



**INFORMED CONSENT, TERMINATION OF
MEDICAL TREATMENT, AND THE FEDERAL
TORT CLAIMS ACT—A NEW PROPOSAL FOR
THE MILITARY HEALTH CARE SYSTEM**

Captain Stephen E. Deardorff

**EXPERT PSYCHOLOGICAL TESTIMONY ON
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Captain John R. Morris

Pamphlet

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CORRECTION: In Farhy, *Current Legal Trends in the Areas Administered by Israel*, 113 Mil. L. Rev. 47 (1986), a misprint incorrectly placed the word "not" in the last line of the first paragraph on page 51. The word should be deleted. The correct text of the paragraph reads:

Thus, in the 1978 case of *Al Taliah Weekly Magazine v. Minister of Defense*, a case arising from the refusal of the military commander to allow—for security reasons—an Arabic language newspaper published by West Bank residents to be distributed in the West Bank, the Court held that the military commander is bound not only by the relatively limited provisions of customary international law (which do not guarantee freedom of the press), but also by the much further reaching provisions of Israeli public law which does recognize that and other civil liberties.

The *Military Law Review* regrets the error.

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INFORMED CONSENT, TERMINATION OF MEDICAL TREATMENT, AND THE FEDERAL TORT CLAIMS ACT—A NEW PROPOSAL FOR THE MILITARY HEALTH CARE SYSTEM

by Captain Stephen E. Deardorff⁴

1545 hours, Friday, 13 September 198X, Tort Branch, Litigation Division, Office of The Judge Advocate General, Washington, D.C. The staff judge advocate, Fort Leonard Wood, Missouri, reports that the local hospital commander has been served with a temporary restraining order preventing the removal of Sergeant First Class Gary Brown from mechanical life-support systems. A few days earlier, Sergeant Brown's military doctors, believing him to be terminally ill with no hope of recovery, contacted his spouse, Jane Brown, to get her permission to remove the life-support equipment keeping Sergeant Brown alive. Pursuant to Army Regulation 40-3,¹ the physicians obtained Jane's written consent and wrote orders to remove all mechanical equipment and tubes from Sergeant Brown's body, to include intravenous (IV) and nasogastric (NG) tubes carrying nutrients. Before this could be done, Sergeant Brown's eldest son filed suit seeking injunctive relief. He alleges that Mrs. Jane Brown is estranged from Sergeant Brown and that he is the lawful next of kin.

⁴Judge Advocate General's Corps, United States Army. Currently assigned as Special Assistant United States Attorney, Western District of Texas. Formerly assigned as Brigade Legal Advisor and Legal Assistance Officer, VII Corps, Ludwigsburg, Federal Republic of Germany, 1984 to 1985; Senior Defense Counsel, Stuttgart, Federal Republic of Germany, 1982 to 1984; Senior Trial Counsel and Administrative Law Attorney, Office of the Staff Judge Advocate, Fort Gordon, Georgia, 1979 to 1982; Medical Service Corps officer, Munson Army Hospital, Fort Leavenworth, Kansas, 1975 to 1976; enlisted service, 1970 to 1972. B.S., Southwest Missouri State University, 1974; J.D., University of Missouri at Kansas City, 1979. Honor Graduate, 34th Judge Advocate Officer Graduate Course, 1986; Graduate, 90th Judge Advocate Officer Basic Course, 1979; Army Medical Department Officer Basic Course, 1975; Author of Casenote, *Traditional Classification of Entrants on Land: A More Flexible Standard is Needed*, 46 UMKC L. Rev. 162 (1977). Member of the bars of the state of Kansas, the United States District Court for the District of Kansas, the United States District Court for the Western District of Texas, the United States Court of Appeals for the Fifth Circuit, the United States Court of Military Appeals, the United States Army Court of Military Review, and the United States Supreme Court. **This** article was originally submitted in satisfaction of the thesis elective of the 34th Judge Advocate Officer Graduate Course. Captain Deardorff was the co-recipient of the award for the best thesis of the 34th Graduate Course.

¹Dep't of Army, Reg. No. 40-3, Medical, Dental and Veterinary Care (15 Feb. 1985) [hereinafter AR 40-3].

1550 hours, Friday, 13 September 198X, Office of the Staff Judge Advocate, Fort Bliss, Texas. The claims officer advises the staff judge advocate that Mrs. Elizabeth White, age twenty-four, has filed a \$1,000,000 claim. Mrs. White alleges that she is an avid amateur athlete and that she can no longer participate in marathon racing due to the negligence of Colonel (Dr.) Burgundy. She claims to have developed urinary stress incontinence as a result of an abdominal hysterectomy performed by Dr. Burgundy on 22 April 198X-1. She does not claim that Dr. Burgundy erred in performing the surgery. Rather, she complains that Dr. Burgundy did not tell her everything he should have told her. She alleges that, had he done so, she would not have had the surgery.

Dr. Burgundy was first assigned to Fort Bliss (and the state of Texas) on 31 March 198X-1. On 1 April 198X-1, Mrs. White came to the hospital complaining of severe abdominal pain. Medical tests revealed that she probably had a malignant ovarian cyst. Dr. Burgundy properly advised her of the need for immediate surgery and of the scope of the necessary procedure. He informed her that he might have to remove her ovaries and her uterus. Mrs. White asked Dr. Burgundy to perform the operation and to do whatever he believed was necessary. Dr. Burgundy returned to his office and dictated a detailed summary of his conversation with Mrs. White. He obtained Standard Form 522,² the Army consent form, from the Patient Administration Division and returned to Mrs. White's room. He explained the form to her and answered all of her questions. She voluntarily signed the form. The next morning he skillfully performed a total abdominal hysterectomy. Pathology later confirmed the presence of cancer.

Texas statutes require the use of a specific form and the disclosure of specific information about abdominal hysterectomies.³ Dr. Burgundy was not aware of this. Some hospital personnel were aware of Texas law, having been repeatedly cautioned by the Fort Bliss legal office. Few of the doctors have attempted to comply with Texas law. Instead, they have chosen to rely upon the consent provisions set out in Army Regulation 40-3.

²General Serv. Admin. & Interagency Comm. on Medical Records, Standard Form 522, Request for Administration of Anesthesia and for Performance of Operations and Other Procedures (Oct. 1976) [hereinafter SF 522].

³For a detailed discussion of how Texas statutes provide for a cause of action against the doctor for failure to use these procedures, see *infra* notes 251 & 305, and accompanying text. See also *infra* Appendix A of the Addendum to this article.

1655 hours, Friday, 13, September 198X, the Staff Judge Advocate, Fort Lee, Virginia calls the Administrative Law Division, The Judge Advocate General's School, Charlottesville, Virginia, for assistance. His hospital ethics panel representative is at the Fort Lee hospital and in need of help. Lieutenant Colonel (retired) Green is in the hospital and is terminally ill. She has been pleading with her doctors to let her die. She has a very painful form of lung cancer which is causing her to very slowly drown in her own body's fluid. The strain on her heart has caused two cardiac arrests in the last 24 hours. Each time she was defibrillated "back to life." Her husband and two children are not emotionally ready for her to die and have therefore argued that she is not competent to request a do-not-resuscitate (DNR) order due to the intense pain she is suffering. Colonel Green's doctor says she is competent, but the chief of the Medical Department agrees with the family. The hospital commander has ordered the ethics panel to decide whether Colonel Green is competent and whether they should implement a DNR order. The Staff Judge Advocate's representative wants to know if they have the authority to decide these issues and, if so, does it require a unanimous vote?

I. INTRODUCTION

It seems that similar issues, involving civilian hospitals, are now appearing in the news media about once a week. The Army has not been significantly involved with these issues inasmuch as military doctors have not had regulatory authority to write termination of medical treatment orders.⁴ Recently, however, the Army incorporated procedures for do-not-resuscitate orders⁵ and removal of life-support equipment into its regulations.⁶ Given this,

⁴*But see* Tune v. Walter Reed Army Medical Hosp., 602 F. Supp. 1452 (D.D.C. 1985). Mrs. Tune was a 71-year-old, terminally ill cancer patient who was being kept alive by a respirator. She wanted the respirator disconnected so that she could die. Although the doctors were sympathetic to her wishes, Army policy precluded withdrawal of any life-support system once it was placed in operation and, as a federal institution, Walter Reed Army Medical Center was not subject to the District of Columbia Natural Death Act. A guardian *ad litem* was appointed to ascertain Mrs. Tune's state of health, her desires, and her competence. All members of the family were in accord with the patient's wishes. The Army concurred in all but the prayer for relief and even waived appellate review prior to the court's decision. The court granted the patient's petition and ordered that she be removed from life-support systems.

⁵AR 40-3, chap. 19.

⁶Enclosure to Dep't of Army Letter, DASG-PSQ, subject: Withdrawal of Life-Sustaining Treatment, 30 Aug. 1985 [hereinafter Encl., DASG-PSQ Letter (1985)]. The letter was published by order of the Secretary of the Army to provide policy and procedures for the withdrawal of life-sustaining treatment within Army

and the extent of the Army's medical business, it would not be surprising for the above hypotheticals to become actual events in our military hospitals in the near future.'

The do-not-resuscitate and removal-of-life-support issues are part of a larger, more general medical-legal doctrine—the informed consent doctrine. To properly decide the correct course of action for situations similar to those stated above, doctors, lawyers, and hospital commanders must first understand the doctrine of informed consent. Military litigators and claims officers must be able to apply the doctrine to cases arising under the Federal Tort Claims Act.⁸

In *Tune v. Walter Reed Army Medical Hospital*,⁹ the Army's leading case on removal of life-sustaining equipment, the court relied heavily on a leading informed consent case, *Canterbury v. Spence*,¹⁰ in stating that "it is the patient, not the physician, who ultimately decides if treatment—any treatment—is to be given at all."¹¹ The *Tune* court concluded that "a competent, mature patient has a right to be fully informed of the possible consequences of a course of treatment before he permits the medical ministrations to **begin**."¹² In other words, the informed consent doctrine was an integral part of the court's decision to remove life-support equipment.

In this article, I will present a succinct digest of state informed consent law and review the impact of state law on litigation arising under the Federal Tort Claims Act;¹³ discuss the Federal Tort Claims Act's discretionary function **exception**¹⁴ and the probability that the Army can effectively avoid state informed consent law in Army medical malpractice cases; examine the adequacy of the Army's current implementing regulations on informed consent,¹⁵ do-not-resuscitate orders,¹⁶ and withdrawal of

medical treatment activities. Procedures contained in the enclosure are to be published in the next revision of AR 40-3.

The Army has recently been sued for noncompliance with the provisions of its new regulation on removal of life-sustaining treatment. See *infra* notes 289-95 and accompanying text.

⁸28 U.S.C. §§ 1346(b), 2671-2680 (1982). The Federal Tort Claims Act waives the United States' sovereign immunity in tort cases.

⁹602 F. Supp. 1452 (D.D.C. 1985).

¹⁰464 F.2d 772 (D.C.Cir.), *cert. denied*, 409 U.S. 1064 (1972).

¹¹602 F. Supp. at 1455 (emphasis added).

¹²*Id.*

¹³28 U.S.C. § 1346(b), 2671-80 (1982).

¹⁴28 U.S.C. § 2680(a) (1982).

¹⁵AR 40-3, para. 2-19.

¹⁶AR 40-3, chap. 19. I do not intend to discuss the ethical or moral decisions concerning whether do-not-resuscitate (DNR) orders or removal from life-support

life-sustaining **treatment**;¹⁷ and present a proposal that the armed forces promulgate a single informed consent regulation to deal with **all** medical consent situations, to include the termination of medical treatment.

II. INFORMED CONSENT

A. INTRODUCTION

The informed consent doctrine is “highly complex, involving issues of law, morality, and ethics and...is the cause of continuing controversy among the multiple parties.”¹⁸ On one hand there are those who feel that the patient has an absolute right to make the medical decisions concerning the patient’s own **body**.¹⁹ On the other, physicians are disturbed by “[their] inability

procedures should or should not be implemented. Rather, to the maximum extent possible, I will only address the legal implications resulting from the policy decision to implement such procedures.

¹⁷Encl., DASG-PSQ Letter (1985).

¹⁸J. Ludlam, *Informed Consent I* (1978). The book was commissioned by the American Hospital Association to “bring more light to the subject by focusing on the underlying principles and rationale of informed consent and to identify the somewhat disparate paths the doctrine has taken at the hands of different courts and state legislatures.” *Id.* at v.

For excellent discussions of the controversy among the multiple parties see Meisel, *The “Exceptions” to the Informed Consent Doctrine: Striking a Balance Between Competing Values in Medical Decisionmaking*, 1979 Wis. L. Rev. 413, 413-29 [hereinafter *Exceptions*] and B. Barber, *Informed Consent in Medical Therapy and Research* (1980).

¹⁹In 1972, the American Hospital Association released a statement entitled *A Patient’s Bill of Rights*. The primary purpose of the statement was to inform patients of their rights and to prompt them to exercise those rights. It stated in part:

2. The patient has the right to obtain from his physician complete current information concerning his diagnosis, treatment, and prognosis in terms the patient can be reasonably expected to understand. When it is not medically advisable to give such information to the patient, the information should be made available to an appropriate person in his behalf. . . .

