
Robin L. Lewis

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Available at: http://scholarship.law.marquette.edu/mulr/vol76/iss3/9

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obriens@marquette.edu.

I. INTRODUCTION

After raising children, most individuals eagerly anticipate grandparenthood. However, the untimely death of an adult child may put the relationship between grandparent and grandchild in jeopardy. The surviving parent of the minor child may have little motivation to nurture the relationship between the deceased spouse's parents and the child, particularly after a remarriage and subsequent adoption by the new stepparent.

At common law, grandparents generally had no visitation rights when the custodial parent or parents objected to the visitation. In the last three

1. Lillian H. Robinson, Grandparenting: Intergenerational Love and Hate, 17 J. AM. ACAD. PSYCHOANALYSIS 483, 483 (1989). Grandparents often enjoy their grandchildren more than they enjoyed their children. Id. at 486. But see Judith L. Shandling, Note, The Constitutional Constraints on Grandparents' Visitation Statutes, 86 COLUM. L. REV. 118, 122 (1986) (citing studies indicating peer relationships are more important to grandparents than their relationships with their grandchildren).

2. A 1984 study of grandparent couples with divorced children revealed that "by remaining nonjudgmental and by offering help and emotional support," grandparents could maintain a cordial relationship with the custodial parent even when their own child did not have visitation rights. Robinson, supra note 1, at 484. This same grandparental conduct is also likely to foster a better relationship with the custodial parent when the grandparents' child has died.

3. Grandparents are more likely to have more frequent and more gratifying contacts with their grandchildren if they have a good relationship with the child's parents. See id. at 483-84.


   (1) Ordinarily the parent's obligation to allow the grandparent to visit the child is moral, and not legal. [Succession of Reiss, 15 So. 151, 152 (La. 1894).]


   (4) Where there is a conflict as between grandparent and parent, the parent alone should be the judge, without having to account to anyone for the motives in denying the grandparent visitation. [Odell, 177 P.2d at 629; Reiss, 15 So. at 152.]
decades, grandparents, with power through their increased numbers lob-bied their legislatures for the enactment of grandparent visitation statutes. Many of the new statutes did not mention the existing adoption or visitation statutes. Consequently, some uncertainty arose about the overlap between grandparent visitation statutes and adoption statutes. Visitation statutes gave grandparents visitation rights. However, state adoption statutes fre-quently severed all rights of the biological family upon adoption. Courts were then called upon to reconcile the grandparent visitation statutes, the adoption statutes, and the general visitation statutes.

A recent decision by the Wisconsin Supreme Court, In re Grandparental Visitation of C.G.F., addressed the family conflict that arises when grandparents, after the death of their child, are denied visitation of their minor grandchild who has been adopted by a stepparent. The issue before the court was "whether a trial court can award visitation rights to grandparents under [Wisconsin Statute] sec. 880.155 . . . notwithstanding the child's adoption by a stepparent." The court held that Section 880.155 of the Wisconsin Statutes, the statute providing for visitation by a grandparent

(5) The ties of nature are the only efficacious means of restoring normal family relations and not the coercive measures which follow judicial intervention. [See Smith v. Painter, 408 S.W.2d 785, 786 (Tex. Civ. App. 1966), writ ref'd n.r.e., 412 S.W.2d 28 (1967); Reiss, 15 So. at 152.]


6. Because people are living longer today, they are spending a greater portion of their lives as grandparents. Cf. Wayne Moore, Improving the Delivery of Legal Services for the Elderly: A Comprehensive Approach, 41 Emory L.J. 805, 812 (1992) (attributing longer lives to new medical practices and technologies). By 1989, an estimated 94% of people over the age of 65 with children were grandparents and almost half of the grandparents were great-grandparents. Gregory E. Kennedy, College Students' Relationships with Grandparents, 64 Psychol. Rep. 477, 477 (1989).

7. At present, all 50 states and the District of Columbia have enacted statutes that allow a grandparent to petition the court for visitation. Jaquelynn B. Rothstein, Grandparent Visitation Rights: Over the River and thru the Woods . . . , Wis. Law., Nov. 1992, at 10, 10.


10. See, e.g., Bond v. Yount, 734 P.2d 39, 40 (Wash. 1987) (denying grandparents standing to bring petition for visitation with adopted grandchild because ties to natural parent were completely severed by adoption).


12. Id. at 65, 483 N.W.2d at 804.

13. Id. at 64, 483 N.W.2d at 803 (footnote omitted).

14. Section 880.155 provides as follows: If one or both parents of a minor child is deceased and the minor is in the custody of the surviving parent or any other person, any grandparent of the minor may petition for visitation.
after the death of either or both of the grandchild's parents, is an exception to Section 48.92(1) and (2), the adoption statute that provides for termination of the relationship between an adopted child and the biological family.\textsuperscript{15}

Part II of this Note discusses the background of grandparent visitation rights. Part III examines Wisconsin statutory and case law on grandparent visitation rights. Part IV provides a statement of the case of \textit{In re Grandparent Visitation Rights of C.G.F.}. Part V recites the court's reasoning in \textit{C.G.F.}, and Part VI analyzes that reasoning. Finally, Part VII provides recommendations for the application of Section 880.155 and the \textit{C.G.F.} decision.

\section{II. Background of Grandparental Visitation Rights}

An 1894 Louisiana case, \textit{Succession of Reiss},\textsuperscript{16} is often cited as the first case holding that grandparents do not have visitation rights at common law when the parents object.\textsuperscript{17} In \textit{Reiss}, the maternal grandmother was denied visitation by her former son-in-law after the death of her daughter. The grandmother sued to compel visitation. She was awarded visitation by the trial court, but the Supreme Court of Louisiana reversed. The court held that a "parent's obligation to allow the grandparents visitation is a moral and not a legal one."\textsuperscript{18}

Subsequent to \textit{Reiss} and its progeny, state legislatures enacted statutes creating visitation privileges for grandparents.\textsuperscript{19} Judicial response to the

\footnotesize

\textsuperscript{15} Wis. Stat. § 880.155 (1991-92). This section allows either a parent of the deceased parent or of the surviving parent to petition for visitation. Under this section, the court retains jurisdiction to modify visitation "upon a showing of good cause." \textit{Id.}

\textsuperscript{16} Wis. Stat. § 48.92 (1991-92), "Effect of Adoption," provides in relevant part:

(1) After the order of adoption is entered, the relation of parent and child and all the rights, duties and other legal consequences of the natural relation of child and parent thereafter exist between the adopted person and the adoptive parents.

(2) After the order of adoption is entered the relationship of parent and child between the adopted person and his birth parents, unless the birth parent is the spouse of the adoptive parent, shall be completely altered and all the rights, duties and other legal consequences of the relationship shall cease to exist.

\textsuperscript{17} E.g., Foster & Freed, \textit{supra} note 4, at 646.

\textsuperscript{18} Reiss, 15 So. 151 (La. 1894).

conflicts between the adoption statutes and visitation statutes has varied. This variation can be attributed to differences in judicial philosophy and differences in statutory language.

In *Browning v. Tarwater*, a 1974 decision, the Supreme Court of Kansas held that, when granting an adoption decree, a court does not have authority to also grant visitation privileges to a member of the biological family pursuant to the visitation statute. The Kansas visitation statutes allowed only the parents of the deceased parent to bring an action. This court found that the Kansas Legislature's failure to specify the effect of adoption on the visitation statute and its failure to specify what would happen if both parents died indicated a legislative intent that the grandparent visitation statute should not apply after a grandchild was adopted by a stepparent. The court reasoned that upon adoption there is a changing of the guard, with the new adoptive parent and extended family assuming all of the rights and responsibilities that were once associated with the birth parent's family. Furthermore, the interests in preserving the unity of authority in the adoptive family were said to compel the denial of grandparent visitation rights. (1990); GA. CODE ANN. § 19-7-3 (Michie 1991); ILL. REV. STAT. ch. 40, para. 607 (1991); IND. CODE ANN. § 31-1-11.7-2 (Burns 1991); KAN. STAT. ANN. § 38-129 (1990); KY. REV. STAT. ANN. § 405.021 (Baldwin 1992); LA. REV. STAT. ANN. § 9:572 (West 1991); 1991 La. Acts 235 (allowing limited post-adoption visitation rights of grandparents); MD. FAM. LAW CODE ANN., § 9-102 (1991); MASS. ANN. LAWS ch. 119, § 39D (Law. Co-op. 1992); MICH. COMP. LAWS § 722.27b (1990); MINN. STAT. § 257.022 (1991); MISS. CODE ANN. § 93-16-3 (1991); MO. REV. STAT. § 452.402 (1990); MONT. CODE ANN. § 40-9-102 (1992); NEB. REV. STAT. § 43-1802 (1990); NEV. REV. STAT. ANN. § 125A.330 (Michie 1991); N.H. REV. STAT. ANN. § 458:17-d (1991); N.J. REV. STAT. § 9:2-7.1 (1991); N.M. STAT. ANN. § 40-9-2 (Michie 1991); N.Y. DOM. REL. LAW § 72 (Consol. 1992); OHIO REV. CODE ANN. § 3109.11 (Baldwin 1991); OKLA. STAT. ANN. tit. 10, § 5 (West 1991); 23 PA. CONS. STAT. § 5311 (1991); R.I. GEN. LAWS § 15-5-24.1 (1991); S.C. CODE ANN. § 20-7-1770 (Law. Co-op. 1990); 1992 Utah Laws 175; VT. STAT. ANN. tit. 15, § 1012 (1991); W. VA. CODE § 48-2B-1 (1991); WIS. STAT. § 767.245 (1991-92); WIS. STAT. § 880.155 (1991-92); WYO. STAT. § 20-2-113 (1991).


22. KAN. STAT. ANN. §§ 38-129 to 38-130 (1971). The 1982 version of Kansas Statutes Annotated section 38-129 overruled *Browning* and provided that the court may grant visitation rights to the parents of a deceased person "even if the surviving parent has remarried and the surviving parent's spouse has adopted the child." KAN. STAT. ANN. § 38-129 (1982).

23. *Browning*, 524 P.2d at 1140.

24. Id. at 1139; see also *In re Marriage of Soergel*, 154 Wis. 2d 564, 572-73, 453 N.W.2d 624, 627 (1990).

GRANDPARENT VISITATION RIGHTS

However, in *Mimkon v. Ford*, the Supreme Court of New Jersey concluded that the visitation statute changed the common law rule providing that grandparents have no independent cause of action to compel visitation rights. The court addressed the issue of whether a maternal grandmother was entitled to visit her grandchild after the death of that child’s mother and after the adoption by a stepparent. The New Jersey visitation statute in effect at the time provided that if either or both parents of a minor child were deceased, the court could order grandparent visitation upon application by writ of habeas corpus if it was in the best interests of the child. The visitation statute did not indicate the effect of adoption on grandparent visitation petitions. The court reasoned that the adoption statute, which provided for the termination of “all rights, duties, and obligations” of the natural parents to the child, was “principally concerned with adoptions by persons other than relatives of children ‘placed for adoption’ because their parents are unwilling or unable to care for them.” In that situation, according to the court, the visitation by members of the biological family would be more detrimental to the child’s well-being because it would cause more interference in the adoptive home. However, in the situation where one of the birth parents had died, the court posited that grandparental visitation poses “a much lesser risk of threat to the physical and psychological well-being of the child or to the development of a healthy and natural relationship between the child and the adopting parents.”

III. WISCONSIN LAW

A. Statutes

In Wisconsin, grandparents can petition for visitation of their grandchildren pursuant to three statutes: Sections 48.925, 767.245, and 880.155. In these sections, the Wisconsin Legislature has specified the circumstances

27. Id. at 205.
28. Id. at 200.
30. Mimkon, 332 A.2d at 203 (citations omitted). The court stated that the legislative objective behind both the adoption statute and the visitation statute was to “provide substitute parental relationships for children, who, for some reason, have been deprived of the benefits of a healthy relationship with one or both natural parents.” Id. at 202.
31. Id. at 203.
32. Id. at 204. In fact, the court asserted that “the continuous love and attention of a grandparent may mitigate the feelings of guilt or rejection, which a child may feel at the death of or separation from a parent.” Id. at 205.
33. For a brief discussion of all three statutes, see Rothstein, supra note 7, at 11. Rothstein points out that all three statutes incorporate the “best interests of the child” standard. Id.
in which persons have standing to petition for visitation.\textsuperscript{34} Section 767.245(4) allows persons who have maintained a parent-like relationship with the minor child to petition for visitation rights.\textsuperscript{35} However, Section 767.245 petitions cannot be pursued unless an "action affecting the family" has been filed.\textsuperscript{36} Section 880.155 allows only the parent of a deceased or surviving parent to petition for visitation.\textsuperscript{37} Section 48.925 allows relatives to petition for visitation only if the child was adopted by a stepparent or relative, and the relative has had a parent-like relationship with the child within two years of petitioning.\textsuperscript{38} The following descriptions are given to provide a background on Wisconsin statutory law in the area of grandparent visitation.

1. Section 767.245 of the Wisconsin Statutes

Section 767.245\textsuperscript{39} allows a "grandparent, greatgrandparent, stepparent, or person who has maintained a relationship similar to a parent-child relationship with the child" to petition the court for visitation rights "if the parents have notice of the hearing and if the court determines that visitation is in the best interest of the child."\textsuperscript{40} Wisconsin case law has interpreted this section to require that, before a petition can be filed under this section, there must have been a "previously filed action affecting the family."\textsuperscript{41} "Actions affecting the family" include divorce, legal separation, custody, and child support.\textsuperscript{42} The statute is silent about the effect of adoption on visitation rights.

2. Section 880.155

Section 880.155 allows a parent of the deceased parent or a parent of the surviving parent to petition for visitation of a minor child "in the custody of the surviving parent or any other person . . . whether or not the person with custody is married."\textsuperscript{43} The court may grant "reasonable visitation privileges" to grandparents "if the court determines that it is in the best interests

\textsuperscript{34} See infra notes 39-52 and accompanying text.
\textsuperscript{36} Van Cleve v. Hemminger, 141 Wis. 2d 543, 545, 415 N.W.2d 571, 572 (Ct. App. 1987).
\textsuperscript{39} Chapter 122, Laws of 1975 created Wis. Stat. § 247.24(1)(c), renumbered as § 767.245(4).
\textsuperscript{40} Wis. Stat. § 767.245(1) (1991-92).
\textsuperscript{41} Van Cleve v. Hemminger, 141 Wis. 2d 543, 545, 415 N.W.2d 571, 572 (Ct. App. 1987); see infra notes 65-73 and accompanying text.
\textsuperscript{42} Wis. Stat. § 767.02(1) (1991-92).
and welfare of the child."

Under this section, the court retains jurisdiction to modify visitation "upon a showing of good cause." Grandparents can petition for visitation of their grandchildren even if their own child denies them visitation.

3. Section 48.925

After the Wisconsin Supreme Court heard oral arguments in In re Grandparental Visitation of C.G.F., the Wisconsin Legislature enacted Section 48.925, which amended the Wisconsin adoption statute, Section 48.92. Although this amendment had no effect on the C.G.F. decision, a discussion of Section 48.925 is included to give a broader perspective on the current state of grandparent visitation rights in Wisconsin.

Pursuant to Section 48.925, relatives of a child adopted by a stepparent or relative may petition the court for reasonable visitation rights if they have "maintained a relationship similar to a parent-child relationship" within two years of filing the petition. The parents must receive notice of the hearing. Further, to grant reasonable visitation, the court must find all of the following:

(a) That visitation is in the best interest of the child.
(b) That the petitioner will not undermine the adoptive parent's or parents' relationship with the child or, if a birth parent is the spouse of an adoptive parent, the adoptive parent's and birth parent's relationship with the child.
(c) That the petitioner will not act in a manner that is contrary to parenting decisions that are related to the child's physical, emotional, educational or spiritual welfare and that are made by the adoptive parent or parents or, if a birth parent is the spouse of an adoptive parent, by the adoptive parent and birth parent.

Section 48.925 does not cross-reference to either of the other visitation statutes. One commentator has raised the question of whether Section 880.155 still controls "for grandparental visitation petitions filed after stepparent or relative adoption following the death of a parent" or whether

44. Id.
45. Id.
46. Id.
48. Id. at 73, 483 N.W.2d at 807 (Abrahamson, J., concurring).
50. Wis. Stat. § 48.925(1).
Section 48.925 "limited the compass of Section 880.155 to petitions filed before adoption." This question remains unresolved.

**B. Case Law**

Previous Wisconsin case law does not construe the adoption statute with Section 880.155. However, Wisconsin courts have addressed grandparent visitation petitions pursuant to Chapter 767 in actions affecting the family.

In *Weichman v. Weichman*, the Wisconsin Supreme Court held that, in actions affecting the family, a court may grant visitation to grandparents and others where it is "for the best interest and welfare of the child." In *Weichman*, the dispute arose between the natural mother and the paternal grandparents of a minor child. Annette and John Weichman were married in February 1969. Two months later, they separated. About two months after that, Annette gave birth to their daughter. John enlisted in the Armed Services shortly after the birth of his child, and a divorce action was commenced. John was absent without leave from the Armed Services

---


53. "Actions affecting the family" are listed in Wisconsin Statutes section 767.02 and include: to affirm marriage, annulment, divorce, legal separation, custody, for child support, and for maintenance payments. *Wis. Stat.* § 767.02 (1991-92); see supra note 42 and accompanying text.

54. 50 Wis. 2d 731, 184 N.W.2d 882 (1971).

55. *Id.* at 734, 184 N.W.2d at 884 (citation omitted). This holding was reaffirmed in Ponssford v. Crute, 56 Wis. 2d 407, 415, 202 N.W.2d 5, 9 (1972).

One commentator has listed factors to be considered for the determination of whether grandparental visitation rights are in the best interests of the child:

1. friction in the minor child's home as a result of grandparental visits, see Commonwealth *ex rel.* McDonald v. Smith, 85 A.2d 686, 687-88 (Pa. 1952) (grandparental visitation denied because irreconcilable animosity between parents and grandparents engendered a contest for child's affection which was deemed to be detrimental to the child). But see Evans v. Lane, 70 S.E. 603, 606 (Ga. Ct. App. 1911) (granted visitation to maternal grandmother despite friction between natural father and grandparent, stating that child could possibly effect a reconciliation between the "warring families");

2. child's physical and psychological response to visits or deprivation of visits by grandparents, see Commonwealth *ex rel.* Flannery v. Sharp, 30 A.2d 810, 812 (Pa. 1952) (denied visits by grandparents which were deemed to cause emotional conflicts); (3) child previously resided with petitioning grandparent, particularly where mutual affection demonstrated, see *Evans*, 70 S.E. at 605;

3. previous surrender of custody to grandparent, see Jackson v. Martin, 167 S.E.2d 135, 137 (Ga. 1969) (implied that proving prior surrender of parental control to grandparents might have been influential in granting visitation rights to grandparents); and

4. whether visitation sought in context of divorce, stepparent adoption, or death of biological parent.


56. *Weichman*, 50 Wis. 2d at 733, 184 N.W.2d at 883.
shortly after the divorce decree. The grandparent visitation was granted as part of the divorce action between Annette and the grandparents' son, John. Annette appealed the order and judgment granting the paternal grandparents visitation privileges with the minor child.

The court held that no common-law rule or statutory rule proscribed the grant of visitation rights to grandparents. Instead, the question was a matter of judicial discretion: "The underlying principle or guideline for the granting of visitation privileges, as it is for the granting of custody, is what is for the best interest and welfare of the child." The court opined that many divorced parents allow their personal conflicts to obfuscate the child's best interests. Furthermore, the court reasoned that grandparents' visitation rights do not derive from parents' visitation rights and, therefore, the parents' rights are "not controlling on the question of whether in a given case the child may have his grandparents visit him or he visit his grandparents." Section 767.245(4) codified the Weichman holding. Therefore, when an action affecting the family has been filed, a court may intervene in decisions about visitation.

Conversely, Wisconsin courts have refused to intervene in decisions about visitation when an "intact family" exists. By implication, an intact family exists when a Chapter 767 action has not been filed or when an intact family is created by an adoption. In Van Cleve v. Hemminger, a 1987 decision by the Wisconsin Court of Appeals, a grandparent petitioned

---

57. Id.
58. Id.
59. Id. at 734, 184 N.W.2d at 884 (citation omitted).
60. Id. at 736, 184 N.W.2d at 885.
61. Id. at 737, 184 N.W.2d at 885.
62. This statute was previously Section 247.24(1). Section 767.245(4) was amended and is now set forth in Section 767.245(1) (1991-92). Section 767.245 provides:

(1) Upon petition by a grandparent, greatgrandparent, stepparent or person who has maintained a relationship similar to a parent-child relationship with the child, the court may grant reasonable visitation rights to that person if the parents have notice of the hearing and if the court determines that visitation is in the best interest of the child.

(2) Whenever possible, in making a determination under sub. (1), the court shall consider the wishes of the child.

63. In re Marriage of Soergel, 154 Wis. 2d 564, 570, 453 N.W.2d 624, 626 (1990) (citation omitted).
64. See, e.g., Marotz v. Marotz, 80 Wis. 2d 477, 486, 259 N.W.2d 524, 529 (1977).
65. Soergel, 154 Wis. 2d at 567, 453 N.W.2d at 625 (grandparents denied visitation under Section 767.245(4) after child, his biological mother, and his adoptive stepfather formed an intact family); Van Cleve v. Hemminger, 141 Wis. 2d 543, 546, 415 N.W.2d 571, 573 (Ct. App. 1987).
66. Soergel, 154 Wis. 2d at 572-73, 453 N.W.2d at 627.
67. 141 Wis. 2d 543, 415 N.W.2d 571 (Ct. App. 1987).
under Section 767.245(4) for visitation of her grandchildren.68 Linda and Kurt Hemminger were married and living with their two children.69 The Hemmingers did not allow Mary Van Cleve, Linda’s mother, to visit their two children. The grandmother subsequently petitioned the court for visitation of her two grandchildren even though there had been no previously filed action affecting the family.70 The court denied the grandparent’s request, stating that “sec. 767.245(4) applies only to situations involving a previously filed action affecting the family. . . . [T]he legislature did not intend to reach into intact families to override parental determinations involving visitation privileges between their children and the grandparents.”71 The court concluded that strong public policy reasons exist for limiting visitation petitions pursuant to Section 767.245(4).72 In the absence of “the trauma and impact of a dissolving family relationship,” the court stated that “there is no justifiable reason for the state to override determinations made by parents as to what is in the best interests of their children.”73 Hence, grandparents lack standing to bring a Section 767.245 action unless an action affecting the family has previously been filed.

The legislative intent behind the adoption statute, Section 48.92, was examined in Estate of Topel.74 The court noted that subsection (1) of Section 48.92 gives the adopted child the same rights and legal consequences with the adoptive parent that the child had with the birth parent.75 Subsection (2) declares that all “rights, duties and legal consequences” of the relationship between the adopted child and the natural parent(s) shall cease to exist after the order of adoption “unless the natural parent is the spouse of the adoptive parent.”76 Interpreting these provisions broadly, the Topel court held that adoption creates a “complete substitution of the adoptive

68. Id. at 545, 415 N.W.2d at 572. The court stated that when the family unit has been disturbed by adjudication or by death, “the children’s best interests are frequently compromised for reasons of spite, hostility, or economics.” Id. at 546, 415 N.W.2d at 572-73 (citing Weichman v. Weichman, 50 Wis. 2d 731, 734-36, 184 N.W.2d 882, 884-85 (1971)).
69. Id. at 545, 415 N.W.2d at 572.
70. Id.
71. Id. at 546-47, 415 N.W.2d at 573. In construing Section 767.245(4), the court stated that to allow the grandparent visitation under the circumstances of this case would be to render Section 880.155 superfluous. Id.
72. Van Cleve, 141 Wis. 2d at 547, 415 N.W.2d at 573.
73. Id. at 549, 415 N.W.2d at 574.
74. 32 Wis. 2d 223, 145 N.W.2d 162 (1966), limited by In re Grandparental Visitation of C.G.F., 168 Wis. 2d 62, 483 N.W.2d 803, cert. denied, 113 S. Ct. 408 (1992); see infra note 127 and accompanying text. The issue in Topel was whether an adoption pursuant to Section 48.92(1) and (2) terminated the right of the adopted child to inherit through a natural parent or that parent's family members. Topel, 32 Wis. 2d at 226, 145 N.W.2d at 163.
75. Topel, 32 Wis. 2d at 226-27, 145 N.W.2d at 164.
76. Id. at 226-27 n.1, 145 N.W.2d at 164 n.1 (citing Wis. STAT. § 48.92(2) (1965)).
relationship for the natural relationship." Accordingly, adoption cuts off the child's right to inherit via intestate succession from the child's biological family while creating that same right with the adoptive family. However, the rule set forth in Topel was altered when the Wisconsin Legislature subsequently amended Section 48.92 and enacted Section 851.51. These sections created a limited exception to Section 48.92 for a child who has been adopted by a stepparent after one of the child's natural parents has died and the other natural parent has remarried. These children are allowed to inherit from their natural parents under the law of intestate succession or wills.

In In re Marriage of Soergel, the Wisconsin Supreme Court read Section 767.245(4) with Section 48.92(1) and (2) and concluded that adoption severs "all rights of the adopted child's birth family to the child" and that the effect of the adoption statute must prevail over any visitation allowed under Section 767.245. In Soergel, the biological father voluntarily terminated his parental rights after a divorce with the child's mother. After the mother's remarriage, the child was adopted by the new stepfather. The grandparents, parents of the biological father, petitioned for visitation pursuant to Section 767.245(4). The provisions pertaining to adoption and termination of parental rights were silent about their effect on visitation privileges. The grandparents argued that "had the legislature intended that their grandparental visitation rights would not survive the termination of their son's parental rights and the subsequent stepparent adoption . . . the legislature would have expressly stated such intent in ch. 48." Further, the grandparents argued that their visitation rights did not derive from their son's rights but should be determined according to their grandchild's best interests.

The Soergel court denied the grandparents' request. Relying on the broad construction of Section 48.92 set forth in Topel, the court reasoned

77. Id. at 227, 145 N.W.2d at 164-65.
78. Id.
80. Id.
81. Id.
82. 154 Wis. 2d 564, 453 N.W.2d 624 (1990).
83. Id. at 573-74, 453 N.W.2d at 627 (citation omitted).
84. Id. at 566, 453 N.W.2d at 624.
85. Id.
86. Id. at 567, 453 N.W.2d at 624-25.
87. Id. at 568, 453 N.W.2d at 625.
88. Id.
89. Id.
that the stepfather "established a status between himself and the child that is identical to the status that exists between a natural parent and his or her child." A "complete substitution of the adoptive relationship for the natural relationship" results. Consequently, the biological mother, stepfather, and child formed an intact family, the existence of which, under the Van Cleve holding, precluded a petition for visitation rights pursuant to Section 767.245(4). Citing Browning v. Tarwater, the court further stated that "[o]ne of the rights parents have as a result of the natural relation of parent and child is the right to determine whether a relationship with the grandparents, or any other person, is contrary to the child's best interests."

Justice Louis J. Ceci concurred in the result of this case, but stated that "loving grandparents have effectively become 'nonpersons' as a consequence of the law in this case." He suggested that the legislature might respond to this "sad result" by revising Section 48.92(1) and (2).

IV. STATEMENT OF THE CASE

The biological father of the minor child, C.G.F., died in 1988 after heart surgery. The grandparents were the parents of the deceased father. After her father's death, the child continued to live with her mother, and continued to visit with her grandparents on a regular basis. However, after a gradual decrease in the frequency of visits permitted by the mother, the mother denied the grandparents all visitation. The child's mother remarried in 1990, and the new stepfather subsequently began adoption proceed-

90. Id. at 574, 453 N.W.2d at 627.
91. Id. at 573, 453 N.W.2d at 627.
93. Soergel, 154 Wis. 2d at 567, 453 N.W.2d at 625.
94. 524 P.2d 1135 (Kan. 1974).
95. Soergel, 154 Wis. 2d at 574, 453 N.W.2d at 628 (citing Browning v. Tarwater, 524 P.2d 1135 (Kan. 1974)).
96. Id. at 575, 453 N.W.2d at 628 (Ceci, J., concurring).
97. Id.
100. Id. Before her father's death, C.G.F. had frequent visits with her grandparents, including seven to eight weekends per year. Petitioners' Brief at 3, C.G.F. (No. 91-0293). However, according to the mother, after their son's death, the grandparents never came to Baraboo, the mother's home town. Respondents' Brief at 1, C.G.F. (No. 91-0293).
101. C.G.F., 168 Wis. 2d at 65, 483 N.W.2d at 804.
GRANDPARENT VISITATION RIGHTS

102 Before the adoption was finalized, the grandparents petitioned the circuit court for visitation pursuant to Section 880.155. In a detailed order, the circuit court set forth the grandparents' visitation rights and its findings that "such visitation is in the best interest of the child." However, the circuit court also noted that the visitation order would have no force if the stepfather's adoption of the child was granted. The circuit court held that "the completion of the adoption proceedings vests with the parents the determination relating to grandparent visitation." In an unpublished opinion, the court of appeals, relying on *In re Marriage of Soergel*, upheld the circuit court's decision. In *Soergel*, the Wisconsin Supreme Court held that the trial court could not grant visitation to grandparents pursuant to Section 767.245(4) after adoption of the minor child because the effect of Section 48.92(1) and (2) was to sever "all rights of the adopted child's birth family to the child." In *C.G.F.*, the Wisconsin Supreme Court reversed the court of appeals, deciding that the factual distinctions between *Soergel* and the present case rendered "the logical underpinnings of *Soergel* inapplicable" to the present case.

V. *IN RE GRANDPARENTAL VISITATION OF C.G.F.*

A. Majority Opinion

In *In re Grandparental Visitation of C.G.F.*, the Wisconsin Supreme Court held that a trial court has authority pursuant to Section 880.155 to grant grandparental visitation if it is in the best interests of the child, even after subsequent adoption and even if it is "in direct opposition to the wishes of the custodian regardless of who the custodian is." The Wisconsin Supreme Court, identifying factual distinctions between *In re Marriage of Soergel* and *C.G.F.*, held that the *Soergel* holding is limited to grandparent visitation petitions pursuant to Chapter 767. Under Chapter 767, if an action affecting the family has been filed, the court may

102. Id.
103. Id.
104. Id. at 66, 483 N.W.2d at 804.
105. Id. at 65-66, 483 N.W.2d at 804.
106. 154 Wis. 2d 564, 453 N.W.2d 624 (1990). In *Soergel*, the court held that the effect of the adoption statutes was to sever, upon the child's adoption, all rights of the birth family. Id. at 574, 453 N.W.2d at 627.
107. *C.G.F.*, 168 Wis. 2d at 66, 483 N.W.2d at 804.
108. *Soergel*, 154 Wis. 2d at 573-74, 453 N.W.2d at 627.
109. *C.G.F.*, 168 Wis. 2d at 67, 483 N.W.2d at 805.
110. Id. at 71, 483 N.W.2d at 806.
111. Id. at 68, 483 N.W.2d at 805.
grant visitation to grandparents, great-grandparents, stepparents, or others who have had a parent-child relationship with the minor child. In comparison, Section 880.155 "affords visitation to only a limited class of persons, that is, grandparents of a child whose parent is deceased" and is further limited by the "best interest of the child" requirement. Because Section 880.155 is narrower in effect than Section 767.245, the court implied that it is consistent with legislative intent for a court to exempt petitions pursuant to Section 880.155 from the effect of Section 48.92.

The court made a second factual distinction. The parental rights in C.G.F. were terminated because of death. In comparison, the parental rights in Soergel had been terminated by legal process. The court found that the difference between termination of parental rights by legal process and by death was dispositive. According to the court, a parent is defined by Wisconsin law as "either a biological parent . . . or parent by adoption." Furthermore, persons whose parental rights have been severed are not in-

112. "Parent-child" relationship is not defined in this statute. Case law has characterized a parent-like relationship as being one in which the person seeking custody or visitation has provided primary care for the child. See In re Z.J.H., 162 Wis. 2d 1002, 1007, 1010, 471 N.W.2d 202, 204, 206 (1991).


114. C.G.F., 168 Wis. 2d at 68, 483 N.W.2d at 805.

115. After C.G.F. was argued, the legislature adopted an amendment to Section 48.92(2) which provides that a court may order reasonable visitation to certain relatives after the adoption of a child by a relative or a stepparent. C.G.F., 168 Wis. 2d at 73, 483 N.W.2d at 807 (Abrahamson, J., concurring) (citing 1991 Wis. Laws 191 (codified at Wis. Stat. § 48.925)). Section 48.925 provides, in relevant part:

(1) Upon petition by a relative who has maintained a relationship similar to a parent-child relationship with a child who has been adopted by a stepparent or relative, the court may grant reasonable visitation rights to that person if the petitioner has maintained such a relationship within 2 years prior to the filing of the petition, if the adoptive parent or parents, or if a birth parent is the spouse of an adoptive parent, the adoptive parent and birth parent, have notice of the hearing and if the court determines all of the following:

(a) That visitation is in the best interests of the child.
(b) That the petitioner will not undermine the adoptive parent's or parents' relationship with the child or, if a birth parent is the spouse of an adoptive parent, the adoptive parent's and birth parent's relationship with the child.
(c) That the petitioner will not act in a manner that is contrary to parenting decisions that are related to the child's physical, emotional, educational or spiritual welfare and that are made by the adoptive parent or parents or, if a birth parent is the spouse of an adoptive parent, by the adoptive parent and birth parent.

(2) Whenever possible, in making a determination under sub. (1), the court shall consider the wishes of the adopted child.


116. C.G.F., 168 Wis. 2d at 67, 483 N.W.2d at 805 (quoting Wis. Stat. § 48.02(13) (1989-90)).
cluded in the definition of "parent." Consequently, although the father in the present case lost his parental rights through his death, by definition he was still considered a parent. However, the father in Soergel ceased to be a parent by definition when he terminated his parental rights.

The court also rejected the application of Soergel because of its reliance on Estate of Topel. In C.G.F., the court concluded that Topel was superseded by statute. After Topel, the legislature enacted Section 48.92(3), which, when read with Section 851.51, would allow an adopted child to inherit via intestate succession from the birth parent's family "after the birth parent's death and the child's subsequent stepparent adoption." Further, these sections could foreseeably allow grandparents to inherit from their grandchildren. By creating an exception to Section 48.92(1) and (2), the legislature, according to the C.G.F. court, had demonstrated its intent to "maintain ties between a child adopted by a stepparent and the

117. Id.
118. Id. The petitioners asserted that the adoption statute does not "terminate a deceased birth parent's status as a parent." Petitioners' Brief at 11, C.G.F. (No. 91-0293).
120. C.G.F., 168 Wis. 2d at 69-70, 483 N.W.2d at 806. The Topel court concluded that because adoption terminates the adopted child's relationship with the birth parents' family, the child could not inherit via intestate succession from the birth parents' family. Estate of Topel, 32 Wis. 2d 233, 227, 145 N.W.2d 162, 164 (1966), limited by C.G.F., 168 Wis. 2d at 70-71, 483 N.W.2d at 806.
121. C.G.F., 168 Wis. 2d at 68-70, 483 N.W.2d at 805-06.
122. Section 48.92(3) provides that "[r]ights of inheritance by, from and through an adopted child are governed by s. 851.51." Wis. STAT. § 48.92(3) (1991-92).
123. Section 851.51(2)(b) reads in part: "[T]he child is treated as the child of the deceased natural parent . . . for purposes of any statute conferring rights upon . . . relatives of that parent under the law of intestate succession or wills." Wis. STAT. § 851.51(2)(b) (1989-90). The court stated that Section 851.51(2)(b) creates an exception to Section 48.92(1) and (2) that is available only to a "limited class of persons, those children whose natural parent has died and who subsequently have been adopted by a stepparent." C.G.F., 168 Wis. 2d at 70, 483 N.W.2d at 806 (footnote omitted). Consequently, a child whose birth parent's rights have been terminated by legal process may not inherit from that birth parent.
124. C.G.F., 168 Wis. 2d at 69, 483 N.W.2d at 806 (footnote omitted). Courts will presume that the legislature enacts a statute with full knowledge of existing statutes. Wood v. American Fam. Mut. Ins. Co., 148 Wis. 2d 639, 646, 436 N.W.2d 594, 597 (1989) (citation omitted). Therefore, the court assumes that an exception, rather than a conflict, is created by the enactment of a new statute. C.G.F., 168 Wis. 2d at 70, 483 N.W.2d at 806. Furthermore, courts will avoid a statutory construction that would make a provision or phrase superfluous. Green Bay Broadcasting Co. v. Redevelopment Auth., 116 Wis. 2d 1, 19, 342 N.W.2d 27, 35 (1983), modified on reconsideration, 119 Wis. 2d 251, 349 N.W.2d 478 (1989).
125. C.G.F., 168 Wis. 2d at 70, 483 N.W.2d at 806.
child’s biological grandparents.”126 Consequently, the court concluded that Topel now only applies to “cases involving adoptions subsequent to a termination of parental rights,” and not to cases involving the death of a parent, and that Soergel cannot control when grandparents seek visitation pursuant to Section 880.155.127

The court further reasoned that to allow an adoptive parent to prevail over visitation rights granted pursuant to Section 880.155 would be to create rights for the adoptive parent that a natural parent would not have after the death of his or her spouse.128 In other words, the grandparents could petition for visitation and, if it were deemed to be in the best interests of the child, the natural and custodial129 parent would not have the right to override Section 880.155. However, if the natural parent remarried and the stepparent adopted the child from the first marriage, the stepparent could override the grandparents’ visitation rights. The court rejected this result as logically inconsistent.130

B. Concurrence

Justice Abrahamson concurred with the majority, but would have expressly overruled Soergel. Abrahamson could “find no basis for concluding that the legislature intended that the right of adoptive parents to control who visits their child depends on the manner by which the adoption arises. An adoption is an adoption.”131 The majority had no reason, according to Abrahamson, to conclude that allowing grandparental visitation pursuant to Section 767.245(4) would be contrary to the adoption statute’s purposes, when allowing visitation pursuant to Section 880.155 would not be contrary to the adoption statute’s purposes.132 Abrahamson concluded that the result in Soergel was reached because of the legal effect of the adoption proceedings, not the termination proceedings.133 Therefore, Soergel should be

126. Id. at 69, 483 N.W.2d at 806.
127. Id. at 70-71, 483 N.W.2d at 806.
128. Id. at 71, 483 N.W.2d at 806.
129. Section 767.001(2) defines legal custody as “the right and responsibility to make major decisions concerning the child.” Wis. Stat. § 767.001(2) (1989-90). Petitioners conceded that an adoptive parent would have custody of a child after adoption and that the right to decide who may visit that child would typically accompany that legal status. However, petitioners argued that Section 880.155 abrogated that right. Petitioners’ Brief at 7, C.G.F. (No. 91-0293).
130. C.G.F., 168 Wis. 2d at 71, 483 N.W.2d at 806.
131. Id. at 72-73, 483 N.W.2d at 807 (Abrahamson, J., concurring).
132. Id. at 73, 483 N.W.2d at 807 (Abrahamson, J., concurring).
133. Id. at 72, 483 N.W.2d at 807 (Abrahamson, J., concurring).
overruled, rather than distinguished on the facts and logical underpinnings.134

VI. ANALYSIS

In re Grandparental Visitation of C.G.F.135 placed Wisconsin among a large group of states allowing grandparents visitation rights after adoption by a stepparent, despite opposition by the child's parents.136 The majority holding is based, in large part, on its conclusion that Section 880.155 constitutes an exception to Section 48.92, and therefore In re Marriage of Soergel does not apply.137 Wisconsin's legislature has deemed the best interests of the child to be paramount in visitation determinations, whether pursuant to Sections 880.155, 767.245, or 48.925.138 Thus, although the "best interests" of C.G.F were not an issue before the C.G.F. court, the court's holding implies that a child's need for continued contact with a grandparent is somehow different if the child's biological parent has died than if there has been a termination of parental rights by legal process.139 However, whether visitation is in the best interests of the child is determined by sociological and psychological factors that do not necessarily turn on the legal circumstances under which an adoption occurs.140 Therefore, if C.G.F. did not impliedly overrule Soergel, the result is an illogical application of the best interests of the child standard.

134. Id. at 73, 483 N.W.2d at 807 (Abrahamson, J., concurring).
137. The majority held that Soergel would apply to petitions pursuant to Section 767.245. C.G.F., 168 Wis. 2d at 68, 483 N.W.2d at 805. In this circumstance, grandparents would not be awarded visitation after the grandchild was adopted by a stepparent, even if the visitation was found to be in the best interests of the child.
138. See In re Custody of D.M.M., 137 Wis. 2d 375, 390-91, 404 N.W.2d 530, 537 (1987); Rothstein, supra note 7, at 11.
139. The way in which parental rights are terminated may or may not indicate the quality of the relationship between grandparent and grandchild. For a discussion of grandparent-grandchild relationships, see Robinson, supra note 1, at 485-90.
140. See infra notes 155-57 and accompanying text.
The concurrence inquired whether *Soergel* has been impliedly overruled by the majority. This author contends that *C.G.F.* has overruled *Soergel*. The *C.G.F.* majority distinguished *Soergel* because the *Soergel* court relied upon *Topel*. *Soergel* primarily relied upon *Topel* for its construction of Section 48.92(1) and (2). The *Soergel* court used the *Topel* construction of the adoption statute to conclude that adoption creates an intact family. Accordingly, once an intact family exists, the court cannot enter into decisions related to visitation by grandparents. Thus, the *Soergel* court determined that the adoption statute overrides the visitation statute, Section 767.245(4). As Justice Abrahamson stated in her concurring opinion, the impact of the adoption proceeding was the primary consideration of the court in *Soergel*.

However, in *C.G.F.*, the Wisconsin Supreme Court decided that Section 880.155 overrides the effect of Section 48.92(1) and (2). That is, despite the presence of an "intact family" after an adoption proceeding, grandparents can petition pursuant to Section 880.155 for visitation "regardless of who the custodian is." Consequently, the majority opinion is inconsistent with and overrules *Soergel* because it rejects *Soergel*’s "intact family" analysis of the impact of adoption proceedings. If *Soergel* has been overruled, adoption of the grandchild will also not bar a grandparent’s petition pursuant to Section 767.245.

If *Soergel* has been overruled, a grandparent may be granted visitation with a grandchild who has been adopted after the termination of a parent’s rights, but that same grandparent and grandchild would not be allowed to inherit from each other under the law of intestate succession or wills.

---

141. *C.G.F.*, 168 Wis. 2d at 71, 483 N.W.2d at 807 (Abrahamson, J., concurring). Section 48.925 has overruled *Soergel* to the extent that it applies to grandparents who have had a parent-child relationship with their grandchild within two years of petitioning the court. See Wis. Stat. § 48.925 (1991-92).


143. *Id.*

144. *See supra* notes 65-66 and accompanying text.

145. *C.G.F.*, 168 Wis. 2d at 71, 483 N.W.2d at 807 (Abrahamson, J., concurring). This author contends that an adoption creates an "intact family," regardless of the precipitating circumstances.

146. *See id.* at 71, 483 N.W.2d at 806-07.

147. *Id.* at 71, 483 N.W.2d at 806.

148. *See Estate of Topel*, 32 Wis. 2d 223, 227, 145 N.W.2d 162, 164-65 (1966), *limited by In re Grandparental Visitation of C.G.F.*, 168 Wis. 2d 62, 483 N.W.2d 803, *cert. denied*, 113 S. Ct. 408 (1992). *Topel* held that adoption cuts off the child’s right to inherit via intestate succession from the child’s biological family. *Id.* After the enactment of Wisconsin Statutes section 851.51, a child who has been adopted by a stepparent after one of the natural parents has died and the other natural parent has remarried would be allowed to inherit from the natural parent under the law of intestate succession or wills. Wis. Stat. § 851.51 (1991-92).
The C.G.F. majority concluded that Topel is now only applicable to "cases involving adoptions subsequent to a termination of parental rights but not those involving the death of a natural parent." 149 Therefore, under Topel, a child who has been adopted by a stepparent after the termination of a biological parent's parental rights will not be able to inherit via intestate succession from his biological family. 150 Arguably, if a legislative objective is to maintain ties between the child and the child's biological family, it is inconsistent to allow visitation between grandchild and grandparent and not allow inheritance via intestate succession. 151 Nevertheless, visits between grandparent and grandchild are valuable to the child's emotional needs upon the loss of a parent, regardless of how that loss occurs. The loss is multiplied if, in addition to the loss of the parent, the child is also denied visits with grandparents.

When the C.G.F. court focused on the differences between the Soergel situation (adoption after termination of parental rights by legal process) and the C.G.F. situation (adoption after death of a parent), it naturally avoided the similarity between the situations. That similarity is the best interests of the child standard. 152 Because determining the child's best interests could foreseeably involve similar inquiries in the C.G.F. situation as in the Soergel situation, this best interests of the child focus would probably have required the court to expressly overrule Soergel. The Wisconsin Supreme Court, in Weichman v. Weichman, reasoned that grandparent visitation rights do not derive from parental rights, but are determined on the basis of the best interests of the child. 153 Further, neither the legislature nor the court has indicated that the best interests of the child standard is different when a biological parent has died than when the biological parent's rights have been terminated by legal process.

