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Fixed Shares in Intestate Distribution: A Comparative Analysis of Islamic and American Law

John Makdisi*

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* Assistant Professor of Law, Cleveland State University. Mr. Makdisi would like to thank the American Research Center in Cairo and the International Communication Agency for funding part of this project and Iden Martyn, J.D. Candidate, Cleveland State University, for his contribution to the American law section of this article.
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I. INTRODUCTION

A well-established characteristic of intestate succession laws in most American jurisdictions is that only the spouse of the decedent is required to share the inheritance with other classes of heirs, usually the issue, parents, or brothers and sisters of the decedent. A recent study sponsored by the American Bar Association (ABA study) has suggested that this characteristic of intestate succession fails to adequately reflect the distributive preferences of the decedent. The ABA study proposes revision

1. See infra text accompanying notes 87-101. Only nine of the fifty states depart from the general rule and in those states the sharing among classes is on a very limited basis. See infra text accompanying notes 102-03.

2. Fellows, Simon & Rau, Public Attitudes about Property Distribution at Death and Intestate Succession Laws in the United States, 1978 Am. B. Found. Research J. 319. The authors conclude that the distributive preferences of a decedent should be reflected in the intestate succession law:

Testamentary freedom should include the right not to have to execute a will in order to have accumulated wealth pass to natural objects of the decedent's bounty. Moreover, unless the statutory scheme invoked in the absence of a will conforms to the likely wishes of a person who dies without having executed a valid will, it creates a trap for the ignorant or misinformed. The alternative defensible rationale for adoption of a particular distributive pattern in an intestacy statute is that it serves society's interests. There are four identifiable community aims: (1) to protect the financially dependent family; (2) to avoid complicating property titles and excessive subdivision of property; (3) to promote and encourage the nuclear family; and (4) to encourage the accumulation of property by individuals. If society's well-being requires a distributive pattern different from the determined wishes of intestate descendants, the decedents' wishes should be subordinated. But our society places high value on testamentary freedom. Thus, the preferred distributive pattern of intestate decedents should be given full effect and should be deviated from only if necessary to satisfy an overriding societal interest. To do otherwise would be contrary to our concept of testamentary freedom.

Id. at 323-24 (footnotes omitted).
of American statutes to include a scheme of proportional sharing in the decedent's estate among heirs belonging to different classes.

The principal proposal of the ABA study was that "siblings share in the estate with parents." This proposal was based on responses to a telephone survey in which respondents were asked: "Indicate the percentage of your estate that you would want to give to each survivor if you are survived by your father, your mother, and an adult brother and sister." The distribution pattern of preferences by respondents for these relatives was split with about forty percent favoring distribution to one or both parents and about forty percent favoring distribution to all four. If we assume a general preference (based on a weighted average of the preference patterns in the study) to distribute to the father-mother-brother-sister combination in fixed proportions of 2.5-2-1-1, then it may be assumed that a decedent survived by the heirs listed in the survey question would want his or her estate of $13,000 distributed in the following way: $5,000

3. Id. at 386. It is interesting to note that the Statute of Distribution 22 & 23 Car. 2, ch. 10 (1670), on which American statutes are generally based, provides for joint sharing between the widow and a class of heirs, but it was thought to be unsatisfactory. In 1685 Parliament provided for joint sharing between a mother and brothers and sisters when the praepositus died without wife, father, or children. 1 Jac. 2, ch. 17, § 7 (1685). See T. ATKINSON, HANDBOOK OF THE LAW OF WILLS 47 (2d ed. 1953).


5. The distribution patterns found in the study were as follows:

<table>
<thead>
<tr>
<th>Distribution Pattern by Percent of Estate to:</th>
<th>Percent of Respondents in Pattern</th>
<th>No. of Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Father         Mother         Brother   Sister</td>
<td></td>
<td></td>
</tr>
<tr>
<td>100            0              0        0</td>
<td>7.3</td>
<td>55</td>
</tr>
<tr>
<td>0              100             0        0</td>
<td>1.6</td>
<td>12</td>
</tr>
<tr>
<td>50             50              0        0</td>
<td>31.9</td>
<td>239</td>
</tr>
<tr>
<td>25             25              25       25</td>
<td>40.3</td>
<td>302</td>
</tr>
<tr>
<td>0              0               50       50</td>
<td>7.1</td>
<td>55</td>
</tr>
<tr>
<td>Other          .                .        .</td>
<td>11.7</td>
<td>88</td>
</tr>
<tr>
<td>Total          .                .        .</td>
<td>99.9</td>
<td>749</td>
</tr>
</tbody>
</table>

*1 missing case.

Id. at 346. Weighting each pattern by the percent of respondents in the pattern produces a weighted average distribution pattern as follows:

<table>
<thead>
<tr>
<th>Father</th>
<th>Mother</th>
<th>Brother</th>
<th>Sister</th>
</tr>
</thead>
<tbody>
<tr>
<td>33.325</td>
<td>27.625</td>
<td>13.625</td>
<td>13.625</td>
</tr>
</tbody>
</table>
to the father, $4,000 to the mother and $2,000 each to the brother and sister. Intestate succession laws presently existing in thirty-nine states would ignore such preferences and distribute the entire estate to the parents.

The ABA study did not investigate the preferences of respondents concerning shared inheritances among other classes, such as between issue and siblings or between issue and parents. However, it is evident that the totally exclusive inheritance by one class of heirs contains certain inadequacies and may require amendment in the direction of proportional shares to be distributed among two or more classes of heirs.

The purpose of this article is not to study further the distributive preferences of decedents—for which there is certainly a need. Rather, it is to present some of the problems which arise when proportional shares are incorporated in a scheme of intestate succession and to propose various techniques for dealing with these problems suggested by a study of the Islamic legal system, which has incorporated the idea of proportional shares in its intestate succession law. Therefore, the article begins with a description of the Islamic system followed by a survey of existing American intestate succession laws. It then discusses the various techniques used in the Islamic system to accommodate a scheme of fixed proportional shares and suggests how they may be used in an American scheme. The conclusions of this article will be confined to problems arising in the construction of a scheme of proportional shares. There is no attempt to expand on the substantive conclusions of the ABA study concerning the proportions which should be allocated among the different classes of heirs.

II. Islamic Law

The Islamic law of intestate succession proved a viable method for distributing decedents’ estates for over a thousand years in the Islamic world and continues to influence, if not regulate, the distribution of intestate estates there today. Islamic law—which is based on scholarly interpretations of the Qur'an and the traditions ascribed to Muhammad, as well as customs of the local culture—divided the heirs of an intestate decedent into three major classes: those who possess a right to inherit fixed shares (Sharers); those who take the remainder after distribu-
tion of the fixed shares by virtue of their agnatic\(^6\) relationship to the decedent (Agnates); and those who take a remainder portion only in the absence of living blood relatives among the first two classes (Blood Relatives). Minor variations exist among the different schools of Islamic law\(^7\) and, within schools, among different legal scholars.\(^8\) However, in its finally evolved form, the Islamic scheme constitutes a fairly unified, albeit complex body of rules, the knowledge of which has been said (in a famous dictum attributed to the Prophet) to "equal one half the sum total of human knowledge!"\(^9\) Despite its complexity, the essence of the Islamic scheme of shared inheritance among different classes of heirs may be summarized in a few pages.\(^10\)

---

6. The term "agnatic" characterizes the relationship through male descent or ascent. The agnatic granddaughter is the daughter of a son or of a son's son or of a son's son's son, etc.; the agnatic grandfather is the father of the father or of the father's father or of the father's father's father, etc.

7. The four sunni schools of Islamic law are the Hanafi, Shafi'i, Maliki and Hanbali. The law of intestate succession will be described for these four schools based on a Hanbali treatise of the 13th century, Ibn Qudama, *Kitab al-Fara'id* (Book of Distributive Shares), in 6 *KITAB AL-MUGHNI* (1367 H., i.e., 1948 A.D.) [hereinafter cited as *MUGHNI*]. This treatise was chosen as a reference for Islamic law because of its importance, not only as a source of Hanbali law (still used in Saudi Arabia today), but also as a comparative work. Professor Noel Coulson has written a comprehensive book on the Islamic law of intestate succession, N. COULSON, *SUCCESSION IN THE MUSLIM FAMILY* (1971). Although Professor Coulson does not cite any authoritative sources as a general basis for his work, a careful comparison of his work with the MUGHNI reveals that both expound essentially the same law. I have chosen to digest the MUGHNI in order to provide a more summarized account of the law, as well as to provide references to an original Arabic source in this area of the law. All translations from original Arabic are the author's. Arabic terms have been transliterated both in the text and the footnotes with a minimum of diacritical marks.

8. Different Islamic legal scholars mentioned in this article include: Abu Hanifa (died 150 H./767 A.D.), the eponym of the Hanifa school of Islamic law; Abu Yusuf (died 182 H./798 A.D.) and Shaybani (died 189 H./804 A.D.), two disciples of Abu Hanifa; Malik (died 179 H./795 A.D.), the eponym of the Maliki school of Islamic law; and Shafi'i (died 204 H./820 A.D.), the eponym of the Shafi'i school of Islamic law. Some of the greatest disagreements concerning the law occurred between Abu Yusuf and Shaybani, both of whom belonged to the Hanafi school.


10. This description of the Islamic scheme is concerned solely with the distribution of the net estate of an intestate decedent to regular heirs and does not examine the individual's freedom to distribute his property by testamentary disposition, or impediments to or conditions of inheritance, death-sickness, advancements, bequests, or the effect of slavery, illegitimacy, or guardianship on intestate succession. For a discussion of these subjects, as well as a more detailed description of the scheme of intestate succession, see N. COULSON, *SUCCESSION IN THE MUSLIM FAMILY* (1971).
A. The Sharers (dhawu al-furud)

In pre-Islamic times the intestate's wealth was inherited by his closest male agnatic relative; women were not considered useful in combat or in the defense of tribal territory and, therefore, did not enjoy the same rights of inheritance as men. An important reform introduced by Islam was the assignment of fixed shares to certain female relatives of the decedent. The Prophet was determined to give females a share in intestates' wealth, and to this end he included three verses in the Qur'an:


IV, 11

God (thus) directs you
As regards your children's
(Inheritance): to the male,
A portion equal to that
Of two females: if only
Daughters, two or more
Their share is two-thirds
Of the inheritance;
If only one, her share
Is a half.

For parents, a sixth share
Of the inheritance to each,
If the deceased left children;
If no children, and the parents
Are the (only) heirs, the mother
Has a third; if the deceased
Left brothers (or sisters)
The mother has a sixth.
(The distribution in all cases
Is) after the payment
Of legacies and debts.
Ye know not whether
Your parents or your children
Are nearest to you
In benefit. These are
Settled portions ordained
By God; and God is
All-knowing, All-wise.

IV, 12

In what your wives leave,
Your share is a half,
If they leave no child;
But if they leave a child,
Ye get a fourth; after payment
Of legacies and debts.
In what ye leave,
which ensured women a share in the estates of close family

Their share is a fourth,
If ye leave no child;
But if ye leave a child,
They get an eighth; after payment
Of legacies and debts.
   If the man or woman
Whose inheritance is in question,
Has left neither ascendants nor descendants,
But has left a brother
Or a sister, each one of the two
Gets a sixth; but if more
Than two, they share in a third;
After payment of legacies
And debts; so that no loss
Is caused (to any one).
Thus is it ordained by God;
And God is All-knowing,
Most Forbearing.

IV, 176

They ask thee
For a legal decision.
Say: God directs (thus)
About those who leave
No descendants or ascendants
As heirs. If it is a man
That dies, leaving a sister
But no child, she shall
Have half the inheritance:
If (such a deceased was)
A woman, who left no child,
Her brother takes her inheritance:
If there are two sisters,
They shall have two-thirds
Of the inheritance
(Between them): if there are
Brothers and sisters, (they share),
The male having twice
The share of the female
Thus doth God make clear
To you (His law), lest
Ye err. And God
Hath knowledge of all things.

Verse IV, 12 appears to contradict verse IV, 176 by giving the brother and sister each a one-sixth share as opposed to giving a two-thirds share to two sisters, and if there be a brother, a double share to him over the sister. The consensus reached in Islam to explain this apparent contradiction is that verse IV, 12 refers to uterines and verse IV, 176 refers to germanes and consanguines. A recent study has suggested that, contrary to this explanation, both verses refer to germanes and consanguines, but the first deals with testate succession and the second with intestate succession. See Powers, The Islamic Law of Inheritance Reconsidered: A New Reading of Q. 4:12B, 55 STUDIA ISLAMICA 61 (1982).
members in conjunction with the inheritance of the male agnates.  

These verses create a class of Sharers consisting of the husband, wife, uterine brother and sister, mother, father, daughter, germane sister, consanguine sister, agnatic grandfather, grandmother, and agnatic granddaughter of the decedent who inherit according to a fixed share scheme.

The fixed share of an intestate’s estate allotted to each heir of the Sharer class is summarized in Table 1. The fixed share varies as shown in Table 1, depending on the existence or nonexistence of certain specified heirs.

<table>
<thead>
<tr>
<th>HEIR</th>
<th>WITH</th>
<th>WITHOUT</th>
<th>SHARE</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Husband</td>
<td>Agnatic descendant</td>
<td>—</td>
<td>1/4</td>
</tr>
<tr>
<td>(2)</td>
<td></td>
<td>Agnatic descendant</td>
<td>1/2</td>
</tr>
<tr>
<td>(3) Wife</td>
<td>Agnatic descendant</td>
<td>—</td>
<td>1/8</td>
</tr>
<tr>
<td>(4)</td>
<td></td>
<td>Agnatic descendant</td>
<td>1/4</td>
</tr>
<tr>
<td>(5) Uterine Brother or Sister</td>
<td>Agnatic descendant</td>
<td>—</td>
<td>0</td>
</tr>
<tr>
<td>(6)</td>
<td></td>
<td>Agnatic descendant</td>
<td>1/6 or, if more than one, 1/3 collectively</td>
</tr>
</tbody>
</table>

---

13. It is possible that women did have a right of intestate succession in Mecca before the Qur’anic reforms. See F Petter & G H Bousquet, supra note 11, at 99-102.

14. A uterine brother or sister has the same mother as the decedent but a different father.

15. A germane brother or sister has the same parents as the decedent.

16. A consanguine brother or sister has the same father as the decedent but a different mother.

17. Mughni, supra note 7, at 178(3)-178(6); Qur’AN IV, 12.

18. Mughni, supra note 7, at 178(4)-178(8); Qur’AN IV, 12. There may be one or more wives who share in the wife’s share.

19. Mughni, supra note 7, at 166(20)-167(8), 183(10)-183(12); Qur’AN IV, 12. According to Malik and Shafi’i, if one or more germane brothers (or one or more germane sisters converted into residuaries by a germane brother) would be totally excluded from a share in the inheritance due to the presence of uterines (i.e., where they inherit with the husband and the mother (or grandmother)), he or they inherit equally with the uterines qua uterines. Mughni, supra note 7, at 180(17)-181(17).
<table>
<thead>
<tr>
<th>Heir</th>
<th>With</th>
<th>Without</th>
<th>Share</th>
</tr>
</thead>
<tbody>
<tr>
<td>(7) Mother&lt;sup&gt;28&lt;/sup&gt;</td>
<td>Agnatic descendant</td>
<td>—</td>
<td>1/6</td>
</tr>
<tr>
<td>(8) &quot;</td>
<td>Two or more brothers or sisters</td>
<td>Agnatic descendant</td>
<td>1/6</td>
</tr>
<tr>
<td>(9) &quot;</td>
<td>Father</td>
<td>Agnatic descendant or two or more brothers or sisters</td>
<td>Residue</td>
</tr>
<tr>
<td>(10) &quot;</td>
<td>—</td>
<td>Agnatic descendant, more than one brother or sister, or father</td>
<td>1/3</td>
</tr>
<tr>
<td>(11) Father&lt;sup&gt;21&lt;/sup&gt;</td>
<td>Male agnatic descendant</td>
<td>—</td>
<td>1/6</td>
</tr>
<tr>
<td>(12) &quot;</td>
<td>Female agnatic descendant</td>
<td>Male agnatic descendant</td>
<td>1/6 plus residue</td>
</tr>
<tr>
<td>(13) &quot;</td>
<td>—</td>
<td>Agnatic descendant</td>
<td>Residue</td>
</tr>
<tr>
<td>(14) Daughter&lt;sup&gt;22&lt;/sup&gt;</td>
<td>Son</td>
<td>—</td>
<td>Residue</td>
</tr>
<tr>
<td>(15) &quot;</td>
<td>—</td>
<td>Son</td>
<td>1/2 or, if more than one, 2/3 collectively</td>
</tr>
<tr>
<td>(16) Germane Sister&lt;sup&gt;23&lt;/sup&gt;</td>
<td>Male agnatic descendant or father (or, according to Abu Hanifa, agnatic grandfather&lt;sup&gt;24&lt;/sup&gt;)</td>
<td>—</td>
<td>0</td>
</tr>
</tbody>
</table>

The published edition of MUGHNI indicates that the share of one-third is divided among the uterine brothers and sisters "equally, to the male the equivalent of the portion of two females" (bi as-sawiya li adh-dhakar mithl hazz al-'unthayyn). MUGHNI, supra note 7, at 181(10). But two manuscripts of the work at Dar al-Kutub, the main library in Cairo, show that "two females" is an error in the text and should read "the female" (al-'untha). IBN QUDAMA, MSS 18(7) and 23(7) Fiqh Hanbal [classification of the two manuscripts] AL-MUGHNI.

20. MUGHNI, supra note 7, at 176(4)-176(5), 177(11)-177(12), 179(20)-179(22); QUR'AN IV, 11. With the father alone the mother receives her Qur'anic share of one-third, but with the spouse and the father she inherits one-third of the remainder after the spouse. This results effectively in her being a residuary with the father and sharing in one-third of the residue.

21. MUGHNI, supra note 7, at 177(3)-177(11), 177(15)-177(17); QUR'AN IV, 11.

22. QUR'AN IV, 11.

23. MUGHNI, supra note 7, at 166(6)-166(7), 168(12)-168(13), 168(16), 169(17); QUR'AN IV, 176. For inheritance with uterines, see supra note 19.

24. MUGHNI, supra note 7, at 215(10)-215(11), 215(15).
<table>
<thead>
<tr>
<th>HEIR</th>
<th>WITH</th>
<th>WITHOUT</th>
<th>SHARE</th>
</tr>
</thead>
<tbody>
<tr>
<td>(17) Germane Sister</td>
<td>Germane brother, female agnatic descendant, or agnatic grandfather (also according to Abu Yusuf, Shaybani, Malik, and Shafi'i)</td>
<td>Male agnatic descendant or father (or, according to Abu Hanifa, agnatic grandfather)</td>
<td>Residue</td>
</tr>
<tr>
<td>(18) &quot; &quot;</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(19) Consanguine Sister</td>
<td>Male agnatic descendant, germane brother, or father (or, according to Abu Hanifa, agnatic grandfather)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(20) &quot; &quot;</td>
<td>Two germane sisters</td>
<td>Consanguine brother</td>
<td>0</td>
</tr>
<tr>
<td>(21) &quot; &quot;</td>
<td>Consanguine brother, female agnatic descendant, or agnatic grandfather (also according to Abu Yusuf, Shaybani, Malik, and Shafi'i)</td>
<td>Male agnatic descendant, germane brother, or father (or, according to Abu Hanifa, agnatic grandfather)</td>
<td>Residue</td>
</tr>
<tr>
<td>(22) &quot; &quot;</td>
<td>One germane sister</td>
<td>Agnatic descendant, male agnatic ascendant, germane brother, or consanguine brother</td>
<td>1/6</td>
</tr>
</tbody>
</table>

25. *Id.* at 217(22)-218(21). For identification of these jurists, see *supra* note 8.
27. *Id.* at 166(6)-166(7), 166(15)-166(16), 168(12)-168(13), 168(16), 169(17), 174(3)-174(9), 175(11)-175(12); *Qur'an IV*, 176.
29. *Id.* at 217(22)-218(21).
30. *Id.* at 215(10)-215(11), 215(15).
### INTESTATE DISTRIBUTION

<table>
<thead>
<tr>
<th>HEIR</th>
<th>WITH</th>
<th>WITHOUT</th>
<th>SHARE</th>
</tr>
</thead>
<tbody>
<tr>
<td>(23) Consanguine Sister</td>
<td>Agnic descendant, male agnic descendant, germane brother, consanguine brother, or germane sister</td>
<td>1/2 or, if more than one, 2/3 collectively</td>
<td></td>
</tr>
<tr>
<td>(24) Agnic Grandfather</td>
<td>Father or nearer agnic grandfather</td>
<td>—</td>
<td>0</td>
</tr>
<tr>
<td>(25) &quot; &quot;</td>
<td>Male agnic descendant</td>
<td>Father or nearer agnic grandfather</td>
<td>1/6</td>
</tr>
<tr>
<td>(26) &quot; &quot;</td>
<td>Female agnic descendant</td>
<td>Father, nearer agnic grandfather, or male agnic descendant</td>
<td>1/6 or residue, whichever is greater</td>
</tr>
<tr>
<td>(27) &quot; &quot;</td>
<td>—</td>
<td>Father, nearer agnic grandfather, or agnic descendant</td>
<td></td>
</tr>
<tr>
<td>(28) Grandmother</td>
<td>Mother or nearer grandmother (with modifications according to Abu Hanifa, Malik, and Shafi’i)</td>
<td>—</td>
<td>0</td>
</tr>
</tbody>
</table>

31. *Id.* at 177(3)-178(1). The grandfather differs from the father by inheriting as a residuary with germane and consanguine brothers and sisters. (Abu Yusuf, Shaybani, Malik and Shafi’i are in accordance, but Abu Hanifa maintains the exclusion of these collaterals by the grandfather). *Id.* at 215(10)-215(11), 215(15), 217(22)-218(21). If the grandfather’s share in the residue in the presence of these collaterals is greater than one-sixth of the total inheritance, it is computed without taking the one-sixth share into account (as will be more fully explained in the text accompanying notes 43-44 infra). See also examples in MUGHNI, *supra* note 7, at 227(9)-227(10), 227(19)-227(20). Therefore, his share becomes “1/6 or residue, whichever is greater” rather than “1/6 plus residue” as in the case of the father’s inheritance with a female agnic descendant and without a male agnic descendant. *See supra* Table 1, pp. 274-77.

32. MUGHNI, *supra* note 7, at 206(1), 206(14)-206(15), 206(20), 209(9)-210(5). The Prophet gave the grandmother a one-sixth share. *See id.* at 214(4). Not all grandmothers are entitled to inherit as Sharers. On the maternal side only one line of grandmothers—the mother of the mother and of the mother’s mother and of the mother’s mother’s mother, etc.—participates in the inheritance. On the paternal side, the two lines of grandmothers stemming from the father and the father’s father are admitted. Malik and his followers admit only the maternal line of grandmothers and the paternal line stemming from the father. Abu Hanifa and his followers and Shafi’i (according to one report) admit the maternal line of grandmothers and the paternal lines of grandmothers stemming from the father and every agnic grandfather. MUGHNI, *supra* note 7, at 208(3)-209(8).

33. Malik and Shafi’i (according to Shafi’i’s second statement on the matter) main-
<table>
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<th>HEIR</th>
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<th>WITHOUT</th>
<th>SHARE</th>
</tr>
</thead>
<tbody>
<tr>
<td>(29) Grandmother</td>
<td>—</td>
<td>Mother or nearer grandmother (with modifications according to Abu Hanifa, Malik, and Shafi‘i)</td>
<td>1/6</td>
</tr>
<tr>
<td>(30) Agnatic</td>
<td>Higher(^a) male agnatic descendant</td>
<td>—</td>
<td>0</td>
</tr>
<tr>
<td>Granddaughter(^b)</td>
<td>Equal male agnatic descendant</td>
<td>Higher male agnatic descendant</td>
<td>Residue</td>
</tr>
<tr>
<td>(31) &quot; &quot;</td>
<td>Higher female agnatic descendant</td>
<td>Higher or equal male agnatic descendant</td>
<td>1/6</td>
</tr>
<tr>
<td>(32) &quot; &quot;</td>
<td>Lower male agnatic descendant in the presence of two or more higher female agnatic descendants</td>
<td>Higher or equal male agnatic descendant</td>
<td>Residue</td>
</tr>
<tr>
<td>(33) &quot; &quot;</td>
<td>Two or more higher female agnatic descendants</td>
<td>Male agnatic descendant</td>
<td>0</td>
</tr>
<tr>
<td>(34) &quot; &quot;</td>
<td>—</td>
<td>Higher or equal male agnatic descendant or higher female agnatic descendant</td>
<td>1/2 or, if more than one, 2/3 collectively</td>
</tr>
</tbody>
</table>

If the sum of the fractional fixed shares of the Sharers equals unity (i.e. = 1.0), the inheritance is divided in accordance with those fixed shares. If the sum is greater than unity, the share of each is proportionately decreased (‘awl). Thus, in the case of a decedent who leaves a father, mother, two daughters,

\(^a\) I.e., nearer in degree to the praepositus.
\(^b\) Mugni, supra note 7, at 184(7)-184(9).

34. Id.
35. Id. at 169(15)-174(2).
36. Mugni, supra note 7, at 184(7)-184(9).
and a wife to inherit a $13,500 estate, the mother takes a share of one-sixth (first category under Mother in Table 1), the father takes a share of one-sixth plus residue (second category under Father), the two daughters each take one-third (second category under Daughter), and the wife takes one-eighth (first category under Wife). Since these shares total one and one-eighth \((1/6 + 1/6 + 2/3 + 1/8)\), the share of each is proportionately decreased, so that the father actually takes 4/27, the mother 4/27, the daughters 8/27 each, and the wife 3/27. Their shares in the $13,500 estate are $2,000 (father), $2,000 (mother), $4,000 (each daughter), and $1,500 (wife). If the sum of the fixed shares is less than unity, the remainder of the inheritance after distribution to those with fixed shares goes the Sharers who have been made residuaries and the Agnates. In the absence of fixed shares, the residuaries take the whole inheritance.\(^{38}\)

### B. Residuaries

In addition to the sharers who may be entitled to a residuary interest, there are two classes of potential heirs to the residue of a decedent's estate after distribution of fixed shares to the Sharer class: Agnates ('asaba) and Blood Relatives (dhawu al-arham).

#### 1. Agnates ('asaba)

The Agnates are the male heirs listed below among whom the first existing heirs in order of priority inherit the remainder of an estate to the exclusion of other Agnates:\(^{39}\)

1. sons;
2. nearest in degree of agnicous grandsons;
3. father;
4. nearest in degree of agnicous grandfathers, germane brothers, and consanguine brothers, with germane brothers excluding consanguine brothers;\(^{40}\)

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38. *Id*. at 168(14)-168(15). *But see infra* text accompanying notes 43-44 (exception when the grandfather and one germane or consanguine sister are in competition with the husband and mother).


40. Germane and consanguine brothers are not excluded by the agnicous grandfather. *Id*. at 215(16)-215(17), 217(22)-218(21). Abu Yusuf, Shaybani, Malik and Shafi'i are in accordance on this point. *Id*. at 215(18), 218(2). Abu Hanifa maintains that they are excluded by the agnicous grandfather. *Id*. at 215(10)-215(11), 215(15). One situation exists in which germane brothers are considered as uterines. *See supra* note 19.
(5) nearest in degree of male agnatic descendants of germane and consanguine brothers, with the germane's descendants excluding the consanguine's descendants of equal degree;
(6) father's germane brothers;
(7) father's consanguine brothers;
(8) nearest in degree of male agnatic descendants of the father's germane and consanguine brothers, with the germane's descendants excluding the consanguine's descendants of equal degree;
(9) relatives of the nearest in degree of agnatic grandfathers who inherit in the following order of exclusive priority:
   (a) germane brothers,
   (b) consanguine brothers,
   (c) nearest in degree of male agnatic descendants of germane and consanguine brothers, with the germane's descendants excluding the consanguine's descendants of equal degree.

Thus, for example, when a decedent leaves only an uncle, one son, and two grandsons, the son will take the whole estate. If the decedent also leaves heirs belonging to the Sharer class then the son will take a residuary interest after the distribution has been made to the Sharers.

When two or more heirs are entitled to take the residue, it is distributed generally in accordance with the priorities established for the Agnates. Consequently, when residuaries among the Sharers are Agnates or female Sharers inheriting in conjunction with Agnates, the Agnates exclude all Agnates following them in order of priority. When a germane or consanguine sister inherits as a residuary with a female agnatic descendant, she takes an inheritance like that which her brother would have taken, and appears to exclude all Agnates who rank after her brother in order of priority. This would include the exclusion of the consanguine sister by the germane sister when a female agnatic descendant survives the decedent.

Determining the share of a grandfather can become quite involved. For example, when germane or consanguine brothers or sisters inherit with the grandfather, the share of the grandfather is determined by taking the maximum share of the following:

41. Mughni, supra note 7, at 169(6).
42. See, e.g., id. at 222(10)-222(11).
(1) one-sixth of the total estate as a fixed share;
(2) one-third of the estate remaining after deduction of fixed shares not going to germane or consanguine brothers or sisters or himself;
(3) a male's share of such remaining estate after a nominal division is made among the brothers and sisters and himself with males receiving double the portion of females; or
(4) if the grandfather is in competition with the husband, the mother, and one germane or consanguine sister, an initial distribution of fixed shares is made to all, the shares are decreased proportionately (by 'awl), and then the grandfather takes two-thirds of the collective entitlement of himself and the sister (8/27 of the total estate).

Once the grandfather has taken his allowable share, the shares of the germane and consanguine brothers and sisters in any residue remaining are determined as follows: (1) germanes exclude consanguines (except when the germane is only one sister, in which case she takes a share to the extent of one-half of the total inheritance, if the remaining residue is that large, after which any remaining residue goes to the consanguines); and (2) as between a germane brother and sister or between a consanguine brother and sister, the male receives double the share of the female.

Except for the case of the grandfather in competition with the germane or consanguine brothers or sisters, the residuaries who inherit share equally, but with the male taking double the portion of the female. If there are no residuaries who take and the sum of the fixed shares does not add to unity, each fixed share is increased proportionately (radd), except for the spouse's share which remains constant. However, according to Malik and Shaafi'i, when there are no other residuaries there is no proportionate increase and the remainder escheats to the public treasury (bayt al-mal).

Thus, in the case of a decedent who leaves a father, mother, brother, and sister to inherit a $13,500 estate, the father is first

43. Id. at 218(4)-220(2), 223(13)-223(18).
44. Id. at 218(12)-218(14), and examples at 220(3)-223(12).
45. QUR'AN IV, 11 (son and daughter); MUGHNI, supra note 7, at 171(5)-171(7) (granddaughter and grandson); id. at 175(15)-175(17) (germane brother and sister; consanguine brother and sister). For the mother and father, see supra note 20.
46. MUGHNI, supra note 7, at 201(9)-202(3). Abu Hanifa and his followers are in accordance. Id. at 201(14)-201(15).
47. Id. at 202(3)-202(5).
in order of priority and takes to the exclusion of the brother. The father also excludes the sister (first category under Ger-
mane Sister in Table 1) and then takes a two-thirds share as residue after the mother takes her one-third (third category under Mother and third category under Father in Table 1). Their shares in the $13,500 estate are $9,000 (father) and $4,500 (mother).

2. Blood Relatives (dhawu al-arham)\(^48\)

If there are no blood relatives among the Sharers or Agnates surviving the decedent, the Blood Relatives of the deceased are entitled to share in the inheritance.\(^49\) The spouse is not a blood relative and will inherit his or her maximum fixed share. The Blood Relatives will inherit that part of the estate not going to the spouse, and if there is no spouse, they will take the whole inheritance.\(^50\)

Among the Blood Relatives, shares in the inheritance are generally determined according to the doctrine of tanzil, whereby each relative is put in the position (manzila) of the Sharer or Agnate (known generally as "ordinary heirs") with whom he is connected.\(^61\) However, in the Hanafi school, the shares of Blood Relatives are determined according to the doctrine of relationship (qaraba), whereby each Blood Relative is considered in his direct relationship to the decedent and according to the ranking of the Agnates.

a. Tanzil. Under the doctrine of tanzil the ordinary heir with whom a Blood Relative is connected for purposes of inheritance is determined as follows:

(1) for descendants of the decedent, by tracing the line of ascent to the first ordinary heir;\(^62\)

---

48. The term dhawu al-arham may be used generally to refer to all blood relatives but is used here to refer only to blood relatives other than Sharers and Agnates. See id. at 202(1)-202(2), 202(8)-202(10), 229(3)-229(4); Qur'an VIII, 75. Therefore, "Blood Relatives" is capitalized when used in this restricted sense. For a list of these relatives, see Mughni, supra note 7, at 229(4)-229(8). Malik and Shafi'i do not recognize this group of heirs. Id. at 229(11)-229(12).

49. Id. at 229(8)-229(9), 229(20)-229(21). Abu Hanifa is in accordance. Id. at 232(15)-232(16). Malik and Shafi'i do not recognize this group of heirs and give the inheritance to the public treasury (bayt al-mal). Id. at 229(11)-229(12).

50. Id. at 231(14)-231(20), 237(4)-237(5).

51. Id. at 231(10)-231(16). The doctrine of tanzil elaborated in this study is that of Ibn Qudama, who differs in some particulars with others who espouse the doctrine.

52. See, e.g., id. at 233(1)-233(4).
(2) for descendants of brothers or sisters of the decedent, by tracing the line of ascent to the first ordinary heir; 53
(3) for ascendants of the decedent, by tracing the line of descent to the first ordinary heir; 54
(4) for brothers and sisters of ascendants of the decedent, by tracing the collateral line to their brother or sister who is an ascendant of the decedent and, if that ascendant is not an ordinary heir, by tracing the line of descent from that ascendant to the first ordinary heir; 55 and
(5) for descendants of brothers and sisters of ascendants of the decedent, by tracing the line of ascent to the brother or sister of an ascendant of the decedent, then the collateral line to that ascendant, then the line of descent from that ascendant until the first ordinary heir is reached. 56

A single existing relative from the Blood Relatives takes the entire inheritance. 57 If more than one Blood Relative exists, the right of each to inherit is determined initially by the proximity of his relationship to the ordinary heir he represents. If relatives representing the same ordinary heir are in varying degrees of proximity to that ordinary heir, the nearer in degree exclude the more remote. 58 If relatives representing different ordinary heirs are in varying degrees of proximity to their ordinary heirs, the nearer in degree exclude the more remote, but only if they are in the same class of relatives. 59 For this purpose the Blood Relatives are divided into four classes—descendants, fraternal relatives, maternal relatives, and paternal relatives. 60

53. See, e.g., id. at 232(12)-232(13), 233(1)-233(5), 245(12)-245(16).
54. See, e.g., id. at 251(22)-252(4).
55. See id. at 232(7)-232(15), and examples at 251(9)-251(19).
56. See, e.g., id. at 233(20)-233(22), 234(2), 246(10)-247(13), 251(20)-251(21).
57. Id. at 233(9)-233(10).
58. Id. at 233(10)-233(13).
59. Id. at 234(5)-234(7).
60. Ibn Qudama knows of no one who has counted the classes and explained them, except for Abu al-Khattab, whose count of five leads to results which no one supports. Id. at 234(15)-234(18). From Khiraqi (a tenth-century scholar whose Mukhtasar serves as the basis for Ibn Qudama’s commentary in Mughni) Ibn Qudama deduces that the classes are four. Id. at 234(19)-235(2). Ibn Qudama mentions that it is possible that the classes are three and that one is best, but later examples confirm his recognition of four classes. Id. at 236(3)-236(7), and examples at 246(2)-246(6), 248(15)-249(5).

The relatives constituting each of the four classes respectively are the descendants of the decedent, the descendants of brothers and sisters of the decedent, the other relatives stemming from the mother, and the other relatives stemming from the father. See, e.g., id. at 235(2)-236(2). However, it appears that the paternal grandmother is considered a maternal relative, for the purpose of this classification, when her relatives exist
The inheritance is then divided among the ordinary heirs represented by Blood Relatives who have not been excluded. Each ordinary heir represented takes the share he would have received in competition with the other ordinary heirs represented, and that share devolves on the relatives representing him. The share of the ordinary heir is distributed to his relatives as if he were the decedent and they his heirs, with certain exceptions:

(1) Descendants of the decedent or of a brother or sister of the decedent inherit per stirpes the share of their ordinary heir, with two schools of thought on the manner in which the shares are divided. One school equalizes (man sawwa) between male and female and gives the male an equal share with the female. The other school gives preference (man faddala) to the male and gives the male double the share of the female, unless the ordinary heir is a uterine brother or sister in which case the male takes an equal share with the female.

(2) The father and mother of the mother's father, inheriting alone, take shares of two-thirds and one-third respectively. The distribution to higher ascendants related to the same ordinary heir remains unclear.

(3) A brother and sister of an ascendant of the decedent,

with relatives of the mother or maternal grandmother. See, e.g., id. at 251(19)-252(4). Whether she is considered a maternal relative with other relatives is not clear from MUGHNI.

61. Id. at 234(3)-234(7). The presence of the spouse does not affect the determination of these shares, except according to one view not espoused by Ibn Qudama, whereby the existing spouse is considered initially in competition with the ordinary heirs for the purpose of determining the ratio of their shares. After the ratio is determined, the spouse takes his or her maximum fixed share and each group of relatives representing the ordinary heirs takes its share of the remaining portion in proportion to the predetermined ratio. Id. at 237(4)-237(10).

62. See id. at 233(10)-233(13).

63. Inheritance per stirpes is the taking of the share one's parent would have taken had he been alive, and that parent's share is the one his parent would have taken and so forth on up the line. In the case here described, where two or more children are descended from the same parent, they take equally except where it is indicated that a male takes double the share of a female.

64. See MUGHNI, supra note 7, at 238(15)-239(10), 243(6)-243(7), and examples at 239(14)-239(22), 240(14)-240(17), 240(18)-241(2) (example of per stirpes devolution where the ordinary heir is a descendant of the decedent), 241(8)-241(12) (example of per stirpes devolution where the ordinary heir is a sister of the decedent), 241(17)-241(18), 242(3)-242(5), 243(8)-243(10), 245(1)-245(5), 245(19)-246(4).

65. Id. at 252(2).

66. E.g., when the parents of the mother's paternal grandfather are in competition with the mother of her paternal grandmother.
who are not ordinary heirs and are either germane or consanguine, take their shares equally according to those who equalize between the male and female. According to those who give a preference to the male, the brother takes double the share of the sister.67

(4) Descendants of a brother or sister of an ascendant of the decedent inherit per stirpes the share of their ordinary heir, or, if their ordinary heir is an ascendant of the decedent, they inherit per stirpes the share which would have been taken by their own ascendant who is the brother or sister of an ascendant of the decedent. According to those who equalize, the male shares equally with the female. Those who give a preference to the male give the male double the share of the female unless the ordinary heir is uterine, in which case the male takes an equal share with the female.68

Thus, in the case of a decedent who leaves two paternal aunts and a cousin who is the daughter of his mother’s sister to inherit a $13,500 estate, the paternal aunts are put in the position of the father, and the cousin is put in the position of the mother. Neither excludes the other because the aunts are paternal relatives and the cousin is a maternal relative. Since the mother would have received one-third and the father two-thirds, the aunts each take one-third and the cousin takes one-third. Their shares in the $13,500 estate are $4,500 each.

67. See MUGHNI, supra note 7, at 238(15)-239(10), and examples at 249(12)-249(17) (for maternal aunt and uncle).
68. See id. at 238(15)-239(10), 244(1)-244(6), 244(21)-244(22), and examples at 239(14)-240(2), 245(1)-245(5), 246(2)-246(11), 247(9)-247(13), 249(8)-249(12), 251(5)-251(21). Per stirpes devolution, while not explicitly mentioned for this group of heirs, appears to be implied.

When the ordinary heir is an ascendant of the decedent, it is not clear from Ibn Qudama what share the descendants of a brother or sister of an ascendant of the decedent take in competition with a relative who is an ascendant of that ordinary heir, e.g., when the sons of the mother’s germane, consanguine, and uterine brothers are in competition with the mother’s paternal grandfather. The general rule is that the paternal grandfather excludes nephews, which would argue for the grandfather taking the whole inheritance. But in the absence of the grandfather, the general rule is that the germane brother’s son takes to the exclusion of the consanguine and uterine brother’s sons. This is not the case for the sons of the mother’s brothers in the absence of her paternal grandfather. The sons are represented by their fathers for purposes of the rules of exclusion: the consanguine brother is excluded, the uterine brother is allocated one-sixth and the germane brother five-sixths of the inheritance, which then devolves to the sons of the uterine and germane brothers respectively. Id. at 245(3)-245(5). Query whether the sons of the mother’s brothers are represented by their fathers for purposes of the rules of exclusion when in the presence of the mother’s paternal grandfather, and if so, whether the paternal grandfather of the mother is represented by her father.
b. Qaraba. Under the doctrine of qaraba followed by the Hanafi school in lieu of tanzil, a Blood Relative inheriting an interest in the intestate’s estate according to his direct relationship to the decedent and according to the Agnate rankings. Thus, descendants exclude descendants of the decedent’s parents, and the descendants of nearer ascendants exclude the descendants of further ascendants.\(^6^9\) Within each of the classes of descendants, the relatives who are nearer in degree to the decedent exclude the more remote.\(^7^0\) Where relatives of the same class are all equal in degree to the deceased, relatives who are closest in degree to ordinary heirs, who are their ascendants but not ascendants of the decedent, exclude the others.\(^7^1\) A division exists between the followers of Abu Yusuf and Shaybani\(^7^2\) concerning the rules of priority and apportionment among the relatives not excluded in the application of the doctrine of qaraba.

(1) Abu Yusuf. Abu Yusuf directs that distribution be made per capita\(^7^3\) with the male taking double the share of the female.\(^7^4\) When the class consists of descendants of the decedent’s parents or higher ascendants, germanes exclude consanguines, consanguines exclude uterines, the issue of germanes exclude the issue of consanguines, and the issue of consanguines exclude the issue of uterines.\(^7^5\) If the relatives remaining after this exclusion are from both the maternal and paternal sides, the relatives on the maternal side take one-third and the relatives on the paternal side take two-thirds of the inheritance collectively.\(^7^6\) In this regard, descendants of great grandparents on either the maternal or paternal side are further subdivided into maternal and

\(^6^9\) *Id.* at 232(15)-232(20). Ibn Qudama does not explain the position of the ascendants within this order except to say that Abu Hanifa himself gave precedence to the father’s mother, the father’s mother’s mother, etc., over the children of the daughters. *Id.* at 232(19).

\(^7^0\) See, e.g., *id.* at 241(21)-241(22), 245(12)-245(13), 247(5)-247(7), 249(6)-249(8), 249(18)-249(19).

\(^7^1\) See, e.g., *id.* at 241(23)-243(2) (descendants), 245(13)-245(14) (descendants of parents), 246(10)-246(12), 247(8)-247(9) (descendants of paternal aunts and uncles), 251(8)-251(9).

\(^7^2\) See supra note 8.

\(^7^3\) I.e., according to their number (‘ala ʿadadihim).

\(^7^4\) *Mughni*, supra note 7, at 240(7)-240(9), and examples at 240(14)-241(7) (descendants), 241(8)-241(20) (descendants of parents).

\(^7^5\) *Id.* at 244(6)-244(7), and examples at 245(14)-245(16), 246(10)-246(12), 248(5)-248(6), 249(21)-249(23).

\(^7^6\) See, e.g., *id.* at 248(5)-248(6), 249(21)-249(23), 251(15)-251(16).
paternal relatives and given a collective share of one-third and two-thirds respectively of the collective share of their side.\footnote{77} 

(2) Shaybani. Shaybani’s approach differs from that of Abu Yusuf. For the class of descendants he directs that the estate be divided initially between the male and female ascendants of the heirs at the first generation under the decedent differing in sex. The females are allocated a share for each heir claiming through them and the males are allocated a double share for each heir claiming through them. The collective shares of the males and females are then further subdivided among the males and females of the next lower generation under each of them differing in sex, and the subdivision continues in like manner until the heirs take their shares, the male taking double the share of each female under each subdivision. If there are no generations between the heirs and the decedent which differ in sex, distribution is made per capita with the male taking double the share of the female.\footnote{78}

For the class of descendants of the decedent’s parents, Shaybani directs that the estate be divided initially among the brothers and sisters of the decedent, who have heirs claiming through them, according to the normal principles of distribution to these relatives but with each brother and sister counting as however many heirs claiming through him or her. The subsequent distribution of the share of each brother and sister to their descendants is made in the same way as the decedent’s estate is distributed to his descendants, except that male and female issue of uterines are allocated equal shares.\footnote{79}

Within the class of descendants of the decedent’s grandparents or higher ascendants, germanes exclude consanguines, consanguines exclude uterines, the issue of germanes exclude the issue of consanguines, and the issue of consanguines exclude the issue of uterines.\footnote{80} If the relatives remaining after this exclusion are from both the maternal and paternal sides, the relatives on

\footnote{77. See, e.g., id. at 251(8)-251(9). Further subdivision for descendants of higher ascendants is implied.} 
\footnote{78. Id. at 240(10)-240(13), and examples at 240(14)-241(8). The text does not refer to more than one division among males and females at a generation between the heirs and the decedent, but implies a successive subdivision for each generation differing in sex.} 
\footnote{79. Id. at 243(5)-243(7), 244(6)-244(9), and examples at 241(8)-241(19), 243(4)-243(5), 243(11)-243(18), 245(7)-245(8).} 
\footnote{80. Id. at 244(6)-244(9), and examples at 246(10)-246(12), 248(5)-248(6), 249(21)-249(23).}
the maternal side take one-third and the relatives on the paternal side take two-thirds of the inheritance collectively. In this regard, descendants of great-grandparents on either the maternal or paternal side are further subdivided into maternal and paternal relatives and given a collective share of one-third and two-thirds respectively of the collective share of their sides. The subsequent distribution of the estate is not described explicitly by Ibn Qudama but appears to be the same as for the class of descendants of the decedent's parents. 

Thus, for example, in the case of a decedent who leaves two paternal aunts and a cousin who is the daughter of his mother's sister to inherit a $13,500 estate, all three are descendants of grandparents, but the aunts are nearer in degree to the decedent and therefore exclude the cousin. Each aunt takes one-half the $13,500 estate.

Finally, if the decedent dies with no blood relative, the public treasury (bayt al-mal) takes the share of the inheritance not going to a surviving spouse.