3. The patient has the right to receive from his physician information necessary to give informed consent prior to the start of any procedure and/or treatment. Except in emergencies, such information for informed consent should include but not necessarily be **limited** to the specific procedure and/or treatment, the medically significant risks involved, and the probable duration of incapacitation. Where medically significant alternatives for care or treatment exist, or when the patient requests information concerning medical alternatives, the patient has a right to such information. The patient also has the right to **know** the name of the person responsible for the procedures and/or treatment.

to determine in advance whether [they have] properly documented [their] professional responsibility. [Furthermore, many] physicians find intellectual difficulty with the concept that not only does the patient have the right to participate in and control the ultimate medical decision but the patient has the right to make the 'wrong medical' decision."²⁰

Regardless of who is right, we cannot ignore the fact that the moral and ethical statements contained in professional medical codes, dating from the Hippocratic oath to the present, have influenced, and will continue to influence, the development of the informed consent doctrine. In his book about the influence of social systems on informed consent,²¹ Bernard Barber states:

For the longest part of their history, professional medical codes have been paternalistically nonegalitarian. . . . The Hippocratic Oath required that physicians refuse requests in certain cases. . . . The oath also stipulated that it is the doctor's right to determine what confidences to keep in his dealings with his patients. So, from the beginning in the practice of medicine, informed consent has not been an accepted norm.²²

B. EARLY JUDICIAL DEVELOPMENT

In perhaps the earliest reported case, *Slater v. Baker*,²³ the court held a surgeon and an apothecary liable for disuniting a substantially healed fracture without the patient's consent. The defense argued that the case should have been dismissed because proof of the consent issue did not conform to plaintiff's pleading, which alleged that the surgeons negligently performed the medical procedure. The court decided, however, that it was improper to disregard "the usage and law of surgeons [by] disunit[ing] the callous without consent" and that "it is reasonable that a patient should be told what is about to be done to him."²⁴ Thus it

4. The patient has the right to refuse treatment to the extent permitted by law, and to be informed of the medical consequences of his action.

J. Ludlam, *Informed Consent* 5-6 (1978). *See also infra* notes 101-03 and accompanying text, concerning the subjective patient disclosure standard.

²⁰J. Ludlam, *Informed Consent* 2 (1978).

²¹B. Barber, *supra* note 18.

²²*Id.* at 28 (citing J. Berlant, *Profession and Monopoly: A Study of Medicine in the United States and Great Britain* (1975) and Pellegrino, *Medical Ethics, Education and the Physician's Image*, 235 *J. Am. Med. A.* 1043, 1043-44 (1976)).

²³95 Eng. Rep. 860 (K.B. 1767).

²⁴*Id.* at 862.

appears that in 1767 there was some requirement for surgeons to obtain the patient's consent prior to operating.

In the latter part of the nineteenth century and during the first part of this century, American cases reported that, as a general rule, the physician could not treat a patient without his consent.²⁵ The distinguishing features of the early cases were: courts often focused on the patient's behavior;²⁶ courts were often unwilling to hold a doctor liable;²⁷ and the basis for liability rested on the intentional torts of assault and battery,²⁸ or trespass to the

²⁵See *Burroughs v. Crichton*, 48 App. D.C. 596 (1919); *Pratt v. Davis*, 224 Ill. 300, 79 N.E. 562 (1906); *State v. Housekeeper*, 70 Md. 162, 16 A. 382 (1889); *Mohr v. Williams*, 95 Minn. 261, 104 N.W. 12 (1905), *overruled on other grounds by* *Genzel v. Halvorson*, 248 Minn. 527, 80 N.W.2d 854 (1957); *Schloendorff v. Society of N.Y. Hosps.*, 211 N.Y. 125, 105 N.E. 92 (1914), *overruled on other grounds by* *Bing v. Thunig*, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 1 (1957); *Rolater v. Strain*, 39 Okla. 572, 137 P. 96 (1913); *Hively v. Higgs*, 120 Or. 588, 253 P. 363 (1927); Note, *Consent as a Prerequisite to a Surgical Operation*, 14 Univ. Cin. L. Rev. 161, 181-83 (1940).

²⁶In Meisel, *The Expansion of Liability for Medical Accidents: From Negligence to Strict Liability by Way of Informed Consent*, 56 Neb. L. Rev. 51 (1977), the author distinguishes between the early consent-to-medical-treatment cases wherein the courts "developed an extensive body of law specifying what sorts of behavior on the part of the patient amount to a consent," and the more contemporary "informed consent" cases wherein "the courts also have begun to focus on the conduct of the physician in obtaining the patient's consent." *Id.* at 75. In evaluating the development of the informed consent doctrine he concludes that:

While the values which the informed-consent doctrine ostensibly seeks to implement may, in their origins, have been the primary interest and purpose of the doctrine's judicial progenitors, the contemporary application of the doctrine serves a quite different purpose. The requirement of informed consent to medical treatment has, for at least the last two decades, been used as the cloth from which the courts slowly have begun to fashion a no-fault system for compensating persons who have suffered bad results from medical treatment.

Id. at 77.

²⁷Several cases recognized the consent requirement but found implied consent in the patient's presentation for treatment. See *Knowles v. Blue*, 209 Ala. 27, 95 So. 481 (1923); *Barfield v. South Highland Infirmary*, 191 Ala. 553, 68 So. 30 (1915); *O'Brien v. Cunard S.S. Co.*, 154 Mass. 272, 28 N.E. 266 (1891); *McGuire v. Rix*, 118 Neb. 434, 225 N.W. 120 (1929); *Bennan v. Parsonnet*, 83 N.J.L. 20, 83 A. 948 (1912); *Boydston v. Giltner*, 3 Or. 118 (1869); *Dicenzo v. Berg*, 340 Pa. 305, 16 A.2d 15 (1940). See also W. Prosser, *Handbook of the Law of Torts* § 18, at 101-03 (4th ed. 1971).

²⁸In *Schloendorff v. Society of N.Y. Hosps.*, 211 N.Y. 125, 130, 105 N.E. 92, 93 (1914), *overruled on other grounds by* *Bing v. Thunig*, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 1 (1957), Judge Cardozo states, "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." See also *State v. Housekeeper*, 70 Md. 162, 16 A. 382 (1889); *Mohr v. Williams*, 95 Minn. 261, 104 N.W. 12 (1905), *overruled on other grounds by* *Genzel v. Halvorson*, 248 Minn. 527, 80 N.W.2d 854 (1957); *Rolater v. Strain*, 39 Okla. 572, 137 P. 96 (1913).

person.²⁹

Alan Meisel, a prominent writer on the informed consent doctrine, presents the following mental picture of the relationship between physician and patient during this period:

In substance the physician said to the patient, "You need thus-and-so to get better," and the patient responded with... "O.K. Doc, whatever you say"; [or] "Go ahead and do thus-and-so"; [or] "Go ahead and do 'thus,' but I don't want you to do any 'so'"; [or] "If that's what I need, then I'd rather be sick, and don't do anything at **all.**" Each of these responses (even the express prohibition) has been relied upon by physicians as authorization to treat, and the courts have generally agreed that the patient has, by speaking some such phrase, authorized the physician to proceed and thereby provided the physician with a defense to an action for battery.³⁰

Beginning in the 1940s several marked changes occurred. For one thing, the German concentration camp atrocities resulted in a greater demand for human rights and human dignity. In 1947, following the Nuremberg trials and a realization of the extent of the experiments the Nazi doctors had performed on prisoners without their consent, a code relating to medical experimentation was formulated, which specifically required informed consent.³¹ The rapid changes in medical research codes did not instantly influence changes in the consent required from patients seeking routine medical care, however.

Following the war, rapid advances in technology and significant advances in medicine made many more treatment alternatives available at far greater risks. Doctors were no longer restricted to merely making patients comfortable until they died. They now could keep patients alive for longer periods of time, and patients began to expect and demand miraculous cures. More physicians began to study and practice in specialized areas and the family physician disappeared. More patients went to the hospital, where they faced a "bewildering spectrum of specialists and consultants who [were] often, at best, a vague name and an overwhelming presence."³²

²⁹Pratt v. Davis, 224 Ill. 300, 79 N.E. 562 (1906).

³⁰Meisel, *supra* note 26, at 79-80; *see also infra* note 33.

³¹B. Barber, *supra* note 18, at 29-30 (1980); *see also* Beecher, *Some Guiding Principles for Clinical Investigation*, 195 J. Am. Med. A. 1135, 1135-36 (1966).

³²J. Ludlam, *Informed Consent* 8 (1978). This may explain the last sentence of paragraph 3, *A Patient's Bill of Rights*, *supra* note 19.

Although merely mentioning the procedure to the patient generally continued to operate as a shield for physicians,³³ the courts began to look for ways to hold the doctor liable. For example, a doctor who undertook to explain the procedure might be held liable if he affirmatively misrepresented the nature of the procedure or its consequences and thus invalidated the consent.³⁴ Eventually, “[a]s litigation over the contours of a legally valid consent proceeded, the concept of consent, like that of negligence, began to be viewed as being quite malleable, if not quite infinitely expandable.”³⁵

C. JUDICIAL CREATION OF THE INFORMED CONSENT DOCTRINE

In 1957 and 1958,³⁶ courts in California and Minnesota clearly began to change the rules concerning the physician’s duty to disclose information. In *Salgo v. Leland Stanford Jr. University Board of Trustees*,³⁷ a California appellate court held that the physician had an affirmative duty to make a “full disclosure of facts necessary to an *informed consent*.”³⁸ In *Bang v. Charles T.*

³³See *supra* note 30 and accompanying text; see also *Corn v. French*, 71 Nev. 280, 289 P.2d 173 (1955), where the physician examined the patient’s breast and recommended hospitalization for some tests. He then called the hospital and in the presence of the patient mentioned removal of her breast. The patient told the doctor she did not want her breast removed. He said he had no intention of doing so. The patient later signed a consent form for a “mastectomy,” not knowing what the term meant. Before she was put to sleep, the patient again told the doctor he was not to remove her breast. When the patient recovered from the anesthesia her breast was gone. Amazingly, the court did not question the *validity* of the consent. Rather, the court held that there was a jury question as to whether she had *revoked* the consent!

³⁴See *Wall v. Brim* 138 F.2d 478 (5th Cir. 1943); *Hunt v. Bradshaw*, 242 N.C. 517, 88 S.E.2d 762 (1955) (dictum); *Waynick v. Reardon*, 236 N.C. 116, 72 S.E.2d 4 (1952); *Paulsen v. Gundersen*, 218 Wis. 578, 260 N.W. 448 (1935). See also Meisel, *supra* note 26, at 80-81. Mr. Meisel analogizes to other areas of tort law where the actor has had no duty to act. For example, the general rule has been that the seller of a house must merely use due care when volunteering information or responding to inquires. Mr. Meisel points out, however, that this rule has changed so that the seller must now disclose certain known dangers. *Id.* at 81 n.80.

³⁵Meisel, *supra* note 26, at 80.

³⁶Mr. Meisel properly states that “the development of the informed-consent doctrine is better characterized as an organic process than as a single event.” *Id.* at 82 n.82. For the purposes of this brief digest, however, I chose not to analyze all the dicta presented in the various cases.

³⁷154 Cal. App. 2d 560, 317 P.2d 170 (1957).

³⁸*Id.* at 578, 317 P.2d at 181 (emphasis added). The case primarily describes the therapeutic privilege exception to the informed consent doctrine; the case set aside a verdict for the plaintiff because the jury was not instructed that the physician has discretion to take into account the patient’s condition before deciding what information to disclose. Nevertheless, the court clearly places an affirmative disclosure duty on the physician. Where the case fails is that it does not specify the types of information required under the duty.

Miller Hospital, the Minnesota Supreme Court held a physician liable for failing to provide information about alternative treatments.³⁹

Elsewhere during this period, other courts expressed dissimilar views on the topic. The United States Court of Appeals for the Fifth Circuit,⁴⁰ and the Missouri Supreme Court⁴¹ agreed, in dicta, that there should be an affirmative duty on the physician to disclose information about the diagnosis and proposed treatment. Just previously, however, the Fifth Circuit had affirmed a Louisiana district court decision that a physician had no affirmative duty to disclose such information.⁴² The Supreme Court of Washington also rejected such a duty.⁴³ In *Ferrara v. Galluchio*,⁴⁴ the New York Court of Appeals went so far as to hold physicians liable for the mental anguish caused by disclosing that the radiation therapy the patient had received could cause cancer.

In 1960, the Supreme Courts of *Kansas*⁴⁵ and *Missouri*⁴⁶ began what many commentators believe to be the contemporary period of informed consent.⁴⁷ In *Natanson v. Kline*,⁴⁸ the patient sustained

³⁹251 Minn. 427, 434, 88 N.W.2d 186, 190 (1958) (prostate operation resulted in severance of spermatic cords).

⁴⁰See *Lester v. Aetna Casualty Surety Co.*, 240 F.2d 676, 679 (5th Cir. 1957) (Although the court agreed, in general, that physicians must advise patients of the diagnosis and proposed treatment, the court objected to the plaintiff's contention that the physician failed to advise him of the dangerous nature of the procedure. The court was concerned that the plaintiff was presenting his case "as though it were one of a person being deprived by another of due process of law.")

⁴¹See *Steele v. Woods*, 327 S.W.2d 187, 198-99 (Mo. 1959) (In addressing a question of fact of whether the patient was told of the alternative procedure, the court found that the doctor should have advised the patient of the alternatives.)

⁴²See *Hall v. United States*, 136 F. Supp. 187, 193 (W.D. La. 1955), *aff'd*, 234 F.2d 811 (5th Cir. 1956) (The Fifth Circuit did not address the consent issue.)

⁴³See *Wood v. Pommerening*, 44 Wash. 2d 867, 271 P.2d 705 (1954).

⁴⁴5 N.Y.2d 16, 20-21, 152 N.E.2d 249, 252, 176 N.Y.S.2d 996, 999 (1958) (The patient sought assistance from a dermatologist as a result of injuries sustained in the course of radiation therapy administered by the defendant physicians. The dermatologist disclosed that the patient should have tissue examinations done every six months as cancer could develop as a result of the treatment she had received. She developed a severe case of cancerphobia. The court held that the defendant physicians were liable for the mental anguish caused by the dermatologist's disclosure.)

