher price than Auburn did for its transgressions two years ago, which resulted in a loss of only six scholarships in three years. To be sure, Auburn was collared with a two-year bowl ban and a one-year TV moratorium, in contrast to Miami's lesser sanctions in these areas. But the heart of college football's future is new recruits." Thomas V. DiBacco, *Apply Rules Evenly*, USA TODAY, Dec. 6, 1995 at A10.

The court examined the restraint to determine whether the "harm to [the] competition outweighs the restraint's procompetitive effects."[78] The Ninth Circuit placed the burden of proof upon the plaintiff to show the anticompetitive effects of the restraint. The players successfully showed the Pac-10 sanctions imposed anticompetitive effects on the UW. However, the Pac-10 highlighted the procompetitive effects of the rules. The Ninth Circuit summarily accepted the significant advantages of the Pac-10's procompetitive effects without conducting further analysis or offering additional support for its conclusion.

B. Overcoming the Sanctions' Reasonableness

The court recognized the Pac-10 sanctions had an anticompetitive impact. Nevertheless, the plaintiff still could not overcome the procompetitive effects argument. The Pac-10 had little difficulty showing the significant procompetitive effects of the agreement with the member teams. Unless the sanctions had unreasonable economic implications or could have been achieved in a less restrictive manner, the procompetitive effects were recognized as reasonable. The plaintiff was unable to show the sanctions were unreasonable or could have been applied in a substantially less restrictive manner.

Following the application of the rule of reason analysis, the court narrowed the issue to decide whether the sanctions created an unreasonable restraint of trade. The Ninth Circuit required evidence to support the proposition the sanctions may be imposed in a substantially less restrictive manner. This requirement has effectively created an insurmountable burden for plaintiffs bringing suit against the NCAA. The courts have consistently been unwilling to look at the way the NCAA governs without a clear indication the rules are directed at the individual plaintiffs.

In order to bring a viable antitrust claim, plaintiffs need to establish how the sanctions could have been applied in a less restrictive manner. The Ninth Circuit's ruling typifies the plaintiff's difficulty in overcoming the burden because the claim would require substantial evidence of alternative means to achieve the NCAA's purpose. In effect, the court is asking for evidence supporting an organizational overhaul of the NCAA system.[79] The Ninth Circuit's ruling once again shows the court's reluctance to seriously question the NCAA's operations.

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78 Hairston v. Pacific 10 Conference, 101 F.3d 1315, 1319 (9th Cir. 1996).

79 "It is not judicial business to tell a voluntary athletic association how best to formulate or enforce its rules." Shelton v. National Collegiate Athletic Ass'n, 539 F.2d 1197, 1198 (9th Cir. 1976). *See, e.g.*, Note, *Sherman Act Invalidation of the NCAA Amateurism Rules*, 105 HARV. L. REV. 1299, 1305 (April 1992).

C. Piercing the Role of the NCAA

The judicial decisions consistently support the NCAA's position by deferring to the association when noncommercial restrictions are involved. The court has effectively allowed the NCAA to hide behind the traditional purpose of the association, insulating the organization from meaningful judicial scrutiny. However, due to the increased commercialization and popularity of college sports, it is questionable whether the regulations exist solely for the purpose of protecting the student athletes.[80]

By simply adhering to the recognized advantages of the NCAA, the court has not been willing to look at whether the NCAA has become too powerful an association. The courts are refusing to accept this challenge, particularly in claims that do not involve the member universities or colleges. A definitive statement of the antitrust implications of noneconomic NCAA regulations will require suit by its members. However, since athletic departments bring in millions of dollars in revenue,[81] the universities and colleges are reluctant to change the status quo unless they can foresee a more equitable alternative approach.

Assuming the NCAA possesses market power, those challenging any restraint will still need to prove the harmful effects of the restraint outweigh its procompetitive benefits. In a district court case where a player tried to restore his eligibility status, the court stated that, when a defendant "claims to have acted with a procompetitive purpose, the challenged restraint must bear some nexus to that purpose for the claim to be credible."[82]

The call for reform has initiated the creation of numerous models for changing the existing college athletic system.[83] The NCAA is painfully aware of the public's negative perceptions of its overpowering role in college sports.[84] As an attempt to ward off government imposed regulations, the NCAA has recognized the

80 In order to prevail on an antitrust claim, student athletes must prove the NCAA has commercial motives and is not an organization with educational goals. "[W]ithout the NCAA's educational rationale to fall back on, courts would not apply relaxed scrutiny, and would find many regulations to be per se invalid." Chin, *supra* note 10, at 1244.

81 *Supra* note 3.

82 Bank v. National Collegiate Athletic Ass'n, 746 F.Supp. 850, 860 (N.D. Ind. 1990).

83 As a proponent of NCAA academic and financial reforms, academic and economic areas should be targeted for changes. Chin, *supra* note 10, at 1245. The NCAA options consist of three plans: Plan A: entering the free-enterprise system; Plan B: Calling for the student athletes having the same rights to loans and gifts as other students; Plan C: Reserving a percentage of the gross for the players. No matter which plan is adopted in order to make any significant improvements, the universities need simply limit the number of scholarships and eligible players with a good-sportsmanship code. Bob Oates, *The Big Steal*, L.A. TIMES, Oct. 3, 1993, at C9.

84 Some of the public perceptions include: there are special admittance standards for student athletes, coaches are overpaid and cheat, and there is a lack of due process for eligibility rules. Linda Deckard, *NCAA Exec Director Urges Preparation for Dramatic Changes*, AMUSEMENT BUS., Jan. 13, 1992, at 1. The NCAA bureaucracy is "widely per-

importance of implementing drastic changes.[85] However, the Ninth Circuit's ruling makes it clear the court will not provide the forum for reassessing the NCAA's role in collegiate sports.