The particular fixed shares which were ordained in the Qur'an are unimportant to U.S. intestate succession laws since they depend on social and historical factors peculiar to Islam and are not suited to American culture. However, some of the techniques used to distribute shares to various heirs in the Islamic system may shed some light on how to approach problems of refining the American system of intestate succession. Before examining these techniques, the intestate succession laws presently existing in the United States will be examined to determine the extent to which they use the concept of fixed shares.

81. See supra note 76.
82. See supra note 77.
83. But see supra note 49 (exceptions of Malik and Shafi'i). It should be noted that an heir who has a dual relationship with the decedent inherits as a separate individual under each title. MUGHNI, supra note 7, at 252(5)-252(7), and examples at 186(7)-186(19), 252(9)-252(20). According the Shafi'i, Abu Yusuf, and reasoning by analogy from the word of Malik, there is an exception for the case of a grandmother who is two grandmothers to the decedent. They claim she will inherit only as one grandmother. Id. at 210(11)-210(17).
84. The distribution of a double share to the male over the female is not only counter to our ideas of propriety but actually contradicts fundamental notions of fairness expressed in the Equal Protection Clause of the 14th Amendment. Nevertheless, in Islam the duty of the husband to provide for the support of his family without any set-off from the wife's earnings, as well as other duties, justifies the unequal division of wealth. See Fellows, Simon & Rau, supra note 2, at 386 for the finding that the surviving spouse should inherit the entire estate in preference to the decedent's family of orientation.
III. American Law

Each state in the United States has enacted a statute that lists the persons who are or who may be heirs to part of an intestate decedent’s estate and the amounts each inherits. Although the list of heirs who may be entitled to some portion of the decedent’s estate is relatively similar from state to state, there are significant differences in the portions of the estate the heirs receive when certain individuals survive the decedent and others do not. Each state has adopted some form of fixed share distribution to determine the respective shares of each class of heirs entitled to participate in the estate.

Under existing intestate statutes there are two patterns of sharing among classes. The first pattern, which exists in all states, involves sharing among a surviving spouse and other classes of heirs according to various fixed share schemes. The second pattern involves sharing among other classes of heirs when there is no surviving spouse. Sharing according to the second pattern occurs only in nine states.

A. Sharing Among Surviving Spouse and Other Heirs

The differences among the state intestate inheritance laws primarily involve the existence of a spouse who may receive a

85. All states list the following persons who may be entitled to part of the decedent’s estate: 1) the spouse, 2) the decedent’s issue, 3) the decedent’s parents, and 4) the decedent’s brothers and sisters. In virtually all states these heirs take in order of priority to the exclusion of all others. If none of these heirs exists, differences begin to appear among the states concerning the next persons to inherit: (1) eight states (Arizona, Hawaii, Kansas, New Hampshire, New Mexico, Ohio, Tennessee, and Wisconsin) name the decedent’s grandparents (Hawaii adds great-grandparents; Ohio adds next of kin and step-children; Wisconsin adds nieces and nephews and next of kin); (2) sixteen states (Alabama, Alaska, Colorado, Florida, Idaho, Illinois, Indiana, Nebraska, New Jersey, North Carolina, North Dakota, Oregon, Pennsylvania, Texas, Washington, and Wyoming) name grandparents, and aunts and uncles (Pennsylvania adds children and grandchildren of aunts and uncles; Illinois adds great-grandparents and next of kin; Utah adds next of kin); (3) seven states (Arkansas, Iowa, Kentucky, Maryland, New York, Rhode Island, and Virginia) name grandparents, aunts and uncles, great-grandparents, and great-aunts and great-uncles, and in some cases further kindred; (4) eleven states (California, Connecticut, Delaware, Massachusetts, Michigan, Minnesota, Montana, Nevada, Oklahoma, South Dakota, and Vermont) merely add “next of kin” to the list (Massachusetts, Michigan, and Minnesota also add nieces and nephews); (5) seven states (Georgia, Maine, Mississippi, Missouri, South Carolina, Utah, and West Virginia) and the District of Columbia add some combination of all these heirs (in Utah, issue of parents and grandparents take by right of representation; in the District of Columbia, great-grandparents, great-aunts, and great-uncles are not included; West Virginia includes the spouse’s kindred).

86. See infra note 102 and accompanying text.
statutory fixed sum or a statutory share in conjunction with other heirs. The spouse’s treatment in the different state statutes directly affects when and how much the other heirs will receive. In the following discussion, the states will be divided into three categories depending on the classes of heirs with which the spouse shares the inheritance.87

1. States in which spouse shares only with surviving issue

In seventeen states the spouse inherits the entire estate to the exclusion of all other heirs when the decedent dies without issue.88 Among these seventeen states there are three basic patterns of distribution when both a spouse and issue survive the decedent. In two states, Arizona and Montana, the spouse inherits the entire estate even if there are surviving issue.89 In four other states—Colorado, Florida, Ohio and Wisconsin—the spouse inherits a fixed dollar amount from the estate and the remainder is divided between the spouse and issue according to a designated fraction.90 In several cases the practical effect of

87. The discussion in this section focuses primarily on the shares that particular heirs inherit through intestate succession, including the effect of the existence or nonexistence of an heir on the distributive share of another. When distinctions affect the distribution scheme, this discussion will distinguish between different types of heirs within a particular class, such as between issue who are issue of the surviving spouse and those who are not. Community property variation, illegitimacy, and similar distinctions have all been omitted in order to simplify and help clarify this description.


89. Ariz Rev Stat Ann § 14-2102 (1975); Mont Code Ann § 72-2-202 (1983). Both states require that the surviving issue be the issue of the surviving spouse in order for the spouse to receive the entire estate. If this requirement is not met, then in Arizona the spouse receives one-half the estate and the surviving issue receives the other half. In Montana, if there is only one surviving issue who is not the issue of the surviving spouse, then the spouse receives one-half the estate and the issue receives the other half. If there is more than one surviving issue who is not issue of the surviving spouse, then the spouse receives one-third of the estate and the issue receives two-thirds.

90. Colo Rev Stat § 15-11-102 (1973); Fla Stat Ann § 732.102 (West 1976); Ohio Rev Code Ann § 2105.06 (Page 1976); Wis Stat Ann § 852.01 (West 1971). These
this scheme is to give the entire estate to the spouse when the statutory dollar amount exceeds the net worth of the estate, because persons who die with wills tend to be wealthier than people who die without.91 In the final eleven states in this group—Arkansas, Georgia, Illinois, Kansas, Minnesota, Mississippi, New Mexico, Oregon, Tennessee, Virginia, and West Virginia—the spouse receives a designated fraction of the total estate, but no fixed sum.92

2. States in which spouse shares with issue or parents of decedent

In eighteen states the surviving spouse inherits the entire estate only when no issue and no parents survive.93 The spouse

states list certain restrictions on the actual amount to be received. In Ohio, the spouse receives the first $30,000 if one or more of the surviving issue are issue of the surviving spouse. If none of the issue is issue of the surviving spouse, then the spouse receives only the first $10,000 of the estate. As for the designated share, Ohio gives the spouse one-half the remainder if there is only one surviving issue; if there are more, then the spouse receives one-third. In Florida, the spouse receives the first $20,000 plus one-half of the remainder of the estate unless one or more issue are not issue of the surviving spouse. In such a situation, the spouse receives only one-half the estate. Both Colorado and Wisconsin give the spouse the first $25,000 plus one-half of the balance of the estate. As in the other states, Wisconsin and Colorado give the surviving spouse less if there are issue of the decedent who are not issue of the spouse. Colorado gives the spouse one-half the estate, while Wisconsin gives the spouse one-half if there is only one surviving issue (not the issue of the surviving spouse) and one-third if there are more than one such issue surviving.

91. See Fellows, Simon & Rau, supra note 2, at 324-25.

Arkansas' distribution scheme is unique because it requires the spouse to be married continuously for more than the three years preceding the intestate's death to be entitled to the entire estate. If married for this three-year period, the spouse receives the entire estate, provided that there are no surviving issue. Ark. Stat. Ann. § 61-149 (1971). In Mississippi, the spouse shares equally with the surviving issue. New Mexico gives the surviving spouse one-fourth of the estate and the surviving issue the other three-fourths.

shares the estate with either issue or parents, but issue take to the exclusion of parents. The distinction between this group and the first is that parents have a greater likelihood of receiving a share in the decedent’s estate because they can inherit a portion of the estate along with the spouse. As in the first group, three basic patterns exist. In fourteen states—Alabama, Alaska, Connecticut, Idaho, Maine, Maryland, Missouri, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Pennsylvania, and Utah—the spouse receives a fixed dollar amount and also shares in a fixed proportion of the remainder as designated by statute.94 Two other states—Delaware and North Carolina—follow a similar fixed amount scheme but draw distinctions between real and personal property.95 In the final two


95. DEL. CODE ANN. tit. 12, § 502 (1979); N.C. GEN. STAT. § 29-14 (Supp. 1983). Delaware gives the spouse the first $50,000 plus one-half the balance of the personal estate.
states in this group—Hawaii and Indiana—the spouse inherits only a fixed share in conjunction with either the issue or parents.

3. **States in which spouse shares with surviving issue, parents, or brothers and sisters of decedent**

The last major group includes ten states and the District of Columbia. These states give the surviving spouse the entire estate only if there are no surviving issue, no surviving parents, and no surviving brothers and sisters of the decedent. There are two basic subcategories in this group. In five states—South Dakota, Texas, Vermont, Washington, and Wyoming—the spouse receives a larger fixed share when sharing with parents or brothers and sisters than when sharing with issue. In the other five

and a life estate in the real property, whether the spouse shares with issue or parents. (The fixed amount is omitted if one or more of the issue are not issue of the surviving spouse.) North Carolina gives the spouse the first $15,000 plus a child's share of the remainder of personal property or one-third, whichever is greater, and an identical share of real property. If the spouse is sharing with parents, the spouse receives the first $25,000 plus one-half the remainder of personal and real property.

96. HAWAII REV. STAT. § 560:2-102 (Supp. 1982); IND. CODE ANN. § 29-1-2-1 (Burns 1972). Hawaii gives the spouse one-half of the estate whether sharing with issue or with parents. In Indiana, a spouse sharing with issue receives an issue's share or one-third, whichever is greater. If any of the issue are not issue of the surviving spouse, then the spouse's share in the real property is only a life estate in one-third. If the spouse shares the estate with parents, then the spouse receives three-fourths of the estate.


98. S.D. CODIFIED LAWS ANN. §§ 29-1-5, -6 (1976); TEX. PROB. CODE ANN. § 38 (Vernon 1980); VT. STAT. ANN. tit. 14, §§ 461, 474, 551 (1974); WASH. REV. CODE ANN. § 11.04.015 (Supp. 1983); WYO. STAT. § 2-4-101 (1980). South Dakota, Vermont, and Wyoming give the spouse only a fixed share when sharing with issue, but when sharing with parents or brothers and sisters, the spouse also receives a fixed sum. South Dakota gives the spouse one-third or an issue's share, whichever is greater when the issue survive. When sharing with parents or brothers and sisters, the spouse receives the first $100,000 plus one-half the balance of the estate. Vermont gives the spouse an elective share of one-third of the value of all the real estate of which the decedent died seised (one-half when sharing with only one of the surviving spouse's issue). When sharing with parents or brothers and sisters, the spouse receives the first $25,000 plus one-half the balance of the estate. Wyoming gives the spouse the first $20,000 plus three-fourths of the balance of the estate when sharing with parents or brothers and sisters. The spouse receives only
states—California, Kentucky, Michigan, Nevada, and Oklahoma—and in the District of Columbia the spouse receives the same share regardless of the existence of any other class inheriting in conjunction with the spouse.

4. **Extended sharing with spouse**

In five other states—Iowa, Louisiana, Massachusetts, Rhode Island, and South Carolina—the pattern of intestate succession does not fit into any of the three preceding groups. In each of these states except Louisiana, a spouse may be required to share the intestate estate with uncles or aunts, grandparents, great-grandparents, great-aunts and great-uncles, or even the "lineal ancestors" or "surviving kindred" of the decedent. In Louisiana, the spouse takes only if there are no descendants, parents, or brothers or sisters (or their descendants).

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99. CAL. PROB. CODE §§ 221, 223 (West 1956); KY. REV. STAT. ANN. § 392.020 (Baldwin 1978); MICH COMP. LAWS ANN. § 700.105 (West 1980); NEV. REV. STAT. §§ 134.040, .050 (1981); OKLA. STAT. ANN. tit. 84, § 213 (West 1970); D.C. CODE ANN. §§ 19-303, -304 (1981). Kentucky gives the spouse a fixed dower/curtesy share. California, Michigan, Nevada, and Oklahoma each give the spouse one-third or an issue's share, whichever is greater, when sharing with issue, and one-half the estate when sharing with parents or brothers and sisters. Texas gives the spouse one-third of the personal estate and a one-third life estate in real property when sharing with issue, and all the personal property and one-half the real property in fee simple when sharing with parents or brothers and sisters.

100. In South Carolina, the spouse shares the estate either with issue (one-third or an issue's share, whichever is greater), with parents or brothers and sisters (one-half the estate), or with lineal ancestors (one-half the estate). S.C. CODE ANN. § 21-3-20 (Law. Co-op. 1976). Massachusetts gives the spouse one-half the estate when sharing with issue, and the first $50,000 plus one-half the remainder of the estate when sharing with surviving kindred. MASS. GEN. LAWS ANN. ch. 190, § 1 (West Supp. 1983). Rhode Island gives the surviving spouse a dower/curtesy share of personal property and a life estate in real property. The remainder interest in the real property, and a portion of any remaining personal property, then go to the first surviving class of heirs from the following list: issue, parents, brothers and sisters, grandparents, uncles and aunts, great-grandparents, great-uncles and great-aunts, and nearest lineal ancestors. R.I. GEN. LAWS §§ 33-1-1 to -2-10 (1969). Iowa gives the spouse $50,000 or one-third of the estate, whichever is greater, if there are issue and $50,000 plus one-half if there are no issue. IOWA CODE ANN. §§ 633.211-.212 (West 1964 & Supp. 1983).

B. Sharing Among Classes of Heirs Other than Surviving Spouse

Only nine states—Georgia, Illinois, Indiana, Louisiana, Mississippi, Missouri, South Carolina, Texas, and Wyoming—require sharing among classes of heirs when no spouse survives the decedent. The remaining forty-one states and the District of Columbia do not require sharing among classes in the absence of a surviving spouse. Rather, the estate is distributed to the class of heirs with the greatest statutory priority, beginning with issue of the decedent, to the exclusion of all other classes of heirs. Even in the nine states that provide for sharing among classes in the absence of a surviving spouse, the surviving issue of the decedent take the entire estate. Sharing among classes occurs only among the parents and siblings of the decedent when neither issue nor spouse survive. The respective shares of the siblings and parents vary according to individual state law.

The preceding discussion indicates the very limited use American states make of fixed share distributions and sharing among different classes of heirs. The following section of this article discusses the problems that arise when joint sharing is incorporated into a scheme of intestate succession and delineates some of the techniques suggested by the Islamic system for dealing with these problems. However, because of differences between American and Islamic history and social circumstances, many of the substantive aspects of the Islamic system are inappropriate for transfer to the American system. Nevertheless, the experience of the Islamic system in dealing with the problems of


103. In Georgia, Mississippi, Missouri, South Carolina, and Wyoming, the father and mother share equally with brothers and sisters in the estate. In Mississippi, Missouri, and Wyoming, if the parents and siblings do not survive, the grandparents and uncles aunts share equally. In Indiana, the father and mother share equally with brothers and sisters, except that a parent takes no less than one-fourth of the estate. In Louisiana, brothers and sisters take subject to a usufruct in favor of the parents. In Texas, the father and mother receive equal portions in the whole estate, but a sole surviving parent takes one-half and the other half goes to the brothers and sisters. In Illinois, the father and mother share equally with brothers and sisters, but a sole surviving parent takes a double portion.
fixed shares may provide some insight into how we can incorporate such a scheme into our own system.

IV. TECHNIQUES

In American law there is generally an order of exclusive priority by which heirs take the estate of the decedent: (1) the spouse, (2) the decedent's issue, (3) the decedent's parents, (4) the decedent's brothers and sisters, and (5) others. At present the American scheme incorporates a system of fixed shares almost exclusively between the spouse and children. The ABA study suggests that the distributive preferences of the testator would best be served by also permitting the following heirs to inherit with each other: the spouse with the mother, the spouse with the issue, the parent(s) with the siblings, and the son with the issue of other, deceased sons. However, much work remains to be done in this area. The ABA study does not present results concerning the sharing of the inheritance between the following heirs who do inherit together in the Islamic scheme: parents with children, siblings with children, grandparents with children, the spouse with grandchildren, the spouse with grandparents, the spouse with siblings, grandchildren with parents, grandchildren with grandparents, grandchildren with siblings, parents with grandparents, and grandparents with siblings.

Furthermore, this list mentions only combinations of two different heirs and does not refer to combinations of three or more heirs who might inherit together.

Jurisdictions seeking to reform their intestate succession laws to provide a larger group of heirs who share concurrently in an inheritance will face two major problems: (1) the fear of disturbing a time proven system that has provided a simple and satisfactory method of distributing an intestate decedent's estate; and (2) the difficulties of apportioning the estate among members of various classes of heirs. The techniques used in the Islamic law of inheritance may be helpful in dealing with both of these problems.

A. Reform of a Time Proven Scheme Through Amendment

One problem that hinders reform of intestate succession
laws is the uncertainty concerning the changes to be made and the fear of disturbing a system having the advantages of a simple scheme and a long history. This fear might be mitigated by dismissing the idea of reform in favor of the idea of amendment. The scheme of intestate succession among the pre-Islamic tribes favored the Agnates' inheritance in a simple order of exclusive priority. Later, Islamic law amended this scheme to include fixed shares for certain designated individuals. The system of fixed shares, promulgated initially through three verses in the Qur'an, was simply grafted into the Agnatic succession scheme. As a result, it was possible to make certain changes in Islamic inheritance law without reconsidering the whole scheme of intestate succession.

If the goal were to further the usual intent of the testator and allow certain heirs to inherit with others under American intestate laws, a scheme of fixed shares that more closely reflected the testator's intent could be adopted by way of amendment to existing statutes without destroying the existing scheme of intestate succession.

The uncertainty concerning the changes that should be made will remain until further surveys such as those contained in the ABA study have been conducted. The ABA study was not meant to be complete. However, as the need for certain changes becomes apparent, it should be possible to implement them through successive amendments to the intestate succession laws without waiting for a total picture of sweeping reform. Gradual change in this matter will allow greater flexibility for experimentation and should diminish the problem of uncertainty.

B. Apportionment Through Designated Fixed Shares

Some of the problems in apportioning an estate among various classes of heirs include: (1) how a fixed share will be designated for a specific heir; (2) how the proportionate share of each class of inheriting heirs will be determined; (3) what adjustments will be made when the total of the fixed shares is either greater or less than unity; and (4) how an inheritance will be apportioned when only remote heirs survive the decedent.

Islamic law has developed a systematic method of answering or dealing with each of these problems. This method provides tested solutions that draftsmen of intestate laws may wish to consider in adopting inheritance reforms.
1. **Designation of fixed shares**

Once the combination of heirs who will inherit together has been determined, Islamic law provides several different ways in which a fixed share may be designated for a specific heir:

(1) A fixed share may be designated only if certain persons survive the decedent with the fixed sharer. For example, the husband and wife in the Islamic system receive a designated share of one-fourth and one-eighth respectively if they survive with an agnatic descendant.\(^{107}\) Likewise, the mother receives a fixed share of one-sixth if she survives with an agnatic descendant,\(^{108}\) and the father receives a fixed share of one-sixth if he survives with a male agnatic descendant.\(^{109}\)

(2) A fixed share may be designated only if certain persons survive the decedent and other persons do not. For example, in the Islamic system, the mother surviving with two or more brothers or sisters but without an agnatic descendant receives a fixed share of one-sixth.\(^{110}\) The consanguine sister who survives with one germane sister but without an agnatic descendant or a male agnatic ascendant or a germane brother or a consanguine brother receives a fixed share of one-sixth.\(^{111}\) An agnatic grandfather who survives with a male agnatic descendant but without a father or a nearer agnatic grandfather receives a fixed share of one-sixth.\(^{112}\) An agnatic granddaughter who survives with a higher female agnatic descendant but without a higher or an equal male agnatic descendant receives a fixed share of one-sixth.\(^{113}\)

(3) It is also possible for a fixed share to be designated only if certain persons do not survive the decedent with the fixed sharer. For example, in the Islamic system, the husband and wife are entitled to receive respective shares of one-half and one-fourth only if they survive the decedent without an agnatic descendant.\(^{114}\) A uterine brother or sister is entitled to a fixed share of one-sixth if he or she survives the decedent without an

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107. See supra Table 1, lines 1 & 3, p. 274.
108. See supra Table 1, line 7, p. 275.
109. See supra Table 1, line 11, p. 275.
110. See supra Table 1, line 8, p. 275.
111. See supra Table 1, line 22, p. 276.
112. See supra Table 1, line 25, p. 277.
113. See supra Table 1, line 32, p. 278.
114. See supra Table 1, lines 2 & 4, p. 274.
agnatic descendant or a male agnatic ascendant. A mother who survives without an agnatic descendant or two or more brothers or sisters or a father is entitled to a fixed share of one-third. A daughter who survives without a son is entitled to a fixed share of one-half. Likewise, a germane sister who survives without an agnatic descendant or a germane brother or a male agnatic ascendant is entitled to a fixed share of one-half. A consanguine sister is entitled to the same share in similar, although not identical, circumstances. Other heirs who fall within this category are the grandmother and the agnatic granddaughter.

These three methods of determining the designated share for a specified heir under Islamic law should be of particular concern to those seeking intestate law reform. These methods require critical focus on whether an heir should always inherit the same fixed share or whether the presence or absence of other objects of the intestate’s bounty should affect the fixed share of any or all other heirs. Although the fixed shares under the Islamic system may not prove workable in modern American society, they nevertheless may serve as a model upon which the framework of American reform may be based.

2. Allocating shares among classes

The fixed share described in Islamic law applies to a class of heirs and requires that the proportion of the estate which that class receives be fixed regardless of whether another class of heirs is added to or dropped from the list of sharers.

The ABA study indicates that following the Islamic concept of allocating a fixed portion to each class would produce desirable results for American jurisdictions. If the decedent leaves a father, mother, and brother and sister, the ABA study concluded that preferences for distribution among the surviving father, mother, and brother and sister of the decedent was 2.5-2-2. Does this mean that the father should always inherit 5/4 of the

115. See supra Table 1, line 6, p. 274.
116. See supra Table 1, line 10, p. 275.
117. See supra Table 1, line 15, p. 275.
118. See supra Table 1, line 18, p. 276.
119. See supra Table 1, line 23, p. 277.
120. See supra Table 1, line 29, p. 278.
121. See supra Table 1, line 35, p. 278.
122. See supra text accompanying note 5.
siblings’ share in order to reflect distributive preferences? Suppose the decedent is survived only by the father and the brother and sister. This hypothesized set of survivors was presented to the respondents in the telephone survey of the ABA study. A weighted average of the patterns for these three relatives inheriting without the mother indicates that the distributive preferences would still be 2.5-2.123

However, what would happen if there were only one brother surviving with the father, or five brothers, or even fifteen brothers? The fixed proportion allocated to the class of siblings ultimately would require that the absolute share of each sibling decrease as the number of siblings increase. The problem is not solved by allocating a fixed proportion to each heir, rather than to each class, because ultimately the father’s absolute share would become an insignificant amount in combination with an increasing number of shares to brothers and sisters. One solution to this problem would be to vary the fixed share given to a class depending on the number of persons in the class. Islamic law uses this approach in the case of sisters, daughters, and granddaughters inheriting in conjunction with other heirs. A sister, daughter, or granddaughter will ordinarily be entitled to inherit one-half, but two or more sisters, daughters, or granddaughters would collectively inherit two-thirds of the estate.124

123. The distribution patterns found in the study were as follows:

<table>
<thead>
<tr>
<th>Distribution Pattern by Percentage of Estate to:</th>
<th>Percent of Respondents in Pattern</th>
<th>No. of Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Father</td>
<td>Brother</td>
<td>Sister</td>
</tr>
<tr>
<td>100</td>
<td>0</td>
<td>0</td>
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<td>50</td>
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<tr>
<td>0</td>
<td>50</td>
<td>50</td>
</tr>
<tr>
<td>Other</td>
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<td></td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

*1 missing case.

Fellows, Simon & Rau, supra note 2, at 346. Weighing each pattern by the percentage of respondents in the pattern produces a weighted average distribution pattern as follows:

<table>
<thead>
<tr>
<th>Father</th>
<th>Brother</th>
<th>Sister</th>
</tr>
</thead>
<tbody>
<tr>
<td>49.033</td>
<td>19.783</td>
<td>19.783</td>
</tr>
</tbody>
</table>

124. See supra Table 1, lines 15, 18, 23, 35, pp. 275-78.
Distributive preferences in the United States might be analyzed to determine not only if siblings should inherit with parents, but also how much the proportionate share of siblings should be increased when there is an increase in surviving membership of that class. It may be determined that two siblings should take a larger share than one and ten siblings should take a larger share than two. A maximum fixed share should also be contemplated in order to avoid minimizing the shares of heirs in other classes.

3. Adjustment to fixed shares to provide for total distribution

An additional problem that has not confronted American intestate succession systems is designating certain fixed shares to individuals and finding that the total of these shares in a particular case adds to greater than or less than unity. At present, a spouse is entitled to inherit a designated share with surviving issue or, in some states, with surviving parents or surviving siblings. The spouse is given a fixed share and the remainder is divided among the class that inherits with the spouse. There are some states that alter the proportion of the estate going to the spouse depending upon the number of issue surviving. However, there is never a problem of the shares totalling to other than unity because the shares are specified for each combination.

In an intestate scheme which includes several combinations of heirs inheriting in conjunction with one another, the specification of shares for each combination might well become unwieldy. The Islamic solution to this problem has been to designate fixed shares for joint sharers with and without certain other persons surviving the decedent but not for every combination of heirs. When these fixed shares do not add to unity, the shares are proportionately increased or decreased until unity results. In Islamic law this process is called ‘awl (decrease) and radd (increase).

Care should be taken in constructing a scheme of fixed shares to minimize the possibility of a situation in which the proportionate decrease of fixed shares may be necessary to bring the total to unity. When fixed shares are grafted upon an already existing system in which heirs inherit in an order of exclusive priority, the class that would otherwise inherit the whole estate will usually take as residuaries. A system of fixed shares that is too generous in shares allocated to the sharing class may
totally exclude or drastically reduce the share of a residuary who once had an exclusive right to the inheritance.

One way in which the Islamic scheme protects the interest of the residuary is to include him in the class that receives a fixed share. In the case of the father who inherits with a female agnatic descendant but without a male agnatic descendant, the father is entitled to a fixed share of one-sixth plus any remaining residue. If the father survives the decedent with two daughters and the husband of the decedent, the two daughters would be entitled to a two-thirds share (8/12), the husband would be entitled to a one-fourth share (3/12), and the father would be left with the remaining residue of one-twelfth. However, because the father is entitled to a one-sixth fixed share plus any remaining residue, he is entitled to a minimum share of one-sixth (2/12). Through the process of radd, the two daughters are then entitled to split an 8/13 share, the husband is entitled to a 3/13 share, and the father is entitled to a 2/13 share. A similar combination of fixed share with residue is given to the agnatic grandfather when he inherits with a female agnatic descendant but without a father or a nearer agnatic grandfather or a male agnatic descendant.

Islamic law further protects members of the residuary class by varying the fixed share of one class of heirs as the class of residuary heirs increases in number. In the Islamic system the mother who survives the decedent without an agnatic descendant or a father is entitled to a fixed share of one-third if she survives with one brother of the decedent, but she is entitled to a fixed share of only one-sixth if she survives with two or more brothers of the decedent. This variation in the fixed share of the mother permits the brothers to have greater shares as their number increases from one to two.

4. Apportionment of the estate among remote heirs

As the heirs designated to take from the decedent become further removed and less important as objects of the decedent's bounty, distributive preferences may indicate that they be totally excluded from the inheritance by the survival of any heir existing in a closer degree to the decedent. There is no reason to

125. See supra Table 1, line 12, p. 275.
126. See supra Table 1, line 26, p. 277.
127. See supra Table 1, lines 8 & 10, p. 275.
distinguish this set of heirs from those who inherit presently in classes according to an order of exclusive priority, except insofar as the fixed shares of certain heirs are grafted upon the closer set of heirs and not those further removed. If there are no heirs who inherit as residuaries in the first set, it may be determined that the testator's distributive preferences are to give the entire estate to the fixed sharers and to increase their shares proportionately if they do not total to unity when first determined. For simplicity of presentation in an intestate succession law, a division could be made between the primary heirs who inherit with fixed sharers and the secondary heirs who inherit only if there are no primary heirs or fixed sharers. This distinction has been made in the Islamic system between the Agnates and the Blood Relatives.

Most American states do not provide for the inheritance by heirs beyond a certain degree removed from the decedent. There is an interest in limiting the number of potential takers in order to avoid the "laughing heir" (one who is so loosely linked to his benefactor as to suffer no sense of bereavement at his loss). On the other hand, a laughing heir may be preferred to the state taking by escheat.

If a preference is found to give to the secondary heirs, it may be difficult to determine the distributive preferences of the testator concerning the inheritance of each of those relatives. With the assumption that the testator would prefer a distribution pattern analogous to that of the distribution to the first two classes of heirs, Islamic law provides two different methods for implementing such a preference: tanzil and qaraba. Either of these methods could be adapted to meet the needs of American intestate reform.

According to the doctrine of tanzil, each secondary heir is put in the position of one of the primary heirs with whom he is connected. The connection with the primary heir is determined in a particular way, and the right of each heir to inherit is determined initially by the proximity of his relationship to the primary heir he represents. If he is entitled to inherit, he will take the share which would have devolved on the primary heir in conjunction with the other primary heirs represented. Tanzil recognizes that the testator may want to benefit the nearest relative

to a deceased relative of the first two classes in the same way that he would have benefitted the latter. Therefore, each Blood Relative stands in the shoes of the ordinary heir with whom he is connected.

According to the doctrine of qaraba, each secondary heir is considered in his direct relationship to the decedent. Mutually exclusive classes of heirs are determined, and within the class that is to inherit, relatives who are nearer in degree to the decedent exclude the more remote. When the relatives are all in equal degree to the decedent, the relatives who are closest in degree to primary heirs may exclude others. This latter doctrine provides for classes of heirs that resemble the mutually exclusive categories of the American system, but within the class that inherits, the heirs are determined by degree of relationship.

V. Conclusion

The problems accompanying the incorporation of fixed shares in an intestate succession law are manifold. The remarks made here only begin to touch on them. I hope, however, that this presentation of the manner in which the Islamic system has already dealt with problem areas will help to illuminate solutions to some of the obstacles that accompany intestate law reform. I also hope that the detailed discussion of the American system will indicate the severe lack of experimentation in the several states for intestate succession reform. The ABA study indicates possible areas in which substantive reform is needed. This article’s comparative analysis suggests techniques for implementing potential reforms. Further study in both areas is needed, but it rests with the states to provide a forum for the testing of such reforms.
An Insider's Perspective on the Significance of the German Criminal Theory's General System for Analyzing Criminal Acts

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I. INTRODUCTION

Over the past several years, increasing attention has been paid in the United States to German criminal law and criminal theory. This is a reflection not only of the preeminent position of German criminal law in countries outside the common law orbit, but also of the burgeoning literature on the German criminal system in the United States. This article explores one of the

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central structural features of German criminal law, which can be described as the German theory's "general system for analyzing criminal acts." (The underlying German term, Straftatsystem, has no precise English equivalent and can also be translated as the "general system for structuring criminal analysis," or more briefly, as the "general analytical system" or as the "criminal analysis structure." These phrases will be used interchangeably.


3. Literally translated, "Straftatsystem" means simply "criminal act system," but this translation fails to convey the structural and methodological significance of the Straftatsystem as a basic organizing principle of German criminal law. No translation of the term can be fully adequate, since there is no precise equivalent to the Straftatsystem within the American legal system and American legal practice. Thus, any set of English words will fail to adequately convey what is involved because of the lack of a corresponding institutional referent within American legal culture. In an effort to bridge this language gap, it has proven useful to employ a number of English terms that would not be obvious choices at the level of literal translation. The word "general" is added to indicate the expectation that the Straftatsystem is the method of analysis to be applied in all cases. Moreover, the Straftatsystem is general in the same sense that the "general part" (allgemeiner Teil) of criminal law is general: it relates to features of criminal conduct that go beyond the specific crimes of the "special part" (besonderer Teil). Not surprisingly, German texts on the general part are typically organized around the basic features of the general system for structuring criminal analysis. See, e.g., J. BAUMANN, STRAFRECHT: ALLGEMEINER TEIL (8th ed. 1977); H. JESCHECK, LEHRBUCH DES STRAFRECHTS: ALLGEMEINER TEIL (3d ed. 1978); R. MAURACH, DEUTSCHES STRAFRECHT: ALLGEMEINER
in this article to refer to the German *Straftatsystem.*) This system is an intellectual framework that defines and delimits the approach that a German jurist adopts in determining whether particular conduct violates the norms of the substantive criminal law. It is parallel in systemic significance to the Model Penal Code's innovative "element analysis" methodology, but has much deeper philosophical and cultural roots. This article will

The terms "analyzing" and "analytical" are used because the *Straftatsystem* is fundamentally concerned with what American lawyers would describe as legal analysis. More particularly, the *Straftatsystem* provides a structure for analyzing the basic constituents of criminal liability: whether the relevant prohibitory norm has been violated, whether justificatory circumstances are present, and whether culpability or accountability is negated by pertinent excusing conditions. Technically, it might be more accurate to think of the *Straftatsystem* as an effort at "synthesis" rather than "analysis," since its key function is to bring together the various constituents of liability and the wider values that shape our thought about criminal norms, justifications, and excuses in a structured methodology for resolving particular cases. But Americans tend to use the term "analysis" indiscriminately to cover both the "breaking down" (analytic) and the "gathering together" (synthetic) aspects of the process of reasoning used in deciding cases. "Analysis" is thus the better term to use in conveying the meaning of *Straftatsystem* to American lawyers.

The terms "structure" and "structuring" used in two of the suggested translations reflect the fact that the *Straftatsystem* constitutes not only a method of analysis, but a structure or structuring of thought. Perhaps these come to the same thing, but there are contexts in which the structural dimension of the *Straftatsystem* is not adequately evoked by the English word "system." The term *System* in German has stronger structural overtones than the cognate English term.

One further point about the term *System* must be made. The *Straftatsystem* is not to be thought of as a system of criminal law in the sense that one might speak of a "philosophical system"—i.e., as a theoretical or metaphysical construct accounting for a particular sector of thought or reality. This is not to say that German criminal theorists have not utilized the *Straftatsystem* as a central feature of comprehensive accounts of German criminal law. They have. Indeed, as noted above, most texts on the "general part" of German criminal law are organized around the basic features of the *Straftatsystem*. Moreover, as this article contends, the general system for analyzing criminal acts does reflect a constellation of values connected with the ideal of rule of law (*Rechtsstaatlichkeit*). Conceivably, in an age more conducive to philosophical system building, a criminal theorist might attempt to construct a system embodying these values. The point for present purposes, however, is that *Straftatsystem* is to be thought of as a practical, systematic method for structuring analysis of liability for criminal actions, rather than as some particular thinker's philosophical systematization of criminal law.

German criminal law scholars often refer not only to the *Straftatsystem*, but also to the *Straftatlehre* (literally, "criminal act doctrine"). The latter is merely the body of doctrine or theory about the former. No effort has been made to distinguish between translations of these two terms in this article, since from the perspective of American readers, the two blend together as a linked theoretical approach to analyzing criminal liability.

describe how the general analytical system operates in practice and will then explore the deeper values it reflects and protects. My aim is to provide an overview of a central feature of German criminal methodology, and then to reflect at a more general level on the relationship between legal methodology and legal values.

II. AN OVERVIEW OF GERMAN METHODOLOGY IN ANALYZING CRIMINAL LIABILITY

A. "Wild Postering": A Representative Problem

For those familiar with the significance of the "general theory for analyzing criminal acts" in German criminal thought, the topic addressed by this article may sound extremely broad. I think, however, that the subject is central to a number of significant theoretical and practical issues. The nature of the subject may become more clear if I begin with a legal issue that is currently the subject of frequent debate in Germany.

German courts are time and again confronted by the following set of facts: A group of young people has difficulty gaining public attention for their political views, and to remedy this problem they decide to "advertise." They have some posters printed and paste them up as firmly as possible in as many locations as they see fit. The modern glues are quite permanent, and the material is often bonded to the surface to which it is attached. It is usually a tremendous inconvenience to remove the posters or fliers, and is sometimes impossible.

Under German criminal law, the question is whether the foregoing conduct is sufficient to constitute the crime of damaging property under section 303 of the German Criminal Code. There are conflicting opinions, and the courts and scholars de-

5. See supra note 3.
6. In Germany this is called wildes Plakatieren, which may be translated as "wild postering," or more tamely, as "unauthorized advertising."
7. Section 303 provides, "Wer rechtswidrig eine fremde Sache beschädigt oder zerstört, wird mit Freiheitsstrafe bis zu zwei Jahren oder mit Geldstrafe bestraft." STRAFGESETZBUCH [StGB] § 303 (W. Ger.). This may be translated as follows: "Whoever wrongfully damages or destroys an object not belonging to him shall be punished by imprisonment for a term not to exceed two years or by a fine."
9. See, e.g., 1 R. MAURACH & F. SCHRÖDER, STRAFRECHT: BESONDERER TEIL 267 (6th
fend their views with numerous arguments. It is unsettled whether firmly pasting a flier or poster on an object damages that object. Those who believe that it does must turn to further questions. Conceivably, such property damage is justified by the right to freedom of speech. Even someone who does not accept the argument that free speech rights legitimize property damage might still argue that the young people should not be punished because they (mistakenly) thought that their right to freedom of speech justified their actions. These are difficult legal issues in Germany and they place great demands on the breadth and precision of analysis.

B. Fundamental Tools of Legal Analysis in the German System

The German lawyer must have total command of two fundamental and distinct tools of legal analysis to discuss properly the question of the punishability of unauthorized advertising: knowledge of the pertinent code sections and mastery of the general system for analyzing criminal acts.

1. Knowledge of code provisions

Knowledge of the the pertinent code sections entails knowledge not only of the wording of the applicable statutory texts but also a sound understanding of how they are to be interpreted. In the “wild postering” situation, one must know the text of section 303 of the German Criminal Code. According to the text of section 303, the damage or destruction of an object is a prerequisite for liability. The German lawyer must be aware that, according to the accepted interpretation of section 303, cases of unauthorized advertising fall within the statute’s prohibition of “damaging” as opposed to “destroying” property. He or she must also be conscious of the various legal interpretations of the word “damage.” Interpretations of this term are associ-
ated with three different views of the interests protected by section 303. The interests protected by this statute might reflect concerns with (1) the physical integrity of the object; (2) the object's functional capacities; or (3) the authority of the owner to determine what can and cannot be done with the object. If the protected interest is seen as the physical integrity or the functional capacity of the property, unauthorized advertising does not constitute damaging property. Pasting up a placard usually destroys neither the physical integrity nor the functional capacity of an object. If, on the other hand, the interest protected by making it a crime to damage property is the owner's authority over the object, then unauthorized advertising does constitute damaging property. Indeed, unauthorized advertising unavoidably invades the authority of the owner over his property.

Familiarity with, and the ability to discuss, these issues are part of the knowledge of the code that is required for a German jurist to work effectively with section 303.

2. The general system for analyzing criminal acts

Familiarity with the code, however, does not provide the German lawyer with enough knowledge to make a thorough legal analysis of unauthorized advertising. He must also be master of the second tool of legal analysis, the general system for analyzing criminal acts. In this general analytical system are collected those features of crime that are common to all crimes, whether it be damaging property, theft, murder, or anything else. If, therefore, unauthorized advertising is to be punishable under German law, it must be found to exhibit the general paradigmatic features of crime as determined by German criminal theory, as well as the particular elements of section 303 established by statute.

By pouring the question of liability for specific conduct through the filter of the general system for analyzing criminal acts, we are adding something—and not just a little some-
thing—to the law as written by the legislature. My central concern in this article is this “filling out” of the code’s text by the general analytical system. In order to appreciate how this “filling out” process operates, we turn first to a brief description of the main elements of the system.

The general analytical system describes the main features of criminal action with the German terms \textit{Tatbestandsmässigkeit} (definition of the offense), \textit{Rechtswidrigkeit} (wrongfulness), and \textit{Schuld} (culpability).\footnote{These translations of the German terminology are necessarily rough and imperfect. The basic structural features of criminal action they identify and the contrasts between them have been explored at length by Professor George P. Fletcher. See G. Fletcher, Rethinking Criminal Law 454-504, 552-69, 575-79 (1978); see also Durham, Book Review, 1979 Utah L. Rev. 629, 634-40. In the main, the translations I am using follow those used by Professor Fletcher, but a few comments are in order.}

Whatever the governing code provision may be, every criminal act must be wrongful and culpable conduct that conforms to (i.e., is violative of) the definition of the offense. Unauthorized advertising can only be punished if it violates the definition, is wrongful, and is culpable. These central elements are discussed with much effort and pomp in Germany.

First, \textit{Tatbestandsmässigkeit} connotes more than what American lawyers normally mean by the definition of an offense. The first part of the word, \textit{Tatbestand}, means “that of which the [criminal] act consists.” The suffix -mässigkeit means “the state or condition of being subject to.” In actuality, then, the German term refers not to the definition of an offense itself, but to the state of being subject to or in conformity with (i.e., in violation of) the definition or prohibitory norm (which specifies what the criminal act consists of). In many ways, the phrase “elements of an offense” constitutes a better translation of the core term \textit{Tatbestand}, since it preserves the German term’s ambiguous reference to both the norm and the prohibited conduct. One could thus translate \textit{Tatbestandsmässigkeit} as “the state or condition of fulfilling the defined elements of a criminal offense.” It is simpler, however, to refer to this feature of criminal acts as the definition of the offense, or as the state of fulfilling or violating the definition.

Turning to \textit{Rechtswidrigkeit}, I prefer the translation “wrongfulness” to Fletcher’s rendition of the term as “wrongdoing.” A literal translation would be “the state or condition of being against the law” or more simply “unlawfulness.” I share Fletcher’s view that this is inadequate because, to an American reader, this might suggest that \textit{Rechtswidrigkeit} has to do only with the state or condition of being inconsistent with positive law. The German term \textit{Recht}, which means both “law” and “right” has moral overtones that are independent of positive law. While I thus agree with Fletcher on the major translation issue here—namely, that an unduly positivistic rendition should be avoided—I prefer “wrongfulness” to “wrongdoing” because the former preserves the sense that \textit{Rechtswidrigkeit} is a characteristic of actions, rather than the “doing” itself.

\textit{Schuld} could be literally translated as “guilt,” but the question of guilt tends to be thought of in English as the final determination that a defendant is criminally liable, not as a more limited issue about whether the defendant may fairly be held accountable for his conduct. “Culpability,” with its overtones of accountability and moral responsibility, is a closer translation.
The discussion, however, has not achieved a conclusive result.\textsuperscript{14} A few main points, however, are undisputed.

\textit{a. The definition of an offense.} The word \textit{Tatbestandsmäßigkeit} embraces all of the elements of a particular crime that are found in the applicable code section. A rough American equivalent would be the phrase "elements of the offense."\textsuperscript{16} There is a \textit{Tatbestand} or definition of theft, homicide, fraud, and so on. The problems of interpretation mentioned earlier\textsuperscript{16} that arise in connection with applying section 303 to "wild postering" are questions about whether such conduct fits within the scope of the definition of damaging property. A German law student writing an exam on this issue, or for that matter, a German judge deciding a "wild postering" case, would be regarded as engaging in improper analysis if he or she tried to treat these questions at a different stage of the analysis—i.e., as an issue of wrongfulness or culpability.

Demanding that the problem of determining which legal interest is protected by section 303 be treated as a problem of the definition of damaging property affects more than the mere formal ordering of legal analysis. This demand also aids the decision of substantive issues. The content of the definition of a crime cannot be extended beyond that formulated by the legislature. In the context of section 303, for example, the authority of the property owner to determine what may happen to his property is protected only to the extent this authority is asserted to prevent damage to, or destruction of, the property. From this perspective it would take a strained interpretation to hold unauthorized advertising to be a violation of section 303, since such conduct leaves the property intact and intrudes solely upon the owner's authority. Further, the notion of \textit{Tatbestandsmäßigkeit} itself, in its German usage, necessarily implies that the perpetrator's deed (\textit{Tat}) be unambiguously and conspicuously antisocial. If, however, the definition of the crime of damaging property were tied to the authority of the owner to control his property, the determination of whether a particular act satisfied the elements of the definition would be dependent upon whether the property owner viewed the act as an incursion upon his author-

\begin{footnotes}
\item[15] See supra note 13.
\item[16] See supra text accompanying note 11.
\end{footnotes}
ity. But this latter definition does not comport with accepted theory concerning the nature of the definition of criminal acts. Thus, this theory makes it more difficult to punish “wild poster-ing” as a violation of section 303.\(^\text{17}\)

b. **Wrongfulness. Rechtswidrigkeit**, or wrongfulness, embraces all the statutory and extrastatutory general grounds for holding that conduct which is violative of the definition may still be found to be justified, thereby escaping punishment. Self-defense is a classic justification that negates the wrongfulness of an act. The right to free speech, which some “wild posterers” cite as the source of the legitimacy of their activity, is a doubtful justification in their case;\(^\text{18}\) but it is in any event an argument that must be legally analyzed under the heading of wrongfulness. The category of wrongfulness in the general analytical system not only provides the proper place for the discussion of such justifications but also provokes the discussion of doubtful justification.

c. **Culpability.** The first task of the element of **Schuld** or culpability in the general analytical system is to secure the status of culpability as an indispensible prerequisite to punishment. A result of the culpability requirement is that the lawyer must carefully consider possible grounds for excusing the actor, even though his conduct is violative of the definition of the crime and is wrongful. Insanity and duress are illuminating examples of the doctrines that serve to negate culpability in this manner. A party availing himself of either of these defenses typically claims that while he has engaged in conduct specified in the definition of some crime, and though he has done so without justification, he cannot fairly be held responsible for what he did.