⁴⁵*Natanson v. Kline*, 186 Kan. 393, 350 P.2d 1093, *opinion on denial of motion for rehearing*, 187 Kan. 186, 354 P.2d 670 (1960).

⁴⁶*Mitchell v. Robinson*, 334 S.W.2d 11 (Mo. 1960), *opinion on denial of motion for rehearing*, 360 S.W.2d 673 (Mo. 1962).

⁴⁷See *supra* note 26 and accompanying text; see also C. Lidz, A. Meisel, E. Zerubavel, M. Carter, R. Sestak & L. Roth, *Informed Consent: A Study of Decisionmaking in Psychiatry* 12 (1984) [hereinafter Lidz]; B. Barber, *supra* note 18, at 36; *Exceptions*, *supra* note 18, at 420; J. Ludlam, *Informed Consent* 21 (1978); W. Prosser, *supra* note 27, § 18, at 165.

⁴⁸186 Kan. 393, 350 P.2d 1093, *opinion on denial of motion for rehearing*, 187 Kan. 186, 354 P.2d 670 (1960).

injuries during radiation therapy following a mastectomy. The plaintiff did not claim malpractice in the performance of the therapy, but rather alleged that the treating physician “failed to warn the appellant the course of treatment which he undertook to administer involved great risk of bodily injury or death.”⁴⁹ Citing *Salgo*,⁵⁰ the court held that the physician “was obligated to make a reasonable disclosure to the appellant of the nature and probable consequences of the suggested or recommended cobalt irradiation treatment, and he was also obligated to make a reasonable disclosure of the dangers within his knowledge which were incident to, or possible in, the treatment he proposed to administer.”⁵¹ Further, the physician must explain to the patient “in language as simple as necessary” the nature of the ailment, the probability of success, and the alternative methods of treatment.⁶² The court limited the disclosure to what a reasonable medical practitioner would make under the same or similar circumstances.⁵³

Two days later the Missouri court announced its decision in *Mitchell v. Robinson*.⁵⁴ The cause of action was for negligence arising from the performance of insulin shock and electroshock treatments for schizophrenia. The plaintiff also alleged that he was not informed of the inherent risk of convulsions resulting in bone fractures. The court held that, “considering the nature of Mitchell’s illness and this rather new and radical procedure with its rather high incidence of serious and permanent injuries not connected with the illness, the doctors owed their patient in possession of his faculties the duty to inform him generally of the possible serious collateral **hazards**.”⁵⁵

One commentator appropriately stated, “The combined legal effect of the Mitchell and Natason decisions was to establish a clear common law duty to disclose the risks of medical treatment. The combined practical effect was to open the floodgates to a rash of informed consent **claims**.”⁵⁶

⁴⁹*Id.* at 400, 350 P.2d at 1099.

⁵⁰*Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees*, 154 Cal. App. 2d 560, 317 P.2d 170 (1957).

⁵¹*Id.* at 410, 350 P.2d at 1106.

⁵²*Id.*

⁵³*Id.* This is the beginning of the professional disclosure standard. See *infra* notes 78-85 and accompanying text.

⁵⁴334 S.W.2d 11 (Mo. 1960), *opinion on denial of motion for rehearing*, 360 S.W.2d 673 (Mo. 1962).

⁵⁵*Id.* at 19.

⁵⁶J. Ludlam, *Informed Consent* 23 (1978).

Subsequently, in the last 20-25 years, the courts have been repeatedly called upon to decide the what, when and how issues involving disclosure. In response, they have developed three or four⁵⁷ different standards of disclosure, two different proximate causation tests, and at least three general exceptions to the doctrine. Recently, the courts more frequently have addressed cases involving patients' requests for termination of medical treatment orders; one may expect litigation in these areas to shift from the question of whether these actions *should* be done (a constitutional, moral, and ethical question) to the examination of *how* these actions *were* done (a due care question).

While this article will focus upon the current judicial and statutory status of the informed consent doctrine, the assault and battery, consent-to-medical-treatment action is not a moot issue.⁵⁸ In *Downer v. Veilleux*,⁵⁹ the Supreme Court of Maine noted that, although the majority trend was "towards treating the physician's failure to disclose as merely another variety of medical negligence," the battery theory is still available in "cases in which the treatment is either against the patient's will or substantially at variance with the consent *given*."⁶⁰

Normally battery actions should be brought only in cases where the physician fails to disclose the nature or character of the procedure to be performed.⁶¹ The negligence theory is the primary cause of action in cases where the physician fails to exercise due

⁵⁷Whether a fourth standard exists is discussed *infra* text accompanying notes 101-02.

⁵⁸The Federal Tort Claims Act generally prohibits the bringing of any intentional tort cause of action, such as assault or battery, against the United States. 28 U.S.C. § 2680(h) (1982). But 10 U.S.C. § 1089(e) (1982), popularly known as the Gonzales bill, provides that 28 U.S.C. § 2680(h) will not bar a claim arising out of a wrongful act or omission of any physician, dentist, nurse, or other supporting personnel of the armed forces. But *cf.* *Doe v. United States*, 618 F. Supp. 503 (D.S.C. 1984), *aff'd*, 769 F.2d 174 (4th Cir. 1985) (An Air Force social worker exposed himself to a patient and suggested sexual acts. The court held that such conduct was an assault under South Carolina law but that the social worker's conduct was outside the scope of his employment. Thus the action was not maintainable under the Federal Tort Claims Act.).

⁵⁹322 A.2d 82 (Me. 1974).

⁶⁰*Id.* at 89. See also *Berkey v. Anderson*, 1 Cal. App. 3d 790, 803-04, 82 Cal. Rptr. 67, 76-77 (1969); *Cooper v. Roberts*, 220 Pa. Super. 260, 286 A.2d 647 (1971).

⁶¹In *Lloyd v. Kull*, 329 F.2d 168 (7th Cir. 1964), the patient consented to a surgical repair of a vesico-vaginal fistula. During the unsuccessful attempt to repair the fistula, the doctor removed a mole from the patient's leg. Using an assault and battery theory, the patient was awarded \$500 for the unauthorized removal of the mole. See also J. Ludlam, *Informed Consent* 23-24 (1978) ("The cases in which the battery theory is properly applied include: where the physician. . . exceeds the scope of [the] consent, misrepresents the severity of the operation, or performs an operation of a substantially different nature.").

care in disclosing potential risks or alternative courses of treatment.⁶² But, in a given case, the trier of fact may have to decide whether the physician intentionally misrepresented the nature or risk of the procedure (and thus vitiated the consent) or negligently failed to disclose the necessary information. Given that, as well as the relative newness⁶³ of the negligence action and the persistence of the assault and battery action, it is important to remain cognizant of the procedural differences between the two types of actions.⁶⁴

In the battery action there is no causation in fact test or proximate cause obstacle.⁶⁵ The plaintiff need only prove that the procedure was performed without consent. Also, the burden of proof may be substantially lessened in the battery action inasmuch as the plaintiff will most likely avoid the expert testimony,⁶⁶ standard of care,⁶⁷ and actual damage⁶⁸ requirements associated with negligence actions.

Other state law differences between the battery and negligence actions include the availability of punitive damages⁶⁹ and the statute of limitation periods.⁷⁰ Fortunately or unfortunately, depending upon your perspective, the Federal Tort Claims Act⁷¹

⁶²In *Cobbs v. Grant*, 8 Cal. 3d 229, 240-41, 502 P.2d 1, 8, 104 Cal. Rptr. 505, 512 (1972), the court states:

The battery theory should be reserved for those circumstances when a doctor performs an operation to which the patient has not consented. . . . However, when the patient consents to certain treatment and the doctor performs that treatment but an undisclosed inherent complication with a low probability occurs, no intentional deviation from the consent appears; rather the doctor in obtaining the consent may have failed to meet his due care duty to disclose pertinent information. In that situation the action should be pleaded in negligence.

⁶³State courts are still dealing with the adoption of the informed consent doctrine. For example, the South Carolina Court of Appeals first recognized the doctrine in *Hook v. Rothstein*, 281 S.C. 541, 316 S.E.2d 690 (Ct. App.), *cert. denied*, 283 S.C. 64, 320 S.E.2d 35 (1984).

⁶⁴See also *supra* note 58.

⁶⁵See *infra* notes 110-24 and accompanying text.

⁶⁶See *infra* notes 81-84 and accompanying text.

⁶⁷See *infra* notes 74-109 and accompanying text.

⁶⁸See generally *W. Prosser, supra* note 27, § 9 (4th ed. 1971).

⁶⁹*Id.* § 2, at 9.

⁷⁰The statute of limitations difference may or may not favor the plaintiff. For example, in *Terry v. Albany Medical Center Hosp.*, 78 Misc. 2d 1035, 359 N.Y.S. 2d 235 (1974), the plaintiff pleaded both theories. The negligence theory survived due to a three-year statute of limitations while the battery action was barred by a one-year statute.

⁷¹28 U.S.C. §§ 1346(b), 2671-2680 (1982).

prohibits imposition of punitive damages⁷² and sets its own statute of limitations.⁷³

D. ESTABLISHING THE PHYSICIAN'S DUTY TO DISCLOSE, LE., THE STANDARD OF CARE

The courts have basically agreed as to what constitutes the so-called "'classical' elements of informed consent."⁷⁴ The real problem arises when doctors, lawyers, and courts have to decide what particular information should be disclosed in a given case. This problem is greatly aggravated for the military physician by the fact that the various state courts have developed three or four⁷⁵ diverging standards of disclosure.⁷⁶

The majority view, often referred to as the professional standard, requires the physician to disclose those facts a reasonable medical practitioner in a similar field of practice and in a similar community would disclose. The minority or lay standard requires the physician to disclose those facts a reasonable patient would deem material or significant in deciding whether to submit to a course of treatment.⁷⁷

1. The Professional Standard.

In *Gouin v. Hunter*,⁷⁸ the patient alleged that the doctor should have told her that the multiple incisions required in a vein stripping procedure would result in her being scarred and disfigured. Although the court recognized that the physician had a duty to reveal serious risks involved in the procedure, it held that

⁷²*Id.* § 2674.

⁷³28 U.S.C. § 2401(b) (1982).

⁷⁴In Meisel, *supra* note 26, at 86-87, Mr. Meisel points out that:

[*Natanson* required] disclosure of the nature of the ailment, the nature of the proposed treatment, the probability of success, and possible alternative treatments. These requirements, with slight modifications of terminology, are the classical elements of informed consent, and constitute the basis from which the corpus of informed-consent rules, subrules, and exceptions have developed.

See also *supra* notes 48-52 and accompanying text.

⁷⁵It is questionable whether Oklahoma has adopted a fourth disclosure standard. See *infra* notes 101-02 and accompanying text.

⁷⁶The Army's current regulation on informed consent fails to provide the military physician with any standard to follow. See AR 40-3, para. 2-19; *infra* notes 338-47 and accompanying text.

⁷⁷See generally B. Barber, *supra* note 18, at 36-41 (1980); Lidz, *supra* note 46, at 13-15; J. Ludlam, *Informed Consent* 27 (1978); Meisel, *supra* note 25, at 93-99; Note, *Professional Standard Determines Physician's Duty to Disclose*, 37 S.C.L. Rev. 251, 251-56 (1985).

⁷⁸374 P.2d 421 (Wyo. 1962).

the manner in which the physician discharges the duty is a matter for medical judgment. The court further held that in the absence of proof that the patient's physician departed from the practice of other competent physicians in furnishing information about this procedure to a patient, the verdict in the physician's favor denying the patient's claim was justified.⁷⁹

The professional standard normally requires that the patient use expert testimony to prove that the physician's failure to disclose a certain factor deviated from the community standard.⁸⁰ Thus, the standard has been the subject of much criticism.⁸¹

The foremost objection is that the patient must prove what does not exist—a community standard.⁸² It seems very likely that, given the availability of several medical options in a particular situation and the unlimited range of potential individual biases, prejudices, and degrees of paternalism driving a particular expert, plaintiff or defendant could call "X" number of experts to the stand and receive the same number of different opinions as to the doctor's duty to disclose a particular risk or alternative.

⁷⁹*Id.* at 423-24.

⁸⁰For a detailed listing of jurisdictions following the professional standard see *infra* note 109. See also *Karp v. Cooley*, 493 F.2d 408, 419-22 (5th Cir. 1974) (case involved the use of expert testimony to establish the extent of the duty to disclose information concerning the implantation of a mechanical heart); *Grosjean v. Spencer*, 258 Iowa 685, 140 N.W.2d 139 (1966) (directed verdict for defendant); *Gray v. Grunnagle*, 423 Pa. 144, 223 A.2d 663 (1966) (court recognized the professional standard proof requirements but the jury decided against the physician because the defendant's own testimony established that the information provided to the patient failed to satisfy the community standard); Annotation, *Necessity and Sufficiency of Expert Evidence to Establish Existence and Extent of Physician's Duty to Inform Patients of Risks of Proposed Treatment*, 52 A.L.R.3d 1084, 1091-99 (1973).

⁸¹See *Wilkinson v. Vessey*, 110 R.I. 606, 295 A.2d 676 (1972); 2 D. Louisell & H. Williams, *Medical Malpractice* ¶ 22.10 (1985); 61 Am. Jur. 2d *Physicians, Surgeons and Other Healers* § 194, at 326 (1981) [hereinafter *Healers*]; Comment, *Informed Consent: A New Standard for Texas*, 8 St. Mary's L. J. 499, 506-10 (1976) [hereinafter *New Standard*]; Comment, *Informed Consent in Medical Malpractice*, 55 Cal. L. Rev. 1396, 1404-06 (1967) [hereinafter *Informed Consent*]; Annotation, *Modern Status of Views as to General Measure of Physician's Duty to Inform Patient of Risks of Proposed Treatment*, 88 A.L.R.3d 1008, 1016-19 (1978); Annotation, *supra* note 80, at 1088-89 (1973).