These cases create an interesting anomaly under antitrust law. Courts have generally closely scrutinized extrajudicial private regulatory agencies, which set rules affecting competition and then enforce them through internal disciplinary proceedings.[86] Yet, the courts currently defer to a private agency, giving it carte blanche authority to regulate intercollegiate sports in the United States. Instead of viewing the case of *Board of Regents* as a warning sign indicating the NCAA warrants closer judicial scrutiny, the courts have treated the NCAA as a commercial aberration and defer to the agency's regulatory activities. Yet, the NCAA is acting like a traditional cartel by fixing prices and limiting output. Such power can easily be abused without adequate judicial review.[87]

V. CONCLUSION

The Ninth Circuit's ruling in *Hairston* foreclosed a challenge to the association governing collegiate sports. Relying on the reasoning that the NCAA plays an important role in bringing the competitions between collegiate teams to the consumer fans, the court deferred to the procompetitive effects of the association instead of focusing on the restraints. This judicial deference is understandable in light of the need for an organization to promulgate and enforce the rules of amateur athletics. These organizations face a perhaps insurmountable task in attempting to curb the activities of overzealous coaches, fans, unscrupulous agents, and young impressionable athletes. Yet, courts should recognize the sanctions by the supervisory bodies might have a disproportionate impact on otherwise innocent schools, athletes, and fans. There needs to be a balance between the laudable efforts of the NCAA and the rights of the universities and athletes. The current rules essentially provide no weight to the claims of the innocent athletes.

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ceived to be cold, vindictive and bungling." William F. Reed, *It's the Rules, Stupid!*, SPORTS ILLUSTRATED, May 24, 1993, at 72.

85 Sports Illustrated reported that Executive Director Cedric Dempsey seems "determined to bring the NCAA rule book into a closer relationship with reality, to 'take a hard look at deregulation and rais[e] the sensitivity level of our group to some of the contradictions in our rules.'" Kostya Kennedy, *Hopeful Signs in the NCAA*, SPORTS ILLUSTRATED, June 24, 1996, at 19.

86 *See especially* Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 465 (1941). "[This] combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus 'trenches upon the power of the national legislature and violates the statue.'"

87 *Cf.* Allied Tube & Conduct Corp. v. Indian Head, 486 U.S. 492 (1988).

The interplay between college and professional athletes and the excitement of intercollegiate competition continues to attract a variety of spectators. Enormous revenues are generated by the collegiate athletic arena. The NCAA's decisions may have a dramatic impact on the athlete and financial success of a college's athletic program. However, the judiciary views the Pac-10 as a traditional organization vital to collegiate sports. Consequently, courts have been unwilling to entertain antitrust disputes involving the NCAA, in effect granting a private organization carte blanche authority over substantial commerce. Antitrust claims against the NCAA require sufficient evidence the sanctions could be imposed in a substantially less restrictive manner. This burden has proven impossible to overcome.

There are two possible solutions. Congress could take the initiative and establish clear regulations in the area. Otherwise, the judicial system could remedy the current problem itself by providing athletes access to bring a legitimate claim. In the meantime, aggrieved parties, such as athletes, do not have a day in court to assert their claim that the NCAA penalties may be arbitrary, capricious, discriminatory, disproportionate or vindictive.

A Tale Involving the Magic Kingdom, Pirates, and a Court's Broad Interpretation of Common Carrier Liability

Chad A. Gerardi

I. INTRODUCTION

California Civil Code § 2168 provides, "[e]very one who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he [or she] thus offers to carry."[1] The common carrier designation carries significant importance because operators are held to a heightened duty of utmost care and diligence rather than the ordinary negligence duty of reasonable care under the circumstances.[2]

This standard, while simple conceptually, has proven difficult in its application. When interpreting this statute, the California courts have struggled with defining a common carrier.[3] Guided by the plain words of the statute, California courts initially interpreted "common carrier" to include railways,[4] steamboats,[5] and stagecoaches.[6] Over time, the common carrier definition expanded to include airplanes,[7] buses,[8] taxicabs,[9] escalators,[10] elevators,[11] mule trains,[12] and ski-lifts.[13] In *Neubauer v. Disneyland, Inc.*,[14] the United States District Court for the Central District of California held that Disneyland amusement park rides fall within Cali-

1 CAL. CIV. CODE § 2168 (West Supp. 1998).

2 CAL. CIV. CODE § 2100 (West Supp. 1998) ("A carrier of persons for reward must use the utmost care and diligence for their safe carriage . . . .").

3 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, vol. 6, §§ 767-773 (9th ed. 1988). *See also*, Webster v. Ebright, 4 Cal. Rptr. 2d 714 (Ct. App. 1992) (operator of horseback rides held to a duty of ordinary care); McIntyre v. Smoke Tree Ranch Stables, 23 Cal. Rptr. 339 (Ct. App. 1962) (operator of a mule train held to a duty of utmost care and diligence).

4 Kerigan v. Southern Pac. R. Co., 22 P. 677 (Cal. 1889); Cowden v. Pacific Coast S. S. Co., 29 P. 873 (Cal. 1892).

5 *See generally* Metz v. California South R. Co., 24 P. 610 (Cal. 1890).

6 Fairchild v. Stage Co., 13 Cal. 599 (1859).

7 Smith v. O'Donnell, 12 P.2d 933 (Cal. 1932).

8 Lopez v. Southern Calif. Rapid Transit Dist., 710 P.2d 907 (Cal. 1985).

9 Larson v. Blue & White Cab Co., 75 P.2d 612 (Cal. Ct. App. 1938).

10 Hendershott v. Macy's, 322 P.2d 596 (Cal. Ct. App. 1958).

11 Parker v. Manchester Hotel Co., 85 P.2d 152 (Cal. Ct. App. 1938).

12 McIntyre v. Smoke Tree Ranch Stables, 23 Cal. Rptr. 339 (Ct. App. 1962).

13 Squaw Valley Ski Corp. v. Superior Court, 3 Cal. Rptr. 2d 897 (Ct. App. 1992).

14 875 F. Supp. 672 (C.D. Cal. 1995).

fornia's statutory definition of common carriers, thereby imposing a heightened duty of care in transporting the public.

This note explains why the federal court in *Neubauer* interprets California's common carrier statute too broadly. In doing so, the court fails to adequately address California's common law and the principles set forth in other jurisdictions relating to amusement park rides and common carrier liability. Section I discusses common carrier liability in other jurisdictions, and then focuses on California case law addressing this issue. Section II examines the facts and decision rendered in *Neubauer*. In Section III, the *Neubauer* opinion is compared to cases in other jurisdictions which have established common law tests for determining whether amusement rides are common carriers.