Legal discussions of unauthorized advertising commonly encounter the view that this conduct conforms to the definition of damaging property and is wrongful. Those who defend this position are not, however, finished with their analysis. They must take up the further problem presented by the possibility that the actor thought he had a right to paste up posters. In the terms of the theory of the general analytical system, this is a

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17. *See OLG, Karlsruhe, W.Ger., 1978 JZ 72; Thoss, supra note 9, at 1613.*

18. Just as in the United States, free speech rights in West Germany constitute constraints on state action, and do not confer unfettered license to encroach on the rights of others.
problem of culpability. A perhaps overly simplistic formulation is that the category of culpability marshals all of the arguments favoring a finding of not guilty that are based on the subjective state of the accused and insures that they are considered in every case.

C. Application of the General Analytical System

Knowledge of the statute and the general system for analyzing criminal acts are the two tools of analysis that the German criminal lawyer must employ in order to decide every case. The law student must, from the very beginning of his studies, become sure of his ability to handle both. The practicing criminal lawyer is, for the most part, uninterested in the subtleties of the academic discussion of refinements in the theory of the general analytical system, but he recognizes that the basic elements of the structure guide his work. This can be seen in the German courts' decisions on unauthorized advertising. Judges apply the general analytical system as a matter of course as the framework for analyzing and deciding cases.\textsuperscript{19}

The use of these two tools of analysis is made more interesting by a further feature of the legal landscape. The power to decide cases is not evenly distributed between the statute and the general analytical system. Rather, the latter is given priority. Law students learn, for example, that a statute can only be applied in a manner permitted by the system. Every statute must submit to being reordered and reinterpreted by way of the general analytical system before it can be applied. The statute as formulated by the legislature is not applied directly; prior to application the statute is passed through the sieve of this system and undergoes a structural metamorphosis in that process.

Thus, the provision of the German Criminal Code covering damage to property is not applied directly and verbatim to the case of unauthorized advertising. It must first be subjected to the strict regimen of the general analytical system. Its provisions must first be dissected into the categories of the definition, wrongfulness, and culpability, and only then applied.

\textsuperscript{19} See, e.g., OLG, Oldenburg, W. Ger., 1978 JZ 70; OLG, Karlsruhe, W. Ger., 1978 NJW 1636; 29 BGHSt 129.
III. THE RELATIONSHIP BETWEEN POSITIVE LAW AND THE GENERAL ANALYTICAL SYSTEM

It can be concluded from the discussion to this point that the general system for analyzing criminal acts is successfully able to force conformity with its dictates upon criminal statutes. Its structuring of legal materials and legal analysis transcends the dictates of the positive law. This is a rather remarkable state of affairs. In accord with the tradition in Europe since the Renaissance, German criminal law is inseparably bound to legislation. The maxim *nulla poena sine lege*, with its requirements of prospectivity and fair warning by statute, is a zealously guarded constitutional principle in West Germany; and yet, the same criminal law that is supposedly bound to and by legislation yields to the nonlegislated general system for analyzing criminal acts.

I want to discuss some troubling aspects of this relationship between legislation and the general analytical system. The goal is to justify, if possible, the preeminent position of this system vis-à-vis legislation.

A. Transpositive Features of the General Analytical System

The German Criminal Code itself does not require that attention be paid to the general system for analyzing criminal acts. The Code does presuppose application of the system at many points. The words for definition, wrongfulness, and culpability are repeatedly used. But this is not a consistent legislative practice. No provision exists from which one could derive the legislative intent that the structure be used in applying the Code’s sections.

German scholars of the nineteenth and early twentieth centuries thought that they could derive the main features of the general structure by studying the text of the Code. They thought of the Code as a kind of physical object, and hoped that by constantly observing it they could discover its inner order.

21. See, e.g., StGB § 11 abs. 1 nr. 5 (W. Ger.); see also id. §§ 13, 17, 20, 32, 34, 35.
22. See, e.g., E. BEILING, DIE LEHRE VOM VERBRECHEN (1906); K. BINDING, DIE NORMEN UND IHRER ÜBERTRETUNG (1872); F. VON LISZT, LEHRBUCH DES DEUTSCHEN STRAFRECHTS 116 ff. (14th ed. 1905).
The structure of offenses seemed to be a kind of scientific discovery. The requirement of respect for the structure was founded on its status as a law of nature.

This justification of the preeminence of the general analytical system underestimates, however, the nature of the claim that this system makes. This justification rests on the notion that the main features of the general system are an intrinsic part of the Code; but the argument has a scarcely acceptable consequence. Another set of statutes—for example, a code that did not recognize wrongfulness or culpability as prerequisites of punishment—would of necessity lead quickly and unswervingly to another theory of the structure of offenses. This is precisely what the general analytical system will not allow. It is not tied to a given body of positive law. Rather, the theory of the general analytical system requires that all positive legislation conform to it.

The fact that the positive criminal law of a particular country at a particular time happens to give credence to the categories of definition, wrongfulness, and culpability is a political accident. A theory of the general structure of crimes cannot be founded on such an accident. Put another way, the general system for analyzing crimes demands to be recognized even when the positive criminal law does not conform to it. Legal theory then becomes criticism of nonconforming positive law. At any rate, it is clear that the general analytical system is not derived from the positive law; on the contrary, it comes before and sets itself above positive law.

B. The Propriety of Placing the General Analytical System Above the Positive Law

We are left with the question of whether such patronizing treatment of legislation is acceptable in a legal system in which statute is supreme. With respect to this question, the credentials of the general system for structuring criminal analysis are impressive. The system is often praised in German literature as the guarantor of order, certainty, and impartiality in the application of individual statutes. These credentials provide some insight

into the vastness of the claim staked out by the general analytical structure on the landscape of the criminal law. In Germany, this general analytical system is the hallmark of sophisticated lawyerly professionalism. Let legislators write the statutes as they please—our structure insures at least order, certainty, and impartiality in the statutes’ application. This is the first clear signal that the general analytical system entails more than a formal model that helps one better organize and explicate statutory language. Embodied within the general system for structuring criminal analysis are certain basic elements that are essential to any process that calls itself just.

Admittedly, an explanation of why the general analytical system developed its particular structural features (i.e., violation of the definition, wrongfulness, and culpability) is still required. A continuing respect for these elements promotes order, certainty, and impartiality in the administration of justice. But these goals are attainable in other ways. One could, for example, number the characteristics of a particular crime arbitrarily, beginning with number one and ending when each characteristic had been assigned a number. Order, certainty, and impartiality could be insured by requiring courts to work down this checklist in every case.26

However, much more than the simple, formal ordering of the process of deciding an individual criminal case is sought in German criminal law by invoking the general system for analyzing criminal acts and, in particular, by structuring analysis in terms of the categories of violation of the definition, wrongfulness, and culpability. These categories seek rather to impose certain substantive values in connection with the making of particular decisions—values that are not necessarily contained in the individual criminal statutes being applied.

The substance imparted by the three main categories of the general analytical structure is different for each category. The category of violation of the definition seeks to insure that the criminal justice system does not impose criminal liability without first establishing that a precise statutory rule has been broken by the perpetrator. The category of wrongfulness seeks to

1978); Welzel, Zur Dogmatik im Strafrecht, in Festschrift für Maurach 3 (1972).

25. Element analysis under the American Law Institute’s Model Penal Code proceeds in essentially this fashion. It assumes that the process of carving up the characteristics of a crime is essentially arbitrary, and that the only genuine issue to be faced in making a determination of liability is whether all the elements have been satisfied.
insure that general justificatory exceptions militating against liability are sought, clarified, and considered in every case. The category of culpability seeks to insure that punishment does not follow on the mere showing that, objectively viewed, a rule has been violated without justification. It forces attention to the person of the perpetrator and requires special attention to the excuses he offers for his conduct.\textsuperscript{26}

Clearly, then, the substantive values of the general analytical structure entail a precise legal program. In order to shore up this program against the ever present risk of legislation that runs afoul of its dictates, and especially to safeguard its authority in times when the positive legislation of a country tends toward disregarding it, secure foundations must be found to justify and protect the program.

In Germany, as in the United States, constitutional principles are cited for this purpose. The category of violation of the definition as a general characteristic of crime is commonly thought to be founded on the provision in the West German Basic Law (Grundgesetz, the West German constitutional document) that punishment can only be legislatively prescribed.\textsuperscript{27} Another commonly defended position attempts to ground the status of culpability as a general prerequisite of punishment on the article of the Basic Law that declares the dignity of the person to be inviolable.\textsuperscript{28}

But these efforts to derive some of the features of the general analytical system from constitutional provisions are not so much genuine justifications as displays of the European tendency to argue for every legal conception as if it had legislative origins. In fact, West Germany has no constitutional provision requiring that, for conduct to be punishable, it must, in addition to being violative of a statute, satisfy the various categories of the general system for analyzing criminal acts. That is, the insistence that criminal liability attaches only where conduct violates a definition and is wrongful and culpable is not rooted exclusively in constitutional provisions. The most that one can say is

\textsuperscript{26} See supra note 12.

\textsuperscript{27} GG art. 103, abs. 2.

that the cited West German constitutional provisions and the general structure of offenses can be traced back to a common legal tradition.

C. *The General Analytical System and Just Punishment*

This tradition is the real foundation for the demand that the positive law only be applied as the general analytical structure allows. The structure represents the results of lengthy deliberations in the realms of political and moral philosophy, as well as the result of numerous experiments in real world politics.

This is, to be sure, a rather sweeping statement. We would do well to try to flesh out more precisely the meaning of the contention that the general system for analyzing criminal acts imparts the most durable results of prolonged endeavors in political and moral theory and practice.

What is meant is primarily that this general analytical structure is not merely a scholarly or legislative construction. It is instead a reservoir of political experience gained during lengthy periods of legal history. One could probably show that the basic features of the theory were already known and valued long before the beginning of the modern history of criminal law.

The political experience that the general analytical structure of offenses seeks to secure for the decision of every case can, in my opinion, be described more or less as follows: Deviation from the accepted norms of society should not be responded to with uncontrolled violence. The first reaction, rather, should be to try to gain distance from the deviant event. This distance is attained by binding oneself to a definite and formal pattern of analysis.

To phrase the idea pointedly, applying the statute according to the program of the general analytical structure is a contrasting image to a violent act as well as to any summary execution of punishment. The general system for analyzing criminal acts reflects the discursive, objective way in which Western philosophical tradition thinks about a subject—crime and punishment—that offers resistance to the tendency to react to breaches of established norms with unfettered and arbitrary power. The degree to which a theory of the general structure of offenses like the German theory is followed is an indication, I believe, of the distance that a system of criminal law has put between itself and the direct, forceful, and manipulative imposition of the will of the majority on deviant individuals in society. The general ana-
lytical structure, or its functional equivalent, is thus not only a practical criterion to be applied in deciding particular cases, but also an indicator of the level of criminal law culture a particular society has attained.

From the vantage point of the general analytical structure and its use, one is able to specify the position of the criminal in the criminal process. The structure, whose main features I have described, guarantees that the criminal is in a precisely definable legal position regardless of the exact construction of a particular statute. The general structure guarantees (1) that the particular statutory violation must be established (fulfillment of the requirements of the definition); (2) that the criminal can defend himself with general justifications of his conduct (wrongfulness); and (3) that attention is devoted to the accused as a person by allowing him to raise any relevant excusing conditions (culpability).

The theory of the general system for analyzing criminal acts thus contains the minimum conditions that must be maintained if punishment is to be just. The demand that the positive law only be enforced within the framework described by the structure is nothing more than the demand that the minimum conditions for just punishment be preserved.29

IV. Conclusion

The foregoing discussion has established that the relationship between the German criminal theory's general analytical structure and the positive law has a number of important features.

First, whatever the content of everchanging criminal laws may be, the structure of offenses imbues the decision of every case with the results of long-term, extrastatutory considerations of justice that constitute some of our deepest traditions in criminal law. The general structure represents politically, philosophically, and morally proven traditions in a quickly evolving world of expedient legislation. There is much in the considerations that have shaped the theory of the general analytical structure that is traceable to particular European or German developments. I believe some of these developments to be responses to

issues that are distinctively German and that do not have broader ramifications for other legal cultures. But it would be premature to treat problems concerning the general analytical structure as problems of a single country’s law.30 Discussions with American colleagues have convinced me that the basic features of the structure are clearly perceptible in American law. This lends credence to the view that the values implicit in the general system for analyzing criminal acts have a natural lawlike character that transcends national boundaries.

Second, it appears that, at least to some extent, the emergence of a general system for analyzing criminal acts depends on accidents of national, political, legal, and, in particular, procedural developments. But if, as I have argued, the recognition and application of the general analytical system is an indicator of the level of criminal law culture a particular society has attained, then work on refining and developing the theory of such systems of analysis cannot be limited by national boundaries.

Finally, while linguistic usage and legal conceptualization in the theory of general systems for structuring legal analysis may differ from country to country, it should not be difficult to examine the results of national discussions of such issues in fruitful ways. By focusing on the contribution these discussions make to clarifying and refining the place of the criminal law in a democracy, we can make joint strides toward a larger objective: the furtherance of justice in punishment.

30. For an extended analysis of the features of the general analytical structure discernible in common law approaches to criminal law, see G. FLETCHER, RETHINKING CRIMINAL LAW 391-875 (1978).
COMMENTS

Philosophical Hermeneutics: Toward an Alternative View of Adjudication

Adjudication is interpretation: it is the process by which a judge comes to understand a legal text and express its meaning.¹ Two opposing views of adjudication prevail in Anglo-American jurisprudence. The first sees judicial interpretation as being objectively constrained by legal rules and institutional principles that compel a correct determination of textual meaning.² The second sees judicial interpretation as being subjectively determined by personal value preferences that render textual meaning contingent and multiple.³

In a crucial way, these two opposing views of adjudication are mirror images. Both views assume that interpretation is an essentially free and discretionary activity; their disagreement turns on whether freedom and discretion can be effectively constrained. While the first view insists that effective constraints are available, the second view maintains that they are not. As a result, both views focus their discussions largely on the availability of interpretive constraints. In the process, however, their dis-

1. Fiss, Objectivity and Interpretation, 34 Stan. L.Rev. 739 (1982). See generally Dworkin, Law as Interpretation, 60 Tex. L. Rev. 527 (1982). In this comment, “text” connotes any written document, including reported judicial decisions, statutory and constitutional law, administrative regulations, and such writings as wills and contracts. In each instance, the writing is an object of interpretation. However, “text” does not connote only written documents. For example, Paul Ricoeur has argued that meaningful social action shares the constitutive features of a written text, and that the methodology of the social sciences is similar to the procedures for the interpretation of written texts. P. Ricoeur, The Model of the Text: Meaningful Action Considered as a Text, in Hermeneutics and the Human Sciences 197-221 (1982). In other words, the interpretation of “text” includes the interpretation of social actions and relationships. See C. Geertz, The Interpretation of Cultures 3-30, 452 (1973) (culture is an “acted document,” an “ensemble of texts,” whose analysis is similar to reading a manuscript); see also Taylor, Understanding in Human Science, 34 Rev. Metaphysics 25 (1980); Taylor, Interpretation and the Sciences of Man, 25 Rev. Metaphysics 3 (1971).
². See infra text accompanying notes 6-46.
³. See infra text accompanying notes 47-98.
Philosophical hermeneutics rejects the view of interpretation that is assumed, but never directly examined, in Anglo-American jurisprudence. Philosophical hermeneutics contends that interpretation is not a free and discretionary activity but rather a dialogical interaction between interpreter and text that is made possible through their mutual participation in a common medium of history and language. In other words, neither interpreter nor text independently determines textual meaning; both interpreter and text interdependently contribute to the determination of textual meaning. Thus, contrary to the Anglo-American jurisprudence, discussions fail to examine the validity of the assumption that interpretation is free and discretionary. For this reason, Anglo-American jurisprudence remains irresolvably divided in its views of adjudication.

Philosophical hermeneutics was first elaborated by Hans-Georg Gadamer. See H. Gadamer, Truth and Method (1975). It is a general theory of interpretation that was developed as a challenge to interpretive assumptions in social science and literary theory, which are similar to the assumption underlying the opposing views of adjudication in Anglo-American jurisprudence. Philosophical hermeneutics is commanding increased attention as a powerful critique of traditional interpretive theories in these disciplines. See, e.g., Z. Bauman, Hermeneutics and Social Sciences (1978); J. Bleicher, The Hermeneutic Imagination: Outline of a Positive Critique of Scientism and Sociology (1982); J. Bleicher, Contemporary Hermeneutics: Hermeneutics as Method, Philosophy and Critique (1980); H. Gadamer, Philosophical Hermeneutics (1976); R. Howard, Three Faces of Hermeneutics (1982); D. Hoy, The Critical Circle: Literature, History and Philosophical Hermeneutics (1978); R. Palmer, Hermeneutics: Interpretation Theory in Schleiermacher, Dilthey, Heidegger, and Gadamer (1969); P. Ricourr, Hermeneutics and the Human Sciences (1981).

American jurisprudential view, interpretation is a structured process of existential constraints.

Philosophical hermeneutics represents a direct theoretical challenge to Anglo-American jurisprudence because the hermeneutic view of interpretation renders the Anglo-American debate on the availability of constraints for judicial interpretation groundless. For this reason, philosophical hermeneutics deserves attention from the Anglo-American jurisprudential community. At least, attention to philosophical hermeneutics may initiate the critical examination of the nature of interpretation that has heretofore been ignored. At most, attention to philosophical hermeneutics may lead to a transcendence of the opposing views of adjudication that prevail in Anglo-American jurisprudence.

Part I of this comment contends that Anglo-American jurisprudence is riven by opposing views of adjudication and that this opposition is based on a common assumption about the nature of interpretation. Part II maintains that this opposition—the difference of views concerning the availability of interpretive constraints—has captured the attention of Anglo-American jurisprudence and diverted its focus from examining the validity of the assumption about interpretation upon which the opposition rests. Next, it examines the nature of interpretation from the perspective of philosophical hermeneutics. Part III concludes that the theory of interpretation provided by philosophical hermeneutics represents a direct challenge to the Anglo-American assumption about interpretation and that this challenge demands an Anglo-American jurisprudential response.

I. THE OPPosing Views of Adjudication: Objective and Subjective Interpretivism

The two opposing views of adjudication found in Anglo-American jurisprudence may be characterized as objective and subjective interpretivism. Objective interpretivism represents an effort to interpret a legal text without the influence of the judicial interpreter's value-orientation, through the construction of interpretive constraints. Subjective interpretivism represents a countereffort to deconstruct interpretive constraints in the belief that interpretation is unavoidable controlled by personal value preferences. Both views presume that interpretation is a free

5. The existence of an objective-subjective opposition has been recognized in legal scholarship, Tushnet, Legal Scholarship: Its Causes and Cure, 90 Yale L.J. 1205 (1981),
and discretionary activity—free in the sense that the evaluation of the text is normatively standardless, and discretionary in the sense that judgment of the text entails a personal choice based on privately held values. The difference between objective and subjective interpretivism lies in their disagreement about the efficacy of constraints for interpretive activity.

A. Objective Interpretivism: The Construction of Constraints

The basic justification for the effort of objective interpretivism to secure value-free interpretation of a legal text is founded on a fundamental tenet of the Anglo-American administration of justice: rule of law demands that judicial interpretation occur on
a basis other than in accordance with the will of a judge. In pursuit of this ideal, objective interpretivists seek to ensure value-free interpretation in two principal ways. First, they seek to minimize the normative gaps of the legal system to preclude the invitation to rely on subjective values. Second, they seek to maximize the institutional demands on judges to adjudicate in accordance with the general constitutional character of the legal system. In other words, the strategy is to contract constraints on the judicial interpreter in order to ensure his personal detachment from the legal text.

The hope of achieving personal detachment from the object of interpretation is the reason for characterizing this view of adjudication as objective. Essentially, objectivity is a demand that the object of interpretation be allowed to reveal its own meaning independent of the value-laden interests of the interpreter. For instance, in the social and literary sciences objectivity is sought by way of methodologies that proscribe the personal participation of the interpreter in his work. These methodologies preestablish impersonal criteria of evaluation that are characteristic of the object of interpretation itself so that the object may reveal its intrinsic meaning. The assumption is that the interpreter's

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7. A representative definition of objectivity is found in F. CUNNINGHAM, OBJECTIVITY IN SOCIAL SCIENCE (1973). An inquiry is objective if and only if:

[a] it is possible for its descriptions and explanations of a subject-matter to reveal the actual nature of that subject-matter, where “actual nature” means “the qualities and relations of a subject-matter as they exist independently of an inquirer’s thoughts and desires regarding them,” and [b] it is not possible for two inquirers holding rival theories about some subject-matter and having complete knowledge of each other’s theories... both to be justified in adhering to their theories.


8. One example of such a methodology is found in R. COLLINGWOOD, THE IDEA OF HISTORY (1946). Collingwood argued that, in order to interpret the action of historical agents, one must take into account the “inside” or “thought-side” of their actions. His assumption was that historical events express the thought of their agents. Thus, understanding historical events required ascertainment of the thoughts of their agents, which could be accomplished through “reenactment.” By reconstructing the circumstances of the historical event, the interpreter could project himself back into the position of the...
value-laden interests in the text, if allowed to factor into his interpretation of it, obscures the text’s meaning. In jurisprudence, objectivity is sought in the same way for the same reason. The methodology is the deductive application of preexisting legal rules and institutional principles through which the legal text may be understood in impersonal legal terms, not in terms of personal nonlegal values.

Objective interpretivism found its first modern expression in John Austin’s construction of a “science of law.” A basic agent, “reenact” or “rethink” the reasons for the agent’s actions, understand the thought behind the deeds, and discern the meaning of the event. The methodology of reenactment is objective in the sense that it presupposes the historical interpreter’s capacity to acquaint himself directly with his subject matter (the historical agent) and to derive the subject matter’s own special meaning (the thought behind the acts). Reenactment is also objective in the sense that it requires the negation of the personal and historical perspective of the interpreter and demands evaluation of the historical event as the agent himself evaluated it. Because the agent and the interpreter share a common rational humanity, the interpreter is presumably qualified to evaluate the agent (i.e., the “text”) on its own terms. For a recent exposition and expansion of Collingwood, see R. MARTIN, HISTORICAL EXPLANATION: RE-ENACTMENT AND PRACTICAL INFERENCE (1977).

E. D. Hirsch’s search for criteria to validate literary interpretations led him to a goal of interpretation similar to Collingwood’s: ascertainment of authorial intention. E. HIRSCH, VALIDITY IN INTERPRETATION (1967). “The interpreter’s primary task is to reproduce in himself the author’s ‘logic,’ his attitudes, his cultural givens, in short, his world. Even though the process of verification is highly complex and difficult, the ultimate verificative principle is very simple—the imaginative reconstruction of the speaking subject.” Id. at 242. Professor Hirsch’s position has been accepted in other discussions of the applicability of literary interpretation to judicial interpretation. See, e.g., McIntosh, supra note 4.

Some judicial interpreters have thought that authorial intention is determinative of textual meaning. See, e.g., Home Bldg. & Loan Ass’n v. Blaisdell, 290 U.S. 398, 453 (1934) (Sutherland, J., dissenting) (“The whole aim of construction, as applied to a provision of the Constitution, is . . . to ascertain and give effect to the intent, of its framers and the people who adopted it.”). For an analysis and criticism of this theory of adjudication, see Brest, The Misconceived Quest for the Original Understanding, 60 B.U.L. REV. 204 (1980).

This comment relies upon Hirsch’s rival in hermeneutic philosophy, Hans-Georg Gadamer, to critique the prevailing views of interpretation in legal thought. The reason for this reliance is Hirsch’s commitment to objectivity and his resultant inability to contribute to the transcendence of the objective-subjective opposition. For a good introduction to the issues of the Hirsch-Gadamer debate, see D. HOY, supra note 4, at 11-72.

9. See generally J. STONE, LEGAL SYSTEM AND LAWYERS’ REASONINGS 62-136 (1964). Admittedly, Austin is not the first in the Anglo-American tradition to advocate objective adjudication. Blackstone wrote “what that law is, every subject knows, or may know, if he pleases; for it depends not upon the arbitrary will of any judge, but is permanent, fixed, and unchangeable, unless by authority of parliament.” 1 W. BLACKSTONE, COMMENTARIES 151. Elsewhere, he wrote:

The judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and the sentence of the law. It is the conclusion that naturally and regularly follows from the premises of law
theme of his legal science was the separation of positive law from transpositive considerations.\textsuperscript{10} The purpose of this separation was to allow logical analysis of the positive law in order to ascertain the essential concepts and structures of the legal order reflected in it.\textsuperscript{11} Using this legal scheme required one to

fix in the mind a map of the law, so that all its acquisitions made empirically in the course of practice, take their appropriate places in a well-conceived system; instead of forming a chaotic aggregate of several unconnected and merely arbitrary rules. It tends to produce the faculty of perceiving at a glance the dependencies of the parts of his system . . . .\textsuperscript{12}

With this legal map, Austin believed that, consistent with his rational description of law, the dominant method of judicial in-

\textsuperscript{10} and fact . . . which judgment or conclusion depends not therefore on the arbitrary caprice of the judge, but on the settled and invariable principles of justice.

3 id. at 434. Indeed, the notion of legal objectivity is ultimately attributable to the Greeks. Greek mythology portrays the goddess Themis with the sword of justice in her right hand and the scales of justice in her left. She is blindfolded, symbolizing impartiality. The assumption is that justice originates in judgments that are free from the personal prejudices of the legal administrator. Judgment is reached only through the mechanical balancing of evidence that is sorted onto the dishes of the scale by other similarly impartial persons. Reynolds, supra note 5, at 2. Interestingly, legal objectivity is not endemic only to Anglo-American jurisprudence; it is the primary paradigm of jurisprudential and judicial analysis in legal systems following the civil law tradition. See generally J. Merryman, The Civil Law Tradition (1969).

10. Throughout his work, Austin pleaded for a strict separation of law as it is and law as it ought to be:

The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry. A law, which actually exists, is a law, though we happen to dislike it . . . .

J. Austin, The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence 184 (Library of Ideas ed. 1954). Austin did not dismiss the influence moral opinion had on the development of law, or conversely, the influence the law had on moral standards. He believed, however, that the determination of moral norms upon which law ought to rest was not within the province of jurisprudence but was a subject of the "science of legislation." Id. at 127, 372. The science of jurisprudence concerned itself only with the study of laws once they were posited. See generally Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593 (1958); Rumble, The Legal Positivism of John Austin and The Realist Movement in American Jurisprudence, 66 Cornell L. Rev. 986 (1981).

11. According to Austin, every legal order has the same basic constituent parts. Concepts like duty, right, liberty, injury, punishment, redress, law, sovereignty, and independent political society belong to every legal order because "we cannot imagine coherently a system of law (or a system of law as evolved in a refined community), without conceiving them as constituent parts of it." J. Austin, supra note 10, at 367.

12. 2 J. Austin, Lectures on Jurisprudence or the Philosophy of Positive Law 1085 (5th ed. R. Campbell 1885).
terpretation was syllogistic: legal classification of the facts and their subsumption under general rules.13

Nevertheless, Austin acknowledged the existence of “judiciary law.”14 In instances of linguistic ambiguity in legal terms, interstices in the body of positive law, and social change rendering law archaic, judges are invited to legislate rules on the basis of their own value-orientations.15 This reality introduced considerable dissymmetry into Austin’s rational system of law.16 His response was to conceive of an institutional mechanism that harmonized particular judge-made rules with the general legal order. Reasoning that judicial activity is an extension of the sovereign’s power, Austin concluded that the sovereign could legitimate judge-made rules either by express acceptance or by acquiescence to their existence.17 In other words, judges could be institutionally constrained from arbitrarily legislating rules to the extent that they “legislat[e] in subordination to the sovereign.”18

Austin’s construction of a normatively complete system of law and an institutional constraint on judicial interpretation was prototypical for subsequent jurisprudential efforts to achieve le-

15. Austin saw ambiguous legal terms as “hotbeds of competing analogies. The indefiniteness is incorrigible. A discretion is left to the judge. Questions arising on them . . . are hardly questions of interpretation or induction, for though the rule were explored and known as far as possible, doubt would remain.” 2 J. AUSTIN, supra note 12, at 1001 n.20. Austin also contended that judicial legislation was necessary “to make up for the negligence or the incapacity of the avowed legislator.” J. AUSTIN, supra note 10, at 191. In this regard, judicial legislation was of “obvious utility” to adapt law to social change. 2 J. AUSTIN, supra note 12, at 612. Austin noted that equity courts were created because of the unwillingness of common law courts to “do what they ought to have done, namely to model their rules of law and of procedure to the growing exigencies of society, instead of stupidly and sulkily adhering to the old and barbarous usages.” Id. at 647.
16. Austin wrote:

Wherever, therefore, much of the law consists of judiciary law, the entire legal system, or the entire corpus juris, is necessarily a monstrous chaos: partly consisting of judiciary law, introduced bit by bit, and imbedded in a measureless heap of particular judicial decisions, and partly of legislative law stuck by patches on the judiciary law, and imbedded in a measureless heap of occasional and supplemental statutes.

2 J. AUSTIN, supra note 12, at 660.
17. “For, since the state may reverse the rules which [the judge] makes, and yet permits him to enforce them by the power of the political community, its sovereign will ‘that his rules shall obtain as law’ is clearly evinced by its conduct, though not by its express declaration.” J. AUSTIN, supra note 10, at 31-32.
18. 2 J. AUSTIN, supra note 12, at 510.
gal objectivity. Thus, nineteenth century legal formalism pro-
pounded the view that a legal system is a closed logical system
in which correct decisions are deducible from predetermined le-
gal rules by pure logical operation. This formalist view of law
gained widespread acceptance in legal scholarship and judicial
opinions. Although strict legal formalism has been largely
abandoned, its substance persists in many contemporary theo-
ries of judicial decision. This is especially apparent among the
"new analytical jurists," who seek to document the theoretic
"fetters," or the preexisting principles of rational decision, that
constrain judicial interpretation.

One of the leading figures in the new analytical movement
has been H. L. A. Hart. His strategy was to minimize the fre-
quency of the linguistic indeterminacy of rules that invites reli-
ance on subjective values. In his estimation, a legal rule has a
"core of certainty" and a "penumbra of doubt." In the core of

19. See generally Horwitz, The Rise of Legal Formalism, 19 AM. J. LEGAL
HIST. 251 (1975). Typically, the following five postulates accompany the legal formalist's position:

1. that every concrete legal decision is the "application" of an abstract
legal proposition to a "fact situation"; second, that it must be possible in every
concrete case to derive the decision from abstract legal prepositions by means
of legal logic; third, that the law must actually or virtually constitute a
"gapless" system of legal propositions, or must, at least, be treated as if it were
such a gapless system; fourth, that whatever cannot be "construed" legally in
rational terms is also legally irrelevant; and fifth, that every social action of
human beings must always be visualized as either an "application" or "execu-
tion" of legal propositions, or as an "infringement" thereof.

M. WEBER, LAW IN ECONOMY AND SOCIETY 64 (1954) (footnote omitted).

20. See infra notes 47-49.

21. See Kennedy, Legal Formality, 2 J. LEGAL STUD. 351 (1973). Strict legal formal-
ism is the deductive application of preexisting rules. Substituting "rational" and "princi-
plies" for "deductive" and "rules" produces a broader definition of formalism: the ra-
tional application of preexisting principles. In this definition, "principles" may mean
rules as well as propositions of purpose or value. Professor Kennedy argues that purpose-
based reasoning is "no less dependent on rules" and "no less vulnerable to the dilemma
of formality" than is traditional rule formalism. Id. at 396-98; see also Kennedy, Form
and Substance in Private Law Adjudication, 89 HARV. L. REV. 1685 (1976) [hereinafter
cited as Kennedy, Form and Substance]. For example, under Kennedy's analysis, Hart
and Sack's portrayal of judicial decision as "rational implications of the 'shared pur-
pose'" implicit in the "social order" ultimately possesses the same structure as rule

(1966).

23. See Greenawalt, Discretion and Judicial Decision: The Elusive Quest for the

The problem of penumbral vagueness is inevitable: "the price to be paid for the use of
general classifying terms in any form of communication concerning matters of fact." H.
certainty, the applicability of the rule to a factual circumstance is clear. However, in the "fringe of vagueness," the normative guidance of the rule dissipates, thus imposing a "creative function" upon the judge to resolve the dispute. While syllogistic reasoning may be appropriate in the core of certainty, it cannot be employed in the fringe of vagueness, and resort to subjective values is inevitable.


26. Id. at 122-25. The problem is that linguistic indeterminacy allows multiple meanings, presenting a judge with "a fresh choice between open alternatives" that cannot be decided with formal logic but only with his "discretion." Id. Elsewhere Hart wrote:

If a penumbra of uncertainty must surround all legal rules, then their application to specific cases in the penumbral area cannot be a matter of logical deduction, and so deductive reasoning, which for generations has been cherished as the very perfection of human reasoning, cannot serve as a model for what judges, or indeed anyone, should do in bringing particular cases under general rules. In this area men cannot live by deduction alone. And it follows that if legal arguments and legal decisions of penumbral questions are to be rational, their rationality must lie in something other than a logical relation to premises. . . . [I]t seems true to say that the criterion which makes a decision sound in such cases is some concept of what the law ought to be . . . .

Hart, supra note 10, at 606-08. Importantly, Hart contended that normative guidance was not wholly lacking in penumbral areas. Overarching social policies from which legal rules are derived may cover the "penumbra of doubt."

The point must be not merely that a judicial decision to be rational must be made in the light of some conception of what ought to be, but that the aims, the social policies and purposes to which judges should appeal if their decisions are to be rational, are themselves to be considered as part of the law in some suitably wide sense of "law". . . . [I]nstead of saying that the recurrence of penumbral questions shows us that legal rules are essentially incomplete, and that, when they fail to determine decisions, judges must legislate and so exercise a creative choice between alternatives, we shall say that the social policies which guide the judges' choice are in a sense there for them to discover; the judges are only "drawing out" of the rule what, if it is properly understood, is "latent" within it. To call this judicial legislation is to obscure some essential continuity between the clear cases of the rule's application and the penumbral decisions.

Id. at 612. To the extent that Hart relies on purpose or value propositions to reach decisions in the penumbra of doubt, his concept of law remains formalistic. See supra note 21.
However, Hart argued that “preoccupation with the penumbra” is a mistake—one that confuses and obstructs the advance of jurisprudence.27

[T]o soften the distinction [between clear and penumbral cases] is to suggest that all legal questions are fundamentally like those of the penumbra. It is to assert that there is no central element of actual law to be seen in the core of central meaning which rules have, that there is nothing in the nature of a legal rule inconsistent with all questions being open to reconsideration in the light of social policy.28

On the contrary, the meaning of rules is normally not in doubt; rules have a core of “settled” meaning.29 Proper attention to this fact might reveal an “essential continuity” in clear and unclear case adjudication.30 For this reason, Hart’s concept of law is heavily rule-oriented, focusing on the normative constraints imposed on adjudication.31

Another of the leading analysts is Ronald Dworkin. Like Hart, Dworkin acknowledges the existence of “hard cases” in which “no settled rule dictates a decision.”32 However, unlike Hart, Dworkin contends that a judge is not free to interpret from nonlegal values,33 but is constrained to interpret in light of the political structure of his community. Hard-case adjudication

28. Id.
29. Id. at 614.
30. Id. at 612.
31. “[T]he life of the law consists to a very large extent in the guidance both of officials and private individuals by determinate rules which, unlike the applications of variable standards, do not require from them a fresh judgment from case to case.” H. Hart, The Concept of Law 132 (1961).
32. Dworkin, Hard Cases, 88 HARV. L. REV. 1057, 1060 (1975) [hereinafter cited as Dworkin, Hard Cases]. Presumably, “easy” cases would be cases in which rules with settled meaning do dictate a decision. Dworkin has argued that rules are applicable in an “all-or-nothing fashion,” meaning that “[i]f the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.” Dworkin, The Model of Rules, 35 U. CHI. L. REV. 14, 25 (1967). In short, “rules dictate results, come what may.” Id. at 36.
33. Dworkin interpreted Hart as contending that a judge, who possesses no rules to guide his adjudication, exercises “strong discretion,” meaning that “he is not bound by any standards from the authority of law . . . .” Dworkin, The Model of Rules, 35 U. CHI. L. REV. 14, 35 (1967). However, it is questionable whether Hart can be so interpreted. See supra note 26; see also Raz, Legal Principles and the Limits of Law, 81 YALE L.J. 823, 846 (1972) (Hart uses “rule” in a broad sense that includes principles and standards); Reynolds, Dworkin as Quixote, 123 U. PA. L. REV. 574, 596-99 (1975) (by “discretion” Hart simply means that a judge must use his best judgment in appealing to public standards in resolving borderline cases).
requires reference to the set of principles that, comprising a community's "constitutional morality," are "presupposed by the laws and institutions of the community" and are therefore inferable from those laws and institutions. By referring to these principles, a judge is capable of adjudicating a hard case in a fashion that preserves the institutional integrity of the political community and achieves the result to which a party is entitled. In short, the legal system is "a seamless web" that provides sufficient normative guidance for the correct judicial resolution of every legal dispute.

34. Dworkin, Hard Cases, supra note 32, at 1105-07.
35. Dworkin's argument, which he entitles "the rights thesis," is that judicial decisions in hard cases are characteristically generated by principle not policy. Id. at 1060. Arguments of principle justify a decision by showing that it respects or secures some individual or group right; they are distinguishable from arguments of policy that justify a decision by showing that it advances or protects some collective goal of the community as a whole. Id. at 1059. Dworkin believes that principles are discoverable from the institutional structures that are constitutive and regulative of the context in which the judicial decision must be made. In the case of a game, for example, the adjudication of a hard case by a referee is institutionally constrained to that particular decision which preserves the integrity of the game. Id. at 1078-82. "We do not think that he is free to legislate interstitially within the 'open texture' of imprecise rules. If one interpretation of [a] rule will protect the character of the game, and another will not, then the participants have a right to the first interpretation." Id. at 1080 (footnote omitted). The uniquely correct interpretation of the rule is found when the referee reconstructs the game's character by posing to himself different theories about the nature of the game. (In this respect, Dworkin's interpretation theory is notably similar to Collingwood's "re-enactment" theory. See supra note 8.) When the referee determines which of the theories most appropriately fits the institutional features of the game, then that theory of the game's character guides his resolution of the dispute. Consequently, only one party has the right to win the dispute, which right is the referee's obligation to determine in light of the genuine institutional character of the game. The same applies to a judge who must enforce "existing political rights" latent in the combination of the constitutional values and substantive rules of his political community. Dworkin, Hard Cases, supra note 32, at 1063. For a good discussion and critique of this argument, see Note, Dworkin's "Right Thesis," 74 Mich. L. Rev. 1167 (1976); see also Soper, Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute, 75 Mich. L. Rev. 473 (1977); Greenawalt, Policy, Rights and Judicial Decision, 11 Ga. L. Rev. 991 (1977).

Rolf Sartorius has expressed views that are consistent with Dworkin's. Sartorius argues that while on occasion "extra-legal" considerations such as policy or value enter judicial reasoning, "legal principles" are always available to govern their use and, accordingly, "the judge is in all cases ultimately guided by legal principles which severely limit, if they do not totally eliminate, his discretion." Sartorius, Social Policy and Judicial Legislation, 8 Am. Phil. Q. 151 (1971). Moreover, he maintains that "a litigant before a court of law is not in the position of one begging a favor from a potential benefactor, but rather in that of one demanding a particular decision as a matter of right, as something to which the law entitles him." Id. at 153; see also Sartorius, The Justification of the Judicial Decision, 78 Ethics 171 (1968).

36. Dworkin, Hard Cases, supra note 32, at 1093-96; see also Dworkin, Judicial Discretion, 60 J. Phil. 624, 634 n.7 (1963) ("an arrangement of entitlements"); Note, supra
In a recent clarification of his position, Dworkin analogizes hard-case adjudication to a "chain novel" enterprise.\footnote{37} The task of a writer to contribute one chapter to a novel-in-progress requires him to determine the direction of developments in prior chapters. Then, consistent with the demands of coherency for the entire work, the writer must advance these developments in the same direction through his chapter.\footnote{38} Similarly, the task of a judge to adjudicate a hard case in the common law enterprise requires him to determine the structure of his legal community—from its profound constitutional arrangement to the details of its statutory schemes and judicial opinions. Then, consistent with the demands of coherency for his work, the judge must write his decision "'going on as before' rather than by starting in a new direction as if writing on a clean slate."\footnote{39} Indeed, the

\footnote{37}{Dworkin, "Natural" Law Revisited, 34 U. FLA. L. REV. 165 (1982). The "chain novel" enterprise is described as follows: Imagine, then, that a group of novelists is engaged for a particular project. They draw lots to determine the order of play. The lowest number writes the opening chapter of a novel, which he then sends to the next number who is given the following assignment. He must add a chapter to that novel, which he must write so as to make the novel being constructed the best novel it can be. When he completes his chapter, he then sends the two chapters to the next novelist, who has the same assignment, and so forth. Id. at 166-67.}

\footnote{38}{Dworkin wrote: Now every novelist but the first has the responsibility of interpreting what has gone before . . . . Each novelist must decide what the characters are "really" like; what motives in fact guide them; what the point or theme of the developing novel is; how far some literary device or figure consciously or unconsciously used can be said to contribute to these, and therefore should be extended, refined, trimmed or dropped. He must decide all this in order to send the novel further in one direction rather than another. But all these decisions must be made, in accordance with the directions given, by asking which decisions make the continuing novel better as a novel. Id. at 167. For a more thorough examination of the chain-novel enterprise and its consequences for aesthetic and legal interpretation, see Dworkin, supra note 1.}

\footnote{39}{Dworkin, supra note 37, at 168. Deciding hard cases at law is rather like this strange literary exercise. The similarity is most evident when judges consider and decide "common-law" cases; that is, when no statute figures centrally in the legal issue, and the argument turns on which rules or principles of law "underlie" the related decisions of other judges in the past. Each judge is then like a novelist in the chain. He or she must read through what other judges in the past have written not simply to discover what these judges have said, or their state of mind when they said it, but to reach an opinion about what these judges have collectively done, in
judge is duty-bound by his participation in the common law enterprise to follow the legal history he finds; thus, "the constraint, that [he] must continue the past and not invent a better past, will often have the consequence that [he] cannot reach decisions that he would otherwise, given his own political theory, want to reach." 

The construction of constraints on judicial interpretation has also proceeded outside the analytic movement. This is exemplified in Herbert Wechsler's "neutral principles" and John Hart Ely's "textual determinism" approaches. Herbert Wechsler's neutral principles approach requires judges to decide cases on the basis of general principles that the judges are committed to apply consistently in all similar cases. John Hart Ely's textual

the way that each of our novelists formed an opinion about the collective novel so far written. . . . Each judge must regard himself, in deciding the new case before him, as a partner in a complex chain enterprise of which these innumerable decisions, structures, conventions, and practices are the history; it is his job to continue that history into the future through what he does on the day. He must interpret what has gone before because he has a responsibility to advance the enterprise in hand rather than strike out in some new direction of his own. So he must determine, according to his own judgment, what the earlier decisions come to, what the point or theme of the practice so far, taken as a whole, really is.

Dworkin, supra note 1, at 542-43.

40. "A judge's duty is to interpret the legal history he finds, not to invent a better history." Dworkin, supra note 1, at 544.

41. Dworkin, supra note 37, at 169. Dworkin's chain-novel analogy is a valiant attempt to outflank both objective and subjective interpretivism. Chain novel interpretation is neither purely objective, since it allows room for reinterpretation of the prior writings in a way that both unifies and provides new meaning, nor purely subjective, since it prevents the interpreter from proceeding independently of prior institutional writers. In this regard, the chain-novel analogy has much to commend it. Nevertheless, as Professor Stanley Fish has perceptively and correctly argued, "Dworkin repeatedly falls away from his own best insights into a version of the fallacies (of pure objectivity and pure subjectivity) he so forcefully challenges." Fish, supra note 5, at 552. Dworkin "posits for the first novelist a freedom that is equivalent to the freedom assumed by those who believe that judges (and other interpreters) are bound only by their personal preferences and desires . . . ." Id. at 555. Moreover, he views later novelists as "bound by a previous history in a way that would be possible only if the shape and significance of that history were self-evident." Id.


[The main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved[,] . . . [resting] on grounds of adequate neutrality and generality, tested not only by the instant application but by others that the principles imply.]

H. WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 21 (1961); see also Bork,
determinism requires judges to look only to the words of the document and, when faced with opaque terms, to the intent of those who wrote it. In Ely's view, judges "should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution ..."43 In essence, both of these theories assert that the proper institutional role of judicial interpreters is to follow the available norms in good faith and to commit to the logical implications of their application.44

The common element in each of the legal theories

Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1, 6-7 (1971) (advocating a requirement that decisions rest on principles that are neutral in content and application); Perry, Why the Supreme Court Was Plainly Wrong in the Hyde Amendment Case: A Brief Comment on Harris v. McRae, 32 STAN. L. REV. 1113, 1113-14 (1980) (arguing that the ruling in Harris v. McRae was inconsistent with the operative principle of Roe v. Wade and criticizing the Court for not being principled).

In his criticism of Wechsler, Professor Martin Shapiro observed an essential objectivism in the "neutral principles" approach:

Neutral principles or standards are really the objective and eternal rules embedded in a "Blackstonian" body of law and the Constitution, which the judge discovers and applies to the case before him. When the defenders of neutral principles speak of the judge as motivated by reason, not will, they visualize the common law judge who did not command (make law) but simply discovered by deductive and analogical reasoning which of the great verities of the common law controlled the particular set of facts before him. Since the common law itself was the embodiment of reason and was applied by a purely reasonable process, there was no need of, nor could there be any room for, judicial prejudice, fiat, or preference.


43. J. ELY, DEMOCRACY AND DISTRUST 1, 3, 13-17 (1980). Professor Ely felt secure in asserting that Roe v. Wade was wrongly decided because he found it obvious that the purported right there vindicated was based on no "value inferable from the Constitution" and "lacks connection with any value the Constitution marks as special." Ely, The Wages of Crying Wolf, A Comment on Roe v. Wade, 82 YALE L.J. 920, 933, 949 (1973). Professor Ely's understanding of interpretation resembles Professor Thomas Grey's. See Grey, Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought, 30 STAN. L. REV. 843 (1978); Grey, Do We Have an Unwritten Constitution?, 27 STAN. L. REV. 703 (1975).

The term "textual determinism" is adopted from Professor Owen Fiss who appropriately found the term that usually attaches to Ely's work, "interpretivism," to be misdescriptive. Fiss, supra note 1, at 743. As will be shown in part II of this comment, interpretation is in fact much more than that contemplated in Professor Ely's approach.

Professor Ely's "textual determinism" facially resembles Professor George Christie's objectivism. Christie, Objectivity in the Law, 78 YALE L.J. 1311 (1969). Concluding that contemporary legal theorists had failed to "confirm our intuition that judicial decision-making is objective," Professor Christie argued that only "those marks on paper called statutes and cases" could be accepted as the fixed reference points for judicial interpretation. Id. at 1326.