⁸²See *Canterbury v. Spence*, 464 F.2d 772, 783-84 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); *New Standard*, *supra* note 81, at 508; *Informed Consent*, *supra* note 81, at 1404-06; see generally Maldonado, *Strict Liability and Informed Consent: "Don't Say I Didn't Tell You So!"*, 9 Akron L. Rev. 609 (1986); Note, *Malpractice: Toward a Viable Disclosure Standard for Informed Consent*, 32 Okla. L. Rev. 868 (1979).

The military situation is even more difficult because the "local community" in which the patient's doctor practices is constantly changing. Military doctors receive medical school, internship, and residency training at various locations and thereafter are reassigned to different locations about every 3-4 years.

The expert testimony requirement is itself strongly criticized. The primary concern appears to be a fear that physicians will not properly police themselves through self-regulation or by testifying against one another.⁸³ Another concern is that courts are allowing physicians to subvert the patient's right to self-determination and, hence, the doctrine itself. It has been suggested that expert witnesses are improperly allowed to interject medical *judgment* about the limits of disclosure when they should be limited to providing medical *knowledge* of the established risks and alternatives.⁸⁴

The final condemnation is that "the manner in which medical services are financed, together with the social goals of good health and medical innovation, tends to produce a bias in favor of underdisclosure among doctors in general, thereby making a community medical standard for disclosure inadequate."⁸⁵

2. *The Lay Standard.*

In its 1972 landmark decision, *Canterbury v. Spence*,⁸⁶ the United States Court of Appeals for the District of Columbia Circuit described how a nineteen-year-old FBI clerk was paralyzed as a result of seeking medical help for his back pain.⁸⁷ Although

⁸³See *Cooper v. Roberts*, 220 Pa. Super. 260, 267, 286 A.2d 647, 650 (1971); see generally 2 D. Louisell & H. Williams, *supra* note 81, ¶ 22.10; *Healers*, *supra* note 81, § 194, at 326 (1981); Annot., *supra* note 81, at 1016.

⁸⁴*Katz, Informed Consent—A Fairy Tale?*, 39 U. Pitt. L. Rev. 137, 168-69 (1977) states:

Law has not challenged traditional medical practice. Instead, it has generally adopted the medical professional standard of care with respect to disclosure, requiring expert testimony to establish the applicable standard. Even in the few jurisdictions where plaintiffs can rely on a judge-made standard of disclosure, the professional standard of disclosure, often with compulsory requirements of expert testimony, is almost inevitably reintroduced by invocation of "medical judgment," ordinarily via the therapeutic privilege not to disclose. Thus, the distinction between the two standards readily becomes meaningless.

Both standards tend to confuse the need for *medical knowledge* to establish the risks of and alternatives to a proposed procedure in the light of professional experience, with the need for *medical judgment* to establish the limits of disclosure which are "best" for the patient. The difference is crucial to the clarification of the law of informed consent.

⁸⁵J. Ludlam, *Informed Consent* 28 (1978) (citing Schneyer, *Informed Consent and the Danger of Bias in the Formation of Medical Disclosure Practices*, 1976 Wis. L. Rev. 124).

⁸⁶464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

⁸⁷*Id.* at 776. The young man submitted to spinal surgery without being informed of the inherent risks. A day after the operation he fell out of his hospital bed. He had been left without assistance while urinating. A few hours later his lower body was entirely paralyzed. Dr. Spence rushed to the hospital and performed additional

the trial court apparently only considered issues involving the causation of the **paralysis**,⁸⁸ the court of appeals reversed because “[t]he testimony of appellant and his mother that Dr. Spence did not reveal the risks of paralysis from the laminectomy made out a prima facie case of violation of the physician’s duty to disclose which Dr. Spence’s explanation did not negate as a matter of **law**.”⁸⁹ Subsequently, the court stated:

In our view, the patient’s right of self-decision shapes the boundaries of the duty to reveal. That right can be effectively exercised only if the patient possesses enough information to enable an intelligent choice. The scope of the physician’s communications to the patient, then, must be measured by the patient’s need, and that need is the information material to the decision. Thus the test for determining whether a particular peril must be divulged is its materiality to the patient’s decision: all risks potentially affecting the decision must be unmasked. And to safeguard the patient’s interest in achieving his own determination on treatment, the law must itself set the standard for adequate disclosure.⁹⁰

Thus *Canterbury* generally “discarded the professional standard of disclosure, replacing it with a ‘lay’ standard which effectively withdrew from the medical profession the right to determine what information must be disclosed to patients.”⁹¹

surgery but, according to the court’s lament, Jerry Canterbury now “hobble[s] about on crutches, a victim of paralysis of the bowels and urinary incontinence. In a very real sense this lawsuit is an understandable search for reasons.” *Id*

⁸⁸*Id.* at 778-79.

⁸⁹*Id.* at 779.

⁹⁰*Id.* at 786. Note, however, that the day before *Canterbury* was issued, a different judge of the United States District Court for the District of Columbia issued a decision in which informed consent was raised at trial. The district court held for the defendants on the grounds that the plaintiffs failed to show that they would have stopped the procedure had they **known** the risks. *Haven v. Randolph*, 342 F. Supp. 538, 543-44 (D.D.C. 1972), *aff’d*, 494 F.2d 1069 (D.C. Cir. 1974). One commentator claims that, as a result, the personal injury bar of the District of Columbia questions whether or not *Canterbury* is the law in that jurisdiction. *See* D. Sharpe, S. Fiscina, & M. Head, *Cases and Materials on Law and Medicine* 202-03 (1978).

⁹¹*Meisel, supra* note 26, at 96. On the other hand *Canterbury* clearly indicates that the doctrine of informed consent does not require patient comprehension of all sorts of medical minutiae: “It seems obviously prohibitive and unrealistic to expect physicians to discuss with their patients every risk of proposed treatment—no matter how small or remote—and generally unnecessary from the patient’s viewpoint as well.” 464 F.2d at 786. *See also* *Precourt v. Frederick*, 395 Mass. 689, 481 N.E.2d 1144 (1985); *Harnish v. Children’s Hosp. Medical Center*, 387 Mass. 152, 439 N.E.2d 240 (1982); Curran, *Law-Medicine Notes: Informed Consent in Malpractice Cases: A Turn toward [sic] Reality*, 314 *New. Eng. J. Med.* 429 (1986).

The Supreme Courts of California⁹² and Rhode Island⁹³ quickly adopted the Canterbury standard. So have several other jurisdictions.⁹⁴ On the other hand, several jurisdictions have specifically rejected the lay standard⁹⁵ on the basis that: "(1) the decision to disclose is a medical judgment, and only a physician can judge the patient's health and the psychological impact of a disclosure; and (2) the lay standard would waste the physician's time in disclosing all risks and limit the physician's flexibility in caring for the patient's needs."⁹⁶ The battle lines are thus drawn between the paternalistic concept of good health and the patient's right to self-determination.⁹⁷

3. The Hybrid Standard.

One court has had considerable difficulty determining on which side of the war it belongs and has consequently developed a third standard, which incorporates both the majority and minority standards.⁹⁸ In *Kinikin v. Heupel*,⁹⁹ the Supreme Court of Minnesota reviewed a difficult case in which a woman suffered skin necrosis, gangrene, severe scarring, and deformity of her breasts following surgery. In an attempt to define the physician's duty, the court held that:

But see Harbeson v. Parke Davis, Inc., 746 F.2d 517 (9th Cir. 1984); *infra* notes 234-37 and accompanying text.

⁹²*Cobbs v. Grant*, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972).

⁹³*Wilkinson v. Vessey*, 110 R.I. 606, 295 A.2d 676 (1972).

⁹⁴*See infra* note 109 for a detailed listing of the jurisdictions that follow the lay standard. *See also* J. Ludlam, *Informed Consent* 32 n.70 (1978); Annotation, *supra* note 81, at 1034-44; Meisel, *supra* note 26, at 96 n.128.

⁹⁵*See, e.g.*, *Hook v. Rothstein*, 281 S.C. 541, 316 S.E.2d 690 (Ct. App.), *cert. denied*, 283 S.C. 64, 320 S.E.35 (1984). *See generally* Annotation, *supra* note 81, at 1020-32; Meisel, *supra* note 26, at 96 n.128.

⁹⁶Note, *supra* note 77, at 253; *see also* *Wooley v. Henderson*, 418 A.2d 1123, 1128-31 (Me. 1980); *Aiken v. Clary*, 396 S.W.2d 668, 674-75 (Mo. 1965); *Folger v. Corbett*, 118 N.H. 737, 394 A.2d 63 (1978); *Hook v. Rothstein*, 281 S.C. 541, 316 S.E.2d 690 (Ct. App.), *cert. denied*, 283 S.C. 64, 320 S.E. 35 (1984); *Bly v. Rhoads*, 216 Va. 645, 222 S.E.2d 783 (1976); *see generally* 2 D. Louisell & H. Williams, *supra* note 81, ¶ 22.06; *Healers, supra* note 81, §§ 189-94; Annotation, *supra* note 81, at 1016-20.

⁹⁷*See Exceptions, supra* note 18, at 413-430.

⁹⁸*See* LeBlang, *Informed Consent—Duty and Causation: A Survey of Current Developments*, 18 Forum 280 (1983). LeBlang states, "It is interesting to observe that, in the face of a clear dichotomy of judicial thinking relative to the applicable disclosure standard in informed consent cases, some jurisdictions have appeared to blend the two standards in order to achieve equitable results." *Id.* at 285-86. *See also supra* note 84.

⁹⁹305 N.W.2d 589 (Minn. 1981) (A woman consented only to an adenomamectomy, removal of some of the tissue from the breast. She specifically refused to consent to a simple mastectomy, removal of the breast itself. The physician performed a subcutaneous mastectomy, i.e., he removed substantially all of the breast anyway. The court held that the \$600,000 verdict was not excessive.).

[A] physician must disclose risks of death or serious bodily harm . . . which a skilled practitioner of good standing in the community would reveal . . . [and], to the extent a doctor is or can be aware that his patient attaches particular significance to risks not generally considered by the medical profession serious enough to require discussion with the patient, these too must be brought out.’¹⁰⁰

4. *The Subjective Patient Standard?*

Another court has arguably adopted a fourth standard, which requires **full** disclosure of **all** facts considered material to the *individual* patient’s decision concerning any treatment received or omitted—i.e., the subjective patient standard. In *Scott v. Bradford*,¹⁰¹ the Oklahoma Supreme Court held that:

¹⁰⁰*Id.* at 595. See also *Bloskas v. Murray*, 646 P.2d 907, 912-13 (Colo. 1982); *Harnish v. Children’s Hosp. Medical Center*, 387 Mass. 152, 439 N.E.2d 240 (1982).

¹⁰¹606 P.2d 554 (Okla. 1979). See *Trichter & Lewis, Informed Consent: The Three Tests and a Modest Proposal for the Reality of the Patient as an Individual*, 21 *S. Tex. L.J.* 155, 162 (1981)(analyzing *Scott v. Bradford*).

Trichter and Lewis fail to consider that the Oklahoma court has profoundly confused the disclosure and causation issues of the informed consent doctrine. For example, *Scott* sets out three distinct elements of the cause of action—duty to disclose, causation, and injury. In discussing the *disclosure* element the court reviews the professional standard and the minority standard established by *Canterbury*. Immediately thereafter, the court *specifically* rejects the professional standard, *generally* agrees with language in the *Canterbury* opinion, and then apparently adopts a totally patient-oriented standard. Confusion concerning the adopted standard comes from the court’s failure to *specifically* agree or disagree with the *Canterbury* standard as well as the use of such overbroad terms as “his patient’s need” and “full disclosure.” Additional confusion is added when the court, in addressing the *causation* element, states that “[t]he basic right to know and decide is the reason for the full-disclosure rule. Accordingly, we decline to jeopardize this right by the imposition of the ‘reasonable man’ standard.” 606 P.2d at 559.

Likewise, in *Smith v. Reisig*, 686 P.2d 285 (Okla. 1984), the court closes out its discussion of the disclosure element and moves on to the causation element before stating:

[W]e are urged to abandon the subjective test adopted in *Scott v. Bradford*. . . We decline to do so.

In adopting that test, we noted that if the patient testified he would not have consented to the treatment if adequately informed, “. . . then the causation problem must be resolved by examining the credibility of plaintiff’s testimony.”

Id. at 288. These cases clearly stand for the proposition that Oklahoma follows the subjective causation test. See *infra* notes 110-24 and accompanying text. But it is not clear to what extent it has adopted a subjective patient *disclosure* standard. This makes it virtually impossible for the military physician, and his supporting staff judge advocate, to determine what informed consent procedures should be used at Fort **Sill**, Oklahoma.