Section IV of this note concludes that existing case law does not support the *Neubauer* court's overly formalistic interpretation of California's common carrier statute. Moreover, under the court's reasoning, the "common carrier" status may be applied to virtually any amusement ride or device. Thus, *Neubauer* significantly impacts the interests of owners and operators of amusement rides in California in terms of their exposure to common carrier liability.

II. Traditional Common Carrier Liability

A. Across the Nation

Several jurisdictions define the duty of care owed by operators of amusement park rides.[15] Generally, amusement ride operators are required to exercise a level of reasonable and ordinary care under the circumstances.[16] However, a few jurisdictions demand a

15 *See, e.g.*, John Kimpflen, *Duties and Liabilities as to Amusement Rides and Devices*, 27A Am. Jur. 2d *Entertainment and Sports Law* § 90 et seq. (1996); Annotation, *Liability of Owner, Lessee, or Operator for Injury or Death on or near Loop-o-plane, Ferris Wheel, Miniature Car, or Similar Rides*, 86 A.L.R. 2d 350 (1962); Annotation, *Liability to Patron of Scenic Railway, Roller Coaster, or Miniature Railway*, 66 A.L.R.2d 689 (1959).

16 *See, e.g.*, Wright v. Midwest Old Settlers and Threshers Ass'n, 556 N.W.2d 808 (Iowa 1996) (train ride at an annual reunion event held not a common carrier); Deutsch v. Chubb Group of Insurance Companies, 1995 WL 584394 (D. Colo. 1995) (white water rafting operator held not a common carrier); Bregel v. Busch Entertainment Corp., 444 S.E.2d 718 (Va. 1994) (gondola ride, which carried passengers high above the amusement park, held not a common carrier); Beavers v. Federal Insurance Co., 437 S.E.2d 881 (N.C. Ct. App. 1994) (white water rafting operator held not a common carrier); Lamb v. B & B Amusement Corp., 869 P.2d 926 (Utah 1993) (court held no error in jury instructions in refusing to instruct a roller coaster ride was subject to the duty of a common carrier); Gunther v. Smith, 553 A.2d 1314 (Md. Ct. Spec. App. 1989) (hayride held not a common carrier); Harlan v. Six Flags over Georgia, Inc., 297 S.E.2d 468 (Ga. 1982) (vertical-type merry-go-round held not a common carrier); Sergermeister v. Recreation Corp. of America, 314 So. 2d 626 (Fla. Dist. Ct. App. 1975) ("Lover's Coach" ride was not equated to a common carrier); Eliason v. United Amusement Co., 504 P.2d 94 (Or. 1972) (merry-go-round operator held not bound by a heightened degree of care); U.S. Fidelity & Guaranty Co. v. Brian, 337 F.2d 881 (5th Cir. 1964) (amusement park ride named the "Whizzer" held not a common carrier); Firszt v. Capital Park Realty Co., 120 A. 300 (Conn. 1923) ("aeroplane swing"

higher duty of care comparable to that owed by a common carrier.[17]

Expounding on the breadth of the common carrier duty of care, courts describe this duty as "the utmost caution characteristic of very careful prudent men,"[18] and "the highest degree of vigilance, care, and precaution."[19] As Prosser and Keaton state, "[C]ommon carriers, who enter into an understanding toward the public for the benefit of all those who wish to make use of their services, must use great caution to protect passengers entrusted to their care. . . ."[20]

The rationale behind imposing a heightened duty of care on common carriers involves several factors. First, those who travel on common carriers essentially surrender themselves to the carrier's care and custody.[21] Secondly, these patrons waive their freedom of movement and actions while in the custody of a common carrier.[22] As these carriers have the exclusive control of their devices, courts have held common carriers to a higher standard than a mere duty of ordinary care under the circumstances.[23]

B. California

California Civil Code § 2100 mandates that a common carrier "use the utmost care and diligence for [a passenger's] safe carriage, must provide everything necessary for that purpose, and

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ride held not a common carrier); Brennan v. Ocean View Amusement Co., 194 N.E. 911 (Mass. 1935) (roller coaster held not a common carrier).

17 *See, e.g.*, Lyons v. Wagers, 404 S.W.2d 270 (Tenn. Ct. App. 1966) (operator of amusement ride known as the "Merry Mixer" held to highest degree of care equivalent to that of a common carrier); Lewis v. Buckskin Joe's, Inc., 396 P.2d 933 (Colo. 1964) (operator of amusement park's stage-coach ride held to the highest duty of care—court did not determine if ride was a common carrier); Coaster Amusement Co. v. Smith, 194 So. 336 (Fla. 1940) (operator of roller coaster held to highest degree of care equivalent to that of a common carrier); Bibeau v. Fred W. Pearce Corp., 217 N.W. 374 (Minn. 1928) (operator of roller coaster held to highest degree of care equivalent to that of a common carrier); Cooper v. Winnwood Amusement Co., 55 S.W.2d 737 (Mo. Ct. App. 1932) (operator of a roller coaster held to the highest degree of care for passenger safety); Sands Springs Park v. Schrader, 198 P. 983 (Okla. 1921) (operator of a scenic railway held to the duty of highest care, skill and diligence—court did not determine if ride was a common carrier).

18 Pennsylvania Co. v. Roy, 102 U.S. 451, 456 (1880).

19 Orr v. New Orleans Public Service, Inc., 349 So. 2d 417, 419 (La. Ct. App. 1977).

20 W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 34, at 209 (5th ed. 1984).

21 *See, e.g.*, *Lewis*, 396 P.2d at 939 (passengers of stage-coach ride "had surrendered themselves to the care and custody of the defendants; they had given up their freedom of movement and actions; there was nothing they could do to cause or prevent the accident"); Lopez v. Southern Calif. Rapid Transit Dist., 710 P.2d 907, 912 (Cal. 1985) (passengers on a transit bus are "forced into very close physical contact with one another . . . the means of entering and exiting the bus are limited and under the exclusive control of the bus driver . . . passengers have no control over who is admitted on the bus and, if trouble arises, are wholly dependent upon the bus driver to summon help or provide a means of escape").

22 *Lewis*, 396 P.2d at 939; *Lopez*, 710 P.2d at 912.