44. See Tushnet, Following the Rules, supra note 6 (arguing that Ely's and Wechsler's theories are inconsistent with liberalism).
presented—Austin's legal science, Hart's minimization of penumbral doubt, Dworkin's hard case argument, Wechsler's neutral principles, and Ely's textual determinism—is the effort to ensure that the legal text is interpreted without the influence of the judicial interpreter's value-orientation. In each case, normative gaps in the body of law are minimized, and institutional demands on the judicial interpreter are maximized, with the design of ensuring that the legal text is interpreted in harmony with the external legal order. However, this common effort makes sense only if the judicial interpreter is viewed as being free to determine the outcome of his interpretation in accordance with personal value preferences. In other words, by constructing interpretive constraints, each theory presumes that interpretation is an activity in need of constraint because it is fundamentally free and discretionary.

This presumption is evidenced in Dworkin's chain novel analogy. Dworkin maintains that the contributor of a chapter to the novel-in-progress must be seriously committed to continue the work of his predecessors; indeed, he must be duty-bound to "advance the enterprise in hand." In other words, an awareness on the part of the novelist and the judge of their responsibility to the corporate enterprise will supposedly check a temptation to strike out in some direction of their own. Only with a sense of duty to the enterprise will the novelist and the judge comport themselves as partners in the chain rather than as free and independent agents. In short, the entire account depends on the possibility of novelists and judges (both interpreters) comporting themselves in some fashion that is inconsistent with the chain enterprise; i.e., in a free and discretionary fashion. The question then becomes whether novelists and judges can comport themselves in a fashion inconsistent with the chain enterprise. If one assumes that the answer is yes, then one must see that interpretation as free. If one assumes that the answer is no, then one must see interpretation as something entirely different. As will be argued in parts II and III of this comment, interpretation is something different from that presumed by objective interpretivists.

45. Dworkin, supra note 37, at 167 ("[I]n this case the novelists are expected to take their responsibilities seriously, and to recognize the duty to create, so far as they can, a single unified novel rather than, for example, a series of independent short stories with characters bearing the same names.").
46. Dworkin, supra note 1, at 543.
B. Subjective Interpretivism: The Uncontrollable Assertion of Values

Objective interpretivism has not gone without critical response. In the early part of the twentieth century, a growing tendency towards objective formalism in legal education, legal scholarship, and judicial opinions sparked the vigorous countermovement of legal realism. Legal realism had many dis-

47. In legal education, Christopher C. Langdell's case-method approach to the study of law was gaining widespread acceptance in the law schools. Professor Rumble has suggested that this was the "signal event" in the emergence of legal realism. Rumble, supra note 10, at 996.

Langdell's case method presumed that the law consisted of certain principles and rules that could be distilled out of selected cases because legal doctrines evolved slowly and traceably in relatively few key cases. He argued that the number of legal principles and rules is "much less than is commonly supposed; the many different guises in which the same doctrine is constantly making its appearance, and the great extent to which legal treatises are a repetition of each other, being the cause of much misapprehension." C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS viii-ix (2d ed. 1879). Consequently, "[t]he vast majority of cases are useless, and worse than useless, for any purpose of systematic study." Id. at viii. In order to find the rules of law, a jurist need only analyze the key cases in the evolution of a legal doctrine. Once in possession of these rules, the "true lawyer" would apply them "with constant facility and certainty to the ever-tangled skein of human affairs." Id.

48. In legal scholarship, the American Law Institute undertook its first attempt to restate the law in order to clarify the fundamental principles behind the "swamp of decisions." Address of Elihu Root in Presenting the Report of the Committee, 1 A.L.I. PROC. pt. 2, 48, 52 (1923). The ALI was established because of the growing recognition that the law is uncertain. "[T]he confusion, the uncertainty, [is] growing worse from year to year. . . . [W]hatever authority might be found for one view of the law upon any topic, other authorities could be found for a different view . . . . [T]he law [is] becoming guesswork." Id. at 48-49.

Similarly, legal scholars such as Joseph Beale and Samuel Williston asserted that the varied issues in their fields, conflicts of law and contracts respectively, were governed by unified bodies of legal doctrine. See 1 J. BEALE, A TREATISE ON THE CONFLICT OF LAWS 92-94 (1935) (determination of domicile has certain automatic legal consequences that apply regardless of circumstance). See generally S. WILLISTON, THE LAW OF CONTRACTS (1920) (deriving the law of contracts from few general principles of universal applicability).

49. In federal and state judicial opinions, social legislation was invalidated partly on the "logic" of general constitutional concepts such as liberty of contract and substantive due process. See, e.g., Lochner v. New York, 198 U.S. 45 (1905); see also Allaire v. St. Luke's Hosp., 184 Ill. 359, 56 N.E. 638 (1900).


Langdell's case method approach was criticized for its exclusive focus on the operation of rules in judicial decisions. According to William O. Douglas, such a focus grossly oversimplifies and distorts the nature of law. After all, law is neither more nor less than a prediction of what a governmental agency or other agency of control will do under a given situation. A study of the legal literature exem-
sonant voices; however, these voices achieved harmony in the belief that a legal text has any number of possible meanings, that interpretation consists of choosing one of those meanings, and that selecting a particular meaning forces the judge to express his own values. In short, legal realism contended that interpretation is an uncontrollably subjective value-based activity. Legal realism is thus the basic expression of subjective interpretivism in Anglo-American jurisprudence.

Legal realism originates with distrust of "the theory that traditional prescriptive rule-formulations are the heavily operative factor in producing court decisions." This "rule-skepti-

plified by judicial opinions supplies part, but only part, of the material necessary to make such a prediction. The other psychological, political, economic, business, social factors necessary to complete that prediction are innumerable. The weakness of the old system was that all of these more general and imponderable factors were eliminated from consideration. It was for that reason that the nonconformists in legal education began to raise disconcerting notes.


Williston's scholarship in contracts was criticized, for example, for presupposing the unity of the legal universe, a notion impossible to reconcile with the totality of judicial decisions. The "legal universe," wrote Walter Wheeler Cook, "is far more complex than that visualized by the more orthodox writers of whom Professor Williston is an example." Cook, Williston on Contracts, 33 ILL. L. REV. 497, 514 (1939). Cook argued that a unified body of legal doctrines could be maintained only if one completely ignored some judicial decisions or failed to distinguish consistently between actual holdings and dicta. According to Cook, Williston's treatise on contracts illustrated both these vices. Id. at 499, 514. For a contemporary critique of recently perceived formalizations of law, see Kennedy, Cost-Benefit Analysis of Entitlement Problems: A Critique, 33 STAN. L. REV. 387 (1981).

Oliver Wendell Holmes and Roscoe Pound were vigorous in their condemnation of judges who decided cases solely in a formally deductive manner from legal generalizations. See Pound, Law in Books and Law in Action, 44 AM. L. REV. 12, 16 (1910); Pound, Liberty of Contract, 18 YALE L.J. 454, 457, 478-80 (1909). Holmes, for instance, criticized analysis that relied on the logical compulsion of legal generalizations to reach particular conclusions. "General propositions do not decide concrete cases." Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). Holmes insisted upon the role of unconscious factors in reaching decisions. "The decision will depend on a judgment or intuition more subtle than any articulate major premise." Id. This skepticism towards general rules as a means of compelling particular decisions and this insistence on the role of unconscious factors in the adjudicatory process found resonance in the realist movement as two of its central themes. See W. RUMBLE, supra, at 39-40.

51. K. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 56 (1962). "[T]he theory that rules decide cases seems for a century to have fooled not only library-ridden recluses, but judges. More, to have fooled even those skillful and hard-bitten first-hand observers of judicial work: the practitioners."

cism was motivated by the interpretive malleability and normative ambiguity of legal materials. For example, Karl Llewellyn observed two judicial techniques of case construction that permit either an extremely narrow or an extremely wide application of precedent. With the “strict” or “orthodox” technique, a judge can, “through examination of the facts or of the procedural issue, narrow the picture of what was actually before the court and can hold that the ruling made requires it to be understood as thus restricted.” In other words, a judge can, if he desires, limit the authoritative value of an “unwelcome precedent” by so narrowly confining it to its particular facts that its ruling could be made to apply only to “red-headed Walpoles in pale magenta Buick cars.” By contrast, the “loose view of precedent” holds that once “a court has decided . . . any point or all points on which it chose to rest a case,” then “[n]o matter how broad the statement, no matter how unnecessary on the facts or the procedural issues, if that was the rule the court laid down, then that the court has held.” The judge can, if he chooses, capitalize on “welcome precedents” for the purpose of authoritatively supporting any proposition he desires. Essentially, the same judicial techniques were thought to be available for statutory construction.

This range of interpretive possibilities for case and statutory materials decreased their normative value for the realists.

52. This term appears to have been coined by Jerome Frank. See J. FRANK, LAW AND THE MODERN MIND (1949). Professor Rumble treats this term as being descriptive of the main currents of the realist movement. See W. RUMBLE, supra note 50, at 48-106. But for an argument distinguishing influential realist Karl Llewellyn’s work from “rule-skepticism,” see W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 408 n.22 (1973). In any event, rule-skepticism for the realists did not mean that judges completely disregarded rules in adjudication but only that rules were one factor among many, including social, moral and psychological factors, which influenced judicial decisions. W. RUMBLE, supra note 50, at 189-90.


55. Id. at 67.

56. Id. at 67-68.

57. Id. at 68.

58. “[A]gain and again . . . I have had to insist that the range of techniques correctly available in dealing with statutes is roughly equivalent to the range correctly available in dealing with case law materials.” K. LLEWELLYN, TRADITION, supra note 53, at 371. Llewellyn listed 47 examples of contradictory, yet legally acceptable, canons of statutory construction, id. at 522-35, to illustrate that “there are two opposing canons on almost every point.” Id. at 521.
But the realists maintained that such normative ambiguity was inconsequential in comparison to the equivocity resulting from the plethora of squarely conflicting judicial decisions. For example, Benjamin Cardozo believed that every legal precedent could be matched by another reaching an opposite conclusion. Consequently, a judge could find precedential authority for any proposition on nearly any issue.

The absence of consistent normative guidance from legal materials had two important consequences for the realists' picture of judicial interpretation. First, the normative void necessitated judicial choice; it "disposes of all questions of 'control' or dictation by precedent." With conflict among precedential authorities, a judge was compelled to choose from among them the authority that best assisted him in resolving his case. The authority he chose to rely upon was solely within his control; he possessed "sovereign prerogative of choice." As Herman Oliphant pictured the necessity of judicial choice, every case considered by judge or student "rests at the center of a vast and empty stadium. The angle and distance from which that case is viewed involves the choice of a seat. Which shall be chosen? Neither judge nor student can escape the fact that he can and


60. Belief in the plurality of judicial authority on any issue was virtually universal among the realists. See, e.g., Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908) (Justice Holmes portrayed judicial decision as a balancing of opposed principles); B. Cardozo, supra note 59, at 40 (one principle or precedent often is matched by another pointing to an opposite conclusion); J. Frank, supra note 52, at 111 n.2 ("You will almost always find plenty of cases to cite in your favor."); K. Llewellyn, supra note 51, at 339 ("Our whole body of authoritatively accepted ways of dealing with authorities . . . is a body which allows the court to select among anywhere from two to ten 'correct' alternatives in something like eight or nine appealed cases out of ten."); Cohen, The Problems of a Functional Jurisprudence, 1 Mod. L. Rev. 5, 11 (1937) (cases often present "a plaintiff principle and a defendant principle," each opposing the other); Corbin, The Law and the Judges, 3 Yale Rev. 234, 246 (1914) (prior judicial decisions "are not harmonious; in them can be found authority for both sides of almost any question"); Dickinson, The Law Behind Law: II, 29 Colum. L. Rev. 285, 298 (1929) (broad general principles of the law have a significant habit of traveling in pairs of opposites); Douglas, Stare Decisis, in Essays on Jurisprudence from the Columbia Law Review 18, 19 (1963) ("[T]here are usually plenty of precedents to go around; and with the accumulation of decisions, it is no great problem for the lawyer to find legal authority for most propositions.").

61. K. Llewellyn, Tradition, supra note 53, at 76.

In sum, judges, not rules, possessed the critical function in case adjudication.

The second consequence of the normative void for the realists’ picture of adjudication was that judicial choice could be made and justified only on extralegal grounds. Llewellyn reasoned that if conflicting legal premises are available, then “there is a choice in the case; a choice to be justified; a choice which can be justified only as a question of policy—for the authoritative tradition speaks with a forked tongue.” In other words, without the authority of dispositive rules, judges could only resort to nonlegal values to resolve disputes. Some realists hoped that the extralegal grounds the judge used to justify his decision would be considerations of the social consequences of his intended decision as weighed against possible alternative decisions. In the balancing of possible social consequences resulting from his decision, the judge became, for the realists, a kind of social engineer, and the law became his instrument to facilitate social progress and justice.

64. K. LLEWELLYN, supra note 51, at 70. Felix Cohen made a similar statement: “[N]o one of these rules [of prior cases] has any logical priority; courts and lawyers choose among competing propositions on extra-logical grounds.” F. COHEN, ETHICAL SYSTEMS AND LEGAL IDEALS: AN ESSAY ON THE FOUNDATIONS OF LEGAL CRITICISM 35 n.47 (1959).
65. This instrumental aspect of legal realism was the result of the influence of William James’s and John Dewey’s philosophical pragmatism. See generally W. RUMBLE, supra note 50, at 4-20, 72-78; R. SUMMERS, supra note 50, at 22-35. The pragmatists were antiformalist thinkers. William James stressed that theorists should turn “away from abstraction . . . , from verbal solutions, from bad a priori reasons, from fixed principles, closed systems, and pretended absolutes and origins.” W. JAMES, WHAT PRAGMATISM MEANS, in THE WRITINGS OF WILLIAM JAMES 376, 379 (J. McDermott ed. 1968). Instead, theorists should adopt a “pragmatic” orientation, by “looking away from first things, principles, ‘categories,’ supposed necessities; and . . . looking towards last things, fruits, consequences, facts.” Id. at 380 (emphasis omitted). This “pragmatic method,” or result-orientation, was concerned with the “ways in which existing realities may be changed.” Id. Similarly, John Dewey argued that theoretical decision-making should be result-oriented. “The problem is not to draw a conclusion from given premises; that can best be done by a piece of inanimate machinery by fingering a keyboard. The problem is to find statements of general principle and of particular fact which are worthy to serve as premises.” J. DEWEY, PHILOSOPHY AND CIVILIZATION 134 (1931). Thus, the “logic of rigid demonstration” must be replaced by a “logic of search and discovery,” a “logic relative to consequences rather than to antecedents,” a “logic of inquiry into probable consequences.” Id. at 138-39; see also J. DEWEY, LOGIC: THE THEORY OF INQUIRY (1938); J. DEWEY, ESSAYS IN EXPERIMENTAL LOGIC (1916).

This result-orientation was picked up by the realists. Llewellyn wrote that realistic jurisprudence “fits into the pragmatic and instrumental developments in logic.” K. LLEWELLYN, supra note 51, at 28. With society in a constant state of flux, “and in flux typically faster than the law . . . the probability is always given that any portion of law
But other realists believed that the justification of the judicial decision would not be socially instrumental, but subjectively intuitive. Psychology teaches, wrote Jerome Frank, that "the process of judging" does not begin at a premise and proceed to a conclusion.66 "Judging begins rather the other way around— with a conclusion more or less vaguely formed; a man ordinarily starts with such a conclusion and afterwards tries to find premises which will substantiate it."67 Frank argued that the same must apply to judges.

Now, since the judge is a human being and since no human being in his normal thinking processes arrives at decisions (except in dealing with a limited number of simple situations) by the route of . . . syllogistic reasoning, it is fair to assume that the judge, merely by putting on the judicial ermine, will not acquire so artificial a method of reasoning. Judicial judgments, like other judgments, doubtless, in most cases, are worked out backward from conclusions tentatively formulated.68

Frank believed the formulation of the conclusion, whether done vaguely, tentatively, or expressly was an expression of the "subjective sense of justice inherent in the judge."69

Other realists also believed that judicial intuitions about the particular justice of a case motivated judges to resolve that case in a particular way. Llewellyn wrote that the judicial mind is driven by a sense of "Justice-for-All-of-Us."70 Benjamin Cardozo argued that a judge's decision in choosing between alternative standards is based on the "conviction in the judicial mind" that the standard selected leads to "justice."71 Finally, according to Judge Frank Hutcheson, judicial decisions are reached by an in-

73. Hutcheson, supra note 72, at 285.
74. Id. John Rawls has written the following in contrasting systematic theories of justice with the intuitionist-pluralist perspective:

Intuitionist theories, then, have two features: first, they consist of a plurality of first principles which may conflict to give contrary directives in particular types of cases; and second, they include no explicit method, no priority rules, for weighing these principles against one another: we are simply to strike a balance by intuition, by what seems to us most nearly right.

J. RAWLS, A THEORY OF JUSTICE 34 (1971). This is an apt description of the ground of legal realism's judicial intuitionism.

75. This inadequacy was observed from without the ranks of legal realism:
They have assured us of the immense range of irrational considerations entering into the judicial process, the subjectivity necessarily inherent in judicial determinations, the dominating influence of prejudices, idiosyncrasies, and preconceived social theories in the disposition of lawsuits . . . without presenting us with an embracive theory of the constructive elements necessary for the building of a serviceable science of legal methodology.

Bodenheimer, Analytical Positivism, Legal Realism, and the Future of Legal Method, 44 VA. L. REV. 365, 376 (1958). One reason for this inadequacy may be that realists were intent on destroying, rather than constructing, theory. See Rumble, The Paradox of American Legal Realism, 75 ETHICS 166, 173-76 (1965).

76. Holmes, The Path of the Law, 10 HARV. L. REV. 457 (1897); see also K. LLEWELLYN, THE BRAMBLE BUSH 13 (1960) ("[T]he main thing is seeing what officials do . . . and seeing that there is a certain regularity in their doing—a regularity which makes possible prediction of what they and other officials are about to do tomorrow.").
However, realists who were committed to predictionism could not agree on those factors from which accurate predictions could be made. The only agreement was that one had to look beyond the "paper" rules, or the formal legal rules enunciated in judicial decisions, and discover the "real" rules, or the psychological, political, economic, business, and social factors that accounted for judicial behavior in a particular case.

77. Fred Rodell argued that one could look at the "vast complex of personal factors—temperament, background, education, economic status, pre-Court career" and make predictions based on these factors "with a surprising degree of accuracy." Rodell, For Every Justice, Judicial Deference is a Sometime Thing, 50 Geo. L.J 700, 700-01 (1962). Llewellyn cited 14 "steadying factors" upon which predictions could be based. K. LLEWELLYN, TRADITION, supra note 53, at 19-51. Herman Oliphant argued that the predictable element in judicial decisions is the judges' "response to the stimuli of the facts of the concrete cases before them . . . . The response of their intuition of experience to the stimulus of human situations is the subject-matter having the constancy and objectivity necessary for truly scientific study." Oliphant, supra note 63, at 159.

78. In other words the "real" rules of the judicial process are the regularities of judicial behavior. The paper-real rule distinction is found in both J. FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 336-37 (1949), and K. LLEWELLYN, supra note 51, at 21-27.

This emphasis on studying and describing actual judicial behavior led some realists to attempt to create a precise science of judicial behavior through empirical research. This largely inspired the foundation of the Institute of Law at the John Hopkins University in 1928. The aim of the school was "the development of the scientific study of law. All else [was] incidental." Cook, Scientific Method and the Law, 13 A.B.A. J. 303, 309 (1927). Achievement of this objective required research of an empirical nature. Walter Wheeler Cook emphasized that

the only way to find out what anything does is to observe it in action and not to read supposedly authoritative books about it, or to attempt by reasoning to deduce it from fundamental principles assumed to be fixed and given. The consequence of this assumption is that only a small part of the work of the staff of the Institute will be with books in libraries; by far the larger part will be concerned with the difficult, time-consuming, and expensive task of gathering and interpreting the facts concerning the operation of our legal system.


One interpretation of the realist movement is that it was not a critical reaction to Langdellian and formalist model of law. See G. GILMORE, supra note 50. Gilmore believes that the adepts of the new jurisprudence—Legal Realists or whatever they should be called—no more proposed to abandon the basic tenets of Langdellian jurisprudence than the Protestant reformers of the fifteenth and sixteenth centuries proposed to abandon the basic tenets of Christian theology. These were the ideas that "law is a science" and that there is such a thing as "the one True rule of law."

Id. at 87. Gilmore therefore maintains that "[r]ealist jurisprudence proposed a change of course, not a change of goal." Id. at 100. Although this interpretation is defensible, it does not represent the whole movement. Some realists doubted that a science of law was possible at all. See, e.g., Frank, What Courts Do in Fact, 26 Ill. L. Rev. 761, 773 (1932); Llewellyn, The Theory of Legal "Science," 20 N.C.L. Rev. 1, 10-22 (1941). For a good
Jerome Frank rejected the search for "real" rules. In Frank's estimation, "the major cause of legal uncertainty is fact-uncertainty—the unknowability, before the decision, of what the trial court will 'find' as the facts, and the unknowability after the decision of the way in which it 'found' those facts." Thus, Frank concluded that "it is impossible, and will always be impossible, because of the elusiveness of the facts on which decisions turn, to predict future decisions in most (not all) lawsuits." Fact-uncertainty arises for two reasons. First, in addition to possessing discretion in rule-applying, a judge possesses discretion in fact-finding. "When the oral testimony is in conflict as to a pivotal fact-issue, the trial judge is at liberty to choose to believe one witness rather than another." This discretionary fact-finding is "almost boundless" since appellate courts rarely interfere with such determinations. Second, judges react to facts very subjectively. These judicial subjectivities include "unique, idiosyncratic, sub-threshold biases and predilections" which are impossible to precisely define. Similarly, jurors reach their fact-determinations on "emotional responses to the lawyers and witnesses." Because of these una-

79. J. FRANK, supra note 52, at xiv. Frank characterized his argument as "fact-skepticism." It marks one of the major divisions in the realist movement. See generally W. RUMBLE, supra note 50, at 107-36. Frank classified the realists into two groups: rule-skeptics and fact-skeptics. Rule-skeptics, of whom Llewellyn was "the outstanding representative," focus on appellate courts and strive for greater legal certainty. Fact-skeptics focus on trial courts and deny the possibility of accurate formulations of real rules. J. FRANK, supra note 78, at 73-75.

80. J. FRANK, supra note 78, at 74 ("the pursuit of greatly increased legal certainty is, for the most part, futile—and . . . its pursuit, indeed may well work injustice").

81. Id. at 57.

82. Id.

83. J. FRANK, supra note 52, at xxvi. "The reactions of trial judges or juries to the testimony are shot through with subjectivity." J. FRANK, supra note 78, at 22. Elsewhere, Frank called these subjectivities "prejudices of judges . . . [that] have no 'large scale social' character, and lack uniformity. They are distinctly individual, unconscious, unget-at-able." They are "concealed, publicly unscrutinized, uncommunicated . . . secret, unconscious, private, idiosyncratic." Frank, "Short of Sickness and Death": A Study of Moral Responsibility in Legal Criticism, 26 N.Y.U. L. Rev. 545, 573, 582 (1951).

84. J. FRANK, supra note 78, at 130. Frank continues, "they like or dislike, not any legal rule, but they do like an artful lawyer for the plaintiff, the poor widow, the brunette with the soulful eyes, and they do dislike the big corporation, the Italian with a thick,
voidable subjectivities in the judicial process and the impossibility of rationalizing them, Frank concluded that "real" rules could never be formulated concerning the probable outcome of cases.\(^8\)  

Although the energy of legal realism was largely spent by midcentury,\(^8\) its legacy remains. The critical legal studies movement is one example of the contemporary continuation of the legal realist attack on objective legal analysis.\(^7\) Critical legal scholars agree with the realists' contention that legal analysis is nothing more than a veneer covering deeper motives for judicial decisions. But critical legal scholars depart from the realists by providing a neo-Marxist, materialist explanation, rather than a psychoanalytic account of judicial decisions.\(^8\) They undertake this explanation in two principal ways. First, they show legal

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\(^8\) See generally W. Rumble, supra note 50, at 238-39.

86. See generally W. Rumble, supra note 50, at 238-39.


doctrines to be historically contingent by demonstrating their change over time in response to judicial class biases and judicial perceptions of the material needs of capitalist society.89 Second, they show legal reasoning to be fundamentally incoherent by elaborating the logical contradictions or "opposing principles" underlying private law, particularly the law of the marketplace, contract law.80 Thus, they view legal analysis as ideological, non-rational argumentation91 that is used to legitimate existing social practices.92

89. See M. Horwitz, The Transformation of American Law (1977). Professor Horwitz argues that precapitalist, communitarian doctrines of private law made way for nineteenth century capitalist-oriented doctrines because of the class sympathies of judges and their historically limited perceptions of social needs. However, this account of legal development is disputed. See, e.g., Simpson, The Horwitz Thesis and the History of Contracts, 46 U. CHI. L. REV. 533 (1979) (demonstrating that no such shift occurred in contract law during the period Horwitz describes); White, The Intellectual Origins of Torts in America, 86 YALE L.J. 671 (1977) (providing a fundamentally different account of the development of tort theory).


90. See Kennedy, Form and Substance, supra note 21. Professor Kennedy argues that "there are two opposed rhetorical modes for dealing with substantive issues [found in American private law opinions, articles, and treatises] which I call individualism and altruism." Id. at 1685; see also Feinman, Critical Approaches to Contract Law, 30 UCLA L. REV. 829 (1983); Unger, supra note 87.

91. See Kelman, Interpretive Construction in the Substantive Criminal Law, 33 STAN. L. REV. 591 (1981). Professor Kelman depicts legal argument as involving "interpretive construction," or the conscious and unconscious reduction of factual situations to substantive legal controversies, and "rational rhetoricism," or "the process of presenting the legal conclusions that result when interpretive constructs are applied to the 'facts.'" Id. at 592. In Kelman’s view, the necessary imposition of interpretive constructs prior to the employment of rational rhetoricism radically undercuts the rationality of legal argument:

"Interpretive constructs . . . are . . . simply inexplicably unpatterned mediators of experience, the inevitably nonrational filters we need to be able to perceive or talk at all. . . . When the unwarranted conceptualist garbage is cleared away, dominant legal thought is nothing but some more or less plausible common-wisdom banalities, superficialities, and generalities, little more on close analysis than a tiresome, repetitive assertion of complacency that "we do pretty well, all considered, when you think of all the tough concerns we've got to balance.' Legal thought does have its rigorous moments, but these are largely grounded
Other less organized remnants of legal realism can be found in other contemporary writings. In his leading law school primer on judicial reasoning, E. H. Levi portrays adjudication in terms of organic growth in the law whereby the “concepts” that express the law change in response to changed conditions in society. His model implies that judicial “intuition” is the vehicle by which a judge registers and implements into law the changed “concepts” of society. In contrast, Sanford Levinson, maintaining that the unavailability of determinate meaning in literary interpretation applies equally to judicial interpretation, argues that every judicial interpreter is radically impaired in his ability to confidently express the meaning of the text or to reject the meaning proposed by another. The “contingency of percep-

in weak and shifting sands. There is some substance, but we tend to run for cover when it appears.

Id. at 671-72; see also Kelman, Trashing, 36 Stan. L. Rev. 293 (1984); Kairys, supra note 88, at 3 (“There is no legal reasoning in the sense of legal methodology or process for reaching particular, correct results.” Law is “only a wide and conflicting variety of stylized rationalizations from which courts pick and choose.”); Trubek, Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law, 11 Law & Soc’y Rev. 529, 561 (1977) (“I see the [legal] system as partially open and flexible, and therefore as offering support for moral and political ‘entrepreneurs’ who can take advantage of the pressures of ideals and the legitimation needs of the system to effect changes that can further genuine equality, individuality, and community.”).

92. See Gabel, supra note 89, at 602 (traditional legal theory produces fictions by hypostatizing phenomena into facts); Kennedy, Cost-Reduction Theory as Legitimation, 90 Yale L.J. 1275, 1276 (1981) (traditional legal scholarship contributes to legitimation of oppressive social order); Kennedy, The Structure of Blackstone’s Commentaries, 28 Buffalo L. Rev. 209 (1979) (the Commentaries legitimated existing social practices in Blackstone’s England through the creation of artificial legal categories that gradually assumed an appearance of necessity).


94. Id. at 6-9.

95. In Levi’s model of reasoning, “concepts” (such as consideration and trespass), not legal rules, are the main vehicles of the law. See Levi, The Natural Law, Precedent and Thurman Arnold, 24 Va. L. Rev. 587, 604 (1938). His model follows Max Radin’s portrayal of judicial reasoning as a selection between “several categories [that] struggle . . . for the privilege of framing the situation before [the judges].” Radin, The Theory of Judicial Decision: Or How Judges Think, 11 A.B.A. J. 357, 359 (1925). Radin argues that “‘principles’ are not principles at all but aggregations of type transactions, schematized to make them easier to carry in one’s memory.” Id. at 360; see also K. Llewellyn, Tradition, supra note 53 (conceptions such as “type situation” and “situation-sense” are basic to judicial reasoning). However, these pictures of judicial reasoning provide no normative guidance for weighing the “concepts” or “categories.” See J. Rawls, supra note 74, at 34.

96. Levinson, Law as Literature, 60 Tex. L. Rev. 373 (1982). For a criticism of this position, see Fish, Interpretation and the Pluralist Vision, 60 Tex. L. Rev. 495 (1982).
tion” results in “fractured and fragmented discourse,”97 leaving the interpreter with only a mere “hope that some future conjunction of author and reader will provide a common language of [judicial] discourse.”98

In sum, legal realism and its heirs basically argue that judicial interpretation is an unavoidable expression of privately held values because of the unavailability of effective interpretive constraints. They see normative guidance as being unavailable because it is not self-evident: a variety of meanings is attributable to the same precedent or statute and contradictory meanings exist among different precedents and statutes. Therefore, judicial interpreters are compelled to choose from among the available meanings—a choice that can be made only on extralegal bases that include the privately held values of the judicial interpreter. Similarly, institutional demands that a judicial interpreter perform in a certain fashion are ineffective. The irrepressible subjective motivations of the judicial interpreter make it impossible to ensure the judicial interpretation of a text within any objective constraint.

II. PHILOSOPHICAL HERMENEUTICS: TRANSCENDING THE OPPOSING VIEWS OF ADJUDICATION

The Anglo-American jurisprudential traditions of objective and subjective interpretivism both presume that judicial interpretation is a free and discretionary activity. The principal difference between these two traditions lies in the extent to which they believe that the judicial interpreter can be controlled in exercising his freedom and discretion. On one hand, the objective interpretivist tradition constructs normative and institutional constraints that supposedly prevent the responsible judicial interpreter from freely resorting to personal, value-laden considerations. On the other hand, the subjective interpretivist tradition denies the authority and efficacy of such constraints, concluding that judicial interpretation is an activity motivated by nonrational subjective interests.

Unfortunately, both traditions have failed to examine critically their common presumption that interpretation is by nature free and discretionary. Rather, each tradition has directed its efforts at contesting the availability of interpretive constraints.

97. Levinson, supra note 96, at 402-03.
98. Id.
The result has been the incapacity of both jurisprudential traditions to transcend their opposition. Thus, while objective interpretivism's preoccupation with constructing normative and institutional constraints has prevented it from investigating the possible structure of interpretation, subjective interpretivism's primary interest in deconstructing these constraints has diverted its attention away from the need to explain the otherwise "mysterious" act of interpretation.99

The objective-subjective opposition can be transcended by denying the common presumption about the nature of interpretation. In other words, if interpretation is shown not to be free

99. Professor Edgar Bodenheimer once argued that the divergent ideological commitments of analytical positivism and legal realism prevented them from providing "a well-considered theory of the non-formal (i.e., non-positive) sources of the law." Bodenheimer, supra note 75, at 375. Responding to H.L.A. Hart's "open texture" characterization of legal rules, Bodenheimer maintained that Hart's continuing commitment to the analytical positivist ideal of judicial objectivity inhibited him (and would inhibit all other analytical positivists) from investigating the possible structure of judicial discretion. On the other hand, the legal realists' continued assurance to jurists "of the immense range of irrational considerations entering into the judicial process, the subjectivity necessarily inherent in judicial determinations, [and] the dominating influence of prejudices, idiosyncrasies, and preconceived social theories in the disposition of lawsuits" diverted his focus from "presenting us with an embracive theory of the constructive elements necessary for the building of a serviceable science of legal methodology." Id. at 376. In short, the ideological commitments of analytical positivism and legal realism were "leading the science of law into a blind alley from which it can extricate itself only by an extensive and serious re-investigation of the entire realm of legal methodology." Id. at 375; see also R. UNGER, KNOWLEDGE AND POLITICS 3, 104-42 (1975) (characterizing conceptions of reason intrinsic to Western thought in the sciences, humanities, and jurisprudence as dichotomous, which results in a "prison house" for thought from which escape is possible only with a "total criticism" of the "deep structures" of our thought and a transcendence of the dichotomies with a "holistic consciousness"); Gross, supra note 5 (outlining jurisprudential "patterns of evasion" of the rule-value dichotomy); Reynolds, supra note 5 (following Bodenheimer's analysis).

Charles A. Miller's description of judicial interpretation is one example of the "blind alley" or "prison house" effect flowing from objective-subjective dichotomous views of adjudication:

The three sources of decision—values, rules, and facts—combine to focus on the mysterious "act of deciding." While the sources of decision are rationally comprehensible, the act of deciding is not. But after that act, adjudication becomes understandable once more when the opinion of the court, the explanation of decision, is handed down.

C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 11 (1969) (footnote omitted). This description vacillates helplessly between objective and subjective accounts without hope of any synthesis. For this reason, the act of judicial interpretation remains mysterious. A similar vacillation is evident within legal realism between its scientific and intuitionist wings. See supra text accompanying notes 61-78. More recently, Professor Dworkin's position has been characterized as a vacillation between objectivity and subjectivity. See Fish, supra note 5.
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and discretionary, then the disagreement between objective and subjective interpretivism over the availability of effective constraints for interpretation disappears. No ground exists to support the disagreement. Jurisprudential discussion of adjudication is then necessarily transformed to reflect the new view of interpretation.100

Philosophical hermeneutics rejects the notion that interpretation is free and discretionary.101 Interpretation is a dialogical

100. Generally, advocates of the resolution of the objective-subjective opposition in jurisprudence have sought to construct a method of reasoning that integrates the objective and subjective dimensions of human experience. For instance, see Roberto Unger's argument, supra note 99. In Unger's estimation, an "order of mind" must be constructed that exists "between" the particularity of events in human experience and the generality of concepts and symbols constituting the content of human thought. Id. at 107-11. Further, this "order of mind" must employ neither the subjective valuations associated with the particularity of events nor the logic and causality associated with the generality of thought, but rather a "symbolic interpretation" that merges these two. Id. Examples of this interpretation are found in the aesthetic experience of finding universal meaning and concrete particularity in a great work of art or the religious experience of finding Christ as an embodiment of both the universal, infinite God and the particular, finite man. Id. at 144; see also Gross, supra note 5.

In contrast, Professor Noel Reynolds contended that the escape from Bodenheimer's "blind alley" should begin with a complete reformulation of the classical ideal of legal objectivity into a notion of objectivity that more fully "squares . . . with actual human experience." Reynolds, supra note 5, at 27. In his estimation, this could be achieved by seeing legal generalizations as publicly corrigible; see also Fiss, supra note 1.

101. The term "hermeneutics" can be traced to the Greek noun, hermeneia, meaning interpretation. See R. PALMER, supra note 4, at 12-32. The term hermeneia appears to be derived from the name of the Greek god Hermes. Essentially, Hermes' task was to translate, or bring into a form intellectually accessible to human understanding, the transcendent knowledge of the gods. Analysis of Hermes' divine function of mediation between the world of gods and the world of men reveals a three-fold dimensionality that hermeneia, or interpretation, had for the early Greeks. First, Hermes was to reveal and proclaim the will of the gods to men. Thus, interpretation connoted an announcing of what was previously unrevealed. Id. at 15-20. Second, Hermes was to elucidate what was revealed by relating it to the listeners' own projects and intentions. Thus, interpretation to the Greeks carried with it the implication of a context in which the receivers of the message found themselves. The problem of interpretation was making clear the message in terms of the receivers' anticipations of meaning. Id. at 20-26. Third, Hermes was to bring the unintelligible into intelligibility through the medium of the people's own language. He was a translator who sought to mediate man's own understanding with the gods' understanding. For the Greeks, interpretation meant a mediation of world views, a fusion of different understandings in which interpreter and object both operated. Id. at 26-32.

Hermeneutics did not begin to assume the form of a theory of interpretation until the Reformation. Arguing that the Bible could be understood independently and validly without the dogmatic interpretation of the Catholic Church, the Reformers sought a theory of biblical exegesis that would allow their interpretation to stand on its own. See J. BLEICHER, supra note 4, at 12-13; see also H. GADAMER, TRUTH AND METHOD 153-55 (1975). The Reformers argued that any textual passage, the sense of which is not clear, could be understood through the reciprocal relationship between the whole text and its
interaction between interpreter and text that occurs within an *a priori* relationship that is mediated by their common history and language. In this interaction, neither interpreter nor text determines textual meaning independently of the other; both interpreter and text contribute interdependently to the determination of textual meaning. In essence, philosophical

particular passages. While the whole scriptural text guided the interpretation of the particular passages, the meaning of the whole could be reached only through the cumulative understanding of individual passages. From sacred texts, it was only a small step to apply the same insight to profane texts.

Until Friedrich Schleiermacher, "special" hermeneutics existed in the various disciplines, depending upon the kind of text involved and the theoretical problems peculiar to the discipline. Schleiermacher sought to establish a "general" hermeneutic underlying all specialized hermeneutics— the act of understanding itself. Arguing that understanding occurs primarily through a comparing of the unintelligible to the already intelligible, he schematized the act of understanding as a circle. Just as the unclear meaning of a particular textual passage is made clear by reference to the general meaning of the whole text, so is any particular experience made intelligible by reference to what has already been understood. But what has already been understood is only the accumulation of the meaning of particular experiences. This schema of understanding—the general informing the particular and the particular informing the general—became known as the "hermeneutical circle." See J. BLEICHER, supra note 4, at 13-16; H. GADAMER, *supra*, at 162-74; R. PALMER, *supra* note 4, at 75-97.

Following Schleiermacher's attempt to generalize hermeneutics, Wilhelm Dilthey sought to make hermeneutics the foundation for all the human sciences by providing a universally valid methodological basis for the interpretation of all human expressions. Dilthey believed that employment of the hermeneutical circle could lead to a knowledge of the human world resembling the natural sciences' knowledge of nature. Asserting that the meaning of all human action lay in the subjective intention of the actor, Dilthey reasoned that the task of understanding was to reconstruct the actor's original "life-experience" by way of the hermeneutical circle in order to understand the actor as he understood himself. See J. BLEICHER, supra note 4, at 19-26; H. GADAMER, *supra*, at 192-234; R. PALMER, supra note 4, at 98-123. In this respect, Dilthey presages Collingwood's objective reenactment theory of interpretation. See supra note 8.

Dilthey's notion of understanding marked a decisive turn in hermeneutic theory—a turn that Hans-Georg Gadamer viewed as wrong. In Gadamer's view, Dilthey's hermeneutics implied that the inquirer's present situation had a negative value. Understanding the actor as he understood himself required "essentially a self-transposition or imaginative projection whereby the [inquirer] negates the temporal distance that separates him from the object and becomes contemporaneous with it." Linge, *Introduction* to H. GADAMER, *Philosophical Hermeneutics*, at xiv (1976). In other words, temporal distance between the inquirer and the object of his inquiry is a source of prejudice that hinders valid understanding and that must be transcended. To the extent that Dilthey's notion of understanding demands negation of the inquirer's present and extrication from his immediate historical situation, Gadamer believed Dilthey's hermeneutic theory must be rehabilitated. Gadamer argued that the interpreter can never extricate himself from the entanglements of his history and the prejudices that come with those entanglements. The interpreter's history is always constitutively involved in his process of understanding. *Id.*
hermeneutics sees interpretation as an activity of mutual constraint between the interpreter and the text.

A. The Historicality of Interpretation

Philosophical hermeneutics' rejection of the free and discretionary view of interpretation begins with an argument for the fundamental historicality of interpretation. Philosophical hermeneutics contends that every interpreter is historically situated. To be historically situated means to be inextricably located within a relational context that bears the stamp of the past.102 An interpreter's historical situatedness implies both that the interpreter cannot encounter the present without a direction to his project and a perspective of his text that are dictated to him from his past and, equally important, that there are parameters to his project and boundaries to his perspective. In other words, the interpreter's past not only provides certain possibilities for seeing the present, it also limits what can possibly be seen.

Both the possibilities and the limitations of the interpreter's present are a manifestation of the interpreter's "effective-history."103 The effective-history of an interpreter "determines in advance both what seems to [him] worth enquiring about and what will appear [to him] as an object of investigation."104 Put another way, it is the interpreter's "horizon," or "range of vision[,] that includes everything that can be seen from a particu-

102. See H. GADAMER, supra note 101, at 225-74. Gadamer is deeply indebted to Martin Heidegger for this view of the interpreter. In his phenomenology of man, Heidegger contended that man's being is "Dasein" (There-Being). M. HEIDEGGER, BEING AND TIME (1962). In other words, man is always located temporally and spatially. However, man does not exist solipsistically; his being is "Being-in-the-world." Id. at 78-90. By "world," Heidegger means not just the natural environment of entities, but the relational context in which man always finds himself immersed and in terms of which each entity is pregrasped and preunderstood. Id. at 91-145. The existential structures of "Being-in-the-world" are man's primordial "being-with" objects of experience, his "being-in" situations, and his "being-towards" (caring for) objects of experience. Id. at 149-273. Each of these structures presumes that man "grasps in advance" the objects of his experience because of his primordial relation to them. Id. at 188-95. Consequently, human understanding has a prestructure which comes into play in all interpretation. For this reason, "[i]nterpretation is never a presuppositionless apprehending of something presented to us" in advance. Id. at 191-92. Gadamer seized upon these basic insights about man and interpretation. "Heidegger's temporal analytics of human existence (Dasein) has, I think, shown convincingly that understanding is not just one of the various possible behaviours of the subject, but the mode of being of [man] itself." H. GADAMER, supra note 101, at xviii; see also J. BLEICHER, supra note 4, at 98-103; R. PALMER, supra note 4, at 124-61.


104. Id. at 267-68.
lar vantage point." Moreover, the effective-history of an interpreter infuses him with pre-judgments that he cannot possibly dispossess himself. Because he sees the present only in terms of judgments that he has drawn in the past, the interpreter's past judgments predispose him to judge the present in the same way. The interpreter always approaches the text with certain expectations that reflect his past experience.

Not only is the interpreter historically situated, but so is his text. The effective-history of the text is manifest in the manner in which it has been previously understood. Its "horizon" is the range of its prior interpretations; its pre-judgment is how it has come to be judged by others. Importantly, it is the text's grounding in history that makes its present interpretation possible. The interpreter's and the text's sharing of history allows the interpreter to have access to the text, to find relation with it, or to have a basis for understanding it at all. In other words, a common history provides the medium for interpreting the text and determining its meaning.

Given the historicality of both interpreter and text, philosophical hermeneutics maintains that interpretation and meaning are possible only because of the interpreter's historically based pre-judgments of the text. This claim is illustrated by re-

105. Id. at 269.

[T]he historicity of our existence entails that prejudices, in the literal sense of the word, constitute the initial directedness of our whole ability to experience. Prejudices are biases of our openness to the world. They are simply conditions whereby we experience something—whereby what we encounter says something to us.

Id. Certainly, one of the most controversial aspects of philosophical hermeneutics is the notion that pre-judgment has positive, rather than negative value for interpretation. Gadamer attributes the negative connotation of pre-judgment to the Enlightenment. H. GADAMER, supra note 101, at 239-45. The Enlightenment idealized reason as the autonomous determiner of judgments. Pre-judgments were seen as being remnants of an unenlightened mentality that impedes rational self-determination. Truth was obtained by rejecting pre-judgments and establishing an impartial system of rules and methodological principles. Gadamer seeks to rehabilitate the concept of pre-judgment. Given man's historicality, pre-judgments are an ontological fact.

107. In the case of an interpreter's original reading of a text, the horizon of the text is not so much evident in its historicity as it is in its linguisticality. In this case, the text is intellectually accessible to the interpreter primarily because of their sharing of a common language. As will be shown in section C, language has an horizon too; it is the peculiar world view of the community that possesses the language. See infra text accompanying notes 134-41. For this reason, the interpreter will always have certain expecta-

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Reflecting on the common interpretation of any written text. When an interpreter encounters a written text, he performs an act of projection. He projects onto the text the meaning that he anticipates the text as a whole may have for him; his “effective-history” disposes him to pre-judge the possible meaning of the text. However, in projecting the “fore-meaning”\(^\text{108}\) of the text, the interpreter may encounter passages that call into question its suitability and adequacy as an account. Most likely, the interpreter will be “pulled up short by the text,” signifying that the projected meaning of the text “does not yield any meaning or [the text’s] meaning is not compatible with what [the interpreter] had expected.”\(^\text{109}\) Consequently, the interpreter is compelled to account for the unsettling passage in his understanding of the text and to revise his fore-meaning accordingly. The revised fore-meaning then becomes the newly projected meaning, and the process of projection from fore-meaning to particular textual passages and back to fore-meaning continues as before. “The working out of this fore-project, which is constantly revised in terms of what emerges as [the interpreter] penetrates into the meaning, is understanding what is there.”\(^\text{110}\)

In this illustration, the interpreter’s pre-judgments “constitute the initial directedness of [his] whole ability to experience [the text] at all.”\(^\text{111}\) His pre-judgments direct him to the text as an object worthy of inquiry; they are the ground for his initial interest in reading the text. Moreover, his pre-judgments direct him along a particular course of inquiry; they are the fore-meanings that he projects for the text as a whole and that are revised as they become challenged by the text itself. Although the interpreter’s pre-judgments constitute his initial direction, they do not necessarily constitute solely his understanding of the text. His pre-judgments may turn out to be legitimate, and thus pro-

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\(^{108}\) H. Gadamer, \textit{supra} note 101, at 237.

\(^{109}\) Id. For a brief discussion of what philosophical hermeneutics intends in the word “meaning,” see \textit{supra} note 122 and authorities cited therein.