VII. RECOMMENDATIONS

Grandparent visitation must be granted in accord with the best interests of the child. 154 Social scientists have concluded that the quality of parenting, the economic and emotional stability of the home life after a divorce or death of a parent, and the presence of parental discord before a divorce are

---

149. C.G.F., 168 Wis. 2d at 70-71, 483 N.W.2d at 806.
150. Id.
151. Despite the termination of parental rights, grandparents can still choose to include their grandchild in their wills.
153. 50 Wis. 2d 731, 734, 184 N.W.2d 882, 884 (1971); see supra notes 54-64 and accompanying text.
important predictors of a child's emotional outcome after a divorce or death of a parent.\textsuperscript{155} Consequently, whether the grandparents' visits will mediate or exacerbate the child's reaction to the parental loss will be determined by such factors as consequent family conflict and impact of grandparental visits on parenting and economic stability. Regardless of whether the child experiences family disruption because of divorce or death of a parent, the child must grieve the loss.\textsuperscript{156} Therefore, it is important that a grandparent be able to support and assist the child in working through the child's grief reactions. Grandparent visitation is in the child's best interests if the grandparents provide emotional security in the child's life and are not obsessed with their conflicts with the child's parents.\textsuperscript{157}

Neither Section 880.155 nor C.G.F. specifies factors for determining the best interests of the child in the grandparent visitation context. The recent amendment to Section 48.92, Section 48.925, provides that the court may grant visitation only if the visitation is in the best interests of the child and the petitioning relative will not undermine either the parents' relationship with the child or parenting decisions related to the child's welfare.\textsuperscript{158} As implied above,\textsuperscript{159} these criteria are reasonable regardless of whether the parental rights have been severed by death or by a legal process and even if the grandparent has not had a parent-child relationship with the grandchild as required under Section 48.925. A grandparent and grandchild may have a close and meaningful relationship even if there has not been a parent-child relationship between them.\textsuperscript{160}

However, it would usually be in the best interests of the child to avoid subjecting him or her to extraordinary conflict between the parents and the

\textsuperscript{155} Christopher Tennant, \textit{Parental Loss in Childhood; Its Effect in Adult Life}, 45 \textit{Arch. Gen. Psychiatry} 1045, 1045-50 (1988). Studies have also shown that children who have suffered the loss of a parent by death are not at any greater risk of psychiatric disorders in adulthood than children who have suffered separation from a parent because of divorce. \textit{See} Kenneth S. Kendler et al., \textit{Childhood Parental Loss and Adult Psychopathology in Women; A Twin Study Perspective}, 49 \textit{Arch. Gen. Psychiatry} 109, 109 (1992). Exposure to parental discord prior to the separation or poor parental care after the separation may be more significantly causal of disorder in adulthood. \textit{See} id.


\textsuperscript{157} \textit{See} id. at 74.

\textsuperscript{158} Wis. STAT. § 48.925 (1991-92).

\textsuperscript{159} \textit{See supra} note 154 and accompanying text.

\textsuperscript{160} The social science literature on the importance of grandparents to grandchildren is sparse. A 1989 study of college students' attitudes about their grandparents revealed that the students felt strong emotional ties with their grandparents. \textit{Kennedy, supra} note 6, at 478. Child psychologists have stressed that continuity of personal relationships is important to a child's healthy development. \textit{Shandling, supra} note 1, at 123.
grandparents. An action to compel visitation is likely to be brought only when there has been a serious dispute between the custodial parents and the grandparents. Trial courts often rely upon mental health experts to ascertain when the best of interests of the child would compel visitation by the grandparents, despite opposition by the custodial parents.\textsuperscript{161} In many cases there will not be a clear consensus by the experts about what is in the best interests of the child and the court will need to decide between competing theories.\textsuperscript{162} A 1989 publication sponsored by the American Bar Association recommended several factors for trial court consideration in grandparent visitation disputes:

1. Can the grandparents provide a safe, responsible and satisfactory atmosphere for the proposed visit?
2. What is the history of grandparent visitation in the past?
3. Is the child emotionally stable? Physically healthy?
4. Are the grandparents physically and emotionally equipped for handling visitation?
5. Is there an earnest desire on the part of the grandparents and the grandchild to have a meaningful visitation relationship? Or are the visits requested for any other reason?
6. What are the wishes of the child?\textsuperscript{163}

If the court decides to award grandparental visitation, a family may find itself in a highly conflicted situation without the motivation or the tools necessary to make court-granted visits between the grandparent(s) and grandchild truly in the child’s best interests.\textsuperscript{164} Just as parents obtaining a divorce in Wisconsin must participate in mediation when custody disputes arise,\textsuperscript{165} visitation disputes between grandparents and custodial parents also suggest the use of mediation to try resolving the conflicts leading to the

\textsuperscript{161} See Rotenberg, supra note 156, at 76. Social workers, psychologists, and psychiatrists often serve as experts in child custody cases. See Samuel R. Gross, Expert Evidence, 1991 WIs. L. Rev. 1113, 1207.

\textsuperscript{162} According to one commentator, judges are likely to impose their own values because there is a lack of information on the effects of allowing or denying grandparental visitation. Sara Simrall Rorer, Grandparents’ Visitation Rights in Ohio: A Procedural Quagmire, 56 U. Cin. L. Rev. 295, 300 n.39 (1987). Many child psychology experts maintain that a child’s best interests are not served when the visitation would place the child in a hostile situation. See Michael J. Minerva, Jr., Grandparent Visitation: The Parental Privacy Right to Raise Their “Bundle of Joy,” 18 Fla. St. U. L. Rev. 533, 555 (1991). However, some courts have refused to use family hostility as a basis for denying visitation, suspecting that parents have manipulated the litigation by generating hatred. Id.

\textsuperscript{163} Rotenberg, supra note 156, at 73.

\textsuperscript{164} Furthermore, C.G.F. opens the way for more court involvement in parental decisions, and hence more use of judicial resources.

\textsuperscript{165} Section 767.11(8) provides in relevant part: "[I]n any action affecting the family, . . . in which it appears that legal custody or physical placement is contested, the parties shall attend at
lawsuit and to lessen the use of judicial resources. In visitation disputes, mediation may produce a better result than litigation does because “[m]ediation does not focus on who was right and/or wrong in the past but rather on how the disputants want to reorganize the future.” While the adversarial litigation process may emphasize the parties’ conflicts, mediation focuses on their similar concerns. For instance, the parties are likely to share a love for the grandchild.

Litigation often focuses on the past relationships of the parties. Although the past relationships between the child and grandparents and the grandparents and the parent(s) are indicative of whether grandparent visitation is appropriate, a focus on the future relationships is very important to the resolution of the visitation conflict. Despite past problems between the parent(s) and grandparents, the parties may be able to come to an agreement about a future visitation arrangement. The mediator may ask the objecting parent, “If you could structure the relationship between your children and their grandparents, how would it look?” This question

least one session with a mediator” unless this requirement would cause “undue hardship.” Wis. Stat. § 767.11(8) (1991-92).

166. The effectiveness of mediation depends on one’s willingness to participate: you can order one’s body to mediation, but not one’s psyche. Cf. Jerold S. Auerbach, Recent Publication: Justice Without Law?: Resolving Disputes Without Lawyers, 51 GEO. WASH. L. REV. 792, 792 (1983) (discussing some necessary elements for effective mediation). The question remains: Once the custodial parents discover that they must still have a relationship with the petitioning grandparents through their child, will they be motivated to attempt to resolve their difficulties, or at least make the most of a difficult situation? Or will the court become further emersed in a family’s conflicts through frequent petitions for changes in visitation arrangements?


168. Id.

169. Id.

170. John M. Haynes discusses the complexities of family problems in grandparent visitation disputes. Id. at 80. The family problems may involve intergenerational conflicts between the parent and grandparents, but may also include siblings and extended-family members. Id. Consequently, many people who are not parties to the court action are nonetheless important to the resolution of the family problems and the visitation dispute. Id. The failure of the litigation process to adequately resolve these conflicts arises from an adversarial focus on past wrongs. See id. At the conclusion of the litigation, the court renders a judgment either denying or granting visitation. Regardless of the decision, the family conflicts remain. Haynes discusses the advantages of mediation for avoiding this unsatisfactory result. He cautions, however, that mediation is not advisable in situations involving criminal activity. Id. Therefore, mediation is usually not recommended when there are allegations of sexual abuse or domestic violence. See id.

171. Rotenberg recommends that divorcing parties anticipate potential visitation disputes and provide for grandparent visitation by written agreement. Rotenberg, supra note 156, at 72. This would require the divorcing parties to plan for visitation in the event of death of either of the divorcing spouses, either spouse’s incapacity, or an out-of-state move by either spouse. Id.

172. Haynes, supra note 167, at 82. Granted, some parents may respond, “I do not want the grandparents to have any relationship with my child.”
presumes that there will be a relationship and, therefore, may invoke constructive problem solving.\(^{173}\)

The best interests of the child standard requires a fact-intensive inquiry. Mediation can be used to elicit facts about the parties' willingness to work together toward the child's best interests. If mediation does not produce a visitation agreement, the court is still left with a difficult dilemma: whether to order visitation despite the likelihood of great conflict between the parties or to deny the grandparents visitation at the risk of acquiescing to parental manipulation of the mediation process.\(^{174}\)

**VIII. CONCLUSION**

*In re Grandparental Visitation of C.G.F.*\(^{175}\) resolved whether grandparents have the right to petition the courts for visitation of their adopted grandchild who had lost a parent by death. Thus, the Wisconsin Supreme Court decided that an adoption proceeding will not necessarily terminate the rights of the biological family even when a biological parent is dead. Even if the denial of visitation comes from the grandparents' own child, the grandparents can petition the court pursuant to Section 880.155 of the Wisconsin Statutes so long as their child's former spouse has died.

Parents do not always consider the best interests of their children when deciding whether to allow visitation by grandparents. A judge may exercise discretion to grant grandparental visitation, despite the parents' opposition, when the visitation would be in the child's best interests. Because of the high potential for family disruption, judges should be very cautious in granting grandparental visitation in these situations. For reasons of judicial economy and more satisfactory resolution of family conflicts, judges should utilize mediation to resolve many of these conflicts.

ROBIN L. LEWIS

---

173. See *id*.
174. See *Minerva*, *supra* note 162, at 555.
SURROGATE GESTATOR: A NEW AND HONORABLE PROFESSION

JOHN DWIGHT INGRAM

I. INTRODUCTION

In recent decades, sex without reproduction has become common and widely accepted, and more recently medical science has made it increasingly possible to have reproduction without sex. The former is much more enjoyable than the latter for most of us and, while it does entail some moral and legal issues, is a great deal less complex than the latter.\(^1\) A major cause of the complexity of the issues associated with noncoital reproduction is that, while "science [tends to] look... forward to anticipate new and unforeseen possibilities, the law looks backward, drawing its support from precedent.\(^2\)" Our society seems to first develop and perfect medical and scientific techniques, and only later consult experts in ethics and law to determine if we \textit{should} be doing that which in fact we already \textit{are} doing. Meanwhile, we try to resolve disputes arising from new reproductive technologies by using "old legal codes of paternity, maternity, baby-selling, adoption, and contracts."\(^3\)

This Article proposes a new approach to an aspect of noncoital reproduction—"gestational surrogacy"—that is gaining rapidly in popularity and seems to hold great promise for the future. Gestational surrogacy is an

\(^{\text{* Professor of Law, John Marshall Law School; A.B. 1950, Harvard University; J.D. 1966, John Marshall Law School.}}\)

\(^{\text{I acknowledge with thanks the help and contributions of my very capable research assistants, Heather Brooks, Patricia Holland, and Christina Lazich, and of my equally capable former research assistants (now attorneys), Shari Kalik and Ann Lawrence. The views expressed in this Article are mine and not necessarily theirs.}}\)


\(^{\text{3. Laura R. Woliver, \textit{Reproductive Technologies and Surrogacy: Policy Concerns for Women}, 8 POL. & LIFE SCI. 185, 185 (1990).}}\)
arrangement whereby the sperm and ovum of a couple, who wish to raise a genetically related child, is used to create an embryo through in vitro fertilization.4 The embryo is then implanted in the uterus of another woman who subsequently gives birth to the child. The child is then given to the genetic parents to raise.5 Gestational surrogacy has the potential to benefit both the creating genetic parents who will raise the child and the surrogate who will bear and give birth to the child. To achieve the full potential of this unique opportunity we must develop new ways of viewing and resolving the issues and problems involved.

II. WHY SURROGACY?

The idea of "surrogate" motherhood dates back to at least the Old Testament stories of the apparently infertile Sarah7 and Rachel,8 who instructed their husbands to impregnate their maid-servants so that they might have children. In more recent years, the pregnancy of the surrogate mother has been accomplished by artificial insemination, or in vitro fertilization, rather than by physical intercourse. In any case, the objective is for the surrogate to take the place of a woman who cannot conceive a child or cannot carry it to a live birth.

Although many people are aware of surrogate motherhood, many of them, unfortunately, know about it only because of a few highly publicized contests between the surrogate mother and the parents who intended to raise the child. In recent years, less than one percent of surrogate births have created contests over custody of the child.9 However, it is these few battles that produce headlines and come to public attention.10

Approximately two to three million couples in the United States, constituting eight to ten percent of married couples with a wife of child-bearing age, are infertile.11 Although some people think that infertility has greatly

5. See, e.g., Johnson v. Calvert, 851 P.2d 776 (Cal. 1993). In this case, however, the gestator, Anna Johnson, attempted to keep and raise the child as her own.
6. A surrogate is "one appointed to act in place of another; . . . one that serves as a substitute." WEBSTER'S NEW COLLEGIATE DICTIONARY 1187 (10th ed. 1983).
8. Id. 30:3.
increased in recent decades,\textsuperscript{12} it has actually remained fairly constant.\textsuperscript{13} However, due to sociological and environmental factors, such as postponement of parenthood for financial and career reasons, pollution in the atmosphere, and disease, individuals are less fertile when they try to have children after reaching thirty or forty.\textsuperscript{14} Thus, the incidence of infertility among couples who are trying to have children today is higher than in the past.

Through the years, adoption has been viewed as an acceptable alternative for many infertile couples. However, because of the widespread use of contraceptives, availability of abortion, and growing willingness of single mothers to keep their babies, the supply of desirable\textsuperscript{15} children available for adoption has dwindled greatly.\textsuperscript{16} For most couples, adoption is "a long and arduous process."\textsuperscript{17} The judge in the \textit{Baby M} case "found that in 1984, two million couples contended for the 58,000 children placed for adoption"\textsuperscript{18} and that the waiting period was three to seven years.\textsuperscript{19} Many couples seek a better solution.

That better solution has sometimes involved the use of a surrogate mother, and use of surrogacy seems likely to increase in the years ahead. It is quite possible for a child born through a surrogacy arrangement to be in the welcoming arms of his parents within a year of the beginning of the process. Although surrogacy involves substantial expense, it may be less costly than adoption,\textsuperscript{20} especially when the latter is expedited by the use of the gray or black market.

Even more important, many couples are quite willing to invest more time and money than that required for adoption in order to have a child who is genetically related to one or both of them. This is clearly evidenced by the great increase in infertility treatment, the widespread use of artificial insemination and \textit{in vitro} fertilization, and the growing interest in surrogate

\begin{itemize}
\item \textsuperscript{14} Parish, supra note 9, at 56; Richard A. Posner, \textit{The Regulation of the Market in Adoptions}, 67 B.U. L. Rev. 59, 61 (1987).
\item \textsuperscript{15} For most potential adoptive parents, "desirable" means a healthy Caucasian baby.
\item \textsuperscript{16} Christopher P. Litterio, \textit{Artificial Insemination, In Vitro Fertilization, and Surrogate Motherhood: Breeding Life and Legal Problems in the United States and Great Britain}, 10 Suffolk Transnat'l L.J. 533, 537 (1986).
\item \textsuperscript{17} Avi Katz, \textit{Surrogate Motherhood and the Baby-Selling Laws}, 20 Colum. J.L. & Soc. Probs. 1, 4 (1986).
\item \textsuperscript{18} Peter H. Schuck, \textit{Some Reflections on the Baby M Case}, 76 Geo. L.J. 1793, 1802 (1988).
\item \textsuperscript{19} \textit{Id.}
\item \textsuperscript{20} \textit{Id.}
\end{itemize}
In our society there is a powerful and pervasive "desire to reproduce [and] . . . connect to future generations through one's genes."22

III. WHAT IS SURROGATE MOTHERHOOD?

Generally, most people use the phrase "surrogate mother" "to designate a woman who gives up a child she has borne to be raised by another woman and her husband, [the latter being] the child's biological father."23 This arrangement is often called "partial surrogacy," because the "surrogate" is the genetic mother of the child, while the woman who will raise the child as its mother has no genetic relationship to it. In its purest form, however, surrogacy involves the creation of an embryo from the sperm and ovum of the couple who intend to raise the child. This embryo is then implanted in the womb of the surrogate, where it develops until birth. This arrangement is often called "full surrogacy," since the surrogate has no genetic relationship to the child, but simply provides a womb for the development of the child.24

The remainder of this Article discusses only full surrogacy and the issues and opportunities pertaining thereto. Although there are problems and objections with any form of surrogacy, many do not apply to full surrogacy at all, and others apply to a much lesser degree. Moreover, full surrogacy has the potential to provide great opportunities and rewards to both the rearing parents and the gestator.

For purposes of this Article, I will avoid using the word "mother" for either of the women involved. Instead, I will refer to the couple who are the genetic creators of the child as the "parents" and the woman who bears and gives birth to the child as the "gestator." In so doing, I hope to avoid the confusion that often surrounds the word "surrogate," and the emotional and traditional connotations of the word "mother." I will refer to the entire process as "gestational surrogacy."

23. Capron, supra note 1, at 679 n.1.
SURROGATE GESTATOR

IV. POTENTIAL PARTICIPANTS IN GESTATIONAL SURROGACY

A. Parents

Many couples who are involuntarily childless are not infertile. They are, in fact, capable of producing healthy ova and sperm. For some women, pregnancy is difficult or dangerous because of some physical condition, such as diabetes or high blood pressure. In other cases, a woman with ovaries may have undergone a hysterectomy. A woman also may elect to use a surrogate gestator rather than bear her own child simply for convenience, for reasons relating to her career, leisure, or lifestyle.

B. Gestators

Women choose to be gestators for many reasons. Some women enjoy being pregnant and like the feeling that comes from creating a new life. Others get great satisfaction from being able to help another couple have a much-wanted child. Most women, however, including many of those influenced by the above reasons, are motivated by the desire for financial reward. For some, this means being able to buy things, such as a second car, a better house, or an education that they could not otherwise afford. For those less economically privileged, it means an opportunity to be self-supporting or to contribute to the basic budget of one's family. For women who find it difficult to obtain employment that pays well, being a gestator may be the ideal job, since it can be done in their "spare time at home with little training." A gestator can bear children for others in between and after the births of her own children, "allowing [her] to stay at home to raise [her own] children while still making money to support the family."

26. Robertson, supra note 25, at 1012.
27. Katz, supra note 17, at 3.
28. Some women may wish "to avoid ... morning sickness, a bulky torso, ... or the discomfort of childbirth." Shari O'Brien, Commercial Conceptions: A Breeding Ground for Surrogacy, 65 N.C. L. REV. 127, 132 (1986).
30. Levitt, supra note 29, at 461.
32. Woliver, supra note 3, at 189.
C. The Host Uterus Program

Gestational surrogacy is not revolutionary. The Division of Reproductive Endocrinology and Fertility at George Washington University Medical Center started its “host uterus” program in the late 1980s, and eighty or more such births have been reported in recent years. The next logical step is to have the sponsors of host uterus programs assume responsibility for all aspects of gestational surrogacy: matching parents and gestators, collecting and paying all fees and compensation, providing medical facilities and benefits to the gestators, and enforcing all provisions of the agreement among the parties. Each gestator would become, at least during her pregnancy, an employee of the host uterus program, subject to its rules and regulations, and assured of full payment for performance of her duties. The parents, on the other hand, would be clients of the host uterus program. Thus, they would be able to rely on its past performance and its interest in future good will and reputation. In this way, they are less likely to encounter a dispute than if they dealt directly with the gestator.

There is every reason to believe that, over a period of time, the position of gestator will be viewed as an honorable and desirable profession, which gives many women the opportunity to earn money by providing a service that society values. But before this will materialize, we must recognize the objections that have been raised to surrogate motherhood, including gestational surrogacy. We must then demonstrate that these objections are ill-founded and far outweighed by the benefits of a well-conceived host uterus program.

V. Objections and Their Rebuttal

A. Commercialization

The following article describes New York’s ban on surrogate-parenting for profit:

Albany, N.Y.—[July 23, 1992] Gov. Mario Cuomo signed a bill Wednesday making New York—where an estimated 40 percent of the nation’s surrogate-parenting deals are arranged—the 18th state to ban surrogate parenting for profit. The Legislature, pushed by an unusual coalition that included the National Organization for Women and the New York State Catholic Conference, approved the ban last month. It takes effect in one year. New Yorkers will still be

---

33. Levitt, supra note 29, at 459.
34. See infra part VII.
allowed to act as surrogates for friends or relatives, but no contracts or broker fees will be allowed.\textsuperscript{35}

"[S]urrogate parenting contracts of a commercial nature are void and against public policy, and you cannot use the courts to enforce them," said Helen Weinstein, a chief sponsor of the new legislation.\textsuperscript{36} Moreover, Weinstein believes that "[s]urrogate parenting denigrates human life and turns reproductive rights into something that you can buy and sell, and turns children into commodities."\textsuperscript{37}

In response, Betsy Aigen, a clinical psychologist who became interested in the issue after she discovered that she was infertile, said "the proposed legislation would do more harm than good."\textsuperscript{38} According to Aigen, "Anti-surrogacy bills don’t prevent surrogacy, [but rather] leave [the] participants without any protection."\textsuperscript{39} Aigen warns that "eliminating trained, accountable professionals would lead to a proliferation of Baby M stories."\textsuperscript{40}

Although most people apparently do not object, in principle, to surrogate motherhood, considerable opposition to paid surrogacy exists. It is, however, difficult to find any logic in such a distinction. Perhaps the opposition to commercial surrogacy is derived from our "historical failure to value [the] domestic work of mothers and housewives [, which contributes] to the sense that gestation has no value[,] as a form of productive labor."\textsuperscript{41} But this overlooks the value of the services that the gestator provides to the parents. She should be paid for her time, energy, physical discomfort, and risk. If society is comfortable with allowing payment to doctors who aid in the creation of children through \textit{in vitro} fertilization, and with compensating those who contribute their sperm or ova, it certainly should be acceptable to pay a gestator who contributes the temporary use of her womb.\textsuperscript{42} Why is using a body to produce a baby for someone else any different from using a body to produce blood, sperm, ova, or any other regenerative substance for someone else's use?

Throughout American history, we have readily accepted the use of surrogates to perform various roles of parenthood, such as wet nurse, govern-

\textsuperscript{35} Helen Weinstein, \textit{N.Y. Outlaws Surrogate-Parenting Profits}, CHI. TRIB., July 23, 1992, § 1, at 11.
\textsuperscript{36} George E. Curry, \textit{New York State May Bar Mothers for Hire}, CHI. TRIB., May 31, 1992, § 1, at 17.
\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} Id.
\textsuperscript{42} Hollinger, \textit{supra} note 12, at 893.
ess, day-care worker, and boarding school teacher. Prebirth surrogacy is merely a modern extension of postbirth surrogacy, made possible by advances in science and medicine. No one has ever questioned that postbirth surrogates should be paid for their services. Ours is a commercial society, and most of our needs are satisfied by the use of commercial transactions. Only a fair financial return will induce most potential gestators to allow others to use their reproductive capacity. Allowing surrogate motherhood but prohibiting payment for the gestator's services would be comparable to allowing doctors to perform abortions but prohibiting payment for the doctors' services. Such a prohibition would "erect a major barrier to access to the procedure." Bearing and giving birth to a child is perhaps the finest and most valuable service a woman may provide. We should allow women to place an economic value on this service so that they may be properly compensated if they wish to provide this service to others.

B. Baby-Selling

All states prohibit the selling of children, and most have statutes aimed at eliminating black market adoptions. Some people feel that these statutes should apply to surrogacy arrangements. However, surrogate motherhood did not exist when the baby-selling statutes were enacted. Such legislation was established to protect a mother and child in an adoption situation from falling prey to unscrupulous people operating in the adoption black market. In most cases, the child involved was unplanned, unwanted, and illegitimate, and the mother could not find an alternative to giving up her baby to the highest bidder. Generally, the adopting parents were not biologically related to the child, their suitability as parents was not usually investigated, and the child's best interests were rarely considered.

In a gestational surrogate parenting arrangement, however, the agreement to bear a child and give the child to its genetic parents is entered into

44. Noel P. Keane, Legal Problems of Surrogate Motherhood, 1980 S. Ill. U. L.J. 147, 156.
46. See Muller v. Oregon, 208 U.S. 412, 421-22 (1908) (holding that women are competent to enter into binding contracts).
47. Merrick, supra note 13, at 163.
48. Katz, supra note 17, at 8-9 n.34.
before conception. The gestator is "not avoiding the consequences of an unwanted pregnancy or fear of the financial burden of child rearing."\(^5\) Rather than being unwanted, the pregnancy is actively sought by a gestator who knowingly and voluntarily relinquishes any claim she may have to the child before she becomes pregnant. Since the child will be reared by his genetic parents, his best interests will be as well protected as if his birth had resulted from normal coital conception and his genetic mother's pregnancy.\(^5\)

If the child is deemed to be, from conception, the child of his genetic parents, there is no sale of the child. The gestator is not a parent, and thus has no parental rights to relinquish. Payments to the gestator are for her services in bearing and giving birth to the child and delivering the parents' child to them. Moreover, the payments compensate her for her foregone opportunities (employment, travel, birth of own child) and limitations on activities (recreation, diet, sexual relations).\(^5\)

The most that can be reasonably argued is that part of the gestator's compensation is for her preconception relinquishment of any possible claim to parental rights she might have under existing state law. For many years, we have allowed the preconception sale of a man's possible parental rights when he provides sperm for artificial insemination. If that is permissible, it should not be objectionable to allow a gestator, who will have no genetic tie to the child, to do the same. In divorce cases, for example, we routinely allow a party to relinquish or limit his right to custody of a child in exchange for some other benefit in the overall divorce agreement.

**C. Exploiting Poor Women**

Some are concerned that most surrogates will be poor women who will offer the use of their bodies to the well-to-do as an addition to their present services of housekeeping and childrearing.\(^5\) First, there is no reason to think that only poor women will want to become gestators. Despite the long-standing view that women work only because of either stark economic necessity or to earn some "pin money," many middle-class women work, and would become gestators, to improve their standard of living.\(^5\) These

---

51. Surrogate Parenting Assocs., Inc. v. Commonwealth, 704 S.W.2d 209, 211 (Ky. 1986) (emphasis omitted).
52. Levitt, supra note 29, at 475 & n.141.
54. Robertson, supra note 25, at 1022.
55. For example, a woman may wish to buy or remodel a house, buy a car, pay for her own or her children's education, or travel.
women are certainly not being exploited any more than a man would be if he took a second job for the same purpose.\textsuperscript{56}

The exploitation argument is most often raised in connection with gestational surrogacy because the racial, genetic, and educational background are no longer of much concern to the child's genetic parents. Some argue that African-American and Hispanic women, who have fewer economic choices than Caucasian women, will be hired as gestators because they will accept lesser fees than Caucasian women.\textsuperscript{57} But the well-to-do are presently employing these same women at very low wages for childcare and housework that takes them away from their own families. Why is it "exploitation" to give these women the free choice of opting to earn money while remaining at home, or perhaps earning more money while performing their previous jobs and, at the same time, also serving as a gestator? Rather than exploiting women, commercial surrogacy will liberate many women by allowing them to engage in employment that is less distasteful and more remunerative than their present choices.\textsuperscript{58}

The other exploitation argument is that "[t]he lure of a very large sum of money, perhaps larger than the woman could get any other way, may lead her to commit herself to a decision that she may very deeply regret."\textsuperscript{59}

This problem is certainly not limited to surrogate motherhood. Many people who commit themselves to long-term activities later wish they had not. In many cases, they must complete their obligations because they have no alternatives. Examples that readily come to mind are undertaking polar or space expeditions, military combat, or an ocean voyage; performing a long and delicate operation; or caring for children in the parents' absence. In such instances, as with a surrogate gestator, the appeal of the offered rewards may fade as the task becomes more onerous and seemingly never-ending. However, the task must be completed. Generally, we do not consider it exploitive to expect people to perform difficult and dangerous assignments that they have willingly and knowingly undertaken.

\section*{D. Surrogacy Degrades Women}

Some people, especially some feminists, believe that surrogate arrangements "demean[ ] motherhood by reducing it to a type of farming; it rele-

\begin{thebibliography}{99}
\item 56. Andrews, \textit{supra} note 45, at 76.
\end{thebibliography}
gates [these] women . . . to their biological function as reproducers, thus
degrading and objectifying them as 'mother machines.'" An additional
concern is that, because gestators will be valued in the marketplace by their
physical and psychological characteristics, some will have Saks Fifth Ave-
 nue price tags while others will have K-Mart price tags. Some consider it
degrading that a woman's body can be rented for a price determined by her
reproductive capabilities, rather than for her intrinsic worth and
achievements.

However, most people readily accept the fact that, for many purposes,
their worth is determined by their personal characteristics, including physi-
cal, psychological, and other attributes. While many of us wish our per-
sonal characteristics were of a higher quality, we do not consider it
degrading to be judged on that basis. Perhaps the resistance to allowing
women's bodies to be treated as marketable objects is derived from the sex-
ism associated with Playboy bunnies and Miss America. But to let that
stand in the way of a woman's right to engage in gestational surrogacy is
paternalism at its worst. Women are not second-class citizens and do not
need to be protected from themselves. They are fully capable of making
their own decisions and accepting responsibility for them.

Far from being degrading, gestational surrogacy has the potential to
open up new opportunities for women that might not otherwise be economi-
cally possible. It may provide temporary employment to fulfill the short-
term needs of many women. For example, a young woman could finance a
year of school, save for the down-payment on a house, travel, or study
abroad. And for the mother-to-be who will raise the child, the potential
for opportunity and liberation is equally promising. Freed from the need to
take time out for bearing and giving birth to children, women will truly be
free to compete equally with men in business and professional life. Because
the role of gestator will be left to those who choose it, how can it be degrad-
ing for a woman to willingly bear and give birth to a child?

E. Surrogacy Will Reduce Demand for Adoption

A further objection to surrogate arrangements is that they will reduce
the demand for adoption at a time when there are many handicapped,
older, and non-Caucasian children in need of good adoptive homes.

60. Antoinette S. Lopez, Privacy and the Regulation of the New Reproductive Technologies: A
61. Merrick, supra note 13, at 166.
62. Healy, supra note 53, at 115 n.112.
63. Anita L. Allen, Privacy, Surrogacy, and the Baby M Case, 76 Geo. L.J. 1759, 1763 n.17
(1988).
Martha Field argues that “[i]t would be a real social harm for surrogacy to substitute for adoption.” While it is indeed difficult “to adopt the healthy, white infants that many desire,” the shortage of the latter “has resulted in many children being adopted who once would have been hard to place.”

While I do not question the social desirability of placing these “less desirable” children in adoptive families, I do question whether the availability of gestational surrogacy will have much effect on the adoption of hard-to-place children. Relatively few couples will engage in gestational surrogacy, but those who do need to be fairly affluent to afford the substantial costs involved. If surrogacy is not available to these couples, they will most likely enter the black or gray market to adopt a Caucasian baby. Hard-to-place children will continue to be adopted primarily by couples who lack the means to pursue other alternatives.

Moreover, there is no reason to burden one small group of potential parents with a special duty to adopt hard-to-place children. If we are determined to find homes for these children, we should require that all couples who already have two genetically related children must adopt one hard-to-place child before they may have another child by natural birth. Failure to adopt before the arrival of a third child would subject the couple to a substantial fine. Perhaps my suggestion seems facetious, but it illustrates how unfair it is to limit the opportunities of a group of people who did not cause the social problem that we wish to cure.

It must also be noted that, to the extent that surrogate arrangements result in a small decrease in the demand for adoption, it will make it possible for some eager adoptive parents to raise a child who would not otherwise be available to them or whose availability would at least be long delayed.

F. Effect on Gestator’s Own Children

Most host-uterus programs will require that a gestator have at least one child of her own before entering into a gestational surrogacy arrangement. Because of this, some writers suggest that the gestator’s own children will experience feelings of abandonment, fear, and anxiety when they see their mother go through nine months of pregnancy, and they then observe that

---

65. Id.
67. See infra part VII.A.
the baby does not join their family.\textsuperscript{68} The rather obvious solution to such a problem is for the gestator to honestly and fully explain to her children exactly what she is doing and why. It should be no different from the situation in which a woman provides day care for other people's children, or serves as a temporary foster parent. Bearing and giving birth to another couple's child is her "job." Because this is an honorable and useful service, she should be quite comfortable explaining it to her children and expecting them to be proud of her "work." If her children know from the beginning that the baby-to-be is the child of the parents-to-be, and not a part of the gestator's family, they will have no reason to fear that they will be abandoned or given away.

There is concern that the gestator's children will suffer embarrassment when their peers learn of their mother's arrangement.\textsuperscript{69} Perhaps they will, as is sometimes the case with children whose parents are members of religious sects or children whose parents advocate unpopular causes. We surely do not want to let social intolerance and bigotry determine what activities are permissible. It is the gestator's right to determine if her surrogacy arrangement is good for her family. Moreover, it is her responsibility to help her children understand the importance of doing what they think is right, even when that does not coincide with the views of others.\textsuperscript{70}

\textbf{G. Maternal Bonding}

There is evidence that "a deep attachment or bond develops in the course of the prenatal and postnatal relationship between mother and child."\textsuperscript{71} Because of this, some people feel that a gestator will experience mental anguish and depression when she "gives up" the baby. However, although this is a common experience for women who give up their children for adoption, there is little danger that this will occur with a gestational surrogate. The latter knows before conception that the child is not hers, and that her role in the child's life will end shortly after birth. The relationship of gestator to fetus is analogous to that of many nannies and housekeepers to their charges. They provide loving care for a time and often develop close ties, but they always know that the child's tie to his parents is paramount. The very low risk of unyielding "maternal bonding" on the part of a gestator is evidenced by the fact that, while seventy-five percent of biological mothers who give up a child for adoption later change their

\begin{itemize}
  \item \textsuperscript{68} Merrick, \textit{supra} note 13, at 167.
  \item \textsuperscript{69} \textit{Id}.
  \item \textsuperscript{70} Andrews, \textit{supra} note 45, at 78.
  \item \textsuperscript{71} Hill, \textit{supra} note 21, at 394-96 & nn.219-25.
\end{itemize}
minds, only about one percent of surrogates have similar changes of heart.72 Furthermore, most surrogates who have a change of heart are the genetic mother of the child, not just a genetically unrelated gestator.

VI. THE ROLE OF THE STATE IN SURROGATE ARRANGEMENTS

The force of law over surrogacy, in the form of statutory regulation, should be employed only to: (1) provide a back-up for situations when the parties directly involved have not made their own contractual arrangements; (2) expressly authorize arrangements that may have been considered illegal in the past;73 (3) relieve involved parties from parental or other responsibilities, when appropriate; and (4) provide for problems of inheritance, custody, and financial support.

A statute should expressly require that the parties directly involved in gestational surrogacy—the parents, the gestator, and the clinic or other medical facility (host uterus program)—must enter into a complete and binding agreement covering every foreseeable issue.74 The parties should be free to make any provisions they wish unless those provisions are clearly contrary to public policy. No provision should be deemed contrary to public policy merely because it offends some people’s beliefs. The agreement should specifically state that advance provisions concerning surrogacy will be legally binding and enforceable. As a result, all concerned will “know with reasonable certainty” what will happen “if certain contingencies occur.”75 Those who are involved in gestational surrogacy must be able to rely on the agreements they made.76 And, the certainty that provisions

74. See infra part VII.
76. Without enforceability, surrogacy contracts could easily become tools for blackmail. A gestator might seek to extort additional payments from the parents by either threatening to abort or keep the child. Krause, supra note 43, at 203. In connection with the widely publicized case of Anna J. v. Mark C., 286 Cal. Rptr. 369 (Ct. App. 1991), the intended father, Mark Calvert, stated on ABC-TV’s The Home Show, on February 11, 1993, that the gestator (Anna Johnson) had offered to give up her claim to custody of the child for $50,000.
Also, as Judge Posner points out, surrogacy becomes less valuable to the gestator because she loses part of her bargaining power. If surrogacy contracts are enforced, the gestator can command a higher fee because the outcome is more certain. Richard A. Posner, The Ethics and Economics of Enforcing Surrogate Motherhood, 5 J. CONTEMP. HEALTH L. & POL’Y 21, 22 (1989).
made in advance will be binding and enforceable will "minimize the fre-
quency and expense of dispute resolution."  

Undoubtedly, one of the worst ways to start a child’s life is with a cus-
tody contest.  To avoid this undesirable possibility, statutory law should
make clear that the couple who genetically create the child and intend to
rear the child are the child’s legal parents and are entitled to custody of the
child from the moment of birth. The statute should also clearly state that
the gestator is not the mother of the child and has no parental rights or
obligations in relation to the child. We have traditionally defined father-
hood by the genetic link. There is every reason to define motherhood in the
same way. If the right to custody of the child is clearly established and
legally enforceable, even the very small percentage of disputes that have
occurred will be largely eliminated.

VII. Provisions for the Agreement of the Parties

The agreement among the parents (the couple who will genetically cre-
ate the child), the gestator, and the host uterus program should anticipate
and provide for as many future contingencies as possible. The agreement
must be binding on all involved parties and subject to modification only if
all parties agree. By now, we have had enough experience in this field to
foresee most of the issues and problems that may arise.

As stated in Part IV.C, the host uterus program will find and employ
gestators. Because each program will expect to provide services for many
years to come, it will have a strong incentive to set high standards and build
an excellent reputation. It is quite possible that, as the popularity of such
programs increases, some programs will have their own medical facilities to
assure quality and to achieve economies of scale.

A. Compensation of Gestators and Fees Charged Parents

In gestational surrogacy, the race and ethnicity of the gestator will be
irrelevant. The primary qualifications will be her present health and med-
cal history, her willingness to conform her activities and lifestyle to the op-
timum conditions for pregnancy, and her willingness to relinquish custody

---

77. Ahnen, supra note 75, at 1345.
78. Field, supra note 64, at 5.
79. This should eliminate any possible argument about "baby-buying or selling." Hill, supra
note 21, at 356-57.
80. Only one percent of surrogate birth mothers, most of whom have a genetic link to the
child, have attempted to rescind their agreement to relinquish the child. See supra note 72 and
accompanying text.
of the child immediately after birth. A well-run program will subject potential gestators to psychological and physical tests to determine their health and emotional stability. It also seems wise to require that a gestator must be living with at least one natural child of her own. This will assure that she is physically capable of bearing and giving birth to a child. Moreover, it will establish that she can accurately predict her own feelings about relinquishing the parents' child at birth and that she understands the medical and emotional consequences of pregnancy and birth.\(^8\)

The gestator's compensation will be determined by market forces—the law of supply and demand. Over time, some gestators may be able to command a premium price because of their successful record in prior surrogate births. First-timers will necessarily be judged largely by the results of the program's testing. However, the rules of economics also dictate that the opportunity costs of gestators will play a major role. Although a woman is pregnant twenty-four hours a day for nine months, she may do many other things during pregnancy. Women commonly work right up to the day of delivery. In any case, many gestators will probably be women who have low opportunity costs because their other earning opportunities are limited.\(^2\)

In addition to receiving compensation for opportunity costs, a gestator should also be compensated for (1) any medical expenses not covered by the program's own facilities or her own insurance; (2) her discomfort, pain, and risk during pregnancy and birth; and (3) interruption of her sexual activity.\(^3\) The program should also compensate the gestator, her family, or both in the event of her death or disability during the period of employment.\(^4\)

The host uterus program would recoup the gestator's compensation and its other costs by charging fees to the parents who contract for its services. Among these costs would be: (1) the expenses of any medical facilities and personnel it maintains or contracts; (2) the expenses of locating and screening qualified gestators; (3) the fees of attorneys and other consultants; and (4) the cost of any guarantees the program may give to provide institutional or other care for children born with impairments.\(^5\)

---

81. Levitt, supra note 29, at 476-77.
83. If the gestator is married, which will usually be the case, her husband should be a party to the agreement with the program and should be compensated for interference with his normal consortium with his wife.
84. This likely could be provided by insurance, perhaps on a group basis.
85. This may also be covered by insurance. See infra part VII.B for further discussion of this topic.
Obviously, the fees charged to parents will be quite substantial, often ranging from $30,000 to $50,000.\(^{86}\) While this will limit the potential demand for gestational surrogacy, it will be partially offset by the parents’ opportunity cost savings. The genetic mother-to-be will be relieved of undergoing pregnancy and childbirth herself. Thus, she can avoid taking time out from her career and can avoid all the discomfort, inconvenience, and risk of giving birth to her own child. For many, the net cost will be very attractive, especially when compared to the present high cost and delay in adopting a child who would not be genetically related.\(^{87}\)

B. The Agreement

A number of articles list and discuss the specific provisions that should be included in the agreement among the parents, the gestator, and the host uterus program.\(^{88}\) Because it would serve no purpose to repeat all of that in this Article, the instant discussion will be limited to the key issues where controversial questions will arise and where breaches of the agreement are most likely to occur.

1. Activities of the Gestator

The agreement will usually provide that the gestator agrees to: (1) visit the treating physician, chosen by the program, according to a specified schedule; (2) follow the medical instructions of that physician, including tests and screening; (3) not smoke tobacco products, drink alcohol, use illegal drugs, or take any medication without the physician’s consent; and (4) submit to medical care or treatment prescribed by the physician.\(^{89}\) The agreement should affirmatively list the tests and procedures permitted or list those to which the gestator need not submit. There must be a clear understanding of this before conception because thereafter the interests of the parents and the gestator will often conflict. The parents’ interest will be

---

86. Merrick, supra note 13, at 163.
90. Such procedures might include amniocentesis, ultrasonography, drug therapy, blood transfusions, fetal surgery, and Cesarean delivery. Id. at 627.
almost exclusively in the child's well-being; they will be interested in the
gestator's health only to the extent that her health will affect the delivery of
a healthy child. While the gestator will want to deliver a healthy baby and
successfully complete her contract, she will not be eager to risk her own life
and health to reduce the chances of the child's death or disability.91 Once
there is a voluntary and knowing agreement on the part of the gestator, any
deviation from or refusal to submit to the prescribed regimen will be prop-
erly treated as a breach of contract.

In most cases, gestators will be willing to follow the requirements of the
agreement, especially if they hope for future employment as a gestator.
When a breach is threatened, or occurs, a court is unlikely to affirmatively
order the gestator to undergo a test or procedure that involves more than a
minimal invasion of her body.92 However, courts are usually much more
willing to issue prohibitory injunctions93 and might well order the gestator
to stop smoking, drinking, or engaging in other activity that is potentially
harmful to the fetus. In addition to any monetary consequences provided
for in the contract or awarded as damages by a court, any subsequent viola-
tion of the injunction would subject the gestator to sanctions for contempt
of court.

2. Confidentiality

Because the gestator will be an employee of the program, and the par-
ents will be clients of the program, the gestator and parents need not know
each other's identity or ever meet. Parties may be matched by the program
according to their wishes on this subject. Some will be eager to share the
experience of pregnancy and birth and perhaps will have a continuing relation-
ship thereafter. Others will want total or partial confidentiality and pri-
vacy. There is no right or wrong. The critical thing is to have a clear and
binding agreement, which cannot be modified later without the consent of
all parties.

3. Miscarriage or Stillbirth

In order to receive the full contractual compensation for her services,
the gestator will presumably have to bear and give birth to the child and
deliver the child to the parents. It is sometimes argued that the gestator
should receive a partial or pro-rata payment in the event of miscarriage or stillbirth. The rationale for this is that she has performed a service by carrying the fetus for that period of time. It is further argued that if no payment is made unless a live baby is delivered to the parents, the transaction is tantamount to illegal baby-selling. However, as stated earlier, baby-selling cannot occur in gestational surrogacy because the baby is at all times the child of the parents. The gestator is being paid to bear and give birth to the child, deliver the child to the parents, and waive any possible claim to custody. Under this reasoning, the gestator might logically be denied any compensation in the event of miscarriage or stillbirth, and the parents may have no liability. The marketplace often compensates people only for producing a desired result, regardless of the time and labor spent. Examples of this include the farmer whose crop is destroyed by hail just before the harvest, the artist whose watercolor is washed out by a flood, and the Ph.D. candidate whose almost-finished thesis is thrown out by a janitor. All have expended labor over a long period of time, but will receive no reward. The potential buyer will not have to pay anything for the fruits of their labor.

Of course, the program may contract to compensate a gestator in case of miscarriage or stillbirth, especially if it wants to build good will and enhance its reputation as a quality operation. The program may either incorporate such costs into its overall fee structure or require the parents whose baby is miscarried or stillborn to pay all or part of the normal fee.

4. Abortion: Permitted? Required?

In most agreements, the gestator will agree not to have an abortion unless her treating physician determines that it is necessary for her physical well-being or that the child is impaired. She will also agree to have an abortion in the event of either of these two contingencies. Of course, the agreement may provide that the gestator is not required to abort, if that is what the parties wish. It also seems wise to give the parents the right to require an abortion if one of them dies or they become divorced.

While Roe v. Wade protects a woman's right to have an abortion, that right may be voluntarily and knowingly waived, just as other constitutional rights may be waived. Having an abortion when prohibited, or refusing to

have one when required, will constitute a breach of contract. The gestator may not change the rules any more than an astronaut may quit during a mission or a surgeon may walk away during an operation. It is not uncommon for a party to a contract to regret having entered into the agreement, but the law still provides that contracts voluntarily entered into will be enforced.97

If the gestator decides to have an unauthorized abortion, the agreement will probably provide that she will forfeit some or all of her compensation. It would also seem proper for the parents to be relieved of their financial obligation and perhaps to also receive some compensation from the program for the delay and mental suffering that may ensue.98 Conversely, if the parents and program want the gestator to have an abortion and she refuses, the parents should be relieved of any financial and legal obligation to the child. Custody of the child at birth should vest in either the gestator or the program, as provided in the agreement. The agreement may also provide for the child's placement for adoption, or for institutional care, if necessary. The expenses involved, both present and future, will become part of the program's overall budget. The expenses will be reflected in compensation and penalties to the gestator and fees charged to satisfied parents.