23 *Id.*

must exercise to that end a reasonable degree of skill."[24] This higher standard of care imposes additional duties on the carrier. For example, common carriers have the added burden of protecting passengers against assaults by fellow passengers, employees, and other third persons,[25] of collecting information after a mishap in anticipation of litigation,[26] and a greater duty of inspecting and warning passengers of dangers.[27]

In *Lopez v. Southern Calif. Rapid Transit Dist.*,[28] the California Supreme Court held that Civil Code § 2100 imposes a duty on a common carrier "to do all that human care, vigilance, and foresight reasonably can do under the circumstances."[29] In *Lopez*, the plaintiffs were injured after a group of juveniles engaged in a fight on a transit bus. The plaintiffs alleged that the defendant bus company failed to take affirmative measures to protect passengers from assaults by fellow passengers, especially since it had knowledge of the potential for assaults on its buses.

The court found the argument persuasive and held that common carrier employees have an affirmative duty to use due care to aid passengers who become ill or who are attacked by third parties.[30] The court reasoned that large numbers of strangers are forced into close physical contact. Furthermore, the means of entering and exiting a bus are limited and under the exclusive control of the driver. When trouble arises, the passengers are wholly dependent on the driver to summon help or provide a means of escape.[31]

Under California law, common carriers are thereby responsible for even the slightest degree of negligence. Prosser and Keaton define this duty as "an absence of that degree of care and vigilance which persons of extraordinary prudence and foresight are accustomed to use, or in other words, a failure to exercise great care."[32] This heightened duty of care standard makes a common carrier vulnerable to negligence suits for which noncarriers, under a duty of ordinary care, would not be held liable.

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24 CAL. CIV. CODE § 2100 (West Supp 1998).

25 *See, e.g.*, Berger v. Southern Pac. Co., 300 P.2d 170, 173-74 (Cal. Ct. App. 1956) (operator of train held to a duty to protect its passengers from assaults by its employees); *Lopez*, 710 P.2d 907 (operator of transit bus held to a duty to protect passengers from assaults by fellow passengers or third parties).

26 De Vera v. Long Beach Pub. Transp. Co., 225 Cal. Rptr. 789 (Ct. App. 1986) (bus company held to a duty to collect and preserve accident-related information for use in future civil litigation).

27 Gray v. San Francisco, 20 Cal. Rptr. 894 (Ct. App. 1962) (operator of streetcar held under a duty to inspect for potential dangers to passengers).

28 *Lopez*, 710 P.2d at 907.

29 *Id.* at 909.

30 *Id.* at 912.

31 *Id.*

32 PROSSER AND KEATON ON THE LAW OF TORTS § 34, at 211.

III. *NEUBAUER V. DISNEYLAND, INC.*

A. The Alleged Facts and Procedural History

"Pirates of the Caribbean" is an underground flume-type boat ride located in the New Orleans Square area of the Disneyland theme park in Anaheim, California. Approximately forty guests are loaded into each boat at a loading dock. The boats float along a flume through the attraction. The boats travel down two short, steep waterfall-type drops which take the boats from the loading dock area at ground level, to the studio level underground. When the guests arrive underground, they travel past a ghost ship and a treasure lair, and then are treated to a show of audio-animatronic pirates attacking a fort, pillaging a Caribbean town, chasing women with food,[33] enjoying a drunken celebration, and burning the town to ashes. At the end of the ride, the boats are transported back to ground level via a belt lift. Guests exit the ride at the unloading dock which is directly across from the loading area.

One afternoon in June 1995, Gary and Donna Neubauer boarded the Pirates of the Caribbean boat ride.[34] The ride attendants seated Gary and Donna in the rear seat of one of the boats.[35] While proceeding through the attraction, their boat slid down the first waterfall drop and collided with another boat which was situated immediately in front of their boat.[36] After the collision, their boat came to a stop near the bottom of the waterfall.[37] Before their boat had a chance to move forward, the next boat in line on the attraction slid down the waterfall and collided with the Neubauer boat from behind.[38] The rear boat climbed onto the back of the Neubauer boat, creating a substantial impact and splintering the rear of the Neubauer boat.[39] As a consequence of the two collisions, the couple sustained serious injuries.[40]

The Neubauer's filed suit against Disneyland, alleging negligence as well as common carrier liability. Disneyland moved to

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33 Prior to 1997, Disneyland's audio-animatronic pirates chased women. In response to growing public concern, Disney modified the ride so that the pirates are now chasing women with plates of food. In this age of political correctness, pirates are depicted in "hot pursuit of a good meal rather than terrified village maidens." Marla Dickerson, *Flap Over 'Pirates' Proves a Treasure Trove for Disney*, L.A. TIMES, Metro Desk, Mar. 8, 1997 (1997 WL 2189333).

34 Complaint for Damages, Neubauer v. Disneyland, Inc., No. SACV94-841-GLT (C.D. Cal. filed Sept. 16, 1994), at 3.

35 *Id.*

36 *Id.* at 4.

37 *Id.*

38 *Id.*

39 *Id.*

40 The details of the injuries are not available. However, in their Complaint for Damages, the Neubauers prayed for $1,200,000.00 in general and special damages. They alleged "great mental, physical and nervous strain, pain and suffering . . . . [E]ach of them, were required to and did employ physicians and surgeons to examine, treat and care for [them] . . . ." *Id.* at 5, 9.

dismiss the common carrier claim contending that, as a matter of law, the Pirates of the Caribbean is not a common carrier.

B. The Court's Decision

Judge Taylor held in a short one-page opinion that the amusement park boat ride fell within California's statutory definition of a common carrier.[41] Consequently, the court held, pursuant to the plaintiff's allegations and California Civil Code § 2100, "the duty of utmost care and diligence would apply to Disneyland."[42] As a result, Disneyland's motion to dismiss the common carrier claim was denied.[43]

The court elaborated on the broad scope of California Civil Code § 2168 and concluded that this statutory definition includes the broad category of amusement park rides.[44] The court conceded a reasonable argument could be made that the common carrier status should not apply to amusement park rides.[45] However, the court reasoned it is the legislature's role to narrow the statute's breadth, not the court's.[46]

In analyzing the scope of California's common carrier statute, the court faced an issue of first impression. While the court stated that courts nationwide have struggled with the degree of care owed by amusement park operators,[47] it noted that no California court had directly ruled whether amusement rides are common carriers pursuant to California's common carrier statute.[48] In its analysis, the court analogized the facts of *Neubauer* to two earlier rulings involving a ski-lift and a mule train.[49]

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41 Neubauer v. Disneyland, Inc., 875 F. Supp. 672 , 673 (C.D. Cal. 1995).