\(^{110}\) H. Gadamer, \textit{supra} note 101, at 236. The constant movement from the interpreter’s pre-judgment of the text to a particular passage of the text and back to pre-judgment, with both informing each other, illustrates the basic epistemological model of philosophical hermeneutics known as the “hermeneutical circle.” See \textit{supra} note 101. The “hermeneutical circle” should not be understood to be viciously inescapable. For a cogent clarification of this commonly misunderstood aspect of philosophical hermeneutic theory, see D. Hoy, \textit{supra} note 4, at 2-6.

ductive for understanding, if they are confirmed in being "worked out" with the passages of the text. But his pre-judgments may also turn out to be illegitimate, and thus unproductive for understanding, if they "come to nothing in the working out."\textsuperscript{112} In either case, however, it is only in terms of the interpreter's pre-judgments that judgments of the text can be reached. The crucial point is that pre-judgments become legitimate or illegitimate only if the interpreter allows them to be challenged and questioned by the object of his inquiry. Otherwise, the interpreter's pre-judgments become definitive and prescribe how he will understand the text.

An interpreter prevents his pre-judgments from prescribing his understanding of the text by being "effective-history conscious."\textsuperscript{113} Such consciousness entails awareness of his pre-judgments and suspension of the effects of his effective-history. Admittedly, suspension of effective-history is impossible in any absolute sense. "The prejudices and fore-meanings in the mind of the interpreter are not at his free disposal. He is not able to separate in advance the productive prejudices that make understanding possible from the prejudices that hinder understanding and lead to misunderstandings."\textsuperscript{114} But latent pre-judgments can be teased into the foreground of awareness through an open and direct confrontation with the text. In confronting the text, the interpreter encounters its "otherness" which throws his pre-judgments into contrasting relief and thereby casts them into the foreground of awareness for his critical scrutiny.\textsuperscript{115}

Although the text is historically related to the interpreter, it is nonetheless "an historically intended separate object."\textsuperscript{116} In other words, it is not only physically separate but also temporally distant in its creation from the interpreter's present. Im-

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\item \textsuperscript{112} H. Gadamer, \textit{supra} note 101, at 237.
\item \textsuperscript{113} \textit{Id.} at 268-71.
\item \textsuperscript{114} \textit{Id.} at 263.
\item \textsuperscript{115} Linge, \textit{supra} note 101, at xx-xxi. Linge illustrates this phenomenon in the history of cultures:

[I]t is in times of intense contact with other cultures (Greece with Persia or Latin Europe with Islam) that a people becomes most acutely aware of the limits and questionableness of its deepest assumptions. Collision with the other's horizons makes us aware of assumptions so deep-seated that they would otherwise remain unnoticed. This awareness of our own historicity and finitude—our consciousness of effective history—brings with it an openness to new possibilities that is the precondition of genuine understanding.

\textit{Id.} at xxi.
\item \textsuperscript{116} H. Gadamer, \textit{supra} note 101, at 263.
\end{enumerate}
portantly, every interpreter, even the creator of the text, must accomplish his interpretation across some temporal distance that is never "a closed dimension, but is itself undergoing constant movement and extension."117 This means that the interpreter always occupies a new present in relation to the text, giving him a new perspective (or pre-judgment) of the text that is shaped by concerns and expectations inherited from his constantly extending past. For this reason, a text is always endowed with a sense of "otherness," or "strangeness."118 To be sure, the text retains its sense of "familiarity"119 as well, because of its presence in the interpreter's history (and, as will be shown later, language); this familiarity is manifest in the interpreter's capacity to pre-judge the text.

Thus, the interpreter's open and direct confrontation with the text reveals a "polarity of familiarity and strangeness."120 This polarity creates a contrast between what the interpreter presently expects to understand from the text and what the text historically has to say.

If a person is trying to understand something, he will not be able to rely from the start on his own chance previous ideas, missing as logically and stubbornly as possible the actual meaning of the text until the latter becomes so persistently audible that it breaks through the imagined understanding of it. Rather, a person trying to understand a text is prepared for it to tell him something. That is why a hermeneutically trained mind must be, from the start, sensitive to the text's quality of newness. But this kind of sensitivity involves neither 'neutrality' in the matter of the object nor the extinction of one's self, but the conscious assimilation of one's own foremeanings and prejudices. The important thing is to be aware of one's own bias, so that the text may present itself in all its newness and thus be able to assert its own truth against one's own foremeanings.121

In other words, if the interpreter is open to the text, meaning that he is genuinely prepared to receive its message, then the text may expose his pre-judgments by way of establishing a contrast between itself and those pre-judgments. In this way, the

117. Id. at 266.
118. Id. at 262.
119. Id.
120. Id. at 262-63.
121. Id. at 238.
interpreter becomes aware of his pre-judgments and avoids the prescriptive effect they would have on his understanding of the text were they to remain latent in his consciousness.

This open confrontation between the interpreter's pre-judgments and the text is the process by which the true meaning of the text emerges. In allowing constantly emerging pre-judgments to be contrasted and tested against the text, the interpreter is in the position to discard pre-judgments that obscure textual understanding and to retain pre-judgments that are confirmed by the text. In short, temporal distance between interpreter and text does not obstruct understanding, but actually produces it. Temporal distance acts as a "filtering process;" it "not only lets those prejudices that are of a particular and limited nature die away, but causes those that bring about genuine understanding to emerge clearly as such." For this reason, interpretation and the determination of meaning are never a completed task, but are "an infinite process."

In sum, the view of interpretation that emerges from a dis-

122. In the parlance of philosophical hermeneutics, meaning is something that neither inheres in an object nor attaches to it as an arbitrary projection of thought. Meaning is contextual, occurring only in relationships with the interpreter. Meaning is seen as always being "for us;" it is found in making the unintelligible intelligible in terms of our present concerns and expectations, just as Hermes made the unintelligible world of the gods intelligible to man through the medium of man's own language. See R. PALMER, supra note 4, at 118-21, 184.

This determination of meaning is thus dependent on the interpreter making the text "applicable" to him. Application is a crucial dimension of interpretation. See D. HOY, supra note 4, at 51-61. Gadamer believed that interpretation in theological and judicial contexts is particularly exemplary of this dimension:

In both legal and theological hermeneutics there is the essential tension between the text set down—of the Law or of the proclamation—on the one hand and, on the other, the sense arrived at by its application in the particular moment of interpretation, either in judgment or in preaching. A law is not there to be understood historically, but to be made concretely valid through being interpreted. Similarly, a religious proclamation is not there to be understood as a merely historical document, but to be taken in a way in which it exercises its saving effect. This includes the fact that the text, whether law or gospel, if it is to be understood properly, i.e., according to the claim it makes, must be understood at every moment, in a particular situation, in a new and different way. Understanding here is always application.

H. GADAMER, supra note 101, at 275, 289-305. Both judicial and theological interpretation see the task as an effort to mediate the temporal distance between the historic text and the present situation. Thus, interpretation is not the objective reconstruction of another world in its own terms, nor the subjective determination of the world in terms of the interpreter's own vision and thoughts.


124. Id. at 265.
cussion of its historicality is fundamentally different from objective and subjective interpretivism. Interpretation is a dynamic interaction, between the interpreter (his pre-judgments) and the text (its historical meaning), from which meaning is determined. The interpreter's pre-judgments contribute to the determination of meaning by providing the basis on which the text is made intelligible to the interpreter. But these pre-judgments do not prescribe meaning. So long as the text is allowed to have expression and to challenge the interpreter's pre-judgments, the text contributes to the determination of meaning by compelling revised understandings of it. As a result, interpretation is neither free nor constrained, but is free and constrained. It is free in the sense that the interpreter approaches the text in accordance with his pre-judgments concerning it. But it is also constrained in the sense that these pre-judgments, shared by both interpreter and text in their common historical medium, are subject to modification and revision in the interaction between the interpreter and the text.

B. The Dialogical Structure of Interpretation

As maintained in section A, interpretation requires openness to the text, meaning that the interpreter lays open the possibility that the text may have something to say different from the interpreter's expectation of its meaning. But in so doing, the interpreter assumes the risk that the suitability of his pre-judgments for understanding the text may be called into question by the claims of the text itself. Indeed, the laying open of possibilities for other meanings of the text is the "essence of the question." For this reason, interpretation is said to have the structure of questioning. The text asserts its claims, calling into question the interpreter's pre-judgments; the interpreter answers with revised judgments of the text that are drawn in terms of his prior understandings and the message of the text, but

125. Id. at 266. Gadamer indicates elsewhere that the openness that is "questioning" is not intermittent, but continuous and infinite:

Dialectic, as the art of asking questions, proves itself only because the person who knows how to ask questions is able to persist in his questioning, which involves being able to preserve his orientation towards openness. The art of questioning is that of being able to go on asking questions, [i.e.,] the art of thinking. It is called "dialectic", for it is the art of conducting a real conversation.

Id. at 330.

126. Id. at 266.
which may be called into question again by other textual passages.

This question-answer-question structure suggests that the interpretive interaction between the interpreter and the text is dialogical. Indeed, dialogue is precisely the relationship the interpreter achieves with the text. The dialogues of Plato are paradigmatic of the character of the dialogue that occurs in interpretation.\textsuperscript{127} The purpose of the Platonic dialogues is for the interlocutors to reach a transcendent understanding about an issue of common concern. Importantly, the individuality of each interlocutor is not to be neutralized but is significant in achieving of this understanding. For instance, the confrontation between Socrates, the man of contemplation, and Callicles, the man of action, in the \textit{Gorgias}\textsuperscript{128} casts their peculiar pre-judgments into contrasting relief for their mutual scrutiny. The result of their confrontation is thus more likely to be true understanding because it is accomplished in terms of each others' pre-judgments and transcends each one's purely subjective perspective.

The interlocutors of a Platonic dialogue move beyond their subjective perspectives when they inquire into the subject matter of the dialogue. In other words, the more an interlocutor opens himself to the subject matter, the more his personal opinions cease to prescribe his understanding. An interlocutor becomes engaged in an inquiry \textit{with} the other interlocutors and falls out of an interrogation \textit{of} them.\textsuperscript{129} He gets “caught up” in

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127. \textit{Id.} at 325-41.
129. The distinction is crucial. Genuine dialogue is a focus on some subject matter, not on the particular interlocutors. To conduct a conversation “requires that one does not try to out-argue the other person, but that one really considers the weight of the other’s opinion.” H. \textsc{Gadamer, supra} note 101, at 330. The effort to “out-argue” is an undertaking that presumes the validity of one’s own position and focuses on changing another person’s views to conform with one’s own. However, this kind of dialogue is inconsistent with the requirement of openness that leads to understanding because it is so uninterested in the other. Genuine dialogue is openness to another person’s views, which changes the tenor of the undertaking into a common inquiry about some issue of common concern.

Just as there are legitimate and illegitimate pre-judgments, see \textit{supra} text accompanying notes 111-12, so there are legitimate and illegitimate inquiries (or questionings). Legitimate (or “true”) questioning is an inquiry with the answers still undetermined. Illegitimate (or “false”) questioning is an inquiry with predetermined answers; it is concerned with hearing only what it has already decided is worthwhile to hear. This kind of questioning is illegitimate because it is so one-sided. H. \textsc{Gadamer, supra} note 101, at 326-27.
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the conversation; he becomes engaged or possessed by the back-and-forth movement of the dialogue. At this point, the dialogue takes on a life of its own that is filled with unanticipated developments that carry the interlocutor beyond his present perspective. Although we frequently say that one may "conduct" a conversation, or dialogue, "the more fundamental a conversation is, the less its conduct lies within the will of [the parties]. . . .

Philosophical hermeneutics rejects illegitimate questioning in all its forms, including methods of prescribed inquiry. Methods are rejected as illegitimate because of their prescription of a correct answer to their inquiries:

Strictly speaking, method is incapable of revealing new truth; it only renders explicit the kind of truth already implicit in the method. The discovery of the method itself was not arrived at through method but dialectically, that is, through a questioning responsiveness to the matter being encountered. In method the inquiring subject leads and controls and manipulates; in dialectic the matter encountered poses the question to which he responds.

R. PALMER, supra note 4, at 165. The philosophical roots for the rejection of methods are found in M. HEIDEGGER, Question, supra note 5, at 3; M. HEIDEGGER, Age, supra note 5, at 115.

130. "What emerges in its truth is the logos, which is neither mine nor yours and hence so far transcends the subjective opinion of the partners to the dialogue that even the person leading the conversation is always ignorant." H. GADAMER, supra note 101, at 331. Later, Gadamer argues that the phenomenon of "hearing" illustrates the impossibility of subjectivity in genuine dialogue. Id. at 419-21.

Unlike seeing, where one can look away, one cannot "hear away" but must listen, unless the language is an alien one or is mere chatter. Even idle chatter has a way of captivating the listener against his will. Hearing implies already belonging together in such a manner that one is claimed by what is being said.

D. HOY, supra note 4, at 66.

The notion of being carried by the dialogue is illuminated by a second phenomenon used to support the hermeneutic view of interpretation—the phenomenon of a game (or "playing"). H. GADAMER, supra note 101, at 91-114. The fundamental characteristic of the phenomenon of playing is the total absorption of the player in the back-and-forth movement of the game. In genuine playing, a player does not hold himself back in self-awareness, reflecting on the game as an object of definable procedures and rules. A player who cannot lose himself in earnest in the playing is a "spoilsport"—one who cannot play. Id. at 91-92. Similarly, playing "cannot be taken as an action of subjectivity . . . and self-possession. The real subject of playing is the game itself." Linge, supra note 101, at xxiii. The playing possesses the players; it has primacy over the players engaged in it.

Moreover,

[t]he movement of playing has no goal in which it ceases but constantly renews itself. That is, what is essential to the phenomenon of play is not so much the particular goal it involves but the dynamic back-and-forth movement in which the players are caught up—the movement that itself specifies how the goal will be reached.

Id. In other words, playing has its own momentum and carries its players along with it. The point is that interpretation involves the same kind of absorption of the interpreter in the question-answer-question movement between himself and the text.
he people conversing are far less the leaders of it than the led. No one knows what will 'come out' in a conversation."\textsuperscript{131}

This phenomenon of dialogue illustrates the nature of the relationship to be achieved between the interpreter and the text. Like dialogue, interpretation is an inquiry into a subject matter that concerns both the interpreter and the text. Like dialogue, interpretation also requires an openness to the particular viewpoint of another, meaning "acknowledgment that [the interpreter] must accept some things that are against [himself]."\textsuperscript{132} Only in this way do both the interlocutor and the interpreter permit themselves to be engaged by the dialogical interaction and carried by it beyond their present perspectives. In short,

both [dialogue and interpretation] are concerned with an object that is placed before them. Just as one person seeks to reach agreement with his partner concerning an object, so the interpreter understands the object of which the text speaks. . . .

. . . [In] the successful conversation they both come under the influence of the truth of the object and are thus bound to one another in a new community . . . [it is] a transformation into a communion, in which we do not remain what we were.\textsuperscript{133}

Again, this dimension of the philosophical hermeneutic characterization of interpretation differs fundamentally from the presumption of objective and subjective interpretivism. Interpretation is not an essentially free and discretionary activity for which the existence of constraints is in dispute. Because interpretation does not occur independently of the dialogical relation between the interpreter and the text, it makes no sense to view the interpreter as essentially free to construe the text according to his subjective values. Interpretation is not a manipulative action of the interpreter's subjectivity, but is rather his placing of himself in dialogue with the text so that both the interpreter and the text move into a new understanding.

\textit{C. The Linguisticality of Interpretation}

In sections \textit{A} and \textit{B}, interpretation has been shown to be a

\textsuperscript{131} H. Gadamer, \textit{supra} note 101, at 345.
\textsuperscript{132} Id. at 324.
\textsuperscript{133} Id. at 341 (footnote omitted). The elevation of the interpreter's pre-judgments and the claims of the text into a higher generality, or "communion," is what philosophical hermeneutics terms the "fusion of horizons." Id. at 273.
transsubjective event. Both the interpreter and the text are absorbed in a dialogical interaction from which new understandings arise. But the peculiar perspective of neither the interpreter nor the text is to be extinguished. The confrontation of these perspectives initiates the dialogical movement towards understanding because of their contrast. In previous sections of this comment, the medium in which the dialogical interaction of interpretation occurs has been referred to simply as the common history of the interpreter and the text. However, this historical relation is not to be construed as something vague and intangible; it has its concrete manifestation in language. For this reason, language is seen as being the "concretion of effective-historical consciousness." 134

The history of both the interpreter and the text makes itself known in the present by way of language. Language is the concrete means by which the judgments and understandings of the past are carried into the present. Thus, the interpreter's effective-history that provides his present pre-judgments exists in the language he employs.

To say that the horizons of the present are not formed at all without the past is to say that our language bears the stamp of the past and is the life of the past in the present. Thus the prejudices [that philosophical hermeneutics] identifies as more constitutive of our being than our reflective judgments can now be seen as embedded and passed on in the language we use. Since our horizons are given to us prereflectively in our language, we always possess our world linguistically. Word and subject matter, language and reality, are inseparable, and the limits of our understanding coincide with the limits of our common language. 135

Thus, the mediation that occurs between an interpreter and the text, as in the dialogue between interlocutors, can be seen as "the full realisation of conversation, in which something is expressed that is not only [the interpreter's] or [his text's], but common." 136

The linguisticality of effective-history means that interpretation can occur neither prelinguistically nor extralinguistically. Not only does the text appear to the interpreter in terms of lan-

134. Id. at 351.
135. Linge, supra note 101, at xxviii.
guage, but the interpreter can approach the text only in terms of language. There is no world outside language.137

[T]he linguistic quality of our experience of the world is prior, as contrasted with everything that is recognised and addressed as being. The fundamental relation of language and world does not, then, mean that world becomes the object of language. Rather, the object of knowledge and of statements is already enclosed within the world horizon of language. The linguistic nature of the human experience of the world does not include making the world into an object.138

In other words, there is no world outside its presence as the subject matter of some language community. One cannot experience language prior to experiencing the world, nor the world prior to experiencing language. “We cannot see a linguistic world from above in this way, for there is no point of view outside the experience of the world in language from which it could itself become an object.”139

Consequently, language is not simply an optional function that the interpreter engages in or does not engage in at will.140

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137. The idea of “world” has peculiar significance in philosophical hermeneutics. The idea has its origins in Martin Heidegger’s phenomenology of man. See supra note 102. World is not the environment, the sum total of all objects; it is rather the entire relational context in terms of which every object is pregrasped. Therefore, the world is never separate from man; it is prior to any separation from the objects of the world. M. HEIDEGGER, supra note 102, at 91-148. Philosophical hermeneutics carries forward Heidegger’s notion of world by making explicit that the human experience of world is linguistic. H. GADAMER, supra note 101, at 397-414.

138. H. GADAMER, supra note 101, at 408.

139. Id. at 410. The peculiar world of a language community is known to any person who has mastered a foreign language. The language is a repository of cultural-historical experience. Consequently, many of its words and phrases have a richness of meaning that reflects that experience and, therefore, can be fully understood only by total immersion in the culture of the language community. Not surprisingly, translation of such words and phrases requires much more than mechanical synonym finding; it requires explanation of the foreign context of understanding. However, even with such an explanation there is always a sense of the loss of the dimensions of the language. See id. at 345-51.

140. The fact that the world cannot be grasped prelinguistically or extralinguistically is illustrated by our complete possession by language in even thinking about language:

[All thinking about language is already once again drawn back into language.

We can only think in a language . . . .

Language is not one of the means by which consciousness is mediated with the world. . . . Language is by no means simply an instrument, a tool. For it is in the nature of the tool that we master its use, which is to say we take it in hand and lay it aside when it has done its service. That is not the same as when we take the words of a language, lying ready in the mouth, and with their
Language is beyond the interpreter’s manipulative control because it is between him and the text, making possible his very relating to it. The interpreter cannot first have an extralinguistic contact with the text and then put the text into the instrumentation of language. “Language is not just one of man’s possessions in the world, but on it depends the fact that man has a world at all.” Language is the very relational context in terms of which any text is pregrasped. Indeed, because language is presupposed in every act of interpretation of any text, it is prior to any separation of the interpreter and the text. Language is, therefore, prior to all objectivity and subjectivity since both are conceived within a schema that separates subject from object.

III. The Implication of Philosophical Hermeneutics for the Anglo-American View of Adjudication

Philosophical hermeneutics is a theory of interpretation that directly conflicts with the view of interpretation assumed in Anglo-American jurisprudence. The assumption is that interpretation is free and discretionary, meaning that no common standards exist between the interpreter and the text to provide guidance for evaluating and judging the text. In a fundamental sense, the interpreter and text are assumed to be independent of each other. This assumption yields two approaches to adjudication. The objective interpretivist approach constructs preestablished norms for inquiry that reflect the characteristics of the text itself so that the interpreter’s judgment identifies with the text. The subjective interpretivist approach insists that judgments of the text will be drawn only in terms of the interpreter’s preconceptions of the text. In other words, while the objectivist sees an independent text as determining understanding, the subjectivist sees an independent interpreter as determining understanding.

The hermeneutic theory of interpretation, on the other hand, views interpretation as a dialogical interaction of inter-

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use let them sink back into the general store of words over which we dispose. Such an analogy is false because we never find ourselves as consciousness over against the world and, as it were [sic], grasp after a tool of understanding in a wordless condition. Rather, in all our knowledge of ourselves and in all knowledge of the world, we are always already encompassed by the language that is our own.


141. H. GADAMER, supra note 101, at 401.
preter and text that is mediated by their common history and language. As a result, neither interpreter nor text is sufficiently independent to be determinative of meaning. The text prevents the interpreter from being the sole determiner of meaning by providing a contrasting relief against which the interpreter’s pre-judgments are brought to awareness for critical scrutiny. Likewise, the interpreter prevents the text from being the sole determiner of meaning since the text is intelligible only in terms of the interpreter’s pre-judgments. In these fundamental ways, the determination of meaning is beyond the control of either interpreter or text; indeed, both contribute to the determination of meaning interdependently.

In contrast to Anglo-American jurisprudence, philosophical hermeneutics concludes that interpretation is never an activity in need of constraints because it is a structure of existential constraints. These existential constraints are the interrelations that exist between the interpreter and the text prior to interpretation. The interpreter’s access to the text is made possible only because of the a priori mediation provided by their shared historical and linguistic context. This contextual interrelatedness provides both the possibilities and the limitations of the interpretation. Moreover, the interpreter and text stand in a dialogical relation without which interpretation cannot possibly occur. The dialogical relation is prior to interpretation in the sense

142. A similar idea has been expressed by Professor Stanley Fish in a critical response to Dworkin’s “chain novel” analogy for adjudication. Fish criticizes Dworkin for presuming the interpretive freedom of the first author in the chain. See supra note 41.

The first author has surrendered his freedom (although, as we shall see, surrender is exactly the wrong word) as soon as he commits himself to writing a novel . . . . He must decide, for example, how to begin the novel, but the decision is not “free” because the very notion “beginning a novel” exists only in the context of a set of practices that at once enable and limit the act of beginning. One cannot think of beginning a novel without thinking within, as opposed to thinking “of,” these established practices, and even if one “decides” to “ignore” them or “violate” them or “set them aside,” the actions of ignoring and violating and setting aside will themselves have a shape that is constrained by the preexisting shape of those practices. This does not mean that the decisions of the first author are wholly determined, but that the choices available to him are “novel writing choices,” choices that depend on a prior understanding of what it means to write a novel, even when he “chooses” to alter that understanding. In short he is neither free nor constrained (if those words are understood as referring to absolute states), but free and constrained. He is free to begin whatever kind of novel he decides to write, but he is constrained by the finite (although not unchanging) possibilities that are subsumed in the notions “kind of novel” and “beginning a novel.”

Fish, supra note 5, at 553.
that interpretation cannot be undertaken without the open dialogical interaction of interpreter and text. Importantly, these interrelations are said to be existential because they constitute the very manner of the interpreter's existence with the text.\textsuperscript{143} Again, the implication is that interpretation is so fundamental to the interpreter's means of knowing the text that the act of interpretation cannot be manipulatively controlled by the interpreter.

The view of interpretation provided by philosophical hermeneutics represents a direct theoretical challenge to Anglo-American jurisprudence. Because Anglo-American jurisprudence presumes that interpretation is an essentially unrestrained activity, the jurisprudential debate has focused on the availability of constraints for interpretation. Unfortunately, this debate has proceeded without a specific and systematic examination of the nature of interpretation upon which the entire debate rests. Philosophical hermeneutics is challenging because its examination of the nature of interpretation concludes that interpretation is not what traditional Anglo-American jurisprudence has blindly presupposed. Therefore, the ground upon which the objective and subjective interpretivist debate stands is gone.

This theoretical challenge deserves careful attention from the Anglo-American jurisprudential community.\textsuperscript{144} Anglo-Ameri-

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\item The fundamental existentiality of these constraints in the act of interpretation prompted one commentator to conclude as follows:

The task of philosophical hermeneutics, therefore, is ontological rather than methodological. It seeks to throw light on the fundamental conditions that underlie the phenomenon of understanding in all its modes, scientific and non-scientific alike, and that constitute understanding as an event over which the interpreting subject does not ultimately preside.

Linge, \textit{supra} note 101, at xi. Consequently, philosophical hermeneutics "pervades all human relations to the world." H. Gadamer, \textit{supra} note 101, at xi. Its issue is "not what we do or what we ought to do, but what happens to us over and above our wanting and doing." \textit{Id.} at xvi. \textit{See generally} M. Heidegger, \textit{supra} note 102.

\item The purpose of this comment is to direct Anglo-American jurisprudential attention to its unexamined assumption about the nature of interpretation and to the philosophical hermeneutic challenge to this assumption. The presentation of a philosophical hermeneutic theory of law is beyond the scope of this comment. However, the present avoidance of an articulation of this theory does not mean that philosophical hermeneutics offers little or nothing that is directly relevant to the judicial context. Several ideas of jurisprudential relevance may be derived from the outline of philosophical hermeneutics provided herein.

First, the idea of the historical mediation of the past with the present is relevant. A judicial interpreter can be easily characterized as situated in a historical present, facing the present expectations of litigants that are based on prior judgments drawn by legislative writers or other judicial interpreters. The judicial interpreter's adjudicative task is
can jurisprudence can only stand to benefit by directing its attention to the theory of interpretation provided by philosophical hermeneutics. In the very least, attention to the hermeneutic theory of interpretation, even if it were ultimately rejected, could induce the critical and systematic jurisprudential study of the nature of interpretation that has heretofore been assumed but never studied. However, careful attention to the hermeneutic theory of interpretation will more than likely lead to an abandonment of the prevailing jurisprudential assumption about the nature of interpretation and a transcendence of the objective and subjective interpretivist debate that preoccupies Anglo-American jurisprudence.

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to mediate these conflicting historically-based expectations, including his own pre-judgments that may come into play with the interests of the present case. See supra note 122.

Second, the idea that this mediation occurs in language is relevant to the judicial context. Law is language-bound because all the materials of the law have their existence in language. Any use of these materials in any context, including negotiation, litigation, and adjudication, occurs in language as well. In a very important sense then, the judicial interpreter is a necessarily obligated participant in language. The consequence of his participation is that his resolution of the litigants' claims is regulated by the same terms and conditions of language that regulated the linguistic articulation of those claims.

Third, and perhaps most important, the idea of the dialogical structure of interpretation is relevant to the judicial context. In the adjudicative process, the judicial interpreter is obligated to hear claims that he might not otherwise want to hear, to listen to all persons who will be directly affected by his resolution of their claims, and to respond specifically to these claims by resolving them and assuming responsibility for that resolution. In other words, the adjudicative process institutionally compels the judicial interpreter to confront openly and directly the interests and expectations of others. Philosophical hermeneutics indicates the significance of this confrontation for the judicial interpreter. The judicial interpreter's pre-judgments are brought to awareness (for him as well as for others) only when cast into contrasting relief against judgments that are different from his own. Once his pre-judgments are illuminated, they are more easily subject to critical evaluation (by him as well as by others) for their suitability in the resolution of the dispute. In sum, the judicial interpreter is restrained by the very nature of his undertaking from interpreting in a free and discretionary manner.
The Right to Life of the Unborn—An Assessment of the Eighth Amendment to the Irish Constitution

The late President of Ireland and former Chief Justice of the Irish Supreme Court, Cearbhall O'Dalaigh, once stated, "Constitutional rights are declared not alone because of bitter memories of the past but no less because of the improbable, but not-to-be-overlooked, perils of the future." This statement describes the rationale behind the eighth amendment to the Irish Constitution. Viewed in popular terms as a prolife amendment, its genesis lies in fear that the almost universal trend to liberalize abortion legislation may creep into Ireland. The amendment attempts to strike the appropriate balance between the mother's constitutionally protected personal rights and the unborn's right to life. Although it was strongly supported by the people, the amendment contains some technical problems, as well as some broad language that may permit rather than prevent the introduction of abortion legislation in Ireland. However, in light of the strong public opinion against any liberalization of abortion laws, and the legislative and judicial development of Irish family law, the more realistic view is that the amendment is a powerful endorsement of Ireland's prolife position.

I. Historical Background

In order to understand the legal and political atmosphere in Ireland at the time the amendment was passed, it is necessary to understand (1) the historical development of the Irish Republic, (2) the effects of foreign legislation on Irish law, and (3) the development of Irish abortion law.

Because English rule was imposed for several centuries, English common law directly applied in Ireland. Abortion was viewed by early English commentators as a serious crime. Blackstone stated:

Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion or otherwise, killeth it in her womb; or if anyone beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter. But the modern law doth not look upon this offence in quite so atrocious a light, but merely as a heinous misdemeanor.  

Ireland was incorporated into the United Kingdom of Great Britain and Ireland in 1800 by the Union with Ireland Act. The English Parliament became the sole legislator for both England and Ireland and thereafter all enactments specifically stated whether they were to apply to England, Ireland, or both. In the nineteenth century, the English Parliament codified the law governing abortion in the Offences Against the Person Act. The Act specifically declared that it applied to Ireland. Sections 58 and 59 provided:

58. Every Woman, being with Child, who with Intent to procure her own Miscarriage, shall unlawfully administer to herself any Poison or other noxious Thing, or shall unlawfully use any Instrument or other Means whatsoever with the like Intent, and whosoever, with Intent to procure the Miscarriage of any Woman, whether she be or be not with Child, shall unlawfully administer to her or cause to be taken by her any Poison or other noxious Thing, or shall unlawfully use any Instrument or other Means whatsoever with the like Intent, shall be guilty of Felony, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life or for any Term not less than Three Years, or to be imprisoned

3. 1 W. BLACKSTONE, COMMENTARIES 129-30 (4th ed. 1771); see also E. COKE, THIRD INSTITUTE 50 (1st ed. London 1628).
4. 39 & 40 Geo. 3, ch. 67 (1800), reprinted in 23 HALSBURY'S STATUTES OF ENGLAND 832 (A. Yonge 3d ed. 1970). The union was codified by an identical Irish act, the Act of Union (Ireland) 1800. The Act abolished the separate Irish Parliament that had existed since the thirteenth century. The Act received the Royal Assent on August 1, 1800.
5. For example, The Abortion Act, 1967, ch. 87, § 7(3) specifically provides that it does not apply to Northern Ireland.
6. 24 & 25 Vict., ch. 100 (1861).
7. Id. The preamble to the Act states, "Whereas it is expedient to consolidate and amend the Statute Law of England and Ireland in relation to offences against the person . . ." (emphasis in original).
for any Term not exceeding Two Years, with or without
Hard Labour, and with or without Solitary Confinement.

59. Whosoever shall unlawfully supply or procure any Poison
or other noxious Thing, or any Instrument or Thing
whatsoever, knowing that the same is intended to be un-
lawfully used or employed with Intent to procure the
Miscarriage of any Woman, whether she be or be not with
Child, shall be guilty of a Misdemeanor, and being con-
victed thereof shall be liable, at the Discretion of the
Court, to be kept in Penal Servitude for the Term of
Three Years, or to be imprisoned for any Term not ex-
ceeding Two Years, with or without Hard Labour.

This Act continues to be the law concerning abortion in Ireland
today.8

In 1921 a treaty was signed between Ireland and England
forming the Irish Free State (Saorstat Eireann) out of twenty-
six of the thirty-two Irish counties.9 Although it remained a
member of the British Commonwealth of Nations, the Irish Free
State ceased to be part of the United Kingdom. In 1922 an Irish
Constitution was established.10 This constitution was amended
twenty-seven times in the next fifteen years11 and was finally
superceded in 1937 when the present constitution was approved
by plebiscite. The eighth amendment discussed in this comment
has been incorporated into the 1937 constitution.12

The 1937 constitution virtually severed Ireland’s ties to
Great Britain.13 However, it provided (as did the 1922 constitu-
tion) that all laws previously in force would continue to be of
full force and effect so long as they were consistent with the
1937 constitution, or until they were repealed or amended by the
Oireachtas (Irish Parliament).14 Thus, the “unlawful miscar-

Education and Research Network).
9. Codified in The Irish Free State (Agreement) Act, 1922, 12 & 13 Geo. 5, ch. 4,
reprinted in 4 HALSURY’S STATUTES OF ENGLAND 636 (A. Yonge 3d ed. 1968). The re-
maining six counties now constitute Northern Ireland and remain under English rule.
Geo. 5, ch. 1, reprinted in 4 HALSURY’S STATUTES OF ENGLAND 641 (A. Yonge 3d ed.
1968).
12. IRISH CONST. art. 40.3.3.
13. The final step occurred in 1948 when the Irish Free State left the British Com-
monwealth of Nations. It is now internationally recognized as the Republic of Ireland.
See The Ireland Act, 1949, 12, 13 & 14 Geo. 6, ch. 41, reprinted in 4 HALSURY’S STAT-
14. IRISH CONST. art. 50.1.
riages” provisions of the Offences Against the Person Act were carried over into Irish law by the new constitution.

Although sections 58 and 59 of the Offences Against the Person Act specifically prohibit abortion in Ireland, there have been few prosecutions. In 1945 William Henry Coleman was charged with two counts of attempting to perform an abortion. He was found guilty and sentenced to fifteen years of penal servitude on each count with the sentences to run concurrently. The most infamous Irish abortionist was a woman known as Nurse Cadden, who “was a well known figure . . . on the Dublin scene for 20 years.” Her medical services came to an end in 1956, when she was convicted of murder after the body of a woman, who died following an abortion, was found on the public footpath outside her apartment. Nurse Cadden was sentenced to death, but the sentence was commuted to life imprisonment.

In neither of these cases, nor in any other case to date, has an Irish court analyzed the scope of sections 58 and 59. However, the English courts have analyzed these sections and an examination of their analysis is instructive because of its potentially persuasive influence on Irish law.

The most pertinent case is Rex v. Bourne. Dr. Aleck Bourne, a respected obstetrician, performed an abortion on a fourteen-year-old girl who had been violently raped. Dr. Bourne stated that he felt he had a duty to perform the abortion after deciding that continuance of the pregnancy would probably cause her serious injury. Justice MacNaghten, in his instructions to the jury, stated that since sections 58 and 59 used the word “unlawfully” in relation to procuring a miscarriage, it implied that procuring a miscarriage would not be “unlawful” in certain circumstances. In defining these circumstances he borrowed language from the Infant Life (Preservation) Act of

15. P. Jackson, The Deadly Solution to an Irish Problem—Backstreet Abortion 2 (1983) (published by the Women’s Right To Choose Campaign). Jackson suggested that there have been 58 illegal abortion cases investigated or tried in Ireland between 1926 and 1974.
16. People v. Coleman, 1945 Ir. R. 237 (Crim. App. 1944) (the conviction was later reversed on other grounds).
18. Id. at 5.
21. Id. at 688.
1929, which provided that the killing of a child capable of being born alive was not an offense if the act was done "in good faith for the purpose only of preserving the life of the mother." Though sections 58 and 59 of the Offences Against the Person Act did not provide such an exception, Justice MacNaghten interpreted the Act as though it did. He added that this standard ought to be given a reasonable interpretation:

[If the doctor is of opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are [sic] quite entitled to take the view that the doctor who, under those circumstances and in that honest belief, operates, is operating for the purpose of preserving the life of the mother.]

Based on this sweeping instruction, the jury acquitted Dr. Bourne.

The impact of Bourne on Irish law is unclear. It is not binding precedent and opinions vary about its persuasive value. William Binchy, a member of the Irish Law Reform Commission, and an authority on Irish family law stated:

It will be recalled that that decision [Bourne] held that necessity was a defence to a prosecution for abortion, and that an abortion performed to save the life of the mother would thus be permissible. It seems that this part of the judgment would represent the law in this country. But where that judgment went on to hold that an abortion would be lawful if designed to save the mother from becoming a "physical or mental wreck", this would surely not represent our law, since it goes far beyond what the defence of necessity can encompass.

On the other hand, Father Bernard Treacy, a staunch anti-abortion campaigner noted:

However, the judge did state that the words "for the purpose only of preserving the life of the mother" represented the common law, and thus were implicit in the 1861 Act by virtue of the word "unlawfully".

If these words do represent the pre-1861 common law, it

25. Id. at 696.
26. Binchy, supra note 19, at 103.
could be argued that they thereby declare the position in Irish law. If so, an Irish court could validly adopt the view that procuring a miscarriage would not be "unlawful" in regard to Section 58 of The Offences Against the Person Act if it were procured in good faith for the purpose only of preserving the life of the mother. However, the doctrine in [sic] unclear; and clarification would be welcome.27

However, it is clear that Bourne opened the door to the liberalization of abortion laws in England. In 1967, in response to the thalidomide tragedy of the early 1960s,28 the English Parliament, with the encouragement of the Abortion Law Reform Association, passed The Abortion Act.29 The Act provided:

1(1) . . . [A] person shall not be guilty of an offence under the law relating to abortion when a pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith—

(a) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated; or

(b) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.30

The Abortion Act did not overrule sections 58 and 59 of the Offences Against the Person Act; however, it significantly narrowed the definition of what an unlawful abortion entailed.31 Furthermore, although the Abortion Act, as an act of the British Parliament, has no legally binding effect in Ireland, it has had a significant impact in that an increasing number of Irish women

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29. 1967, ch. 87.
30. Id. § 1(1)(a)-(b).
31. Effectively, abortion is now available on demand in England. Official statistics indicate that in the last three months of 1983 there were 37,628 abortions performed. OFFICE OF POPULATION CENSUSES & SURVEYS, OPCS MONITOR (August 7, 1984).
are now having safe, lawful, and relatively inexpensive abortions in English clinics.\textsuperscript{32}

\section*{II. Modern Influences}

A modern trend toward liberalization of abortion laws in western democracies\textsuperscript{33} caused conservative Irish lawyers and doctors to be concerned that the Irish abortion laws might be subject to change. Much of this concern was due to the fact that the Irish Constitution provided no explicit protection for the unborn child. Article 40.3 provides:

\begin{itemize}
  \item[(1)] The State guarantees in its laws to respect, and as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
  \item[(2)] The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.\textsuperscript{34}
\end{itemize}

However, these provisions only apply to "citizens." The constitution provides that citizenship is "determined in accordance with law."\textsuperscript{35} The law defining citizenship is contained in the Irish Nationality and Citizenship Act and provides:

\begin{itemize}
  \item[(1)] Every person born in Ireland is an Irish citizen from birth.
  \item[(2)] Every person is an Irish citizen if his father or mother was an Irish citizen at the time of that person's birth or becomes an Irish citizen under subsection (1) or would be an Irish citizen under that subsection if alive at the passing of this Act.\textsuperscript{36}
\end{itemize}

Although it is clear from this language that an unborn child is not a citizen, the Irish Supreme Court in \textit{State (Nicolaou) v. An Bord Uchtala}\textsuperscript{37} left open the possibility of affording constitutional protection for a noncitizen. Nicolaou, a British subject,

\begin{itemize}
\item[32.] In 1968 fewer than 100 Irish women had abortions in English clinics, whereas by the end of 1981, the number had risen to almost 4,000. MEDICO-SOCIAL RESEARCH BOARD, \textit{TERMINATION OF PREGNANCY, ENGLAND 1983, WOMEN FROM THE REPUBLIC OF IRELAND} 9 (1984) (citing MEDICO-SOCIAL RESEARCH BOARD, \textit{ANNUAL REPORT} 49 (1982)).
\item[34.] \textit{Irish Const. arts. 40.3.1 \& 40.3.2.}
\item[35.] \textit{Id. art. 9.1.2.}
\item[36.] \textit{Pub. Gen. Acts, no. 26, §§ 6(1) \& (2) (1956).}
\item[37.] 1966 Ir. R. 567.
\end{itemize}
sought a court order to prevent the adoption of his illegitimate son. He claimed that the Adoption Act was unconstitutional because it violated his rights as a natural father. The court stated: "This Court expressly reserves for another and more appropriate case consideration of the effect of non-citizenship upon the interpretation of the Articles in question . . . ." Even if Article 40.3 were interpreted to apply to noncitizens, it would take quite a liberal interpretation of the word "citizen" to encompass the unborn child.

The parameters of the constitutional rights of the unborn became less clear following decisions of the Irish Supreme Court that provided constitutional protection of individual personal rights that were not explicitly granted in the constitution. This trend began in 1963 with Ryan v. Attorney General. Mrs. Ryan sought to have the Health (Floridation of Water Supplies) Act struck down as unconstitutional. The supreme court affirmed the high court's decision that, based on the facts, Mrs. Ryan's suit could not succeed. However, the court confirmed that the right to bodily integrity was included as part of the general constitutionally guaranteed personal rights. Quoting Justice Kenny of the high court, the supreme court held that "the personal rights which may be invoked to invalidate legislation are not confined to those specified in Article 40 but include all

38. Id. at 645.
The phrase "of the citizen" has given rise to difficulties here and elsewhere throughout the fundamental rights Articles. At least two questions arise—first, whether the constitutional guarantees extend to aliens and secondly, whether they extend to artificial as distinct from natural persons. The Supreme Court seems to be uncertain whether the constitutional guarantees protect aliens, although in one case on the matter (In Re Singer) [97 I.L.T.R. 130 (1960)] in which the issue might have arisen, counsel for the State expressly disclaimed any reliance on it. Clearly it would be very embarrassing for the Court, especially since the State has joined the European Economic Community, to be obliged to hold that an alien was not entitled to the same degree of protection as a citizen. On the other hand, simply as a matter of the interpretation of words, it is very difficult to see how the word "citizen" can be held to mean "any person whether a citizen or an alien."
40. 1965 Ir. R. 294.
41. The Health Act authorized the adding of flouride to public water in order to protect against dental decay. Mrs. Ryan challenged the state action as an infringement of (1) her parental rights to raise her children, and (2) her individual rights to personal integrity. Id. at 341.
42. Id. at 295.
those rights that flow from the Christian and democratic nature of the State.”

The court soon recognized other personal rights, most notably the right of marital privacy recognized in the 1973 landmark decision of McGee v. Attorney General. In three years Mrs. McGee bore four children, two of them twins. Mrs. McGee had a long history of medical problems and each of her pregnancies had been difficult; she nearly lost her life while pregnant with her second child. Her doctor advised her that another pregnancy would endanger her life, so she was fitted with a diaphragm to be used with an intrauterine contraceptive jelly. She brought this action after a supply of contraceptive jelly she was attempting to import from England was seized by customs officials pursuant to the Criminal Law Amendment Act. Strangely, the Act prohibited the importation and sale of contraceptives, but not their use. By a four-to-one majority, the supreme court held that the importation restriction was a violation of the right to marital privacy provided by articles 40.3.1 and 41.1 of the Irish Constitution.

Those opposed to abortion were not so much concerned by the narrow holding of McGee as they were by the cases the court cited as support for the decision. The court relied extensively on two United States Supreme Court decisions, Griswold v. Connecticut and Eisenstadt v. Baird. In Griswold, the United States Supreme Court held that the right of married persons to use contraceptives was part of the constitutionally protected right of marital privacy. Eisenstadt extended that right to the

43. Id. at 312.
44. See State (Healy) v. Donoghue, 1976 Ir. R. 325 (the right to justice and fair procedure); Murtagh Properties v. Cleary, 1972 Ir. R. 330 (the right to work & earn a livelihood); In re Haughey, 1971 Ir. R. 217 (the right to defend one’s name).
45. 1974 Ir. R. 284.
46. Id.
47. PUB. GEN. ACTS, no. 6 (1935).
48. Id. § 17(1) provides, “It shall not be lawful for any person to sell, or expose, offer, advertise, or keep for sale or to import or attempt to import into Saorstat Eireann for sale, any contraceptive.”
49. 1974 Ir. R. at 284-85. IRISH CONST. art. 40.3.1 states, “The State guarantees in its laws to respect, and as far as practicable, by its law to defend and vindicate the personal rights of the citizen.” Article 41.1.1 states, “The state recognizes the family as the natural, primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.”
50. 381 U.S. 479 (1965).
52. 381 U.S. at 484-86.
unmarried, and was the stepping-stone from Griswold to one of the major United States abortion decisions, Roe v. Wade. In Roe, the United States Supreme Court held that the word "person", as used in the equal protection clause of the Fourteenth Amendment, did not include the unborn child. The United States Supreme Court also held that the constitutionally protected right to privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

The American cases disturbed conservative Irish lawyers and doctors because of the similarity of the equal protection clauses of the United States and Irish Constitutions. It was feared that McGee would lead to the liberalization of abortion laws in Ireland, particularly since the Irish Supreme Court looks upon the decisions of the United States Supreme Court with the greatest of respect.

It is questionable whether these concerns were justified. Justice Walsh, speaking for the court in McGee, addressed the abortion issue in somewhat veiled terms: "Any action on the

53. 405 U.S. at 453-54.
55. 410 U.S. at 157.
56. Id. at 153.
57. The Irish Association of Lawyers for the Defence of the Unborn, Newsletter 2 (1983) stated, "The great abortion debate in America grew around the word 'person' and whether or not the word 'person' extended to include the unborn child. The similarity to our own situation is disturbing."
58. Irish Const. art. 40.1 provides, "All citizens shall, as human persons, be held before the law. This shall not be held to mean that the state shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."
59. In O'Brien v. Stoult, No. 3264p (High Ct. May 5, 1982), Justice D'Arcy said that "decisions of the Supreme Court of the United States will always be received by this Court with the greatest of respect." See Binchy, The Need for a Constitutional Amendment, in Abortion & Law 116, 121, n.16 (A. Flannery ed. 1983); see also State (Quinn) v. Ryan, 1965 Ir. R. 70. Justice Walsh stated:

I reject the submission that because upon the foundation of the State our Courts took over an English legal system and the common law that the Courts must be deemed to have adopted and should now adopt an approach to Constitutional questions conditioned by English judicial methods and English legal training which despite their undoubted excellence were not fashioned for interpreting written constitutions or reviewing the constitutionality of legislation. In this state one would have expected that if the approach of any Court of final appeal of another State was to have been held up as an example for this Court to follow it would more appropriately have been the Supreme Court of the United States rather than the House of Lords.