If the parents, the program, or both determine that an abortion is desirable, and the gestator aborts as requested, she should certainly be entitled to substantial compensation to cover her services for her time involved, her lost opportunity costs, and her risk and discomfort. The fees charged to the parents should logically cover this because the parents are exercising a right to abort in the same way as if the female parent was herself pregnant and carrying the fetus.

5. Death or Divorce of the Parents

If one parent dies before the child is born, the surviving parent will still have full custody of the child, just as with the child of a coital conception and normal birth. If both parents die before the child is born, the parents should provide for the child's custody and care just as they would for any of their other children. Of course, if the parents wish, the agreement could provide for custody of the child to pass to the gestator, or to the program, which would make the child available for adoption.

97. Hill, supra note 21, at 407.
98. A court is unlikely to award damages for breach of contract, since in purely monetary terms "not having to raise a child is a financial benefit, not a loss, and intangible values of parenthood are very difficult to 'price.'" Natalie Loder Clark, New Wine in Old Skins: Using Paternity-Suit Settlements to Facilitate Surrogate Motherhood, 25 J. Fam. L. 483, 494 (1986-87).
The parents should also make a provision in the agreement in case they are separated or divorced during the pregnancy. They may prefer an abortion in the early months of pregnancy. Further along, the likely options are that one parent will take custody of the child and relieve the other parent of all responsibility or that custody will pass to the gestator or the program, as in the case of death of the parents.

6. After Birth of the Child

The agreement should provide that the gestator and her husband, if any, agree that they have no parental or custodial rights or obligations to the child and that the parents will be entitled to immediate physical custody of the child upon birth. The agreement should provide that either the parents or the gestator will be entitled to specific performance, "that is, the right to have the court order and enforce the delivery of the child [by the gestator] to the . . . [p]arents." The situation is analogous to commissioning a work of art. While the artist cannot be forced to create the work, "once it is completed" it belongs to the commissioning party, and the artist "cannot refuse to deliver it . . . merely because he wants to keep it."

7. If Parents Refuse to Accept the Child

If a healthy child is born, but for some reason the parents refuse to accept custody, they should certainly be required to pay all fees provided for in the agreement and other expenses that are incurred until someone else assumes custody of the child. As in the case of death or divorce of the parents, the agreement could provide for custody to pass to the gestator or to the program so that the child may be placed for adoption. There is no reason to force a healthy child on unwilling parents when others would be very happy to raise the child.

If the child is impaired in some way, however, the situation is more difficult. If the impairment is genetic or otherwise not attributable to the gestator, custody should remain in the parents, just as it would with a child born naturally to the female parent. As with a natural child, they would have full legal and financial responsibility for the child. If appropriate, they would also have to arrange for institutional care.

On the other hand, if the child's impairment results from actions of the gestator, such as smoking, drinking, or failing to conform to the medical

100. Id. at 133.
regimen, an instinctive reaction might be that she should be legally and financially responsible for the child. However, this is not a wise solution. The gestator has made it clear from the beginning that she does not want or intend to raise the child even if the child is healthy. Furthermore, she is unlikely to be in an economic position to provide for an impaired child. The agreement could certainly provide that the parents assume the risk of gestator-caused impairments and will accept custody and responsibility in any case. However, that might create a very resentful atmosphere in which the child would be raised. It might be best in this situation to provide for custody to pass to the program, to seek adoption of the child, or to provide institutional care. Any costs involved would be borne by the program as part of its overall cost of doing business.

The parents should be allowed to renounce custody of the child only if the gestator-caused impairment is "serious." The agreement should attempt to define "serious." If either the seriousness of the impairment or its cause is disputed, the agreement should provide for the issue to be decided by a medical arbitration panel.

VIII. STATUTORY PROVISIONS

A. If There Is No Surrogacy Agreement

Even though a statute may require that no surrogacy arrangements may be undertaken without a written agreement among the parents, gestator, and host uterus program,102 people will violate the law. Thus, it will be necessary to determine the custody of the child and financial responsibility for the child when the parties themselves cannot agree. As suggested in Part VI, a statute should provide that the parents are the legal parents of the child and are entitled to custody from the moment of his birth.103 The statute should also state that the gestator is not the mother of the child104 and has no parental rights or obligations relating to the child. These simple statutory provisions will eliminate almost all of the disputes that might otherwise occur. Because the parents will be indisputably entitled to custody of the child, a court should not hesitate to order the gestator to deliver

102. See supra part VI.


104. The presumption that the mother of a child "was the one from whose womb the child came" has been so strong that the law has never felt it necessary to define the word "mother." Stumpf, supra note 41, at 187 & n.1.
the child to the parents, just as would be the case in a divorce or other child custody proceeding in which a court orders someone to deliver a child to the person(s) having a right of custody.

B. Statutory Provisions Needed to Support a Surrogacy Agreement

1. Inheritance

Probate law generally permits a person conceived before but born after a parent's death to inherit by will or intestacy. Inheritance by a posthumous child born as a result of gestational surrogacy should provoke no more societal objection than inheritance by a child conceived coitally and given birth by his genetic mother.

2. Relief from Parental Responsibility

Just as the law imposes no obligation of financial support on a sperm or egg donor, a gestator who makes her womb available to produce a child for others to raise should be relieved of any financial obligation to the child. This may be accomplished by so providing in the surrogacy agreement and by enacting statutes that make such agreements legally binding and enforceable. While this will leave a gestator who does not have a formal agreement exposed to possible financial liability, it is consistent with the strong public policy requiring formal surrogacy agreements to reduce or eliminate disputes.

3. Confidentiality

Just as in cases of adoption, the parties will usually want confidentiality in the surrogacy arrangements to protect the child from learning about his origin from someone other than his parents. The parents should be able to control "the time and manner in which their child learns of the circumstances of [his] birth," when the child is deemed "ready to understand and benefit from this information." By the same token, while most gestators will not try or be able to hide their pregnancy and the fact that they are serving as gestators, many will want to be sure that they cannot be linked in

105. See, e.g., CAL. PROB. CODE § 6150(c) (West 1991).
107. See supra part VI.
any way to the parents and the child after the birth. Statutory law should recognize the general acceptance of a right to privacy in reproductive matters. The law should provide that all records and documents relating to a surrogacy arrangement shall be confidential and that only the parents shall be listed on the birth certificate.

IX. CONCLUSION

The fact that an occasional gestator may regret having to surrender the child to the parents is not a valid reason to ban the practice or to make such agreements unenforceable. People often make agreements that they later regret—marriage, divorce, relinquishment of children for adoption—but society continues to permit such practices and enforce such agreements. The law should recognize as legal parents the couple who really want to have and raise a child because they are as likely to perform well the task of parenting as any other couple whose child was born in the usual way.

Banning surrogacy will not end the practice; it will simply force it underground, as was the case with abortion in many states prior to Roe v. Wade. Gestational surrogacy may be beneficial to all parties involved and to society. Some states will almost surely allow surrogacy arrangements. Thus, banning the practice in other states will be largely futile because potential surrogate parents will usually have the means to travel to and make arrangements in another state.

Society not only allows women to bear and give birth to children without compensation, it lauds and honors them for doing so. Why should we deny women the opportunity to earn fair compensation for voluntarily producing children for others? Is cleaning houses and offices, providing child day care, clerking, and waitressing more honorable than bearing and giving birth to children? Do we prefer to keep women economically dependent when they could be earning substantial sums doing something that they want and prefer to do over the other choices available to them? How can it logically be argued that using one's body to clean bathrooms for pay is morally permissible, but using one's body to produce a child for others for pay is not?

109. Id. at 97.
110. Merrick, supra note 13, at 166.
113. Hill, supra note 21, at 411.
The benefit of gestational surrogacy to the parents is clear and largely undisputed. The benefit to the gestator should be just as clear. We should allow gestational surrogacy to become an accepted and honored profession.
ABORTION, ETHICS, AND THE COMMON GOOD: WHO ARE WE? WHAT DO WE WANT? HOW DO WE GET THERE?

ROBERT J. ARAUJO, S.J.*

I. INTRODUCTION

In truth, I am as distressed as the Court is—and expressed my distress several years ago [in Webster v. Reproductive Health Services] about the "political pressure" directed to the Court: the marches, the mail, the protests aimed at inducing us to change our opinions. How upsetting it is, that so many of our citizens (good people, not lawless ones, on both sides of this abortion issue, and on various sides of other issues as well) think that we Justices should properly take into account their views, as though we were engaged not in ascertaining an objective law but in determining some kind of social consensus. The Court would profit, I think, from giving less attention to the fact of this distressing phenomenon, and more attention to the cause of it. That cause permeates today's opinion: a new mode of constitutional adjudication that relies not upon text and traditional practice to determine the law, but upon what the Court calls "reasoned judgment"... which turns out to be nothing but philosophical predilection and moral intuition.¹

"For today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows."²

[Al]though pro-life forces prevail in some states, pro-choice forces in others, there is no sense in which one can say that the two sides are holding a dialogue. Because they can see no common ground, then, there is a political void to match the void in scholarship. ... The implication is that the two sides in this battle should

---

be talking to each other rather than at or past each other, a lovely vision of the role of public moral dialogue in the liberal state.\(^3\)

The starting point for a discussion about abortion ought to be the frank recognition that the issue is life or death. To abort a fetus is to kill; to prevent the realization of a human life. But to say that much is not to answer the moral question involved. We (Americans) have just completed a war in which we killed many thousands of people, some of whom were civilians, others of whom were exposed to danger against their will. That we choose to kill does not make it wrong on that score alone; but we surely need a vocabulary for talking about life and death issues in moral terms that underscore the seriousness of any choice for death. Our experience with abortion, and perhaps with war, suggests that the lack of such a vocabulary will lead inevitably to excess. Religion has served for many hundreds of years to offer some hope in the face of despair, to offer life in the face of inevitable suffering and death. *We discard those traditions at our peril.*\(^4\)

Although the previous remarks originate from different sources, each involves the issue of human life and the question of abortion in American society. Each statement also reveals something about different perspectives concerning the subject of abortion. I believe that each of these statements provides a different approach for assessing two major components of the abortion issue. These components are: (1) the ethical issues and (2) the question of the common good.

Almost twenty years ago in *Roe v. Wade,\(^5\)* the American legal and judicial communities, as well as the American public at large, became engaged in the public debate about the legality of abortion. This debate has not abated. The subject of abortion continues to raise many critical issues meriting investigation and discussion (for example, whether the fetus is a “person” within the meaning of the U.S. and state constitutions). I shall examine two areas involving ethics and the common good in the context of a particular state control on abortion rights. This legislative effort imposes the modest restrictions of a twenty-four hour waiting period and informed consent requirements.

In Part II of my investigation, I shall address the medical matters involved. Part III will frame the investigation in the context of the legal is-

---

sues. Part IV will investigate the legal questions in the context of principle-based ethics. Since I find the principle-based ethical approach insufficient, I will proceed to re-examine the ethical questions in the context of a virtue-based ethics in Part V. At this stage, I suggest to the reader that a virtue-based ethics approach effectively raises the subject of the common good that principle-based ethics do not. Consequently, Part V will look at the question of the common good as it relates to informed consent laws regulating abortion.

II. THE MEDICAL ISSUES AND THEIR EVALUATION

The issue of abortion will often raise questions about the medical status of the human fetus. An episode of the popular and thought-provoking television series Star Trek: The Next Generation has Lieutenant Commander Data, the android science officer, inquiring of the ship's physician, "Doctor, what is life?" This question is raised when Data discovers that a small, robotic device has developed the ability to think, reproduce, and protect itself. We can apply a parallel question to this inquiry emerging from the investigations of medical ethics and the common good: What is fetal life?

In answering this question, it is helpful to obtain a fundamental understanding of human development that begins with the reaction between the sperm and the ovum. Once the sperm encounters the ovum, the process of fertilization begins. Fertilization does not take place immediately when the sperm penetrates the surface of the ovum; it is the beginning of the process called syngamy during which the sperm completes its penetration and exchange with the ovum. That stage takes approximately twelve to twenty-four hours to complete. At the syngamy stage of development, the resulting entity is called a zygote.

According to authors Shannon and Wolter, fertilization accomplishes four things in human embryonic development: (1) It gives the pre-embryo its own complete set of forty-six chromosomes, (2) it determines chromosomal sex, (3) it establishes genetic variability, and (4) it initiates the cell division of the zygote that is now called the pre-embryo. As cell division

9. Id.
10. Id. at 606-07.
occurs, the pre-embryo travels through the fallopian tube and reaches the uterus around the sixth or seventh day where it commences the implantation process. On or about day fourteen, the implantation process is completed upon the initiation of “primitive utero-placental circulation.” Shannon and Wolter also note that the pre-embryo at this stage is still “capable of dividing into multiple entities,” i.e., it can divide into human twins, triplets, etc. At some point during the third week, the possibility of division into multiple entities ceases, and the layering process that results in the development of tissues and organs of a distinct human entity (the embryo) begins. Moreover, in the third week of development the embryo’s “cardiovascular system reaches a functional state.”

I return to my variation of Commander Data’s question and rephrase it into the related question: When does human life begin? While recognizing that disagreements exist among scholars, Shannon and Wolter argue that once biological development results in the formation of the zygote, there is “a living entity which has the genotype of the human species.” Moreover, the zygote is the “precursor of all that follows.” Richard McCormick acknowledges that the zygote is “a new hereditary constitution” that has “the potential to become an adult.” In agreeing with the view of Shannon and Wolter, McCormick concludes that “developmental individuality or singleness” is established once the attachment to the uterine wall is completed. Shannon, Wolter, and McCormick concur that a distinction must be made between genetic individuality (the fertilized ovum) and developmental individuality. There is some chance that the genetically unique life implanted on the mother’s uterine wall may further divide so that twins, triplets, or other multiple births will result. However, once human development reaches this stage (usually in the third week), when the possibility of

11. Id.
12. Id. at 608 (quoting Keith L. Moore, Essentials of Human Embryology 14 (1988)).
13. See id. at 608 (relying on Bruce Carlson, Patten’s Foundations of Embryology 35 (1988)).
14. Id. at 609 (relying on Carlson, supra note 13, at 186).
15. Id. at 609 (relying on Moore, supra note 12, at 24).
16. Id. at 611.
17. Id.
19. Id. at 4.
20. See id. at 4; Shannon & Wolter, supra note 7, at 612-14.
multiple births ceases, the ontological unity (developmental individuality) of a distinct human being is established.\textsuperscript{21}

The reasonable response to the question "when does human life begin?" is consequently bifurcated: (1) genetically unique human life begins with the completion of fertilization of the ovum by the sperm (about eighteen to twenty-four hours after the sperm's initial penetration of the ovum), and (2) ontologically unique human life begins during the third week after completion of fertilization. With the completion of fertilization (day one), it may be said that a genetically unique human entity, distinct from the genotype of the mother and father, exists. At the conclusion of the third week after fertilization, there exists an ontologically unique human being who will remain distinct from any sibling who may join this human in a multiple birth.

III. THE LEGAL ISSUES

The questions of ethics and the common good arise in the context of the State of Pennsylvania's legislative efforts to impose the modest restriction of a twenty-four hour waiting period and informed consent requirement on women who seek an abortion. This legislation was at the center of one of the major legal issues in the recent U.S. Supreme Court case of Planned Parenthood \textit{v.} Casey.\textsuperscript{22} Planned Parenthood challenged the legality of the informed consent requirement in the Pennsylvania statute on the basis that it placed illegal burdens on a woman seeking an abortion.\textsuperscript{23}

\begin{itemize}
\item \textsuperscript{21} See Shannon \& Wolter, \textit{supra} note 7, at 612, 622 (relying on NORMAN M. FORD, \textit{WHEN DID I BEGIN? CONCEPTION OF THE HUMAN INDIVIDUAL IN HISTORY, PHILOSOPHY, AND SCIENCE} 158, 212 (1988)).
\item \textsuperscript{22} 112 S. Ct. 2791 (1992) (plurality opinion).
\item \textsuperscript{23} \textit{Id.} The relevant portions of the statute read in part:
\begin{itemize}
\item General Rule.—No abortion shall be performed or induced except with the voluntary and informed consent of the woman upon whom the abortion is to be performed or induced. Except in the case of a medical emergency, consent to an abortion is voluntary and informed if and only if:
\begin{itemize}
\item (1) At least 24 hours prior to the abortion, the physician who is to perform the abortion or the referring physician has orally informed the woman of:
\begin{itemize}
\item (i) The nature of the proposed procedure or treatment and the risk and alternatives to the procedure or treatment that a reasonable patient would consider material to the decision of whether or not to undergo the abortion.
\item (ii) The probable gestational age of the unborn child at the time the abortion is to be performed.
\item (iii) The medical risks associated with carrying her child to term.
\end{itemize}
\item (2) At least 24 hours prior to the abortion, the physician who is to perform the abortion or the referring physician, or a qualified physician assistant, health care practitioner, technician or social worker to whom the responsibility has been delegated by either physician, has informed the pregnant woman that:
\end{itemize}
\end{itemize}
\end{itemize}
O'Connor, Kennedy, and Souter along with Justices Scalia, White, Thomas, and Chief Justice Rehnquist agreed that the informed consent requirement was valid, and voted to uphold it. Only Justices Stevens and Blackmun believed that the informed consent provision constituted an “undue burden” on the pregnant woman, and therefore should have invalidated the provision. Until new Justices are appointed to the Court, it is unlikely that the present Court will revoke a similar informed consent requirement.

In order to assess the ethical questions and the subjects of the common good that evolve from the Casey decision, it is essential to obtain a general understanding of Roe v. Wade, the abortion case that paved the way for virtually all legal discussion on this topic for over the last twenty years.

(i) The department publishes printed materials which describe the unborn child and list agencies which offer alternatives to abortion and that she has a right to review the printed materials and that a copy will be provided to her free of charge if she chooses to review it.

(ii) Medical assistance benefits may be available for prenatal care, childbirth and neonatal care, and that more detailed information on the availability of such assistance is contained in the printed materials published by the department.

(iii) The father of the unborn child is liable to assist in the support of her child, even in instances where he has offered to pay for the abortion. In the case of rape, this information may be omitted.

(3) A copy of the printed materials has been provided to the woman if she chooses to view these materials.

(4) The pregnant woman certifies in writing, prior to the abortion, that the information required to be provided under paragraphs (1), (2), and (3) has been provided.

(b) Emergency.—Where a medical emergency compels the performance of an abortion, the physician shall inform the woman, prior to the abortion if possible, of the medical indications supporting his judgment that an abortion is necessary to avert her death or to avert substantial and irreversible impairment of major bodily functions.


In the definitions contained in § 3203, a “medical emergency” is defined as:

That condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of major bodily function.


25. Id. at 2855, 2868 (Rehnquist, C.J., concurring in part and dissenting in part).

26. Id. at 2843, 2852 (Blackmun, J., concurring in part and dissenting in part).

27. See Linda Greenhouse, Justices Decline to Hear Mississippi Abortion Case, N.Y. TIMES, Dec. 8, 1992, at A22. A group of Mississippi physicians challenged their state's informed consent statute, which paralleled the Pennsylvania statute reviewed in Casey. Id. In the Mississippi case, Barnes v. Moore, No. 92-588, the physicians alleged an “undue burden” existed because the rural nature of Mississippi and the location of abortion clinics in only two counties presented “logistical problems” that exacerbated the requirements of the waiting period. Id.

ABORTION, ETHICS, AND THE COMMON GOOD

Under the framework of Roe, the legal questions of abortion in the United States are usually framed by two main issues: (1) the privacy right of the individual woman to bodily and reproductive autonomy and (2) the state's interest to protect developing (fetal) human life. Although I shall examine more fully the competition between these two positions in my subsequent discussion of the common good in Part VI, it is important to recount what the Supreme Court actually said about abortion rights in Roe. The majority of the Court constructed a compromise position giving "the attending physician, in consultation with his patient," the right to terminate the pregnancy during the first trimester without "regulation by the state." The majority's recognition of the physician-patient consultation reveals some understanding about the process of informed consent pertaining to abortion.

The majority did not accept the argument of the appellant Roe (Norma McCorvey) that "she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses." Roe established the rule that the qualified right to abort the fetus during the first trimester belongs to the pregnant woman's physician, not to the woman herself. If the woman has a right to an abortion, it is based on the physician's right, which in turn is established by the physician's medical judgment that an abortion should be performed. The woman's right, in short, is qualified by the physician's right; her right is conditioned by and dependent on the physician's right. Under Roe, the woman has no right to an abortion that is independent of the physician's determination as based on his or her "medical opinion.”

Curiously, as the subject of abortion rights continued to be litigated in succeeding cases, this crucial holding in Roe (i.e., the legality of an abortion is "inherently, and primarily, a medical decision" for which the basic responsibility "must rest with the physician") began to blur.

29. Under Roe, the right is actually that of the doctor; however, it has been extended to the woman in other cases. See, e.g., Webster v. Reproductive Health Servs., 492 U.S. 490 (1989).
31. The majority opinion was subscribed to by Justices Blackmun (who wrote the opinion), Douglas, Brennan, Stewart, Marshall, Powell, and Chief Justice Burger. Justices White and Rehnquist dissented.
32. Roe, 410 U.S. at 163 (emphasis added).
34. Roe, 410 U.S. at 153. To put any doubt of this to rest, Chief Justice Burger, who joined the majority in Roe, stated in his concurring opinion in the companion case Doe v. Bolton, 410 U.S. 179, 208 (1973), that “[p]lainly, the Court today rejects any claim that the Constitution requires abortions on demand.”
35. Roe, 410 U.S. at 166.
By the time Webster\textsuperscript{36} and Casey were decided, Justice Blackmun had departed from the original premise upon which judicially declared abortion rights had been established. In Webster, Justice Blackmun opined in the first paragraph of his separate opinion (joined by Justices Brennan and Marshall) that "[t]oday, Roe v. Wade, . . . and the fundamental constitutional right of women to decide whether to terminate a pregnancy, survive but are not secure."\textsuperscript{37} One earlier indication that some members of the Court were gradually expanding the qualified abortion rights established in Roe came in 1986 in Thornburgh v. American College of Obstetricians & Gynecologists.\textsuperscript{38} As he did in Roe, Justice Blackmun wrote for the majority of the Court. In his Thornburgh opinion, he stated, "Again today, we reaffirm the general principles laid down in Roe."\textsuperscript{39} And what might those principles be? Justice Blackmun redefined them as including "the constitutional principles . . . for recognizing the constitutional dimensions of a woman's right to decide whether to end her pregnancy."\textsuperscript{40} Although he joined the majority in Roe, Chief Justice Burger noted the substantive change in what the Court held in Thornburgh to be the woman's right—a right that became more distant from the one in Roe because it became independent of the physician's limited right.

The Chief Justice, noting this significant development and departure from Roe, dissented in Thornburgh:

I based my concurring statements in Roe . . . on the principle expressed in the Court's opinion in Roe that the right to an abortion "is not unqualified and must be considered against important state interests in regulation." In short, every Member of the Roe Court rejected the idea of abortion on demand. The Court's opinion today, however, plainly undermines that important principle . . . .\textsuperscript{41}

In spite of this acknowledgment of what Roe stood for—and, perhaps more important, does not stand for—Justice Blackmun complained that the plurality decision in Webster sympathized with those individuals who "would do away with Roe explicitly."\textsuperscript{42} A major part of Justice Blackmun's concern was that the Webster plurality is "oblivious or insensitive to the fact

\textsuperscript{37.} Id. at 537 (Blackmun, J., concurring in part and dissenting in part) (emphasis added) (citation omitted).
\textsuperscript{39.} Id. at 759.
\textsuperscript{40.} Id.
\textsuperscript{41.} Id. at 782-83 (Burger, C.J., dissenting) (citing Roe, 410 U.S. at 154-55).
that millions of women, and their families, have ordered their lives around the right to reproductive choice, and that this right has become vital to the full participation of women in the economic and political walks of American life." Justice Blackmun also exemplified the altered understanding of Roe when he concluded the dissenting portion of his opinion with a warning: "For today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows." Justice Blackmun, in short, took the dependent right of the woman and made it independent of the physician's right. This was an unwarranted extension of the Roe compromise about which Chief Justice Burger warned in his Thornburgh dissent.

But the legal turmoil about what was decided in Roe and what rights that decision conferred did not stop in 1989 with Webster. It continued in Casey. While my principal examination and analysis of the Casey decision involving the informed consent requirement will occur in Part V, I raise here the highlights of this case that are relevant to the discussion thus far. In Casey, Justice Blackmun initiated a new line of discussion in the Roe context when he presented his "steadfast... belief that the right to reproductive choice is entitled to the full protection afforded by this Court before Webster." He pointed out that the Court reaffirmed "the long recognized rights of privacy and bodily integrity" with judicial precedent dating back to 1891. But Justice Blackmun again departed from the discussion of the attending physician's rights of Roe when he argued in Casey that "continuation of a pregnancy infringes upon a woman's right to bodily integrity" and that the restrictions on terminating a pregnancy imposed by the Pennsylvania informed consent law "deprive[ ] a woman of the right to make her own decisions about reproduction and family planning." Conspicuous by its absence from Justice Blackmun's discussion was any reaffirmation of the attending physician's exercise of medical judgment, which constituted the heart of the legality of a first trimester abortion under Roe.

Justice Stevens made an interesting observation at the outset of his concurring and dissenting opinion in Casey when he stated that "[t]he societal costs of overruling Roe at this late date would be enormous. Roe is an integral part of a correct understanding of both the concept of liberty and

43. Id. at 557 (Blackmun, J., concurring in part and dissenting in part) (emphasis added).
44. Id. at 560 (Blackmun, J., concurring in part and dissenting in part) (emphasis added).
46. Id. at 2844 (Blackmun, J., concurring in part and dissenting in part) (emphasis added).
47. Id. at 2846 (Blackmun, J., concurring in part and dissenting in part).
48. Id. (Blackmun, J., concurring in part and dissenting in part).
the basic equality of men and women." Absent from his discussion was the crucial language establishing that the woman's abortion rights were defined by and dependent on the qualified physician's rights, which had to be substantiated by the physician's medical judgment, not by concern for gender equality or "reproductive autonomy." The fundamental holding of Roe that the permissibility of a first trimester abortion is based on the attending physician's professional medical judgment has, in the understanding of some of the Justices (and many abortion advocates), been supplanted by a new doctrine: "[A] woman's decision to terminate her pregnancy is nothing less than a matter of conscience." As an aside, it should be noted that matters of conscience that emerge from religious belief are, in the minds of Justices Blackmun and Stevens, inappropriate because of the Establishment Clause prohibition of the First Amendment. It can, of course, be argued that the kinds of activities or beliefs that concern these two members of the Court could well be protected by the Free Exercise Clause. I submit that the concern of these two members of the Court about the establishment question is unfounded. Religious as well as secular members of American society share moral views on important topics such as abortion, war, the environment, discrimination, and health care. Laurence Tribe, Michael Perry, Ruth Colker, and Eliza-

49. Id. at 2838 (Stevens, J., concurring in part and dissenting in part).
50. Id. at 2839 (Stevens, J., concurring in part and dissenting in part).
51. Id. at 2840 (Stevens, J., concurring in part and dissenting in part).
52. Justice Stevens opined that the adoption of views which parallel those of religious groups would constitute an unlawful establishment of religion. See Casey, 112 S. Ct. at 2839 (Stevens, J., concurring in part and dissenting in part); Webster v. Reproductive Health Servs., 492 U.S. 490, 568 (1989) (Stevens, J., dissenting in part).
55. See generally Ruth Colker, Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom, 77 Calif. L. Rev. 1011 (1989). While I do not agree with all of Colker's positions, I join her concern about the need for dialogue among those who hold opposing views on the subject of abortion. Neither the bombing of clinics nor the persecution of peaceful pro-life demonstrators helps the cause of rational and civil discourse that is sorely needed to protect all human life. Such discourse is essential, I believe, to moral resolution of the questions surrounding abortion. I note with both sadness and concern that Colker has expressed certain opinions about some of my own views published elsewhere. In her article An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age, and Class, 1991 Duke L.J. 324, 328 n.15, she argues that I have offered "an especially insensitive account of the impact of reproductive decisions on women's lives." In writing my article Fetal Jurisprudence—A Debate in the Abstract, 33 Cath. Law. 203 (1990), I wrote about the subject of abortion from the perspective of fetal interests. Considering the plethora of articles addressing the subject from a woman's perspective, I considered it responsible then, as I do now, to contribute to the debate arguing fetal interests, which have been presented less frequently. It should be kept in mind that the views of some pro-abortion advo-
beth Mensch and Alan Freeman generally agree that involvement by religious groups in the public debate on abortion and other important issues, and the government’s adoption of some of their views, do not automatically constitute a violation of the Establishment Clause. I maintain, as do these authors, that individuals and groups who speak out of their religious convictions permissibly contribute to the formation of the public conscience on questions containing moral implications. It is the “matter of conscience” raised by Justice Stevens that prompts an investigation at this stage into the ethical questions surrounding the informed consent provision. I propose to examine initially the ethical questions associated with the issue from the basis of principles. These principles are four in number: (1) autonomy, (2) nonmaleficence, (3) beneficence, and (4) justice. Ultimately, I conclude in Part IV that these principles fail to adequately address the ethical issues concerning abortion. They leave a void in the discourse of the ethical considerations about abortion. Consequently, I re-examine in Part V these ethical questions about abortion—in light of the specific issue of informed consent—within the framework of virtue ethics. I shall find that an ethics cate, while sensitive to the interests of women, can be construed as being “insensitive” to the fetus. I do not find that tacking this or any label on those with whom Colker or I do not share outlooks productive in reconciling the opposing views involved in the debate about human abortion. To suggest that I am “insensitive” comes as an unwelcome and unjustified surprise. The remark that my article may be “insensitive” fails to acknowledge that, in addition to presenting the interests of the fetus, I also addressed the interest of the woman. I pointed out that “there is a second entity who shares with the woman the interest of self-preservation and further development.” I at 230. I would not want any reader of Colker’s work or mine to forget that I raised the obligations that our society has to care for both the woman and the fetus. Many of the problems surrounding this difficult question have devastating consequences for both the mother and the fetus. Moreover, these problems contribute to the tragedy which has much to do with the ability or inability of our society to treat its current and future members in a humane way that guarantees all members of the human race those essentials of a productive human life. . . . The solution to the problem is not the taking of life. Rather, the solution is making available that which life needs, the essential goods and services that cultivate productive lives and promote human flourishing.

Id. at 233 (emphasis added). My position is that the life and flourishing interests of the woman are important, as are those of the fetus. Colker’s further remarks about the “abstract” argument and my hiding behind “a veil of ignorance” are misplaced. The use of the word abstract in the title was chosen to indicate that the debate between two advocates was abstract, i.e., it really did not take place; however, the issues that they discuss and debate are real. The suggestion that I am “hiding behind a veil of ignorance” is unfortunate, particularly in view of my recognition that the question of life and human flourishing extends to both the woman and the child she bears.

56. Mensch & Freeman, supra note 4, at 1102.


58. See also KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 6, 227-28 (1988).
based on virtue rather than principles leads to a fuller, better understanding of moral concerns associated with the informed consent regulation of abortion. Moreover, it is from the context of virtue ethics that we begin to see the subject of the common good as it surfaces from the legal and moral questions that extend from informed consent regulations.

IV. ETHICAL PRINCIPLES AND THE REGULATION OF ABORTION

At the outset of this portion of the discussion, I acknowledge that there are attractive elements of a principle-based ethical theory. Specific attractions will emerge from the examination of the four principles that I have outlined at the conclusion of Part III. Both principle-based and virtue-based ethical theories generally share a common element: justice. I suggest at this point in my discussion that the component of justice in ethical theories, as well as the search for justice in practice, brings us to a more effective understanding of how virtue-based ethics can raise our consciousness about the common good. In turn, an examination of the common good can provide American society of the late twentieth century with a desirable means of minimizing the entrenched, absolute positions that emerge from many ardent pro-choice and pro-life proponents. In short, I suggest here that a virtue-based ethics theory applied to informed consent abortion regulation can, at this stage in the national debate of a difficult issue, provide hope not only for minimizing conflict but also maximizing the opportunity of achieving the good for all concerned with the question of abortion. I now turn to my examination of the first ethical principle: autonomy.

A. The Principle of Autonomy

The principle of autonomy can theoretically be defined as "self rule." The notion of autonomy is based on the Greek roots autos (self) and nomos (rule). In the context of biomedical ethics, autonomy can be viewed as the principle based on "reflective individual choice" that is sometimes qualified by an authority (e.g., a combination of professional medical advice and legal responsibilities, or by "tradition, or social morality"). In general, authority does not constrain autonomous decision-making. It is important to recognize that informed consent is a crucial component of the exercise of autonomy by individuals making medical and health care decisions.

60. Id. at 71.
61. Id. at 72.
62. Id. at 74.
decision made by a patient is not considered to be autonomous if comprehensive disclosures about medical procedures and their known effects are not made, if there is inadequate understanding about the information derived from these disclosures by the person making the autonomous decision, if the decision is not voluntary, and if the person lacks the requisite competence to make the decision. In the context of abortion, a variety of attitudes about autonomy prevail.

In Roe, while there was some discussion about the relationship between the woman and the attending physician (which may suggest the need for informed consent before an abortion can be performed), the privacy language that permeates the decision can insulate the woman's autonomy from review by those people (for example, the state) who see a need to protect the interests of the fetus and balance them against those of the pregnant woman. If we see a need to question the woman's autonomous decision to have an abortion and this autonomy's independence from the fetus's interests, we need only re-examine some of the judicial discussion in Casey or Webster in which the woman's autonomy is insulated from most external controls. In reviewing the nature of a woman's autonomy to abort her child, investigators have arrived at a variety of conclusions about the nature and extent of her autonomy.

James Gustafson, while generally favoring protection of human fetuses from abortion, is willing to grant the pregnant woman who is the victim of "sexual crime" the right to abort the fetus if she is "convinced" that it is "right" to do so. Gustafson believes that moralists must honor a woman's "personal responsibility"; consequently, in his estimation, she cannot be coerced into making a decision that contravenes her own sense of responsibility. Any concern about the extent to which the woman's autonomy can be detrimental to the genetic and ontological existence of the fetus is eliminated in the absolute case made for a woman's autonomy by Mary Anne

63. Id. at 78-79. Beauchamp and Childress organize the informed consent process by grouping the components under three categories: (1) Threshold element concerns competence, (2) information elements include (a) disclosure of information and (b) the understanding of that information, and (3) the consent elements consist of (a) voluntariness and (b) authorization. Id. at 79.


65. Casey, 112 S. Ct. at 2844 (Blackmun, J., concurring in part and dissenting in part).


68. Id. at 116.
By excluding the fetus as a member of the human community, Warren argues that the pregnant woman has the moral ability and autonomy "to protect her health, happiness, freedom, and even her life, by terminating an unwanted pregnancy" and that this right "will always override whatever right to life it may be appropriate to ascribe to a fetus, even a fully developed one."  

So far, the concerns about autonomy focus on its exercise by the pregnant woman. However, the Catholic Church, through its Congregation for the Doctrine of the Faith (CDF), has addressed the principle of autonomy in a different way. The CDF views this issue quite broadly by looking at every human's autonomy—the pregnant woman or the fetus. The Church constructs its understanding about human autonomy in the context of the human right to life. The right to life is, for the Church, a fundamental principle, the "condition of all others," because:

It does not belong to society, nor does it belong to public authority in any form to recognize this right for some and not for others: all discrimination is evil, whether it be founded on race, sex, colour, or religion. It is not recognition by another that constitutes this right. This right is antecedent to its recognition; it demands recognition and it is strictly unjust to refuse it.

With the exception of the CDF's understanding of autonomy in the context of abortion, each of the other views already mentioned looks at the subject from the perspective of the woman and—depending on the surrounding circumstances—her autonomous choice to abort a pregnancy with little or no objection from anyone else. On the other hand, the CDF's view can, even in situations when the mother's life is threatened by the fetus, allow the "autonomy" of the fetus to trump the "autonomy" of the mother. We begin to see how the exercise of autonomy can adversely affect the interests of others. For example, the absolute exercise of the woman's autonomy, which Warren is willing to grant, can bring great harm to the fetus by prejudicing its right to live. On the other hand, the CDF's position does not address the difficult case of the harm that the pregnant woman faces when her health is prejudiced by the continued presence of the fetus.

---


70. Id. at 469 (emphasis added) (citation omitted).


72. This statement is not to be construed as a justification to abort the pregnancy when the mother's life is threatened.
Those of us interested in applying ethics to the question of abortion should also be concerned with the harm to another that the exercise of autonomy can produce. While we may disagree on which harms are to be avoided and whose interests are to be protected, we probably agree that harm is to be avoided. Consequently, I shall turn to the principle of nonmaleficence and the contribution it makes to this segment of my investigation.

B. The Principle of Nonmaleficence

Put simply, the principle of nonmaleficence means do no harm. On first examination, the norm of avoiding harm seems rather attractive. Most ethical persons harbor the general notion that no one should harm another. However, an examination of authors who treat this principle reveals that this principle, while attractive by itself, raises questions about the contributions it can make to ethical discourse concerning abortion when we realize that it inadequately deals with the underlying question of: Who is harmed?

For example, in the majority opinion in Roe, the Court pointed to the harm that the woman may face if her pregnancy is to continue. Within a narrow application of the principle of nonmaleficence, it might be ethical to abort the fetus in order to prohibit harm to the woman if she is endangered by the pregnancy. However, the Roe majority opinion failed to reconcile the harm that the aborted fetus will permanently suffer if removed from the mother's womb by the abortion. James Gustafson presents the case in which the pregnancy is the result of the woman's gang rape by her estranged husband and his accomplices; but like the majority in Roe, Gustafson is more concerned about avoiding harm to the woman than harm to the fetus. Warren's concern about avoiding harm is focused solely on the pregnant woman: The only harm to be avoided is the harm that may befall her (the prejudice and harm that befalls the fetus—while perhaps unfortunate—is inconsequential). The view of Warren is countered by the CDF, which acknowledges the irreversible harm suffered by the fetus during an abortion. The CDF contends that the harm to the fetus can only be avoided through the prohibition of abortion. But just as Warren is not

---

73. Beauchamp & Childress, supra note 59, at 120, 194.
75. Gustafson, supra note 67, at 107, 116.
76. Warren, supra note 69, at 469.
77. Declaration on Procured Abortion, supra note 71, at 443-44. In his encyclical letter, Humanae Vitae (Encyclical Letter on the Regulation of Births), in VATICAN COUNCIL II: MORE POSTCONCILIAR DOCUMENTS 404 (1982), Pope Paul VI urged the principle of doing no harm to human procreation by avoiding the direct interruption of the generative process.
concerned about the harm done to the fetus, the CDF does not address the harm that may be suffered by the continuation of a life-threatening pregnancy.

As admirable as the principle of avoiding harm is, it does have limitations—particularly when it is only applied to one interest (that of the pregnant woman or the fetus) but not both. What constitutes the avoidance of harm for one (and therefore good for the protection of that individual's interests) may be prejudicial to the other. Thus, if we turn to the positive effort to do good (as opposed to the avoidance of doing harm), we might obtain a better principle to address the question of abortion.

C. The Principle of Beneficence

Beneficence is the affirmative course of action one takes to do and achieve good. It "require[s] positive acts to assist others."78 Beauchamp and Childress suggest that beneficence has two components. The first is a positive component that mandates "the provision of benefits (including the prevention and removal of harm as well as the promotion of welfare)."79 The second element is the utilitarian component of beneficence that "requires a balancing of benefits and harms."80 Whereas nonmaleficence requires that a person refrain from doing something (i.e., harm), beneficence imposes an affirmative obligation to take some action that will achieve a desirable, good result.81 The obligation exists even when there is no legal obligation to do so.82 How is the principle of beneficence applied in the literature that I have been using concerning the topic of abortion?

In the Roe majority opinion, there is a weak form of beneficence defined and applied in the context of giving the physician the legal protection from prosecution when he or she performs a first trimester abortion that is justified by his or her medical opinion.83 A contradiction immediately surfaces in the application of the beneficence principle because the effort by the physician to do good for the pregnant woman harms the fetus. This contradiction also appears in the example developed by Gustafson when action is

78. Beauchamp & Childress, supra note 59, at 194.
79. Id. at 195.
80. Id.
81. Id. at 198.
82. Id. at 205; see also Mary Ann Glendon, Rights Talk: The Impoverishment of Political Discourse 16-88 (1991) (discussing a moral obligation to take action like the Good Samaritan even though there is no legal obligation to do so).
taken to help the woman who has been gang raped.\textsuperscript{84} The obligation to do what is good for the woman is highly prejudicial to the fetus. The strong obligation that emerges from Warren's notion of beneficence to do whatever is necessary to help the woman simultaneously supplies the harm that the fetus will suffer from the obligation to terminate the pregnancy.\textsuperscript{85}

Interestingly, the CDF acknowledges that there may be some kind of obligation to assist a pregnant woman when it mentions the need "to free [women] from all unjust discrimination."\textsuperscript{86} However, the CDF simultaneously imposes an absolute obligation to do good for the fetus by pointing out that discrimination against the fetus must be combatted by banning abortion.\textsuperscript{87} Beauchamp and Childress observe that the exercise of beneficence can be paternalistic and thereby conflict with the exercise of autonomy.\textsuperscript{88} In other words, the obligation to protect the fetus as advocated by the CDF constitutes a form of paternalism\textsuperscript{89} that challenges the first trimester autonomy of the attending physician and her patient by imposing an absolute obligation to protect the fetus from the discrimination of abortion.

Again, we see that the good that comes from one kind of beneficence may conflict with the good that comes from obligations imposed by other applications of beneficence. Do principle-based ethics offer any resolution of these competing efforts to seek different goods? Perhaps the principle of justice might offer some help, if not a solution, to this predicament that emerges from the applications of the first three principles.

\textbf{D. The Principle of Justice}

Justice has been understood through a wide range of definitions. For Socrates, it was The Good.\textsuperscript{90} For Aristotle, it included true friendship.\textsuperscript{91} For Mill, it was the utilitarian calculus of the greatest good for the largest number.\textsuperscript{92} For H.L.A. Hart, justice is treating like cases alike.\textsuperscript{93} For

\begin{itemize}
  \item \textsuperscript{84} Gustafson, supra note 67, at 116.
  \item \textsuperscript{85} Warren, supra note 69, at 469; see also Judith J. Thomson, \textit{A Defense of Abortion}, 1 PHIL. & PUB. AFF. 47 (1971).
  \item \textsuperscript{86} \textit{Declaration on Procured Abortion}, supra note 71, at 446.
  \item \textsuperscript{87} \textit{Id.} at 445.
  \item \textsuperscript{88} \textit{Beauchamp \& Childress}, supra note 59, at 209-27.
  \item \textsuperscript{89} \textit{Id.} at 218-19.
  \item \textsuperscript{90} Plato, \textit{The Republic} (Desmond Lee trans., 1974).
  \item \textsuperscript{93} H.L.A. Hart, The Concept of Law 158 (1961).
\end{itemize}
Rawls, it is the exercise of fairness. For John Finnis, justice is, among other things, the realization of basic human goods for one's self as well as for others. Others have seen justice as a synthesis of rewards, punishments, and entitlements. Hart's understanding of justice (like cases being treated alike, different cases being treated differently) constitutes what has been termed as "formal justice." Thomas Aquinas identified several types of justice: (1) the private arrangement between two parties may be understood as "commutative justice"; (2) the just distribution of goods, services, etc. based on needs is "distributive justice." One other type of justice referred to by commentators is social or general justice: the proper ordering of society to minimize and eliminate conflict so that individuals and groups are treated with the respect and dignity that would be accorded every other individual and group.

In turning to the sources cited earlier to develop the first three ethical principles, we see a variety of understandings of justice used to reconcile the conflicts that emerge from the practice of abortion. In Roe, the majority attempted to resolve the conflict by working out a type of calculus in which the direct rights of the attending physician and the dependent rights of the woman were given prominence in the first trimester of pregnancy. In the final trimester, the state was given the preference by being able to regulate abortion so as to protect fetal life. The middle trimester became a ground for weighing the two interests and reaching some kind of compromise between them.

Gustafson prefers to protect fetal life. However, while "[l]ife is to be preserved rather than destroyed" and those "who cannot assert their own rights to life are especially to be protected," there are exceptions to this rule. For Gustafson, justice might recognize the following exceptions to the general rule: (1) "medical indications" mandate a therapeutic abortion; (2) the pregnancy is the result of a "social crime"; and (3) "sexual and

95. John Finnis, Natural Law and Natural Rights 161 (1980).
96. See Beauchamp & Childress, supra note 59, at 257.
97. Thomas Aquinas, Summa Theologica, II-II, Question 61, Of Commutative and Distributive Justice (Fathers of the English Dominican Province trans., 1920).
98. Id. Question 58, Of Commutative and Distributive Justice, art. 5 (Whether Justice is a General Virtue?).
100. Gustafson, supra note 67, at 112.
101. Id. at 116.
emotional conditions do not appear to be beneficial for the well-being of the mother and child." 102

Since Warren asserts an absolute right of the pregnant woman to terminate the pregnancy at any time, no conflict can arise challenging the woman's right. If a conflict were to arise, justice would simply require whatever is necessary to protect the woman's absolute right. Any challenge to her right, according to Warren, would lose.