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.*

46 *Id.*

47 The court stated, "Some [jurisdictions] have held that common carrier liability is appropriate, while others have concluded that a lesser standard of ordinary care is owed." *Neubauer*, 875 F. Supp at 673.

48 In *Barr v. Venice Giant Dipper Co.*, 32 P.2d 980 (Cal. Ct. App. 1934), the court held, after examining case law in other jurisdictions, there was no error in the jury instructions charging the operator of a miniature scenic railway with the utmost care and diligence required of a common carrier. In *Davidson v. Long Beach Pleasure Pier Co.*, 221 P.2d 1005 (Cal. Ct. App. 1950), the court held the operator of a tilt-a-whirl, described as a "merry-go-round with a college education," was under a ordinary duty of reasonable care under the circumstances in the maintenance, inspection, and supervision of the premises and amusements. The issue of common carrier liability was not addressed by the court. In *Pontecorvo v. Clark*, 272 P. 591 (Cal. Ct. App. 1928), defense counsel conceded their roller coaster was a common carrier without a decision by the court on this issue. And in *Kohl v. Disneyland*, 20 Cal. Rptr. 367 (Ct. App. 1962) the court merely described the "passenger-carrier" relationship when discussing res ipsa loquitur principles. At issue before the court was the sufficiency of the evidence to support a finding, there was no negligence. The court did not define the relationship of the parties involved in the case.

49 *Neubauer,* 875 F. Supp at 673.

The California Court of Appeal, in *McIntyre v. Smoke Tree Ranch Stables*,[50] held a guided mule train, which carried passengers along a fixed route from Palm Springs to Tahquitz Falls, was a carrier.[51] The court held the passengers paid a fare for a trip by mule and the defendant stables offered to carry such passengers for hire. Therefore, "the transaction between [the parties] constituted an agreement of carriage."[52] Thus, the court ruled that jury instructions charging the stables with the utmost care and diligence should not have been refused.[53]

Similarly, in *Squaw Valley Ski Corp. v. Superior Court*,[54] the California Court of Appeal held a chair lift at a skiing resort was a carrier.[55] The court noted that a common carrier is "any entity which holds itself out to the public generally and indifferently to transport goods or patrons from place to place for profit."[56] The court held because the Squaw Valley Ski Corporation indiscriminately offered to carry skiers from the bottom to the top of the mountain, the lift should be treated as a common carrier.[57]

IV. Analysis of *Neubauer*

The short, one-page opinion is too concise. The opinion fails to address several major issues and distinctions that have developed in determining what activities constitute a common carrier. The court does not expound on the various tests used by other jurisdictions in classifying common carriers. For example, the opinion does not discuss the important distinction between common and private carriers as discussed by *Webster v. Ebright*,[58] a California case decided just twenty-one days after *Squaw Valley*.[59] Nor does the court lend significant weight to the legislative intent of the common carrier statute enacted back in the days of horse and steam locomotion.[60] Instead, the court allows the "common carrier" status to be conferred upon a wide variety of activities that

50 23 Cal. Rptr. 339 (Ct. App. 1962).
51 *Id.* at 341.
52 *Id.*
53 *Id.* at 342
54 3 Cal. Rptr. 2d 897 (Ct. App. 1992).
55 *Id.* at 902.
56 *Id.* at 900.
57 *Id.*
58 4 Cal. Rptr. 2d 714 (Ct. App. 1992).
59 In *Webster v. Ebright*, 4 Cal. Rptr. 2d at 714, 717-20 (Ct. App. 1992), the court held an operator of horseback rides, as a private carrier, was not subject to the heightened duty of utmost care and diligence. The court distinguished between a common carrier and a private carrier.
60 "When legislative intent cannot be discerned directly from the statutory language, courts may look to a variety of extrinsic aids, including the objects the statute seeks to achieve or the evils it attempts to remedy, the legislative history, public policy, and the statutory scheme of which the statute is a part." People v. Woodhead, 239 Cal. Rptr. 656 (Cal. 1987).

do not readily appear to be common carriers. Under the *Neubauer* court's broad interpretation, an owner or operator of every amusement device from a pair of roller blades to a slide at a neighborhood playground could conceivably be treated as a common carrier.

As a case of first impression, the court should have relied more on the principles set forth not only in California but in jurisdictions across the country. A majority of jurisdictions deciding the issue have determined amusement rides are not carriers of any kind,[61] and thus should not be held to the ordinary negligence duty of reasonable care under the circumstances.[62] While a few jurisdictions have held amusement ride operators to a heightened duty of care, most courts have not gone so far as to define amusement park rides as common carriers.[63] Several tests have evolved for determining whether an amusement ride or device rises to the level of a common carrier. An examination of these tests, and the principles underlying them, is instructive.

A. Carriage v. Entertainment

The Virginia Supreme Court, in *Bregel v. Busch Entertainment Corp.*,[64] considered the level of care an amusement park operator owes its patrons. The amusement park ride in question was the Skyride, a mono-cable gondola which traveled high above the park.[65] The court held an amusement park is not a common carrier "because it does not, as a regular business, undertake for hire to transport persons from place to place."[66] The court further stated the Skyride, "is for entertainment purposes, and the transportation function is incidental to the entertainment function. Busch Entertainment's patrons do not pay admission to the park to obtain transportation services; rather, they pay to be entertained by amusement rides, shows, and other attractions."[67] The court distinguished amusement rides and devices from traditional common carriers such as elevators. Unlike elevators, "Busch Entertainment's Skyride is used to entertain patrons at the amusement park, and any transportation function is purely incidental to

61 A "carrier" is one who undertakes to transport persons from place to place. *See generally Carriers*, 13 Am. Jur. 2d § 1 et seq. (1964).

62 See cases cited *supra* note 16.

63 See cases cited *supra* note 17.

64 444 S.E.2d 718 (Va. 1994).