Id. at 126.
part of either husband and wife or of the State to limit family sizes by endangering or destroying human life must necessarily not only be an offence against the common good but also against the guaranteed personal rights of that human life in question.60 McGee was decided eleven months after Roe, and Justice Walsh, presumably aware of this major decision,61 appeared to stress that McGee was a narrow decision that selectively recognized the right of married couples to use contraceptives and it was not to be interpreted as anything more. Six years later, Justice Walsh was even more explicit in G. v. An Bord Uchtala:62

[A child] has the right to life itself and the right to be guarded against all threats directed to its existence whether before or after birth. . . . The right to life necessarily implies the right to be born, the right to preserve and defend (and to have preserved and defended) that life . . . .63

Despite these dicta the potential effect of McGee on Irish abortion law remains open to debate.64 Professor James Casey of University College Dublin Law School stated, "Those who argue that since the matrimonial privacy of Griswold v. Connecticut

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60. 1974 Ir. R. at 312.
61. Surprisingly, one leading commentator has suggested that the Irish Supreme Court was unaware of the Roe decision. W. Binchy, Sexual Behavior and the Law in Ireland 22 n.70 (1978) (unpublished manuscript). This seems inconsistent with the publicity surrounding Roe and the deference given by the Irish Supreme Court to United States Supreme Court decisions. See supra note 59.
62. 1980 Ir. R. 32.
63. Id. at 69.
64. Proponents of the prolife amendment have rejected the persuasive value of these dicta:

Whilst these views expressed by the learned judge are encouraging they do not in themselves, of course, afford any adequate legal Constitutional protection for the unborn. The other judges in these decisions made it clear that they were not expressing any view on this issue. Obiter dicta bind no judge in any subsequent decision, not even the judge who made them originally. Mr. Justice Walsh would be the first to acknowledge that his view could not bind the Court in a future decision: as he pointed out in McGee’s case, constitutional interpretation is not rooted in the past but is a continuous process through time.


Obiter dicta in cases of this importance are not lightly uttered, they are regarded as the next best thing to a binding authority and are freely cited in court by counsel. They are treated for all practical purposes as though they were authority, even though they do not have a status in the ordinary hierarchy of binding precedent that we respect here.

led to the proabortion decision in *Roe v. Wade*, the same must follow here from *McGee v. A.G.* are guilty of an absurdly mechanical view of the judicial process."^{65} Professor James O'Reilly, another professor of law at University College Dublin Law School, was even more assertive in declaring, "One wonders if the commentators who regard the finding of a right to abortion lurking behind *McGee* have actually read that decision and noticed not only the small print but the implications of the small print."^{66} Referring to such people as "prophets of doom," he concluded, "Any commentator who seriously suggests that one can expect the Irish Supreme Court to arrive at a situation similar to *Roe v. Wade* or *Doe v. Bolton* simply has not read the Irish Constitution, the judgment in *McGee*, nor understands all the issues involved."^{67}

Professor Binchy, a key figure in the movement for a prolife amendment, saw it otherwise:

In my view, these commentators are guilty of too much vigour in ridiculing the possible developments in this country. No one seriously suggests that our Supreme Court would tomorrow recognise a constitutional right to abortion. Equally clearly, however, attitudes among the judiciary towards abortion may change in the coming years. If this happens, the introduction by *McGee* of the privacy concept into our jurisprudence may well serve to assist the constitutional case for abortion. Without such a concept, the constitutional argument in favour of abortion would be that much more difficult to establish.^{68}

Additionally, there were concerns among staunch anti-abortionists that Ireland, as a signatory and contracting party to the European Convention on Human Rights and Fundamental Freedoms, might be obligated to modify its laws in relation to abortion. This could happen if article two of the Convention, which states that "[e]veryone's right to life shall be protected by law,"^{69} were interpreted by the European Commission on Human Rights as giving women a limited right to abortion.

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67. Id. at 22.
68. Binchy, supra note 19, at 104.
Prolife supporters argued that Ireland would be required to comply with such a finding, since article 53 of the Convention provides, "The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties."

Fears that abortion might be legalized in Ireland were also increased by statistics showing an increase in the number of Irish women having abortions in England from 64 in 1968 to more than 3,600 in 1981. Such figures lent credibility to fears that Irish legislators might be more willing to adopt some form of abortion legislation, particularly in light of references to therapeutic abortion made previously in Irish parliamentary debates.

Proposals (1) to extend jurisdiction to allow criminal prosecution of Irish women who had abortions abroad, (2) to enjoin women from leaving Ireland for abortions, and (3) to criminally prosecute abortion referral agencies were dismissed as either unmanageable or undesirable. Conservative lawyers considered an amendment to the constitution as more effective in preserving the existing laws against abortion. They argued that an amendment would have the double effect of prohibiting the Oireachtas from introducing abortion legislation, while at the same time preventing the Irish Supreme Court from holding that sections 58 and 59 of the Offences Against the Person Act were unconstitutional.

III. PASSAGE OF THE AMENDMENT

In light of these developments, on April 27, 1981 "a group of organisations acting with the full support of the Professors of Obstetrics and Gynaecology in the Irish Universities" launched
the campaign for a constitutional amendment to protect the life of the unborn. Under the Irish Constitution, an amendment must be initiated as a bill in the Dail (house of representatives), passed by both Houses of the Oireachtas, and submitted by referendum to the people.\textsuperscript{77} The amendment is considered approved if it receives a majority of the votes in the referendum.\textsuperscript{78} Because of these constitutional requirements, the Pro-life Amendment Campaign (PLAC) sought the support of the leading political parties for an amendment to the constitution that would provide for an "absolute right to life."\textsuperscript{79}

The campaign was timed perfectly because a general election was called within six weeks of its inception. Opposition to the amendment by any political party might have been interpreted by the electorate as a proabortion stance—a position no party could afford in a country that is ninety-five percent Catholic.\textsuperscript{80} Three weeks after the campaign had been launched, the Fianna Fail Government and the opposition Fine Gael Party publicly stated that they were totally and unalterably opposed to abortion and promised to introduce an amendment to the constitution.\textsuperscript{81} The other major party, Labour, stated that it was "unequivocally opposed to abortion and would give serious consideration" to the idea of an amendment.\textsuperscript{82}

The Fine Gael Party achieved a narrow victory in the June

\textsuperscript{77} IRISH CONST. art. 46.2.
\textsuperscript{78} Id. art. 47.1.
\textsuperscript{79} SEN. DEB. 555 (daily ed. May 4, 1983) (citing a news release entitled \textit{Campaign for Pro-Life Amendment to the Constitution}, Apr. 27, 1981). The statement provided:

While the precise wording of the actual amendment will be a matter for others, in accordance with legal advice available to us it is proposed that it be along the following lines:

"The State recognises the absolute right to life of every unborn child from conception, and accordingly guarantees to respect and protect such rights by law."

\textsuperscript{80} W. Binchy, \textit{supra} note 61, at 1 n.2.
\textsuperscript{81} The official Fianna Fail statement read:
The Government are [sic] totally opposed to abortion, and an appropriate constitutional amendment to give effect to the position will be brought forward as soon as circumstances permit. The Government will also continue to take the necessary steps to prevent abortion referral and seek to alleviate the causes which may lead to abortion.

Pro-Life Amendment Campaign, Information Sheet No. 2 (June 1981). The Fine Gael Party statement stated, "Fine Gael is unalterably opposed to the legalisation of abortion and in Government will initiate a referendum to guarantee the right to life of the unborn child. Fine Gael recognises that a pro-life policy places an obligation upon us to support the single mother." \textit{Id.}

\textsuperscript{82} Id.
election. Once in power the new Taoiseach (prime minister), Garret FitzGerald, confirmed his party's preelection commitment to the amendment, but lacked the time to act because a second general election restored power to the Fianna Fail party in March 1982. In November of the same year, the third general election in eighteen months was called. The narrowly elected governments and the successive election campaigns enabled the organizers of PLAC to exert pressure on deputies (members of parliament) and aspiring deputies to support a constitutional amendment.

On November 2, 1982, during its final days in power, Fianna Fail introduced a bill that proposed what eventually became the wording of the amendment. It provided, "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."

Within days, the Fine Gael Party issued a statement supporting the wording of the amendment, and FitzGerald stated that the wording was "about as good a formula as you could get." He later regretted this statement.

The third general election also failed to produce a clear winner. This caused Fine Gael and Labour to form a coalition government that continues in power today. By this time, liberal members of Fine Gael and Labour were beginning to be concerned about the wording of the abortion referendum. It was

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83. The Prime Minister stated: "The Government is unalterably opposed to the legalisation of abortion and is committed to taking whatever steps are necessary to ensure that an appropriate amendment is brought forward. The Attorney General is now examining the form such an amendment might take." Letter from Garret FitzGerald to Dr. Julia Vaughan (Aug. 5, 1981), reprinted in SEN. DEB. 557 (daily ed. May 4, 1983) (Dr. Julia Vaughan was chairman of PLAC).
85. Under the Irish system of government, a general election is called if the National Parliament, by a simple majority, gives a vote of "no confidence" in the government.
86. Eighth Amendment to the Constitution Bill (1982).
87. Eighth Amendment of the Constitution Act, 1983, pt. II.
88. 339 DAIL DEB. 1374 (1983) (quoting a statement issued by Fine Gael Party on Wednesday, Nov. 3, 1982). The statement declared, "The Fine Gael Party welcomes the form of the Amendment to the Constitution proposed by the Government. The Amendment as proposed is worded in positive terms, designed to strengthen the Constitutional protection of life, as proposed by the leader of Fine Gael . . . ."
feared that the amendment might provide for an absolute, unequivocal right to life. There was also discomfort at the growing criticisms from protestant churches about the matter and apprehension that the amendment would not fit into the Prime Minister’s plans for a pluralist, secular state.\(^{91}\) As a result, the coalition government refused to support the amendment as it was worded, arguing that it was sectarian and ambiguous.\(^{92}\) This spawned a national controversy described by one commentator as “our moral civil war.”\(^{93}\)

A major division soon emerged. The prolife groups consisted of conservative members of the legal and medical profession. Such groups were strongly supported by the Fianna Fail Party and the Catholic Church.\(^{94}\) The anti-amendment groups were a loose coalition of prochoice groups—feminists, trade unions, and liberal politicians—and somewhat more conservative groups made up of politicians, concerned members of the legal and medical professions, and most of the protestant churches and la-

94. The Catholic Church enthusiastically encouraged its members to vote for the amendment. In a letter read to all Catholic congregations in the Dublin diocese on Sunday, Apr. 10, 1983, Archbishop Ryan stated:

Attempts have been made to raise issues which have little or nothing to do with the central point. Sectarianism has been mentioned, as if it were a question of deciding between the views of various churches. It is not. The question is whether the people of Ireland want, or do not want, to give to the unborn child a greater legal protection than it has at present. This is not in any sense a “Church” matter. It is rather a matter of the basic human right to life. It can hardly be called “sectarian” to say that this right to life belongs to all, not just to some.

Letter from Archbishop Ryan to all Catholic congregations in the Dublin diocese (Apr. 4, 1983).

A statement from the Irish Episcopal conference concluded: “A decisive ‘Yes’ to the Amendment will, we believe, in the words of Pope John Paul II in Limerick, constitute a ‘witness before Europe and before the whole world to the dignity and sacredness of all human life, from conception until death.’”* The Amendment—A Statement from the Irish Episcopal Conference, (Veritas Publications Aug. 22, 1983).

Finally, a statement by the Archbishop of Dublin, Dr. Ryan, read at all Catholic churches three days before the national referendum concluded:

Over the last few weeks many people have been asking me for guidance. My advice to them, and to all of you, is that a “Yes” vote on Wednesday will protect the right to life of the unborn child; it will not create a threat to expectant mothers; it will block any attempt to legalise abortion in this country.

Letter from Archbishop Ryan to all Catholic congregations in the Dublin diocese (Sept. 1, 1983).
ity, who, although opposed to the introduction of abortion legis-

Allegations of sectarianism resulted from the similarities in
the proposed amendment to the Catholic doctrine of "double ef-
fect." This doctrine, which permits an operation to remove a wo-
man's cancerous womb with the resultant inevitable death of the
fetus, is based on the rationale that the primary intention—the
removal of a diseased organ—justifies the secondary effect—the
death of the fetus.96 Right wing prolife supporters argued that
such actions are not abortions but are merely unfortunate conse-
quenuses that result from such operations. Dr. Julia Vaughan,
Chairman of the Pro-Life Amendment Campaign explained:

Doctors who participate in these procedures are not performing
abortions. It cannot be too strongly emphasized that they are
not abortions in either medical or legal terms. In each case, the
removal of a pathological organ is carried out to save women's
life, not in order to kill the fetus. The pregnancy is not directly
attacked, even though its loss may be the inevitable conse-
quenuse of treatment which has as its objective the "good" of
saving the life of the mother.97

Prolife supporters argued that the rights of the unborn were ab-
solute and unequivocal, and that no exceptions existed to a gen-
eral prohibition on abortion.98 Protestants and prochoice sup-
porters considered this a flagrant attempt by right wing prolife
supporters who, while claiming to be nonsectarian, were at-
tempting to have the permissible parameters of Irish abortion
law defined in a very Roman Catholic way.99

In contrast, Fine Gael's opposition was directed toward the
wording of the amendment. The Director of Public Prosecutions
and the Attorney General issued statements that mirrored these
concerns. The Director of Public Prosecution stated that while
he would have no difficulty prosecuting an unlawful abortion
under the 1861 Offences Against the Person Act, he would expe-

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95. For a sizeable but not exhaustive list of statements, see Protestant Churches' Statements, in "THE ABORTION REFERENDUM"—THE CASE AGAINST 61-65 (M. Arnold & P. Kirby eds. 1983).
96. Uniting the Catholic Right, supra note 91.
97. J. Vaughan, Pro-Life Amendment Campaign—A Response to Prof. O'Mahony (May 19, 1982).
99. Id.
rience "grave difficulty" in maintaining prosecutions in many cases if the amendment passed. The Attorney General attacked the wording of the amendment.

[The] wording is ambiguous and unsatisfactory. It will lead inevitably to confusion and uncertainty, not merely amongst the medical profession, to whom it has of course particular relevance, but also amongst lawyers and more specifically the judges who will have to interpret it. Far from providing the protection and certainty which is sought by many of those who have advocated its adoption, it will have a contrary effect.

In particular it is not clear as to what life is being protected; as to whether "the unborn" is protected from the moment of fertilisation or alternatively is left unprotected until an independently viable human being exists at 25 to 28 weeks.

Further, having regard to the equal rights of the unborn and the mother, a doctor faced with the dilemma of saving the life of the mother, knowing that to do so will terminate the life of "the unborn," will be compelled by the wording to conclude that he can do nothing. Whatever his intentions, he will have to show equal regard for both lives, and his predominant intent will not be a factor.

In those circumstances I cannot approve of the wording proposed.

Fianna Fail, the party that proposed the wording of the amendment, and the members of PLAC maintained that the wording was adequate to protect the rights of the unborn. They argued that there was no justification for the "needless anxiety" that had been generated concerning the consequences of the amendment's adoption. The Irish Association of Lawyers for the Defence of the Unborn stated bluntly, "We unequivocally maintain that there is nothing in the original wording which would oblige an Irish Court to make such a grotesque decision as that suggested by Mr. Sutherland [Attorney General]."

On April 27, 1983, in response to these concerns, Fine Gael introduced a more simply worded version of the amendment which stated, "Nothing in this Constitution shall be invoked to invalidate, or to deprive of force or effect any provision of a law

102. SEN. DER. 1265 (daily ed. May 26, 1983).
103. Id. (quoting statement of The Irish Association of Lawyers for the Defence of the Unborn).
on the ground that it prohibits abortion.” Fine Gael argued that this wording avoided the multiple interpretations of the Fianna Fail amendment and made it easier for the public to understand. At the same time, the proposal fulfilled Fine Gael’s commitment to introduce an amendment to the constitution that would prohibit the introduction of abortion in Ireland. However, the wording proposed by Fine Gael proved unacceptable because it did not preclude future legislative repeal of the 1861 Act and provision for some form of legalized abortion. As a result, the Fine Gael proposal was soundly defeated.

Several other proposals to clarify the wording of the original amendment were also presented in the Dail. These included: (1) a proposal to delete the word “unborn” and substitute “unborn human being,” (2) a proposal to delete “with due regard to the equal right to life of the mother” and substitute “subject to the right of the mother to life and bodily integrity,” and (3) a proposal to insert after “practicable” the words “without interference with any existing right or lawful opportunity of any citizen.” Each proposal was soundly defeated.

Similar proposals were made in the Senate (1) to modify the wording of the amendment by inserting “which shall not include the fertilised ovum prior to the time at which such fertilised ovum becomes implanted in the wall of the uterus” after the word “unborn” and (2) to delete the word “equal” and substitute the word “prior.” Each of these proposals was also defeated.

The amendment, as originally worded by Fianna Fail, passed overwhelmingly in the Dail, with Fine Gael abstaining from the vote and Labour voting against it. Thereafter, Garret FitzGerald, the Taoiseach, issued a statement expressing his regret that he had supported the idea of an amendment. FitzGerald asked the people to vote against the amendment because it

105. SEN. DEB 935 (daily ed. May 18, 1983).
107. Id. at 2229.
108. Id. at 2230.
109. Id. at 2231.
110. Id. at 2233-38.
111. SEN. DEB 1092 (daily ed. May 25, 1983). The proposal was defeated by a vote of 18 to 10. Id. at 1149-50.
112. Id. at 1154. The proposal was defeated by a vote of 15 to 8, SEN. DEB. 1281-82 (daily ed. May 26, 1983).
was "ambiguous and unclear" and could lead to the death of women "whose lives are now saved in all hospitals in accordance with universal medical practice." Despite FitzGerald's plea, on September 7, 1983, in one of the smallest voter turnouts in Irish history, the electorate voted by a two-to-one majority to include the amendment in the Irish Constitution.

IV. IMPLICATIONS OF THE AMENDMENT

The eighth amendment to the Irish Constitution grew out of the desire of prolife groups and concerned citizens to further protect the rights of the unborn. The challenge faced by the drafters was to produce an amendment that would legally protect the rights of the unborn, while at the same time not create an absolute right that would supersede the already guaranteed personal rights of the citizen.

Despite the powerful endorsement the amendment received at the polls, it poses several problems. The most serious challenge is likely to be directed at the language of the amendment itself. The amendment guarantees the "right to life of the unborn" but fails to indicate at what point that "unborn" life begins. Admittedly, this is not an easy question, but it is a fundamental question that must be answered. The United States Supreme Court in *Roe v. Wade* noted that due to the "wide divergence of thinking" among philosophers, theologians, and physicians, it could not resolve the "difficult question of when life begins." Yet, the United States Supreme Court's failure to resolve the question combined with their refusal to protect the fetus until the time of viability (24-28 weeks) practically resulted in recognition that life does not exist prior to that time.

115. Kirby, *A Pyrrhic Victory—Disarray Over Abortion*, Commonweal, Oct. 7, 1983, at 519, col. 1. As a result of this statement, the anti-amendment groups adopted the slogan, "This amendment could kill women."
116. Id. at 518. The turnout at the polls was only 54%, extremely low compared to the 70% plus that usually turn out to vote in Ireland. This may be a reflection of the difficulty people had in deciding which way to vote. Significant, too, is that in Dublin the vote was split almost evenly, with 48% for the amendment and 51% against, indicating that the rural vote was mainly responsible for the passage of the amendment by the 2-1 margin.
118. 410 U.S. 113 (1973).
119. Id. at 159-60.
This avoidance of the question of when life begins has been sharply criticized by one Irish commentator:

This failure of either English or American law to resolve the basic question of the humanity of the unborn child must be criticised, whatever the true motives of the courts or legislature may be. If, on the one hand, there is a genuine reluctance to determine the issue, this may be criticised on the basis that the question is so fundamental that it requires to be resolved before any other subsidiary issues are determined. Moreover, a Court which is too timid to resolve such a basic moral issue could scarcely feel itself competent to determine other equally important moral questions in the legal forum.

If, on the other hand, the apparent failure to determine the issue amounts in reality to a decision that the unborn child is not a human being, then the courts and legislature should have the courage to say so clearly and be judged accordingly. From the standpoint of the child, the failure to resolve the issue of his humanity amounts in result to a finding that he is not a human being. 120

This criticism is particularly applicable to the Irish legislature because it holds the exclusive constitutional power to make laws for the state. 121 This makes legislators responsible for vigorously debating the issues, considering all possible ramifications, and coming up with the clearest language possible before presenting to the people a proposed amendment of the constitution. This does not require legislators to determine the exact moment when human life begins for all purposes. However, it does require the election of a specific cognizable time at which the law is prepared to protect the unborn's right to life.

The amendment's failure to define when the unborn is constitutionally protected means the judiciary will eventually have to formulate the definition; the very result the prolife campaigners sought to avoid. 122 This has caused uncertainty about the effect of the amendment. The Attorney General has stated:

In the event that the Supreme Court is called upon to construe the proposal, it could come to a number of different conclusions as to the definition of the class which is afforded pro-

120. Binchy, supra note 19, at 99 (emphasis in original).
121. IRISH CONST. art. 15.2.1 provides that “[t]he sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State.”
122. See supra note 75 and accompanying text.
tection. Undoubtedly a view which might commend itself to the court is that all human beings fall within the ambit of the amendment, and that a human being comes into existence when the process of fertilisation is complete.

If, as would appear to be the case, it is correct to state that certain contraceptives can operate after fertilisation, then these would be abortifacient if human life commences on conception. Thus the importation, dissemination and use of such contraceptives would be prohibited, and as an example, the use of the “morning-after” pill in the treatment of rape victims will not be permissable, nor will the use of such contraceptives in certain conditions of the health of a woman—e.g. valvular heart disease or diabetes.

However, the point of time for which the most compelling legal argument could be made, other than the time of fertilisation, as being the moment of commencement of protection, could be said to be the time when the foetus becomes independently viable. I understand that this is probably at some time between 25 and 28 weeks of pregnancy.

Such a construction could be supported by an argument that “unborn” could be regarded as being applicable only to something capable of being born. The word “unborn” used as a noun must, as a matter of language, mean “unborn person”, “unborn child” or “unborn human being”. It could be argued that neither a fertilised ovum, a fertilised and implanted ovum, an embryo or even a foetus prior to the time when it is independently viable, would come within this definition.

The consequences of such a finding could be that there would be no constitutional prohibition on abortion prior to this stage of pregnancy.123

It is possible that a future Irish Supreme Court may choose to interpret the amendment in a liberal manner, particularly if Irish public opinion moves toward acceptance of some form of abortion. This could place Ireland in a situation similar to that of the United States where the generally proabortion courts have thus far succeeded in liberalizing abortion legislation despite the contrary views of generally prolife legislatures. In reality, this is not likely to occur because of past developments in

123. SEN DBB 524-26 (daily ed May 4, 1983) (statement of Attorney General, Mr Peter D. Sutherland, S.C., quoted from The Irish Times, Feb. 16, 1983)
Irish family law and the happenings accompanying the movement to amend the constitution.

The justices cannot avoid being influenced by the strong public stance against the introduction of abortion legislation in Ireland. Even prior to passage of the amendment, the Irish Supreme Court intimated that the right to life of the unborn would be protected. Although dicta, these statements have not been challenged and cannot go unnoticed. Admittedly, the Irish Supreme Court looks upon decisions of the United States Supreme Court with great respect, and has even made extensive use of American decisions in formulating the concept of marital privacy in McGee. However, it does not necessarily follow that the Irish Supreme Court will track the judicial trend developed in the United States in relation to abortion. Past experience indicates the opposite may be true. In the decade since Roe, the United States has become more liberal, while Ireland has become more conservative.

At most, the impact of McGee is limited to the 1979 passage of the Health (Family Planning) Act, which permits limited access to contraceptives. In drafting the Health Act, the Irish legislature clearly stated the Act was not to be used as a stepping-stone to some form of abortion legislation. Section 10 provides: “Nothing in this Act shall be construed as authorizing . . . the procuring of abortion . . . .” The act is so restrictive toward abortion that it provides that the Censorship Board may ban a book that “advocates or might reasonably be supposed to advocate the procurement of abortion or miscarriage or any

124. See supra notes 60 & 63 and accompanying text.
125 See supra note 64.
126 See supra note 59.
127 See supra notes 50-53 and accompanying text.
128 See City of Akron v. Akron Center for Reproductive Health, 103 S. Ct. 2481 (1983) (an abortion performed after the first trimester need not be performed in a hospital, state may not impose a blanket provision requiring parental consent for an abortion for an unmarried minor; state cannot require instructions by attending physician as to fetal development and alternatives to abortion); Colautti v. Franklin, 439 U.S. 379 (1978) (struck down a statute that required postviability abortions to be by such method as to give the fetus the best opportunity of surviving); Planned Parenthood v Danforth, 428 U.S. 52 (1976) (a woman’s decision to have an abortion cannot be made subject to parental or spousal consent).
129. PUB GEN ACTS, no. 20 (1979).
130. Id § 10(a).
method, treatment or appliance to be used for the purpose of such procurement."\textsuperscript{131}

Other operative acts also suggest that the unborn child is a \textit{persona judicata}. Section 58 of the Civil Liability Act\textsuperscript{132} provides for recovery, by a child, of damages for injuries caused before birth: "For the avoidance of doubt it is hereby declared that the law relating to wrongs shall apply to an unborn child for his protection in like manner as if the child were born, provided the child is subsequently born alive."\textsuperscript{133} Similarly, the Succession Act\textsuperscript{134} gives inheritance rights to a child \textit{en ventre sa mere} who is not illegitimate, provided the child is subsequently born alive.\textsuperscript{135}

More significantly, the parliamentary debates during the campaign to amend the constitution were devoid of any suggestion that abortion in any form ought to be legalized. Each of the major parliamentary parties also publicly stated that they opposed abortion.\textsuperscript{136} Similarly, nearly all of the churches that released statements indicated their opposition to the introduction of abortion legislation, and their support of the right to life of the unborn.\textsuperscript{137} Moreover, the Irish people approved the amendment by a two-to-one margin.\textsuperscript{138} Indeed, just four months before the amendment inevitably passed,\textsuperscript{139} the Irish Supreme Court, in \textit{Norris v. Attorney General},\textsuperscript{140} a case concerning the constitutionality of legislation against homosexuality, commented on the abortion issue. Speaking for the court, Chief Justice O'Higgins stated:

A right to privacy or, as it has been put, a right "to be let alone," can never be absolute. There are many acts done in pri-

\textsuperscript{131} \textit{PUB GEN ACTS, no. 41, § 58 (1961)}.
\textsuperscript{132} \textit{Id.}
\textsuperscript{133} \textit{Id.}
\textsuperscript{134} \textit{PUB GEN ACTS, no. 27 (1965)}.
\textsuperscript{135} \textit{Id} § 3(2).
\textsuperscript{136} \textit{See supra} notes 81-82 and accompanying text.
\textsuperscript{137} \textit{See supra} notes 94-95.
\textsuperscript{138} \textit{See supra} note 116 and accompanying text.
\textsuperscript{139} The Women's Right to Choose Campaign, in a recent discussion of their amendment campaign, admitted, "The function of our organization was to present a right to choose argument against the amendment's provisions. We were in existence as a point of principle—we had no illusions about the likely effectiveness of our propaganda." \textit{Fighting for Control—The Ongoing Struggle for Reproductive Rights} 7, 16, in \textit{THE IRISH FEMINIST REVIEW} (Womens Community Press 1984).
vate which the State is entitled to condemn, whether such be done by an individual on his own or with another. The law has always condemned abortion, incest, suicide attempts, suicide pacts, euthanasia or mercy killing. These are prohibited simply because they are morally wrong and regardless of the fact, which may exist in some instances, that no harm or injury to others is involved.\textsuperscript{141}

Justice McCarthy was even more effusive. In a dissenting opinion, he stated:

\begin{quote}
I cannot delimit the area in which the State may constitutionally intervene so as to restrict the right to privacy, nor can I overlook the present public debate concerning the criminal law, arising from the statute of 1861, as to abortion—the killing of an unborn child. It is not an issue that arises in the instant case, but it may be claimed that the right of privacy of a pregnant woman would extend to a right in her to terminate a pregnancy, an act which would involve depriving the unborn child of the most fundamental right of all—the right to life itself.\textsuperscript{142}
\end{quote}

He then suggested that the right to life of the unborn was protected by the preamble to the constitution that acknowledges Jesus Christ and the principles of Christianity.\textsuperscript{143} He concluded:

\begin{quote}
For myself, I am content to say that the provisions of the Preamble which I have quoted earlier in this judgment would appear to lean heavily against any view other than that the right to life of the unborn is a sacred trust to which all organs of government must lend their support.\textsuperscript{144}
\end{quote}

Against this background, it is unlikely that any member of the

\begin{footnotes}
141. \textit{Id.} at 379.
142. \textit{Id.} at 387.
143. \textsc{Irish Const.} preamble. It states:
In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We the People of Eire [Ireland], Humbly acknowledging all our obligations to our divine Lord, Jesus Christ, Who sustained our fathers through centuries of trial, Gratefully remembering their heroic and unremitting struggle to regain the rightful independence of our Nation, And seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations, Do hereby adopt, enact, and give to ourselves, this Constitution.
144. W. Binchy, \textit{supra} note 140, at 387.
\end{footnotes}
Irish Supreme Court would interpret the amendment in such a manner as to defeat the right to life of the unborn.\textsuperscript{145}

The language of the amendment is deliberately general, just as is every other article of the constitution. The amendment was not intended to outline every possible eventuality, but rather to give adequate guidelines to the courts to enable them to make reasonable decisions.\textsuperscript{146} The amendment is modelled after and uses language nearly identical to that found in the constitutional provision that protects the rights of the citizen. That provision states: "The State guarantees in its laws to respect, and as far as practicable by its laws to defend and vindicate the personal rights of the citizen."

Because this wording has provided adequate protection for the rights of Irish citizens since 1937, it is not surprising that similar wording was used to protect the rights of the unborn.

Opponents of the amendment have also been critical of the phrase "with due regard to the equal right to life of the mother." The Attorney General elaborated:

The meaning of "with due regard to" is entirely unclear. These words are generally perceived to allow for, at least, termination of the life of the foetus in the cases of ectopic pregnancy or cancer of the uterus. The words "with due regard to" have been understood by many to suggest that the right to life enjoyed by the unborn was to be confined in some way. That interpretation is in my opinion incorrect. (The word "comhcheart" in the Irish text is literally "the same right.") The right to life of both the unborn and the mother is stated in the proposed text to be equal, and in these circumstances I cannot see how it could be possible knowingly to terminate the existence of the unborn even if such termination were the secondary effect of an operation for another purpose.

... If a doctor were to be faced with the choice as to saving the life of one, and thereby terminating the life of the other, then I believe that the only lawful conclusion to this dilemma would be that he could do nothing, absolutely nothing, which

\textsuperscript{145} Similarly, criticism of the amendment because it may effectively ban contraceptives that are considered abortifacient is misguided since such contraceptives are already prohibited by the Health (Family Planning) Act. See supra notes 129-30 and accompanying text.

\textsuperscript{146} Society for the Protection of Unborn Children, The Pro-Life Amendment-Questions and Answers, Fact Sheet No. 3 (1983).

\textsuperscript{147} IRISH CONST. art. 40.3.1.
infringed on either right. It is only where there is no possibility of the foetus surviving, even without the doctor's intervention, that no difficulty will arise.\textsuperscript{148}

While this argument is superficially appealing, the only alternative is to resolve the equality issue between the mother and the unborn by giving one or the other greater rights. This presents even greater difficulties. Affording greater rights to the mother would cater to the prochoice lobby, which views the rights of the mother as always superior to those of the unborn. This is not in keeping with the purpose of the amendment to further protect the right to life of the unborn. Conversely, affording greater rights to the unborn would cater to the right wing prolife lobby, which views the rights of the unborn as absolute and unequivocal, with no exceptions save those covered by the Catholic doctrine of double effect. This position is also unacceptable because there really is no such thing as an absolute right to life. The common law, based on the biblical command, "Thou shall not kill"\textsuperscript{149} admits to exceptions such as self-defense. The right to life of the unborn is subject to exceptions as well. Even some staunch prolife supporters recognize this. Father Haring, a noted Catholic theologian, has stated:

I consider probable the opinion of those who justify the removal of a foetus that surely cannot survive, when the action is taken in order to prevent grave damage to the mother. For instance, an anencephalic foetus not only cannot develop into a conscious human life but cannot survive. To remove it in order to spare great damage to the mother is truly therapeutic, while no injustice is done to the life of the foetus already doomed to death.\textsuperscript{150}

Under these circumstances, the only logical solution was to give both mother and unborn an equal statutory right to life, allowing the judiciary to decide each case on the facts. The fact that both mother and unborn have equal rights does not prevent any action from being taken in cases of conflict as suggested by the Attorney General. Such a conclusion defies common sense, suggesting that if two patients needed a life support system to


\textsuperscript{149} Exodus 20:13 (King James).

stay alive, but only one was available, the doctor could not utilize the system for either patient since it would interfere with the equal right to life of the other.

In addition, the amendment merely states that the equal rights of the mother and the unborn will be defended and vindicated by Irish laws only "as far as practicable." The Irish translation, recognized by the constitution as the prevailing language in cases of conflict,\(^\text{151}\) reads: "sa mheid gur feidir e," which literally translated means "as far as possible." This phrase also appears as part of the article of the constitution into which the amendment was incorporated.\(^\text{152}\) Under either translation, the language makes allowance for situations that may arise where it is not "practicable" or even "possible" to protect the right to life of the unborn.

The equal rights provision of the Irish Constitution, included in the same article as the prolife amendment, also recognizes this. It states: "All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function."\(^\text{153}\) In 1972, in *O'Brien v. Keogh*,\(^\text{154}\) the Irish Supreme Court suggested that "equal" may not mean a mathematical equality. Chief Justice O'Dalaigh stated that, "Article 40 does not require identical treatment of all persons without recognition of differences in relevant circumstances. It only forbids invidious discrimination."\(^\text{155}\)

Justice Walsh previously commented in *State v. An Bord Uchtala*:\(^\text{156}\)

In the opinion of the Court section 1 of Article 40 is not to be read as a guarantee or undertaking that all citizens shall be treated by the law as equal for all purposes, but rather as an acknowledgment of the human equality of all citizens and that such equality will be recognised in the laws of the State. The section itself in its provision, "this shall not be held to mean that the State shall not in its enactments have due regard to

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151. IRISH CONST. art. 25.4.6. This article provides: "In case of conflict between the texts of a law enrolled under this section in both the official languages, the text in the national language shall prevail."
152. Id. art. 40.3.1.
153. Id. art. 40.1.
154. 1972 Ir. R. 144.
155. Id. at 156.
156. 1966 Ir. R. 567.
differences of capacity, physical and moral, and of social function," is a recognition that inequality may or must result from some special abilities or from some deficiency or from some special need and it is clear that the Article does not either envisage or guarantee equal measure in all things to all citizens. To do so regardless of the factors mentioned would be inequality.157

More realistically, the weakness of the constitutional right to life for the unborn is that the unborn, by its nature, cannot assert that right. Therefore, this right must be capable of being asserted by a third party. Those opposed to the amendment feared that individuals concerned about the rights of the unborn, might be able to obtain injunctions to prevent Irish women from going abroad to have abortions. Technically this appears possible. The Irish Supreme Court stated in Cahill v. Sutton,158 that, while the general rule of standing is that “the challenger must adduce circumstances showing that the impugned provision is operating, or is poised to operate, in such a way as to deprive him personally of the benefit of a particular constitutional right,”159 third parties, in “exceptional cases, hopefully rare,” may also be heard on behalf of persons who cannot assert their own rights.160 The pertinent question is the likelihood that third parties will stalk women they suspect may go abroad to have an abortion. In all probability, it can be expected that such injunctive actions, if they are permitted by the Irish courts, would generally be brought by the father. If such a situation were to arise, the judiciary would have to resolve the matter with due regard for the rights of all parties.

Lastly, Ireland is a signatory of the European Convention on Human Rights and Fundamental Freedoms.161 Therefore, the validity of the Irish constitutional amendment may be challenged in the European courts. The European Commission, charged with ensuring compliance with the provisions of the Convention, could find Ireland in violation of one of the articles of the convention. However, this is unlikely in view of previous abortion decisions by the Commission, which demonstrate its reluctance to interfere with abortion legislation in individual

157. Id. at 639.
158. 1980 Ir. R. 269.
159. Id. at 282.
160. Id. at 277.
161. See supra note 69 and accompanying text.
member countries. Even if the amendment was determined to

162. The first abortion case before the Commission was brought in the 1960s by a Norwegian man challenging a Norwegian abortion law as violative of the rights of the unborn. He claimed the unborn was protected under the language of article two of the Convention which provided, "Everyone's right to life shall be protected by law." The Commission found the petition was inadmissible on the grounds that "only a victim of an alleged violation of the convention may bring an application" and that the Norwegian petitioner, who declared that he acted in the interest of third persons, "could not claim to be himself the victim of a violation of the Convention." Gorby, *The West German Abortion Decision before the European Commission on Human Rights*, in NEW PERSPECTIVES ON HUMAN ABORTION 264 (1981) (quoting Application No. 86760, Collection of Decisions 6, at 34).

The first abortion case actually decided by the Commission was *Bruggermann & Scheuten v. Federal Republic of Germany*, 1978 Y.B. EUR. CONV. ON HUMAN RIGHTS 638 (Eur. Comm'n on Human Rights). Two West German women claimed that (1) a decision of the West German Constitutional Court that invalidated part of a 1974 abortion law permitting abortions in the first trimester with approval of a doctor and the mother, and (2) a subsequent law that prohibited abortion at any time absent exceptional circumstances, violated Article 8(1) and other Articles of the Convention. Article 8(1) provides, "[E]verybody has the right to respect for his private or family life, his home and his correspondence." The Commission held that neither the German abortion legislation nor the Federal Constitutional Court's decision violated any Convention right.

This decision has raised questions about whether the Commission will interfere with the abortion laws of individual member States. One commentator suggested that in view of the wide divergence of abortion laws among member nations "a decision in Bruggermann & Scheuten's favor would have had the effect of declaring the law on abortion in most of the member States incompatible with the European Convention on Human Rights—a decision which would hardly inspire confidence in the Commission on Human Rights. Gorby, *supra*, at 274. He postulated that the decision "reflects the caution of an international legal body whose powers of enforcement are minimal." *Id.*

The most recent case to come before the Commission, *Paton v. United Kingdom*, 3 EUR. HUM. RTS. REP 408 (1980), seems to provide support for this theory. Paton applied to the English courts for an injunction to prevent his wife from getting an abortion. The English courts refused to grant the injunction, holding that the father had no right to stop the mother from having an abortion, even if he was her husband. *Id.* at 410. Paton appealed the decision to the Commission, which concluded:

The Commission . . . does not find that the husband's and potential father's right to respect for his private and family life can be interpreted so widely as to embrace such procedural rights as claimed by the applicant, *i.e.* a right to be consulted, or a right to make applications, about an abortion which his wife intends to have performed on her. *Id.* at 417. Before deciding that the application was inadmissible, the Commission considered whether article two, while not providing any express limitation concerning the fetus, is to be interpreted (1) as not covering the fetus at all, (2) as recognizing a right to life with certain limitations, or (3) as recognizing an absolute right to life. *Id.* at 415. The Commission readily dismissed the idea that the fetus had an absolute right to life, noting that almost all signators at the time of the signing of the Convention permitted some form of abortion legislation. *Id.* However, the Commission circumvented the more difficult questions by concluding:

The Commission considers that it is not in these circumstances called upon to decide whether Article 2 does not cover the foetus at all or whether it recognises a "right to life" of the foetus with implied limitations. It finds that the authorisation, by the United Kingdom authorities, of the abortion com-
violate the Convention, the Commission has no power to order changes in the domestic laws of Ireland; Ireland has previously ignored decisions of the Commission without any detrimental consequences.\(^{163}\)

V. CONCLUSION

The Irish prolife amendment grew out of fears that the nearly universal trend to liberalize abortion legislation might plained of is compatible with Article 2(1), first sentence because, if one assumes that this provision applies at the initial stage of the pregnancy, the abortion is covered by an implied limitation, protecting the life and health of the woman at that stage, of the "right to life" of the foetus. \(^{163}\)

163. The Commission is not a traditional court of appeal. It may find that a particular piece of legislation violates one of the articles of the Convention, but it has no power to overrule any domestic law of a member state. Telephone interview with Professor John Gorby (Nov. 8, 1984). Admittedly, article 53 does provide, "The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties." This means that, while the Convention, as a treaty, is binding on all states that have ratified it, the Commission's decisions are still not enforceable until the Convention has been adopted into the domestic law of the state. Ireland has not done this.

The Irish Constitution provides, "No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas." IRISH CONST. art. 29.6. It further states, "The sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State." Id. art. 15.2.1. In 1960, the Irish Supreme Court indicated its refusal to apply the provisions of the Convention in In re O'Laighleis, 1960 Ir. R. 93. The Court stated:

The Oireachtas has not determined that the Convention of Human Rights and Fundamental Freedoms is to be part of the domestic law of the State, and accordingly this Court cannot give effect to the Convention if it be contrary to domestic law or purports to grant rights or impose obligations additional to those of domestic law. \(^{12}\)

12. Id. at 125. The situation remains the same today. One commentator recently concluded, "Nearly thirty years after ratifying the European Convention on Human Rights, Ireland has still failed to incorporate it into domestic law. As a consequence the Irish Courts have, for the most part, refused to take cognisance of the provisions of the Convention in domestic cases." Comment, The Application of the European Convention on Human Rights before the Irish Courts, 31 INT'L & COMP. L.Q. 856, 860-61 (1982).

No action has been taken against Ireland for failing to incorporate the Convention into domestic law. It is possible that Ireland could be asked to withdraw or even be expelled from the Commission if it were determined that Irish abortion laws violated one of the articles of the Convention, and Ireland refused to modify its stance on abortion. However, this is highly unlikely in view of what appears to be a clear reluctance on the part of the Commission to interfere with abortion legislation in member countries. In the 35 year existence of the Commission only one country, Greece, has been asked to withdraw, and that was for flagrant violations of numerous articles. For a discussion of the relationship between the Convention and the domestic law of the signatories generally, and Ireland specifically, see Buergenthal, The Domestic Status of the European Convention on Human Rights, 13 BUFFALO L. REV. 354 (1964).
eventually reach Ireland. The amendment attempts to constitutionally establish the ultimate balance between the mother’s rights and the unborn’s right to life. Viewed against the long-standing Irish legislative, judicial, and public policy of protecting the life of the unborn, it appears that the real motivation for the amendment was not that the prior law did not adequately prevent abortion. Rather, the amendment stemmed from a political and social fear that a clear and dramatic rejection of abortion was necessary to prevent the country from drifting into a slow acceptance of abortion over time, as has happened in most other western nations. Once the amendment had been proposed, it was also critical that it or some equally strong anti-abortion amendment be passed, because a defeat could have been interpreted as a signal that Ireland was ready for some form of abortion legislation.164

Interestingly enough, the broad language of the amendment may permit rather than prevent the introduction of abortion legislation in Ireland. However, in spite of the potential problems, passage of the amendment by such a large margin can be expected to lend a powerful endorsement to the existing prohibition of abortion in Ireland.165

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164. This is consistent with a statement made by the Women’s Right to Choose Group (a separate organization from the Women’s Right to Choose Campaign) that concluded, “[T]he current political objective is the defeat of the amendment, the pro-abortion lobby comes later.” Address by Professor Cornelius O’Leary, Vice-Chairman of the Pro-Life Amendment Campaign (Aug. 16, 1983) (quoting Sunday Tribune, May 15, 1983).

165. The Women’s Right to Choose Campaign has even accepted this conclusion. They recently stated:

By winning the referendum PLAC [Pro-Life Amendment Campaign] have [sic] indeed made it impossible for abortion to become legal without another referendum on the issue. That does make our long-term task more difficult—but only marginally so, because there had been no prospect of achieving any liberalisation of the law in the foreseeable future anyway.

Apart from the Post-Referendum Solidarity March in July 1984 which highlighted SPUC’s [Society for the Protection of Unborn Children] pickets on Open Line [an abortion referral agency in Dublin] and a right to choose counter-picket at SPUC’s referendum anniversary vigil on September 7th this year, next to nothing was heard publicly of a pro-abortion nature in 1984. To some extent this may be due to sheer weariness, but it also suggests a certain level of dismay among right to choose supporters.

Fighting for Control—the Ongoing Struggle for Reproductive Rights, in THE IRISH FEMINIST REVIEW 7, 23-24 (Women’s Community Press 1984).”
In Search of the Role of the Private Producer in the Argentine Petroleum Industry

Nowhere can the vicissitudes of business life be experienced more acutely than in the private sector of the petroleum industry of the Argentine Republic. The discovery of oil in Argentina in 1907 precipitated an internal economic and political struggle to develop a national oil policy that has continued to this day.¹ On one side are the extreme economic nationalists who assert that state ownership of all minerals and state monopoly of the petroleum sector are fundamental to Argentina's industrial development and economic self-sufficiency. On the other side are the aristocratic economic liberalists who thrive on an export-based economy, support high importation levels, and encourage local foreign investment. Playing the middle of the field are the less radical economic nationalists who maintain that the state should be involved in energy production, but that private investment and enterprise, under close scrutiny, should be allowed to supplement government efforts.² Historically, changes in governmental control among these forces have resulted in dramatic petroleum policy changes, usually in the form of executive decrees, federal intervenors, or new legislation.³

For the present time, it is clear the Yacimientos Petroliferos Fiscales (YPF), the official Argentinian state petroleum enter-

¹. C SOLBERG, OIL AND NATIONALISM IN ARGENTINA—A HISTORY 9 (1979); South America: Cash Troubles Cloud Previous Projections—Argentina, WORLD OIL, Aug. 15, 1982, at 124 (major revisions in Argentina's petroleum legislation are probable) [hereinafter cited as WORLD OIL].
². See C SOLBERG, supra note 1, at 1-7, 13-14, 34-37, 82-86, 116-29, 176-79; UNITED NATIONS CENTRE FOR NATURAL RESOURCES, ENERGY, AND TRANSPORTATION, STATE PETROLEUM ENTERPRISES IN DEVELOPING COUNTRIES 12 (1980) [hereinafter cited as CNRET].
prise, is not, by itself, capable of satisfying Argentina’s drive for energy self-sufficiency. Although YPF has served as a forerunner and model for state petroleum enterprises in Latin America, labor problems, capital goods shortages, and financial struggles have plagued the company since its inception. Formed in 1922, YPF was not clothed with significant official public authority until 1958. The role of the company has constantly varied based on the prevailing political climate. Further, YPF has never matured to the point of being able to fulfill the country’s petroleum needs without assistance from private investors and producers. Currently, YPF is heavily in debt and is not receiving adequate prices for its production. In addition, government taxes are stripping the company of much of its revenues. Thus, based on YPF’s history and present status, Argentina will likely have a strong appetite for private petroleum investment and private hydrocarbon-seeking activities for the foreseeable future.