[T]he scope of a physician's communications must be measured by his patient's need to know enough to enable him to make an intelligent choice. In other words, full disclosure of **all material risks** incident to the treatment must be made. There is no bright line separating the material from the immaterial; it is a question of fact. A risk is material if it would be likely to affect [the] patient's decision. When non-disclosure of a particular risk is open to debate, the issue is for the finder of facts.¹⁰²

The *Canterbury* court considered and rejected the subjective disclosure standard because a requirement for the physician to disclose with such specificity what a particular patient would consider important "would make an undue demand upon medical practitioners, whose conduct, like that of others, is to be measured in terms of reasonableness. Consonantly with orthodox negligence doctrine, the physician's liability for nondisclosure is to be determined on the basis of foresight, not **hindsight**."¹⁰³

Recently, judges and legislators¹⁰⁴ seem to be firmly supporting the majority standard on the basis of the same general paternalistic feelings¹⁰⁵ that affected the promulgation of the previously

¹⁰²606 P.2d at 558. In analyzing this holding, Trichter and Lewis, *supra* note 101, summarize the majority, minority, and subjective patient standards as "*the physician in a similar community of the same school of thought versus the average reasonable patient's material needs versus the individual patient's material needs.*" *Id.* at 162. They disagree with the majority view as "one that favors the paternalistic belief that the doctor knows best and that good medicine must therefore be good law. Accordingly. . . the standard is set by the physicians themselves." *Id.* They believe the minority view to be better in that it "favors the patient by letting the fact finder establish the standard of duty by measuring the doctor's disclosure against what an average reasonable patient would have deemed material." *Id.* Finally, the authors conclude that even the *minority* standard does not go far enough in that the "individual patient has no greater rights to his own self-determination than those of an average patient. In summation, under both the [majority and minority] positions, there is no such thing as individual autonomy." *Id.* at 162-63.

¹⁰³*Canterbury v. Spence*, 464 F.2d 772, 787 (D.C. Cir.), *cert. denied*, 409 U.S.1064 (1972).

¹⁰⁴*See B. Barber, supra* note 18, at 39, where the author states that:

Recently, however, there has been a certain withdrawal from the "reasonable man" rule. As a result of the so-called "epidemic" of malpractice suits in 1974 and 1975, some twenty states have written new malpractice statutes intended to make such suits harder to institute and win by requiring expert testimony. . . . These statutes have thus strengthened the "reasonable practitioner" rule.

¹⁰⁵*Cf. Exceptions, supra* note 18, at 452. Although the author is discussing the competency exception, as opposed to the standard of disclosure, he notes that

mentioned professional medical codes.¹⁰⁶ For example, in a recent South Carolina case, *Hook v. Rothstein*,¹⁰⁷ the court adopted the professional standard, holding that the decision to disclose a risk is a medical judgment and the doctor should concentrate on the patient's best interests and not what a lay jury might later determine to be appropriate.¹⁰⁸ The tone of the opinion was that

"[d]espite the fact that judges are 'impartial' decisionmakers in that they do not possess the same personal or professional stake in the treatment of the patient that a family member or the physician does, still many judges are guided by the same paternalistic impulses as physicians, though possibly with somewhat less zeal." *Id.*

¹⁰⁶*See supra* notes 18-20 and accompanying text.

¹⁰⁷281 S.C. 541, 316 S.E.2d 690 (Ct. App.), *cert. denied*, 283 S.C. 64, 320 S.E.35 (1984).

¹⁰⁸*Id.* at 551-53, 316 S.E.2d at 696-98. *See also* Buttler v. Berkely, 213 S.E.2d 571 (N.C. Ct. App. 1975), where the court stated:

To adopt the minority rule of *Canterbury* would result in requiring every doctor to spend much unnecessary time in going over with the patient every possible effect of any proposed treatment. The doctor should not have to practice his profession with the knowledge that every consultation with every patient with respect to future treatment contains a potential lawsuit and his advice and suggestions must necessarily be phrased with the possible defense of a lawsuit in mind.

Id. at 581.

Interestingly, some physicians see social issues such as informed consent as being in the patient's best interest. In Hatcher, *Informed Consent*, 236 J. Am. Med. A. 1235 (1976), Dr. Robert Hatcher writes:

[The] concern that "informed consent is a legalistic fiction that destroys good patient care and paralyzes the conscientious physician" is not exactly how I perceive this complicated new concept. . . .

I certainly agree the informed consent is *not* straightforward or uncomplicated. Proper transmission of information to our patients is an exciting but difficult challenge. So complex are some of the drugs we provide and procedures we perform that the process of patient education does involve sensitivity and careful attention to priorities. Perhaps our major problem has been in hoping that informed consent would eliminate malpractice suits. I look instead on informed consent as an educational challenge that may cause physicians to become somewhat more effective teachers. In this way, informed consent may sometimes lead to remarkably improved patient care. A "fringe benefit" (but definitely not a primary goal) may be a minimization of lawsuits.

See also Crile, *Informed Consent*, 236 J. Am. Med. A. 1011 (1976); *cf.* Airing, *On Improving the Public Health*, 239 J. Am. Med. A. 2557 (1978), who states:

Perhaps the most promising potential for improving the public health resides in what people can be motivated to do for themselves. To assist patients to become more mature requires some tempering of medical omnipotence. The process resembles somewhat the rearing of children, where their eventual maturity depends mainly on the quality of parenting.

The traditional role of the physician as teacher requires nurture if it is to be expected that patients will thrive and grow. This was the

the doctor should unilaterally decide what is disclosed. Although the court recognized the existence of the lay standard, it sidestepped it and adopted the professional standard without addressing any favorable lay standard arguments.¹⁰⁹

E. CAUSATION

It has long been held that "an essential element of an action for negligence... is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has **suffered**."¹¹⁰ This causal connection has two parts. First the plaintiff must prove that the defendant in fact caused the injury. Secondly, the plaintiff must show that "the defendant should be legally responsible for what he has **caused**,"¹¹¹ i.e., that the physician's conduct was the "proximate cause" of the injury.

The causation in fact prong is demonstrated by *Downer v. Veilleux*: "Proof of proximate cause... requires, initially, a showing that the unrevealed risk which should have been made known has **materialized**."¹¹² In other words, the plaintiff must

course embarked on by Thomas Jefferson when he established the study of medicine at the University of Virginia, where one of the goals was that every Virginian learn the care of his own health... .

The biologist Rene Dubos, the philosopher-educator Ivan Illich, and the physicians Thomas Mckeown and Michael Wilson are among the modern persons advocating that physicians become aware of the social results of their actions and that patients assume more responsibility for the health of themselves and their families.

Dr. Hatcher's letter points out that courts are wrong if they believe that adoption of the professional standard magically relieves doctors of worry about potential lawsuits (and thus provides more time for patient care). Doctors are, and always will be, concerned about potential lawsuits, especially surgeons, radiologists, obstetricians, and others paying high malpractice insurance costs. I submit, however, that *ignorance* of the standards is, and will continue to be, more of an anxiety builder than the *establishment* of any particular standard.

¹⁰⁹281 S.C. at 551-53, 316 S.E.2d at 696-98. The court concludes that "children play at the game of being doctor but judges and juries ought not." *Id.* at 552, 316 S.E.2d 697 (quoting from *Scaria v. St. Paul Fire & Marine Ins. Co.*, 68 Wis. 2d 1, 227 N.W.2d 647, 659 (1975)).

The South Carolina court determined that the Arizona, Arkansas, Delaware, Florida, Hawaii, Illinois, Kansas, Maine, Michigan, Mississippi, Missouri, Montana, New Hampshire, New Jersey, North Carolina, Tennessee, Texas, Virginia, and Wyoming courts had elected to follow the professional standard while the California, Connecticut, District of Columbia, Indiana, Louisiana, Maryland, Massachusetts, Minnesota, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Washington, West Virginia, and Wisconsin courts had adopted a lay standard. *See id.* at 550-51, 316 S.E.2d at 696.

¹¹⁰W. Prosser, *supra* note 27, § 41, at 236.

¹¹¹*Id.* § 42, at 244.

¹¹²322 A.2d 82, 92 (Me. 1974).

prove that the doctor had a duty to disclose the risk, the doctor failed to do so, the undisclosed risk occurred, and the plaintiff was a victim of the risk.

The proximate cause prong must also be proven before the physician can be held legally responsible. In *Cobbs v. Grant*,¹¹³ the court held that “[t]here must be a causal relationship between the physician’s failure to inform and the injury to the plaintiff. Such causal connection arises only if it is established that had revelation been made, consent to treatment would not have been **given**.”¹¹⁴ Thus there must be proof of more than a failure to disclose and a physical injury. The patient must show that he or she would not have agreed to the procedure, had the disclosure been made.

The only substantial controversy in the causation area is whether the individual patient need only testify that he or she would not have had the operation (subjective test) or whether the individual patient must show that the reasonable patient would not have had the operation (objective test). Early informed consent cases discussing the matter of causation apparently were unconcerned with the difference between the two tests. For example, in *Shetter v. Rochelle*,¹¹⁵ the court states in one sentence that “[t]he fact that the plaintiff proceeded to have this operation upon her other eye by another surgeon, presumably after she was fully informed of the inherent risks to this operation, is some evidence that disclosure by the defendant of inherent **risks** would not have deterred her from having the earlier **operation**.”¹¹⁶ In the very next sentence the court states, “The risks of injury are not so great as to cause most reasonable persons to decline to have such a beneficial operation **performed**.”¹¹⁷

In *Canterbury v. Spence*,¹¹⁸ the court directly confronted the issue and stated:

[The subjective] method of dealing with the issue on causation comes in second-best. It places the physician in jeopardy of the patient’s hindsight and bitterness. . .

Better it is we believe, to resolve the causality issue on

¹¹³8 Cal. 3d 229, 502 P.2d. 1, 104 Cal. Rptr. 505, (1972).

¹¹⁴*Id.* at 245, 502 P.2d at 11, 104 Cal. Rptr. at 515.

¹¹⁵2 Ariz. App. 358, 409 P.2d 74 (1965), *modified*, 2 Ark. App. 607, 411 P.2d 45 (1966).

¹¹⁶*Id.* at 367, 409 P.2d at 83.

¹¹⁷*Id.*; see generally Meisel, *supra* note 26, at 108-09; Plante, *An Analysis of “Informed Consent,”* 36 Fordham L. Rev. 639 (1968).

¹¹⁸464 F.2d 772 (D.C.Cir.), *cert. denied*, 409 U.S. 1064 (1972).

an objective basis: in terms of what a prudent person in the patient's position would have decided if suitably informed of all perils bearing significance. . . . The patient's testimony is relevant on that score of course but it would not threaten to dominate the findings.¹¹⁹

Courts in California,¹²⁰ Kansas,¹²¹ and New York¹²² quickly followed *Canterbury's* lead and adopted the objective standard, which is presently the majority standard.¹²³ Nevertheless, a few jurisdictions follow the subjective standard.¹²⁴

F. EXCEPTIONS TO THE INFORMED CONSENT DOCTRINE

We have already seen how the doctor's medical judgment and the patient's right of self-determination have influenced the development of the disclosure duty. These same concepts have had an even more profound effect on the development of the exceptions to that duty.¹²⁵

¹¹⁹*Id.* at 790-91. In *Salis v. United States*, 522 F. Supp. 989, 997-1005 (M.D. Pa. 1981), the court enunciated considerations pertinent to determining if the plaintiff has met his causation burden of proof. In that case a patient who had a history of heart problems agreed to an angiography. During the procedure, plaque was dislodged from the walls of the patient's blood vessels, which resulted in massive clotting and, eventually, the amputation of part of his leg. In looking at the procedure, the incidence and severity of the risks, the possible benefits and the available alternatives, the court stated:

The patient, moreover, had access to several types of conservative therapy, and his condition would appear to suggest a cautious approach. Although he experienced pain and desired treatment, his situation was relatively stable. Furthermore, increased mobility was not critical to his livelihood, since he was retired. Nothing in the record suggests that he would have desired prompt surgery, if apprised of the potential perils and options. . . . Therefore, [t]he test was not necessary until surgery became an appropriate consideration.

Id. at 1004-05. The court finally concluded that a reasonable person in the patient's position would have foregone the test had he been properly informed about the possible risks. *Id.*

¹²⁰*Cobbs v. Grant*, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972).

¹²¹*Funke v. Fieldman*, 212 Kan. 524, 512 P.2d 539 (1973).

¹²²*Fogal v. Genesee Hosp.*, 41 A.D.2d 468, 344 N.Y.S.2d 552 (1973).

¹²³For a detailed listing see LeBlang, *supra* note 98, at 286 n.25.

¹²⁴*See, e.g.*, *Poulin v. Zartman*, 542 P.2d 251, 275 (Alaska 1975); *Shetter v. Rochelle*, 2 Ariz. App. 358, 367, 409 P.2d 74, 83 (1965), *modified*, 2 Ariz. App. 607, 411 P.2d 45 (1966); *Smith v. Reisig*, 686 P.2d 285 (Okla. 1984); *Scott v. Bradford*, 606 P.2d 554 (Okla. 1979); *Wilkinson v. Vesey*, 110 R.I. 606, 295 A.2d 676 (1972).

¹²⁵*Lidz, supra* note 47, points out that other general duties imposed upon the physician by law and ethics have also "impose[d] limits on the informed consent doctrine and help[ed] to shape its boundaries." *Id.* at 16. Such duties include the duty "to practice technically proficient medicine," the duty "to do no harm," and the duty "of confidentiality." *Id.* at 15-16.

1. *The Emergency Exception.*

Normally the physician's initial act upon seeing a patient is to determine the patient's immediate medical status.¹²⁶ If the physician determines that the patient needs urgent or "emergency" treatment, he is clearly justified in reducing or suspending his disclosure duty.¹²⁷

The critical issue is the definition of "emergency." Few courts have attempted to define the term because "there appears to be an intuitive notion of what an 'emergency' is."¹²⁸ In some cases the courts have gone out of their way to avoid definitions. In *Dunham v. Wright*,¹²⁹ "the trial judge did not define emergency, [but] explained the emergency exception and told the jury that they would have to conclude that an *immediate* operation was necessary to save life or health before the exception would be applicable."¹³⁰ On appeal the Third Circuit affirmed the verdict, noting only that, although there was "meager" testimony to show the existence of an emergency, "the trial judge was not required to rule as a matter of law that no emergency existed."¹³¹

Where the courts have attempted to define the term, the results have varied widely from such strict language as "life or limb"¹³²

¹²⁶In fact, the medical community has a special name for this process—triage. Triage is defined as "a system of assigning priorities of medical treatment to battlefield casualties on the basis of urgency, chance for survival, etc." Webster's New World Dictionary of the American Language 1516 (2d College ed. 1970).