65 A patron was injured when her elbow, which was extended outside of the gondola's cabin, was pinned between two gondolas that made contact. *Bregel*, 444 S.E.2d at 719.

66 *Id.*

67 *Id.*

the amusement function."[68] Thus, the court held the duty of ordinary care applied to operators of the Skyride.[69]

Similarly, in *Harlan v. Six Flags over Georgia*,[70] the Georgia Supreme Court distinguished between traditional common carriers and "The Wheelie,"[71] an amusement ride at a Six Flags amusement park. Georgia had a broad common carrier statute comparable to California's.[72] The court reasoned that persons utilizing common carriers do so for transportation needs.[73] On the other hand, riders of "The Wheelie" "seek a sensation of speed and movement for the sake of entertainment and thrills."[74] The court stated:

> We find it easy to distinguish between operation of elevators, taxicabs, buses, and railroads, which are instruments of transportation that must be used by people to travel from one place to another, and operation of "The Wheelie" and similar instruments, which are not. Passengers board elevators and amusement rides with dissimilar expectations. Persons using ordinary transportation devices, such as elevators and buses, normally expect to be carried safely, securely, and without incident to their destination. Amusement ride passengers intend to be conveyed thrillingly to a place at, or near to, the point they originally boarded, so the carriage is incidental. There is no transport involved with "The Wheelie."[75]

The Supreme Court of Connecticut, in *Firszt v. Capital Park Realty Co.*,[76] also held the duty of ordinary care applied to an amusement park ride known as the "aeroplane swing."[77] Once again, a clear distinction was drawn between common carriage

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68 *Id.*

69 *Id.*

70 297 S.E.2d 468 (Ga. 1982)

71 "'The Wheelie' is an amusement device consisting of 21 cars mounted on the sprockets of a wheel attached to a mechanical support arm, which is mounted in a concrete and steel base. Patrons ride two or three to a car, and after the patrons are seated and the cars are locked, the cars begin rotating on the wheel in a horizontal manner. As the rotational speed increases, the support arm rises from its base and lifts the cars, still rotating, into a near vertical position. In this position as the cars reach the top of the wheel, the cars and riders are upside down, but held in position by centrifugal force. The wheel continues to rotate in a near vertical position for a few seconds, and then the arm returns to a horizontal position . . . ." *Id.* at 468.

72 GA. CODE ANN. § 18-204 provided "passengers [of common carriers] are those persons who travel in some public conveyance by virtue of a contract, expressed or implied, with the carrier as to the payment of the fare."

73 *Harlan*, 297 S.E.2d at 469.

74 *Id.*

75 *Id.* at 468.

76 Firszt v. Capital Park Realty Co., 120 A. 300 (Conn. 1923).

77 The ride consisted "of cars made to resemble aeroplanes, each of which cars accommodated four persons. Each person riding in one of said cars was charged 10 cents—government tax included. Each car was suspended by four steel cables, each fastened at one end to each of the four corners of each swing respectively and at the other end to steel supports or arms extending out from the top of a steel tower about 60 feet high." *Id.* at 301.

and entertainment. The court stated "one desiring for his delectation to make use of pleasure-giving devices similar to the one in question is under no impulsion of business or personal necessity. He is seeking entertainment, and, when invited . . . he can properly ask only that he be not exposed by the carelessness of those in charge of any given instrumentality . . . ."[78]

In the present case, the sole, objective purpose of the Pirates of the Caribbean and other amusement rides at Disneyland is entertainment. The ride takes Disneyland patrons via boats through an underground studio complete with audio-animatronic pirates and fake treasure. The purpose of the ride is not to transport passengers from place to place; it is to provide entertainment and thrills. Disneyland patrons flock by the millions to the amusement park in search of entertainment and escapism. The *Neubauer* court could easily have applied the carriage versus entertainment test to the facts of its case.

In *Neubauer*, the court cites *Squaw Valley* for the proposition that ski lifts have the status of a common carrier.[79] *Squaw Valley* is distinguishable from the facts of the instant case. The ski lifts in *Squaw Valley* are used to transport skiers from the base of the mountain to the ski areas on top, and occassionally back down the mountain, for a ticket price. The purpose of the lifts are for transportation from point A to point B, and not to entertain the patron during the ascent. In contrast, the Pirates of the Caribbean boats carry passengers along a circular route. The passengers depart from a loading and unloading dock and return to the same dock. These passengers unquestionably are on the boat ride for entertainment, not transportation. Moreover, they do not pay a separate fee for riding Pirates of the Caribbean. As the above-mentioned cases illustrate, amusement park rides are purely entertainment devices and, therefore, should not be treated as carriers.

B. Private v. Common Carriers

Other jurisdictions distinguish between private and common carriers. For example, the Connecticut Court of Appeals in *Hunt v. Clifford*[80] stated "[a] common carrier of passengers undertakes to carry for hire, indiscriminately, all persons who may apply for passage, provided there is sufficient space or room available and no legal excuse exists for refusing to accept them."[81] A carrier not meeting this criteria is deemed a private carrier for hire.

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78 *Id.* at 303-4.

79 Neubauer v. Disneyland, Inc., 875 F. Supp. 672, 673 (C.D. Cal. 1995).

80 209 A.2d 182 (Conn. 1965).

81 *Id.* at 183 (quoting 14 Am. Jur. 2d, *Carriers* § 734).

California likewise distinguishes between common and private carriers.[82] Common carriers are defined as carriers who undertake to carry from one place to another the goods of all persons who apply for carriage.[83] These carriers are legally obliged to carry all who apply and may not arbitrarily refuse to carry a particular passenger.[84] By contrast, private carriers for hire carry goods and passengers on their own terms and do not publicly represent that they will carry all who apply for carriage.[85] In other words, private carriers do not undertake to carry all passengers indiscriminately. This common law distinction is relevant because common carriers are charged with the utmost duty of diligence and care, while private carriers need only meet the ordinary negligence standard of reasonable care.[86] Under this distinction, it is wrong to impute the higher level of care on private carriers. As stated by the California Supreme Court, "[T]he law applicable to common carriers is peculiarly rigorous, and it ought not to be extended to persons [or businesses] who have not expressly assumed that character . . . ."[87] The *Neubauer* opinion does not mention the traditional common law distinction between common and private carriers.