This comment explores the role of the private producer in the Argentine oil and gas industry. This comment does not focus on the political and economic turmoil in Argentina, but rather centers on the key legal arrangements under which a private entity can enter the country and engage in exploration and production activities. In addition, the philosophy and principles underlying the country’s petroleum legislation are examined, with special emphasis on the implications for a private petroleum producer considering entering the country to conduct business operations. By examining these two areas of consideration, a private producer can better understand how to conduct hydrocarbon-seeking and -producing activities in Argentina, and will have a framework for anticipating and protecting himself against Argentina’s volatile political and economic trends.

4. C. Solberg, supra note 1, at 173-75 (charts showing historical production records); World Oil, supra note 1.

5. C. Solberg, supra note 1, at 40-45, 66-69, 98-99, 158-59, 164-65, 172; CNRET, supra note 2, at 161; Parker, Argentina Eyes More Private Oil Work, Oil & Gas J., Dec. 6, 1982, at 121; World Oil, supra note 1.


7. C. Solberg, supra note 1, at 173-75 (production charts); World Oil, supra note 1.

8. World Oil, supra note 1; see also C. Solberg, supra note 1, at 172-73.

9. See CNRET, supra note 2, at 45; Parker, supra note 5; World Oil, supra note 1.
I. LEGAL OPPORTUNITIES AVAILABLE TO THE PRIVATE PRODUCER

Argentina’s basic petroleum law is Hydrocarbons Law 17,319 of 1967, as amended by Law 21,778 of 1978. Under the provisions of these laws, private companies can participate in exploration and development of hydrocarbons in three distinct ways:

(1) Through “work or service contracts;”
(2) Through a concession-type approach; or
(3) Through “risk contracts” with state enterprises.

This comment focuses on the viability of the second and third types of arrangements. The first type of arrangement has been employed in various forms over the years and can be highly lucrative for private companies. However, service contract transactions did not prove successful, from Argentina’s point of view, in promoting sufficient exploration and development activities. Argentina’s response to this shortcoming of service contracts has
been the enactment of its current laws. While these laws still allow for service contract transactions, they emphasize involvement, through risk contracts or concession arrangements, in a three-tier structure consisting of surface prospecting, exploration, and exploitation activities. Each of these phases furnishes the private operator with unique rights and opportunities.

A. Surface Prospecting

Any civilly competent party, including universities and other research organizations, may conduct surface prospecting for the existence of hydrocarbons without being encumbered by the rigidity and burdens of the country's general exploration systems. By obtaining consent from surface owners and a permit from the government prescribing the scope and conditions of the reconnaissance, such a party may engage in "any . . . method appropriate for petroleum exploration." The prospecting can occur both onshore and offshore but it cannot infringe upon areas where exploration and exploitation permits have been awarded, most areas reserved for state enterprises, or areas that have been expressly banned from such activity by the National Executive Power. Although this last restriction gives the state great discretion, the state does have important incentives for agreeing to such studies. First, the exercise of these rights does not generate any legal claim in the prospector to conduct more extensive exploration. Second, the prospector must deliver "the primary data" of his surface inspection to the state. Although the state cannot reveal the data for two years without the gatherer's permission, this restriction on divulgence is greatly weakened by an exception that provides for the release of the data in the event that a permit or concession is awarded in the area studied.

Consequently, if the state (which has the right to process
the information, by itself or through the use of third persons, and to use the information for its own purposes) concludes that the property has hydrocarbon potential, it can put out a tender for bids on the property and then release the prospecting information to the party whose bid is selected. Also, the law does not indicate whether the prospecting information is available to state petroleum companies during this two-year period of confidentiality. The result is that the state gains a lot and gives up very little. On the other hand, the prospective producer could gain some very valuable information, but it is of no significant exploratory value to him unless he is prepared to compete for additional rights through a public bid.

B. Exploration

Under Laws 17,319 and 21,778, the most aggressive and potentially profitable petroleum activities are classified into two types: exploration and exploitation. Any given project may involve one or both of these types of activities, but it is not likely to intentionally include only an exploration phase. After all, the exploration phase is simply used to discover commercial deposits of hydrocarbons that justify commencing the exploitation stage. Under Law 17,319, and probably under Law 21,778, exploration rights are awarded only for “possible” zones. These are zones in which the presence of hydrocarbons in commercial quantities has yet to be proven. Properties containing proven reserves of commercially exploitable hydrocarbons are classified as “proven,” and only exploitation rights are awarded in such areas. Consequently, a program on “possible” lands involves

23. Id. at A-14 (art. 45). Awards of permits and concessions under Law 17,319 are based on the bid which is “most conducive to the interest of the Nation.” Id. at A-15 (art. 48).
24. The National Executive Power can enlarge the areas reserved to the state companies. Id. at A-4 (art. 11).
26. Law 17,319, supra note 11, at A-8 (art. 24). Law 21,778 operations are governed by Law 17,319 in any matter that was not modified or specifically provided for under Law 21,778. Law 21,778, supra note 25, at 11 (art. 26). For a definition of “possible zones,” see Law 17,319, supra note 11, at A-4 (art. 10).
27. Law 17,319, supra note 11, at A-4 (art. 10).
28. See id. (arts. 24, 29); Contract for the “Comodoro Rivadavia Coastal Belt” Area, supra note 13, at 2 (art. 1).
more risk and entails both an exploration phase and, if hydrocarbons are discovered in commercial quantities, an exploitation phase. A plan to develop a proven area presents less risk and only involves an exploitation phase.29

The purpose of the exploration phase is to both require and authorize the private operator to search for commercial deposits within the bid area. This is a weeding out period for the state because at the end of the exploration period, any property that has not been explored or proven worthy of exploitation is relinquished to the state.30 Activities during this period are conducted pursuant to work and investment commitments made in the bid.31

Under Law 17,319 an exploration permit confers exclusive rights to search for hydrocarbons within the permit area during the period specified.32 An exploration permit also authorizes the holder to undertake all works “conducive to the discovery of hydrocarbons,” including surface prospection, exploratory drilling, and construction of transportation, communication, and other necessary facilities.33 Inherent in each exploration permit is an exclusive concession of the exploitation of any and all hydrocarbon deposits found within the permit area.34 Within indicated time periods and under threat of specified penalties, a permit holder that discovers hydrocarbons must announce (1) the discovery of the hydrocarbons, (2) if the discovered deposit is commercially exploitable, and (3) his intentions concerning ob-

29. See, e.g., Law 17,319, supra note 11, at A-9 (art. 29, concessions on proven lands); Contract for the “Comodoro Rivadavia Coastal Belt” Area, supra note 13, at 2 (art. 1) (purpose of the contract is development and exploitation with no exploration phase included).

30. Law 17,319, supra note 11, at A-8, A-9 (art. 26); Regulations, supra note 13, at 14-15 (cls. 10.1, 10.4). As an additional incentive to encourage prompt exploration, the exploration period is divided into smaller periods of time and, at the end of each small period, a minimum of 50% of all lands not converted to exploitation parcels or previously relinquished are returned to the state. Law 17,319, supra note 11, at A-8, A-9 (art. 6); Regulations, supra note 13, at 2, 14 (cls. 2.9, 10.1).

31. Law 21,778, supra note 25, at 3-5 (art. 9); Law 17,319, supra note 11, at A-6, A-7, A-15 (arts. 20, 47, 48).

32. Law 17,319, supra note 11, at A-5 (art. 16). The basic unit of an exploration permit is 100 square kilometers and a single permit cannot exceed an aggregate of 100 units for an onshore permit or 150 units for an offshore permit. Id. at A-8 (arts. 24, 25).


34. Law 17,319, supra note 11, at A-6 (art. 17); Memorandum of June 23, 1967, supra note 3, at B-13.
taining a concession and exploitation.\textsuperscript{35} Thus, the conclusion that commercially exploitable hydrocarbons have been discovered moves the Law 17,319 operator into the exploitation phase for that particular deposit. The awarding of an exploitation concession, however, does not terminate the permit holder’s exploration rights for remaining lands not converted to a concession. As these residual lands are explored, they can enter the concession phase or be relinquished to the state. At the end of the exploration phase, all lands within the permit area that have not been converted into an exploitation concession must be given up.\textsuperscript{36}

The exploration procedure under Law 21,778 closely resembles that of Law 17,319. The regulations to Law 21,778 provide that contracted works shall be carried out in two stages, one for exploration and the other for development and production.\textsuperscript{37} The 1980 Unionoil International Exploration Company, Ltd./Inalruco S.A. Petrolera Risk Contract explains that during the exploration phase, the “Contractor must determine and notify . . . Y.P.F. whether . . . the . . . field . . . is considered commercially exploitable.”\textsuperscript{38} The regulations also define (for investment and work commitment purposes) an exploration well as one drilled where no productive well has been previously drilled, or where a stratigraphic trap is sought, or, in some cases, where the purpose of drilling a well or wells is to delineate a field. In addition to drilling wells, a Law 21,778 contractor is obligated to carry out a program of “exploration works” that will generate locations for drilling exploratory wells.\textsuperscript{39} A Law 21,778 contractor who makes a discovery must present YPF with a plan for determining if the “deposit is commercial or not or if it can become one when exploited along with other discoveries.”\textsuperscript{40} This moves the contractor into the exploitation phase for that deposit.

Unlike Law 17,319, Law 21,778 does not set out stringent penalties for failure to announce a discovery or for concealment.

\begin{itemize}
\item \textsuperscript{35} Law 17,319, supra note 11, at A-7, A-8 (arts. 21-22); Memorandum of June 23, 1967, supra note 3, at B-14.
\item \textsuperscript{36} Law 17,319, supra note 11, at A-7 to A-9 (arts. 22-23, 26); Memorandum of June 23, 1967, supra note 3, at B-14.
\item \textsuperscript{37} Regulations, supra note 13, at 4 (cl. 3).
\item \textsuperscript{38} Contract for the “Llancanelo” Area, supra note 13.
\item \textsuperscript{39} Regulations, supra note 13, at 3-4 (cls. 2.13, 11.4).
\item \textsuperscript{40} Id. at 5-6 (cl. 3.2.1); see also Contract for the “Malargue Sur” Area, supra note 13, at 6-7 (art. 3.2.1) (maximum term for such a program is twenty-four months).
\end{itemize}
of a commercially exploitable field. It is possible that the provisions of Law 17,319 which provide for penalties also apply to Law 21,778. However, another explanation for the lack of specified penalties in Law 21,778 may be the fact that a Law 21,778 producer must sell all of his production, and provide extensive information, to state oil companies. Consequently, the state is more likely to know about a Law 21,778 discovery.\textsuperscript{41} In contrast, a Law 17,319 operator has free marketing opportunities and thus more opportunities and incentives to conceal his discoveries.\textsuperscript{42} The Law 21,778 exploration period terminates, like the Law 17,319 exploration period, with the relinquishment of lands not committed to exploitation lots and the cessation of the right to drill additional exploration wells.\textsuperscript{43}

C. Exploitation

The exploitation phase is designed to allow the private operator to reap the benefits of his exploration discoveries. Pursuant to work plans submitted to the state, the operator tries to realize the full potential of the deposits discovered, hopefully within the time period allotted. A Law 17,319 exploitation concession confers an exclusive right to exploit any hydrocarbon fields existing within the area specified by the concession during the established time period.\textsuperscript{44} Law 17,319 obligates the concessionaire to seek for and produce the maximum production that is consistent with economic and conservation concepts. Also, the operator must strive to develop the entire concession acreage.\textsuperscript{45} To assist the Law 17,319 producer in doing this, the statute gives the concessionaire the right to obtain a nonexclusive transportation concession, and various other ancillary privileges such as the right to build treating and refining plants, communication systems, and buildings.\textsuperscript{46}

Under Law 21,778, the basic unit for production and devel-

\textsuperscript{41} Law 21,778, \textit{supra} note 25, at 1, 5 (art. 4, 9(h)); Regulations, \textit{supra} note 13, at 20-22 (cls. 1.0, 15.0); see also Contract for the “Malargue Sur” Area, \textit{supra} note 13, at 15-16, 51-54 (art. 9, Annex IV).

\textsuperscript{42} Law 17,319, \textit{supra} note 11, at A-2, A-3 (art. 6); Memorandum of June 23, 1967, \textit{supra} note 3, at B-5, B-10, B-11.

\textsuperscript{43} Law 21,778, \textit{supra} note 25, at 4 (art. 9(d)); Regulations, \textit{supra} note 13, at 14-15 (cls. 10.1, 10.2, 10.4).

\textsuperscript{44} Law 17,319, \textit{supra} note 11, at A-9, A-11 (arts. 27, 33-34).

\textsuperscript{45} \textit{Id.} at A-10 (art. 31).

\textsuperscript{46} \textit{Id.} at A-9, A-10 (arts. 28, 30); Memorandum of June 23, 1967, \textit{supra} note 3, at B-15.
opment is the "exploitation lot." These lots are defined as "the fraction within the area [originally] being bid on in which the commercially exploitable hydrocarbons are localized." The Law 21,778 contractor agrees to promptly delineate the boundaries of the field and to employ the most "reasonable and efficient techniques" in an effort to "obtain [the] maximum production of hydrocarbons compatible with the appropriate exploitation of same."

1. Direct exploitation activities

Under both Law 17,319 and Law 21,778, there are two paths that lead to exploitation projects. The first is by way of an agreement to enter directly into exploitation activities without a preliminary exploration period. In this situation, a private party is concerned with (1) the land available to him, (2) the time limitations on his rights, (3) the work and investment commitments he is obligated to undertake, and (4) the fiscal regime he is subject to during the life of his concession.

The state determines both the locations and the size of the properties that are available under Law 17,319 and Law 21,778. Although only Law 17,319 specifies maximum acreages for an exploitation concession, it does not appear that the size of an exploitation parcel is a negotiable matter, especially when the original agreement is to perform exploitation operations only. A private entity interested in a particular area may submit a proposal concerning that area. If the state decides that such a recommendation should, in the best interests of the nation, be followed, then a tender for bids will be put out on that area. The author of the proposal will be given preference only if his bid offer is equal to the best of all the offers made.

In addition to land constraints, the rights of private petroleum producers are of limited duration under the Argentine

47. Regulations, supra note 13, at 2, 5 (cls. 2.8, 3.2).
48. Id. at 19 (cl. 13.10) (six month period allotted).
49. Law 21,778, supra note 25, at 2 (art. 6(a)). Law 21,778 does not mention ancillary privileges so Law 17,319 rights should apply. Law 21,778, supra note 25, at 11 (art. 26) (matters not modified or expressly provided for in Law 21,778 are covered by Law 17,319).
51. Law 21,778, supra note 25, at 3-5 (art. 9); Law 17,319, supra note 11, at A-3 (art. 9).
52. Law 17,319, supra note 11, at A-14, A-15 (art. 46).
laws. When these lands revert to the state, operating equipment, fixed installations, and, in some cases, mobile accouterments are also transferred free of encumbrance to the state. A private operator must assure himself that, within the time frame allotted, the economics will be favorable to him based on how many wells will be drilled, expected production rates and productive lives of wells, and projected percentages of wells that will be dry.

The operator will also be required to make work and investment commitments for achieving his exploitation goals. Law 17,319 provides that a concessionaire shall be "bound to make such investments as may be necessary, within reasonable periods of time, for the execution of the works required for the development of the entire acreage comprised in the area of his concession . . . ." Law 21,778 requires a contractor to submit his timetable and investment plans to YPF. Except where force majeure, acts of God, or certain technical difficulties intervene, failure to meet Law 17,319 or Law 21,778 commitments can result in penalization of the private entity including damages or cancellation of the agreement.

Law 17,319 and Law 21,778 each have their own fiscal regime (i.e., taxes, rents, royalties) governing operations conducted under their provisions. The Law 17,319 fiscal regime tries to aid a private entity in preparing for a permit or concession and in realizing those plans. Law 17,319 does this by identifying in advance, by type and amount, all of the financial obligations that a permit holder or concessionaire is liable for during the term of the agreement. These obligations include payment of:

1. All provincial and municipal taxes extant on the date of the award. Governing bodies cannot levy new taxes or increase preexisting taxes except when the changed rates represent a defrayment of costs of services rendered or

54. Law 21,778, supra note 25, at 4 (art. 9(e)); Law 17,319, supra note 11, at A-11, A-12, A-29 (arts. 37, 85); Regulations, supra note 13, at 17 (cl. 12); Memorandum of June 23, 1967, supra note 3, at B-22; see also Contract for the "Comodoro Rivadavia Coastal Belt" Area, supra note 13, at 8 (art. 5).
55. Law 17,319, supra note 11, at A-10 (art. 31).
56. Regulations, supra note 13, at 21 (cl. 15.3).
57. Law 21,778, supra note 25, at 4-5 (art. 9(g)); Law 17,319, supra note 11, at A-27 to A-30 (arts. 80, 87-88).
when the tax change constitutes a contribution toward improvements or a general increase of taxes.\textsuperscript{49}

(2) All national tributes assessed on imported items, exchange surcharges, and capital gains taxes. Aside from these, and the other taxes set forth below, the operator is exempt from all other national taxation (as to activities related to his permit or concession) except for adjustments which defray costs of services provided or contributed toward improvements or where the entity has assumed responsibility for a third party's tax liability.\textsuperscript{60}

(3) A special income tax of 55\% of the operator's net profits. The statute prescribes a formula for computing net profits.\textsuperscript{61}

(4) A progressive annual surface tax during the exploration period.\textsuperscript{62}

(5) An annual surface tax during the exploitation period of 20,000 pesos per square kilometer or fraction thereof.\textsuperscript{63}

(6) A 12\% royalty on liquid hydrocarbons and natural gas that the National Executive Power can reduce by 5\% if production conditions merit such a decrease.\textsuperscript{64}

(7) Any special benefits (e.g., bonuses, deferred or cumulative payments) that the private party committed to in the bidding process.\textsuperscript{65}

(8) Additionally, any hydrocarbons lost through the fault or negligence of the operator shall be included as production in making these calculations.\textsuperscript{66}

This scheme is a benevolent effort by Argentina to be fair to private entities. The exceptions provided for in (1) and (2), however, seem to open wide gaps that minimize the restrictions laid on new or increased taxes; and, unfortunately, the guaranty of a stable tax regime does not encompass a guaranty of a stable economy to operate in.

Law 21,778 approaches the tax treatment of its contractors from a different angle than does Law 17,319. Rather than prescribing an intentionally stagnant fiscal regime, Law 21,778 per-

\textsuperscript{59} Law 17,319, \textit{supra} note 11, at A-17 (art. 56(a)).

\textsuperscript{60} Id. at A-17, A-18 (art. 56(b)). Shareholders and direct pecuniary beneficiaries also come under this tax umbrella. Id. at A-20, A-21 (art. 56(d)).

\textsuperscript{61} Id. at A-18 (art. 56(c)).

\textsuperscript{62} Id. at A-21 (art. 57(a)).

\textsuperscript{63} Id. (art. 58).

\textsuperscript{64} Id. at A-21, A-22 (arts. 59, 62).

\textsuperscript{65} Id. at A-15, A-23 (arts. 47, 64).

\textsuperscript{66} Id. at A-23 (art. 65).
mits the use of price escalator clauses in risk contracts to adjust prices paid to operators for their production in response to "the precise incidence" of tax fluctuations. However, similar to the provisions of Law 17,319, "service rates and betterment taxes" are excluded. Law 21,778 contractors must abide by Argentina's "tax regulations of general applicability" with two options concerning a modified depreciation rule and an option to update tax losses based on the general level of the wholesalers price index. The nation's stamp tax assessment is based on the contractor's investment commitment in the risk contract and is payable over a term that commences on the date the contractor is notified of the decree approving the risk contract.

An annual surface fee (per square kilometer or fraction thereof) is set in the call for bids. The amount of the fee relates to the characteristics of the particular bid area. A special 100% deduction is granted for certain investments that underwrite the stock of Argentine companies engaged in risk contracting. Goods, special tools, parts, components, and some spares and accessories are exempted from import duties upon entry into the country and from export duties upon leaving Argentina when the contract expires. Investments made by contractors are not subject to certain foreign investment regulations and YPF is liable for the 12% royalty on production that is payable to the state. Obviously, a more thorough knowledge of the country's general tax structure is needed before potential risk contractors should attempt interpreting these provisions.

67. Law 21,778, supra note 25, at 7 (art. 15); Regulations, supra note 13, at 24-25 (cl. 17.2).
68. Law 21,778, supra note 25, at 7 (art. 15); Regulations, supra note 13, at 24-25 (cl. 17.2).
69. Law 21,778, supra note 25, at 6-7, 10 (arts. 14, 20).
70. Law 21,778, supra note 25, at 6-7 (arts. 14(a), 14(b)); Regulations, supra note 13, at 24 (cls. 17.1, 17.1(a), 17.1(b)). For an example of tax regimes in actual risk contracts, see Contract for the "Comodoro Rivadavia Coastal Belt" Area, supra note 13, at 27 (art. 13).
71. Law 21,778, supra note 25, at 7 (art. 16).
72. Id. (art. 17); Regulations, supra note 13, at 25 (cl. 17.4).
73. Law 21,778, supra note 25, at 8-9 (art. 18); Memorandum of Apr. 14, 1978, supra note 13, at 14-15.
74. Law 21,778, supra note 25, at 9-10 (art. 19) (compensation for services is expected from this exemption; there are limitations on the sale and movement of these imported goods); Memorandum of Apr. 14, 1978, supra note 13, at 15.
75. Law 21,778, supra note 25, at 10 (art. 23); Regulations, supra note 13, at 25 (cl. 17.3); Memorandum of Apr. 14, 1978, supra note 13, at 15-16.
2. Exploitation following exploration activities

The second way a private producer can enter into an exploitation phase is through exploratory discoveries that precipitate conversions of exploration lands into exploitation lands. For a Law 17,319 exploration permit holder, this is triggered when "the permit holder through the application of approved technical criteria shall have determined the existence of commercially exploitable hydrocarbons." When this vague standard has been met, the permit holder must declare his plans concerning an exploitation concession. Then, a concession will be awarded and the new concessionaire must submit his work and investment commitments for the exploitation phase for approval by the state. A Law 17,319 concessionaire has a duty to delimit the productive area (which the concession boundaries will conform to) as promptly as possible. This is likely to be a natural goal of the concessionaire anyway owing to the impermanent nature of his rights.

The Law 21,778 approach to exploitation ensuing from exploration shows more oilfield sense than the Law 17,319 provisions do for such a conversion by laying out a more extensive and practical procedure for the changeover. When a Law 21,778 contractor discovers a deposit of hydrocarbons, he begins the transition into exploitation by announcing to YPF his plans for determining if the accumulation has, by itself or in combination with other discoveries, commercial potential. The pursuance of such a program will then result in one of three conclusions concerning the investigated hydrocarbon traps: it is commercial, it is not commercial, or its commerciality is still unclear.

If a deposit is labelled noncommercial, the contractor must immediately release all areas coinciding with the trap that was tested. However, if the operator is hesitant to label a property

76. Law 17,319, supra note 11, at A-6, A-9 (arts. 17, 29).
77. Id. at A-7, A-8 (art. 22).
78. Id. Indeed, an exploration permit holder who makes a discovery cannot proceed with field exploitation until he has committed to opt for an exploitation concession. Id. at A-7 (art. 21).
79. Id. at A-10 (art. 32).
80. Id. at A-10, A-11 (art. 33).
81. Regulations, supra note 13, at 5-6 (cl. 3.2.1); see also Contract for the "Llananelo" Area, supra note 13, at 7-8 (art. 3.2.1) (contractor has up to twenty-four months to carry out its program for determining commerciality).
82. Regulations, supra note 13, at 6 (cl. 3.2.3); see also Contract for the "Malargue Sur" Area, supra note 13, at 7 (art. 3.2.3).
noncommercial and, at the same time, is not convinced of the prospect’s commerciality (e.g., it could be commercial if exploited with other discoveries or if prices were to increase slightly), the contractor is permitted to postpone the declaration of his conclusion. The maximum permissible length of this postponement will be set out in a “document of particular conditions,” but in no event shall it extend beyond the end of the exploitation stage time period.83

If a deposit is determined to be commercial, then the contractor must submit all of his geologic and engineering information to YPF along with a plan for full exploitation.84 Law 21,778’s enactment was specifically aimed at encouraging the discovery and development of Argentina’s offshore reserves.85 Accordingly, Law 21,778 has a unique provision. When an offshore gas field is discovered, the exploitation period may be suspended for up to ten years to await the development of a market and transportation facilities for the gas.86

An operator who commences exploitation as a result of conversion from exploration must still concern himself with the applicable fiscal regime, time periods limiting his rights, and work and investment commitments as described above. The quantity of land available to him will be based largely on the initiative he takes and his success in finding exploitable fields. Both Law 17,319 and Law 21,778, therefore, provide a legal mechanism for converting new discoveries into production and development programs, but the Law 21,778 system is clearer and better calculated to conform to oilfield practices.

II. UNDERLYING PHILOSOPHY AND PRINCIPLES

This section analyzes the underlying principles of Argentina’s petroleum laws and the impact those principles have on private producers. Two of these principles, state dominance of the petroleum industry and Argentina’s need for private activity in the petroleum industry, are in constant tension. The dynamics of the conflict between these principles help to explain changes in the country’s petroleum policy. Another one of the

83. Regulations, supra note 13, at 6 (cl. 3.2.4).
84. Regulations, supra note 13, at 6, 21 (cls. 3.2.2, 15.3); see also Contract for the “Malargue Sur” Area, supra note 13, at 7, 16 (arts. 3.2.2, 9.3).
86. Law 21,778, supra note 25, at 4 (art. 9(e)).
fundamental principles, private responsibility for the mining risks of exploration and exploitation, does not present a new concept for private producing entities. The final principle deals with ownership of the hydrocarbons that are produced and the consequences of ownership or nonownership to a private entity. After studying these essential principles, a private producer will recognize and understand the general concerns he should have about the Argentine petroleum industry.

A. State Dominance vs. Dependence on Private Investment and Activity

"[I]ndispensable [sic] . . . control of the state over all aspects involved in" the exploration, exploitation, transportation, and marketing of hydrocarbons characterizes Argentina's petroleum legislation. Undergirding this philosophy of state dominance is Law 17,319's pronouncements that the nation's hydrocarbons are "inalienable and imprescriptible assets" of the state. The National Executive Power controls the legal mechanisms of the petroleum industry by making major policy decisions under Law 17,319 and by approving all risk contracts under Law 21,778. The Secretary of Energy assists the National Executive Power by applying and executing these laws. "State companies" are the "essential agents" for the state in its petroleum activities and these companies play a dominant role in the accomplishment of the national objectives. Strategic proven and prospective hydrocarbon lands are reserved for the sole dominion of the state companies to aid them in fulfilling their assigned functions.

The National Executive Power sets its policies in accordance with the express national objective of meeting the coun-

89. Law 17,319, supra note 11, at A-1 (art. 1). This approach solves a multiplicity of jurisdictions problem that has plagued the development of a national policy, but it also raises constitutional issues concerning ownership and procedural jurisdiction over hydrocarbon reserves. These issues have been hotly debated for many years. See id. at A-4 (art. 12) (provinces to participate equally with the national government in provincial production).
90. Law 21,778, supra note 25, at 5-6 (arts. 12, 13); Law 17,319, supra note 11, at A-1, A-32 (arts. 3, 98).
91. Law 17,319, supra note 11, at A-26, A-32 (arts. 75, 97).
92. Id. at A-4, A-30 (arts. 11, 91).
93. Id.
try’s petroleum needs from indigenous production.\textsuperscript{94} Law 17,319 was directed toward accomplishing this goal through the granting of exploitation concessions. When it became evident that Law 17,319 alone would not meet this target,\textsuperscript{95} Law 21,778 was enacted to stimulate further activity by allowing the state companies to enter into risk contracts with private entities.\textsuperscript{96} These nonpublic entities were to assist state companies in developing those lands reserved to them, especially offshore prospects.\textsuperscript{97}

Another basic theme, partially expressed and partially implied, of Argentina’s petroleum laws is the country’s great need for the economic and technical assistance that private investment and other private involvement provide. In the petroleum sector itself, private entities can supply the tremendous financial resources required for petroleum exploration, particularly in offshore projects.\textsuperscript{98} Private companies also have technical abilities that the state needs.\textsuperscript{99} Both Law 17,319 and Law 21,778\textsuperscript{100} require private operators that want to participate in Argentina’s petroleum industry to possess the technical competence and financial resources necessary to perform the works that will be required of them. By surpassing the “dubious efficiency (resulting from) . . . subordinating the extraction of hydrocarbons to the technical and economic resources of the state,”\textsuperscript{101} a petroleum industry buoyed up by private money and ingenuity gives desperately needed support to the country’s quest for “economic expansion on reasonable technical and economic bases.”\textsuperscript{102} Aside from boosting the petroleum industry, private participation is expected to stimulate local industry and increase employment.\textsuperscript{103} Despite “the acknowledged competence of Argentine technical

\textsuperscript{94} Id. at A-1 (art. 2); Memorandum of June 23, 1967, supra note 3, at B-8 to B-10.
\textsuperscript{95} CNRET, supra note 2, at 45.
\textsuperscript{96} Regulations, supra note 13, at 1 (cl. 1); Memorandum of Apr. 14, 1978, supra note 13, at 12.
\textsuperscript{97} Memorandum of Apr. 14, 1978, supra note 13, at 12-13, 16; WORLD OIL, supra note 1, at 125-32.
\textsuperscript{98} Memorandum of Apr. 14, 1978, supra note 13, at 13; Memorandum of June 23, 1967, supra note 3, at B-4; CNRET, supra note 2, at 45.
\textsuperscript{99} Law 21,778, supra note 25, at 1 (art. 2).
\textsuperscript{100} Id.; Law 17,319, supra note 11, at A-1, A-2 (art. 5); Regulations, supra note 13, at 1, 8-9 (cl. 1, 5.2); Memorandum of June 23, 1967, supra note 3, at B-13.
\textsuperscript{101} Memorandum of June 23, 1967, supra note 3, at B-2.
\textsuperscript{102} Id. at B-1.
personnel and labourers," a private producer is required under both Law 17,319 and Law 21,778 to employ a high percentage of Argentinians.

Even though the Argentine petroleum legislation is founded on the principle of state control, this principle is in constant tension with and must be balanced against Argentina's genuine need for private involvement in accomplishing its petroleum and economic goals. Unfortunately, Argentina's administration of its hydrocarbon laws sometimes does not reflect the country's substantial need for private involvement and, when this happens, both Argentina and the private operators suffer.

The exact impact this struggle between state dominance of natural resource development and reliance upon private investment and technology will have on the private operator is difficult to anticipate. Some general observations would be more appropriate. A private producer planning to operate in Argentina for the entire duration of a risk contract or concession agreement should expect to experience all ranges of the spectrum of government dominance.

An initial indicator of the tenor of the Argentine government at a particular time is the political ideology of the governing authorities. Economic nationalist leaders favor energy self-sufficiency spawned by active government involvement. Government involvement can range from tariff protection and an infrastructure base designed to stimulate private Argentine exploration and production efforts, to complete state dominance of the petroleum industry. Economic liberalist leaders, on the other hand, welcome foreign investment and involvement in petroleum-seeking and -producing activities. Economic liberalism in Argentina is export based and is founded on cordial foreign relations and interchange.

These philosophical labels are of limited value, however, because Argentine politicians do not always remain loyal, at least in practice, to their ideological classifications. Still, even though theoretical bases are of limited value in predicting how Argen-

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105. Law 17,319, supra note 11, at A-25 (art. 4); Regulations, supra note 13, at 19-20 (cl. 13.12).
106. Parker, supra note 5; WORLD OIL, supra note 1.
tine rulers will direct the petroleum industry, it is important to monitor the country's political development as effectively as possible because political developments may prove to be the single most critical factor in the progress or lack of progress of Argentina's petroleum industry.\textsuperscript{108}

In many ways, the Argentine conflict between state control of and private contribution to the oil and gas industry typifies the petroleum technology transfer battle that developing countries have waged with private oil companies.\textsuperscript{109} Hydrocarbon exploration and exploitation activities are markedly enhanced by technological abilities and advancements. Historically, private multinational corporations have provided the technology required for worldwide petroleum operations. Naturally, sovereign countries want to control the use and depletion of their indigenous natural resources. Hence, as in Argentina, an ensuing struggle sets the governments of developing countries (that want to regulate the development of their own energy resources) against the private oil companies (that are seeking to fulfill their own ends) possessing the technology needed for resource utilization. Initially, this confrontation produced concession arrangements giving wide latitude to the oil companies and providing limited financial benefits but no technological benefits to the host countries.\textsuperscript{110} Such concession arrangements were present under early Argentine oil laws.\textsuperscript{111} Gradually, developing countries began using petroleum contracts and other means to develop petroleum technology among their own industries and labor markets.\textsuperscript{112}

Provisions under Law 17,319 and Law 21,778 that require the hiring and training of Argentine nationals, the delivery of oilfield information to the state, and the reversion of production equipment and facilities to the state are examples of Argentine efforts to acquire technology.\textsuperscript{113} Additionally, Argentina has a

\textsuperscript{108} At least one business advisor feels that energy progress is closely related to politics. See Wanniski, \textit{Energy In Abundance}, LANDMAN, Jan. 1983, at 7-12.


\textsuperscript{110} See CNRET, \textit{supra} note 2, at 109-10, 152; Zakariya, \textit{supra} note 109, at 211.

\textsuperscript{111} See Memorandum of June 23, 1967, \textit{supra} note 3, at B-1, B-2; C. Solberg, \textit{supra} note 1, at 14-15.

\textsuperscript{112} See Zakariya, \textit{supra} note 109, at 210-22.

\textsuperscript{113} Law 21,778, \textit{supra} note 25, at 4, 5 (arts. 9(e), 9(h)); Law 17,319, \textit{supra} note 11, at A-11, A-12, A-24, A-25 (arts. 15, 37, 70, 71); see also Zakariya, \textit{supra} note 109, at 211-15.
petroleum technology training institute and belongs to ARPEL, a Latin American association of state petroleum enterprises. A complete transfer of technology lies in the ability of the developing country to purchase or hire directly the most advanced technical means of petroleum exploration and development, if and when it so wishes, at a reasonable price. It also lies above all, in developing the mental skills of its citizens to utilize these technical means effectively, alone if they choose to do so.

However, a full technology transfer is closely tied to economic and industrial development in the developing country. Argentina's shortcomings in these areas make it probable that a complete technological transfer is a distant dream for Argentina, but it is likely that private operators in the country will be faced with demands from the government to assist this transfer of technology.

Finally, in understanding the state dominance versus private participation conflict, the concepts of political ideology and technology transfer must be set afloat on the underlying sea of social, economic, and political problems that plague Argentina. As a developing country, Argentina seems like a child that is dissatisfied with what it has and yet does not know what it wants. For the oil industry, the result of Argentina's uneasiness is a constantly changing oil policy. The country would like to pay fair oil prices to producers, yet economic problems make this difficult. Socially and politically, some forces in Argentina would like to achieve energy self-sufficiency, but the country lacks the financial and technological ability to do so. The consequences to the private operator are uncertainty and instability in the petroleum industry.

B. Risk and Ownership

Under both Law 17,319 and Law 21,778, the private opera-

114. See CNRET, supra note 2, at 82-91; see also Zakariya, supra note 109, at 208, 220.
116. Id. at 222.
117. See C. Solberg, supra note 1, at 156-76. Law 21,778 was enacted in 1978 and, by 1982, the country was considering new major changes in its oil legislation. See generally World Oil, supra note 1.
118. See Law 17,319, supra note 11, at A-1 (art. 3); Memorandum of June 23, 1967, supra note 3, at A-8; C. Solberg, supra note 1, at 172-77; CNRET, supra note 2, at 45.
tor assumes all "hazards defined as mining risk." Producers operating under Law 17,319 own the hydrocarbons they produce, including the right to transport, refine, and market their production. This system is designed to provide "substantial incentives" by opening up the vistas of vertical integration (e.g., marketing, exportation) to nonpublic entities.\footnote{121} The exercise of nonproduction rights, however, is subject to regulation by the National Executive Power. Some initial regulations are set forth in Law 17,319. For example, liquid hydrocarbons can be sold only in domestic markets until the objective of petroleum self-sufficiency is met.\footnote{122} In addition, all natural gas produced in Argentina is subject to a first purchase option granted to the "State-owned enterprise responsible for the public service of gas distribution."\footnote{123}

In contrast to Law 17,319, companies contracting under Law 21,778 receive no legal rights under applicable mining laws, "nor will they have ownership of the hydrocarbons so obtained."\footnote{124} However, if domestic needs are satisfied from indigenous production and an adequate supply of reserves has been accumulated, the contractor may receive payment in kind. As a limitation on this practice, however, YPF can restrict payment in kind to crudes so that even when national requirements are met, natural and liquified gas may not be available in kind.\footnote{125}

In the simplest sense, the procedures under Law 17,319 and Law 21,778 are very similar and, from a producer's viewpoint, the ownership distinctions between the laws are not crucial. Both laws prescribe a system mandating delivery of a specified

\footnotesize{119. Law 21,778, supra note 25, at 1 (art. 2); Law 17,319, supra note 11, at A-1, A-2 (art. 5).
120. Law 17,319, supra note 11, at A-2, A-3 (art. 6); Memorandum of June 23, 1967, supra note 3, at B-5, B-10, B-11.
122. Law 17,319, supra note 11, at B-2, B-3 (art. 6). This limitation is subject to exceptions justified on technical grounds. Id.; Memorandum of June 23, 1967, supra note 3, at B-10. The Executive Power may prescribe rules which assure an equitable and rational participation by all companies in the domestic market. Law 17,319, supra note 11, at B-2, B-3 (art. 6).
123. Law 17,319, supra note 11, at A-3, B-2 (art. 6); Memorandum of June 23, 1967, supra note 3, at B-11 (operators can consume hydrocarbons as needed for their operations).
125. Law 21,778, supra note 25, at 1 (art. 4); Regulations, supra note 13, at 1, 23 (cls. 1, 16.2.3); Memorandum of Apr. 14, 1978, supra note 13, at 13, 14.
126. Regulations, supra note 13, at 23 (cls. 16.2.3).}
amount of production into internal markets, after which the producer may dispose of any excess output as he chooses. Within these basic procedural frameworks, however, differences between the Law 21,778 operator and the Law 17,319 concessionaire do emerge. These disparities, which are largely rooted in ownership rights, can be recognized and managed by the producer by studying the price the producer can receive for his production and the likelihood that the producer will have an available market for all of this production. Additionally, the producer must consider the quantity of his production over which he will have exportation rights. These factors, and not ownership differences, become critical in the producer’s analysis of his opportunities for profitable operations in Argentina.

In evaluating the prices available for his production, a producer interested in exploring in Argentina should ascertain the relative prices obtainable under Law 17,319 and Law 21,778 transactions. Also, since the producer is committed to serving local markets until domestic needs are met, the producer must compare prices available in Argentina to world oil prices. For liquid hydrocarbons, Law 17,319 concessionaires have more price latitude than Law 21,778 contractors because concessionaires have transportation and marketing rights to their production. Law 21,778 operators are obligated, until payment in kind is allowed, to sell their output to “the state company,” whereas the only significant restriction put on crude prices by Law 17,319 is that the National Executive Power might set prices. However, the statute tries to temper this possibility by assuring that “reasonable profits” will be attainable and that even if prices are set by the National Executive Power, they will be equal to those established for the state oil company and will not be lower than those prevailing for imported crudes of similar

127. Law 17,319, supra note 11, at B-2, B-3 (art. 6) (operator must obtain a commercially reasonable price for exported crude).
128. See Argentine Contract Talks Hit Snags, OIL & GAS J., Jan. 10, 1983, at 44. Sagging prices have proven to be a major flaw in the Argentine oil industry and, combined with soaring inflation and political instability, have resulted in a downward production trend in the country. Enright, World Oil Flow, Refining Capacity Down Sharply; Reserves Increase, OIL & GAS J., Dec. 27, 1982, at 75, 77, 79; Parker, supra note 5; WORLD OIL, supra note 1.
129. Law 17,319, supra note 11, at A-2, A-3 (art. 6); Memorandum of June 23, 1967, supra note 3, at B-5.
130. Law 21,778, supra note 25, at 1 (art. 4); Regulations, supra note 13, at 1 (cl. 1).
131. Law 17,319, supra note 11, at A-2, A-3 (art. 6).
quality and under similar conditions. This latter provision should serve to keep Law 17,319 prices at the world market level.

Law 21,778 crude producers are subject to a more nebulous price structure, with the payment in cash being based on “the unit of measurement corresponding to the type of hydrocarbon obtained and delivered . . . .” Since these price standards are set by the state and a risk contractor can sell crude only to the state until payment in kind is made, the Law 21,778 risk contractor has no control over the price he receives for his domestically marketed crude. He will be paid according to the state’s established price structure.

For gas, Law 17,319 provides that gas prices shall be set by agreement and that the prices “shall assure the operator an equitable return on the corresponding investment.” This provision, combined with the state company’s preemptive right to purchase a concessionaire’s gas output, puts the Law 17,319 gas-producing concessionaire in much the same position as the Law 21,778 gas-producing contractor that must sell under contract to the state company based on the same price framework that Law 21,778 crude contractors are subject to. The similarity is further enhanced by Law 21,778’s authorization allowing YPF to prevent payment in kind for natural and liquid gas (i.e., YPF can limit payment in kind to crude petroleum), which, in effect, gives the state a first option to purchase on all of a Law 21,778 risk contractor’s gas production.

Before a petroleum producer commences an exploration program, the producer wants to be assured that he will be able

132. Id. at A-2, A-31 (art. 6); Memorandum of June 23, 1967, supra note 3, at B-11. It appears that this last guarantee has not been abided by. A. IGLESIA, POLITICA PETROLERA ARGENTINE 263 (1980). Perhaps this failure to meet world prices can be explained by the sudden upturn in the world price in recent years and by the Law 17,319 exception which provides that “[s]hould the prices of imported crudes be substantially increased due to exceptional circumstances, such prices shall not be taken into consideration for establishing the domestic marketing prices . . . .” Law 17,319, supra note 11, at A-2 (art. 6).

133. Law 21,778, supra note 25, at 1 (art. 4); see also Regulations, supra note 13, at 1 (cl. 1). For an example of crude price formulas in risk contracts, see Contract for the “Comodoro Rivadavia Coastal Belt” Area, supra note 13, at 22-23 (art. 11.1).

134. Law 17,319, supra note 11, at A-3 (art. 6).

135. Law 21,778, supra note 25, at 1 (art. 4); Regulations, supra note 13, at 1 (cl. 1); Memorandum of Apr. 14, 1978, supra note 13, at 13. For an example of risk contract gas formulas, see Contract for the “Comodoro Rivadavia Coastal Belt” Area, supra note 13, at 23-24 (arts. 11.2, 11.3).

136. Regulations, supra note 13, at 23 (cl. 16.2.3).
to market his product commercially. This should not present a major problem for a Law 17,319 producer. The free market access allowed to such a producer provides him with the opportunity to solve any major marketing obstacles during both nonexportation and exportation periods. Even though a Law 17,319 gas producer must first offer his gas to the state company, such option to purchase must be exercised by the state within "reasonable time limits" and the producer can, with appropriate approval and subject to prescribed regulations, decide on the disposition of any gas not purchased by the state.137

The Law 21,778 producer, on the other hand, has only one buyer prior to payment in kind—the state.138 Such a contractor could find himself in a difficult position if the state company is unwilling (e.g., because the quality of the crude is not suited to the state company's refining facilities) or unable (e.g., lack of storage capacity) to take the contractor's product while, at the same time, domestic production has not satisfied domestic needs so that the payment in kind alternative is also not available to the contractor. The Law 21,778 operator must contractually anticipate these eventualities and obtain either guarantees of receipt of his production in reasonable geographic locations with penalties against the state for failure to comply, or the right to dispose freely of any excess production not taken by the state company. Additionally, provisions should be made stipulating who bears the costs when additional storage or transportation facilities are required to sustain receipt of the private operator's production by the state company. Various provisions along this line have been used by risk contractors including:

(1) A guarantee of reception of a specified volume of crude oil by YPF with options for the contractor to dispose of any excess.
(2) Specification of the reception standards that the hydrocarbons must meet (e.g., water content, salinity levels).
(3) Agreements on when the contractor will not be obliged to make certain production related investments.
(4) Provisions for reinjection or commercial disposal (with a

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137. Law 17,319, supra note 11, A-2, A-3 (art. 6); Memorandum of June 23, 1967, supra note 3, at B-11, B-12.
138. Law 21,778, supra note 25, at 1 (art. 4); Regulations, supra note 13, at 1 (cl. 1). For an example of actual production, delivery, and transportation clauses in risk contracts, see Contract for the "Llancanelo" Area, supra note 13, at 21-30 (art. 10, Annex V, Annex VI).
partial payment to YPF) of gas that YPF cannot receive or for which transportation facilities are not available.

(5) Allowance of construction and operation by the private contractor of equipment for obtaining liquified gas.

(6) Assessment of penalties against YPF for failure to comply with its reception requirements for any causes other than force majeure or fortuitous case.

(7) Provision for who bears the cost of storage and treatment facilities.

(8) Provision, as part of two thermal stimulation pilot projects, that the contractor and YPF shall agree on the conditions under which the contractor may dispose of crude oil not disposed of by YPF.

(9) Provisions concerning transportation to YPF's point of reception. 139

Obviously, a private operator can make only limited demands when dealing with a foreign sovereign in a competitive bidding situation. Nevertheless, the contracting company must protect itself by assuring reception of its production on the most favorable terms possible.