In an Army Medical Service Corps basic course class, given at the Academy of Health Sciences, Fort Sam Houston, Texas, in January or February 1975, the instructor stated that the Army has four categories in which a patient is placed—minimal, immediate, delayed, or expectant. Minimal patients need little treatment and are put to work to help the hospital staff or sent back to the front lines (in the wartime situation). Immediate patients are those needing immediate care to save life or limb. Expectant patients are those who are expected to die regardless of the amount of medical care provided. Delayed patients constitute the remainder. This same triage procedure is currently used by Army hospitals in peacetime mass casualty situations as well as in training for warfare. See generally Department of Army, Field Manual No. 8-10, Health Service Support in a Theater of Operations, chap. 6 (2 Oct. 1978).

¹²⁷W. Prosser, *supra* note 27, § 18, at 103 ("[I]n an emergency, it is generally recognized that.. the surgeon must be free to operate without delaying to obtain consent."). See generally 2 D. Louisell & H. Williams, *supra* note 81, ¶ 22.04, at 22-10.

¹²⁸Lidz, *supra* note 47, at 16. In Plante, *An Analysis of "Informed Consent,"* 36 Fordham L. Rev. 639, 653-54 (1968), the author concludes that many courts have approached the emergency concept in a "negative fashion, i.e., in buttressing the conclusion that defendant owed a duty to disclose collateral hazards, the court emphasizes that no emergency made it impractical to perform the duty."

¹²⁹423 F. 2d 940 (3d Cir. 1970).

¹³⁰*Id.* at 947.

¹³¹*Id.*

¹³²*Mohr v. Williams*, 95 Minn. 261, 269, 104 N.W. 12, 15 (1905) (An emergency

to very loose language such as "suffering or pain [would] be alleviated [by treatment]."¹³³ There is, therefore, no widely accepted judicial definition of a medical emergency.

2. *The Incompetency Exception.*

The doctor's second vital impression, if it can be separated from the first,¹³⁴ is the decisionmaking ability, or competence, of the patient. Clearly this determination gives the physician the greatest latitude in determining whether to fulfill his or her informed consent duties. As such it poses the "greatest danger...[of depriving] patients of decisional authority by finding incompetent any patient whose decision is in sharp contrast with the one which a physician would have made for him."¹³⁵

To compound this danger, there is no generally accepted judicial criteria for determining incompetence. The reasons for this are not clear. There are numerous incompetency cases, although many involve minors rather than adults and most arose prior to the development of the informed consent doctrine.¹³⁶ The vast majority of these cases "have spoken in vague generalities and no comprehensive judicial exergesis of the subject has yet appeared."¹³⁷ Commentators have generally approached incompetency by considering its effect on a certain area of the law, or on a certain medical specialty, rather than seeking to find an across-the-board definition.¹³⁸ Additionally, discussions of incompetency, as it relates to medical treatment, often center on the problem of who can consent for the incompetent patient rather than the substantive question of competence.¹³⁹

Probably the most thorough discussion of incompetency, as it relates to the doctrine of informed consent, is in a series of

may exist where the "physician called to attend [the patient] would be justified in applying such medical or surgical treatment as might reasonably be necessary for the preservation of his life or limb."). *See also* *Moss v. Rishworth*, 222 S.W. 225 (Tex. App. 1920) ("The evidence shows that there was an absolute necessity for a prompt operation, but not emergent in the sense that death would likely result immediately upon failure to perform it.").

¹³³*Sullivan v. Montgomery*, 155 Misc. 448, 449, 279 N.Y.S. 575, 577 (1935).

¹³⁴The emergency exception turns, in great part, on the rational decisionmaking ability of the patient as well as the urgency of the situation. Thus, depending on how the two are defined, the emergency exception could be subsumed by the competency exception.

¹³⁵*Exceptions*, *supra* note 18, at 451.

¹³⁶*Id.* at 473 n.193. *See generally* Annotation, *Consent as Condition of Right to Perform Surgical Operation*, 139 A.L.R. 1370 (1942).

¹³⁷*Exceptions*, *supra* note 18, at 440.

¹³⁸*Id.* at 440 n.100 (containing a detailed listing of various law review articles).

¹³⁹*Id.*

publications written by a group of assistant professors from the University of Pittsburgh's Schools of Law and Psychiatry.¹⁴⁰ They have analyzed the subject on the basis of de jure (legal) versus de facto (actual) incompetence, and general versus specific incompetence.

(a) De Jure and De Facto Incompetency.

As a general rule de jure incompetents include minors and those who have been adjudicated incompetent by a court. Nevertheless, minors and court-ordered incompetents may be able to give a legally valid consent to medical care and thus may be entitled to disclosure under the informed consent doctrine. For example, the Supreme Court has often ruled that mature minors have a constitutional right to consent to medical treatment,¹⁴¹ and statutory law has also drastically altered consent laws as they pertain to minors.¹⁴² Furthermore, an adult can be adjudged specifically, as opposed to generally, incompetent. Thus a spendthrift might be adjudged incompetent to handle money and yet be specifically competent to consent to medical care. It is even possible that "individuals adjudged as generally incompetent may in fact be specifically competent to make a medical decision or persons adjudicated incompetent in the past may in fact have regained their competency."¹⁴³ In short, without further direction, a physician should not automatically seek a third party's consent merely because the patient is a minor or someone flashes a court order. **This** is especially good advice when a termination of medical treatment or do-not-resuscitate order is requested by a family member without the patient's knowledge.

Conversely, one who is considered competent may, in fact, be incompetent. Thus the patient's consent to treatment may not be valid and the physician may be held liable for assault and battery.¹⁴⁴ Alternately, a patient's objection to treatment may be equally invalid and "the doctor who withholds treatment in

¹⁴⁰See Lidz, *supra* note 47; *Exceptions, supra* note 18; Roth, Meisel & Lidz, *Tests of Competency to Consent to Treatment*, 134 Am. J. Psychiatry 279 (1979); see also Meisel, Roth, & Lidz, *Toward a Model of the Legal Doctrine of Informed Consent*, 134 Am. J. Psychiatry 285 (1979).

¹⁴¹See *infra* note 349.

¹⁴²See *Exceptions, supra* note 18, at 442 n.104.

¹⁴³Lidz, *supra* note 47, at 17.

¹⁴⁴See, e.g., *Demers v. Gerety*, 85 N.M. 641, 515 P.2d 645 (Ct. App. 1973) (The patient, who spoke only broken English, was given a sleeping pill and told to go to sleep. Later, in a darkened room, he was awakened by a nurse and told to sign an unidentified paper.); see generally W. Prosser, *supra* note 27, § 18, at 102-03.

reliance upon the refusal . . . may be liable . . . for some species of negligence."¹⁴⁵

(b) Specific Incompetency.

Specific incompetency is defined as being incompetent in some areas but competent in others. To help determine a patient's specific competence, the University of Pittsburgh authors set out four "tests", or substantive standards, that "focus on the patient's conduct in the context of the medical decisionmaking process."¹⁴⁶ These four tests are: the person's mere ability to manifest a decision; the manner in which the person makes a decision; the nature of decision; and the person's understanding of information disclosed by the doctor.¹⁴⁷

The manifestation of a decision test states that the mere presence of a decision equates to competence and the absence of a decision equates to incompetence. Simply put, the person who can shake his head yes or no is competent and the epileptic suffering a grand mal seizure is not.

One author concludes that this first test "assures (if honestly applied) that few persons will be determined to be incompetent and that most will retain their right to have their decisions about medical treatment honored."¹⁴⁸ Unfortunately, if we believe current headlines about the medical profession, the "not so honestly applied situation" too often may occur.¹⁴⁹ Whether this is a result of greedy surgeons doing unnecessary surgery or humanitarian physicians taking unnecessary chances to find new "life-saving techniques", the risk to the patient is too great to rely on this, or any other, separate test.¹⁵⁰

¹⁴⁵*Exceptions, supra* note 18, at 442 n.104 (citing *In re* President & Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964); John F. Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 279 A.2d 670 (1971)(dictum)).

¹⁴⁶*Id.* at 447.

¹⁴⁷*See id.* at 442-47; Lidz, *supra* note 47, at 17.

¹⁴⁸*Exceptions, supra* note 18, at 444.

¹⁴⁹*See, e.g.,* Brody, *Knee Microsurgery: Boon to Some, But Overuse Is a Growing Concern*, N.Y. Times, Feb. 25, 1986, at C1, col. 2 ("[C]oncern is mounting among pioneers in the field that arthroscopy is being abused.").

¹⁵⁰Mr. Meisel agrees that it is likely, though less so, that some persons might be unnecessarily treated and thus be harmed, "or at least not benefited." *Exceptions, supra* note 18, at 444 n.109. Nevertheless, he appears to present the four specific and one general incompetency tests as being independent of each other. *See id.* at 442-53. Some of the other specific incompetency tests are equally flawed and present a risk that, taken independently, these "tests" would result in someone being unnecessarily harmed. Mr. Meisel eventually concludes that the four specific incompetence tests should be combined with the general incompetency test to form a conjunctive approach. *See id.* at 449-50. But more than this, none of these five "tests" should ever be considered independently of the others. Rather, the tests should be considered as one set of decisionmaking criteria.

The second specific incompetence test allows the physician to question the manner in which the patient made his decision on the basis that "there is a greater chance that if the decision is made 'improperly,' reliance upon it will be detrimental to the patient's medical well-being."¹⁵¹ Thus, if a patient chooses to die rather than go through a painful procedure with only a 50-50 chance of survival, because of the risk and pain involved, he most likely will be considered competent under this test. But if he rejects the treatment because he is a devout Protestant and the only hospital in the area that can perform the procedure is St. John's, then he will most likely be found incompetent.

The courts' use of this second test has resulted in conflicting opinions. In *In re B*,¹⁵² the court found the patient incompetent after deciding that his refusal to take a certain drug was based on delusional thinking. In *Lune v. Candura*,¹⁵³ the court refused to hold incompetent a patient who irrationally refused to consider medical treatment.

The third specific incompetency test looks solely at the patient's choice. If it's the "right" choice, the patient is competent and vice versa.¹⁵⁴ Two major problems are present with the test. First, the test is clearly "biased in favor of decisions to accept the [proposed] treatment, even when such decisions are made by people who are incapable of weighing the risks and benefits of treatment. In other words, if patients do not decide the 'wrong' way, the issue of competency will probably not arise."¹⁵⁵

¹⁵¹*Exceptions, supra* note 18, at 445.

¹⁵²156 N.J. Super. 231, 234, 383 A.2d 760, 762 (1977).

¹⁵³376 N.E.2d 1232 (Mass. App. Ct. 1978); *see also In re Yetter*, 62 Pa. D. & C. 2d 619 (Northampton County 1973).

¹⁵⁴*See, e.g., In re President & Directors of Georgetown College, Inc.*, 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964). The patient and her husband were Jehovah's Witnesses who refused to accept blood transfusions that would save her life. The court of appeals judge went to the hospital and noted, "Her appearance confirmed the urgency which had been represented to me. I tried to communicate with her, advising her again as to what the doctors had said. The only audible reply I could hear was 'Against my will.' It was obvious that the woman was not in a mental condition to make a decision." *Id.* at 1007. *See also infra* note 266 and accompanying text.

¹⁵⁵Roth, Meisel & Lidz, *supra* note 140. The authors conclude:

This test is probably used more often than might be admitted by both physicians and courts. Judicial decisions to override the desire of patients with certain religious beliefs not to receive blood transfusions may rest in part on the court's view that the patient's decision is not reasonable. When life is at stake and a court believes that the patient's decision is unreasonable, the court may focus on even the

The second problem involves the difficulty in ranking the risks and alternatives. It is very hard to rank risks like pain, scarring, paralysis, blindness, and sexual impotency, especially when treatments normally carry more than one hazard. "[A] patient must actually weigh combinations of hazards or combinations of hazards and benefits, thus substantially complicating any sort of ranking."¹⁵⁶

A recent factor affecting this ranking process is the controversy over quality of life versus quantity of life. Probably nothing demonstrates this controversy better than the cases involving Elizabeth Bouvia. In *Bouvia v. Riverside Hospital*,¹⁵⁷ the court was called upon to judge Ms. Bouvia's desire to rank death by suicide over life with cerebral palsy.¹⁵⁸ Although the court determined that Ms. Bouvia was competent, its denial of her requests indicates that this first court did not agree with her ranking.¹⁵⁹

Subsequently, Ms. Bouvia was taken by friends to several different public and private hospitals, arriving finally at High Desert Hospital. When this hospital began to force feed her, against her will and contrary to her written directions, she again filed suit. After the trial court denied her request for a preliminary injunction, she petitioned the appellate court for extraordinary relief. In *Bouvia v. Superior Court*,¹⁶⁰ the court held that Ms. Bouvia was a mentally competent patient who understood the risks. The court therefore found, using basic informed consent principles, that Ms. Bouvia had the right to refuse treatment, and that the State's interest in preserving her life did not outweigh her right to refuse treatment.¹⁶¹ In other words, the second court

smallest ambiguity in the patient's thinking to cast doubt on the patient's competency so that it may issue an order that will preserve life or health.