In *Webster v. Ebright*,[88] the California Court of Appeal held a horse stable which provided horses and guided tours on trails was bound only by the ordinary negligence standard of reasonable care.[89] The court articulated a difference between a common carrier and a private carrier for hire: "A common carrier under

82 Webster v. Ebright, 4 Cal. Rptr. 2d 714, 716-17 (Ct. App. 1992).

83 *Id.*

84 *Id.*

85 *Id.*

86 *Id., see also* Carpena v. County of Los Angeles, 7 Cal. Rptr. 889, 891 (Ct. App. 1960) (operator of prison bus was held to be acting at most as a private carrier and "certainly was required to exercise no more than ordinary care and prudence"); Hopkins v. Yellow Cab Co., 114 Cal. App. 2d 394 (1952) (cab company ceased being a common carrier and became a private carrier, held to a duty of ordinary care, when it transported disabled children to and from school at designated hours); Shannon v. Central-Gaither U. School Dist., 133 Cal. App. 124 (1933) (operator of a school bus used by a particular school was held a private carrier under a duty of ordinary prudence); Gorstein v. Priver, 64 Cal. App. 249, 254 (1923) (owner of a truck rented out on weekends was held a private carrier and thus bound to a duty of ordinary care). *But see* Lopez v. Southern Calif. Rapid Transit Dist., 710 P.2d 907 (Cal. 1985). There, the defendant, a municipal transit corporation, argued that even though it was a common carrier, it was nonetheless immune from tort liability under the California Government Code. In the opinion, the court held a duty of utmost care applies to "public carriers as well as private carriers." *Id.* at 909. However, as *Webster* noted, the *Lopez* court meant "private carriers" in the sense of "nongovernmental common carriers" when it rejected the defendant's argument that a duty of utmost care should not apply to governmental common carriers. *Webster*, 4 Cal. Rptr. at 719. This intent is evidenced by the court's own restatement of its holding: "In summary, we hold that Civil Code section 2100 imposes upon all *common carriers*—public or private—a duty of utmost care and diligence . . . ." *Id.* at 914 (emphasis added).

87 Samuelson v. Pub. Util. Comm'n, 227 P.2d 256, 36 Cal. 2d 722, 730 (1951).

88 *Webster*, 4 Cal. Rptr. 2d at 714.

89 *Id.*

§ 2168 is one who offers to the general public to carry goods or persons, and is bound to accept anyone who tenders the price of carriage."[90] Conversely, a private carrier is bound only to carry passengers pursuant to a special agreement.[91] Although the facts of this case are similar to those in *McIntyre*, the court reached an opposite result.[92]

The *Neubauer* court relied on *McIntyre* in ruling amusement park rides are common carriers.[93] However, the *McIntyre* court did not address the issue of private carrier liability.[94] The primary issue considered by the court was whether the mule train constituted a carrier at all.[95] The court narrowly held the ranch stable entered into a contract of carriage and therefore the trial court erred by refusing common carrier jury instructions.[96]

The court in *Neubauer* should have applied the holding of *Webster* to its analysis of common carrier liability in California. Indeed, the court should have addressed the critical distinction between common and private carriers. If these factors had been considered by the court, a different result should have been reached. Disneyland, Inc. is a private corporation which is not legally mandated to indiscriminately carry all public passengers on its rides. Disneyland has the right to refuse carriage, to set height or weight limits, and to displace a passenger from a ride or the entire park at its discretion. When California's common carrier statute is interpreted in light of the traditional California common law, Disneyland should be treated as a private carrier with a duty of ordinary care. Furthermore, unlike a common carrier, many of the rides at Disneyland discriminate based on physical requirements and medical conditions.

C. Perceived Risk of Danger

In *Lamb v. B & B Amusement Corp.*,[97] the Utah Supreme Court held a roller coaster operator was not subject to common carrier liability. In distinguishing common carriers from amusement rides, the court stated:

> Persons using ordinary transportation devices, such as elevators and buses, normally expect to be carried safely, securely, and without incident to their destination . . . . Persons who use

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90 *Id.* at 715-16.

91 *Id.* at 716.

92 *Id.* at 720.

93 Neubauer v. Disneyland, Inc., 875 F. Supp. 672, 673 (C.D. Cal. 1995).

94 The ranch stables maintained it was not a "carrier" in the general sense and the issue on appeal was not whether the stable was a private versus a common carrier. McIntyre v. Smoke Tree Ranch Stables, 23 Cal. Rptr. 339, 342 (Ct. App. 1962).

95 *Id.* at 339-42.

96 *Id.* at 341.

97 869 P.2d 926 (Utah 1993).

> amusement rides have different expectations. Passengers on many amusement rides expect entertainment in the form of high speeds, steep drops, and tight turns. There are, of course, many kinds of amusement rides, and patrons who use those rides must, to some extent, be aware of their own physical abilities and limitations and exercise some judgment as to their ability to endure the physical and mental stresses encountered on various rides. Amusement rides are not designed to provide comfortable, uneventful transportation, even when the equipment operates without incident and as intended.[98]

Some Disneyland rides have posted signs warning of the inherent risks and patrons must be aware of their own physical limitations and exercise judgment as to their ability to endure the physical and mental stresses potentially encountered. However, the majority of the rides, such as Peter Pan's Flight, It's a Small World, the Haunted Mansion and Pirates of the Caribbean, are innocuous excursions in which persons of every age may ride comfortably. An illogical result would exist if these rides are considered common carriers, while holding the park's roller coasters are not common carriers because of the perceived risks. This variety in the types of amusement rides underscores the problem with *Neubauer's* broad holding that amusement park rides are per se common carriers as defined by California's common carrier statute.

D. Legislative Intent

The California Supreme Court has held the "objective of statutory interpretation is to ascertain and effectuate legislative intent."[99] When this intent cannot be discerned directly from the plain language of the statute, or the language is susceptible to more than one reasonable interpretation, courts should "look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy . . . . and the statutory scheme of which the statute is a part."[100]

In *Neubauer*, the court stated, "[a] reasonable argument can be made that common carrier status should not apply to an amusement park ride because it is not the traditional kind of 'transportation' historically contemplated by the common carrier theory, with the main purpose being entertainment rather than travel."[101] However, the court made no further attempt to consider extrinsic aids in its analysis.