A final important concern of a private operator working in Argentina is the quantity of his production that will be available for exportation. In a country such as Argentina that has severe economic problems and chronic political instability, an operator wants to have free rein, including the right to export as much of his production as is possible. The ability to export provides an opportunity to circumvent unfavorable market conditions within the country. Nevertheless, Argentine production must satisfy Argentine petroleum needs before any private operator may truly claim freedom to dispose of his production, especially the freedom to export that production. 140 Additionally, the restrictions on export rights to natural gas are more stringent than those for crude petroleum. 141 A Law 17,319 producer of liquid hydrocarbons has to be authorized by the National Executive

139. For examples, see Contract for the "Comodoro Rivadavia Coastal Belt" Area, supra note 13, at 14-15, 18-19, 20 (arts. 10.1, 10.2.2, 10.3); Contract for the "Llancanelo" Area, supra note 13, at 23-26 (arts. 10.1, 10.2.2, 10.3); Contract for the "Malargue Sur" Area, supra note 13, at 17-19, 21 (arts. 10.1, 10.2.2, 10.3).

140. Law 21,778, supra note 25, at 1 (art. 4); Law 17,319, supra note 11, at A-2, A-3 (art. 6); Regulations, supra note 13, at 1 (cl. 1); Memorandum of Apr. 14, 1978, supra note 13, at 1-14; Memorandum of June 23, 1967, supra note 3, at B-10, B-11.

141. Law 21,778, supra note 25, at 1 (art. 4); Law 17,319, supra note 11, at A-2, A-3 (art. 6); Regulations, supra note 13, at 1, 23 (cls. 1, 16.2.3).
Power to export crude supplies that are "in excess of the normal needs of the internal market."\(^{142}\)

Aside from meeting domestic production goals, the only statutory restrictions placed on the right to export are that the prices received for the exported production be commercially reasonable in light of the international market and that the operator submit to any promulgated rules designed to accomplish equitable participation in the internal market by all producers within the country.\(^{143}\) Similar in nature, but slightly more restrictive, is the Law 21,778 proviso that a contracting company may receive payment in kind when domestic production meets domestic demand and an "adequate margin of reserves [as decreed by the National Executive Power] has been established."\(^{144}\)

One further drawback that a contractor might experience is that if crude risk contract prices in Argentina are low and payment in kind is made based on the cash price, the operator may be disappointed at the quantity of crude received as payment in kind. However, both the 1980 Unionoil International Exploration Company, Ltd./Inalruco S.A. Petrolera Risk Contract\(^ {146}\) and the 1979 Occidental De Argentina Inc./Bridas/Union Texas/Compania Quimica Risk Contract\(^ {146}\) provide that once the contractor has invoiced YPF for crude for which payment is due in kind, the contractor may "dispose of said Crude Oil immediately."\(^ {147}\) So the Law 21,778 crude oil threshold point for export rights is higher than the Law 17,319 threshold level, but once a Law 21,778 contractor that has contracted to receive payment in kind reaches the payment in kind stage for crude, he has unrestricted rights of disposition.

For natural gas exportation rights, a private operator must overcome more legal obstacles than for crude exportation rights.

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142. Law 17,319, supra note 11, at A-2, A-3 (art. 6); Memorandum of June 23, 1967, supra note 3, at B-10, B-11.

143. Law 17,319, supra note 11, at A-2, A-3 (art. 6); Memorandum of June 23, 1967, supra note 3, at B-10, B-11.

144. Law 21,778, supra note 25, at 1 (art. 4); see also Regulations, supra note 13, at 1 (cl. 1). Payment in kind is available only if "clauses contemplating such possibility and the basis for pricing the hydrocarbons delivered in payment have been incorporated to the corresponding contract." Law 21,778, supra note 25, at 1 (art. 4).


147. Contract for the "Llancanelo" Area, supra note 13, at 37 (art. 11.4); Contract for the "Malargue Sur" Area, supra note 13, at 28 (art. 11.5).
Under Law 17,319, a concessionaire may, upon obtaining appropriate consent, decide upon the disposal and utilization of any natural gas not purchased by the state company. There is no limit, though, on how much of his production the state company can purchase, making uncertain the availability of export rights. Even more restrictive is the Law 21,778 reservation by the state of the right to refuse any payment in kind on any “natural and liquid gas produced.” Thus, a Law 21,778 gas producer may not receive payment in kind even after domestic demand is met and an adequate reserve is established.

Some risk contracts provide that when gathering and transportation facilities are lacking, a contractor may, in some instances, commercially market (and export) the gas produced and pay YPF 25% of the price the contractor would have received if the gas had been delivered to the state. Underlying these nuances for Law 21,778 natural gas disposition is the same basic Law 21,778 standard—satisfaction of domestic demand and an adequate supply of reserves—that applies to crudes. In summary, the essence of the exportation right is that a producer’s right to export revolves around the whims of the state and the achievement of national production goals.

III. Conclusion

The private sector of the Argentine petroleum industry does present exploration and production opportunities for entities that possess sufficient technical and financial competence. This industry, however, is highly regulated by the state and should not be entered without a thorough investigation of the prevailing political and economic climates within the country. In addition, whenever legally possible the private company must insist on intelligent contractual safeguards anticipated to protect its interests. In the private company’s favor, and balanced against the state’s desire to control its resources, is the fact that Argentina
cannot rely on its state-owned companies to satisfy the country's petroleum production goals. As a consequence, Argentina has a definite need for private investment and participation in this vital industry.

The private operator looking at potential involvement in Argentina's oil and gas industry has three avenues to consider: service contracts, risk contracts, or concession arrangements. This comment analyzed the latter two alternatives from an exploration and production perspective. Both the risk contract and the concession agreement provide exploitation rights and, as required, exploration rights tailored to meet a specific prospect's requirements. Both, however, come burdened with work and investment commitments and fiscal regimes that require an operator to accurately and continuously plan and evaluate his activities. In all, the demands of keeping up with all of these commitments, combined with the economic and political instability of Argentina, furnish the private operator with an interesting and challenging legal and business venture.

*Stephen L. Snow*
A Comparative Look at the Reporter's Privilege in Criminal Cases: United States, Federal Republic of Germany, and Switzerland

The reporter's privilege allows journalists to withhold the identity of news sources during investigatory proceedings. This controversial privilege has received considerable attention from legislative bodies, courts and scholars in the United States, the Federal Republic of Germany, and Switzerland. Unique national ideas of the press and its role have caused each of these countries to reach different conclusions about granting a reporter's privilege.

The major developments involving the reporter's privilege in the United States, West Germany, and Switzerland occurred approximately ten years ago. However, questions about the existence and scope of the privilege have continued to trouble the lower courts and scholars of each country. This comment compares the availability of the reporter's privilege in criminal actions in the three countries and examines the structural and ideological developments leading to the enactment of their present laws.

I. REPORTER'S PRIVILEGE IN THE UNITED STATES

A reporter in the United States has little protection against judicially compelled disclosure of the identity of his sources in a criminal prosecution because there is no federal statutory or ju-

1. The terms reporter's privilege and Zeugnisverweigerungsrecht (the German term) are used in civil, administrative, and criminal proceedings. However, this comment discusses only the criminal procedure aspect. The reporter's privilege is not limited to reporters. The term is used here to refer to all those working in the news media who are accorded privileges by statutes and judicial decisions. (Translations of all German materials are the author's.)

2. The Federal Republic of Germany will hereinafter be referred to as West Germany.

3. Much of the discussion about the present state of the law will center around landmark judicial decisions. The use of judicial decisions to explain the approaches of the various countries is not intended to emphasize the importance of the judiciary in formulating the reporter's privilege. The role of the judiciary has varied in the different countries, but the court opinions can serve as official statements about the reporter's privilege in the various legal systems.

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dicially recognized reporter's privilege. Congress has considered reporter's privilege legislation several times, but has never adopted a federal reporter's privilege statute. The judiciary has been hindered in developing a common law reporter's privilege by Branzburg v. Hayes, a 1972 Supreme Court decision holding that there is no constitutional basis for a reporter's privilege.

Branzburg v. Hayes is the only Supreme Court decision that discusses the reporter's privilege. In Branzburg, the Court considered the appeals of three journalists who had been subpoenaed by grand juries to answer questions concerning the journalists' reports on certain criminal activities. On three occasions the journalists refused to appear before the grand juries. On two other occasions the journalists appeared, but refused to answer questions relating to the identity of their sources after claiming a reporter's privilege under the first amendment. The Court rejected the journalists' argument and held that requiring journalists to appear and testify before state or federal grand juries does not abridge the freedom of speech and press guaranteed by the first amendment.


7. The only other time the entire Court has considered similar issues was in Zurcher v. Stanford Daily, 436 U.S. 547 (1978), which involved the search and seizure of newsroom materials. Individual justices have, on occasion, stated opinions on reporter's privilege. See, e.g., In re Roche, 448 U.S. 1312 (1980) (Brennan, J., opinion in chambers).

8. Branzburg, 408 U.S. at 667-78. This was not the first time a first amendment claim had been made. However, such claims have generally been unsuccessful. See, e.g., Garland v. Torre, 259 F.2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958); In re Goodfader, 45 Hawaii 317, 367 P.2d 472 (1961); State v. Buchanan, 250 Or. 244, 436 P.2d 729, cert. denied, 392 U.S. 905 (1968); In re Taylor, 412 Pa. 32, 193 A.2d 181 (1963).

Justice White's plurality opinion noted that "[t]he heart of the claim is that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information." The Court weighed the importance of "the right to every man's evidence," especially in criminal grand jury proceedings, against the possible harm to a journalist's ability to gather news, and found the evidentiary interest more compelling. Although newsgathering does qualify for first amendment protection, the Court held that journalists are afforded no greater protection than the average citizen. The Court particularly emphasized that "[f]rom the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished. The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press."

The Court did not grant journalists a conditional first amendment privilege because of the difficulty in (1) defining the terms and scope of the privilege, (2) distinguishing between different crimes, and (3) providing journalists with a reliable rule. According to the Court, the Constitution offers protection only when grand jury investigations are undertaken in bad faith to harass and "disrupt a reporter's relationship with his news sources."

Justice Powell's pivotal concurring opinion articulated a less rigorous standard that has been applied by many courts to limit the impact of Branzburg. Justice Powell stated the rule:

The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis ac-
Courts have used the Powell approach to limit *Branzburg* to its facts. However, no common law reporter's privilege has been granted in criminal proceedings unless the investigation was undertaken in bad faith to harass the reporter or state statutory provisions specifically granted the privilege.

Although the *Branzburg* decision has been uniformly criticized, neither the Court nor Congress has been persuaded to grant a reporter's privilege in criminal cases. However, the Court in *Branzburg* did recognize that state statutes may provide for a reporter's privilege. At the time *Branzburg* was decided nineteen states accorded some form of statutory reporter's privilege. Today twenty-five states have reporter privilege statutes that grant varying degrees of privilege. However, despite

17. *Id.* at 710 (emphasis added).
19. The principles of the *Branzburg* decision appear to have been reinforced by Zurcher v. Stanford Daily, 436 U.S. 547 (1978). Nonetheless, Justice Brennan stated in *In re Roche*, 448 U.S. 1312, 1315 (1980) (Brennan, J., opinion in chambers), that he did "not believe that the Court has foreclosed news reporters from resisting a subpoena on First Amendment grounds."
20. 408 U.S. at 688-89.
the existence of numerous state reporter’s privilege statutes, the judiciary has continued to restrict the privilege in criminal cases.23

Thus, a reporter in the United States has little protection against being compelled to disclose the identity of sources. The Supreme Court’s decision in Branzburg, which held that there is no constitutional basis for a reporter’s privilege, has limited judicial development of the reporter’s privilege to a case by case balancing of law enforcement interests against the function of the press. Law enforcement interests have predominated. Therefore, Congress’s failure to enact a federal reporter’s privilege statute has left reporters dependent on state laws that often do not provide adequate protection in criminal cases.

II. REPORTER’S PRIVILEGE IN WEST GERMANY24

The reporter’s privilege has also been the subject of considerable discussion in West Germany25 because of legislation

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23. See, e.g., H. Nelson & D. Teeter, Law of Mass Communications: Freedom and Control of Print and Broadcast Media 372-75 (4th ed. 1982). Reporters who have personally witnessed a crime, as had two of the journalists in Branzburg, do not appear to be eligible to claim a reporter’s privilege. Id.

24. In German the term used to describe the reporter’s privilege is Zeugnisoerweigerungsrecht.

passed by the German Bundestag (parliament). Of the three countries considered in this comment, West Germany is the only one that has a federal statutory reporter's privilege.

The origin of the West German reporter's privilege statute can be traced to statutes enacted in 1868 by three of the German Länder (states).26 These first statutes were enacted in response to the Prussian government's failure to pass a similar law that would have applied to all the German Länder controlled by Prussia. A federal reporter's privilege statute was not enacted until 1926, even though the unified German Reichstag had first considered passing such a federal law in 1874.27 By 1965, the federal reporter's privilege statute stated:

Editors, publishers, distributors, printers and others who have worked in the production or publication of a periodic publication [are permitted to withhold testimony] about the identity of an author, source or informant of a publication of punishable contents, when an editor of the publication is punished or nothing prohibits his punishment.28

This formulation of the law gave reporters little protection from compelled disclosure for four reasons. First, there was no privilege for reporters who were not directly involved in the production or publication of a periodical.29 This left many reporters, especially free-lance reporters, without protection. Second, even reporters granted the privilege could not withhold the identity of their sources unless their editor would be liable under the law if the material were published. A reporter's sources were protected if an article was false or libelous, but not if the article was accurate. Consequently, only unreliable informants, whose information is of little value to society, were protected under the law.30 Third, the privilege did not arise until the information


27. Id. at 25-26, 34. The federal law was not applied to the broadcast media until 1953. Id. at 39-42.

28. Strafprozessordnung [StPO] § 53(1)(5), 1965 Bundesgesetzblatt [BGBl] I 1374 (W. Ger.). Because this law was contained in the criminal procedure code it was only applicable to criminal procedure. Other statutes exist for other types of procedure. Punishment in this context would apparently be for violation of the press laws. See generally H. Möhl, supra note 26, at 60-74.

29. See L. Hennemann, supra note 25, at 18.

supplied by the informant was published. Thus, authorities could compel disclosure before publication, even if the material was subsequently published.\textsuperscript{31} Fourth, only the name of the source could be withheld. Information about the location of the informant had to be revealed even though such information might easily lead to the identification of the protected source.\textsuperscript{32}

In response to this weak federal statutory privilege, by 1966 every West German Land had adopted a reporter's privilege statute. These state statutes appeared to grant journalists a broader privilege.\textsuperscript{33} However, the scope of the state statutory privilege was unclear because of differences between the state statutes.\textsuperscript{34} This confusion, combined with decisions by the Bundesverfassungsgericht (Federal Constitutional Court) and a vast amount of scholarly work condemning the existing privilege, eventually persuaded the Bundestag to enact a more inclusive and comprehensible statute.

The first decision of the Bundesverfassungsgericht that encouraged the enactment of a new federal statute was the \textit{Spiegel} decision in 1966.\textsuperscript{35} \textit{Spiegel} primarily involved the search and seizure of editorial material from a German magazine, but the opinion also discussed the federal reporter's privilege.\textsuperscript{36} The court stated that the federal reporter's privilege statute was constitutional and partially protected editorial secrecy. However, since the statute was not comprehensive, the court had to balance editorial secrecy against law enforcement interests, giving editorial secrecy as much weight as possible until a new federal statute could be enacted.\textsuperscript{37}

The need for a new federal statute was underscored again in

\begin{footnotes}
\item[32] L. Hennemann, \textit{supra} note 25, at 17.
\item[34] L. Hennemann, \textit{supra} note 25, at 24.
\item[36] West Germany has a separate statute according protection against searches and seizures of media material in criminal procedure. It is codified under StPO § 97(5). The federal reporter’s privilege in criminal procedure discussed above and mentioned by the Court is codified at StPO § 53(1)(5).
\item[37] \textit{Spiegel}, \textit{supra} note 35, at 189.
\end{footnotes}
1973 when the Bundesverfassungsgericht held that the reporter’s privilege statutes of two Länder, Hesse and Hamburg, were unconstitutional in criminal actions. The court held that because the federal government had already enacted legislation in the area, articles 72 and 74 of the West German Basic Law (constitution) did not give the Länder power to promulgate criminal procedure laws. In dicta, the court also stated that a privilege to withhold testimony did not flow directly from the freedom of the press clause in the Basic Law.

In 1975 the Bundestag enacted a new federal reporter’s privilege statute applicable to criminal proceedings. The statute states:

Persons, who in their profession participate or have participated in the preparation, production or distribution of a periodic publication or broadcast [are permitted to refuse to testify] about the identity of an author or source of contributions or documents, as well as about the statements made by them about their activity, to the extent that it concerns contributions, documents and statements for the editorial portion [of the publication or broadcast].

In a 1978 decision, the Bundesgerichtshof in Strafsachen (the highest West German federal court for criminal matters) discussed the new statute and noted that it eliminated three of the limitations found in the previous reporter’s privilege statute. First, no violation of the press laws was required. Second, the editor did not have to be personally liable under the new law.

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39. Hesse, supra note 38, at 317. Among other rules, Grundgesetz [GG] arts. 72(1), 74(1) (W. Ger.) provide that the states have power to promulgate criminally and judicially related laws only if there are no conflicting federal laws. StPO § 53(1)(5), the federal reporter’s privilege statute, was a criminal procedure statute, thus making the state legislation unconstitutional. See also Spiegel, supra note 35, at 202.

40. Hamburger, supra note 38, at 317. This dicta was a response to the theory, proposed by numerous scholars, that a reporter’s privilege could be derived from the Basic Law. See, e.g., P. Cramer, supra note 25, at 36 ff.; R. Gross, supra note 31, at 152; U. Klug, supra note 25, at 52-66; H. Möhl, supra note 26, at 103; Kaiser, supra note 25; Note, 1968 N.J.W. 2368. Some of the speculation appears to have been fostered by the language of the Spiegel decision that appeared to indicate the privilege could be derived directly from the Basic Law. Spiegel, supra note 35, at 176.

41. StPO § 53(1)(5), 1975 BGBl I 1973 (W. Ger.).

before the privilege attached. And third, identifying information, as well as the identity of the reporter's source could be withheld. The court stated that the new statutory privilege was intended to be "friendly to the press." It is an absolute privilege because there are no exceptions that relate to the type of crime involved. However, the statute does not protect journalists who have personally witnessed criminal activity. Additionally, after a journalist has revealed some information about the identity of the informant, the statute no longer provides automatic protection. Instead, the court must weigh the competing law enforcement and confidentiality interests to determine if the privilege should be granted. The privilege will be extended only when (1) the interest in maintaining confidentiality clearly outweighs the interest in criminal justice, and (2) an "extraordinary publicity interest" is involved. The court also indicated that, although the new law approaches the constitutional limits of the reporter's privilege, the Bundestag's formulation must be respected because of the judicial principle: "When in doubt decide in favor of the freedom of the press."

The new "absolute" reporter's privilege is not perfect. The most prominent problem that remains is identifying persons who qualify for the privilege. The statute requires a journalist to participate by profession in the publication or broadcast media in order to qualify for protection. Commentators have postulated that this wording will continue to deny the privilege to

43. Id. at 247.
44. Id. at 247-48, 253.
45. Id. at 244-45.
46. Id. at 248-49. This standard appears to give courts discretion, but with emphasis on the criminal prosecution interest. The court described an extraordinary publicity interest as being when, at least at the time of decision, the publication of the article serves in the general interest to protect especially major rights and when the publication is an appropriate means to protect those rights. Id. at 249. This explanation offers little help in understanding what an extraordinary publicity interest is. However, in the case before it the court decided that a judicially granted privilege was not appropriate. The case involved an article based on an interview with a person who was purported to have participated in a mass murder. The article pointed out that the source, still unknown to authorities, was a "Frankfurt chap". The court held that the statutory privilege had been waived by this disclosure, and the crime involved weighed against a judicially granted privilege. The strictness of this holding has been criticized. See, e.g., Rengier, Die Reichweite des § 53 Abs. 1 Nr. 5 StPO zum Schutze des namentlich preisgegebenen, aber unauffindbaren Informanten, 1979 J.Z. 797.
48. The German word used in the statute is berufsmässig.
part-time and free-lance journalists.\textsuperscript{49} A second problem is that only those who work on a periodic publication or broadcast are granted the privilege. Scholars have contended that the term "periodic" is too restrictive.\textsuperscript{60} The term appears to exclude those involved in publishing a book based on research done for a periodical publication, documentary filmmakers, and possibly others. However, despite its defects, the new reporter's privilege statute gives West German reporters a solid and broad basis for protecting confidential sources.

III. REPORTER'S PRIVILEGE IN SWITZERLAND

In Switzerland the reporter's privilege has not received the same amount of attention it has in West Germany. Unlike the West German Bundestag, the Swiss Bundesversammlung (Federal Assembly) has refused to grant a federal reporter's privilege. Therefore, much as in the United States, the fate of the privilege has been left to the individual cantons (the Swiss equivalent of states). Some of the Swiss cantons have enacted reporter's privilege statutes. However, for purposes of comparison, this section will focus on the canton of Zurich which does not recognize the reporter's privilege.\textsuperscript{51}

In 1972, the case of \textit{Danuser} v. \textit{Bezirksanwaltschaft Zürich}\textsuperscript{52} came before the highest federal court in Switzerland. Several juveniles who had escaped from a reformatory were interviewed on television while their whereabouts were unknown to law enforcement authorities. The show's producer was questioned by the authorities regarding the location of the juveniles, but he refused to answer.\textsuperscript{53} Although the canton had not enacted a statutory reporter's privilege, the producer claimed a privilege derived directly from the freedom of the press clause of the

\textsuperscript{49} See, e.g., L. Hennemann, \textit{supra} note 25, at 48-50; Löfler, \textit{supra} note 25, at 913-14.

\textsuperscript{50} See, e.g., Löfler, \textit{supra} note 25, at 913-14.

\textsuperscript{51} Zurich is emphasized for two reasons. First, the Zurich canton is dealt with in the major decision by the highest national court and other informative decisions involving reporter's privilege. Second, the purpose for including the Swiss system in this comment is to compare and contrast how systems with almost identical backgrounds can reach totally different results. Zurich, one of the cantons to deny reporter's privilege, is a good tool for comparison and contrast.

\textsuperscript{52} Judgment of June 28, 1972, Bundesgericht, Switz., 98 Entscheidungen des Schweizerischen Bundesgerichts, Amtliche Sammlung [BG] I 418 [hereinafter cited as \textit{Danuser}].

\textsuperscript{53} Id. at 420.
Swiss constitution. The court rejected the producer's claim for a reporter's privilege by relying on section 128 of the Züricher Strafprozessordung (Zurich Criminal Procedure Code), which requires full disclosure, with limited exceptions, to investigating authorities. The court held that the producer had to disclose the whereabouts of the youths.

A general reporter's privilege cannot be derived from either the freedom of the press or freedom of expression because the guaranteed basic rights are not directly affected by the obligation to testify. Whether the journalistic worth of anonymous informants is of greater importance than the clarification of particular fact situations so that the anonymity of the informant should be preserved in criminal proceedings, is a question whose solution cannot be derived from the constitution, but rather should be handled by the proper legislature.

The court concluded that because neither the Zurich Criminal Procedure Code nor the federal code contained a reporter's privilege, the constitutional guarantees of freedom of the press and freedom of expression were not violated by requiring the producer to answer questions about the youths. The court reaffirmed this holding in another case in 1981.

The Züricher Obergericht in Strafkammer (Zurich Superior Criminal Court) also confronted the reporter's privilege issue in a case involving the seizure of photocopies of arrest warrants from a newsroom. Although seizure rather than nondisclosure of the identity of news sources was involved, the court discussed the reporter's privilege in detail. First, the court reiterated much of the Danuser decision and pointed out that only doctors, lawyers, and clergy have the privilege not to testify. The court admitted that the confidential relationship between the press and informants was protected by the freedom of the press clause, but held that the Swiss Constitution does not provide an unlimited privilege. Freedom of the press is only a part of the general freedom of expression that is granted to all citizens and cannot be used to avoid obligations that are common to all citizens.

54. Bundesverfassung (BVerf) art. 55 (Switz.).
55. Danuser, supra note 52, at 422 (emphasis added).
56. Id.
59. Id. at 320.
Only the legislature can sanction withholding the identity of news sources in criminal investigations. As a result, the court held that reporters have no greater constitutional protection from testifying than nonreporters.

The court did acknowledge that the confidentiality between informant and reporter cannot be totally disregarded. Under some circumstances the relationship may be considered by the court, but the anonymity of sources does not require any special protection.

The court stated: "The press in Switzerland survived up until now without a statutory privilege. Despite that, or perhaps because of that, the press has prevailed in its important assignment." The defendant, citing a West German case as authority, urged the court to balance the interest in the collection of the news against the interest in prosecution in deciding whether to grant a reporter's privilege. However, even after considering the role of the press the court found that (1) the criminal offense involved in the case was no less important than the reporter's privilege, and (2) no extraordinary interest in publication was present in the case.

As this case illustrates, the Swiss have relied on the legislature to decide whether or not to grant a reporter's privilege. The Swiss constitution does not expressly grant a reporter's privilege and the courts in the canton of Zurich have been unwilling to interpret the constitution or criminal code as requiring a privilege. With few cantonal reporter's privileges and no uniform federal reporter's privilege, the reporter's position in Switzerland remains precarious.

IV. ANALYSIS AND COMPARISON

The federal reporter's privilege accorded the press in West Germany is vastly different from that found in the United States and Switzerland. In West Germany, journalists for periodic publications and broadcasts have an absolute privilege to protect their sources without regard to the seriousness of the crime involved. In contrast, in the United States and Switzerland, although some states and cantons have enacted reporter's
privilege statutes, reporters in over half of the states and cantons have no significant privilege to withhold testimony in criminal proceedings. This difference is a result of the unique constitutional and philosophical theories of the three countries.

A. Constitutional Analysis

Journalists in all three countries claim a reporter's privilege derived directly from a constitutional freedom of the press clause. The journalists' argument is based on two premises. First, the press has a constitutionally granted function to inform the public and stimulate public opinion. Second, a reporter's privilege is necessary to carry out the press function. Journalists argue that, without a reporter's privilege, sources are hesitant to inform and consequently the function of the press is inhibited.

The journalists' first premise has been accepted in all three countries. However, the assertion that a reporter's privilege is necessary in order to perform the press function has been rejected by the United States Supreme Court in Branzburg and by the Züricher Obergericht in Strafkammer. The West German courts, on the other hand, have been reluctant to reject the second argument.

Two cases that were discussed earlier illustrate the West German position. First, in the Hamburg case the Bundesverfassungsgericht specifically denied the constitutional argument while invalidating a state-level reporter's privilege statute, but only after weighing the particular facts of the case. Second, in the Frankfurt decision the Bundesgerichtshof in Strafsachen re-
fused to apply the federal statute because the journalist had already revealed some information about his source. However, the court held that under some circumstances a journalist may refuse further disclosure even when the federal statute is inapplicable. This limited privilege is arguably derived from the constitution.

The reporter's privilege cases in West Germany demonstrate a friendliness toward the press not found in the United States and Switzerland. This difference cannot be explained by the history of the constitutional guarantees of free press in the three countries. The history of the press in all three countries is filled with struggles against government censorship and control. As the governments' awareness for the need of an informed public became more acute, and the efforts of the press to eliminate the shackles of government control correspondingly intensified, the three countries established constitutional guarantees of a free press. However, the free press provisions of the Swiss and United States constitutions and the West German Basic Law have had dissimilar effects on the reporter's privilege.

In Switzerland and the United States the judiciary has interpreted the pertinent constitutional guarantees as requiring the government to remain neutral in matters dealing with the press. Despite a constitutionally guaranteed freedom of the press, the press is granted no more rights or privileges than the average citizen, who is guaranteed freedom of expression. Freedom of the press is only a subpart of freedom of speech and expression. Therefore, a journalist enjoys no more rights than a nonjournalist.

70. Frankfurt, supra note 42; see supra note 46 and accompanying text.
71. Frankfurt, supra note 42; see supra notes 45-46 and accompanying text. For application of this concept see Advertisement, supra note 47.
72. U.S. Const. amend. I; B. Verf. art. 55 (Switz.); GG art. 5 (W. Ger.). The citation for the West German Basic Law is the new version, but varies little from the older versions. For a brief history of the press, see, e.g., H. Nelson & D. Teeter, Law of Mass Communications: Freedom and Control of Print and Broadcast Media 26-56 (4th ed. 1982); M. Löffler & R. Ricker, Handbuch des Presserecht 20-28 (1978); C. Ludwig, Schweizerische Presserecht 63-81 (1964). One German commentator has noted that the government began compelling disclosure of sources and information once censorship was no longer allowed in order to retain some control over the press. In effect, the granting of freedom of the press caused a need for reporter's privilege. H. Möhl, supra note 26, at 22-23.
74. Contra Meiklejohn, The Courts, the Press, and the Public: The Case of Myron
The West German Basic Law contains a provision that could justify a similar result. The Basic Law states that freedom of the press can be limited by general laws, i.e., laws that apply to all persons, and not just the press. This provision essentially gives the legislature constitutional authority to regulate the press to the same extent that it regulates the rest of society. Thus, there is constitutional authority for requiring the press to testify as long as the rest of society is also required to do so.

Although journalists in the United States, West Germany, and Switzerland are all guaranteed the right to a free press by the constitution or Basic Law, that right can be regulated to the same extent the rest of society is regulated. However, in all three countries legislative power exists to grant special privileges. West Germany is the only country that has legislatively enacted a federal statutory privilege. There is nothing notably different about the West German concept of freedom of the press that explains this more liberal approach with the exception of a possible government "friendliness" toward the press.

B. The Philosophies of the Three Systems and the Effect of the "Performance State" on the Reporter's Privilege

Although freedom of the press exists in all three countries, the enactment of a federal statutory reporter's privilege in West Germany may reflect the more encompassing legal theory espoused in that country. Scholars suggest that West Germany has developed into a "performance state" that not only formally acknowledges basic rights by not allowing government interference with those rights, but also places an affirmative duty on the state to implement programs to secure and protect those rights. In essence, the performance state extends the concept...
of the welfare state beyond the obligation to distribute welfare benefits to the poor to include an affirmative duty to the entire legal system.

One West German scholar has stated that in a performance state the "performance law" sets the profile of the social constitutional state and, without such a performance law, basic rights would be socially ineffective.78 Merely granting freedom of the press and formally acknowledging that right offers the journalist little protection. However, the performance state brings about the maximal actualization of that right by enacting affirmative legislation, e.g., a statutory reporter's privilege.

The reporter's privilege in West Germany is an example of a performance state carrying out its affirmative duty to protect rights. In contrast, in most areas of the law, the United States does little more than not interfere with basic rights.79 The emergence of a welfare or performance state in the United States or Switzerland may bring about changes in the reporter's privilege.

V. Conclusion

West Germany has enacted a national statutory reporter's privilege that offers extensive protection from compelled disclosure. In the United States and Switzerland some of the states and cantons have enacted reporter's privilege statutes, but there is no uniform, nationally applicable law. There are no formal constitutional interpretations that explain this difference. It may result from the different legal philosophies of the three nations, in particular the concept of a performance state. Whatever the underlying differences of the three systems, the West German reporter's privilege can serve as a model for a federal reporter's privilege statute in the United States and Switzerland.

Jeff V. Nelson

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78. Haberle, supra note 77, at 47.
79. In the United States, the performance state concept has apparently only been extended in limited economic situations and some areas of civil rights. See generally A. Miller, Social Change and Fundamental Law: America's Evolving Constitution (Contributions in American Studies No. 41, 1979).
The Swedish Ban of Corporal Punishment

On July 1, 1979, Sweden became the first nation to prohibit corporal punishment of children by their parents. The Swedish Parenthood and Guardianship Code was amended to provide: "A child may not be subjected to corporal punishment or other injurious or humiliating treatment." The new Swedish law is distinctive because it allows greater intrusion into family life than the laws of other countries that have considered the relationship between corporal punishment and child abuse specifically and children's rights generally. The law also represents the final step in an attempt by lawmakers to change societal views without coercion.

This comment explores the history of legislative, judicial, and societal attitudes toward corporal punishment in Sweden. It then outlines the legislative process involved in adopting the new law. Finally, it examines government proposals aimed at eliminating corporal punishment and explores the prospects of using more forceful measures in the future.

I. TRADITIONAL VIEWS OF CORPORAL PUNISHMENT

The 1979 law prohibiting corporal punishment reflects the major transformation of Swedish attitudes against the punishment of children that has occurred over the past thirty years. Traditionally, the right of parents to use corporal punishment in raising their children was wholly accepted in Sweden. Both religious and legal codes reiterated the proverbial dictum that 'sparring the rod spoils the child.'

1. Svensk Författningssamling [SFS] 1979:122 (Swed.).
4. Lagutskottets betänkande [LU] 1978/79:11; see also FONDEN FOR DEN MORALISKA RÄTTEN I SVERIGE, CAN YOU BRING UP CHILDREN SUCCESSFULLY WITHOUT SMACKING AND
When Swedish family law was codified in 1920, it expressly gave parents the right to punish their children. This language of the statute was extensively criticized because it resulted in the widespread use of severe corporal punishment. In an effort to discourage the use of harsh punishments, the Parenthood and Guardianship Code was amended in 1949 to replace the word "punish" with "reprimand." However, this change in the code was not accompanied by comparable changes in the criminal law. The Penal Code preserved the parental right to punish children and protected parents from criminal prosecution for actions against those under their supervision, as long as the injuries inflicted were not long-term. This exception from criminal liability for parents and guardians made child abuse cases difficult to prosecute until the exception was eliminated from the Penal Code in 1957.

A. The 1966 Amendment

In 1965, the rising number of child abuse cases led the justice minister to call for stronger statutory condemnation of corporal punishment. He proposed amending the Parenthood and Guardianship Code to expressly state that corporal punishment should be avoided. Justice Ministry officials concluded that an express disavowal of the parental right to inflict corporal punishment was the only effective way to deal with the problem. Even the 1957 repeal of the criminal assault exemption from the Penal Code had not stemmed the tide of child abuse. However, prevailing societal views made an absolute prohibition of physi-

Spanking? (1979) [hereinafter cited as Fondén].
7. Despite the long-standing concern about the rising number of child abuse cases, the Swedish government has not kept official statistics on child abuse cases except from 1969-1970. The government found 777 cases of child abuse in the country during this period. Fondén, supra note 4, at 4.
8. Id.
9. Id. at 11.
10. SOU 1978:10, at 15. The current statute reads: "A person who inflicts bodily injury, illness or pain upon another or renders him unconscious or otherwise similarly helpless, shall be sentenced for assault to imprisonment for at most two years or, in case the crime was petty, to pay a fine." The Penal Code of Sweden, ch. 3, § 5 (T. Sellin & J. Getz trans. 1972).
12. Id.
The ban of corporal punishment was contrary to the prevailing public opinion in Sweden concerning corporal punishment. A public opinion poll in 1965 showed that 53% of all adult Swedes considered physical punishment occasionally necessary in child rearing. However, by 1968 the percentage of persons supporting physical punishment had fallen from 53% to 42% while opposition to corporal punishment had increased.

This shift of opinion continued through 1971 when a survey indicated that support for corporal punishment had decreased to 35%.\textsuperscript{20} The 1971 survey also asked whether people thought the law prohibited corporal punishment. Sixty-one percent of the respondents felt that it was prohibited, while the remaining 39% either felt physical punishment was permitted by law or had no opinion on the issue.\textsuperscript{21}

The reasons for this shift in public opinion are difficult to pinpoint. The possible effect of the statutory change cannot be discounted. However, corporal punishment has also come under criticism in other countries that have not legislatively attempted to ban corporal punishment.\textsuperscript{22}

Despite the change in public opinion and a clear legislative intent to prohibit physical punishment, the Swedish legal community refused to treat the repeal of the right to reprimand as an absolute ban of corporal punishment.\textsuperscript{23} A leading commentator on family law wrote concerning the provision's repeal: "One ought to proceed, nonetheless, from the premise that minor physical intrusions are entirely permitted if the parent needs them to ably guide the child."\textsuperscript{24} A commentary on the criminal code concluded: "Although a right to punish as such no longer exists, it is clear that a physical correction can be minimally intrusive. Child abuse is not the necessary result. Indictments for completely innocent acts can sometimes be an uncalled for interference with personal affairs."\textsuperscript{25}

Such statements by legal scholars have been blamed for the judiciary's failure to recognize the 1966 amendment as a prohibition of corporal punishment.\textsuperscript{26} A 1975 district court case exemplifies the judicial response to the new laws. The court dismissed an indictment for abuse of a three-year-old child, stating: "Even if such a charge could be supported, it does not prove that the

\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} See Gil, supra note 2; Grandke & Stolpe, supra note 2; Renchon, supra note 2; Schröder, supra note 2.
\textsuperscript{23} This seems to be a reflection of the conflict between extra statutory defenses and positivism also found in other European systems. See G. FLETCHER, RETHINKING CRIMINAL LAW 779-84 (1978).
\textsuperscript{24} G. WALIN, KOMMENTAR TILL FÖRLÅTARBALKEN 118 (1971).
\textsuperscript{25} N. BECKMAN, KOMMENTAR TILL BROTTSBALKEN 125 (1970).
\textsuperscript{26} See SOU 1978:10, at 19.
force used by [the defendant] against his daughter has gone beyond the right to punish which parents have against children in their care.”

B. Pressures for Additional Reform

A legislative response to the judicial failure to implement the law was slow in coming. However, in 1972 legislators again introduced proposals that explicitly outlawed corporal punishment. These proposals were again rejected. The Riksdag’s Law Committee investigated the proposals and concluded that a public information campaign against physical punishment would be more appropriate than a statutory prohibition. This decision was applauded by many in the justice administration community who continued to fear that an express ban would give prosecutors the onerous and unrealistic task of prosecuting parents for spanking their children.

In preparation for the International Year of the Child, the Riksdag established the Commission on Children’s Rights on February 24, 1977. The Commission was charged with investigating ways of strengthening the legal position of children. In 1978 the Commission issued its first report, entitled Children’s Rights: A Ban Against Corporal Punishment. The report proposed the enactment of an explicit ban of physical punishment. Corporal punishment was viewed as “a form of degrading treatment” which results in a “lack of self-esteem and a personality change” that could affect the child for life. The report found that “[c]hild psychiatrists and psychologists have long been in agreement that physical punishment of children is inappropriate.”

Influenced by such opinions and the need for society to “work against all forms of violence,” the Commission found an express ban of corporal punishment necessary in order for children to grow up realizing that violence is not socially acceptable

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27. Id.
30. Id.
31. SOU 1978:10, at 3.
32. Id.
33. Id. at 11-12.
34. Id. at 23-24.
behavior. The Commission noted that, while most Swedes felt corporal punishment was prohibited, many people continued to violate the law. The Commission felt greater public knowledge of the law would result in increased compliance. However, the Commission recognized the difficulty of publicizing the mere absence of permission to reprimand or punish. Unless the ban were explicitly expressed, it would be difficult to increase public knowledge concerning the illegality of corporal punishment beyond the 1971 level.

II. THE LEGISLATIVE PROCESS LEADING TO THE BAN OF CORPORAL PUNISHMENT

In accordance with Swedish policy, the government sent the Commission's proposal to a number of interested parties for comments prior to legislative action on it. This process is called remiss, or remittance. Remittance allows a variety of groups to comment on proposed legislation. Over twenty-five different government agencies, private organizations, and political parties (including the law faculty of Uppsala University, the Housewives' Home and Society Federation, and the Swedish Save the Children Federation) responded to the proposed ban on corporal punishment. A majority of the respondents favored the ban.

The Circuit Court of Appeals of Southern Sweden wrote to

35. Id. at 24.
36. Id. at 9.
37. In Sweden, as in Great Britain, West Germany, and other parliamentary systems, the term "the government" refers to the cabinet.
38. Regeringens proposition 1978/79:67. Although this practice is followed in other European countries it has been the subject of little academic work. A limited discussion of the Swedish remittance process is found in Dahlen, A Governmental Response to Pressure Groups—The Case of Sweden, in PRESSURE GROUPS IN THE GLOBAL SYSTEM 148 (P. Willetts, ed. 1982). An in-depth study of the advantages and disadvantages of the remittance process is beyond the scope of this comment. The procedure presents an interesting addition to the legislative process that parallels the notice and comment requirements of American administrative law. The wide spectrum of views made available to the legislature through the remittance procedure gives a breadth not always achieved in the typical legislative hearing process in the United States.

However, the unanimity of the remittance comments on the corporal punishment ban raises doubts about whether the process actually operates to solicit comments from known opponents of a measure. Further, the remittance procedure creates substantial delays in the legislative process, slowing the government's ability to respond. On the other hand, for policy questions not requiring immediate legislative response, submission to a diverse and objective expert audience for comment could, at least in theory, provide legislatures with a variety of innovative and valuable approaches to societal problems.

the legislature reminding the government that in earlier remittances the court had “asserted the necessity of having state authorities take a fixed stand rejecting all forms of violence toward children.” The court’s remittance, focusing on the substance of the legislation rather than on the impact of the legislation on the judiciary, contrasts with the conventional American concept of separation of powers. The Swedish Women’s Leftist Alliance commented simply, “It is about time that the child’s right not to be abused was legally settled.” The Women’s League of the Moderate Party, Sweden’s most conservative political party, joined in the clamor of approval stating, “The regulations must be so worded that no doubt can exist in courts and among juvenile authorities, guardians, and other involved parties that physical or psychological violence cannot be accepted as a method of child rearing.”

The only objections to the proposal came from government prosecutors who felt the proposed change would lead to a greater frequency of child abuse complaints but no significant increase in actual protection for children. Surprisingly, no objections were made to the potential government intrusion into family affairs resulting from the proposed law.

After the government received the remittance responses, the Commission’s proposal was introduced in the Riksdag. In a report of its own, the government emphasized the role of the law in changing the attitudes of parents and guardians. The Riksdag’s Law Committee proposed slight changes in some sections of the law but did not substantively alter the ban. A nearly unanimous vote of the Riksdag adopted the government proposal.

III. Feasibility of Implementing the Ban

The law prohibiting corporal punishment of children was not intended to include criminal sanctions requiring changes in

40. Id. at 10.
41. Id. at 15.
42. Id. at 14.
43. Id. at 9, 11.
44. Id. at 1.
45. Id. at 6.
47. Swedish Save the Children Federation, The Ombudsman and Child Maltreatment 7 (1980) (the vote was 259 to 6).
the Penal Code. The legislation was consciously designed as a prohibition "without teeth." The Commission on Children's Rights noted in its first report that no changes in the Penal Code were proposed. The remittance comments also made reference to the noncriminal nature of the ban and suggested use of a strong advertising campaign to increase public awareness and obedience to the law. The government adopted this suggestion as part of its own report.

After the law was passed the government attempted to increase public knowledge of the statute. In 1971, under the old law, only 61% of all Swedes thought that the law prohibited corporal punishment. In 1980, 93% of the population was aware of the prohibition, and 96% knew of it by 1981. Nevertheless, this increased public awareness of the law has not resulted in its acceptance. The number of adults who felt that corporal punishment is sometimes necessary decreased by 9% between 1971 and 1979. However, the percentage has remained relatively constant since 1979. In 1981, although 96% of Swedish adults knew corporal punishment was illegal, 26% continued to believe that it was not only acceptable but sometimes necessary in child rearing.

The question of penalties for violation of the law is still undecided. Even if additional criminal sanctions are not imposed,

49. See, e.g., Regeringens proposition 1978/79:67, at 11-12 (Uppsala University law faculty's remittance comments).
50. Id. at 16.
51. See, e.g., FONDEN, supra note 4 (this pamphlet was distributed in ten different languages by the Justice Ministry as part of the advertising campaign).
52. See SWEDISH SAVE THE CHILDREN FEDERATION, supra note 19.
53. Id. A 1980 poll by a different pollster showed 93% of the adults knew of the law, yet 31% felt corporal punishment is sometimes necessary in child rearing. BURKE MARKETING RESEARCH, INDEX INFORMATION—"LAG OM AKA" (1980).
54. Despite claims that the law has no penal sanctions, a recent UPI newspaper story from Stockholm, Sweden stated:

An 11-year-old boy walked into a police station and reported his parents for spanking him, which is against the law in Sweden, authorities said.

It was believed to be the first case in which a child has actually used Sweden's 1979 Anti-Spanking Act, which bans any type of spanking or physical disciplining of children.

Police confirmed Monday that the boy, who reported his parents last Saturday, had been given a spanking. He was taken to a social worker, who contacted the parents.

The father and mother could be fined or sent to prison if found guilty of
the ban may severely impact child custody hearings. The law presently allows parents to retain custody unless they grossly abuse or neglect parental responsibilities. However, a second report issued by the Commission on Children’s Rights proposed new child custody laws that would remove children from parental custody when there is simple, rather than gross abuse or neglect of parental responsibilities. It is not clear whether the use of corporal punishment constitutes neglect or abuse under the proposal. However, the fact that the suggestion for lowering the standard for removing children from parental custody came from the same commission that proposed the ban of corporal punishment may provide justification for a judicial determination that corporal punishment is prima facie abuse or neglect under the new custody laws. Although the Commission never stated that the two reports were related, the combined effect of the reports may be to encourage dissolution of the family as punishment for parental use of corporal punishment.

The potential imposition of such harsh sanctions for parental use of physical punishment creates doubt about the future of the law. Although the remittances raised no direct opposition to the ban, they dealt with a law without sanctions or any mention of potential implications in child custody disputes. It is unclear what the government will do if corporal punishment can not be eliminated among the 25-30% of the population that continues to favor physical punishment despite the advertising campaign. The road has already been cleared for the government to remove children from homes as a means of eliminating physical punishment. The ban could also be strengthened by amending the Penal Code’s assault provisions. This would parallel the government’s amendment of the Penal Code in 1957 to strengthen the 1949 changes in the Parenthood and Guardianship Code. Such aggressive governmental attempts to enforce the ban could spur active opposition from the presently dormant segment of society that uses corporal punishment.

 spanking their child, [public prosecutor] Bjelle said.

Deseret News, May 1, 1984, at 12A, col. 4. It is unclear whether authorities would have prosecuted the parents in this case for child abuse under the pre-1979 statutes.


56. Id.
The Swedish ban of corporal punishment provides an interesting study of the efforts of a legislature to change public opinion. The ban demonstrates how a democratic government can interfere with traditional family relationships without creating an explosive public backlash. The Swedish approach to corporal punishment also suggests creative strategies for reform when a government is satisfied with effecting gradual changes in societal attitudes and behavior. The portion of the population that supports corporal punishment will not actively oppose the law so long as it does not include any penalties. This allows time to continue changing the attitudes and behavior of later generations. Thus, the strategy of passing an unenforceable ban may prove more effective than a sudden and aggressive change in the law. However, if the government ever aggressively enforces the ban, the issue of family autonomy may still result in a volatile political battle over the status of the family in modern Swedish society.

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