Id. at 281.

¹⁵⁶*Exceptions, supra* note 18, at 445 n.112.

¹⁵⁷See Note, *Elizabeth Bouvia v. Riverside Hosp.: Suicide. Euthanasia. Murder: The Line Blurs*, 15 Golden Gate U. L. Rev. 407 (1985) (citing *Bouvia v. Riverside Hosp.*, No. 159780 (Super. Ct. Riverside filed Dec. 16, 1983)).

¹⁵⁸Miss Bouvia was physically unable to commit swift suicide on her own. She therefore arranged for voluntary admission to Riverside Hospital and subsequently informed the hospital that she intended to starve herself to death. She requested the hospital assist her by providing pain medication and hygienic care. The hospital refused to help her commit suicide and informed her that they would take steps to force-feed her when her body weight fell below a certain point. *Id.* at 407.

Id. at 411-14.

¹⁵⁹179 Cal App. 3d 1127, 225 Cal Rptr 297 (1986)

¹⁶⁰*Id.* at 1137-46, 225 Cal Rptr. at 300-07.

agreed with her ranking.¹⁶²

The fourth specific incompetency test looks at the patient's ability to understand the information disclosed. Neither the final decision nor the process used to arrive at that decision are reviewed.¹⁶³ Problems with this test include the identification of the questioner, the selection of the subject matter tested, the selection of the questions asked, and the degree of understanding required. If the medical profession is given the authority to determine the questions and establish the requirements of a passing grade, there may be a tendency to find large numbers of people incompetent. As one commentator points out:

One of the distinguishing features of a profession is its claim to a monopoly on expertise in its domain. The physician, as a highly educated, trained, and experienced professional, believes he possesses a monopoly on the relevant information necessary to make the medical decision. This is not something which can be transmitted easily, quickly, or conveniently to the patient, a layman, and certainly not in the 'non-technical' terms the law of informed consent requires. If the information were to be disclosed in simple terms, it would be meaningless because it is inherently complex and sophisticated, and the argument continues if it were to be disclosed in the proper complex and sophisticated terms, it would be incomprehensible to the patient.¹⁶⁴

¹⁶²The court was impressed with Ms. Bouvia's physical condition. She was afflicted with severe cerebral palsy and was a completely bedridden quadriplegic. She could only move a few fingers of one hand and make a few facial movements. **Ms.** Bouvia also suffered from degenerative arthritis and, therefore, was not only virtually helpless and wholly unable to care for herself, but was in constant pain as well. The pain was such that a tube was permanently attached to her chest so that she could automatically be injected with periodic dosages of morphine. The morphine relieved some, but not all, of her pain. *Id.* at 1136, 225 Cal. Rptr. at 299-300.

"*Exceptions, supra* note 18, at 446.

¹⁶⁴*Id.* at 426-27. See also *Roberts v. Wood*, 206 F. Supp. 579, 583 (S.D. Ala. 1962); Ingelfinger, *Informed (but Uneducated) Consent*, 287 New. Eng. J. Med. 465 (1972) (Research patients cannot understand the procedures or risks because they cannot be totally enlightened as to the overall goals and importance of the study.); *Oppenheim, Informed Consent to Medical Treatment*, 11 Clev. Mar. L. Rev. 249, 261-62 (1962) states: -- '[I]nformed' consent may create delay, apprehension, and restrictions on the use of new techniques that will impair the progress of medicine. It is questionable whether the 'average prudent man' will understand and comprehend. . . consent forms used by a prominent neuro-surgeon in his practice. . ." The author then sets out the designated consent forms. Clearly the forms are intentionally written so that they will not be understood. For example the forms state that "[t]he clinical outcome in my case is directly in proportion to the nature of the pathology," rather than saying "there are no guarantees that the

(c) General Incompetency.

The general incompetency test "focus[es] on certain qualities of the person whose competency is in question as a *person*, rather than as a *patient*, that is, outside the medical decisionmaking context rather than within it."¹⁶⁵ Examples include patients who are intoxicated, actively psychotic, severely mentally retarded, unconscious, or senile.¹⁶⁶

(d) Combining Specific and General Incompetency.

One commentator proposes a conjunctive approach to competency decisionmaking which uses the general incompetency test as a threshold test.¹⁶⁷ If the patient is generally incompetent, the doctor's disclosure duties are automatically suspended. If the

operation will help because we are not sure what we will find." *Id.*; cf. *Exceptions*, *supra* note 18, where the author states:

There is evidence that patients do not understand the information they receive because of the complex manner in which it is disclosed to them. One aspect of a survey of informed consent procedures in biomedical and behavioral research revealed that "[c]onsent forms tended to be written in academic or scientific language that may be difficult for the layman to understand. Descriptions of the procedures used in the research tended to be somewhat more readable than descriptions of the purpose or risks of the research; but overall, no more than 15 percent of the consent forms were in language as simple as is found, for example, in *Time* magazine. In more than three-fourths of the consent forms, fewer than ten percent of the technical or medical terms were explained in lay language."

Id. at 427 n.61 (quoting from U.S. Dep't of HEW, *Protection of Human Subjects—Institutional Review Boards; Report and Recommendations of the Nat'l Comm'n for the Protection of Human Subjects of Biomedical And Behavioral Research*, 43 Fed. Reg. 56,174, 56,189 (1978)).

In volume 19 of the Tennessee Law Review the editors used the following apropos filler between two informed consent articles:

CONCISE LANGUAGE

Someone had wired a Government bureau asking whether hydrochloric acid could be used to clean a given type of boiler. The answer was: "Uncertainties of reactive processes make use of hydrochloric acid undesirable where alkalinity is involved." The inquirer wrote back, thanking the bureau for the advice, saying that he guessed he would use hydrochloric acid. The bureau wired him: "Regrettable decision involves uncertainties. Hydrochloric will produce submuriate invalidating reactions." Again the man wrote thanking them for their advice, saying that he was glad to know that hydrochloric acid was all right. This time the bureau wired in plain English. "Hydrochloric acid," said the telegram, "will eat hell out of your *tubes*."—*Camp Livingstone Communique*.

19 Tenn. L. Rev. 348 (1946).

¹⁶⁵*Exceptions*, *supra* note 18, at 447.

¹⁶⁶For a list of cases see *id.* at 448 nn.118-20.

¹⁶⁷*Id.* at 449-50.

patient is not generally incompetent, he is presumed to be legally competent and the doctor must make the required disclosure unless the doctor determines the patient to be specifically incompetent under one of the specific incompetency tests.

There are two problems with this approach. The first problem, which has been previously **discussed**,¹⁶⁸ is that “individuals adjudged as generally incompetent may in fact be specifically competent to make a medical **decision**.”¹⁶⁹ The second problem is that the general incompetence test “makes competency into an issue of the **potentiality** for (1) evidencing a decision, (2) engaging in [rational] decisionmaking, ..., (3) making a [proper] decision ..., or (4) actually understanding [the disclosure]. ..., or some combination of these **approaches**.”¹⁷⁰ Thus the conjunctive approach allows the physician to suspend disclosure based upon a finding of potentiality and not actuality.¹⁷¹

The better approach would be to provide the four specific incompetency tests and the general incompetency test to the physician as five general factors which he or she must use to evaluate the patient's competence. The physician should be informed that no individual factor outweighs the others. The physician would not be allowed, nor required, to find a patient incompetent simply because the patient flunks one or more of the tests. He or she would have to conduct more than a cursory review of the patient's competence but would still have the latitude needed to make a proper finding.

3. *Therapeutic Privilege Exception.*

Although the genesis of the therapeutic privilege is not **clear**,¹⁷² the general concept apparently was recognized as early as 1853. In *Twombly v. Leach*,¹⁷³ the court held that “[u]pon the question whether it be good medical practice to withhold from a patient in a particular emergency, or under given or supposed circumstances, a knowledge of the extent and danger of his disease, the

¹⁶⁸See *supra* notes 141-43 and accompanying text.

¹⁶⁹Lidz, *supra* note 47, at 17.

¹⁷⁰*Exceptions, supra* note 18, at 449.

¹⁷¹Although I may disagree with some of the specific points made by Mr. Meisel and his coauthors, I am impressed by the overall concept they have developed. Their “tests” are part of a set of “evaluation factors” in my proposed military regulation on informed consent. See *infra* note 394 and accompanying text.

¹⁷²See Note, *Restructuring Informed Consent: Legal Therapy for the Doctor Patient Relationship*, 79 Yale L.J. 1533. 1564-65 n.95 (1970) (“[Some authors] state that courts have adopted the therapeutic privilege almost as a matter of judicial notice.”).

¹⁷³65 Mass. (11Cush.) 397 (1853).

testimony of educated and experienced medical practitioners is material and peculiarly **appropriate**.”¹⁷⁴

By the mid-1940s the privilege was clearly recognized.¹⁷⁵ That being the case, it appears that “the medical profession... recognized a privilege to *withhold* information long before there was any firmly established obligation to *disclose* information.”¹⁷⁶

In *Salgo v. Leland Stanford Jr. University Board of Trustees*,¹⁷⁷ one of the first cases to recognize the disclosure duty, the court set aside a verdict for the plaintiff because the jury should have been instructed that the physician has discretion to take into account the patient’s condition before deciding what information to disclose. In so doing the court said:

[T]he physician must place the welfare of his patient above **all** else and this very fact places him in a position in which he sometimes must choose between two alternative courses of action. One is to explain to the patient every risk attendant upon any surgical procedure or operation, no matter how remote; this may well result in alarming a patient who is already unduly apprehensive and who may as a result refuse to undertake surgery in which there is in fact minimal risk; it may also result in actually increasing the risks by reason of the physiological results of the apprehension itself. The other is to recognize that the patient presents a separate problem, that each patient’s mental and emotional condition is important and in certain cases may be crucial, and that in discussing the element of risk a certain amount of discretion must be employed consistent with the full disclosure of facts necessary to an informed **consent**.”¹⁷⁸

Some cases decided during this period went so far as to hold that disclosure *must* be suspended when it poses a reasonable threat of harm to the patient. For example, in *Williams v. Menahan*,¹⁷⁹ the court stated that “complete disclosure ... could

¹⁷⁴*Id.* at 405-06.

¹⁷⁵*See* Lund, *The Doctor, the Patient, and the Truth*, 19 Tenn. L. Rev. 344 (1946); Smith, *Therapeutic Privilege to Withhold Specific Diagnosis from Patient Sick with Serious or Fatal Illness*, 19 Tenn. L. Rev. 349 (1946).

¹⁷⁶Meisel, *supra* note 26, at 99 n.140.

¹⁷⁷154 Cal. App. 2d 560, 317 P.2d 170 (1957); *see supra* notes 37-38 and accompanying text.

¹⁷⁸154 Cal. App. 2d 560, 578, 317 P.2d 170, 181 (1957).

¹⁷⁹191 Kan. 6, 379 P.2d 292 (1963).

so alarm the patient that it would, in fact, constitute bad medical practice.”¹⁸⁰

(a) *Circumstances Justifying Invocation of the Privilege.*

Most commentators now agree that the privilege is well established in virtually all jurisdictions.¹⁸¹ Even so, several problems still remain. First, although the privilege, in theory, allows the physician to put the needs of the patient first, it may in practice, “legitimize the physician’s natural reluctance to disclose unpleasant information to the patient. Therefore, if the privilege is not severely circumscribed in its scope, it threatens to swallow the general obligation to disclose.”¹⁸²

Two leading court decisions, *Nishi v. Hartwell*¹⁸³ and *Canterbury u. Spence*,¹⁸⁴ vary widely concerning the circumstances that justify nondisclosure. Taken together they aptly demonstrate how theory (*Canterbury’s* dictum) and practice (*Nishi’s* holding) may differ.

Recognizing that the privilege could “devour the disclosure rule itself,”¹⁸⁵ the *Canterbury* court very narrowly announced, in dictum, that information could be withheld only if the patient would “become so ill or emotionally distraught on disclosure as to foreclose a rational decision, or complicate or hinder treatment, or perhaps even pose psychological damage to the patient.”¹⁸⁶ Furthermore, the court was very firm in its position that physicians were not to use the privilege to merely substitute their judgment for the patient’s.¹⁸⁷

¹⁸⁰*Id.* at 8, 379 P.2d at 294; *see also* Ferrara v. Galluchio, 5 N.Y.2d 16, 152 N.E.2d 249, 176 N.Y.S.2d 996 (1958); *supra* note 44 and accompanying text.

¹⁸¹*See generally* J. Ludlam, *Informed Consent* 38-39 (1978); R. Miller, *Problems in Hospital Law* 245 (4th ed. 1983); *Exceptions, supra* note 26, at 460; Lidz, *supra* note 47, at 18; Lund, *supra* note 175; Smith, *supra* note 175; Comment, *Informed Consent: The Illusion of Patient Choice*, 23 Emory L.J. 503 (1974); Note, *Restructuring Informed Consent: Legal Therapy for the Doctor-Patient Relationship*, 79 Yale L.J. 1533, 1564 (1970).

¹⁸²Lidz, *supra* note 47, at 19.

¹⁸³52 Haw. 188, 473 P.2d 116 (1970).

¹⁸⁴464 F.2d 772 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972); *see supm* notes 86-91 and accompanying text.

¹⁸⁵464 F.2d at 789.