On the other hand, the CDF recognizes that "civil law cannot expect to cover the whole field of morality or to punish all faults . . . . It must often tolerate what is in fact a lesser evil, in order to avoid a greater one." 103 While stating that abortion can never be approved, "political action" ought to be taken to "combat its causes" in a charitable fashion that deals effectively with the human sorrow and misery that accompany those who are most involved. 104 I consider that the position of the CDF is charitable toward and understanding of the interest of the pregnant woman for whom the pregnancy creates major, possibly even life-threatening problems. Individuals, communities, and, more formally, the state through its lawmakers are called upon by the CDF's justice principle to help and improve these difficult situations. 105 Yet, when all is said and done, both politically and legally, the CDF reiterates that "the life of the child takes precedence over all opinions . . . [and o]ne cannot invoke freedom of thought to destroy life." 106 Just as Warren makes the interest of the pregnant woman absolute, the CDF makes just as absolute the position of the fetus. The positions taken by Warren and the CDF mark the outer boundaries of the rights that are in conflict, but neither position can really deal with the other and reach a solution that the other side can view as just.

Does the theory of justice espoused by either the CDF or Warren (or for that matter, the majority opinion in Roe or the position of Gustafson) really reconcile the conflict so that the other party or side also receives the respect and dignity that it desires? My answer is probably not. Our civil legal system of rules and the judgments based on those rules make winners and losers. In the questions about life that the pregnant woman and the fetus face, the application of rules and the judgments supplied by them will often result in one party being the winner and the other party being the loser.

---

102. Id.
103. Declaration on Procured Abortion, supra note 71, at 448.
104. Id. at 450.
105. Id. at 448-49.
106. Id.
Infrequently, a compromise may be arrived at which gives both parties the decision they seek. Does this mean that there is no adequate solution founded on principle-based ethics that can give the pregnant woman and the fetus the justice they deserve? The conflicts between principle-based arguments advanced by the woman or on behalf of the fetus suggest not. My point here is not to remake a principle-based ethical system that will provide such justice. The task would be Herculean. Rather, I propose to look for the answer to this conflict of absolutes in a virtue-based ethical system, for I believe that virtue-based ethics is an appropriate realm within which we might find a more satisfactory solution to the question of abortion. The transition between principles-based ethics and virtue-based ethics is the concept of justice that is a component of both ethical systems. Thus, I now turn to the contribution virtue ethics can make to the question I have been examining.

I suggest at this stage that the development of a virtue ethics will offer a better way of addressing the issue of abortion. Moreover, it should provide a consistent and coherent approach to dealing with the important issues and interests at stake. Perhaps above all else, virtue ethics will—unlike principle-based ethics—consider more comprehensively the spectrum of interests and experiences at stake in the matter of abortion.

V. VIRTUE ETHICS AND THE REGULATION OF ABORTION

The title of this Article raises three questions: (1) Who are we? (2) What do we want? (3) How do we get there? These questions are derived from Alasdair MacIntyre’s seminal work, After Virtue. If the function of ethics is to guide us toward right action, virtue ethics engages us as moral agents who are seeking to make ourselves better moral agents in the future. At the heart of both the future of the moral agent and the second question posed by MacIntyre (i.e., where do we want to go?, or, what do we want?) is a goal, a telos. As James Keenan stresses, “[o]nly in virtue ethics is a telos constitutive of method; no other ethical system can make
that claim.”

Because we as individual humans are also social beings whose existence is grounded in relationships with others, the concept of the telos helps us to understand better the question advanced by MacIntyre (i.e., where do we want to go?) by placing it into a communal setting.

Joseph Kotva has argued that the telos of a virtue ethic is inextricably intertwined with the means to achieve the goal because: (1) the means move us toward a better understanding of the end; (2) the end concerns the formation of a specific kind of self; and (3) the end concerns the formation of a specific kind of society, and societies stipulate role-specific behavior.

In the context of the question of abortion, Kotva points out that for some individuals, the kind of person each of us is molds the kind of moral questions we face. He illustrates his point with the example that the "question of the moral appropriateness of aborting a defective fetus never occurs to some people; they simply proceed to have and raise the child." His observation and conclusion suggest that the practice of virtue ethics acknowledges the sense of “otherness”: that is, in making moral decisions about who we are and what our goal is and what means we use to get there, we necessarily think of other individuals as we work toward the goal. The practice of virtue ethics can therefore be based on a sense of community, on an awareness of relationship with others.

Mary Ann Glendon has recognized and addressed this discovery in the context of the Roe decision. While the rhetoric of the majority opinion focused on the individual (i.e., the attending physician or the pregnant woman, and the individual's right to privacy), Glendon expresses her concern that the interests of the other—that the concerns of the community most involved with pregnancy and the legality and morality of abortion—are ignored. She addresses this lacuna by stating:

The voice we hear in the Supreme Court's abortion narrative—presenting us with the image of the pregnant woman as autonomous, separate, and distinct from the father of the unborn child (and from

---

112. Keenan, supra note 109, at 123.
114. Kotva, supra note 111, at 159. As Kotva further suggests, “the means cannot be separated from the end because the means are central to the end. A telos which embodies the virtues of justice, courage, and fidelity cannot be severed from acts and social arrangements that are just, courageous, and faithful.” Id. at 160.
115. Id. at 166.
116. Id.
her parents if she is a minor), and insulated from the larger society which is not permitted even to try to dissuade her or ask her to wait to get counseling, information, or assistance—is more distinctively American . . . in its lonely individualism and libertarianism.118

Professor Glendon has identified the problem with the ethical principles of Roe by suggesting that insulating individuals from one another is not a desirable way of addressing the vital question of whether a woman should have an abortion. Glendon refers to those other individuals who can help the pregnant woman, the fetus, and society at large if they are permitted to participate in the deliberation. The Pennsylvania informed consent regulation enables and encourages such participation. In short, Glendon's insight identifies the core problem with the ethics of Roe. She offers a practical solution to the problem of the insulation of the woman prompted by Roe. In her text, she suggests a goal (which includes individuals becoming less isolated and more community oriented) and the means to reach the goal (how do we get there?).

At the end of my discussion on principle-based ethics I indicated that the element of justice is a part of both principle ethics and virtue ethics. Since justice is related to both ethical systems, I shall now address it in the context of a virtue-based system. I also mention here that virtue ethics encompasses several other considerations, including the virtues of prudence, courage, and wisdom, all of which will be addressed shortly.119

Within the privacy rights rhetoric of Roe and the Blackmun-Stevens opinions in Casey and Webster, the kind of justice that emerges has lost a good deal of its goal-oriented function. The language about "justice" that results is narrowly focused on addressing and protecting the act of abortion on the grounds of protecting individual rights and privacy. As Glendon points out, the social, communal, and teleological components of duties that are the correlatives of rights are not discussed. She correctly argues that these components are essential to deal justly with the urgent matter of abortion, which has, in the American context, been cloaked with the absolute rights of privacy, individual autonomy, and isolation.120 To balance the excessive and narrow focus on the rights that emerge from the principle of autonomy, Glendon draws attention to the importance of understanding the needs of all the parties involved: the pregnant woman, the fetus, and

---

118. MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 52 (1987).
119. See MACINTYRE, supra note 108. The author defines a virtue as "an acquired human quality the possession and exercise of which tends to enable us to achieve those goods which are internal to practices and the lack of which effectively prevents us from achieving any such goods." Id. at 178.
120. GLENDON, supra note 118, at 38.
the community. She further suggests that a just resolution of the difficult questions raised by abortion rests in the development, adoption, and the sustaining of policies that encourage child bearing and the protection of fetal life. While the interests of the fetus are protected under Glendon’s proposal, the mother is also helped with concrete programs that give her counselling, health care for herself and her child, and other assistance that she may need.

Lisa Cahill has examined abortion beyond the constraints of principles by probing the realm of virtue. While she understands the predicament of many women who face unplanned pregnancies, Cahill also recognizes that “the principal value at stake . . . is the existence of the fetus itself.” To deal justly with the question of abortion, it is essential for Cahill that we first establish an understanding of who belongs to the human community affected by abortion before the moral relationships among these members can be addressed. After ascertaining that the fetus is from its conception a member of the human community, she, like Gustafson, adopts a “strong bias in favor of the fetus.” Cahill reveals that her ethical approach to abortion contains some elements paralleling a virtue-based method when she shifts attention from only the woman or only the fetus and refocuses it on “their respective rights” being “defined in relation to one another.”

Another source of a virtue-based approach to the question of abortion is the feminist legal scholar Ruth Colker. While Colker considers herself a “pro-choice feminist,” she establishes a foundation for a virtue-based ethics to deal with the issue of abortion. She argues “that both feminist theory and theology can help people discover and experience their authentic selves.” This author relies on a synthesis of theology and feminism to “guide people to the discovery and experience of their authentic self.” For Colker, the goal—the telos—is realization of this authentic self: a self

121. *Id.* at 53-57.
123. *Id.*
125. Cahill, *supra* note 122, at 86.
126. *Id.* at 87.
128. *Id.* at 1011-12 (emphasis added). Colker uses the Buddhist term “authentic self” to mean that “we have control over how the self changes so that we can facilitate its movements toward our aspirations . . . It is important here for the reader to understand that this conception of the self is not static, fixed, isolated, or universal self often described in the western philosophy.” *Id.* at 1012 n.4.
129. *Id.* at 1013.
not cut off from others, insulated by some impenetrable "privacy" but, rather, a self, who is a member of a community, who "attempt[s] to speak aspirationally because such dialogue may enable us to overcome short-term disagreements and move toward our common goals."\footnote{130} In order to attain such goals, Colker suggests that we must rely on "[d]ialogue and contemplation, not rhetoric."\footnote{131} Colker eschews principles supportive of absolute privacy when it comes to abortion. She relies on relationship and dialogue in order to "approach the abortion cases from the perspective of the kind of people and society that we want to be."\footnote{132}

Although the CDF advances a strong principle-based approach in developing its ethical response to abortion, it does raise the teleological issue that is constitutive of virtue ethics when it addresses the role of civil law as an instrument of justice. The CDF acknowledges that the civil law "must often tolerate what is in fact a lesser evil, in order to avoid a greater one."\footnote{133} While this may make us pause and consider how this comment about civil law constitutes a departure from a principle-based ethics, the CDF enters the realm of virtue ethics when it suggests that the "role of law is not to record what is done, but to help in promoting improvement."\footnote{134} Just as those of us who make the case for virtue ethics ask ourselves the teleological question what do we want to become (or where do we want to go), the CDF poses the following:

[The goal of law is] to pursue a reform of society and of conditions of life in a milieu, starting with the most deprived, so that always and everywhere it may be possible to give every child coming into this world a welcome worthy of a person. Help for families and for unmarried mothers, assured grants for children, legislation for illegitimate children and reasonable arrangements for adoption—a

\footnote{130. \textit{Id.} at 1042 (emphasis added).}
\footnote{131. \textit{Id.} at 1045.}
\footnote{132. \textit{Id.} at 1047. Another perspective on the need for civil discourse in the abortion debate is offered by Teresa G. Phelps, \textit{The Sound of Silence Breaking: Catholic Women, Abortion, and the Law}, 59 Tenn. L. Rev. 547 (1992), where the author states:

We may never live in an ideal world and we may never agree on the morality of abortion or when human life begins. We can, nonetheless, work toward this world, an ideal world in which empowered women live in and are supported by their community. In such a world women are trusted to make their own choices, and both sides of the abortion debate, pro-life and pro-choice, might be surprised at what choices they make. We can begin this essential work by listening to each other.

\textit{Id.} at 569 (emphasis added).}
\footnote{133. \textit{Declaration on Procured Abortion}, supra note 71, at 448.}
\footnote{134. \textit{Id.} (emphasis added).}
whole positive policy must be put into force so that there will always be a concrete honourable and possible alternative to abortion.\textsuperscript{135}

There is also contained within the justice component of virtue ethics the recognition of what is the goal of society and its members. A virtuous solution to the question of abortion avoids the defect of "winner-take-all" in the justice of a principle-based ethics. But how do we move toward the goal of justice in virtue ethics? This is where the virtue of prudence comes into play.

If the virtue of justice prescribes the just goal or end, then prudence is the means to get to that end.\textsuperscript{136} A fundamental approach to obtain the means to the just end has been suggested by the CDF. In its discussion of the role of civil law, the CDF recommended the promotion of improvements in social structures that will simultaneously display greater charity toward pregnant women, their families, and fetuses by making available grants, arrangements for adoption, and other legislation that gives "concrete, honourable and possible alternative[s] to abortion."\textsuperscript{137} Paralleling the CDF's recommendations is the United States Catholic Conference's recent election policy statement that urged voters and officials to "support public funding policies that encourage childbirth over abortion, and . . . programs that assist pregnant women and children, especially those who are poor."\textsuperscript{138} Similar sentiments were offered eight years ago by New York Governor Mario Cuomo.

In a speech at the University of Notre Dame on September 13, 1984, Governor Cuomo addressed the dual nature of his position on abortion. As a practicing Roman Catholic, he has accepted personally the teachings of the Church and holds a "reverence" for developing human life.\textsuperscript{139} However, as a governor of a secular state, he stated that he cannot coerce others to accept the same beliefs that emerge from his religious tradition because of the separation between church and state promoted by the Establishment Clause of the First Amendment.\textsuperscript{140} Politics aside, Cuomo then ventured into a realm approaching virtue ethics by raising considerations that every

\textsuperscript{135} Id. at 449.

\textsuperscript{136} Kotva, supra note 111, at 166 n.9 (acknowledging his debt to James Keenan, S.J., for this insight).

\textsuperscript{137} Declaration on Procured Abortion, supra note 71, at 448-49.


\textsuperscript{140} Id. at 20-23.
member of the secular society can reflect upon and adopt regardless of per-
sonal, religious beliefs.

These considerations contain a two-fold goal—the telos—for Cuomo. First, "we must work to find ways to avoid abortions without otherwise violating our faith."141 This search is initiated by education and sustained by elevating the consciousness of fellow citizens through the "weapons of the word and of love."142 The second goal is developing practical ways in which alternatives to abortion are encouraged through support and assistance (e.g., programs making available nutritional and pediatric care, child-
birth and post-natal care, and other relief).143 Cuomo's recommendations echo those advanced by Glendon.144 As he develops the virtue of prudence, Cuomo also raises the virtue of courage.

Courage is the virtue that enables us to meet the challenge of harm or danger when we attempt to do something about the care and concern we have for individuals and communities.145 The exercise of this virtue takes place when the humans facing risks and needing help from others (e.g., the fetus and the pregnant woman) can rely on the response from those others who wish to and are prepared to help.146 Cuomo serves as one example of courage by taking a stand and publicly addressing the risks that both fetuses and pregnant women face, and by proposing practical means for addressing and minimizing those risks.

Underlying the virtues of justice (which helps us recognize the goal), prudence (which provides the means for acting justly), and courage (which reinforces us as we take the action essential to reaching the telos), is the virtue of wisdom. Wisdom provides the insight by which we come to un-
derstand who we are and where we ought to be (or, what we want to be-
come). It parallels prudence and works in tandem with it. In a virtue ethics approach to abortion, wisdom guides us in our quest for understand-
ing who we are as individuals and what we want to become. In the Ameri-
can culture that is strongly characterized by the almost absolute right of privacy, "which is so bound up with individual autonomy and isolation,"147 the focus of our individual and community attention on who we are can be blurred. If it is blurred as Glendon and others suggest, it is difficult to

141. Id. at 27.
142. Id. at 26-27.
143. Id. at 29.
144. GLENDON, supra note 118, at 53-57.
145. MACINTYRE, supra note 108, at 179.
146. Id. at 116.
147. GLENDON, supra note 118, at 38; Colker, supra note 55, at 1066.
identify not only who we are now, but also what we want to be in the future.

That is why Cuomo urges the need for a wisdom to see what we are; as he says, "the wisdom contained in the words, 'Physician, heal thyself.'"\textsuperscript{148} Cuomo identifies the need to increase our understanding, to broaden our knowledge of who we are and what we want to be when he argues that:

Unless we Catholics educate ourselves better to the values that define, and can ennable, our lives, following those [Christian social] teachings better than we do now, unless we set an example that is clear and compelling, we will never convince this society to change the civil laws to protect what we preach is precious human life. Better than any law or rule or threat of punishment would be the moving strength of our own good example, demonstrating our lack of hypocrisy, proving the beauty and worth of our instruction.\textsuperscript{149}

When this wisdom infects our consciousness, our knowledge of ourselves becomes more secure and more certain. And, when our self-knowledge grows, the vision of who we want to become both as individuals and as communities will become all the more clear. And, when our knowledge of who we want to become is better defined, our "moral idealism [can] be found and maintained."\textsuperscript{150} Cuomo synthesized the goals of virtue and the method to attain them when he stated: "We can be fully Catholic, proudly, totally at ease with ourselves, a people in the world transforming it, a light to this nation appealing to the best in our people, not the worst. Persuading, not coercing. Leading people to truth by love."\textsuperscript{151} Joseph Kotva reminds us that a virtue ethic has rules. It offers guidance, it does not restrict our freedom or development, and it moves us away from "the kind of behavior that excludes one from the pursuit of the common good."\textsuperscript{152} I now turn to an investigation of the common good because it identifies the goal I believe we should seek regarding the general question of abortion and the more specific question of informed consent.

VI. THE COMMON GOOD AND THE QUESTION OF ABORTION

In the previous section, I examined the attractions of a virtue ethics versus those of a principle-based ethics. When we examine abortion rights rhetoric, we find that it is usually cast in a strong "principle language." As a result of \textit{Roe}, this language possesses the architecture of privacy and indi-

\textsuperscript{148} Cuomo, \textit{supra} note 139, at 26-27.
\textsuperscript{149} \textit{Id.} at 27.
\textsuperscript{150} Keenan, \textit{supra} note 109, at 123.
\textsuperscript{151} Cuomo, \textit{supra} note 139, at 31.
\textsuperscript{152} Kotva, \textit{supra} note 111, at 169.
individual liberty, the hallmarks of the liberal state.\textsuperscript{153} But, as James Keenan argues, we are in need of a virtue ethics because we need to rediscover the sense of community "$[f]n our liberal society where individual rights have replaced the common good."\textsuperscript{154} John Finnis has likewise commented on the importance of community to the common good for "$[t]he common good is the good of individuals living together and depending upon one another in ways that favor the well-being of each."\textsuperscript{155} It is the sense of community and the individuals who are the community on which this part of my examination will focus. My thesis here is that the concerns of the community and the concerns of individuals are related and complementary through the common good. In the context of the abortion debate, I see that the strongly opposed views that favor either an absolute right to abortion or an absolute right to protect the fetus do not promote the common good.

My examination of the common good is based on virtue ethics because this approach raises questions that make us look at who we are, what we want to be, and how we get there. By examining who we are, virtue ethics can help reveal the problems with the strong individual-rights-and-liberties orientation of our contemporary society. When we acknowledge that we are often individual-rights promoters who fail to relate the interests of different individuals to one another, we can then acknowledge that something is wrong: What do we do when rights that we have made "absolute" conflict with one another? We can address this question with the second stage of the virtue ethics inquiry: What do we want to be? If we see that there is a need to see ourselves as individuals in community rather than as isolated beings independent of all others (in other words, we see ourselves as individuals in community), then we can ask the third question of virtue ethics: how do we get there? A response to this inquiry is to acknowledge the need for public discourse. I suggest that through engaging one another in public

\textsuperscript{153} A source of this contemporary liberal doctrine is MILL, supra note 92, at 197, where the author states: "The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign." Id. (emphasis added).

\textsuperscript{154} Keenan, supra note 109, at 123. The author continues—correctly and properly—that the rediscovery of community today is urgent. The example he gives is the issue of abortion because the two principal sides often rely on the "liberal" view of a strong rights-orientation without abortion advocates trying to understand fully the interests of the fetus and without fetal-protection advocates comprehending the concerns that women who have unwanted pregnancies may face. Keenan's insight relates to the point that I later advance about the need for engagement and dialogue.

\textsuperscript{155} FINNIS, supra note 95, at 305 (emphasis omitted).
dialogue, we educate ourselves and make ourselves wiser to use virtue language, in the needs of both ourselves as individuals and the needs of others.

I shall now develop this thesis more fully in four segments. The first will refocus the abortion issue as it has emphasized absolute rights language (which I suggest is, if not antithetical to the common good, is at least often in conflict with it). Second, I shall briefly investigate the tradition of the common good that has application to my thesis. Next, I shall focus on the insights of contemporary authors who have made connections between the rights of individuals as balanced by the needs of the community. Finally, I shall make suggestions about how we can better address the abortion controversy through our willingness to serve the common good under virtue ethics.

A. The Abortion Issue Refocused

If I were to identify the major proposition that Roe contributes to the issue of abortion, it would be this: There is a qualified right to privacy that precludes the state from interfering with the right to terminate a pregnancy during the first trimester. As mentioned previously, the privacy right was given to the attending physician, not the woman; the pregnant woman’s right was derivative of the physician’s right. However, with the passage of time, the fundamental declaration of Roe became obscured. In this blur, there appeared in the minds of some members of the Supreme Court and abortion-rights advocates “the fundamental constitutional right of women to decide whether to terminate a pregnancy.” In Casey, Justices Stevens and Blackmun argued that the Pennsylvania informed consent regulation.

156. It is important to note that structuring abortion rights on the foundation of privacy was and continues to be challenged by some abortion-rights advocates. See, e.g., Donald H. Regan, Rewriting Roe v. Wade, 77 Mich. L. Rev. 1569 (1979) (offering an “equal protection” argument); Reva Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 Stan. L. Rev. 261, 266 (1992) (“It is clear that abortion-restrictive regulation can violate the antidiscrimination and antisubordination principles which give the constitutional guarantee of equal protection its meaning.”); Cass R. Sunstein, Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy), 92 Colum. L. Rev. 1, 44 (1992) (stating that “laws restricting abortion violate the Equal Protection Clause”).


unlawfully interfered with this "fundamental constitutional right." A majority of the Justices (seven), however, found that the informed consent regulation was valid and upheld it.

The Blackmun-Stevens approach to the resolution of abortion issues strongly supports giving a pregnant woman absolute "reproductive autonomy" during the first trimester. One thrust of their argument is that such autonomy is needed to ensure "both the concept of liberty and the basic equality of men and women." In addition, they consider the right of privacy to be "nothing less than a matter of conscience." Justice Stevens suggested that regulations that "enhance the deliberative quality" of the woman's choice are "neutral regulations on the health aspects of her decision," but those that "influence the woman's informed choice between abortion or childbirth" are invalid. Stevens concluded that the informed consent regulation in *Casey* constitutes an undue burden and therefore unlawfully interferes with the woman's "fundamental constitutional right" because it: (1) wears "down the ability of the pregnant woman to exercise her constitutional right"; (2) rests "on outmoded and unacceptable assumptions about the decision-making capacity of women"; (3) is premised on the assumption that making the decision to terminate the pregnancy with an abortion is made "lightly"; (4) serves no "useful and legitimate state purpose"; (5) presents information "that is either common knowledge or irrelevant" and therefore is "irrational" and "undue"; and (6) places unnecessary burdens on women who attempt to exercise "constitutional liberty," which are therefore "undue." Justice Blackmun shared Justice Stevens's criticism of the informed consent regulation.

While acknowledging that the state "may take steps to ensure that a woman's choice 'is thoughtful and informed,'" Blackmun found that the
requirements of the Pennsylvania law were "rigid" and "biased." In agreeing with the district court judge, Blackmun considered the one-day waiting period "clearly unconstitutional" because it might require two visits to the attending physician that could increase travel time, provide further exposure for anti-abortion protesters, and present additional financial costs. Once again, Justice Blackmun relied on the foundation of privacy rights to justify his attack on the state regulation.

True, the regulation makes a woman wait twenty-four hours before she can abort the fetus; true, it requires in many cases that certain information be presented to the woman; and true, it may require the woman to return to the clinic, physician's office, or hospital a second time. But what the informed consent regulation does not do, as Blackmun and Stevens suggest, is to stop—or, to use the plurality opinion's language, place an "undue burden" on—the woman from having a first trimester abortion if that is indeed what she decides to do.

What the regulation does is present important information to the woman who is about to make a momentous decision—to promote the virtue of wisdom, or, as David Hollenbach suggests, to be "educated in virtue" by other members of the community. Unlike Justices Blackmun and Stevens, I view the Pennsylvania informed consent regulation as a major step toward opening the dialogue—of increasing the virtue of wisdom—between the woman who believes she wants to rid herself of the pregnancy and those who have information which could show the pregnant woman that this may not be what she wants if she is made aware of concrete alternatives such as health care and financial support. The Pennsylvania regulation can open a dialogue between each pregnant woman contemplating abortion and qualified persons who, while respecting her position, also respect the position of the developing human life of the fetus she carries.

The liberal understanding and emphasis on the right to privacy have severe limitations, which Blackmun and Stevens ignore. In reality, a woman who is pregnant is given little support by those advocating her right to privacy. She may be in need of much more than her "right to be left alone." She may be in need of others who can provide information or physical assistance, which would enable her to have the child whom she would

169. Id. at 2850 (Blackmun, J., concurring in part and dissenting in part).
170. Id. at 2851 (Blackmun, J., concurring in part and dissenting in part).
171. Id. at 2846 (Blackmun, J., concurring in part and dissenting in part).
173. Declaration on Procured Abortion, supra note 71, at 449; Cuomo, supra note 139, at 27-29.
rather keep, but physical circumstances (poverty, lack of proper health care for her and her child) militate against her doing so. The right to be isolated from others, which privacy conveniently makes available, could well be the last thing she needs.

Ironically, both the interests of the woman and those of the fetus may not be well served by the right of privacy. Yet this right is urged by many who subscribe to the liberal theory of society. Bruce Ackerman presented one of the most comprehensive outlooks of the liberal position when he stated in reference to abortion that:

The simple truth is that a fetus is not a citizen of a liberal state. While it may possess a humanoid body, we have seen that citizenship is not a biological category. A liberal community does not ask what a creature looks like before admitting it to citizenship. Instead, it asks whether the creature can play a part in the dialogic and behavioral transactions that constitute a liberal polity. The fetus fails the dialogic test—more plainly than do grown-up dolphins.\(^{174}\)

Ackerman’s point focuses on political conversation and participation in public discourse in which only some human entities—and perhaps dolphins—can participate. He excludes the possibility that a third person could speak on behalf of the fetus (as the Pennsylvania regulation, in part, does). Liberal states do not have room for dialogue-through-proxy. But, the tragic irony is that this view of the liberal state offered by Ackerman and others\(^{175}\) disregards the need for all vital interests to be considered by the state in a matter as important as that involving other human life that would be adversely affected by this “fundamental constitutional right” to privacy.

Decisions of this magnitude need to receive the participation and the views of all vital interests that are at stake: those of the woman along with those of the fetus. To insulate the decision-making of the woman as well as the woman herself from the concerns and interests of those other members of the human community, including those who are not yet but will shortly be born, is to misappropriate the right to privacy by using it not as a protection for, but as a weapon against the moral interests of the community. As Michael Perry has suggested, “moral deliberation requires community.”\(^{176}\)


Perry further states that "[i]n constitutional deliberation, as in political delibera-
tion generally, what is at issue . . . is not what should I do? or how should I conduct myself? but: how are we to 'be' together, and what is to be the institutional setting for that being-together? . . . It is not self-deliberation about my life, but mutual deliberation conducted between agents implicated in a common life."177 There is little doubt that the question of abortion places one important set of human values (those of the pregnant woman whose existence is adversely affected by some, but not all, pregnancies) against another important set (those of the fetus she carries). The claim made on behalf of the woman's right to privacy and the exercise of this right do not make this serious conflict disappear; it conceals it to the detriment of the fetus. Perry further argues that: "Politics, then, in a morally pluralistic society, is in part about the credibility of competing conceptions of human good. Political theory that fails to address questions of human good—questions of how human beings, individually and collectively, should live their lives—is, finally vacuous and irrelevant."178

Recalling that he suggested that adult dolphins are more a part of the dialogic process than human fetuses,179 Ackerman argues that in a liberal state, all forms of social dependence "are subordinated to the dialogic processes of Neutral conversation."180 By this, I believe he means that while individual rights are developed through dialogue in a liberal state, these rights seem to be developed more out of an arms-length negotiation process that is disinterested in the other party's concerns as well as areas of mutual concern. My conclusion about Ackerman's position is based on his statement that:

Not only is each citizen of a liberal community free from any obligation to love his neighbor; he is even free to believe that his neighbor is a despicable creature who is wasting his own life and corrupting the lives of those stupid enough to call him friend. While citizens will, of course, have available a rich store of associational networks through which they may achieve their own forms of intimacy and community, the fundamental bond that binds them all together is not one of fraternity in any meaningful sense of the word. What is forged instead is a bond that ties citizens together without forcing them to be brothers; liberal conversation provides a communal process that deepens each person's claim to autonomy at the same time

177. Id. at 156-57 (quoting RONALD BEINER, POLITICAL JUDGMENT 138-39 (1983)) (omissions in original).
178. PERRY, supra note 176, at 182. Perry notes that "the protection of fetal life is surely more than a trivial good." Id.
179. ACKERMAN, supra note 174, at 127.
180. Id. at 347.
that he recognizes others as no less worthy of respect. Liberty, Equality, Individuality are the watchwords of the liberal state.  

I agree with Ackerman's assessment that there should be a communal process involved in public life. I am also encouraged by his acknowledgment that there are "others no less worthy of respect" than the autonomous self. However, I disagree with his exclusion of developing human life from his blueprint for the liberal society. He properly includes the important elements of liberty, equality, and individuality that are essential to preserving individual and community life. What is conspicuous by its absence from his plan is any appreciation of interdependence among individuals that can be called fraternity.

Mary Ann Glendon has evaluated the political ideals vital to the liberal state. In her recent investigation of American political and social culture, she has noted:

[The] penchant for absolute formulations [of rights] . . . promotes unrealistic expectations and ignores both social costs and the rights of others. A near-aphasia concerning responsibilities makes it seem legitimate to accept the benefits of living in a democratic social welfare republic without assuming the corresponding personal and civil obligations.

As various new rights are proclaimed or proposed, the catalog of individual liberties expands without much consideration of the ends to which they are oriented, their relationship to one another, to corresponding responsibilities, or to the general welfare. As if specifically referring to Ackerman's position, she notes that the Enlightenment rights of life, liberty, and property are "preeminently rights of separated, independent individuals," and that the separation of one individual from another has reached its apogee in the United States, "where 'liberty,' and 'equality' did not rub shoulders with 'fraternity.'"

Glendon

---

181. Id.
182. Ronald Dworkin suggests by using virtue and communitarian language that law is "a fraternal attitude, an expression of how we are united in community though divided in project, interest, and conviction. That is, anyway, what law is for us: for the people we want to be and the community we aim to have." RONALD DWORKIN, LAWS EMPIRE 413 (1986).
183. See GLENDON, supra note 82.
184. Id. (emphasis added).
185. Id. at 47-48. Glendon notes that this separation began early in the history of western democracies when [the path of the United States diverged somewhat from those of most other Atlantic-European nations . . . at each of [the] great watersheds in the history of rights. The parting of the ways was already evident in 1789 when the French Declaration of the Rights of Man and the Citizen, in contrast to the [American] Declaration of Independence, emphasized that individuals have duties as well as rights.
further argues that this peculiarly American twist of rights exaggeration has manifested itself in the Supreme Court's recognition of "a protected sphere surrounding the individual."\(^{186}\) Her commentary has particular relevance to the notion of privacy often connected with a pregnant woman's "fundamental" or "absolute" right to have an abortion. Glendon points out that while the "absoluteness" of this right is an illusion, it is "hardly a harmless one" because the "absoluteness of our American rights rhetoric is closely bound up with its other distinctive traits—a near-silence concerning responsibility, and a tendency to envision the rights-bearer as a lone autonomous individual."\(^{187}\)

A major point advanced by the Pennsylvania informed consent regulation is that it offers the pregnant woman (who is caught between the Scylla of having an abortion and the Charybdis of being separated from others by the exaggerated right of privacy) connections with other human beings who can assist her to plan her future by showing her concrete alternatives to an act that is irreversible both for her and her child. Unfortunately, many rights advocates fail to appreciate that her pregnancy also concerns the community, which includes her child. The shroud of the right of absolute privacy conceals many of her vital needs that could be addressed by the community, if only the community were given a chance. The Pennsylvania law challenged in *Casey* is one attempt to give the community such a chance to help both the woman and her child. This law advances the understanding that the political community is a "common project," a project unfortunately "alien to the modern liberal individualist world."\(^{188}\) It is the political community that I shall examine in the next section on the tradition underlying the common good.

### B. The Tradition of the Common Good

The concern about the common good as a social and political issue reaches back to the classical era of ancient Greece and Rome. Aristotle noted that "Every state is a community of some kind, and every community is established with a view to some good."\(^{189}\) In looking at the state or the political institution established to govern the community, he noted that just governments are those "which have a regard for the common interest."\(^{190}\) In assessing what Aristotle considered to be just, we can turn to his dis-

---

\(^{186}\) Id. at 11 (footnote omitted).

\(^{187}\) Id. at 40.

\(^{188}\) Id. at 45 (emphasis added).

\(^{189}\) MACINTYRE, supra note 108, at 146.

\(^{189}\) ARISTOTLE, *Politics*, in *INTRODUCTION TO ARISTOTLE*, supra note 91, at 589.

\(^{190}\) Id. at 629-30.
course on ethics in which he supplied the foundation of a theme we have already seen: Justice is reciprocity and mutuality through relationship.\textsuperscript{191} In placing the notion of reciprocity into the human community, Aristotle contends that the truest or best form of justice is the reciprocal display of friendship.\textsuperscript{192} The reciprocity found in this truest form of justice was expressed by Aristotle:

\begin{quote}
[Reciprocity] is the friendship of [people] who are good, and alike in virtue; for these wish well alike to each other \textit{qua} good, and they are good in themselves. Now those who wish well to their friends for their sake are most truly friends; for they do this by reason of their own nature and not incidentally; therefore their friendship lasts as long as they are good—and goodness is an enduring thing.\textsuperscript{193}
\end{quote}

Although he was critical of the conditions of political community practiced in the ancient Rome of his time, Marcus Tullius Cicero shared the sentiments of Aristotle when he suggested that a commonwealth or social order emerges from the social spirit of people who make the commonwealth their “property,” which is established on the principles of “respect for justice” and “partnership for the common good.”\textsuperscript{194} Although writing for the emerging Christian community, St. Augustine’s view reflected those of Aristotle and Cicero when he argued that the human race is not simply united “in a society by natural likeness” but it is or should be “bound together by a kind of tie of \textit{kinship} to form a \textit{harmonious unity}, linked together by the ‘bond of peace.’”\textsuperscript{195} Augustine drew a distinction between the “earthly city” and the “city of God,” which has relevance to my investigation and analysis of the privacy right that insulates the individual from the rest of the community. Augustine’s insight applicable today makes the distinction between the earthly city where self-love is supreme; in the other city, the civic attitude is characterized by love of God and love of the neighbor.\textsuperscript{196}

During the Middle Ages, Thomas Aquinas, who was influenced by the ideas of both Aristotle and Augustine, continued the work of identifying the common good. For Aquinas, the object or \textit{telos} of justice is to keep people together in a society in which they share relationships with one another. As he said, “justice is concerned only about our dealings with others.”\textsuperscript{197} The notion of justice as being the mutuality or reciprocity shared among the

\begin{footnotes}
\footnotetext{191}{ARISTOTLE, \textit{supra} note 91, at 433-34.}
\footnotetext{192}{Id. at 502-03.}
\footnotetext{193}{Id. at 506.}
\footnotetext{194}{CICERO, \textit{De Re Publica De Legibus} 65 (1966).}
\footnotetext{195}{ST. AUGUSTINE, \textit{The City of God} 547 (Henry Bettenson trans., 1986).}
\footnotetext{196}{Id. at 593.}
\footnotetext{197}{AQUINAS, \textit{supra} note 97, Question 58, art. 2.}
\end{footnotes}
members of society was further refined by Aquinas when he argued that "the virtue of a good citizen is general justice, whereby [each person] is directed to the common good." Furthermore, Aquinas stated as follows:

[T]he good of any virtue, whether such virtue direct man in relation to himself or in relation to certain other individual persons, is referable to the common good, to which justice directs, so that all acts of virtue can pertain to justice in so far as it directs [each person] to the common good.

The modern Christian philosopher Jacques Maritain brought Aquinas's understanding of the common good into the twentieth century. Maritain recognized the need to separate the dignity of the individual human being from the dangers of the primacy of the isolated individual and the promotion of the private good. The common good, for Maritain, is "the human common good," which includes "the service of the human person." In large part, Maritain was responding to the threats posed to the dignity of the human person by three forms of states that existed in the first half of the twentieth century: (1) the bourgeois liberal state, (2) the communist state, and (3) the totalitarian state. His concerns about the modern bourgeois liberal state have special application to the abortion question.

Maritain concluded that "bourgeois liberalism with its ambition to ground everything in the unchecked initiative of the individual, conceived as a little God," was a threat to the dignity of the human person and the common good. As if responding to the arguments made by some abortion advocates who claim the fundamental right of privacy on behalf of pregnant women, Maritain stated that the emphasis on individualism at the expense of community results in "the tragic isolation of each one in his [or her] own selfishness or helplessness." Through his perceptive understanding of the social conditions of the times during which he wrote, Maritain acknowledged that evil arises when "we give preponderance to the individual aspect of our being." I believe that Maritain saw excessive individualism as an evil because he understood that the human being, who is an individual, is simultaneously a member of the human community. For Maritain, a constitutive element of being human is the "inner urge to the communications of knowledge and love which require relationship with other persons."
Simply put, Maritain advanced the basic position (with which I agree) that the human person and the community are not in conflict with one another because their vital interests are complementary rather than contradictory. The words of Maritain are compelling and insightful in this regard:

There is a correlation between this notion of the person as social unit and the notion of the common good as the end of the social whole. They imply one another. The common good is common because it is received in persons, each one of whom is a mirror of the whole...

The end of society is the good of the community, of the social body. But if the good of the social body is not understood to be a common good of human persons, just as the social body itself is a whole of human persons, this conception also would lead to other errors of a totalitarian type. The common good of the city is neither the mere collection of private goods, nor the proper good of a whole which, like the species with respect to its individuals or the hive with respect to its bees, relates the parts to itself alone and sacrifices them to itself. It is the good human life of the multitude, of a multitude of persons; it is their communion in good living.205

Again, as if responding to the advocates of the liberal state and the exaggerated right of privacy, Maritain submits that the rights of the individual human person and the interests of the community are compatible and harmonious. The fundamental rights of persons and those of the society in which each person lives shares as the principal value “the highest access... of the persons to their life of person and liberty of expansion, as well as to the communications of generosity consequent upon such expansion.”206

For Maritain, the expansion of each person’s rights needs the community; by one’s self, cut off from the others, the person is alone and must fend for the self. However, when in community, she or he can rely on the generous support of others to be more, not less, of a human being. In the context of the abortion issue, it would seem that the individuals most concerned (the mother and the fetus) would be better served if society would do more to help them. Programs providing concrete assistance to the mother would

205. *Id.* at 49-50 (footnote omitted).

206. *Id.* at 51. While writing from the perspective of the eve of World War II, Jacques Maritain stated that:

It is up to the supreme effort of human freedom, in the mortal struggle in which it is today engaged, to see to it that the age which we are entering is not the age of the masses, and of the shapeless multitudes nourished and brought into subjection and led to the slaughter by infamous demigods, but rather the age of the people and the man of common humanity—citizen and co-inheritor of the civilized community—cognizant of the dignity of the human person in himself, builder of a more human world directed toward an historic ideal of human brotherhood.

JACQUES MARITAIN, CHRISTIANITY AND DEMOCRACY 97-98 (1944).
ABORTION, ETHICS, AND THE COMMON GOOD

constitute attractive alternatives to abortion that are respectful of the interests of both the woman and the child whom she bears.

While Maritain's philosophy may present something of an ideal, it is realistic in the sense that it is a goal—a telos—toward which our communities can strive. The Pennsylvania informed consent regulation contains elements of the generosity of one person helping another who needs assistance. In the case of the woman who faces the problems of a pregnancy, there is the support of the community—consisting of advice as well as information about how to get concrete assistance—that can help her in a time of great need. Without this regulation, the support of the community disappears, and the pregnant woman is left alone with her right of privacy and the isolation it brings as the only reward.

In the American context, Christopher Mooney has presented the view that an underlying assumption of the United States Constitution is that "the pursuit of the common good was and would continue to be a major motivation of all citizens." Mooney is a realist who acknowledges that rights emphasizing individuation and competition are not always conducive to the common good because their intrinsic attitude enables conflict to prosper and reconciliation to default. Commenting on this attitude, Glendon argues that the "overblown rights rhetoric" nurtures the autonomous individual and directs our "thoughts away from what we have in common and focus[es] them on what separates us." For Glendon,

[T]he new rhetoric of rights is less about human dignity and freedom than about insistent, unending desires [whose] legitimation of individual and group egoism is in flat opposition to the great purposes set forth in the Preamble to the Constitution: "to form a more perfect Union, establish Justice, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."

Glendon aptly illustrates her critique with an example taken from the legal profession. She points to those advocates who rely on "exaggeration and absoluteness" and neglect any other view, regardless of how legitimate or how important, to win a case or to take over some company; on the other hand is the "rank and file" counselor who recognizes that the client must be protected but must also continue to live in relationships with others "that depend on regular and reliable fulfillment of responsibilities."

208. Id. at 60.
209. GLENDON, supra note 118, at 143.
210. Id. at 171-72.
211. Id. at 175.
In their seminal work on individualism and commitment in American life, Robert Bellah and his colleagues discovered during their research into the American culture of the 1980s that “dependence and independence are deeply related, and that we can be independent persons without denying that we need one another.”212 But these researchers, like Glendon, see that the tendency of late twentieth century American individualism prompts citizens to isolate themselves from their neighbors and to take care of “their own,” the result of which makes them suspicious of, and withdrawn from, the public world.213 The language and the practice of individualism-above-all-else has led to what Bellah and his colleagues have called the cardinal sin of the Founders: “[W]e have put our own good, as individuals, as groups, as a nation, ahead of the common good.”214 Nevertheless, the authors of Habits of the Heart have identified an antidote to the poison of individualism-above-all-else: The seeds of a renewal of a world waiting to be born in the realization that “the processes of separation and individualization [that] were necessary to free us from the tyrannical structures of the past . . . must be balanced by a renewal of commitment and community if they are not to end in self-destruction or turn into their opposites.”215

Six years later, the same authors have found that the maxim “plus ça change, plus ça le meme chose”216 is an accurate description of the status of individualism and public commitment in the United States. In their most recent work, The Good Society, they note that “to frame the abortion debate only in terms of rights has been to inhibit realistic, morally engaged social debate about the nature of abortion.”217 In referring to Mary Ann Glendon’s work on the question of abortion in the United States, Bellah and his collaborators argue that we as a nation cannot “deal realistically with the conditions that lead to abortions on the one hand and the moral complexities of abortion decisions on the other” because our national urge to be preoccupied with rights rhetoric “cuts off debate, polarizing society politically” between two groups unable to talk with one another.218

To conclude this section of the evolving tradition of the common good, I turn to the work of Benjamin Barber. He also has concluded that the excesses of liberalism have led to an insularity among people that tends to

213. Id. at 112.
214. Id. at 285.
215. Id. at 277.
216. “The more things change, the more they stay the same.”
218. Id.
erode democratic institutions. He argues that being an individual and being a citizen are compatible with one another:

Autonomy is not the condition of democracy, democracy is the condition of autonomy. Without participating in the common life that defines them and in the decision-making that shapes their social habitat, women and men cannot become individuals. Freedom, justice, equality, and autonomy are all products of common thinking and common living; democracy creates them.\(^{219}\)

As seen elsewhere, protection of the human person in all of his or her dignity requires insertion and participation in, not insulation and separation from, the community. The community prospers when its members contribute of themselves in making it prosperous; it withers when they turn within and tend only to their private cares.\(^{220}\) The threat to a free world of the good citizen is stated as:

The world in which men and women do not exist for others; in which there can also be no public goods. In this world, there can be no fraternal feeling, no general will, no selfless act, no mutuality, no species identity, no gift relationship, no disinterested obligation, no social empathy, no love or belief or commitment that is not wholly private.\(^{221}\)

Like other contemporary writers who have addressed the issue of the common good, Barber also turns to the abortion question and the issue of privacy to illustrate his concern with the erosion of democracy and its vitalizing force of citizenship. Engagement of people with opposing views is essential to resolving the issue and of reconciling differences caused by "absolutizing" positions. Barber warns:

Unless the debate over abortion permits people to discuss the social conditions of pregnancy, the practical alternatives available to the poor, and the moral dilemmas of a woman torn between her obligations to her own body and life and to an embryo, such debate will treat neither pregnant women nor unborn babies with a reasonable approximation of justice.\(^{222}\)

David Hollenbach has raised his hope that the search for "communitarian objectives" is not incompatible with the achievements of and progress


\(^{220}\) Barber continues by stating, "From this precarious foundation [of individualism and privacy], no firm theory of citizenship, participation, public goods, or civic virtue can be expected to arise." Id. at 4.

\(^{221}\) Id. at 71-72.

\(^{222}\) Id. at 182.
for humanity up to the present age.\textsuperscript{223} I submit here that his concern is legitimate, and his theory is supported by others who recognize that our world and our national community of today are established on the interdependence of individual human beings. We seem to do better, if not prosper, when the spirit of fraternity and cooperation prevails. We suffer (as we do in our abortion clinics, in Somalia, in Bosnia) when the spirit of isolation and separation reigns. It is important, to be sure, to pay attention to the individual who cries out, "Look at me! I'm different." It is equally important when we do so, however, to also say, "Look at \textit{us}! We are the same."

In the next section of my discussion, I shall focus on how the issue of the common good emerges in the abortion debate when we look at the "me" and the "\textit{us}.”