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98 *Lamb*, 869 P.2d at 930-31.

99 People v. Woodhead, 239 Cal. Rptr. 656, 658 (Cal. 1987).

100 *Id.*

101 Neubauer v. Disneyland, Inc., 875 F. Supp. 672, 673 (C.D. Cal. 1995).

California's common carrier statute was enacted in 1872. At that time, the primary sources of transportation were horses, stagecoaches, steamboats, and railways. Legislation was enacted to regulate the new transportation era. Arguably, the intent was to provide safety in transportation, not entertainment. After all, the first roller coaster in the United States was not in operation until 1884. The first Ferris wheel was introduced in Chicago in 1893.[102] California's first amusement park opened for business at Santa Cruz in 1904.[103] This history bolsters the argument that traditional modes of transportation such as railways and stagecoaches were the intended objects of the common carrier statute,[104] and any problems associated with amusement rides were not the evils to be remedied.

The question that arises is whether it is fair to apply a statute, that has not been amended by the California Legislature since its enactment 125 years ago, to amusement park rides. The judiciary should refrain from expanding a definition to include entertainment devices that were not contemplated by the those who enacted the common carrier statute of 1872. The legislature should widen the door, not the courts.

E. Ordinary Negligence Will Suffice

Certainly, a court may feel constrained to impose a high degree of liability upon the operators of roller coasters and similar rides which seemingly defy gravity and centrifugal forces. These rides lunge forward at great speeds maneuvering up, down, over and around as they impose pressure on the body and excite the mind. Yet a court need not use the common carrier status to impose a higher duty of care on amusement park operators.

Ordinary negligence concepts protect the patrons of roller coasters and similar "high risk" amusement rides. There is no need to distort the meaning of "common carrier" to reach such a result. Indeed, the common law recognizes that an operator's duty must be in proportion to the apparent risk.[105] As the risk increases, so does the duty of care.[106] In the words of Prosser and Keaton:

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102 National Amusement Park Historical Association, <http:// www.napha.org> (1998).

103 Charles Hillinger, *Time Warp: Boardwalk Recalls Era when Life Was A Beach*, L.A. TIMES, Aug. 27, 1989, at Metro 1.

104 *See generally* Champagne v. A. Hamburger & Sons, 147 P. 954 (Cal. 1915) (the California Supreme Court analogized passenger elevators to railways and stagecoaches); Forsyth v. San Joaquin Light & Power Corp., 281 P. 620 (Cal. 1929) (California Supreme Court noted the Auto Stage and Truck Transportation Act of 1917 in which transportation modes covered under the Act were defined as any automobile, jitney bus, auto truck, stage or auto stage).

105 PROSSER AND KEATON ON THE LAW OF TORTS § 34, at 208.

106 *See* John Kimpflen, *Duties and Liabilities as to Amusement Rides and Devices*, 27A Am. Jur. 2d *Entertainment and Sports Law* § 90, at 455 (1996) ("The measure or amount of

> If the risk is an appreciable one, and the possible consequences are serious, the question is not one of mathematical probability alone. The odds may be a thousand to one that no train will arrive at the very moment that an automobile is crossing a railway track, but the risk of death is nevertheless sufficiently serious to require the driver to look for the train and the train to signal the approach. It may be highly improbable that lightning will strike at any given place or time; but the possibility is there, and it may require precautions for the protection of inflammables. As the gravity of the possible harm increases, the apparent likelihood of its occurrence need be correspondingly less to generate a duty of precaution.[107]

The duty of care will vary according to the risks inherent in a particular amusement park ride. Operators of such rides will be held liable accordingly. Expanding and stretching the definition of the 1872 common carrier statute is not necessary given the negligence theories already in place. It is patently unfair to hold the operators of amusement rides strictly liable to a heightened duty of utmost care and diligence simply because of a statute written 125 years in the past.

V. CONCLUSION

The significance of *Neubauer* lies in the broad construction the court attached to the California statute defining common carriers. The court's formalistic, textual interpretation of this statute goes against existing California precedence, case law around the country, and the spirit of statutory interpretation. Moreover, the court's decision was unnecessary given the negligence protections available to potential plaintiffs.

The existing California case law does not support the court's holding in this case. Disneyland, Inc. is a private corporation and is not legally mandated to indiscriminately carry all public passengers on its rides. When California's common carrier statute is interpreted in light of the common law, Disneyland is perhaps a private carrier with a duty of ordinary care, but probably is not a carrier at all.

The *Neubauer* court relied heavily on *McIntyre* and *Squaw Valley* in holding amusement park rides fall within the statutory definition of common carriers. The court's determination that ski-

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care required will vary according to the hazards involved or the dangers inherent in the particular ride or device, for where the operating hazard is considerable, more exact supervision in its use is required than in cases where there is little or no element of danger. The owner or operator of the ride or device must use reasonable care to see that it is properly constructed and designed, maintained, and managed; reasonable care in such respect is that which an ordinarily prudent person would exercise under like circumstances, and in a like situation.").

107 PROSSER AND KEATON ON THE LAW OF TORTS § 31, at 171.

lifts and mule trains are analogous to amusement park rides is ill-suited because *Neubauer* is factually distinguishable from both *McIntyre* and *Squaw Valley*, which involved persons paying a fare for carriage to a fixed destination.

By way of contrast, Disneyland charges an admission price pursuant to which a patron may enter the park and engage in a wide variety of activities ranging from parade and show watching to riding on roller coasters, all without paying a fee for any specific ride. Disneyland does not transport its patrons to destinations. The only thing Disneyland undertakes to do is stimulate imaginations and inspire dreams. Disneyland is in the business of entertainment, and claims to be the happiest place on earth.

Under the court's blanket holding, common carrier status may be applied to any amusement ride or device. Owners or operators of train rides at kiddy zoos, and playground slides are conceivably common carriers.

California case law has not yet defined "common carrier" in light of late twentieth century developments, much less those reaching into the twenty-first century. As technology speeds along and new devices are created, the California courts or legislature may one day draw a line in the sand, limiting the reaches of a common carrier statute enacted back in the stagecoach era.