\textbf{C. Current Perspectives on Abortion That Relate to the Common Good}

Within the present day context of abortion, we can identify the "me" in the debate as those individuals and groups who hold what I call absolutist positions on the issue. The example on the pro-abortion side could well be the pregnant woman whose own life has been threatened by a difficult pregnancy. On the other side would be the devoted individual who holds the view that all human life is sacred and that no other human being has the right to take such life, especially the life of the fetus. I am confident that in between these two positions, most if not all the other positions, which can be viewed as pro-abortion, pro-choice, or pro-life, fall. The "\textit{us}” generally would include all members of the specific society or community that is concerned about the abortion issue. I suggest that the community or society might be composed of several levels that, in addition to the woman and her baby, include the hospital or other medical center that treats pregnant women, the woman's family, the state that has (or may be developing) a program for regulating abortion, the national government that has (or may be developing) a program to regulate abortion, and any other groups that have come together to express and advocate their views about abortion in public arenas.

One avenue for proceeding into the contemporary scholarly debate on abortion is through the work of Judge John Noonan.\textsuperscript{224} Judge Noonan has taken the Jewish\textsuperscript{225} and Christian\textsuperscript{226} scriptural admonition “to love your

\textsuperscript{223} Hollenbach, \textit{supra} note 172, at 94.
\textsuperscript{224} Judge, United States Court of Appeals, Ninth Circuit.
\textsuperscript{225} \textit{Leviticus} 19:18.
\textsuperscript{226} In the New Testament, the command to love your neighbor as yourself is found at \textit{Mark} 12:30, \textit{Matthew} 22:39, and \textit{Luke} 10:27. The Golden Rule ("do unto others as you would want them to do to you") is found at \textit{Matthew} 7:12.
neighbor as yourself" and put the fetus into the position of the neighbor so that the fetus's life can arguably have parity with one's own life. In order to be of greater appeal to secular interests, Noonan recasts his argument by saying that the religious commandment has its humanistic counterpart: "Do not injure your fellow [hu]man without reason." He goes on to say that:

In these terms, once the humanity of the fetus is perceived, abortion is never right except in self-defense. When life must be taken to save life, reason alone cannot say that a mother must prefer a child's life to her own. With this exception, now of great rarity, abortion violates the rational humanist tenet of the equality of human lives.

However, even this humanist approach can fail to convince some individuals that the life of the fetus is like mine or yours. This has prompted one commentator to point out that the British Parliament recently rejected legislation ensuring that medical practitioners delivering a fetus capable of sustaining life outside of the womb be required to protect its life at the conclusion of the abortion.

Ronald Dworkin has also examined the question of how to consider the status of the life of a human fetus. He readily admits that "it seems undeniable that in the ordinary case a fetus is a single living creature by the time it has become implanted in a womb, and that it is human in the sense that it is a member of the animal species homo sapiens"; however, the protection to be accorded this human interest in Dworkin's estimation is quite another matter. After making this observation, Dworkin proceeds to liken fetal human life to a piece of sculpture, or the assemblage of Dr. Frankenstein's monster, or a baby carrot: He suggests that smashing the sculpture, destroying the mechanism that would vitalize Frankenstein's monster, or picking the baby carrot prematurely are no different than aborting the fetus.

---

228. Id.
229. Id.
230. John Finnis has recently noted that this humanist approach did not appear to move the British Parliament into taking legislative steps to help a fetus sustain his or her life in the performance of an abortion. See John Finnis, The Legal Status of the Unborn Baby, 43 Cath. Med. Q. 5 (1992). There the author relates the following legislative tactic: "In the final stages of Parliament's consideration of the 1990 amendments to the Abortion Act, a Conservative woman peer moved two amendments intended to secure that when an abortion is being performed under the Abortion Act . . ., the medical practitioner doing the termination should use 'all reasonable steps to secure that the child is born alive.' Each amendment was comfortably defeated." Id. at 7.
before the third trimester. His grounds for making this comparison rest on his premise that the fetus's interests parallel those of the sculpture, the baby carrot, and the monster because "nothing has interests unless it has or has had some form of consciousness—some mental as well as physical life."

Dworkin anticipates arguments against his analogy by referring to the "fallacious argument that abortion must be against the interests of a fetus, because it would have been against the interests of almost anyone now alive to have been aborted." Dworkin then goes on to suggest that a fetus may develop interests in retrospect, and he draws upon the following illustration:

[T]hat it was good for [Dworkin] that [his] father was not sent on a long business trip the night before [his] parents conceived [him], rather than, as in fact happened, two days later. It does not follow that it would have been bad for anyone, in the same way, had [Dworkin’s father] left on the earlier date. There never would have been anyone for whom it could have been bad.

Dworkin argues that if he were not conceived because his father had left for the business on the earlier date, there would be no Ronald Dworkin who would have interests. But Dworkin's argument fails because it makes suppositions that disregard the facts. His father did not leave early; Ronald Dworkin was conceived; Ronald Dworkin had interests that would have been adversely affected if his mother decided to have an abortion. And what might that interest be? No Ronald Dworkin among many other things, including his impressive scholarship.

Dworkin relies on one further example to make his point, but this example fails as well. He argues: "[I]f a woman smokes during pregnancy, someone will later exist whose interests will have been seriously damaged by her behavior. If she aborts, no one will exist against whose interests that will ever have been." If the woman aborts because of natural causes, that is one thing; however, if she willingly and knowingly terminates her pregnancy, that is quite another. In this latter case, the woman who smokes or drinks or takes dangerous drugs (all of which can adversely affect her child who is still in her womb) and then voluntarily aborts is like the person who commits a murder and then tries to remove the evidence by burning the body and dissolving the ashes in acid. Dworkin's basic argument seems to

232. Id. at 402-03.
233. Id. at 403.
234. Id. at 404.
235. Id.
236. Id. at 405.
focus on the ability of a born human because it has "some form of consciousness—some mental as well as physical life." Patricia King has an important counter to this problematic reasoning. She points out that neither fetuses nor newborn infants nor comatose adults have "consciousness," yet there are important interests worth protecting in each of these cases. John Hart Ely, who holds a pro-abortion position, has indirectly pointed out the fallacy of Dworkin's reasoning:

Dogs are not "persons in the whole sense" nor have they constitutional rights, but that does not mean the state cannot prohibit killing them: It does not even mean the state cannot prohibit killing them in the exercise of the First Amendment right of political protest. Come to think of it, draft cards aren't persons either.

Dworkin's approach to the issue of abortion is troublesome. He attempts to eliminate the fact that the fetus is a human entity who has vital interests that are worth discussing and protecting. Perhaps in some cases these rights are not absolute because there are other rights involved—particularly those of the mother whose own existence may be compromised in a small number of cases by the fetus. That is my point; that is Glendon's point. We cannot afford to look at one interest and neglect the other competing interests that are simultaneously involved. Rosalind Hursthouse has cast the issue involved here well. In a recent article, she relies on virtue theory not to "solve the problem of abortion" but to illustrate how we ought to "think about it." I suggest that how we think about the interest of the fetus cannot be the fashion in which Dworkin casts the reflection: It is wrong to say that an interest that once was, never was if it is destroyed (as Dworkin implies in the case of abortion). To borrow from Hursthouse, we must think about what it is we are doing before we do it; then, we must talk about what it is we contemplate doing before we do it. To act in a prejudicial way toward the fetus by aborting it, and then think about it and talk about it ex post facto and say that it never was because it no longer exists is not only illogical, it is also wrong.

Patricia King has taken a thoughtful approach in considering how we think and talk about the interests of the fetus. She concludes that the viable fetus (one capable of life outside the womb) has a greater interest in protec-

237. Id. at 403.
tion than the previable fetus because, in her view, "the fetus should not be entitled to the same degree of protection at every stage of development."\(^{241}\) While I do not concur with this particular judgment she makes, I do join in her more general opinion that this does not mean that the previable fetus has no interests at all worth protecting. King asserts that the previable fetus does have interests and those interest merit discussion and protection. As she states, "the unborn fetus, the newborn child, and the mature adult are all at different stages of development, and the fact that a fetus is not conscious or socially responsive should not preclude all legal protection."\(^{242}\)

But how do we discuss the level of protection to be given the fetus? And, how do we discuss the level of protection to be given the mother? If the rights and interests of the fetus change, might we not expect that those of the woman undergo change as well? Alan Brownstein and Paul Dau have recently argued that a proper assessment of the abortion issue necessitates our realization that the pregnant woman's interests are not static but vary during pregnancy:

\begin{quote}
[T]he woman's right also varies during pregnancy and that this change in interest shifts the balance of state interests against fundamental rights in many cases. Indeed, if the woman's interest in terminating her pregnancy declines to a sufficient extent, the balancing necessary to justify abortion restrictions may be accomplished without determining exactly when the conceptus experiences a life worth living.\(^{243}\)
\end{quote}

How we go about evaluating the interests of the principals, vis-à-vis the woman and the fetus, can only be achieved by frank and honest discussion among all of us who hold a substantive view on abortion. Ruth Colker has offered some helpful insights on how this kind of discussion can proceed. Although she is a feminist who holds pro-choice views, Colker nevertheless acknowledges that women have responsibilities along with rights when the subject of abortion is examined.\(^{244}\) She further acknowledges that the right to an abortion cannot be grounded in disrespect for the fetus.\(^{245}\) Colker calls upon the woman considering abortion to appreciate the virtue of wisdom needed to make a decision that is not only important to herself but to

\begin{footnotes}
242. *Id.* at 1672.
243. Alan Brownstein & Paul Dau, *The Constitutional Morality of Abortion*, 33 B.C. L. REV. 689, 749 (1992); see also Cahill, *supra* note 122, at 87, where the author argues that the woman's and fetus's "respective rights must be defined in relation to one another (and, in a less immediate sense, to the rights of others, for example, family members)." *Id.*
244. Colker, *supra* note 55, at 1050.
245. *Id.* at 1055.
\end{footnotes}
the fetus as well. But a pregnant woman does not obtain this wisdom in
the vacuum of her privacy and isolation from others. She obtains the wis-
dom she needs through dialogue with others. As Colker argues:
I oppose a complete prohibition of abortion regulations, because it
would prevent the state from developing mechanisms to encourage
women to consult other people. I would support legislation requir-
ing hospitals and clinics that perform abortions to make available
group counseling sessions . . . for all pregnant women so that they
can be exposed to competing viewpoints in a safe space.
This is basically what the Pennsylvania informed consent regulation is all
about. Another feminist who is pro-life, Lisa Cahill, has emphasized the
need for community and individual understanding that the respective rights
of the mother and the fetus must be defined in relation to one another. "Where those rights can conflict, neither can be absolute. The rights of
both are limited, but still significant."

Laurence Tribe has made a recent contribution to the debate and dia-
logue on abortion. He is somewhat critical of informed consent regulations,
which he believes can be burdensome to some women, especially those from
rural areas. He does not think that these kinds of regulations can "serve
their ostensible purpose of fostering consideration of the gravity of a deci-
sion to abort a pregnancy." He rhetorically asks the question: "What
woman who would take lightly the decision to have an abortion will rethink
it more seriously simply because a law says she has to wait a day before
having the procedure?" While Tribe displays no enthusiasm for this kind
of informed consent regulation, neither does he find the harsh, one-sided
rhetoric helpful in the effort to reconcile the absoluteness of some pro-life
and pro-choice advocates. I doubt that he finds the threat made to legisla-
tors of "[t]ake our rights, lose your job" a conducive way of attempting
to reconcile the differences. After all, Tribe demonstrates his appreciation
of the need to inject abortion alternatives, such as the "humane options" of
pre- and post-natal care and education about human reproduction. Reviews of Tribe's approach are mixed; however, both Michael McConnell

246. Id. at 1063-64.
247. Id. at 1066 (citation omitted).
248. Cahill, supra note 122, at 87.
249. Id.
250. Tribe, supra note 53, at 203.
251. Id.
252. Id. at 179.
253. Id. at 209-12.
254. Michael W. McConnell, How Not to Promote Serious Deliberation About Abortion, 58 U.
and Stephen Carter\textsuperscript{255} agree with Tribe on the need for public discourse and dialogue on the divisive issue of abortion. McConnell, while arguing that Tribe's position fails to do this, nevertheless finds the general project of moving beyond the clash of absolute positions about abortion to be a "worthy purpose." As he suggests, "There is too much shouting and too little serious discussion of the law and morality of abortion."\textsuperscript{256} Carter, while giving reasons why dialogue may not resolve the question "in the near term," nonetheless generally agrees that discussion and examination of alternatives to abortion are vital to resolution of the conflict.\textsuperscript{257} I will conclude this section of my presentation with the advice given by Michael Perry on the subject of political dialogue.

Perry believes that the goals of the liberal state which are based on individualism and privacy have proved to be futile.\textsuperscript{258} The alternative he constructs begins with what Perry terms "deliberative, transformative politics" in which he calls for members of American society to engage one another "in productive moral conversation."\textsuperscript{259} Perry has taken recent steps to develop more fully this process of public dialogue:

[He proposes the need for] a politics in which citizens meet one another in the public square, sometimes to reach consensus, more often diminish dissensus, and most often, perhaps, simply to clarify, to better understand, the nature of their disagreement, but always to cultivate the bonds of (political) community, by reaffirming their ties to one another, in particular their shared commitment to certain authoritative political-moral premises.\textsuperscript{260}

Of course, for politics to be effective, it must include more than talk, more than public discourse and dialogue on the pressing issues of the day, and Perry acknowledges this. But in doing so, he emphasizes that the need for "dialogue and tolerance" he advances has to be more than something that will be "devalued and marginalized."\textsuperscript{261} The dialogue and tolerance Perry finds necessary to deal with the difficult public issues of the present day are the kind that will nourish "a form of political community in which, notwithstanding our sometimes radical disagreements with one another [perhaps like the disagreements that surround abortion], we always strive to understand one another, to know one another, to serve one another, better

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{255} See Carter, supra note 3.
\item \textsuperscript{256} McConnell, supra note 254, at 1181.
\item \textsuperscript{257} Carter, supra note 3, at 2763-65.
\item \textsuperscript{258} Perry, supra note 176, at 55-56.
\item \textsuperscript{259} Id. at 4.
\item \textsuperscript{260} Perry, supra note 54, at 125.
\item \textsuperscript{261} Id. at 144.
\end{enumerate}
\end{footnotesize}
Perry’s understanding of dialogue, tolerance, and a community in which individuals sincerely work at understanding, knowing, and serving one another leads into my own reflection about the common good that underlies the subject of abortion.

D. Abortion and the Common Good: Coming to Know Ourselves

In constructing my own understanding of the common good in the context of the abortion debate, I return to the informed consent regulation. I do so with the goal of determining whether Perry’s notion of “dialogue and tolerance” can help us understand the important human issues at stake, and, if so, how we can then go about addressing them. I conclude that Perry’s approach, which shares elements of the works of other authors I have investigated, can help construct both (1) an understanding of the common good and (2) how it can be advanced. Both constructions rest on a foundation in which the underlying, diverse views come together and share their individual perspectives. Both perspectives must be considered in order to ascertain what is, if not the best solution to the problem, then a better solution than we have now.

While there may be problems of communication in defining solutions to moral issues like abortion and identifying a “shared notion of virtue or the common good” as Mary Ann Glendon acknowledges, this does not mean that the public decision-making in which we as citizens engage one another can “remain resolutely neutral on all controversial questions involving moral issues.” With the deep insight that characterizes much of her work, Glendon argues that “it is only natural that ideas of law as embodying a social dialogue should come to have a special appeal.” I would add that not only does social dialogue have “special appeal,” but that it is urgently needed in order for American society to begin the construction of helpful, concrete solutions to the divisive issue of abortion. Only then can we properly take into account the variety of significant and valuable interests that now seem to be insulated from one another by the cries of absolute rights, which are increasing rather than diminishing in volume. Glendon states that “it does not seem too soon to say that although modern law cannot establish or enforce a single vision of virtue, it can play its part in promoting the potentially self-correcting processes of dialogue and dialectic.”

262. Id. at 145.
263. GLENDON, supra note 118, at 139.
264. Id.
265. Id. at 140.
The Pennsylvania informed consent regulation at the heart of the Casey decision is one reasonable approach to facilitate dialogue and dialectic in the abortion controversy. While some critics of the Pennsylvania regulation argue that it imposes an "undue burden" on pregnant women, in reality, it presents an opportunity for pregnant women to consider that there is an important interest of another, as well as her own, at stake. The attending physician must first of all inform the woman at least twenty-four hours before the abortion about the nature of the proposed procedure, the procedure's risks, the estimated age of the fetus, and the medical risks to her associated with carrying the child to term. The information is presented orally, which is more expeditious than requiring the woman to read some document that may be written in technical language and difficult for a person not schooled in the language of the health care profession to understand.

The second component of the twenty-four hour waiting period mandates that prior to the abortion, either the physician or some other qualified person designated by the physician informs the woman about state publications containing information on alternatives to the abortion, information on medical assistance (including prenatal, child birth, and postnatal care), and information that the father is liable for support (even if he has offered to pay for the abortion). An exception to this last component is in cases of rape. It is significant to note that this section of the informed consent regulation gives the woman the option to review printed materials; if she exercises that option, the materials are provided free of charge. If she does not elect the option, she only receives the information verbally. Prior to the abortion, the woman signs a form certifying that she has received this information. What she does with the information is left up to her: She can consider it, she can discuss it with others during the twenty-four hour period, or she can disregard it. The choice is hers alone.

It is important to acknowledge that in cases of a medical emergency, the physician is under a duty to explain to the pregnant woman, if possible, the medical indications supporting his or her judgment about the medical

266. See Planned Parenthood v. Casey, 112 S. Ct. 2791, 2851 (1992) (Blackmun, J., concurring in part and dissenting in part); id. at 2843 (Stevens, J., dissenting in part); Fine & Law, supra note 175, at 411.
271. PA. CONS. STAT. ANN. § 3203 (West Supp. 1990) defines "medical emergency" as that "condition which, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy
emergency and why the "abortion is necessary to avert her death or to avert substantial and irreversible impairment of major bodily function." \(^{272}\)

I do not suggest that this regulation is the most desirable for giving equal consideration to the interests of the woman and those of her child when an abortion is being considered. These provisions are weighed heavily in favor of the woman's interest notwithstanding the charges of some that they constitute undue burdens. Still, this regulation is one small step in the direction of opening a dialogue between the two principal interests that are at stake; moreover, it encourages some measure of tolerance on each side of these interests to understand the concerns of the other party.

To draw from Mensch and Freeman, I suggest that the Pennsylvania informed consent regulation is a step toward putting aside the abortion perspective of "rational secular individualism" in favor of a more generalized appeal toward the common good of appreciating and balancing (ever so slightly) the significance of competing interests. \(^{273}\) The Pennsylvania regulation is only the first step in the direction of helping women see the moral issues, the issues of conscience that are a vital part of the abortion debate. As Mensch and Freeman also state, the rights-based language of *Roe* and other pro-abortion advocacy "fails to capture the moral and social experience of many women." \(^{274}\)

In the realm of the practical, the informed consent regulation in *Casey* helps to educate a woman about concrete alternatives she may have in lieu of proceeding with the abortion. Verbally, she is given information about health care and other financial support options. These options reflect some of the practical alternatives to abortion mentioned by Governor Cuomo. \(^{275}\) Ironically, many pro-abortion advocates term their movement the "pro-choice" position. But what real choice is there in taking the narrow view that a woman has a fundamental right to an abortion; this is not a position of choice, it is rather a position of absoluteness without alternative. On the other hand, the Pennsylvania scheme gives the woman some real choice that includes the choice to terminate or to continue the pregnancy with the assistance of counseling, health care, and other support. Again, as Mensch and Freeman point out:

> [E]ven for those [pregnant women] not facing extreme economic hardship, there are other social pressures that can give one the expe-

\(^{273}\) Mensch & Freeman, supra note 4, at 1095, 1105.
\(^{274}\) Id. at 1123.
\(^{275}\) Cuomo, supra note 139, at 27-29.
rience of having "no choice." Those pressures include an internalized feminist pressure to be successfully autonomous and independent, and, as pro-life advocates have argued with some force, male pressure for women to be sexually available without reproductive consequences.

"Choice" contains its own coercions, in other words, which may be a necessary price to pay but should not go unnoticed. Ironically, it is the pervasiveness of the language of choice and freedom in our culture which makes a forthright examination of those coercions so legally and politically out of bounds.

It is worth noting that Mensch and Freeman are wife and husband who have either had abortions or have been the responsible other in abortions. They speak with the conviction of understanding that comes from experience. They now present that experience so that others may share their understanding of what is at stake in an abortion. For them, the starting point for discussion is the discussion itself; the discussion then must move into recognition that abortion is about "life or death." They acknowledge that "[t]o abort a fetus is to kill, to prevent the realization of human life." In pointing to the circumstances of the 1991 war against Iraq, Mensch and Freeman opine that the choice:

[T]o kill does not make it wrong on that score alone; but we surely need a vocabulary for talking about life and death issues in moral terms that underscore the seriousness of any choice for death. Our experience with abortion, and, perhaps with war, suggests that the lack of such a vocabulary will lead inevitably to excess.

I find it necessary to take the conclusion of Mensch and Freeman at least one step further: Once we discover the vocabulary, we must use it. Moreover, its use must be regular and frequent. With the dormancy of the vocabulary comes the insularity of the conversationalists; and with their insularity comes the isolation of individualism that makes one person (or one interest) forget the concerns of the other.

At its most fundamental level, that is what the common good is all about: the one being with the other, the me with the you. Ruth Colker and Michael Perry both refer to the scriptural commandment to love your neighbor as yourself. Their recognition of this scriptural commandment

276. Mensch & Freeman, supra note 4, at 1125-26 (citation omitted).
277. Id. at 933-34.
278. Id. at 1137.
279. Id.
280. Id. at 1137-38.
281. See, e.g., Perry, supra note 54, at 50-51; Colker, supra note 55, at 1075 (quoting Leviticus 19:15-18).
is important because the command makes us intimately aware of our similarities as human beings. But, specifically, what does the commandment mean in the context of abortion and the debate about it?

I think it means this: When we are willing to discuss the question of abortion, we can and often do learn a lot more about the subject, especially when we are talking with others who hold different views. As we dispose ourselves to engage one another in a difficult but still important discussion, we come together in a community that does not necessarily share the same views but that does share the same interest in this topic. As a community, we can build a foundation of recognition that we have something in common (our humanity that begins and ends in the same way: with life and death). This mutual interest forges the foundational link between us and helps us recognize that we share a "likeness to one another." 282

Some of us may be reluctant to approach this recognition of likeness with the other because it seems incompatible with our individuality and freedom. Yet, as Philip Rossi has noted, the mistake we often make about ourselves and our freedom is that "we conceive of freedom primarily, if not exclusively, by reference to human agents in their individuality and independence, rather than in terms of their shared human communalities and their fundamental interdependence." 283 While many of us think that it is our independence that makes us human, it is really our social dimension, the fact that we are individuals who are members of a society, that we are distinct human beings who nevertheless flourish when we relate to one another—not when we are isolated from one another. It is, after all, our interdependence that brings us together into the community of human beings. 284 Community fosters exchange between people (and their interests). The exchange, in turn, promotes the opportunity to see that human interaction is mutually beneficial, that it serves and promotes our common good to "care for one another's total well-being." 285

283. Id. at 5.
284. As Philip Rossi argues:
This community is, first and foremost, a community of mutuality: a community of those who conscientiously foster the skills that enable the essential interdependence of their lives to work for the attainment of good for one another. Mutuality fostered in this way constitutes the core of the charity or love that in the Catholic tradition has been claimed to be the fundamental form of the life of virtue. Thus the human community that provides a condition fundamental for satisfying, for each and all, our basic human cravings is a community in which charity gives form to virtue.
Id. at 68.
285. Id. at 145.
I enter the conclusion of this Article (but not the debate, nor the discussion) on abortion by drawing our attention to one final insight from Rossi. Rossi’s notion of the common good emerges from “the recognition of communality at the heart of moral life: ‘I am as she; she is as I.'”\textsuperscript{286} He transfers this fundamental point into the abortion controversy when he states: “[A]cceptance of abortion by our contemporary culture has as one of its major engendering factors the massive failure of many of the practices of our social, political, and economic life to establish, foster, and be at the service of human mutuality.”\textsuperscript{287}

This brings me to my last words. The notion of the common good that I have attempted to present in this discussion about abortion (and I suspect of applicability to many other issues that challenge the human community today) is this: When we engage one another in conversation, we can and do learn about one another. We learn what we did not know before; often, we also learn what we thought but what we did not want to admit. We discover that we are different because that is what makes us individuals. But, more important, we discover—and this is the part that is not easily admitted—that we are also similar in many ways. Each time we engage the other in conversation, we see a reflection of ourselves in the other. I suspect that our rights-oriented culture reinforces the differences that superficially make us different but, in truth, mask our fundamental similarity. We discover our resemblance each time we engage one another in conversation, in dialogue, even debate. We see in each of our conversations a piece of a mosaic that reflects the other. And, when we assemble more of the mosaic, as we see more of the pieces come together, not only do we see the other, we also see ourselves.

This is how the questions about abortion and the common good come together: The more we discuss these issues, the more we see that the concerns of the pregnant woman are our concerns. And, just as significantly, when we hear about the concerns of the fetus, we see the concerns that belong to us. For in the fetus, in the mother, we see another human being with whom we have so much in common. And when we see that other human being, we see ourselves. When we make this discovery, when we allow it to seep into our deepest consciousness, we can then acknowledge that the portrait that emerges from our many conversations belongs to all of us because it represents all of us. It is both our portrait \textit{and} the portrait of the other.

\textsuperscript{286} \textit{Id.} at 154.
\textsuperscript{287} \textit{Id.} at 155.
THE PRECEDENTIAL FORCE
OF PANEL LAW

PHILLIP M. KANNAN*

I. INTRODUCTION

Federal courts of appeals are authorized by statute to hear and determine cases by panels as well as en banc.1 In 1992, 6851 three-judge panels were possible from court of appeals judges alone.2 The number of possible panels ranged from twenty in the First Circuit to 3276 in the Ninth Circuit.3 The number of possible panels would have increased substantially if district judges were included.4 Panels perform almost all of the appellate work in the federal judicial system;5 yet, as explained below, they lack a full range of judicial power and an adequate precedential system to fulfill this responsibility effectively.

No statute defines the precedential force of each panel's decision on subsequent panels of the same circuit. Intracourt comity, the model followed by district courts, could have been adopted by the courts of appeals.6 Instead, all thirteen circuits, with the possible exception of the Seventh Circuit, have developed the interpanel doctrine: No panel can overrule the precedent established by any panel in the same circuit; all panels are bound

---

* B.A. 1961, University of North Carolina; M.A. 1963, University of North Carolina; J.D. 1974, University of Tennessee. The views expressed here are solely those of the author.

1. 28 U.S.C. § 46 (1988). "En banc" and "in banc" are both correct spellings for the same term. Although some sources, including the Federal Rules of Appellate Procedure, use "in banc," most courts prefer "en banc." In this Article, "en banc" will be used unless spelled otherwise by the source quoted.

Panels usually consist of three circuit judges, or two such judges and one district judge. An en banc court for a circuit generally consists of all the circuit judges in regular active service in that circuit. 28 U.S.C. § 46(c) (1988).


3. Id.


5. FED. R. APP. P. 35(a) (An en banc "hearing or rehearing is not favored and ordinarily will not be ordered."); see also Gonzalez v. Southern Pac. Transp. Co., 777 F.2d 637, 641 (5th Cir. 1985) (stating that en banc consideration is an extraordinary procedure)

by prior panel decisions in the same circuit.\textsuperscript{7} In the Seventh Circuit, the rule is implied from the practice of circulating, to all active judges of the court, panel decisions that reverse precedent.\textsuperscript{8}

The decisions applying the interpanel rule have not clearly articulated their legal bases. The rule is apparently based on the assumption that panels have no judicial power or jurisdiction to overrule panel precedent.\textsuperscript{9} This assumption, in turn, seems based on an implication that, because the courts en banc have retained the authority to overrule panel precedent,\textsuperscript{10} panels have no such authority. That rationale, however, is questionable because en banc courts retain a full set of judicial power, but only this one facet is denied panels.

Another possible basis for the interpanel rule is Federal Rule of Appellate Procedure 35 ("Rule 35"), which explicitly authorizes en banc courts to resolve conflicts between decisions, although panels are not so authorized. This argument at best justifies only one part of the interpanel rule: the inability of a panel to overrule precedent. It does not support the other conclusion: namely, that panels are bound by such precedent. In any event, Rule 35's authorization of en banc courts to resolve conflicts does not support the interpanel rule. If the interpanel rule were valid, there would be no conflicts and no need for en banc courts to have authority to resolve them.


\textsuperscript{8} See United States v. Rosciano, 499 F.2d 173, 176 nn.2 & 4 (7th Cir. 1974) (per curiam) (pointing out this practice of the Seventh Circuit in Moody v. United States, 497 F.2d 359, 365 n.7 (7th Cir. 1974)); United States v. Miller, 495 F.2d 362, 366 n.3 (7th Cir. 1974).


\textsuperscript{10} Fast v. School Dist., 728 F.2d 1030, 1034 (8th Cir. 1984); Ford v. General Motors Corp., 656 F.2d 117, 119-20 (5th Cir. 1981) ("We note that the task of reexamining and overruling panel decisions is left to the full Court, sitting en banc.").
In addition to lacking a firm basis, the interpanel rule is at least implicitly inconsistent with Rule 35,11 with the statute authorizing panels,12 and with statutes creating appeals as of right.13 These three inconsistencies are examined in Part II. If the interpanel rule is flawed by being contrary to these statutes, one would expect to find evidence that the rule does not work in practice in the cases that apply or attempt to apply it. Part III considers that evidence. Part IV suggests three alternatives to replace the interpanel rule.

II. STATUTORY BASES FOR QUESTIONING THE INTERPANEL RULE

In this Part, the interpanel rule is tested for consistency with Rule 35, with the statute authorizing panels, and with statutes creating appeals as of right. The interpanel rule is inconsistent with all three statutes. Adjustments must be made in either the interpanel rule or in the three statutes. Modifying the interpanel rule would primarily affect judicial administration by increasing the number of en banc decisions. Courts of appeals themselves could make the change by repudiating the interpanel rule. In contrast, if the statutes were amended, fundamental legal theory would have to be altered, which would require action by courts and Congress. Consequently, the interpanel rule, not the statutes, should be modified.

A. The Interpanel Rule Is Inconsistent with Federal Rule of Appellate Procedure 35.

Under Rule 35(a), only two conditions permit a hearing or rehearing en banc. One condition is "when consideration by the full court is necessary to secure or maintain uniformity of its decisions."14 This language anticipates a lack of uniformity within the circuits. In adopting this rule, the Supreme

---

11. The Federal Rules of Appellate Procedure are not statutes. However, 28 U.S.C. § 2072 (1988) expressly authorizes the Supreme Court to "enact" these rules. They are codified at 28 U.S.C. For convenience, they will be included in the discussion of statutes in Part II of this Article.


13. These include 28 U.S.C. § 1291 (1988) regarding final decisions of district courts and many other statutes that grant parties the right to appeal final actions of federal agencies. Examples of these latter statutes are § 7006(a) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6976(a) (1988), and § 307(b) of the Clean Air Act, 42 U.S.C. § 7607(b) (1988). For convenience, all such statutes will be grouped and considered as a single unit in this Article.

Court expected panels to develop inconsistent law and even specified the procedure for resolving such inconsistencies.15

By establishing the interpanel rule as law, the courts of appeals have subverted the intent of the Supreme Court in two ways, one substantive and the other procedural. The substantive conflict is that the interpanel rule forecloses the possibility of inconsistent decisions within a circuit. This is contrary to Rule 35, which indicates that panels have the power to reject panel precedent in the circuit. Although the Supreme Court recognized that panels have the judicial power to reject panel precedent, the courts of appeals, through the interpanel rule, deny the existence of such power.

The procedural deviation from the Supreme Court's intent is that the courts of appeals have developed their own rule for resolving conflicting intracircuit panel precedent. The court-made rule states that if a panel's decision is inconsistent with the previous decision of a panel in the same circuit, the later decision is not the law; it is invalid.16 This rule mandates that there be no inconsistent interpanel decisions in a circuit. Inconsistencies are aborted at conception. The Supreme Court, in Rule 35(a), foresaw that such inconsistencies would arise and provided a mechanism for resolving them, but did not require that they be resolved. If the Court, acting with the express authority of Congress, had intended no inconsistent interpanel decisions in a circuit, it would have required en banc resolutions or provided some other procedure to assure consistency.

B. The Interpanel Rule Is Inconsistent with the Statute Authorizing Panels

The interpanel rule not only prohibits each panel in a given circuit from overruling other panels' decisions, it also forbids a panel from overruling its own decisions.17 Thus, for circuit panels, the doctrine of stare decisis takes

15. See, e.g., 9 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 235.02 n.3 (2d ed. 1992) ("The function of the in banc hearing is important in resolving conflicting decisions within the circuit . . . .").


17. Although no case was found that addresses this point directly, this conclusion is inherent in the interpanel rule itself when stated in the form that only an en banc court can overrule panel precedent. See, e.g., Ford v. General Motors Corp., 656 F.2d 117, 119-20 (5th Cir. 1981) ("[W]e note that the task of reexamining and overruling panel decisions is left to the full Court, sitting en banc."); Ingram v. Kumar, 585 F.2d 566 (2d Cir. 1978) ("This panel, of course, is bound by Sylvestri and cannot properly overrule it except by rehearing en banc."); cert. denied, 440 U.S. 940 (1979); see also Gerald B. Tjoflat, More Judges, Less Justice, A.B.A. J., July 1993, at 70, 72 ("In theory, prior-panel rules permit panels to create binding precedent, which can be overruled only by the entire court sitting en banc.").
on an absoluteness that is contrary to the intent of that doctrine. Stare decisis, as described by the Supreme Court, is "not an inexorable command" and "not a mechanical formula of adherence to the latest decision." In the Supreme Court's formulation of the doctrine, courts not only have the power to reject their previous holdings, they have an obligation to do so in some circumstances. Yet, under the interpanel rule, panels have neither the power nor the obligation to deviate from their past decisions.

The statute creating the authority of panels to decide cases does not hint that Congress intended to burden society with a set of handicapped courts. The statute mandates that "cases" and "controversies" "shall be heard and determined" by panels. The statute places no restrictions on "heard and determined." No language in the statute implies that a fundamental property of stare decisis, the authority of a court to overrule its own precedent, is to be changed. Such radical departure from stare decisis, an integral part of the common law, would require a clear expression of Congress's intent to change the judicial course. Not only is there no clear expression in the statute authorizing panels, there is no evidence of it at all. The interpanel rule is simply court-made law that sharply contrasts with the statute the courts are purporting to apply. The interpanel rule should be rejected, and panels should be able to apply stare decisis in full measure like all other courts.

C. The Interpanel Rule Is Inconsistent with Statutes That Create an Appeal as of Right.

Courts of appeals are given "jurisdiction of appeals from all final decisions of the district courts." That grant of jurisdiction, which is obligatory for the courts of appeals, creates a right to have the courts of appeals...
exercise the jurisdiction. The interpanel rule, however, depreciates this right.

A right to have a court exercise its jurisdiction means a right to have the court exercise its judicial power. That is the meaning of jurisdiction. The judicial power of a court includes the authority to reject its own precedent. Thus, when a party with a right to an appeal goes before a panel encumbered with the interpanel rule, that party's right is curtailed.

III. EMPIRICAL EVIDENCE THAT THE INTERPANEL RULE IS INVALID

Just because a legal doctrine has exceptions does not render the doctrine invalid. However, as the number of exceptions increases, confidence in the doctrine declines. Moreover, if the exceptions are necessary to avoid conflicts between the doctrine and very fundamental legal principles, the doctrine is questioned even further. As the discussion of the exceptions to the interpanel doctrine will show, the interpanel doctrine contains both of these symptoms, which makes its legal validity questionable.

Some exceptions to the interpanel rule, although very narrow and precise, implicate fundamental questions of judicial power. In this category are the cases in which a panel is confronted with a ruling by a prior panel that would vest jurisdiction in the panel when none exists. The dilemma facing the court is whether to follow the interpanel rule and allow a court to create jurisdiction or to engage in "soft rejection" of the rule: that is, find an exception and respect the jurisdictional boundaries created by Congress.

An example of this dilemma and how it can be resolved is found in Hayes v. United States Government Printing Office. The issue in Hayes was the jurisdiction of the court of appeals in a mixed-motive appeal from the Merit System Protection Board. An earlier motions panel found jurisdiction; the later merits panel refused to be bound by that holding. The inability to revisit that question would have been at odds with the court's basic power to decide whether it had jurisdiction, and questions of jurisdic-

26. "Ordinarily the conferral of jurisdiction without mention of discretion to decline to exercise it has been construed to make the exercise of jurisdiction obligatory. Read this way, § 1291 confers on persons aggrieved by a final decision of the district court a right to review by the court of appeals." 9 MOORE ET AL., supra note 15, ¶ 110.05.

27. See United States v. Aguon, 851 F.2d 1158, 1173 (9th Cir. 1988) (en banc) (Reinhardt & Nelson, JJ., concurring) (discussing differences between courts of appeals and the Supreme Court in applying stare decisis).

28. 684 F.2d 137 (D.C. Cir. 1982).

29. A mixed-motive case is one in which a federal employee "raises allegations both of discrimination and of insufficient evidence to support the agency decision of [poor performance or misconduct]."

tion can be considered at any stage of a proceeding. The same reasoning has been applied when, after a panel grants interlocutory appeal, a later panel concludes that the decision was incorrect and amounted to the panel creating jurisdiction. A second narrow exception arises when en banc review of a panel's decision is not possible. In these cases, a later panel is not bound by the earlier panel's decision. An example of this exception is North Carolina Utilities Commission v. Federal Communications Commission. In this Fourth Circuit case, all but one of the active judges of the court were disqualified, and thus en banc review was not possible. The court, which included two judges from the Fifth Circuit sitting by designation, held that when the interpanel rule would deny the parties the right to even the possibility of a review of panel precedent, a right guaranteed by statute, the interpanel rule must yield.

Courts chafing under the strain of the interpanel rule also use a broader and more malleable exception, the "intervening change" exception. This exception provides that if an intervening, controlling change in the law occurs after a panel decides an issue, a later panel is not bound by the earlier panel's decision. The intervening change can be caused by the en banc court, the Supreme Court, Congress, or an authoritative state court or legislature when that state's law is controlling.

Intervening changes in the law often are within the discretion of the hearing court. A panel faced with precedent it believes is wrong almost certainly can weave a complex argument that points to some shift in the intervening law. Gresham Park Community Organization v.

32. Ray v. Edwards, 725 F.2d 655, 658 n.3 (11th Cir. 1984).
34. Id. at 1044-45.
36. See, e.g., Footman v. Singletary, 978 F.2d 1207, 1211 (11th Cir. 1992) ("We may decline to follow a decision of a prior panel if necessary to give full effect to a United States Supreme Court decision."); Lufkin v. McCallum, 956 F.2d 1104, 1107 (11th Cir.), cert. denied, 113 S. Ct. 326 (1991); Adamson v. Lewis, 955 F.2d 614, 620 (9th Cir.) (en banc) (referring to a collection of cases so holding), cert. denied, 112 S. Ct. 3015 (1992).
39. Unfortunately, using complexity to obscure questionable reasoning was not beyond even Justice Marshall. Jerry J. Phillips, Marbury v. Madison and Section 13 of the 1789 Judiciary Act, 60 TENN. L. REV. 51, 52 (1992) ("The reasoning on this issue, which is central to the outcome of
Howell illustrates how far panels will stretch to escape panel precedent that they consider in error. The plaintiffs in *Gresham Park* sought an injunction under federal civil rights law to prohibit the enforcement of an injunction issued by a Georgia state court. The panel in *Gresham Park* was faced with clear panel precedent from *Brown v. Chastain*. In that case, the panel held that the district court had no jurisdiction to enjoin the state court’s order. The *Gresham Park* panel acknowledged that *Brown* was consistent with a “line of the Fifth Circuit cases” and that *Brown* had been followed by other panels. Using questionable legal analysis, the panel avoided precedent. The panel developed two arguments for not following *Brown*, but neither argument is persuasive.

The panel’s first effort to avoid *Brown* involved the claim that *Brown* was implicitly inconsistent with two later Supreme Court cases, *Huffman v. Pursue, Ltd.*, and *Juidice v. Vail*, which applied the abstention doctrine. The panel premised that if the Supreme Court abstains from hearing a case, it must have had jurisdiction to hear the case. That premise is highly questionable. Perhaps neither the parties nor the Court raised the issue of jurisdiction. In *Califano v. Sanders*, the Court considered the issue of a court deciding the merits without considering jurisdiction. In *Califano*, the court held that the Administrative Procedure Act (APA) was not an independent basis for jurisdiction. The Court referred to previous cases it had decided in which jurisdiction had been assumed to exist under the APA, although the issue had not been considered. It is simply not universally true that a court must have had jurisdiction if it decides a case or if it

---

40. 652 F.2d 1227 (5th Cir. 1981).
43. *Gresham Park*, 652 F.2d at 1234 (“Under Brown, the district court here would have no jurisdiction over GPCO’s suit to enjoin the enforcement of the state court order.”).
44. *Id.*
45. *Id.* at 1234 n.14.
47. 430 U.S. 327 (1977).
51. *Id.* “Three decisions of this Court arguably have assumed, with little discussion, that the APA is an independent grant of subject-matter jurisdiction. However, an Act of Congress enacted since our grant of certiorari in this case now persuades us that the better view is that the APA is not to be interpreted as an implicit grant of subject-matter jurisdiction to review agency actions.” *Id.* (citations omitted).
decides to abstain. The argument in *Gresham Park* based on that assumption is grounded on a false premise and therefore leads to an invalid conclusion.

*Gresham Park*'s second argument to circumvent *Brown* asserted that later cases in the Fifth Circuit departed from *Brown*. The panel cited *Henry v. First National Bank (Henry I)*\(^{52}\) and *Henry v. First National Bank (Henry II)*\(^{53}\) as departing from *Brown*. The weakness in this argument is that these cases should have been invalid under the interpanel rule because they were decided after *Brown* and were required to follow *Brown*.\(^{54}\) To avoid the error it perceived in *Brown*, the panel in *Gresham Park* should have faced squarely the interpanel rule, which appeared to make *Brown* binding. Instead, the panel constructed complex arguments based on dubious premises. Ironically, it also relied on decisions that ignored the interpanel rule, as it strove to show that it did not have to ignore the rule.

Another exception to the interpanel rule based on serious or egregious errors allows panels even more opportunity to avoid the interpanel rule. Of course, the later panel will decide whether the earlier panel precedent was erroneous and, if so, whether the error was serious enough to warrant rejection. This is a prescription for rule-swallowing if ever there was one.

Panels have been willing to follow the prescription. An example of this willingness is *Tucker v. Phyfer*\(^{55}\). While panel precedent controlled the outcome in *Tucker*, the earlier decision failed to mention a controlling Supreme Court decision that would have determined the outcome.\(^{56}\) Consequently, the later panel felt free to reject the earlier panel's holding.\(^{57}\)

Courts have also developed the manifest injustice rule, a more generic rule based on the "egregious error" exception. Under this exception, the later panel is free to re-examine the issue if following panel precedent would cause manifest injustice.\(^{58}\) The later panel, of course, determines whether following precedent would result in manifest injustice.

If unable to find an intervening change in the law or rationalize a finding of egregious error or manifest injustice, a panel has a final escape valve from

---

\(^{54}\) *See supra* text accompanying note 16.  
\(^{55}\) 819 F.2d 1030 (11th Cir. 1987).  
\(^{56}\) *Id.* at 1035 n.7.  
\(^{57}\) *Id.*  
\(^{58}\) *See, e.g.,* United States v. Fooladi, 746 F.2d 1027, 1033 (5th Cir. 1984) ("[W]e see no reason to conclude that the panel's ruling was 'manifest injustice.'"), *cert. denied*, 470 U.S. 1006 (1985).
the interpanel rule. A panel can rely on the principle that all courts should
decide cases according to their reasoned view of the way the Supreme Court
would decide the case today, rather than limiting their function to mere
blind adherence to precedent.\textsuperscript{59} Panels quite rationally have concluded that
they, like all courts, have this power.\textsuperscript{60}

With the many exceptions, including some based on judicial discretion
and judgment, it is difficult to imagine a case that a panel could not exempt
from the interpanel rule.\textsuperscript{61} The interpanel rule is not a principle of law for
courts to follow, but an obstacle for them to avoid. It has been openly
ignored;\textsuperscript{62} its existence has been vigorously denied by a Senior Circuit Judge
of the Sixth Circuit;\textsuperscript{63} and it has been avoided by a 1982 finding that an
1891 case had been overruled \textit{sub silentio} by an 1894 Supreme Court deci-
sion.\textsuperscript{64} The interpanel rule is no longer conducive to coherent, reasoned
judgments, and it forces strained logic based on questionable premises and
nebulous implications in Supreme Court precedent. Such a state of affairs is
an obvious example of exceptions swallowing a rule. The interpanel rule has
lost its compulsion, its ability to bind panels, and is at best an alternative to
its expanding exceptions.

\textsuperscript{59} Cf. Vukasovich, Inc. v. Commissioner, 790 F.2d 1409, 1416 (9th Cir. 1987) ("We con-
clude that the courts of appeal should decide cases according to their reasoned view of the way
[the] Supreme Court would decide the pending case today.").

\textsuperscript{60} Gallagher v. Wilton Enters., Inc., 962 F.2d 120, 124 & n.4 (1st Cir. 1992) (per curiam)
(overruling precedent after circulating opinion to all active judges; advised that this should be
done only sparingly and with extreme caution); Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct &
Sewer Auth., 945 F.2d 10, 12 (1st Cir. 1991) (stating that a panel can overrule panel precedent in
"those few instances in which newly emergent authority, although not directly controlling, never-
theless offers a convincing reason for believing that the earlier panel, in light of the neoteric devel-
opments, would change its course"), rev'd on other grounds, 113 S. Ct. 684 (1993).

\textsuperscript{61} In the opinion of one chief judge, the more judges in a circuit, the less likely the interpanel
rule is to be applied. Tjoflat, supra note 17, at 72 ("As the monitoring burden grows with the size
of the court, jumbo court judges simply abandon their prior-panel rule implicitly, if not by
design.").

\textsuperscript{62} See, e.g., United States v. Bess, 593 F.2d 749 (6th Cir. 1979); Beasley v. United States, 491
F.2d 687 (6th Cir. 1974); see also Tjoflat, supra note 17, at 70 ("[T]here are too many situations in
which three-judge panels, in their published opinions, have glossed over precedent or have disre-
garded it sub silentio, or in unpublished opinions, have decided cases plainly contrary to an estab-
lished rule of law.").

\textsuperscript{63} Speigner v. Jago, 603 F.2d 1208, 1212 n.4 (6th Cir. 1979) ("However, there is no rule in
this Circuit which requires an en banc hearing to overrule a decision of a three-judge panel.")),

\textsuperscript{64} United States v. Thevis, 665 F.2d 616, 626 (5th Cir.), cert. denied, 459 U.S. 825 (1982).
IV. PROPOSED ALTERNATIVES TO REPLACE THE INTERPANEL RULE

Discarding the interpanel rule is only half of the job; a replacement is needed. Three alternatives are proposed in this Article for completing this task. The first alternative would allow conflicting panel precedent in a circuit. The second and third alternatives would eliminate that possibility and the legal uncertainty created by it.

The first alternative to replace the interpanel rule would permit a panel to depart from, but not to overrule, prior panels' decisions. The amount of weight or deference to be given to panel precedent would be for the courts to decide by an evolutionary process. One possibility would be the standard applied by federal district courts regarding intradistrict precedent: to follow such precedent as a matter of comity except in unusual or exceptional circumstances.65

If the alternative of freeing panels to accept or reject panel precedent were adopted, circuits would have conflicting precedent. There would be an increased need for en banc courts to exercise their authority to resolve the conflicts and to maintain or achieve uniformity.66 In circumstances likely to result in rehearings, circuit rules to guide the en banc courts would inject more predictability into the system. This, in turn, would greatly benefit the bar.

If the existence of conflicts and the increased docket of the court en banc seem too steep a price for rejecting the interpanel rule, courts could utilize a variation of this alternative and establish a senior panel to rehear and resolve conflicts.67

The second alternative that could replace the interpanel rule would grant panels the authority to disregard intracircuit panel precedent, and also the power to overrule it. As in the first proposal, the courts would determine the weight panel precedent is to have. However, a decision inconsistent with such precedent would overrule it. This approach is analogous to the long-standing rule of the Supreme Court that when two of its decisions are in conflict, the more recent one has the effect of overruling the older one.68 This second alternative has the advantage of giving a high level of certainty to the law in the circuits. It also would not increase the pres-

---

65. See supra note 6.
66. FED. R. APP. P. 35(a).
67. Even under the interpanel rule, a panel can be authorized to overrule circuit precedent by the full court and all active members. See United States v. Taylor, 828 F.2d 630, 633 (10th Cir. 1987).
sure on en banc courts to rehear cases merely to achieve uniformity in the
circuit.

The courts of appeals could adopt either alternative without legislation. The third, however, would require intervention of the Supreme Court to change Rule 35. Under this approach, when a panel determines that controlling panel precedent is wrong, it would certify the issue to the court en banc. The court en banc would be required to hear and decide that issue.69 A variation of this model would authorize the court en banc to empower a panel to resolve this issue. Either form of this third proposal would prevent conflicting panel precedent in a circuit. The price for this certainty would be an increased burden on the en banc court to hear more cases, a burden that could be eliminated by the suggested variation.

V. CONCLUSION

The interpanel rule deprives panels of part of their judicial power, denies parties a portion of their right of appeal, and dilutes the strength of the Supreme Court’s enactments. The courts have ambiguously and obliquely eliminated the interpanel rule by creating a spiraling array of exceptions. This has made reliance on the rule uncertain. The courts have rejected the substance of the rule, but have left the facade standing. It is time to bring that down, too. The judicial system would benefit if the courts of appeals eliminated the rule decisively and directly.

The most reasonable replacement for the interpanel rule is the first alternative presented in Part IV. Under that model, panels would be freed from the control of panel, but not en banc, precedent. This enhances the authority of the panel hearing a case and thereby restores a major portion of the parties’ rights of appeal. It would also re-establish the duty of resolving conflicts for en banc courts as envisioned by the Supreme Court. Neither of the other two alternatives meets these boundary conditions as well as the first, but either would be better than the current interpanel rule.

69. Asherman v. Meachum, 957 F.2d 978, 983-84 (2d Cir. 1992) (en banc) (The court en banc had the power to determine what issues it would consider, and it could grant rehearing limited to specific issues only.).
ESSAY

WAKE THE NATION: LAW STUDENT INSIGHTS INTO THE NEW JERUSALEM

THOMAS L. SHAFFER
ANTHONY J. FEJFAR

Let the River Run,
Let All the Dreamers Wake the Nation,
Come the New Jerusalem!

Mike Nichols's 1988 movie Working Girl gave Melanie Griffith "a star-making showcase" for her talents; it gave Harrison Ford a chance to show that he could play light comedy; and its theme song, Let the River Run, won an Academy Award for Carly Simon. After watching and discussing the movie with groups of law students from our respective universities, we noticed that both the movie and the song make a religious claim, one that we take seriously. This claim can be found in the principal apocalyptic literature in the New Testament:

And I saw a new heaven and a new earth: for the first heaven and the first earth were passed away; and there was no more sea.

And I John saw the holy city, new Jerusalem, coming down from God out of heaven, prepared as a bride adorned for her husband.

1. Title adapted from CARLY SIMON, Let the River Run, on WORKING GIRL SOUNDTRACK (Arista Records 1989).
2. Robert and Marion Short Professor of Law, University of Notre Dame. B.A. 1958, University of Albuquerque; J.D. 1961, University of Notre Dame; LL.D. 1983, St. Mary's University.
3. Associate Professor of Law, Widener University School of Law. B.A. 1981, Creighton University; J.D. 1985, University of Nebraska.
4. SIMON, supra note 1.
5. WORKING GIRL (Twentieth Century Fox 1988).
7. The Harrisburg campus of the Widener University School of Law is a constituent part of the largest law school in the United States. The law school at the University of Notre Dame, now in its 126th year, is a culturally and ethnographically Roman Catholic, but otherwise widely diverse, institution.

To remove fluency obstacles, not noticeable to listeners but which would be distracting to readers, we have edited the students' oral remarks that are presented here. Additionally, the remarks are arranged thematically.
And I heard a great voice out of heaven saying, Behold, the tabernacle of God is with men, and he will dwell with them, and they shall be his people, and God himself shall be with them, and be their God.

And God shall wipe away all tears from their eyes; and there shall be no more death, neither sorrow, nor crying, neither shall there be any more pain: for the former things are passed away.

And he that sat upon the throne said, Behold, I make all things new. And he said unto me, Write: for these words are true and faithful.

“Let the River Run,” the song says. “Let All the Dreamers Wake the Nation. Come the New Jerusalem!”

In Working Girl, Tess McGill is a secretary in a New York City securities firm who goes to night school, pays attention to business as if she were an analyst rather than a secretary, and prepares to be, as she thinks, more than she is. She is not content to ride the ferry across New York Harbor between Wall Street and New Jersey twice a day; she is not content, as it turns out, to share her life with a boyfriend whose ambition is to own his own boat.

Tess McGill’s creators may have envisioned Thomas Hardy’s Tess, but their creation, unlike Hardy’s, is not an object of fate. Tess McGill takes control of her life; she is out to change things. She is a “Dreamer” out to “Wake the Nation.” She is a bright, working-class young woman, determined to get ahead. Tess does get ahead, not by diligence alone (she is not a

8. Revelation 21:1-5 (King James Int’l Version). This Christian vision invokes the more ancient Hebraic version:

Awake, awake;
Put on thy strength, O Zion;
Put on thy beautiful garments,
O Jerusalem, the holy city;
For henceforth there shall no more come into thee
The uncircumcised and the unclean.
Shake thyself from the dust,
Arise, and sit down, O Jerusalem;
Loose thyself from the bands of thy neck,
O captive daughter of Zion.

Isaiah 52:1-2 (Jewish Publication Society). Rabbi Joseph Hertz says, in an editorial note to this Jewish apocalyptic vision of the restoration of the Temple after the Babylonian captivity: “Jerusalem will rise again from its present degradation. Let her array herself as a queen, surrounded by her restored children. The mountains and waste places of Judea shall rejoice at the Lord’s triumphal return to Zion.” PENTATEUCH AND HAFTORAH 837 (J.H. Hertz ed., 2d ed. 1987).

9. SIMON, supra note 1.

Horatio Alger heroine), nor because she locates powerful patrons (she is no Pygmalion either), but by trickery. Tess pretends that she is her boss, an ambitious, socially credentialed yuppie named Katharine Parker. While Parker is in the hospital recovering from a skiing injury, Tess is able to succeed in her undertakings because of the deception.

"Who makes it happen?" Tess asks herself in a little self-help exercise she learned from her boss. "I do. I make it happen," she answers. For a while, she, like a lawyer, exercises power she does not have. Or rather, she exercises power without authority. However, unlike most lawyers, she acts through deception. For a while, as she puts it, she refuses to follow "rules that I had nothing to do with setting up."

Eventually, the deception is uncovered and for a while Tess is defeated. But then Tess attracts the attention of her own Daddy Warbucks, and by the end of the movie, she is a entry-level corporate manager in a new job. She has her own office, dresses like Katharine Parker, and is far from the madding crowd of the secretarial pool. She telephones her friends there and tells them what has happened, and they cheer at her success.

In the last scene of the movie, Nichols's camera pans away from Tess's new office, like a bird flying away, out of the window and into the sky over New York City. The scene widens to show Tess's office as a cubicle among cubicles, like a shoe box on the shelf with hundreds of other shoe boxes in the back of a store. It is a single-occupant, junior manager's cubicle, though, in a building on Wall Street, a place of power and yet perhaps the most provincial place in America. It is surrounded by scores of offices with scores of junior managers working in them, but Tess has her own window now. She is one of the managers, ready, in a phrase Auden used, for another entirely male generation of young managers to trudge on time to a tidy fortune.

* * * *

This final scene could as easily have shown the office of a beginning associate in a law firm on Wall Street or in one of the scores of law firms in other cities that have adopted the ethos of Wall Street law. We law teachers and our students, of course, thought of Tess's resemblance to a beginning big-firm lawyer as we asked ourselves about Tess's vision—the New Jerusalem:

Tom (not Shaffer): I'll say the New Jerusalem is her office, definitely. Getting the office. I think her religion . . . was to get this job, and she's in heaven at the end of the movie when she gets her office.

Cindy: Her New Jerusalem was not just the job. I think it was the happiness. I think she is going to change the system by the way she does things herself.
Eric: But is that saying she's just become one of the cogs in the system? Is the dream to become one of the cogs in the system? It seemed to me that her life was much more vibrant and real before she became successful.

Regina: I don't think that just because she had that one office in that big office building makes her a cog. I think it's just a start of her New Jerusalem. She's just starting out; she's going to, hopefully, go forward. At the end with her new secretary, she doesn't lay down any rules; she doesn't lay down any laws; they're going to work together. I think that's building her New Jerusalem. She has to make a difference and make it a little better.

Fred: You do get the sense that she's become one of the pillars in the New Jerusalem. She is a woman buying into a man's system instead of a woman looking to change the system that she saw the initial fault in. At the end, the elation shows to me a kind of complacency that doesn't indicate that she's going to change the system that was giving her the shaft in the beginning.

Bobby: When you become a part of corporate America, you may very well change to reflect the values of the individuals that brought you there. The position is tailored by the people who brought you there. You have to fit in to what they have chosen to put you into. You become one of them.

Monica: How many corporate men did we see? Not very many; we saw a few. But look at those vast secretarial pools. I mean floors and floors of them. So she went and got out of that. I think that is really a huge contribution, rather than just this ditsy little thing who was looking for a mink or a six-thousand-dollar dress. I didn't see it as quite that superficial.

Barry: She wasn't going to go along with what everybody else was doing. I thought that was the perfect victory for her.

Paul: That remains to be seen. The movie ends with her finally having somebody underneath her. You never know what is going to happen after that, when the pressure comes down and you know you are faced with all these pressures. Who knows what somebody else is going to do? She may very well turn into another Katharine. You don't know.

Deb: Do you really think that [Tess] is going to turn bad?

Todd: You never know. Maybe. The system does strange things.

* * *

Our discussions led us to issues relating to values, the meaning of life, and cultural trends:

Todd: I think the movie really exemplified what was going on in the 1980s: You have to bend the rules to get to the top. And you have to get to the top at all costs. When the 1990s started, people started to reject that
and are now kind of going back to a simpler tradition. I think you can see
that in American culture.

Matt: Maybe if you want to talk about a transition from one decade to
the next, maybe *Pretty Woman*\(^\text{11}\) "shows [better] how that transition is
moving. In that movie [the ruthless lawyer deal-maker played by Richard
Gere] is not going to be like that anymore. Maybe the reason people like
that movie so much is . . . because they have this whole ideal that they don’t
believe in anymore, and a new ideal they are starting to believe in again.

Todd: I think a lot of people our age are finally beginning to realize that
the 1980s and greed, and success at all costs, even at the cost of not being
happy in your social life—I don’t think that’s important anymore, because
people want to go back to the family and go back to having a life outside the
workplace. Materialism has changed, and . . . values have changed.

Barry (contrasting Tess McGill with her boss, Katharine Parker): Katharine is a kind of false person. She uses all of these stereotypes, all this
very proper language, and she has all these dates at the country club, and
the perfect vacation, but you get the impression that she doesn’t have any
friends in her fake, fragile world. I contrast that with the real life that Tess
is trying to lead, where she does have values; she does have a personality;
she wants accomplishments of her own. She’s concerned about personal
things, whereas the other characters seem more concerned about their envi-
ronment and keeping and protecting it the way it is. Maybe in the 1980s
there were so many people that were worried about creating [Katharine’s]
kind of world for themselves and creating that kind of image for them-
selves. When I am that old, I certainly hope I am not doing that kind of
dance.

Cindy: There is no set thing that we have to do. That’s what was said
about our generation which is so true.

* * * *

We also reflected upon “the system” and “society,” and our own
dreams and hopes for the future:

Bobby: From my perspective as a black man, the system is bad. . . . I
don’t want to belabor the point, but I think there is a way to change it, and
a few people are in a position where they really can. Those are some of the
people that have a goal in mind and are not really looking for a lot of return
from things. . . . If you are not looking solely for monetary reward for what
you are doing, then I think it becomes a little easier to keep changing things

---

\(^{11}\) *Pretty Woman* (Touchstone Pictures 1990).
and to not necessarily buy into the system, and yet still be part of the system.

Tom: I don’t think society is so bad. I think maybe what needs to be changed is for people to set their goals not necessarily based so much on success, so that “success” is going to make me an unhappy or happy person. But maybe to say some things like: “If you make it that’s great, but if not, if you are happy, that is the most important thing.” To de-emphasize the material things in life.

Cindy: One of the things I have realized since coming to law school and having had the opportunity to reflect on my life is that we can do anything we want with this degree. You can go out there and teach, or work in shelters, work for a corporate firm, whatever. There is not one set thing.

Susan: I came from an ethnic family and I’m the first woman from my family to graduate from college and will be the first lawyer in the family. . . . The American Dream in my family, though, is not to be educated. It took me eight years out after college to go back to higher education. In my family, it was more the work ethic. Get out and get a job. You were only valued if you worked. For me, education has been part of the American Dream. So now I’m being educated, and when I get out I’m going to be fifty thousand dollars in debt. So I don’t know whether that is a dream or not. Sometimes I get scared that I traded one thing for another.

Cindy: There are a lot of things you can do that will also [allow you to] pay your loan payments. There are lots of things you can do and still pay your loan payments and live in a meager way. I mean there is no set way that you have to do things. I think people need to realize that, and you need to go out and look for that.

Deb: You hear a lot about our generation being lazy. Just because a large consensus doesn’t want to work sixty to eighty hours a week, like the last generation did, I don’t think that’s lazy. I think it’s just a change of priorities. Make enough money just to have enough fun and a good life.

Matt: So your priorities really have changed. Once everybody has obligations, i.e., family, children, I think we will try to be at least as involved with our children as our parents were with us. In the 1990s, that is going to take a tremendous amount of work. I don’t think things are going to slow down.

John: As long as law schools are so expensive, if you’ve been to law school, it makes people almost have to take out loans, have to take jobs that are high paying and usually very demanding. I think it’s a vicious cycle.

Todd: Not necessarily. It just takes longer to pay them off. I’m taking a job that is nowhere near the amount of money I could be making. It’s just going to take longer to pay it off, just because it’s what I want, here, right
now. I just want to forsake that twelve-hour workday because I don’t think it’s worth it. All you do is get ulcers; you don’t accomplish anything in the long run. You are not happy. What’s the point of living the life if all you are doing is working, working, working, when you don’t have time off for yourself and your loved ones?

Keri: But the thing is, you are going to get ulcers if you’re forty-five and you can’t buy a house yet. I mean, maybe this is selfish of me, but I don’t want to have to struggle like my parents did, and I won’t.

Matt: I don’t want my kids to have to struggle either.

* * * *

There are, perhaps, two notions in those conversations about what the New Jerusalem is. One notion is, like the imagery the song appropriates, apocalyptic: a new personal horizon for Tess, a position from which she can be effective against injustice, enjoy freedom from oppression, and even realize the American Dream of prosperity and self-sufficiency. The other notion is what the theologians call a prophetic notion: Tess represents a generation that will return to and proclaim the values of its living tradition.

The risk, in either notion, is that Tess will become like her oppressors; she will become an oppressor of others. She will take on, from those in other junior-manager cubicles and those who put them there, what Walter Brueggemann calls “static royalist consciousness,” a religion whose god is limited by those who exercise political and religious power.

12. Strictly speaking, there is no such thing as a “new” horizon. Rather, a new horizon can only develop out of a past horizon or tradition, and what is “new” will always retain some of the “old.” See HANS G. GADAMER, TRUTH AND METHOD 306 (Joel Weinsheimer & Donald Marshall trans., 2d rev. ed. 1989) (“[T]he horizon of the present cannot be formed without the past.”).

13. In the text we refer to “tradition” as “living” because a tradition can only be preserved through the creative acts of those who have inherited it. As Gadamer puts it, “In a tradition . . . old and new are always combining into something of living value, without either being explicitly foregrounded from the other.” Id.

14. WALTER BRUEGGEMANN, THE PROPHETIC IMAGINATION 17 (1978). According to Brueggemann, during the life of Moses the gods of Egypt were the “immovable lords of order.” Id. Theirs was a culture of “static royalist consciousness” and a religion of “static triumphalism,” where the gods called for the legitimation of the societal status quo:

In Egypt . . . there were no revolutions, no breaks for freedom. There were only the necessary political and economic arrangements to provide order, “naturally,” the order of Pharaoh. Thus the religion of the static gods is not and never could be disinterested, but inevitably it served the interests of the people in charge, presiding over the order and benefiting from the order. And the functioning of that society testified to the rightness of the religion because kings did prosper and bricks did get made.

Id.
the "religion of static triumphalism" and the "politics of oppression and exploitation."^{15}

Brueggemann's alternative Hebraic and biblical religion is suggested in the students' perception that Tess's relationship with her secretary will be different than the relationship Katharine Parker had with Tess. It is what he calls "alternative prophetic consciousness," a faith in which the believer sees and feels the suffering of other persons and dares to imagine and act to help bring about an alternative vision of society based upon love and justice.^{16} Such a person is moved by a consciousness that integrates creative

15. *Id.* The Israel of King Solomon, characterized by static royalist consciousness, was one where consumer goods seemed plentiful and survival assured—at least for the King and royal society. *Id.* at 33. The affluence of the royal class, however, did not come without a price: "Covenanting which takes brothers and sisters seriously had been replaced by consuming which regards brothers and sisters as products to be used." *Id.*

Brueggemann also points out that the affluence of the royal class was made possible by the presence of an "oppressive social policy":

[This] affluence was undoubtedly hierarchical and not democratic in its distribution. Obviously some people lived well off the efforts of others, for we are reminded that there were those who built houses and did not live in them, who planted vineyards, and did not drink their wine." Fundamental to social policy was the practice of forced labor, in which at least to some extent citizens existed to benefit the state or the corporate economy. *Id.*

Additionally, Brueggemann suggests that there was a relationship between imperial economics and a religion of static triumphalism. *Id.* at 34. The economics of affluence and the accompanying social policy of repression were effectuated through the "establishment of a controlled, static religion in which God and his temple have become part of the royal landscape, in which the sovereignty of God is fully subordinated to the purpose of the king." *Id.* (emphasis omitted). This is a domesticated god who is under the "control" of the political-religious status quo, a god who is static and distant and whose passion is tamed. *See id.* at 35.

16. Moses, the paradigm of the prophet, carried a prophetic vision of an alternative consciousness that had two dimensions: "a religion of God's freedom as alternative to the static imperial religion of order and triumph and a politics of justice and compassion as alternative to the imperial politics of oppression." *Id.* at 18. The underlying point being that "there is no freedom of God without the politics of justice and compassion, and there is no politics of justice and compassion without a religion of the freedom of God." *Id.* Thus, Brueggemann states that alternative prophetic consciousness must be both critical and energizing: "Our faith tradition understands that it is precisely the dialectic of criticizing and energizing which can let us be seriously faithful to God." *Id.* at 14. It is precisely here, Brueggemann points out, that our popular political culture, in both its "conservative" and its "liberal" manifestations, fails to seriously challenge the status quo. This is because:

The liberal tendency has been to care about the politics of justice and compassion but to be largely uninterested in the freedom of God. Indeed, it has been hard for liberals to imagine that theology matters, for it seemed irrelevant. It was thought that the question of God could safely be left to others who still worried about such matters. As a result, social radicalism has been like a cut flower without nourishment, without any sanctions deeper than human courage and good intentions. Conversely, it has been the tendency in conservative quarters to care intensely about God, but uncritically, so that the God of well-being and good order is not understood to be precisely the source of social oppression.
imagination and critical analysis with passionate, caring love. Several students suggested that an alternative prophetic consciousness would manifest itself in Tess’s relationship with her secretary, since one of the lasting impressions of Tess (a credit to the character and to Griffith’s art) is her ability to love. The fact that such a skill is realistically related to doing business on Wall Street is a piece of feminist consciousness that is evidently apocalyptic.

Both of these postures, as well as what our students see as the New Jerusalem and what they fear may come to them instead, are matters of faith. The faith of static royalist consciousness is faith in evident power, the sort of evident power Tess saw around her when she was in the secretarial pool. Under this faith, individual capacity for creativity, critical analysis, and even for care, is repressed, numbed, or skewed in such a way that Tess becomes oblivious to the fact that personal, communal, and societal consciousness can be transformed. She becomes so weary, perhaps, or cynical, or diverted, that she cannot find the energy to challenge the arrangements of power in which she is getting by.

Id. at 18. The epistemological message of such consciousness may not be a popular one: “[T]he dominant culture, now and in every time, is grossly uncritical, cannot tolerate serious and fundamental criticism, and will go to great lengths to stop it.” 18. See Anthony J. Fejfar, A Road Less Traveled: Critical Realist Foundational Consciousness in Lawyering and Legal Education, 26 Gonz. L. Rev. 327 (1990/91) (discussing critical realist foundational consciousness as an integrated mode of consciousness).

17. See Rosemary R. Ruether, New Woman, New Earth: Sexist Ideologies and Human Liberation (1975) (discussing the need for a new society in which love is no longer relegated to a passive domestic sphere, but is instead expressed passionately in all dimensions of life).

18. See Brueggemann, supra note 14, at 41, 46. Brueggemann points out that in order to maintain itself, the static royalist consciousness of the Solomonic era had to find a way to numb the feelings of the people and direct their energies away from prophetic concerns and lifestyles. Id. This was accomplished in several ways. First, through the development of a static cosmos theology, in which it is assumed that the constitution of present and future society has been pre-ordained, and in which human nature, forms of human interaction, and even God are assumed to be static and unchanging. Id. at 34, 41. Moreover, the presence of passionate, caring love in religion, people, and community had to be eliminated: “[P]assion as the capacity and readiness to care, to suffer, to die, and to feel is the enemy of imperial reality.” Id. at 41.

Second, there is another equally powerful tool at the disposal of royalist consciousness: individual or familial satiation. Id. “Imperial economics is designed to keep people satiated so that they do not notice. Its politics is intended to block out the cries of the denied ones. Its religion is to be an opiate so that no one discerns misery alive in the heart of God.” Id. Within this political-religious reality of Solomon’s time, “the human agenda of justice was utilized for security. The God of freedom and justice was co-opted for an eternal now. And in place of passion comes satiation.” Id. at 40-41. Thus, Brueggemann concludes that “the dominant history of that period, like the dominant history of our own time, consists in briefcases and limousines and press conferences . . . and new weaponry systems. And that is not a place where much dancing happens and where no groaning is permitted.” Id. at 41-42.
“Sometimes I sing and dance around the house in my underwear,” Tess’s friend Cyn tells her. “Doesn’t make me Madonna. Never will.” And Tess, in a rare moment of discouragement, tells herself to wise up and not take the whole thing so seriously. That is the way static royalist consciousness feels to a person at the bottom of the ladder. Our students seemed to say that such consciousness is idolatry. It is as much idolatry as it is the self-deceptive perpetuation of injustice that their immediate forebears accepted and that they will not accept. Still, the weariness or cynicism that Tess experiences does not simply materialize out of nowhere. It comes from within an organizational culture in which persons, especially working-class women, are treated as objects or commodities. They are to be used as Tess’s male superiors attempted to use her for their own advancement. In an early scene that our students did not discuss, Tess has an opportunity to improve her situation, and that of her immediate superiors, by granting sexual favors to a man who is able to help them along.

In this and other scenes in the movie, Tess is made the object of sexist jokes by nonclerical male colleagues. Tess is not taken seriously as a person who is unique and talented; rather she is told that in order to “get ahead” she will have to “put out” sexually.

* * * *

Although our students did not discuss situations of sexual harassment as blatant as those depicted in the movie, they did describe work experiences in which women were marginalized, stereotyped, or ridiculed:

Susan: The real movie is the one that’s not told here. The movie that's not made; the movie that happens after she’s in that position, the way they treat you. I was told right out: “I have no time for you to have children, because I have a business to run.” I think that you see that culture there in who [Katharine Parker] was in the movie.

Gretchen: The hardest part, I found, was to have personal relationships, not necessarily romantic relationships, but friendly relationships with the people at work.

Carla: Well, you have to walk a really fine line between not being too feminine—because you look too weak compared to the big boys—and then you have to be feminine enough because you are still a woman and you have to wear make up.

20. See JOHN KAVANAUGH, FOLLOWING CHRIST IN A CONSUMER SOCIETY: THE SPIRITUALITY OF CULTURAL RESISTANCE (1981) (discussing the impact that economic theory and practice can have in “commodifying” persons); cf. BRUEGGEMANN, supra note 14, at 26 (“The language of the empire is surely the language of managed reality, of production schedule and market. But that language will never permit or cause freedom because there is no newness in it.”).
Gretchen: The woman’s voice on the phone was never the person that I wanted to talk to; I always wanted to talk to the person she was working for . . . so I had to combat that on the other end.

Susan: In my company, I dealt with all men except one other woman who was also a manager. One time I tried to set up a meeting with her and she said well, she couldn’t do it that day, because she was going to get her period. I mean, what was I supposed to say? And these men treated her like a little girl. I tried to be more professional, and they just didn’t know what to do about it. I didn’t get any support from the men, and there were no other women in management, so what are you going to do there? Your friends at home don’t even know what you’re doing; they don’t even understand. I felt very alone. Nobody understood, because the men think you’re whining and complaining. So I left. I lasted six months.

Carla: I think many times you have to work harder as a woman to be taken seriously. You have to be a little bit more careful about the way you dress, the things that come out of your mouth, when you show emotion in an office setting. I think you have to be more careful about doing those kinds of things.

* * * *

One of several interesting aspects of the movie as a description of cultures is the fact that Tess, Cyn, and Tess’s former boyfriend, Mick, all apparently grew up in the same Irish-Italian ethnic neighborhood in northern New Jersey. While some of us thought that certain parts of the movie were unrealistic, Cindy, who grew up in an ethnic Italian family and neighborhood on the East Coast, identified with Tess:

Cindy: I identified very, very much with the movie and the way [Tess] evolves from what she was in the beginning. That reminds me a lot of what I have done with my career up to this point, in what I’ve done with my life, how I’ve evolved professionally. . . . I think the reason I identified so well with the movie . . . is that I grew up in a neighborhood very much like that, very ethnic, very Italian. There is so much of that religious thing. I wanted to do everything I could in my power to get out. I could not wait to get out. I left home when I was sixteen. I wanted to get the whole vision—of New York City, the big city—and to leave the neighborhood.

* * * *

Similarly, Susan, who grew up in an ethnic Italian family, identified with Tess’s mixed feelings toward her ethnic neighborhood and culture. On the one hand, just as Tess identified with her friends in the old neighbor-
hood, Susan laments the fact that the neighborhood and familial relationships that she grew up with are disappearing.\textsuperscript{21}

Susan: When my great-grandmother came to this country, everybody all lived together. The aunts, the uncles, they all lived within a couple of houses of one another. The Italian church was here, the Irish church here, and the Polish church here. The religion and the family thing were all one. The family and your religion were your support. But let's face it, who of us lives near their family anymore? We all live away. My brothers live on the West Coast and our family structure has broken down, and with it we have all become individuals. Now we can only relate to one another as individuals.

* * * *

Susan, however, also attributes the patriarchal attitudes that Tess experienced at the hands of her old boyfriend, Mick, to that same type of ethnic culture:

Susan: I come from an ethnic Italian family and also was in a managerial position and was the only woman in that position in the company. I think that your "family" situation can sort of alienate you. Tess didn't relate to her boyfriend [Mick] anymore. She told him she got a promotion and he never even asked her to what [position]? The biggest thing for him was what was going on with him. I think that was the culture. I mean, look who he chose [to marry, after he and Tess broke up]? He chose Doreen Agalagucci, or whatever her name was. . . . Even [Tess's] girlfriend [Cyn] wanted to keep her down. Her girlfriend was stressing that she was breaking out of the mold. They want to keep you where they're at and the minute you get there they don't understand you, so they really, I think, discount you.

* * * *

Susan, however, is not rejecting relationship or community. Instead, she appears to be looking for relationships of mutual support, rather than those of domination and subjugation.\textsuperscript{22} In the movie, Susan saw Tess's relationship with Jack [played by Harrison Ford] as suggesting the possibility of such mutual support:

Susan: I don't know what the answer is. Maybe the answer is that in the movie, the man [Jack] might have been somewhat of a support to her.

\textsuperscript{21} See Thomas L. Shaffer & Mary M. Shaffer, American Lawyers and Their Communities ch. 5-7 (1991) (relating the experiences of Italian-American lawyers).

He seemed a little supportive with the lunch box—better than the average bear—as far as that kind of stuff. He believed in her.

* * * *

Given the experiences that some of our students related, and the religious imagery suggested in the Carly Simon sound track to the movie, it seems that a deficiency in the picture was the absence of characters and themes that explicitly involve family and religion. While individual life experiences and attitudes differed, many of our students recognized the importance of their families and religious communities. The issue of family surfaced in relation to career plans and parental attitudes toward work:

Deb: When I saw this movie I thought of my parents. This movie is the epitome of what my parents would want me to do—they would love to see me in a big office. That's what they would think of as success for me and they would be thrilled if that's what I would do. My values are different from theirs. I guess it goes back to them having to work really hard all their lives just to get where they were, and our generation didn't have to work as hard. [Our generation has] always had everything. We are already set and programmed to go into the [Katharine Parker] position.

Susan: My Dad was a businessman and I guess I thought the American Dream was to make money; or for a woman it was to get into the man's world, be as successful as possible, and don't let them keep you in a box. I don't know though. Now I think, we can all see the end of law school coming and I wonder what the dream really is. Is it to get out there and fall into these stereotypes?

* * * *

For many of our students, experiences of community and family life related closely to the religious dimension of their lives. Regina, for example, had a positive experience of family, community, and religion, which had a substantial impact on her attitudes toward work and social justice.23 Her comments suggest an integrated approach to living in which she refuses to compartmentalize her life.24 It is interesting, in reference to the community Tess thinks she is leaving behind and the vague possibilities of a new

23. Apparently, the impact of religious upbringing on attitudes toward social justice is not just limited to our students. See Shaffer & Shaffer, supra note 21, at 189-90 (where Mario Cuomo discusses in his diary the impact that Catholic education had on his concern for, and actions on behalf of, those persons in society who are in need).

24. See Dana Jack & Rand Jack, Women Lawyers: Archetype and Alternatives, in Mapping the Moral Domain: A Contribution of Women’s Thinking to Psychological Theory and Education 263 (Carol Gilligan et al. eds., 1988) (discussing women lawyers who refuse to “split” themselves, and who attempt to express the virtues of care in their professional activities); see also Fejfar, supra note 17 (contrasting consciousness constituted by a “truncated self” and consciousness constituted by an “integrated self”).
community to be joined, that the religious dimension for these students is communal. The New Jerusalem, like the old one, is a community:

Regina: I think you said, Bobby, that you can't be in the business world and be religious. I don't know what you meant. For me I never thought of it that way. For me religion is a part of my life everyday. And I couldn't get through school or work without reflecting on who I am and how I am behaving. Thinking of others, not passively, but actively. Doing things for others. I think social consciousness is great and that is what we need. For me religious faith is more of a personal thing. I was brought up going to church on Sunday, but it didn't end there. In my family life, we were always doing things together. Actually, where I am from is a very community place, and that must be why I am fortunate. I think that you can't split yourself.

* * * *

Cindy and Monica also seem to express an integrated approach to religion and living:

Cindy: I think religion, whether you go to church on Sunday or whatever, has to be your way of life. I got very interested in the Jewish faith. . . . In the Jewish religion, part of their belief is that, although a lot of them are orthodox and they follow it strictly as far as going to synagogue and doing traditional Jewish things, the reality is that religion to them is not just going to synagogue once a week. It is a way of life; it's family. And that is what I am about. When I go to church now on Sunday, I do it because I want to be there and I want to share in what I want to share in. What I wish is that what a lot of people could get out of religion is that it should be a way of life. And it's not just that you do things for people, but you are really thinking about the next person.

Monica: I was brought up in a real religious background. My mother had been a nun and my father had been a brother in a religious order. Religion is such a part of everything I think, and everything I do. I stopped going to church for a long time. I didn't need it. Then I realized that you go to church for that communal support. You go to help the group.

* * * *

While Regina, Cindy, and Monica seem to have found an experience of religious identity akin to what Brueggemann describes as "alternative prophetic consciousness" within institutional religious structures, other students have not. These students, although they have rejected institutional religious practices, seem not to be rejecting religious faith or community as
such. Instead, they are searching for a more authentic community and religious experience.25

Susan: I grew up going to Catholic school. I wore the uniform every day and the whole deal. I also grew up in an Italian family. So there is that whole thing, the Catholic thing. Since getting to college, I haven’t been to church hardly at all. So I guess I have made a choice against the traditional version, and I’ve tried. I’ve searched a little bit. It’s hard to do it by yourself. So if we are asking, is there a New Jerusalem, a middle ground or type of community? I think it takes an incredible amount of energy to find it. I don’t find it here at school at all. I feel very alienated here at school. Because I feel people are in a box. Nobody is interested in anybody different, or if you speak out too much. So I don’t know where you find community. So if you go searching for community that takes a lot of energy. I don’t know. If you’ve found it, I would like to know. But I don’t know where it is. I think that the New Jerusalem is inside: It has to be some peace you come to about yourself. You can’t look at this world out here because this will drive you nuts. I don’t know; it’s nice and everything; I just don’t know where it is. I mean, I guess it is in my friendship with Setarah or Cindy; do you know what I mean? That would be the New Jerusalem for me, to feel some sort of spiritual community with other people. But I think it is a lot of work.

Sophia: I just had a comment about the Catholic religion and the hierarchy. I didn’t want it at all, which is why I left it. I couldn’t wait to get out of Catholic school after grade school; I just split. The problem was that I think the hierarchy, and the way the religion is run, to me is just a business. It is all just glitter and everything else. They have the Pope and all that stuff. My experiences were just discipline. All you had to do is sit there and fold your hands and do this and do that and sing in church. Don’t question anything, just memorize everything. It was just totally ridiculous. So then I explored other types of religion. With any type of organized religion, my problem was one extreme or the other. Either you didn’t understand, you weren’t to question things, like in the Catholic reli-

25. See Gustavo Gutierrez, We Drink from Our Own Wells: The Spiritual Journey of a People (William E. Jerman ed. & Matthew J. O’Connell trans., 1984) (discussing the relationship between the experience of authentic spiritual solitude and authentic religious community). Interestingly, nine out of 10 adults in the United States say they believe in God; nearly as many say they have never doubted God’s existence. Eight out of 10 believe in miracles. George Gallup, Jr. & Jim Castelli, 9 of 10 Share a Belief in God, WASH. POST, Nov. 28, 1987, at B6 (reporting on the results of a Times-Mirror Corp. poll, “The People, Press, and Politics”). Sixty-nine percent of adults in the United States claim membership in a religious congregation; 80% say they feel led by God in making decisions, and 40% say that God has spoken to them. Religion in America, THE GALLUP REPORT, April 1987.
When I was very small, or else it was too much of a "do-goody" type of atmosphere. Everybody was real "happy" and everybody "loved" everybody, and, you know, it was sickeningly sweet. So that didn't fit me right either. I feel being inter-related with people in the community is really a good idea. I don't think it takes that much of an effort, as Susan said. I think it's just laziness. I think everyone is just so bogged down with doing their own thing that they just don't think about it. I don't think it really takes that much of an effort.

Susan: I was home recently for a funeral, and these two priests and nuns that I know from home were there. They're living in community; and they are living with lay people in community. It was the most wonderful funeral because these people are all in a community and they got up and they all talked about this woman who was dead. They all wanted to die like her. I thought to myself, this is not reality. These people have a wonderful support system, but, God, I don't know—other than what I witnessed there, where do you find it? When you get out into the work world, especially the legal field that we're going into, I mean, I don't know where—uhhgg—it's frightening, I think.

* * * *

The discussion above seems to indicate that, for many of our students, family and religion are very important. They are not rejecting relationships and community. Rather, they are looking for an experience of community and spirituality that is integrative personally, mutually supportive relationally, and interdependent communally. They seem to be rejecting a god and religious community characterized by dominance-submission and distant hierarchical authority. 26

After having listened to the insightful discussion of our students, several thoughts come to our minds. We wonder, how many students at law schools throughout the country share similar dreams for the future? We

26. Lutheran pastor and theologian Karen Bloomquist describes religious consciousness characterized by such attitudes and such communities:

God becomes the paradigm of a distant, hierarchical authority; the legitimation of the authority that is structured into all other orders of life; an authority who calls for a submissiveness that serves the interests of a class structured society. . . . Subordinates are forbidden to get angry over their situation, but those in positions of authority are to exercise their anger as an expression of God's anger. God puts us in our place and intends for us to live in harmony with our neighbors, regardless of their material advantage over us. These kinds of understandings, whether or not they are true to what was intended, help keep in place the structures and ideology of classism.


Gadamer suggests that true authority is not based upon blind obedience, but rather upon competence and knowledge:
hope that our students are right in predicting that students in the 1990s will have a strong desire to build relationships of mutual support and respect at home, in their communities, and at work. Contrary to what one may hear around the law school or in the media, there are law students and future lawyers who are concerned with more than merely maximizing their salaries.

Finally, the discussion raises questions for those of us who are law teachers and law school administrators. Do we spend a disproportionate amount of our time in our teaching and writing describing or analyzing what is or has been, to the detriment of imagining or helping to create what might be? Do we emphasize competitive individualism and spend insufficient time helping to develop and nurture mutually supportive relationships within, and beyond, the law school community? Are we doing enough to set an active example in service to others in the larger community through pro bono, civic, charitable, or religious involvement? We hope the answers to these (as we think of them) "prophetic" questions are yes. But, in our own cases at least, we suspect that we could be doing more. If we members of the law school community are to be participants in helping our students to more effectively "Dream" and "Wake the Nation," then perhaps these questions need our attention.

Based on the Enlightenment conception of reason and freedom, the concept of authority could be viewed as diametrically opposed to reason and freedom: to be, in fact, blind obedience. . . .

But this is not the essence of authority. Admittedly, it is primarily persons that have authority; but the authority of persons is ultimately based not on the subjection and abdication of reason but on an act of acknowledgment and knowledge—the knowledge, namely, that the other is superior to oneself in judgment and insight and that for this reason his judgment takes precedence—i.e., it has priority over one's own. . . . Authority in this sense, properly understood, has nothing to do with blind obedience to commands. Indeed, authority has to do not with obedience but rather with knowledge.

GADAMER, supra note 12, at 279.


28. See THOMAS L. SHAFFER & ROBERT S. REDMOUNT, LAWYERS, LAW STUDENTS AND PEOPLE (1977) (suggesting that legal education does not do enough to develop interpersonal capabilities in students).
COMMENTS

THE FORMAL INQUIRY APPROACH: BALANCING A DEFENDANT'S RIGHT TO PROCEED PRO SE WITH A DEFENDANT'S RIGHT TO ASSISTANCE OF COUNSEL

I. INTRODUCTION

In *McDowell v. United States*, Justice White, joined by Justice Brennan, dissented from the denial of a writ of certiorari to review whether judges must conduct formal inquiries with defendants before permitting them to exercise their right of self-representation. The dissent identified a conflict among the federal appellate courts in their efforts to arrive at a proper balance between the constitutional right of self-representation and the need to ensure a knowing and intelligent waiver of counsel before defendants are permitted to proceed pro se.2

This Comment will review the Supreme Court's early decisions with respect to a defendant's constitutional right to have the assistance of counsel. As will be seen, the standard that emerged from these early cases was highly protective of a defendant's right to counsel even in the face of a purported waiver.

The impact of *Faretta v. California*3 will then be discussed. In *Faretta*, the Supreme Court, for the first time, recognized that defendants have a constitutional right to represent themselves. The effect of the *Faretta* decision has been to create a zero-sum game between two constitutional rights. The result often leaves lower court judges in the untenable position of having their decisions appealed no matter how they rule on a defendant's request to proceed pro se. If a judge permits a defendant to proceed pro se, the defendant may argue on appeal that the constitutional right to counsel

2. *Id.* (White, J., dissenting). Justice White distinguished between the "record as a whole" approach, in which no specific inquiries or special hearings must be conducted to ensure a knowing and intelligent waiver of counsel before a defendant is permitted to proceed pro se, and a second approach, in which a trial judge must conduct a special hearing to ensure a defendant understands the dangers and disadvantages of proceeding pro se. The opinion mentions four circuits that follow the "record as a whole" approach (First, Second, Seventh, and Ninth Circuits), and four circuits that require a special hearing before permitting a defendant to proceed pro se (Third, Fifth, Eleventh, and D.C. Circuits). *Id.* at 980-81.
was compromised because the defendant did not make a knowing and intel-
ligent waiver of counsel. Conversely, if a judge denies a defendant’s request
to proceed pro se, the judge’s decision may be attacked for failing to recog-
nize the defendant’s constitutional right of self-representation.

There has been a split in authority among the appellate courts since
Faretta on the question of how to recognize a defendant’s constitutional
right to proceed pro se without violating his constitutional right to counsel.
The two approaches to this problem that have emerged will be examined.
Finally, an argument favoring the requirement of a formal inquiry in which
defendants are explicitly warned of the dangers and disadvantages of pro-
ceeding pro se will be advanced.

II. EARLY CASE LAW

The constitutional right to counsel was first recognized in Powell v. Ala-
bama.4 In Powell, seven black youths were charged with raping two white
girls.5 An indictment was returned, and the defendants were arraigned six
days after the alleged crime took place.6 At their arraignment, the defend-
ants pleaded not guilty.7 Six days later, a mere twelve days from the date of
the alleged crime, the trials8 began.9 Each of the three trials was completed
within a single day.10

The trial judge appointed all the members of the Alabama Bar as coun-
sel for the defendants’ arraignment.11 He anticipated that the members of
the Bar would continue to help the defendants if no counsel appeared.12 On
the morning of the first trial, however, only one Alabama attorney agreed to
assist in the youths’ trials, and this was after the judge appointed a visiting
attorney from Tennessee to represent the youths.13 Thus, as the Powell
Court noted, the defendants were put in peril of their lives within a few
moments after an identifiable attorney was charged with any degree of re-
sponsibility for representing them.14

---

4. 287 U.S. 45 (1932).
5. Id. at 49.
6. Id.
7. Id.
8. Id. at 53. There was a severance upon the request of the state, and the defendants were
tried in three separate groups.
9. Id.
10. Id. at 50.
11. Id. at 49.
12. Id.
13. Id. at 55-56.
14. Id. at 58.
Out of this set of facts emerged the Supreme Court's declaration that criminal defendants have a constitutional right to the assistance of counsel. The Court's decision centered on the right to be heard in a criminal trial.\textsuperscript{15} "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."\textsuperscript{16}

Five years later, in Johnson v. Zerbst,\textsuperscript{17} the Court reaffirmed its decision in Powell and reminded trial courts of their duty to protect the right to counsel in the face of a purported waiver.\textsuperscript{18} In Zerbst, two enlisted men in the United States Marine Corps were charged with possessing and distributing counterfeit money.\textsuperscript{19} Although counsel represented them at their preliminary hearings, the defendants were unable to employ counsel for their trial.\textsuperscript{20} The defendants informed the trial judge that they did not have an attorney, but were ready for trial.\textsuperscript{21} The defendants made no specific request to the trial judge to appoint counsel, although there was evidence to suggest that such a request had been made to the District Attorney, who replied that no right to counsel existed unless a defendant was charged with

\textsuperscript{15} Id. at 68. The Court cited Holden v. Hardy, 169 U.S. 366, 389 (1898), when it stated that "the necessity of due notice and an opportunity of being heard is described as among the 'immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.'" Powell, 287 U.S. at 68.

\textsuperscript{16} Id. at 68-69. Continuing its reasoning for finding a constitutional right to counsel, the Court stated:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

\textit{Id.} at 69.

\textsuperscript{17} 304 U.S. 458 (1938).

\textsuperscript{18} Id. at 465. According to the Court:

This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.

\textit{Id.}

\textsuperscript{19} Id. at 459-60.

\textsuperscript{20} Id. at 460.

\textsuperscript{21} Id.
a capital crime.\textsuperscript{22} The defendants represented themselves during the trial and were convicted as charged.\textsuperscript{23}

The waiver in \textit{Zerbst} was implied and did not involve a specific request by the defendants to waive their right to counsel.\textsuperscript{24} The Court was concerned that a trial judge would rely on a defendant's implied waiver of counsel as a basis for permitting the trial to go forward without the assistance of counsel.\textsuperscript{25} A defendant's constitutional right to be represented by counsel "involves . . . the protection of a trial court," stated the Court, and an implied waiver of counsel is not in keeping with this protective duty.\textsuperscript{26} Accordingly, the Court refused to find a valid waiver of counsel on the record before it and reversed and remanded the Fifth Circuit's decision in order to determine whether the defendants competently and intelligently waived their right to counsel.\textsuperscript{27}

In \textit{Adams v. United States ex rel. McCann},\textsuperscript{28} the Court was squarely presented with the question of whether a defendant could waive his right to counsel. The case actually involved the waiver of a jury trial,\textsuperscript{29} but because

\begin{itemize}
\item \textsuperscript{22} Id. at 460-61.
\item \textsuperscript{23} Id. at 460. The ineptness of their defense without the assistance of counsel is demonstrated by the testimony of one of the defendants at a subsequent hearing discussing his effort to contradict testimony presented by the prosecutor:
\begin{quote}
I objected to one witness' testimony. I didn't ask him any questions, I only objected to his whole testimony. After the prosecuting attorney was finished with the witness, he said, 'Your witness,' and I got up and objected to the testimony on the grounds that it was all false, and the Trial Judge said any objection I had I would have to bring proof or disproof.
\end{quote}
\textit{Id.} at 461.
\item \textsuperscript{24} See id. at 460.
\item \textsuperscript{25} See id. at 465.
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Id. at 469. In addition to the protecting duty of the courts, the \textit{Zerbst} opinion mentioned two additional considerations that mitigated against the finding of a valid waiver in this case. One was that courts should indulge every reasonable presumption against the waiver of fundamental constitutional rights. \textit{Id.} at 464. The other was that "[t]he determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." \textit{Id.}
\item The second consideration has been used as authority for finding a valid waiver of counsel in the absence of an inquiry or a hearing by the trial judge in which a defendant is made aware of the dangers and disadvantages of proceeding pro se. See, e.g., United States v. Campbell, 874 F.2d 838, 846 (1st Cir. 1989); Fitzpatrick v. Wainwright, 800 F.2d 1057, 1065 (11th Cir. 1986). While the language may be used to support the notion that factors other than an inquiry or a hearing will support a valid waiver of counsel, the holding of the case should not be overlooked. In \textit{Zerbst}, the background, experience, and conduct of the accused, as displayed in the record, was not enough to support a valid waiver of counsel. \textit{Zerbst}, 304 U.S. at 469.
\item \textsuperscript{28} 317 U.S. 269 (1942).
\item \textsuperscript{29} Id. at 272.
\end{itemize}
the defendant waived his right to a jury while proceeding pro se, the validity of the defendant's waiver of counsel was also directly implicated.  

The defendant in *Adams* was indicted on six counts of mail fraud. He insisted on conducting his own defense and was permitted to do so after informing the trial judge "that he had studied law, and was sufficiently familiar therewith adequately to defend himself, and was more familiar with the complicated facts of his case than any attorney could ever be." Thus, the defendant's waiver of a jury trial without the assistance of counsel was upheld.

*Adams* is significant for two reasons. First, underlying the decision was the belief that the constitutional right to counsel was "jealously guarded" by the Court's previous holdings in cases such as *Zerbst*. Therefore, while some of the language in *Adams*, when read in isolation, appears to show a ready willingness by the Court to accept waivers of constitutional rights such as the right to a jury trial and the right to counsel, such a conclusion misplaces the importance that the Court had placed on what it perceived were existing constitutional safeguards that would prevent waivers in most instances.

The second concern, as expressed by Justice Douglas in his dissent, is that without a reliable, objective standard for ensuring a defendant's intelligent and competent waiver of a jury trial without the assistance of counsel, appellate courts would be forced to speculate, based on information contained in the record, whether a defendant had a full understanding of the consequences of such a decision. Speculation over whether defendants

---

30. See id. at 275.
31. Id. at 270.
32. Id. The basis for the defendant's remarks, at least on the issue of familiarity with the case, stemmed from the fact that he had previously brought suit against the New York Stock Exchange and represented himself during both the trial and on appeal to the court of appeals and the Supreme Court. Id. at 270 n.1.
33. Id. at 279.
34. Id. at 280-81.
35. Id. at 280.
36. For example, the Court stated, "[T]o deny [defendants] in the exercise of [their] free choice the right to dispense with some [constitutional] safeguards . . . is to imprison [defendants] in [their] privileges and call it the Constitution." Id.
37. See id.
38. Id. at 283-84 (Douglas, J., dissenting). "Furthermore, the right to trial by jury, like the right to have the assistance of counsel, is 'too fundamental and absolute to allow courts to indulge
truly understand the consequences of waiving their right to counsel, particularly in the absence of a formal inquiry by the trial judge, continues to be a source of concern in more recent decisions.\(^3\)

One final early decision that has shaped subsequent court opinions on the question of whether defendants have made a valid waiver of counsel is *Von Moltke v. Gillies*.\(^4\) In *Von Moltke*, the defendant was charged with violating the Espionage Act of 1917.\(^4\) The defendant was imprisoned for nearly one and a half months before she finally agreed to plead guilty to the charges brought against her.\(^4\) While the defendant was imprisoned she was unable to retain counsel and, thus, counsel was not present when she appeared before a judge to enter her guilty plea.\(^4\)

When the trial judge noticed that the defendant was not represented by counsel, he initially refused to accept the guilty plea.\(^4\) However, after approximately five minutes of routine questioning, the trial judge permitted the defendant to sign a written waiver of counsel and accepted the plea.\(^4\)

In response to the haphazard manner in which this waiver was accepted, Justice Black set forth a standard that requires a trial judge to engage in a "penetrating and comprehensive examination" of defendants who attempt to waive their right to counsel.\(^4\) Justice Black's reasoning\(^4\) is perhaps more important than the standard itself, which gained the support of

---

\(^3\) See infra note 127.

\(^4\) 332 U.S. 708 (1948) (plurality opinion).

\(^4\) Id. at 709.

\(^4\) Id. at 712-15.

\(^4\) Id. at 716-18.

\(^4\) Id. at 717.

\(^4\) Id. at 724. In Justice Black's words:

To discharge the duty [of protecting the right to counsel] properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.

*Id.* at 723-24.

\(^4\) According to Justice Black:

This case graphically illustrates that a mere routine inquiry—the asking of several standard questions followed by the signing of a standard written waiver of counsel—may leave
only a plurality of the Court and, thus, is not a constitutional standard. While the Von Moltke standard has not evolved into a constitutional standard, it is nevertheless often cited by appellate courts when reviewing whether a defendant made a knowing and intelligent waiver of counsel before exercising the right to proceed pro se.

III. FARETTA v. CALIFORNIA

A defendant's privilege to proceed pro se was accorded the status of a constitutional right in Faretta v. California. The effect has been to place lower courts in a difficult position by requiring them to balance a defendant's constitutional right to the assistance of counsel with a defendant's constitutional right of self-representation. Prior to this decision, although a majority of states recognized the right to proceed pro se, it was plausible to argue that granting a defendant's request to proceed pro se was premised not on a constitutional right but on a statutorily created privilege.

This distinction is important because, if self-representation is considered a privilege and not a constitutional right, courts have discretion to decide a judge entirely unaware of the facts essential to an informed decision that an accused has executed a valid waiver of his right to counsel.

Id. at 724.


50. 422 U.S. 806 (1975).

51. See Strozier v. Newsome, 871 F.2d 995 (11th Cir. 1989). The Eleventh Circuit stated:

Since the Supreme Court announced its decision in Faretta there has been tension between the right to counsel and the right to self-representation. The tension exists because the rights are reciprocal: to assert one necessitates waiver of the other. The problem is most difficult for the trial judge because if he allows a defendant his right to proceed pro se, he runs the risk that he may have denied the defendant his right to counsel. Similarly, if counsel is appointed to ensure that the right to counsel is not violated, the right to proceed pro se may be violated.

Id. at 997 (citation omitted).

52. Faretta, 422 U.S. at 813 & n.10.

53. Justice Burger identified two sources of authority for his belief that prior to the Court's decision in Faretta the right of a defendant to proceed pro se was not a constitutional right. First, the Court's decision in Price v. Johnston, 334 U.S. 266 (1948), had distinguished between the "constitutional prerogative" to be present at trial and the "recognized privilege" of self-representation. Faretta, 422 U.S. at 842 (Burger, C.J., dissenting). Second, Section 35 of the Judiciary Act of 1789 had explicitly provided a statutory right to self-representation in federal criminal trials, while the text of the Sixth Amendment, which was proposed the day after the Judiciary Act was signed, provided only for the right to counsel. Id. at 844 (Burger, C.J., dissenting).
whether a particular defendant’s request to proceed pro se will be granted.\textsuperscript{54} Thus, if a trial judge was not convinced that a defendant was capable of conducting his own defense, the judge would not be obliged to grant the defendant’s request to proceed pro se.\textsuperscript{55} However, by holding that defendants have a constitutional right to self-representation, the \textit{Faretta} Court took this discretion away from trial judges and gave defendants an absolute right to represent themselves, irrespective of any concern for the fairness of the trial.\textsuperscript{56}

In \textit{Faretta}, the defendant, charged with grand theft, asked to defend himself because he was concerned about the ability of the public defender’s office to adequately represent him.\textsuperscript{57} The trial judge first stated that he believed that the defendant was “making a mistake.”\textsuperscript{58} Despite his reservations, the judge issued a preliminary ruling allowing the defendant to waive his right to counsel.\textsuperscript{59} However, in a subsequent hearing, the trial judge reversed his previous ruling because he was not convinced that the defendant made an intelligent and knowing waiver of counsel.\textsuperscript{60} Moreover, the trial judge ruled that the defendant did not have a constitutional right to conduct his own defense.\textsuperscript{61} This latter ruling formed the basis for the Court’s holding that the Sixth Amendment “necessarily implies the right of self-representation.”\textsuperscript{62}

Since \textit{Faretta}, lower courts have wrestled with the issue of how to ensure that defendants make a knowing and intelligent waiver of counsel before exercising their absolute right to proceed pro se. The inconsistency in the lower courts over what standard to apply is due to the lack of guidance in \textit{Faretta}.\textsuperscript{63} Furthermore, the bases upon which the \textit{Faretta} Court found a knowing and intelligent waiver of counsel are inconclusive on the

\begin{itemize}
  \item \textsuperscript{54} See \textit{Faretta}, 422 U.S. at 842 (Burger, C.J., dissenting) (citing \textit{Price}, 334 U.S. at 285-86).
  \item \textsuperscript{55} See id. at 846-49 (Blackmun, J., dissenting).
  \item \textsuperscript{56} See id. at 845-46 (Burger, C.J., dissenting).
  \item \textsuperscript{57} Id. at 807.
  \item \textsuperscript{58} Id. at 807-08.
  \item \textsuperscript{59} Id.
  \item \textsuperscript{60} Id. at 808-10.
  \item \textsuperscript{61} Id. at 810 & n.4.
  \item \textsuperscript{62} Id. at 832.
  \item \textsuperscript{63} The \textit{Faretta} Court’s only reference to a standard has itself proven to be contradictory. The \textit{Faretta} Court stated that “in order competently and intelligently to choose self-representation, [a defendant] should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open.’” Id. at 835 (quoting \textit{Adams v. United States ex rel. McCann}, 317 U.S. 269, 279 (1942)). A close examination of this standard reveals two elements: (1) a defendant should be made aware of the dangers and disadvantages of proceeding pro se (2) so that the record will establish that the defendant comprehends the ramifications of waiver of counsel. The inconsistency in the lower courts stems from the question of whether a defendant must still be made aware of the dangers
\end{itemize}
question of what actions a trial judge must take when a defendant requests to proceed pro se.64

A final consideration, noted in Justice Blackmun’s dissent in Faretta, is the method by which lower courts properly balance a defendant’s constitutional right to counsel with a defendant’s constitutional right to proceed pro se.65 On the one hand is Justice Stewart’s explanation of the personal interest of a defendant in proceeding pro se:

[Because a defendant] will bear the personal consequences of a conviction . . . [i]t is the defendant . . . who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of ‘that respect for the individual which is the lifeblood of the law.’66

On the other hand, Chief Justice Burger explains the governmental interest in preserving the right to counsel:

[T]he quality of [a defendant’s] representation at trial is [not] a matter with which only the accused is legitimately concerned. . . . [T]he integrity of and public confidence in the system are undermined, when an easy conviction is obtained due to the defendant’s ill-advised decision to waive counsel. . . . True freedom of choice and society’s interest in seeing that justice is achieved can be vindicated only if the trial court retains discretion to reject any attempted waiver of counsel . . . .67

and disadvantages of proceeding pro se if the record indicates that, irrespective of any such warning, the defendant understands the consequences of waiving the right to counsel.

64. The Faretta Court indicated that the record affirmatively showed that the defendant understood the consequences of waiving his right to counsel. Id. at 835. However, part of that record included the warning given to the defendant by the trial judge. Id. at 808. Two possible interpretations are therefore possible. One is that the warning given by the trial judge was ancillary to the defendant’s understanding of the consequences of waiving counsel as shown by the record and thus was not required. The other interpretation is that the warning was an integral part of the record because it showed that the defendant had been explicitly made aware of the dangers and disadvantages of proceeding pro se and, thus in the absence of such a warning, the record standing alone would have been insufficient. A further question arises if the latter interpretation is followed. That question concerns how extensive the colloquy between the trial judge and a defendant must be before an appellate court will consider the warning given by the trial judge to be sufficient.

65. Id. at 852 (Blackmun, J., dissenting). “Since the right to [the] assistance of counsel and the right to self-representation are mutually exclusive, how is the waiver of each right to be measured?” Id. (Blackmun, J., dissenting).

66. Id. at 834 (citing Illinois v. Allen, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring)).

67. Id. at 839-40 (Burger, C.J., dissenting) (citations omitted).
IV. Split in Authority After Faretta v. California

The impact of Faretta on subsequent appellate decisions has produced two approaches for determining whether a defendant knowingly and intelligently waived his right to counsel before exercising his right of self representation. The first, the "record as a whole" approach, does not require the trial judge to conduct a hearing or an inquiry to ensure the validity of a waiver. Rather, if it can be discerned from the record developed in a case that a defendant was aware of the consequences of waiving his right to counsel, the trial judge's decision to allow the defendant to proceed pro se will not be reversed. Seven circuits follow this approach.

Johnson v. Zerbst supports the record as a whole approach. In Zerbst, the Court identified how a trial judge should determine whether a defendant made a valid waiver of counsel: "The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." In other words, no formal inquiry in which a defendant is warned of the dangers and disadvantages of proceeding pro se is needed if the record sufficiently establishes that the defendant was aware of the consequences of his decision.

The second approach places an affirmative duty on the trial judge to conduct an inquiry with a defendant in which the dangers and disadvantages of proceeding pro se are discussed. In the absence of such an inquiry, a decision by the trial judge to permit a defendant to proceed pro se will be remanded to the district court. Five circuits follow this approach.

---

68. See supra text accompanying note 2; see also infra notes 71, 76.
70. Fitzpatrick v. Wainwright, 800 F.2d 1057, 1065 (11th Cir. 1986).
71. See United States v. Maldonado-Rivera, 922 F.2d 934, 977 (2d Cir. 1990), cert. denied, 111 S. Ct. 2811 (1991); United States v. Bell, 901 F.2d 574, 577 (7th Cir. 1990); United States v. Campbell, 874 F.2d 838, 845 (1st Cir. 1989); Strozier v. Newsome, 871 F.2d 995, 997 (11th Cir. 1989); Gallop, 838 F.2d at 110; Wiggins v. Procunier, 753 F.2d 1318, 1320 (5th Cir. 1985); United States v. Pilla, 550 F.2d 1085, 1093 (8th Cir.), cert. denied, 432 U.S. 907 (1977).
72. 304 U.S. 458 (1938).
73. Id. at 464; see also supra text accompanying note 27.
74. United States v. Padilla, 819 F.2d 952, 959 (10th Cir. 1987).
The formal inquiry approach finds support in *Von Moltke v. Gillies.* As previously discussed, Justice Black believed that the only way a judge could determine whether a defendant knowingly and intelligently waived the right to counsel was by conducting a "penetrating and comprehensive examination" of the defendant.

It is important to recognize at this juncture that the formal inquiry approach does not necessarily require a more rigorous standard to evaluate whether a defendant makes a knowing and intelligent waiver of counsel. At first glance, this might appear to be the case, since circuits that follow the formal inquiry approach require judges to explicitly warn defendants of the dangers and disadvantages of proceeding pro se. However, in the D.C. Circuit, which follows the formal inquiry approach, judges are merely required to engage defendants in a "short discussion" of the dangers and disadvantages of proceeding pro se. By contrast, the Seventh and Eleventh Circuits, two circuits that follow the record as a whole approach, have instructed judges to conduct a formal inquiry whenever a defendant requests to proceed pro se to ensure that defendants are "fully informed" of the consequences of waiving their right to counsel.

The formal inquiry approach provides a framework in which defendants will always be told of the dangers and disadvantages of proceeding pro se because some form of inquiry between the trial judge and a defendant is required. However, the crux of a valid waiver of counsel is not what is said to a defendant, but whether a defendant understands what he is giving up by waiving his right to counsel.

---

77. 332 U.S. 708 (1948).
78. Id. at 724; see also supra note 46 and accompanying text.
79. See supra notes 74-76.
81. See, e.g., United States v. Bell, 901 F.2d 574 (7th Cir. 1990). In Bell, the appellate court reaffirmed its "strong preference" that trial courts, as a matter of course, conduct a formal inquiry in which the defendant is fully informed of the risks of proceeding pro se and is explicitly advised against self-representation. Id. at 576-77. The court even went so far as to point trial judges to 1 BENCH BOOK FOR UNITED STATES DISTRICT JUDGES § 1.02-2 (3d ed. 1986) as an appropriate source for guidelines to follow during an inquiry with a defendant who makes a request to proceed pro se. Id. at 577. The position taken by the Seventh Circuit has, if anything, become more pronounced. See United States v. Belanger, 936 F.2d 916, 918 (7th Cir. 1991) ("[T]he trial court must 'conduct a formal inquiry' in which it asks the necessary questions and imparts the necessary information.") (quoting United States v. Moya-Gomez, 860 F.2d 706, 733 (7th Cir. 1988)).
82. See supra notes 74-76 and accompanying text.
Both the record as a whole approach and the formal inquiry approach have emerged as means by which to ascertain whether defendants were aware of the consequences of waiving their right to counsel when they exercised their right of self-representation. A defendant’s background, experience, and conduct are clearly relevant in determining whether the defendant was aware of the consequences of a waiver. Similarly, a formal inquiry conducted by a trial judge in which a defendant is warned of the dangers and disadvantages of proceeding pro se establishes that the defendant was made aware of the consequences of proceeding without counsel. The critical question is whether a hearing or an inquiry should be required whenever a defendant requests to proceed pro se or whether such a formal inquiry should be left to the discretion of the trial judge on a case-by-case basis.

The Supreme Court had an opportunity to answer this question in *Patterson v. Illinois.* However, *Patterson* further confused the issue and left the appellate courts without additional guidance.

In *Patterson,* a member of the Vice Lords street gang was indicted for the murder of a rival gang member. The accused, after learning of the indictment against himself and two other members of the Vice Lords, gave a lengthy statement to police officers, describing in detail the involvement of himself and other gang members in the murder. The accused gave a similar statement a second time to the Assistant State’s Attorney. The defendant was advised of his right to have the assistance of counsel, and he initialed each of the warnings contained in a *Miranda* waiver form before giving his statements to authorities.

The question before the Supreme Court was whether the accused made a knowing and intelligent waiver of counsel at the time of his postindictment confessions. The Court answered in the affirmative and applied a “sliding scale” method of analysis.

---

84. *Id.* at 287-88.
85. *Id.* at 288. The statement was given at least in part because the accused believed that the principal actor had not been indicted. *Id.* Prior to this statement, the accused was given a *Miranda* waiver form that was read aloud to him and subsequently initialed by him. *Id.* One of the warnings contained in the *Miranda* waiver form was that the defendant had the right to consult with an attorney. *Id.* at 288 & n.1.
86. *Id.* at 288.
87. *Id.* at 288-89.
88. *Id.; see also supra* text accompanying note 85.
89. *Id.* at 289.
90. *Id.* at 298. At one end of the scale, no warning need be given at a postindictment photographic display identification. *Id.* At the other end of the scale, the “most rigorous” means must be employed to ensure that a defendant is aware of the dangers and disadvantages of proceeding
Although the Court appears to recognize a requirement for some form of inquiry between the trial judge and a defendant before permitting the defendant to proceed pro se at trial, this interpretation has not emerged. For the most part, the limited impact of *Patterson* on subsequent lower court decisions is explained by the fact that the Court cited *Faretta* as authority for what procedures courts must adhere to before permitting defendants to exercise their right of self-representation. However, *Faretta* does not provide any clear indication of whether a formal inquiry is required when defendants seek to waive their right to counsel. Under one interpretation of *Faretta*, a formal inquiry is not required, but merely forms a part of the record from which an appellate court can evaluate whether a defendant was aware of the dangers and disadvantages of proceeding pro se. Under a second interpretation of *Faretta*, a formal inquiry is required since the waiver of counsel that took place in *Faretta* came only after the judge warned the defendant against proceeding pro se.

Thus, those circuits that follow the record as a whole approach are unaffected by the *Patterson* decision since they find support under one of the possible interpretations of the *Faretta* waiver standard. Likewise, those circuits that follow the formal inquiry approach are also unaffected by the *Patterson* decision since they too find support in *Faretta*.

For these reasons, any reliance on *Patterson* as authority to support the requirement of a formal inquiry is misplaced. *Patterson* does not address the proper application of the *Faretta* waiver of counsel standard. *Patterson* states only that it should be applied.

V. AN ARGUMENT FAVORING THE ADOPTION OF THE FORMAL INQUIRY APPROACH

The formal inquiry approach has the advantage of ensuring that defendants are explicitly told the consequences of waiving their right to counsel pro se at trial. *Id.* Because the waiver of counsel in this case was near the lower end of the scale (postindictment stage), the use of the *Miranda* warnings as a means of making the accused aware of the dangers and disadvantages of self-representation was sufficient. *Id.* at 299.

91. *Id.* at 298 ("[R]ecognizing the enormous importance and role that an attorney plays at a criminal trial, we have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial.").

92. *Id.*

93. See supra notes 63-64 and accompanying text.

94. See supra note 64 and accompanying text.

95. See supra note 64 and accompanying text.

96. See *Faretta* v. California, 422 U.S. 806, 835 (1975).

97. See *id.*
before they are permitted to exercise their right to proceed pro se. While there is no guarantee that a defendant's decision will be any more knowing and intelligent simply because he is explicitly made aware of the benefits of counsel and the disadvantage of proceeding pro se, the formal inquiry approach nevertheless contributes to what the true objective should be when a defendant seeks to waive his right to counsel: Did the trial court take all reasonable steps to ensure that a defendant understood what he was giving up when he decided to proceed pro se?

In some cases, the requirement of a formal inquiry will amount to nothing more than a formality, especially when a defendant has experience with the court system and already understands what he is giving up by waiving his right to counsel. In such instances, one could argue that requiring a formal inquiry amounts to a waste of judicial resources.

This argument is unpersuasive for two reasons. First, a defendant's Sixth Amendment right to have the assistance of counsel is one of the most important rights that criminal defendants retain. Though Faretta gives criminal defendants a right to represent themselves, courts should continue to abide by the notion, first set forth in Zerbst, that they have a duty to protect a defendant's right to counsel, even when the defendant seeks to waive that right. Trial judges may no longer have discretion to decide whether a defendant should be permitted to proceed pro se, but they certainly should attempt to convey to defendants the reasons a waiver of counsel may be detrimental to their case. If a defendant persists in his request to proceed pro se even after the trial judge's warnings against such a decision, then the defendant's decision must be respected. However, by requiring judges to conduct a formal inquiry before defendants are permitted to exercise their right of self-representation, courts will have taken all reasonable steps to ensure that defendants have been made aware of and understand the consequences of their decision.

98. See supra notes 74-76 and accompanying text.
99. See discussion supra part IV.
100. See, e.g., United States v. Maldonado-Rivera, 922 F.2d 934, 977 (2d Cir. 1990), cert. denied, 111 S. Ct. 2811 (1991) (The defendant was an attorney who was admitted to practice before the Supreme Court of Puerto Rico and had represented numerous defendants in court.); United States v. Campbell, 874 F.2d 838, 846 (1st Cir. 1989) (The defendant was a member of the Maine Bar and had tried numerous criminal cases in both state and federal court.).
101. See discussion supra part II.
102. Johnson v. Zerbst, 304 U.S. 458, 465 (1938); see also supra note 26 and accompanying text.
103. See discussion supra part III.
104. See discussion supra part III.
A second reason for rejecting the argument that a formal inquiry wastes judicial resources is that, in many cases, it may actually conserve judicial resources. When defendants have been explicitly warned against proceeding pro se, the merits of an appeal based on a defendant's failure to make a knowing and intelligent waiver of counsel diminish. Therefore, the number of appeals raising the issue of an invalid waiver of counsel should decline. When the issue of an invalid waiver is raised on appeal, the existence on the record of an explicit warning by the trial judge about the dangers and disadvantages of proceeding pro se should reduce the amount of time necessary to determine whether a defendant made a knowing and intelligent waiver of counsel. For these reasons, a small investment of judicial resources at the front end of a case should result in hefty returns when judicial resources are conserved during the appellate process.

It should be noted that appeals have not stopped in those circuits that presently follow the formal inquiry approach. However, the basis for those appeals is the adequacy of the hearing itself, not whether a hearing took place. For this reason, the Supreme Court could effectively stop all appeals on the issue of a knowing and intelligent waiver of counsel by adopting a standardized set of inquiries that judges are required to perform whenever defendants request to proceed pro se. The risk of such an approach is that defendants may be afforded less protection of their right to counsel than the protection afforded under the record as a whole approach unless the constitutional standard adopted mandates an extremely thorough and comprehensive discussion of the advantages of counsel and the disadvantages of proceeding pro se. The Bench Book for United States District Judges is a source currently relied upon in three circuits and provides guidelines from which the Supreme Court can ideally formulate a constitutional standard for finding a valid waiver of counsel that will satisfy, if not exceed, the "penetrating and comprehensive examination" of defendants advocated by Justice Black in Von Moltke.

The tradeoff to adopting a standardized set of inquiries as the constitutional standard is that a defendant's background, experience, and conduct

105. See supra note 76.
106. See supra note 76.
107. See supra notes 48, 80-81.
108. The Sixth, Seventh, and Eleventh Circuits have suggested that trial judges follow the guidelines set forth in 1 BENCH BOOK FOR UNITED STATES DISTRICT JUDGES, supra note 81, when conducting a hearing or an inquiry in response to a defendant's request to proceed pro se. See Strozier v. Newsome, 926 F.2d 1100, 1109 (11th Cir. 1991); United States v. Bell, 901 F.2d 574, 577 (7th Cir. 1990); United States v. McDowell, 814 F.2d 245, 250-51 (6th Cir. 1987).
109. See supra note 46 and accompanying text.
will no longer be taken into consideration when a defendant waives his right to counsel. However, the failure to consider these factors after a defendant has been explicitly warned against proceeding pro se is no different than relying on a defendant's statements after the defendant has been advised of his *Miranda* rights.\(^{110}\)

Furthermore, after *Faretta*, judges no longer have discretion to deny what has become a defendant's absolute right to proceed pro se.\(^{111}\) Thus, a defendant's background, experience, and conduct may suggest a lack of understanding about the consequences of waiving counsel, but the defendant must, nevertheless, be permitted to proceed pro se.\(^{112}\) As a result, these factors should no longer play a role in determining whether defendants make a knowing and intelligent waiver of counsel. Instead, as long as defendants are made explicitly aware of the consequences of their decision to proceed pro se through a standardized set of inquiries set forth by the Supreme Court, their waiver of counsel should be deemed valid. Such an approach is the only way that the right of defendants to represent themselves can be respected without holding the door open to continued appeals on the issue of a knowing and intelligent waiver of counsel.

The formal inquiry approach also advances two additional, important governmental interests. First, without a requirement that trial judges conduct a formal inquiry before allowing defendants to proceed pro se, the responsibilities of prosecutors may begin to take on a judicial role. For example, in *United States v. Moya-Gomez*,\(^{113}\) the Seventh Circuit Court of Appeals found unsatisfactory a pretrial hearing in which the trial judge offered to appoint a lawyer to represent the defendant, but failed to explain the disadvantages of self-representation.\(^{114}\)

However, the appellate court considered a formal inquiry conducted by two Assistant United States Attorneys, who were prosecuting the case, to weigh in favor of finding a valid waiver of counsel.\(^{115}\) The appellate court was quick to point out that, despite its consideration of the colloquy be-

---

111. *See* discussion *supra* part III.
112. *See* discussion *supra* part III.
114. *Id.* at 733-34. The defendant was involved in an extensive cocaine network centered in Milwaukee, Wisconsin. *Id.* at 714. He was convicted on one count of conspiracy to possess cocaine with intent to distribute, six counts of possession of cocaine with intent to distribute, and one count of conducting a continuing criminal enterprise. *Id.* at 716. On appeal, the defendant asserted six reasons why he was entitled to a new trial; one was that he did not make a knowing and intelligent waiver of counsel before the district court permitted him to proceed pro se. *Id.*
115. *Id.* at 735. During this inquiry, the defendant was warned of the dangers and disadvantages of self-representation by two Assistant United States Attorneys. *Id.* at 734-35.
tween the prosecuting attorneys and the defendant, it was inappropriate for the district court to have delegated its duty to ensure a knowing and intelligent waiver of counsel to the prosecuting attorneys.\textsuperscript{116}

Similarly, in \textit{Fitzpatrick v. Wainwright},\textsuperscript{117} the prosecutor was directly involved in questioning the defendant on whether he was waiving his right to counsel.\textsuperscript{118} The avowed purpose behind the prosecutor's questions was to ensure that the trial judge's decision to allow the defendant to proceed pro se would not be overturned on appeal.\textsuperscript{119} On appeal, the defendant raised the issue of an invalid waiver of counsel.\textsuperscript{120} The Eleventh Circuit Court of Appeals upheld the validity of the defendant's waiver of counsel after examining the colloquy that took place between the defendant, the prosecuting attorney, and the trial judge.\textsuperscript{121} Unlike the Seventh Circuit Court of Appeals, which considered a colloquy between the prosecuting attorneys and the defendant to be inappropriate, the Eleventh Circuit Court of Appeals expressed absolutely no concern over the prosecutor's involvement during the pretrial hearing.\textsuperscript{122}

The use of prosecutors to convey information to, or elicit information from, defendants is hazardous because prosecutors serve as advocates for

\begin{itemize}
  \item \textsuperscript{116} \textit{Id.} at 735. The \textit{Moya-Gomez} court stated that "'[i]t is the solemn duty of a federal judge ... to make a thorough inquiry.'" \textit{Id.} (quoting \textit{Von Moltke v. Gillies}, 332 U.S. 708, 722 (1948)). The court also cited language that places on the trial judge the responsibility for determining whether there has been an intelligent and competent waiver of counsel. \textit{Id.} (citing \textit{Johnson v. Zerbst}, 304 U.S. 458, 465 (1938)).
  \item \textsuperscript{117} \textit{Id.} at 735. The \textit{Moya-Gomez} court was the impact that such inquiries would have on the adversarial process. In the court's words, "this duty should not be discharged by enlisting the defendant's adversary to conduct the waiver inquiry." \textit{Id.} at 735. The court again cited \textit{Von Moltke}, 332 U.S. at 725, when it concluded that "'[t]he Constitution does not contemplate that prisoners shall be dependent upon government agents for legal counsel and aid, however conscientious and able those agents may be.'" \textit{Moya-Gomez}, 860 F.2d at 735.
  \item \textsuperscript{118} \textit{Id.} at 1060-62. The defendant was "convicted in state court on four counts of selling unregistered securities, four counts of fraud in connection with the sale of unregistered securities, and four counts of grand theft." \textit{Id.} at 1058-59. Prior to his trial, the defendant asked for and was granted a number of continuances so that he could raise money for a private attorney. \textit{Id.} at 1059. Approximately six months later, the trial judge held a pretrial hearing in which the defendant affirmatively waived his right to counsel. \textit{Id.} at 1060. It was during this hearing that the prosecutor became directly involved in questioning the defendant. \textit{Id.} at 1060-62.
  \item \textsuperscript{119} Near the end of the hearing, the prosecutor stated to the trial judge: "Only thing, I don't want to belabor this, but if it weren't for the history of this case I wouldn't be quite as worried as I am now, but I want [the defendant] to understand and to so state that once we start on this ship it's not going to dock ...." \textit{Id.} at 1062.
  \item \textsuperscript{120} \textit{Id.} at 1059.
  \item \textsuperscript{121} \textit{Id.} at 1060-62, 1068.
  \item \textsuperscript{122} \textit{See id.} at 1063-68.
\end{itemize}
the government. It is contrary to our adversarial system of justice to place prosecutors in a position of having to serve as counselors to defendants.123

Of course, in cases like Moya-Gomez and Fitzpatrick, it may be argued that a prosecutor is performing the adversarial role by ensuring that a waiver of counsel will not be overturned on appeal.124 However, this argument leads directly to the concern expressed in Moya-Gomez that defendants should not be dependent on government agents for legal counsel and aid.125

The adoption of the formal inquiry approach will ensure that prosecutors are not put in the position of having to counsel defendants on the dangers and disadvantages of proceeding pro se. This approach serves the best interests of prosecutors and defendants under our adversarial system of justice.

The other governmental interest, and perhaps the most important reason for adopting the formal inquiry approach, is that engaging defendants in a formal inquiry before permitting them to proceed pro se contributes to the criminal justice system's efforts to ensure fairness at trial.126 The formal inquiry approach assists in this objective by ensuring that all defendants are made aware of the consequences of waiving their right to counsel before they are permitted to proceed pro se. By explicitly warning all defendants, regardless of their background, experience, or conduct, appellate courts will no longer be placed in the difficult position of having to speculate from the record whether a defendant is simply trying to manipulate the judicial system or, in fact, did not make a knowing and intelligent waiver of counsel.127

123. Of course, prosecutors have a duty to ensure that justice is done. Berger v. United States, 295 U.S. 78, 88 (1935). However, prosecutors should also prosecute with earnestness and vigor. Id.
124. See supra text accompanying note 119.
125. Moya-Gomez, 860 F.2d at 735; see also supra text accompanying note 116.
126. The importance of the right to counsel as it relates to fairness in the criminal justice system is a frequent theme in court opinions. See, e.g., Faretta v. California, 422 U.S. 806, 832-33 (1975) ("For it is surely true . . . that the help of a lawyer is essential to assure the defendant a fair trial."); Argersinger v. Hamlin, 407 U.S. 25, 32 (1972) ("The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.") (quoting Gideon v. Wainwright, 372 U.S. 335, 344 (1963)); Powell v. Alabama, 287 U.S. 45, 68-69 (1932) ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."); United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir.), cert. denied, 423 U.S. 876 (1975) ("While a criminal trial is not a game in which the participants are expected to enter the ring with a near [equal] match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.").
127. See, e.g., Strozier v. Newsome, 926 F.2d 1100 (11th Cir. 1991) (Strozier II); Strozier v. Newsome, 871 F.2d 995 (11th Cir. 1989) (Strozier I). In Strozier I, the Eleventh Circuit Court of Appeals reversed and remanded the district court's decision upholding the validity of the defendant's waiver of counsel in order to develop a more complete record. Strozier I, 871 F.2d at 999-
A formal inquiry will not change a defendant's decision in many, perhaps most, cases. However, the mere fact that it will give defendants an opportunity to listen to some of the reasons why the assistance of counsel may be valuable to them and, in the process, provide defendants with information they otherwise might not have considered justifies inclusion of a formal inquiry requirement. It is one of the reasonable steps courts can take to ensure, to the extent possible, that defendants make a knowing and intelligent waiver of counsel before exercising their rights to proceed pro se.

Courts' efforts to dissuade defendants from proceeding pro se will also signal to society that the criminal justice system is not interested in easy convictions. Assuming that there is an imbalance between adversaries when defendants waive their right to counsel, a formal inquiry requirement serves the important function of demonstrating to society that courts are committed to taking all reasonable steps to fully apprise defendants of the consequences of waiving their right to counsel when defendants insist on representing themselves. This type of proactive response by the courts should promote citizens' continued respect and admiration for the fairness of their criminal justice system.

1000. On remand, a magistrate found that the defendant made a knowing and intelligent waiver of counsel. Strozier II, 926 F.2d at 1101-02. The magistrate's report and recommendation were adopted by the trial court, prompting a second appeal. Id. at 1102.

In Strozier II, the Eleventh Circuit Court of Appeals upheld the defendant's waiver of counsel on the basis of the magistrate's findings. Id. at 1107-08. The magistrate's report included the following factors as evidence that the defendant made a knowing and intelligent waiver of counsel: (1) the defendant's fifth-grade educational level and lack of health problems; (2) the defendant's extensive background with the criminal justice system as a result of prior convictions; (3) the defendant's contact with three attorneys, two of whom testified that they advised the defendant against proceeding pro se, although the defendant denied he was ever fully informed of the risks of self-representation; (4) the defendant's discussion with an attorney who informed the defendant of the charges and penalties brought against him, even though the record of his own defense indicated that the defendant either was not informed or misunderstood the charges; and (5) the defendant's limited knowledge of courtroom procedure. Id. at 1106.

The appellate court's displeasure with having to try to determine from an ambiguous record, and in the absence of a formal inquiry whether the defendant was simply trying to manipulate the judicial system or, in fact, did not understand the consequences of his decision to waive the assistance of counsel is readily apparent. In Strozier I, the court set forth a stern suggestion to the lower courts that the difficulties inherent in any criminal trial, including the importance of evidentiary rules, be made known to defendants who request to proceed pro se. Strozier I, 871 F.2d at 998. In Strozier II, the appellate court went so far as to "strongly urge" the lower courts to conduct an inquiry similar to that found in 1 BENCH BOOK FOR UNITED STATES DISTRICT JUDGES, supra note 81, § 1.02-2 to 1.02-5. Strozier II, 926 F.2d at 1109.
VI. CONCLUSION

The elevation of a defendant's privilege to proceed pro se to the status of a constitutional right has created the type of constitutional question that can only be resolved by the Supreme Court. That question concerns how to properly balance two competing constitutional rights: the right to proceed pro se and the right to have the assistance of counsel.

Underlying these rights are the interests they represent. Certainly, a defendant's individual interest in being free to decide whether to accept the assistance of counsel should be preserved. However, simply because a defendant's right to proceed pro se is recognized does not mean legitimate governmental interests should become subservient to the interests of the individual defendant. Governmental interests such as conserving judicial resources, maintaining the independence of prosecutors in criminal cases, and preserving confidence and integrity in the criminal justice system through fair trials are a few examples of why the Supreme Court should adopt the formal inquiry approach as the constitutional standard for finding a valid waiver of counsel in cases where defendants exercise their right to proceed pro se.

The formal inquiry approach, while not encroaching upon the constitutional right to proceed pro se, provides a framework to ensure that important governmental interests will not be glossed over when defendants exercise their right of self-representation. Anything less than a constitutional standard that requires some form of hearing or inquiry in which defendants are warned of the consequences of waiving their right to counsel is simply too deferential to the interests of individual defendants over the governmental interests triggered whenever defendants exercise their right to proceed pro se.

BRIAN H. WRIGHT
THE U.S. FOREIGN DIRECT INVESTMENT POLICY: THE QUEST FOR UNIFORMITY

I. INTRODUCTION

Foreign direct investment1 (FDI) "encompasses a range of business activities with a common result: the exercise of some degree of management or control over [an] enterprise by a foreign entity."2 Foreign investors find investing in the United States advantageous for many economic and political reasons. Recent currency fluctuations have essentially lowered the price of U.S. companies to foreign investors. In addition, lower production costs in the United States in relation to rising real wages, falling productivity, and increased taxes abroad make the United States attractive to foreigners.3 Investors are also attracted to the relatively limited government intervention in industry, as well as the political stability of the United States government.4 Foreign manufacturers can also avoid some of the effects of protectionist legislation by manufacturing goods in the United States rather than abroad.5 This allows foreign investors to tap into American commercial, financial, and labor markets for resources, opportunities, and technical information that are not available when dealing from their home country.6 Despite these economic and political advantages, foreigners are not buying U.S. companies at random simply because they are "good buys."7 Rather, foreign investors generally concentrate on a handful of key areas of interest to them.8

1. The most prevalent form of direct investment is the creation of multinational enterprises through acquisition of existing businesses. Direct investment also includes joint ventures and the establishment of new foreign-owned businesses, which may or may not be integrated into an existing multinational organization. Richard W. Shepro, Foreign Direct Investment in the United States: A Legal Analysis, 4 Wis. INT'L L.J. 46, 48 (1986).

2. Id. at 47. The United States government, however, limits this definition to ownership or control of 10% or more of an enterprise's voting securities. 15 C.F.R. § 806.15(a)(1) (1991).


4. Id.

5. For example, goods manufactured in the United States by foreign-held businesses are treated as "American" under the Buy American Act, which requires the federal government to buy American goods for public use within the United States. See Buy American Act, 41 U.S.C. § 10(a)-(d) (1988).

6. As noted by Shepro, "many foreign drug companies have U.S. research and development arms to take advantage of the large supply of U.S. Ph.D's." Shepro, supra note 1, at 48 n.8.


8. Id. For example, Japan has concentrated on research and development of intensive manufacturing interests, where substantial production gains are realized through the expansion of ex-
Although many countries have recently increased their investments in the United States, American politicians have expressed particular concern over the number of American businesses acquired by the Japanese, and many have blamed the Japanese for domestic economic trouble. This became especially noticeable in the 1992 election-year use of Japanese investors as "scapegoats." By emphasizing the trade imbalance and ignoring the immense potential impact on U.S. employment and economic growth, protectionists tried to brainwash the average American into believing that the United States needs to end traditional free trade policies. Calling for the institution of a "Buy American" ethic and the return of corporate ownership to U.S. entities, many "Buy American" boosters insisted the movement was not "Japan bashing," but was rooted in deep concern for the ailing U.S. economy. While this debate has diminished somewhat since the election, many have criticized President Bill Clinton for his failure to commit consistently to a free trade stance.

Clinton's position, however, is fairly representative of the current U.S. policy—there is no longer a clear-cut answer whether a specific investment transaction is within the confines of U.S. law. Since the "average American" does not understand the necessity for foreign investment, and the current policy is susceptible to change based upon constituent uproar, a
renewed "Buy American" movement could backfire if it becomes "fodder for a move towards protectionism." 18

The continuing controversy over foreign investment has touched off a political debate that focuses not merely on the overall merits of foreign investment, but also on a multitude of peripheral issues. Common concerns include: the acknowledged data gap regarding the extent and effect of foreign investments; the anticompetitive practices of some foreign investors who purchase American companies to acquire technology, thereby placing U.S. national security at risk; the increased competition among states to boost their local economies through foreign investment; and the lack of legal reciprocity in most foreign nations. 19 To counteract these inconsistencies, the federal government must uniformly implement standards in support of traditional U.S. free trade policy. At the same time, the federal government needs to instill an understanding among American workers and business owners that our business relationships with Japan and other foreign nations can remain an asset rather than become a liability, if the proper approach is used not only toward foreign investment but in all international business transactions.

This Comment will address the protectionist or free trade controversy in the United States as it pertains to foreign direct investment, emphasizing the ignorance of many current American attitudes toward increased Japanese investment. Part II will discuss the currently vague federal policy toward foreign direct investment and the impact of fluctuating American views toward such investment. Part III will discuss the role of the states in encouraging foreign direct investment and the current competition among states vying for local investment. Part IV will discuss the need for a uniform national standard that will withstand potential changes in the executive branch and counteract short-term changes in public attitude. Finally, Part V will examine the options for a restructured policy that will afford American businesses and workers an opportunity to profit from foreign investment.

II. FEDERAL RESPONSES TO FOREIGN DIRECT INVESTMENT

The federal government derives its constitutional power to regulate FDI from the Commerce Clause, which specifically grants Congress the power

18. Anderson & Kalette, supra note 13, at 1A.
to "regulate Commerce with foreign [n]ations." The Supreme Court stated that this constitutional power is "not merely an authorization to Congress to enact laws . . . but by its own force created an area of trade free from interference by the States. . . . [T]he Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States." Therefore, federal responsibility for foreign investment policy was clearly anticipated by the Constitution. Congress, however, has failed to provide laws that are capable of consistent enforcement within the executive branch and, as a result, a dangerously ambiguous overall policy is in effect.

A. Open or Free Trade v. Protectionism

The United States has long advocated free trade policies; in fact, every President since Herbert Hoover has taken a free trade stance. These traditional objectives regarding FDI were reiterated by President Ronald Reagan:

[T]he United States believes that its direct investment abroad should also receive fair, equitable, and non-discriminatory treatment. . . . [T]he United States seeks to . . . foster a domestic economic climate in the United States which is conducive to investment, ensure that foreign investors receive fair and equitable treatment under our statutes and regulations, and maintain only those safeguards on foreign investment which are necessary to protect our security and related interests.

In continued support of these objectives, President George Bush declared that his administration would "continue to resist calls for protection and managed trade . . . [including] any attempts to hinder the free international flows of investment capital, which have benefitted workers and consumers here and abroad." In addition, President Bush emphasized the

22. See generally TOLCHIN & TOLCHIN, supra note 19, at 275-78 (briefly detailing the history of U.S. foreign investment policy).
24. Statement of the President Transmitting International Investment Policy, 19 WEEKLY COMP. PRES. DOC. 1214, 1216-17 (Sept. 9, 1983).
United States commitment to reducing existing barriers to international investment throughout the world.26

President Clinton, on the other hand, has been criticized for his failure to commit consistently to a free trade stance.27 His policy on Japanese investment appears to sway somewhere between a free trade stance and a "managed" trade stance. While critics claim that this position is inconsistent and that the President "needs to pick a side," his policy parallels current U.S. laws. These laws make it difficult to define the "sides," bringing to light the ongoing battle between protectionism and free trade and the question of whether holding to a strict view of either position is possible in light of the current world marketplace.28

Advocates for a continued open trade policy argue that the United States needs foreign investment not only to expand the U.S. economy, but also to resolve current international debt problems.29 FDI supporters emphasize the creation of jobs, the introduction of new technology, and the consumer benefits realized through increased competition that are associated with FDI. In addition to the quantitative effects on U.S. employment and income, FDI can act as a "catalyst,"30 and as a result, "foreign multinationals may revitalize American industry by introducing new technology, managerial skills, and labor practices."31

The free trade view has historically been criticized by advocates of an alternative political view known as "protectionism." The protectionist view sees FDI as a threat to economic independence, political sovereignty, and national security.32 Historically, the main political threats to free trade have arisen because of a fear of job loss.33 Today, however, dissatisfaction also results from a growing concern over stagnant real wages and incomes in the United States and the lack of available "good jobs at good wages."34

26. Id. For a complete discussion of the current movement toward reciprocity, see infra notes 142-56 and accompanying text.

27. See supra note 15 and accompanying text. President Clinton campaigned wholeheartedly as a free trade advocate and consistently emphasized his aversion to protectionist policies.


29. See, e.g., Statement of the President Transmitting International Investment Policy, supra note 24, at 1214.

30. Id. at 1215.


34. Id. at 3.
These protectionists mistakenly believe that if foreign investment is not curbed, U.S. workers will continue to lose out as Japanese firms “outhustle” the American competition.\textsuperscript{35} This contention, however, can be refuted by evidence of Japanese capital that has funded many new plants and supported many local economies.\textsuperscript{36}

\section*{B. The Debate over Japanese FDI}

Protectionist sentiment has been fueled by the recent American obsession with the Japanese. Part of the U.S. fascination may have originated because the Japanese have been the most publicized competition to U.S.-based firms. As a result, there is natural curiosity whether Japanese success can be repeated here.\textsuperscript{37} However, this curiosity has turned into an irrational fear that the Japanese will take over the United States. Former President Bush recently acknowledged this trend:

\begin{quote}
Some have rather cynically said, well, Japan’s going to own all of the United States. My view is, I support Japanese investment in our country. It results in competitiveness. It results in productivity increasing in our country. If they can come in and show us a better way to run a [business], the guy next door is going to have to do a better job, or his [business] is going to go down.\textsuperscript{38}
\end{quote}

This statement also reflects the traditional U.S. policy discussed previously.

Despite historic executive support for free trade, protectionist sentiment was still alive and well in the politics of the 1992 election. What the candidates offered in their commercials, however, was “more emotion than logic, [and] more oratory than substance.”\textsuperscript{39} Regardless of the fact that “[i]f you tally all the economic benefits [of] free trade and all the benefits from protection, free trade generally comes out ahead,”\textsuperscript{40} politicians exploited the sense that Americans were being treated unfairly in international trade, especially by the Japanese.\textsuperscript{41} Because American “politics is fueled by votes, not theories,”\textsuperscript{42} many Americans received false information regarding foreign investment and continue to feel threatened by Japanese investors.

\textsuperscript{35} Glickman & Woodward, supra note 31, at 220.
\textsuperscript{36} The Japanese accounted for $9.1 billion in manufacturing and new plant expansion in the United States between the years of 1979 and 1987. Ray, supra note 7, at 60-61.
\textsuperscript{37} Graham & Krugman, supra note 8, at 18.
\textsuperscript{38} President’s Remarks and an Exchange with Soviet Journalists on the Upcoming Moscow Summit, 27 WEEKLY COMP. PRES. DOC. 1057, 1061 (July 25, 1991).
\textsuperscript{39} Rosenbaum & Bradsher, supra note 12, at A1.
\textsuperscript{40} Id. at A2.
\textsuperscript{41} A New York Times-CBS News Poll taken in November 1991 showed that 32% of Americans believed that the Japanese compete unfairly. Id.
\textsuperscript{42} Id.
“With the buyouts of firms ranging from CBS Records to Talbots to Thermos, there is hardly an industry in America untouched by Japanese money.” However, Japan is not the largest foreign investor in the United States, thereby proving that the notion of “a potential Japanese takeover of [America] has little to do with actual facts.” Therefore, to calm America’s irrational fears, it is also important to note that “Japanese firms show surprisingly little difference in their [ownership] behavior from other foreign firms.” In addition, Japanese “value added” and compensation theories per worker and research and development efforts are similar to those of other foreign-owned firms. The only behavioral difference appears to be Japan’s apparent higher propensity to import. This selection bias is undoubtedly due to the Japanese corporate structure and ownership of a “family” of intermingled manufacturers that rely on one another for business. As a result, Japanese-owned corporations rely upon other Japanese manufacturers with whom they already have a working relationship and to whom they feel a sense of loyalty. However, as American suppliers are purchased by or conduct business with other “family members,” they become integrated into the Japanese “family,” providing potential for expanded domestic consumption.

C. The Current Status of Federal FDI Regulations

1. Antitrust Laws

The Clayton Act is applicable to transactions involving acquisitions of U.S. companies by either domestic or foreign corporations. Section 7 of the Clayton Act is the principle antitrust statute applicable to mergers and acquisitions in the United States. A Section 7 violation occurs when an acquisition of all or part of the stock or assets of a “person” engaged in

44. Ray, supra note 7, at 51.
45. Id. at 60.
46. GRAHAM & KRUGMAN, supra note 8, at 64.
47. Id.
48. See GLICKMAN & WOODWARD, supra note 31, at 295 (discussing the Japanese corporate structure known as “keiretsu”).
49. See id. (discussing the cross-fertility of U.S. and Japanese businesses).
51. The Clayton Act defines the term “person” to include the following: corporations and associations existing under or authorized by the laws of the United States, the territories, the states, or the laws of any foreign country. 15 U.S.C. § 12(a) (1988).
commerce (or an activity affecting commerce) by another such “person” substantially lessens competition or tends to create a monopoly.52

In determining whether a violation has occurred, the “market” involved must be defined. This definition becomes more difficult, and essentially more important when multinational corporations are involved.53 Once the applicable market has been determined, the Clayton Act looks not only to the present effect on competition, but also to the probable future effects of an acquisition by prohibiting “anticompetitive acquisitions even where the offending restraint of trade is only incipient at the time of suit.”54

Section 7 claims can be brought by both the Federal Trade Commission (FTC) and the Department of Justice.55 In the alternative, private parties may bring suit to “(1) prevent a hostile takeover, (2) challenge an acquisition involving competitors, (3) enjoin future acquisitions for a period of years or (4) recover treble damages for antitrust injury sustained as a result of unlawful acquisitions.”56 In order to bring a successful claim, a private party must satisfy five elements: (1) the plaintiff must fall within the Act’s definition of “person” set forth above, (2) a violation of the “antitrust laws” must have occurred,57 (3) a direct injury must have been suffered by the plaintiff, (4) the injury must have been caused by the violation charged, and (5) the injury suffered must be measurable to some degree in dollars.58

Where friendly acquisitions are in question, the parties involved may seek an “advisory opinion” to determine if antitrust violations would result from a proposed transaction. Both the Antitrust Division of the Department of Justice and the FTC have procedures for “advance approval.”59 It is important to note, however, that this advice can be revoked.60 Additionally, the involved parties may not be willing to release all relevant information to the government prior to the transaction, raising doubts about the accuracy of the advice.61

54. 3 JULIAN O. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 23.01, at 23-6 (1993).
56. 3 VON KALINOWSKI, supra note 54, § 23.01, at 23-7.
58. 8 VON KALINOWSKI, supra note 54, § 60.02[2], at 60-24.
60. See 16 C.F.R. § 1.3 (1993).
When investing in the United States, foreign corporations must realize the consequences of antitrust violations and prepare accordingly for possible violations. This becomes especially important when Japanese corporations attempt hostile takeovers because the Japanese government rarely enforces its antimonopoly law. As a result, Japanese investors may not be aware of U.S. antitrust laws to help defend against the takeover of a U.S. corporation, because there is no parallel enforcement in Japan.

2. Federal Entry Restrictions

Military and political interests are often protected by restrictions on foreign control of certain types of businesses. Since “foreign control” is not uniformly defined, foreign investors must carefully investigate the scope of these provisions when examining possible U.S. acquisitions in areas such as natural resource excavation, communications, and national defense. For example, the Mineral Lands Leasing Act of 1920 contains a reciprocity provision that prohibits the Secretary of the Interior from granting excavation leases to aliens whose nation does not allow “similar or like privileges” to U.S. citizens or corporations. This can be especially important when nations such as Japan are involved. Based on Japan’s lack of internal natural resources, coupled with its high demand for raw materials, these industries may seem attractive to Japanese investors. However, ownership of these industries may be out of reach.

Federal restrictions on foreign ownership also protect industries vital to the national defense when: (1) the industry provides materials required by current defense contracts, or (2) the industry is crucial to the maintenance of a healthy economy and the operation of the national government. For example, the Atomic Energy Act of 1954 provides that while a foreign entity may not obtain a controlling interest in a nuclear facility, the Nuclear Regulatory Commission may allow a foreign enterprise to maintain substantial interests in such facilities. The national defense considerations of


66. Waldeck, supra note 63, at 1191.


68. Id.; see also Waldeck, supra note 63, at 1196.
such restrictions are apparent. The Federal Communications Commission (FCC) has also been granted discretionary power to protect national defense. Under Section 310(b) of the Communications Act of 1934, the FCC can bar ownership by refusing to issue licenses when "the public interest will be served by the refusal or revocation of such license." This is based "upon the idea of preventing alien activities against the government during the time of war," thereby justifying the Atomic Energy Act on national defense grounds.

As a result of these restrictions, Congress has allowed the federal government to use discretion when allowing foreign ownership. These restrictions are justified as safeguards to national defense and, as a result, cannot be effectively contested. Therefore, foreign investors must be aware of federal entry restrictions for specific industries when intending to acquire enterprises of this nature.

3. The Exon-Florio Amendment

Another area of legitimate U.S. concern is the purchase of high technology industries by the Japanese. According to testimony at a House subcommittee hearing, 163 United States high technology firms have been purchased by six of the largest Japanese industry groups since 1988. The Semi-Conductor Manufacturing Technology (SEMATECH) joint venture, a consortium of government and private sector officials, recently provided further evidence of how the Japanese are refusing to cooperate with American semiconductor manufacturers. According to the report provided by SEMATECH, Japanese suppliers are refusing to sell equipment containing leading edge technology to U.S. companies. "Even if American buyers succeed in gaining access to such technology, it is priced at a premium and often delivered late." In support of this proposition, the report listed several types of equipment that are not generally available to U.S. semiconductor manufacturers, but can be bought openly by Japanese producers. This loss of technology may be the price the United States pays for an influx of

---

69. Waldeck, supra note 63, at 1192 (citing 47 U.S.C. § 310(b)(4) (1982)).
70. Id.
71. State restrictions also exist. See infra notes 131-39 and accompanying text.
73. SEMATECH released this information in a report titled, How the Japanese Are Sheltering Key Technology, which was released at a May 6, 1991 press conference. Id.
74. Id.
75. Id.
76. These products included high-tech furnaces, electrical circuitry, chassis, and chemical tools. Id.
FOREIGN DIRECT INVESTMENT

foreign dollars, but a continual loss of technology may be dangerous to national security and cannot be tolerated. While these interests are more adequately protected by other types of legislation, in recent years the protection of technology has been utilized as an excuse to try to close American markets to the Japanese and other foreign investors.

Although Congress was aware that FDI was drastically increasing in the United States, the extent of these investments remained unknown until Congress passed the Foreign Investment Study Act of 1974. This Act authorized a Commerce Department survey of foreign investment activity in the United States. As a result of the data collected, Congress realized the need for continual tracking of foreign investment and enacted the International Investment Survey Act of 1976 (IISA). In addition to facilitating the continued collection of FDI information, IISA enables the President to “conduct a regular data collection program to secure current information on international capital flows and other information related to international investment.” This Act was not intended to restrain or deter foreign investment in the United States, but to keep the federal government apprised of ongoing FDI transactions and “to provide analyses of such information to the Congress, the executive agencies, and the general public.” President Gerald Ford designated authority to the Department of Commerce to conduct these surveys and created the Committee on Foreign Investment in the United States (CFIUS) as an advisory agency. Through these measures, Congress and the President created a permanent mechanism to monitor foreign investment activities in the United States.

Although there was an enormous amount of FDI in the following decade, Congress appeared content with this limited FDI policy. However, the complete inability of the federal government to control foreign investment became painfully obvious as a result of two events: (1) the attempted hos-

78. See Robert S. Schwartz & Bennett A. Caplan, Conditioning the Unconditional, 210 N.Y. L.J., Aug. 19, 1993, at 5; see also infra notes 183-87 and accompanying text.
tile takeover of Goodyear Tire & Rubber Company by British corporate raider Sir James Goldsmith in 1986 and (2) the proposed purchase of Fairchild Semiconductor Corporation by Fujitsu, Ltd. of Japan in 1987. Despite Commerce Department concerns regarding competition and the confidentiality of classified information, no U.S. agency had the power to stop either acquisition, short of declaring a national emergency. Although both transactions dissolved prior to completion, Senator J. James Exon and Representative James J. Florio were concerned with the government’s potential inability to act under such circumstances. This concern led to the introduction of the trade bill now known as the Exon-Florio Amendment (EFA or “Amendment”).

The EFA was adopted on August 23, 1988, as Section 5021 of the 1988 Omnibus Trade Act. Generally, this Amendment to the Defense Production Act of 1950 provides a mechanism for the federal government to challenge mergers and acquisitions of U.S. corporations by foreign entities when national security is at stake. The President, or a presidential desig-

88. The only action that could have been brought was on antitrust grounds. See Mark L. Hanson, Comment, The Regulation of Foreign Direct Investment in the United States Defense Industry, 9 Nw. J. INT’L L. & Bus. 658, 662-63 (1989).
89. Fujitsu abandoned its quest, fearing political backlash as a result of the strong protectionist sentiment in the United States. See Thomas W. Soseman, Comment, International Law—The Exon-Florio Amendment to the 1988 Trade Bill: A Guardian of National Security or a Protectionist Weapon?, 15 J. CORP. L. 597, 599-600 (1990). Goldsmith’s action was eventually halted by the invocation of an antitakeover statute in Ohio. Goodyear’s management then agreed to purchase Goldsmith’s shares at a premium. Id. at 600; see also Greene, supra note 16, at 1556-63 (discussing the effects of state antitakeover legislation).
90. Senator J. James Exon is a Democrat from Nebraska.
91. Representative James J. Florio, a Democrat from New Jersey, became governor of that state in 1990.
95. The Exon-Florio Amendment reads as follows:
§ 2170. Authority to review certain mergers, acquisitions, and takeovers
(a) Investigations
The President or the President’s designee may make an investigation to determine the effects on national security of mergers, acquisitions, and takeovers proposed or pending . . . by or with foreign persons which could result in foreign control of persons engaged in interstate commerce in the United States. If it is determined that an investigation should be undertaken, it shall commence no later than 30 days after receipt by the President or the President’s designee of written notification of the proposed or pending merger, acquisition,
ne is authorized to conduct an investigation of a proposed acquisition of
an American "person" by a "foreign person." This investigation must
begin within thirty days of the President's receipt of voluntary written noti-

or takeover as prescribed by regulations promulgated pursuant to this section. Such inves-
tigation shall be completed no later than 45 days after such determination.

(b) Confidentiality of information

Any information or documentary material filed with the President or the President's
designee pursuant to this section shall . . . [not] be made public except as may be relevant
to any administrative or judicial action or proceeding. Nothing in this subsection shall be
construed to prevent disclosure to either House of Congress or to any duly authorized
committee or subcommittee of the Congress.

(c) Action by the President

Subject to subsection (d), the President may take such action for such time as the President
considers appropriate to suspend or prohibit any acquisition, merger, or takeover . . . by or
with foreign persons so that such control will not threaten to impair the national security.
The President shall announce the decision to take action pursuant to this subsection not
later than 15 days after the investigation . . .

(d) Findings of the President

The President may exercise the authority conferred by subsection (c) only if the Presi-
dent finds that—

(1) there is credible evidence that leads the President to believe that the foreign interest
exercising control might take action that threatens to impair the national security, and

(2) provisions of law, other than this section and the International Emergency Economic
Powers Act (50 U.S.C. 1701-1706), do not in the President's judgment provide adequate
and appropriate authority for the President to protect the national security in the matter
before the President . . .

(e) Factors to be considered

For purposes of this section, the President or the President's designee may, taking into
account the requirements of national security, consider among other factors—

(1) domestic production needed for projected national defense requirements,

(2) the capability and capacity of domestic industries to meet national defense require-
ments, including the availability of human resources, products, technology, materials, and
other supplies and services, and

(3) the control of domestic industries and commercial activity by foreign citizens as it
affects the capability and capacity of the United States to meet the requirements of national
security.


96. The acquired "person" may be "of a variety of forms of ongoing or sustainable business
entities, including a corporation, a partnership, a division of a corporation, or an unincorporated

97. "Foreign person" is intended to include:

[A]ny individual who is not a U.S. citizen or a U.S. national under the laws of the United
States . . . [or] an entity organized under the laws of, or having its principal place of
business in a country other than the United States, provided such entity is directly or
indirectly controlled by a foreign person. It would also include any foreign person who,
for example, acquires a domestic corporation for the purpose of acquiring control of an-
other domestic corporation in contravention of the purposes of this [Amendment].

Id. at 925-26.
ification of the proposed transaction\textsuperscript{98} and be completed forty-five days thereafter.\textsuperscript{99} During this investigation, the President must determine whether there is credible evidence to support a finding that the change in control may result in actions that threaten national security\textsuperscript{100} and whether any other legal provision\textsuperscript{101} supplies the President with appropriate authority to protect national security.\textsuperscript{102}

Based on the above criteria, the President may suspend or prohibit any transaction, or limit the level of proposed foreign control.\textsuperscript{103} If the parties fail to report a transaction, the President may also order a foreign corporation to relinquish its control, making use of the phrase "voluntary notification" somewhat inappropriate.\textsuperscript{104} If the President deems action is necessary, a written report of the results of the investigation and a statement of the intended action must be transmitted to both the House and the Senate.\textsuperscript{105} Even though all information contained in this report is confidential, it may be released to other agencies when it is relevant to any administrative or judicial proceeding.\textsuperscript{106} In addition, the President may seek appropriate relief\textsuperscript{107} in the federal district courts to implement and enforce the provisions of this Amendment in both the investigation and relief stages.\textsuperscript{108}

As stated above, the federal government retains the right to place "safeguards" on foreign investments when U.S. security is at risk.\textsuperscript{109} Under the EFA, the standard for transactional review is "national security," which is not defined by the Amendment.\textsuperscript{110} This definition was intentionally left open to allow the President broad discretion in regulating foreign invest-

\begin{itemize}
\item \textsuperscript{98} "Transaction" will hereinafter include mergers, acquisitions, or other business combinations.
\item \textsuperscript{99} 50 U.S.C. app. § 2170(a) (1988).
\item \textsuperscript{100} 50 U.S.C. app. § 2170(d)(1) (1988).
\item \textsuperscript{102} 50 U.S.C. app. § 2170(d)(2) (1988).
\item \textsuperscript{103} 50 U.S.C. app. § 2170(c) (1988).
\item \textsuperscript{104} 50 U.S.C. app. § 2170(c) (1988).
\item \textsuperscript{105} 50 U.S.C. app. § 2170(b) (1988).
\item \textsuperscript{106} 50 U.S.C. app. § 2170(b) (1988).
\item \textsuperscript{107} "The term 'appropriate relief' is intended as a broad term to give the President flexibility to deal with any foreign control attempt which the President deems to pose a threat to national security... [Such relief] includes broad injunctive and equitable relief including, but not limited to divestment relief." H.R. CONF. REP. NO. 576, supra note 96, at 927.
\item \textsuperscript{108} Id.
\item \textsuperscript{109} See supra note 66 and accompanying text.
\item \textsuperscript{110} See Greidinger, supra note 61, at 121-35.
\end{itemize}
FOREIGN DIRECT INVESTMENT

111. Although the conferees did not intend to authorize investigations of foreign acquisitions that are "outside the realm of national security," the national security standard should be "interpreted broadly without limitation to particular industries." H.R. CONF. REP. No. 576, supra note 96, at 926. Moreover, the Conference Report states that "'[t]he Conferees recognize that the term 'national security' is not a defined term in the Defense Production Act . . . [and they do not mean] to imply any limitation on the term 'national defense' as used elsewhere in the . . . Act.'" Id.


113. The 1992 presidential candidates who openly advocated free trade were Paul Tsongas and George Bush. Tom Harkin, Bob Kerrey, and Pat Buchanan, on the other hand, emphasized the need for protectionism. Bill Clinton claimed to remain neutral. See Rosenbaum & Bradsher, supra note 12, at A1-2. But see Kondracke, supra note 15 (stating that Clinton campaigned as a free trade advocate).

114. H.R. REP. No. 399, supra note 72, at 6.

115. Id. at 6-7; see Joseph E. Reece, Buyer Beware: The United States No Longer Wants Foreign Capital to Fund Corporate Acquisitions, 18 DENV. J. INT'L L. & POL'Y 279, 294-301 (1990) (discussing the prior investigations and the divestiture proceeding that have taken place under the EFA).

116. See supra notes 22-36 and accompanying text.
sary actions are being overlooked due to the vague standards set forth in the current EFA.

This concern stems from a recent discovery made by the Subcommittee on Commerce, Consumer Protection, and Competition regarding U.S. production of semiconductors in the aftermath of the Gulf War, when it was realized that the domestic semiconductor industry would not have been able to support the demand of the United States had the war continued. Since the EFA went into effect in 1988, eighty-five American-owned semiconductor material and equipment manufacturers have been sold to foreign investors, more than sixty of which were sold to Japanese firms. The Administration testified that had the United States not been able to obtain semiconductors from a foreign source throughout the Gulf War, it would have taken six months to put domestic semiconductor manufacturing "onstream" to meet U.S. defense needs. This six-month deficiency would not only have prolonged the conflict; it would have cost American lives. This is one of the situations the EFA was designed to protect against. Despite the above-mentioned problems with the current EFA, its “sunset clause” was recently removed from the statute, thereby making it a permanent part of U.S. foreign investment law.

III. STATE RESPONSES TO FDI

The Supreme Court has said that states “may not tell this Nation or Japan how to run their foreign policies.” However, “[n]o one questions the fact that the states now lead the nation in shaping foreign investment policy... They [have] provided the leadership, dictated the parameters of the issue, and persuaded their legislatures to allocate resources earmarked for recruiting foreign capital.” These are three of the very steps that Congress has failed to take. By organizing promotional agencies and proposing individual regulations, the states are testing the vague federal FDI policy. However, they may also be sending mixed signals to foreign investors.

117. “Iraq had bought United States companies with needed equipment and technology, and had stolen components from nuclear weapons of other countries. Rarely in world history had the strength of an aggressor country depended so heavily on technology, equipment and other resources bought in the open world marketplace.” H.R. REP. No. 399, supra note 72, at 7.
118. Id.
119. Id.
120. Id.
123. TOLCHIN & TOLCHIN, supra note 19, at 34.
FOREIGN DIRECT INVESTMENT

A. State Promotional Agencies

Support for the free trade sentiment is evidenced by the growing number of states hoping to increase the amount of inward FDI by offering incentives to foreign investors. By 1979, forty-seven states had established agencies in foreign countries to disseminate information to potential foreign investors on local markets, business conditions, and export opportunities.\(^{124}\) These promotional agencies have been particularly concerned with encouraging Japanese investment, and many state governors now work directly with the Japanese to encourage both new and continuing investment.\(^{125}\)

Several states have offered incentives to attract foreign investors. The incentives include "tax breaks, grants, low-interest bond financing, loans and loan guarantees, employee training site and access improvements, land grants, and special lease promotions."\(^{126}\) An additional incentive that became increasingly popular in the late 1980s was the "Japanese school." Designed to help Japanese workers and their families learn English and adjust to life in the United States, as well as to help Japanese children retain their traditional values, these schools offer inexpensive incentives to promote investment.\(^{127}\) While foreign investors rarely base their investment decisions solely on these types of incentives, "[i]ncentives are, if anything tie breakers in stage two of the location decision process."\(^{128}\)

On its face, this appears to be a step in furthering the open trade policy that the federal government purports to advocate, but state encouragement of foreign investment may be going beyond constitutionally allowable state action. As stated above, the U.S. position on foreign investment supports the view that all corporations should be treated equal—regardless of the nationality of corporate ownership.\(^{129}\) Many states have gone beyond the boundaries of this view by offering incentives solely to foreign investors and, as a result, some foreign corporations may be receiving more favorable treatment than their domestic counterparts. These state promotional activities may be sending mixed messages to foreign investors. "[A]ttempts by most of the State governments to attract foreign investments blur the boundary between international and domestic economic interests and could complicate the efforts of the federal government to negotiate with foreign

---

125. Id.
126. Id. at 235.
127. "Kentucky promised to spend $5 million over 20 years for schools for Japanese employees of Toyota." Id.
128. Id. at 228.
129. See supra notes 22-36 and accompanying text.
governments to reduce incentives for and restrictions on foreign direct investment.  

B. State Attempts to Regulate  

Concurrent with such promotional activities, some state governments have responded to pressure from worried constituents by proposing a variety of legislative measures. In so doing, states are testing the federal government's tolerance of state-imposed protectionism. The concerns of the states undoubtedly mirror those of the federal government. However, congressional failure to provide a national standard has prompted these state proposals to appease the public. These proposals range from mere registration requirements to blanket reciprocity and approval requirements. However, when considering legislation, the states must concern themselves with the limitations imposed by the Constitution and the Supreme Court.

The Supreme Court has made the distinction between pure protectionist legislation, which on its face discriminates against foreigners and is subject to a "virtually per se rule of invalidity," and mere burdens on the free flow of trade, which may pass constitutional scrutiny. In order to determine valid interstate regulations, several criteria have been provided by the Supreme Court. The proposed regulation must: (1) have a "substantial nexus" with the regulating state, (2) be substantially apportioned so that it does not discriminate against interstate commerce, and (3) be fairly related to the services provided by the state. Since the Supreme Court places the highest scrutiny on measures that restrict foreign commerce, additional challenges to these state regulations have been imposed. State regulations may not duplicate federal regulations. Additionally, these regulations must not hinder the nation from "speak[ing] with one voice" regarding FDI transactions. If these criteria are met, the transaction will pass the judi-

130. Tate, supra note 32, at 2030 n.531 (citation omitted).
131. See id. at 2027-28 (providing examples of state regulations proposed in 1989).
133. Id. at 623-24.
135. "Facial discrimination by itself may be a fatal defect; but at minimum, such facially discriminatory statutes invoke the strictest scrutiny." Id. at 337.
136. For example, state governments have tried to impose statutes that tax the worldwide incomes of corporations within their states. The Supreme Court has ruled that if a state tax is "applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce and is fairly related to the services provided by the State," it will be upheld. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). In relation to foreign commerce, however, there is the added criteria of 1) whether there is a risk of multiple taxation and 2) whether the tax prevents the government from "speak[ing] with one voice
cially imposed constitutional scrutiny test, unless the action is pre-empted by federal law.\(^{137}\)

As a result, the only currently valid state impairments to foreign investment are entry-level restrictions, which states can justify on various economic and political grounds. For example, since real property ownership is largely a matter of state law, states can limit or prohibit foreign ownership of agricultural land. Foreign investors must check existing state restrictions carefully and confirm early in the investment process that no prohibitive legislation is pending, since state legislatures are becoming more creative in justifying restrictions against foreign investment.\(^{138}\)

IV. HOW DO WE MOVE FROM HYPOCRISY TO UNIFORMITY?

As stated above,\(^ {139}\) Congress has failed to "[provide] the leadership, [dictate] the parameters of the issue, and [persuade] ... legislatures to allocate resources earmarked for recruiting foreign capital."\(^ {140}\) However, as a result of proposed state actions, the federal government should be receiving a message to take charge of its constitutionally imposed duty to create a consistent federal policy on foreign investment.

In working toward a uniform policy on FDI, however, several factors must be taken into consideration. It is clear that the nation as a whole is concerned with the issues of security and reciprocity, especially as these factors relate to the Japanese. These issues must be reconciled by a uniform national policy on foreign investment to save the reputation of the United States as a free trade nation. The promotional activities of the states should provide enough evidence to Congress that free trade sentiment is alive in American society. However, the federal government needs to curb favorable treatment of foreign corporations and reassure domestic corporations that equal treatment is promoted. An additional problem with current state encouragement is the failure of such programs to foster reciprocity. Incentives should be provided to promote the opening of markets in other countries, rather than providing blanket incentives to increase inward foreign investment. Incentives for reciprocity should be advocated by the federal government; however, a message must also be sent back to the states that protectionism will not be tolerated by the federal govern-
ment. Although the future of proposed state legislation is uncertain, the importance of such bills cannot be diminished; they evidence a hasty political response to short-term protectionist sentiment among constituents. Keeping these objectives in mind, the federal government must decide whether reciprocity is the answer or whether clarification and increased enforcement of existing laws are necessary for universal application of a U.S. policy.

A. The Debate over Reciprocity

1. Is Legal Reciprocity the Answer?

Even with the EFA in place, "the United States is still a long way from the substantive preacquisition reviews that some other countries have imposed on foreign bidders, to say nothing of the laws in some countries that in effect require foreign investors to bring in local partners."141 Since the United States is an attractive investment ground for foreigners who would not allow the same transactions to take place in their own countries, both protectionists and free trade advocates agree that some form of reciprocity should be encouraged. However, their definitions of reciprocity are vastly different because they are motivated by different beliefs.

"The traditional U.S. position is one that advocates right of establishment together with national treatment; that is, a firm from one country should have the unimpeded ability to establish subsidiaries in other countries, and once established, these subsidiaries should receive the same treatment as domestic firms."142 Therefore, under traditional policy, treatment of firms operating in the United States should be neutral, without bias for or against foreign ownership of U.S. productive assets. Free traders, on the other hand, do not seek to limit the incoming FDI, but encourage other nations to open their markets and, thereby, increase the amount of U.S. investment is emphasized.

Protectionists argue that the United States should limit FDI transactions to include only such transactions that would be allowed by the investor's home country. For example, a bill introduced in Congress in 1980 would have amended securities laws to restrict acquisitions of public companies by non-U.S. corporations.143 Unless the laws and regulations of the bidder's country allowed a U.S. corporate acquisition under similar circumstances, the foreign entities would not have been afforded purchasing rights.

142. GRAHAM & KRUGMAN, supra note 8, at 72.
in the U.S.\textsuperscript{144} This bill never passed, demonstrating congressional recognition that the United States should not close its barriers, but rather should encourage other nations to open their markets.

An additional protectionist argument provides that foreign investors should be subject to the laws of their home country with respect to U.S. transactions.\textsuperscript{145} If this definition "were applied literally and consistently on both sides, certain types of foreign investment could actually receive more favorable treatment under the law than would domestically controlled competitors."\textsuperscript{146} Under this theory, however, "selective" reciprocity is actually advocated, in that reciprocity exists only when U.S. firms in the home country are more regulated than these same firms in U.S. markets. In effect, the stricter of the two laws is applied against the foreign investor. It is clear that this standard would discourage FDI and is therefore against the stated U.S. policy.

2. Attempting "Cultural Reciprocity"

Because of the discretionary nature of both the EFA and other restrictions on FDI, changing attitudes toward the Japanese and the traditional policy may sway decisions. Therefore, the protectionist xenophobia toward Japan, which periodically sweeps the country, is a potential cultural impediment to foreign investment. Such an effect, resulting from the EFA, needs to be eliminated. However, it is questionable whether elimination of negative attitudes toward the Japanese would in itself remove the problems of discretion within the EFA. After all, "[t]o the extent that foreign investors behave like locals but bring about superior performance, [it is questionable] whether, at the end of the day, the nationality of firms actually matters all that much."\textsuperscript{147}

In the United States, however, it appears that the more visible the foreign investment and the foreign investors are, the greater the American anxieties surrounding them.\textsuperscript{148} For example, "[t]he same amount of money spent by the Japanese on Rockefeller Center and Pebble Beach would arguably have been much less troublesome had it been less conspicuous property and less conspicuous investors."\textsuperscript{149} However, the United States is not

\textsuperscript{144} Id.
\textsuperscript{145} GRAHAM & KRUGMAN, supra note 8, at 117.
\textsuperscript{146} Id.
\textsuperscript{149} Id. at 151.
likely to commit political suicide by restraining the purchase power of specific nationalities.  Also, Japanese influence on American industry cannot be ignored, since it will continue to grow. It is conceivable that future laws may restrict the sale of "certain nationally historic or otherwise valuable property."\footnote{152}

It appears that the legal reciprocity that many Americans are pushing for is not the answer to effectively restricting U.S. markets or making access to Japanese markets easier for U.S. businesses. Since reciprocal xenophobia is an obvious barrier to investment in both countries, reciprocity in cultural understanding appears to facilitate a better overall solution to the investment problems between the United States and Japan. Through the concept of negotiation, Americans may be able to successfully invest in Japan and better accept the terms of a Japanese investment. In the process, some of the aversion to the Japanese may be overcome, further increasing the likelihood of successful transactions.

The Japanese will also need to make a few adjustments if they have any hope of continued investment in the United States. Despite the reputed Japanese business savvy, as the Japanese "become more firmly entrenched in America, Japanese firms may start to act more like the typical American company next door, acquiring the sensitivity needed to avoid lawsuits and, like other foreign multinationals, allowing American managers to control their piece of the pie."\footnote{153} Although the Japanese may continue to invest much needed capital in U.S. corporations, in order to overcome American animosity the Japanese will need to exert more tact when publicizing acquisitions of American companies.\footnote{154} Willingness to share information will also be important in high technology areas if investment is to be continued in these industries. It is clear, however, that "whether with arms outstretched or folded firmly in defiance, more Americans will have to get used to working with the Japanese."\footnote{155}

\section*{B. Clarification and Enforcement of Existing Law}

While cultural understanding can only help facilitate a better business relationship with the Japanese, one must take "seriously the possibility that Japan . . . might someday become a military enemy of the United States."\footnote{156}
As a result, it is necessary to keep laws in place to protect the technological future of the United States. However, the EFA in its current state provides "a dull weapon at best."\textsuperscript{157} As a result, the existing policy needs to be modified and stronger safeguards must be implemented.

1. Clearly Defining National Security

It has been argued that "it is often more difficult for an overseas company to buy a U.S. product containing sensitive technology than to purchase the entire company that makes the product."\textsuperscript{158} This may be true based on the current state of the law and, as a result, many Americans are encouraging Congress to resolve the vagueness of the current federal policy.\textsuperscript{159} This vagueness also causes problems for investors, since many firms that are not critical to national security feel obligated to report their investments to CFIUS, creating unnecessary transactional delays.\textsuperscript{160} This makes it harder for U.S. corporations to attract foreign bidders and, in effect, the EFA is deterring FDI in industries outside the scope of what the EFA included. Therefore, critics of the EFA are trying to tell the United States that "[o]nly a clear definition [of national security] will put teeth in the law to protect critical technologies while keeping the welcome mat out for foreign investment."\textsuperscript{161}

Foreign nations have also pushed for a clarification of the U.S. standard. The Japanese have failed to comment on the EFA, but the European Community (EC) has been particularly disturbed by the potential inconsistency of U.S. policy. Although "the EC in no way contests the right of any country to take such measures as are necessary to defend its national security,"\textsuperscript{162} the EC has stressed its concern about the "'potentially very wide' scope" of the EFA, stating that the EC considers the possibility of protectionism "very serious indeed."\textsuperscript{163} If the United States entertains hopes of entering into a trade agreement with the EC, the U.S. government had better heed the EC's warning.\textsuperscript{164}

\textsuperscript{158} Moran, supra note 147, at 62.
\textsuperscript{159} See generally McCoy, supra note 157.
\textsuperscript{160} Weiss, supra note 77, at A21.
\textsuperscript{161} Id.
\textsuperscript{162} These concerns were recently expressed by David Tirr, a top EC official. EC Complains of Uncertainty Associated with Exon-Florio, 9 Int'l Trade Rep. (BNA) No. 8, at 300 (Feb. 19, 1992).
\textsuperscript{163} Id. at A3.
\textsuperscript{164} "While the EC is not asking that the law be amended," it has been suggested that there is "room to explore the national security concept." Id.
The Technology Preservation Act of 1991165 (TPA or "Act") was introduced in the House of Representatives on June 12, 1991, to ensure that transactions "vital to United States national security are thoroughly investigated, and that any threats to national security that might arise from such combinations are effectively remedied and prevented."166 Although the EFA's national security standard was retained under the TPA, this Act proposed several significant changes to the EFA. One important addition would have granted the CFIUS powers concurrent with those of the President and enabled CFIUS to direct the involved parties to delay their final transaction until an investigation could be completed.167 The Act would have also granted the President the additional authority to direct parties to "unwind" completed deals. This unwinding would have removed any incentive for American owners to speed up a sale to avoid having the sale blocked under the EFA.168 Additionally, the problem of the foreign purchaser finding a suitable buyer through divestiture procedures would have been avoided.169 Finally, the TPA would have allowed the President to require "assurances" from foreign persons that their control of a U.S. firm would not impair the national security of the United States.170

Additional factors were also provided for the President to consider when making national security determinations. The most important of these was the capability and capacity of foreign-owned or foreign-controlled firms located within the United States to meet the national defense requirements. This section of the Act addressed the Gulf War semiconductor issue discussed earlier in this Comment.171

The most significant portion of the TPA, however, was a move toward an increased understanding of the effects of foreign ownership and control on American industries that are vital to national security. Under the Act, the President would have been required to conduct a study to determine what, if any, technologies or types of U.S. firms should be preserved for research and development and production, and to what extent foreign investment is a factor in the inability of defense suppliers to provide materials and components for defense weapons.

166. H.R. REP. No. 399, supra note 72, at 6.
167. Id. at 16.
168. Id. at 9.
169. Id. at 9.
170. Although such assurances have been provided to the CFIUS under the current EFA, the CFIUS does not have the power to solicit or enforce such assurances. Id. at 8.
171. See supra notes 117-21 and accompanying text.
In addition, each individual transaction referred to CFIUS would have been subject to an initial examination by a White House Science Advisor. The Advisor would be appointed to identify all cases that involve technologies essential to the national security. This may have forced the investigation of transactions the President may have otherwise overlooked. Absent judicial review, however, the Act did not compel action on such matters.

The TPA was not passed by the 102d Congress. The introduction of this bill, however, did represent a small step toward defining national security interests. The analysis of national security was complicated by the Bush Administration's opposition to bringing commercial and economic concerns under review, coupled with an inability to clearly separate military from civilian technology. The changing political world also makes it difficult to determine "friendly" and "unfriendly" nations, and resulting threats to national security.

It is doubtful that the Act will be reintroduced in the present congressional session. If the Act is reintroduced in its original form, however, several problem areas remain. The lack of judicial review reflected a continued ability for presidential abuse of discretion; the President was still afforded the opportunity to investigate all referrals without a judicial check on his final decision. As a result, Congress would again fail to provide adequate restrictions. Therefore, although this proposed amendment to the EFA is justified as an attempt to protect national security, it may have been nothing more than a protectionist attempt to appease the brainwashed American public.

2. Antitrust Considerations

It has also been suggested that the national security concerns could be more adequately protected by adding an antitrust element to the national security standard. For example:

[I]f the largest four firms (or four countries) control less than 50 percent of the market, they lack the ability to collude effectively even if they wish to exploit or manipulate recipients. If they control more

173. Id. at 149.
174. Id.
175. Id. at 148.
176. See, e.g., Congress Unlikely to Take 'Activist' Role in Foreign Investment Issues, Aide Says, 10 Int'l Trade Rep. No. 33, at 138 (Aug. 18, 1993).
than 50 percent of the market, they have the potential to coordinate denial, delay, blackmail, or manipulation.\textsuperscript{177}

While the "4-4-50" rule described above would not place responsibility for antitrust considerations upon the Justice Department,\textsuperscript{178} it has been suggested that increased enforcement of the current antitrust laws and stricter antitrust guidelines would more objectively determine the legality of foreign investments.\textsuperscript{179} While increased enforcement of the current antitrust statutes is expected with Ann A. Bingaman at the helm of the Justice Department's Antitrust Division, it is doubtful that FDI will be discouraged in the process.\textsuperscript{180}

3. New Technology Protection Statutes

Another concern over merely restricting the ownership of U.S. companies is that:

Rejecting the foreign acquisition may simply mean that the foreign company remains offshore, where U.S. authorities have the least clout over its operations, from which position it can undermine the U.S. domestic-owned competitor or consign American industries to using second-class products if U.S. authorities use trade protection to prop it up.\textsuperscript{181}

Therefore, "[t]he need for high-tech legislation was an important element of the Democratic congressional agenda in the Bush Administration, and a Clinton-Gore campaign plank with vocal business support."\textsuperscript{182} The proper tool to eliminate such effects has not yet been determined, but Congress is now attempting to find a remedy for the situation through means separate and apart from the EFA.

One such measure is the Stevenson-Wydler Technology Innovation Act of 1980, which was amended on June 14, 1993.\textsuperscript{183} The purpose of this bill was "to contribute to the competitiveness of the United States by enhancing the Department of Commerce's technology programs."\textsuperscript{184} This bill, in its current form, would require U.S. companies to "(1) 'agree' to promote the

\textsuperscript{177} Moran, supra note 147, at 65.
\textsuperscript{178} Id.
\textsuperscript{179} Id.
\textsuperscript{181} Moran, supra note 147, at 65.
\textsuperscript{182} Schwartz & Caplan, supra note 78, at 5.
\textsuperscript{184} Id. § 202 (proposed amendment to Section 301 of the Stevenson-Wydler Technology Innovation Act of 1980) (amended at (1988)).
manufacture within the U.S. of products resulting from supported technol-
ogy and (2) 'agree' to procure parts and materials from 'competitive United
States suppliers.'”185 It includes the National Outreach Program, grants,
and other educational aspects, which are expected to encourage domestic
research and development efforts.186

While the Act is therefore expected to increase the amount of technol-
ogy research conducted in the United States, it also limits the transfer of
that technology, whether the corporation is domestic or foreign owned. It
is uncertain what impact this bill will have upon current industry but as the
bill is universally applied to both domestic and foreign owned corporations,
it appears to be on the right track; the Act provides two assurances that the
level of technology will not be reduced. Through the enhancement of cur-
rent methods and preservation of both new and existing technology, the Act
appears to be in the best interests of national security advocates, without
providing a discretionary means of enforcement that can be skewed by fluc-
tuations in public opinion.

In addition, this Act would enable the states to encourage continuing
investment in local communities. By ensuring that technological advances
in manufacturing remain in the U.S., this Act would protect U.S. jobs and
ensure continuing economic support for their local economies. Whether
this bill becomes a law or other similar legislation arises, Congress will
clearly pursue this type of legislation until it becomes a permanent part of
U.S. policy.

V. CONCLUSION

The inability of the Clinton Administration to commit to a strict free
trade stance is representative of the current dilemma sweeping the country.
Congress needs to reiterate its free trade stance and provide a consistent
policy to ensure that uniform standards are maintained. Although the ex-
ecutive branch has declared its objectives concerning both inward and out-
ward foreign investment, congressional attitudes have not been consistent
with those of the executive branch. Usually, the more visible congressional
positions are opposed to some specific form of FDI, and although no purely
protectionist legislation has passed, legislation is occasionally introduced to
limit it. As a result, the overall congressional view can be classified as sup-
porting some form of managed trade when national security is a concern.
However, failure to agree on the level of such management has resulted in a

185. Schwartz & Caplan, supra note 78, at 8 (citation omitted).
186. H.R. 820, supra note 183 § 204 (proposed amendment to Section 303 of the Stevenson-
Wydler Technology Innovation Act of 1980).
federal government that appears neutral in its views. Such neutrality could be dangerous. If changes in legal attitudes are significant, they could conceivably cause changes in the U.S. legal and regulatory environment. As a result, legal treatment of direct foreign investment must be changed. It is important that the federal government honor its constitutionally imposed responsibility and present a stable foreign investment policy that can react to short term political and social sentiments without violating long-term U.S. policy goals. In the process, such a policy would eliminate the need for state-imposed regulations and avoid the escape of technology necessary for a stable U.S. economy.

Jacqueline J. Ferber