¹⁸⁶*Id.*

¹⁸⁷*Id.* The court concluded that the privilege cannot be so broadly framed “that the physician may remain silent simply because divulgence might prompt the patient to forego therapy the physician feels that patient really needs. [Rather, the privilege should apply only] where the patient’s reaction to risk information, as reasonable [sic] foreseen by the physician, is menacing.” *Id.* But *see* Comment, *supra* note 181, where the author reported that “[a] number of cases appear to have confused the proper relationship of the privilege to informed consent, primarily by allowing the privilege to be used if the patient’s subsequent choice would be detrimental.” *Id.* at 506 (citing Grosjean v. Spencer, 258 Iowa 685, 140

In *Nishi*, one of the few cases which actually turn on the privilege, the defendant physician had been reluctant to disclose certain information for fear it would add to the patient's hypertension and heart problems. The court agreed with the defendant physician's assertions and very broadly held that "a physician may withhold disclosure of information regarding any untoward consequence of a treatment where full disclosure will be detrimental to the patient's total care and best interest."¹⁸⁸

The *Nishi* court seemed to focus on the seriousness of the medical condition (physician's point of view) and not on the mental status of the patient (patient's point of view). This is not surprising when you consider that *Nishi* (Hawaii) follows the professional disclosure standard¹⁸⁹ while *Canterbury* (District of Columbia) established the lay disclosure standard.¹⁹⁰

In states that follow the professional standard, the privilege is built into the disclosure equation from the very beginning. Under that standard, the information disclosed depends solely upon the doctor's evaluation of the patient's medical condition. The extent to which the disclosure might cause additional harm to the

N.W.2d 139 (1966); *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d 689 (1967); *Hunt v. Bradshaw*, 242 N.C. 517, 88 S.E.2d 762 (1955); *Getchell v. Mansfield*, 260 Or. 173, 489 P.2d 953 (1971)). In *Exceptions*, *supra* note 18, at 461 n.155, Mr. Meisel points out that "[p]erhaps these cases have taken their inspiration from doctors, whose criteria for determining when information should be withheld are confused and circular." *Id.* (citing *Abbuhl & Gerking, Informed Consent of the Emotionally Disturbed Patient*, 1975 *Legal Med. Ann.* 217, 220 (C. Wecht ed. 1976): "[T]he emotionally disturbed person is defined as one whose mental state is abnormal to the extent that a full disclosure of the risk . . . will cause the patient either substantial physical or emotional harm, or cause the patient to unreasonably refuse . . . treatment which a normal person would not refuse."). In *Cobbs v. Grant*, 8 Cal. 3d 229, 246, 502 P.2d 1, 12, 104 Cal. Rptr. 505, 516 (1972), the court indicated that the privilege applies where "disclosure would so seriously upset the patient that the patient would not have been able to dispassionately weigh the risks of refusing to undergo the recommended treatment." Taken literally, this would require that all relatively serious risks be withheld from **all** patients on the grounds that it is unlikely that many reasonable patients can totally separate emotion and bias from their decision—i.e., be dispassionate.

¹⁸⁸52 Haw. at 191, 473 P.2d at 119. The plaintiff, a dentist, was very concerned about his heart problems. As a result, the defendant, Dr. Hartwell, wanted to verify that there was an actual aneurysm of the aorta and arrange for special surgery in Houston, Texas, before he told the patient about it. A consent was therefore obtained from Dr. Nishi to do a thoracic aortography pursuant to a limited disclosure in which collateral risks of the procedure were avoided. Dr. Nishi was paralyzed from the waist down and had no control over his bowels or bladder as a result of the radio-opaque contrast medium (dye) injected into his body during the procedure. The defendant physicians conceded that they were aware of this collateral risk. *Id.* at 190-95, 473 P.2d at 118-20.

¹⁸⁹See *supra* note 109.

¹⁹⁰See *supra* notes 86-91 and accompanying text.

patient is merely another fact to be considered under the community standard.

States which follow the lay standard present a more complicated problem inasmuch as the physician must now weigh the extent of the harm against the patient's right to know all information material to the decision. There, the privilege operates as a device to apply the professional standard in a lay standard jurisdiction.¹⁹¹

This is probably why *Canterbury* was so adamant about restricting the scope of the privilege. In fact, the court went so far as to state that the privilege should apply only "where the patient's reaction to risk information, as reasonable [sic] foreseen by the physician, is *menacing*."¹⁹² Furthermore, although the court's language indicates that an adverse effect on treatment could invoke the privilege, the tone of the opinion indicates that this factor is subordinate to the court's other requirements, i.e., that the patient should be emotionally, mentally, or psychologically incompetent before the privilege is invoked.

By now it should be apparent that any attempt to determine what circumstances justify invocation of the privilege is like trying to nail jello to the wall. The difficulty of this task, especially in a lay disclosure standard jurisdiction, is further demonstrated by the California Supreme Court's¹⁹³ statement that:

A disclosure need not be made beyond that required *within the medical community* when a doctor can prove . . . he relied upon facts which would demonstrate to a *reasonable man* the disclosure would have so seriously upset *the patient* that the patient would not have been able to dispassionately weigh the risks. . . ."¹⁹⁴

(b) Procedural Aspects of the Privilege.

Assuming that the privilege is appropriate in a given case, two other closely related questions arise. First, to what extent can the physician suspend his or her disclosure duty? Second, does the existence of the privilege require, allow, or prohibit disclosure of information to a third party? Again, *Nishi* and *Canterbury* are the leading cases. Each court took an all-or-nothing attitude toward both questions—each court going in the opposite direction.

¹⁹¹See *supra* note 84.

¹⁹²464 F.2d at 789 (emphasis added).

¹⁹³*Cobbs v. Grant*, 8 Cal. 3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972).

¹⁹⁴*Id.* at 246, 502 P.2d at 12, 104 Cal. Rptr. at 516 (emphasis added).

Nishi held that the patient's right to decide is not abrogated by the invocation of the privilege.¹⁹⁵ Furthermore, the court indicated that the invocation of the privilege did not create a duty to make the disclosure to the patient's spouse.¹⁹⁶ The court agreed with Professor Hubert Winston Smith, "a noted authority on legal medicine," that:

[T]he real reason underlying the injunction that a physician should make full disclosure to the patient's spouse, when disclosure could not be made to the patient . . . is not that the law enjoins a physician to do so. It is that to apprise the patient's immediate family, not necessarily limited to the spouse, is a considerate act on the part of the physician to the spouse and the family; it is good public relations; and in some cases, the discussion which follows the disclosure will be helpful to the physician in deciding his course of action.¹⁹⁷

Combining these holdings with its liberal position on the circumstances allowing the invocation of the privilege,¹⁹⁸ *Nishi* has, in effect, provided an ample loophole for physicians to return to the "consent-to-medical-treatment"¹⁹⁹ theory.

Canterbury took the position that when the therapeutic privilege cuts off the patient's right to decide, "disclosure to a close relative with a view to securing consent to the proposed treatment may be the only alternative open to the physician."²⁰⁰ Nothing is said about obtaining the patient's consent after limited disclosure. Such an omission could be very dangerous, for an otherwise competent patient might so violently object to the

¹⁹⁵52 Haw. at 198, 473 P.2d at 122.

¹⁹⁶*Id.* But see 2 D. Louisell & H. Williams, *supra* note 81, ¶ 22.04, at 22-11.

¹⁹⁷52 Haw. at 200, 473 P.2d at 123. It is ironic that the last sentence of this statement points out one of the primary benefits of such disclosure. By talking with the family, the physician can gather data to assist in determining the competence of the patient as well as the applicability of the therapeutic exception. Of course this also has its risks. First, the doctor must be careful to weed out biases and conflicts of interest held by the third party. Second, the disclosure of information to the family before such conclusions are made may require disclosure of other sensitive information about the patient, either directly or indirectly. Some question whether this is an "actionable breach of the doctor's duty of confidentiality to the patient." *Exceptions, supra* note 18, at 466 n.175 (citing Annotation, *Physician's Tort Liability, Apart from Defamation, For Unauthorized Disclosure of Confidential Information About Patient*, 20 A.L.R.3d 1109, 1115-21 (1968) and *Lessard v. Schmidt*, 349 F. Supp. 1078, 1089 (E.D. Wis. 1972) (three judge court), vacated on other grounds, 414 U.S. 473 (1974)).

¹⁹⁸See *supra* note 188 and accompanying text.

¹⁹⁹See *supra* note 26.

²⁰⁰464 F.2d at 789.

initiation of the treatment that he would be harmed more than if he had been provided at least some information about the procedure.²⁰¹

Although the courts have not conclusively solved these procedural problems, most physicians, hospitals, and commentators agree that when the patient cannot make the decision himself, the proper procedure is to obtain the consent of a third party.²⁰² Hence, the most crucial question is not whether to obtain a third

²⁰¹Imagine, under the *Canterbury* standard, that a panic-stricken, hypertensive patient is brought into the emergency room with severe chest pain. Immediately sensing that the therapeutic privilege is appropriate, the doctor tells him, "It's all right, you have not had a heart attack," and disappears for what seems like an eternity. The doctor talks to the wife, who tells him of her husband's long history of chest pain, to include all previous tests that have been performed. The doctor says "It's time to do a cardiac catheterization," and proceeds to explain the procedure, its risks, and its benefits. She gives her written informed consent. The doctor returns to the patient and says, "I want to put you into the hospital for a few days just to see what's causing the pain." The patient, his head hurting from nitroglycerin and tired of lying in the emergency room, agrees and is taken to the cardiac care unit, hooked up with several leads to a monitor and left alone in a small cold room. The doctor comes by later and asks if it is okay to do a few tests. The patient says, "Sure." A little later the nurse comes in, takes some blood and tells the patient to fill the cup. The next morning the nurse walks in and says she is going to give him a shot to relax him. An hour or so later an orderly walks in, says he has to prepare him for one of the tests, and proceeds to shave the patient's right groin. The orderly, as part of the ward staff, knows he is not to tell the patient anything about the test. So he responds to the patient's question about the need for the preparation with a few jokes and a lot of general nonsense. An hour or so later two scrubsuit-clad cardiac catheterization technicians roll in another litter and say, "It's time to go." The patient asks, "Where?" and they respond, "To the lab." Ultimately the patient is taken to the catheterization lab, which appears to him to be very much like an operating room. The room is occupied by several people dressed in scrubsuits, caps, masks and gloves. Fearing the worst (open-heart surgery) the patient panics and sends the needles on the cardiac monitor skyrocketing.

Under the *Nishi* standard, *supra* notes 195-97 and accompanying text, the wife would have been ignored. The patient would have been told of the need for the catheterization and of the general procedure, using terms like "routine test" or "simple procedure." No one would have been told of the risks. Thus, the doctor would only obtain a consent to medical treatment, not informed consent.

The best solution appears to be a hybrid of the two extremes where informed consent is obtained from the spouse and consent to medical treatment is obtained from the patient. This is the approach taken in my proposed military directive. *See infra* notes 392-94 and accompanying text.

²⁰²Lidz, *supra* note 47, at 20. Army regulations are in consonance with this philosophy. *See* AR 40-3, paras. 2-19(f)(5)-(f)(7); *infra* notes 347-57 and accompanying text; *see also* President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Deciding to Forego Life-Sustaining Treatment: A Report on the Ethical, Medical, and Legal Issues in Treatment Decisions 126 (1983)* [hereinafter *President's Commission*]; Capron, *Informed Consent in Catastrophic Disease Treatment and Research*, 123 U. Pa. L. Rev. 340, 424-425 (1974); Note, *Consent as a Prerequisite to a Surgical Operation*, 14 U. Cin. L. Rev. 161, 170-72 (1940).

party's consent but, rather, *which* third party should make the decision?

(c) *Burden of Proving the Privilege.*

Before we discuss proxy decisionmaking, however, one more therapeutic privilege question must be addressed: the allocation of the burden of proof. In general, the informed consent cause of action requires the plaintiff prove the inadequacy of the disclosure.²⁰³ "Reasoning from this premise, it has generally been assumed that... , because [the privilege] essentially speaks to the adequacy of disclosure, the burden of proof on the privilege rests on the plaintiff."²⁰⁴ Several courts have agreed with this approach.²⁰⁵ Conversely, *Canterbury*, in leading a list of cases which suggest the burden is on the doctor,²⁰⁶ found that placing the burden of proof on the physician was "consistent with judicial policy laying such a burden on the party who seeks shelter from an exception to a general rule and who is more likely to have possession of the facts."²⁰⁷

G. PROXY DECISIONMAKERS

1. In General.

One of the most common phrases heard around a hospital, especially if you are administrative officer of the day in a military hospital, is "next of kin." In any given case, we seem to know intuitively who this character is, yet a definition does not appear to exist—at least as the term relates to informed consent.²⁰⁸

²⁰³*See, e.g.*, *Stauffer v. Karabin*, 30 Colo. App. 357, 362-64, 492 P.2d 862, 865 (1971); *Aiken v. Clary*, 396 S.W.2d 668, 675-76 (Mo. 1965); *Smith v. Reising*, 686 P.2d 285, 288 (Okla. 1984); *Scott v. Bradford*, 606 P.2d 554, 558 (Okla. 1979).

²⁰⁴*Meisel, supra* note 26, at 104.

²⁰⁵*See, e.g.*, *Nishi v. Hartwell*, 52 Haw. 188, 195-96, 473 P.2d 116, 121 (1970); *Charley v. Cameron*, 215 Kan. 750, 757, 528 P.2d 1205, 1210 (1974); *Getchell v. Mansfield*, 260 Ore. 174, 182-83, 489 P.2d 953, 957 (1971); *Longmire v. Hoey*, 512 S.W.2d 307, 310 (Tenn. Ct. App. 1974).

²⁰⁶*See, e.g.*, *Cobbs v. Grant*, 8 Cal. 3d 229, 245-46, 502 P.2d 1, 12, 104 Cal. Rptr. 505, 516 (1972); *Scott v. Bradford*, 606 P.2d 554, 558 (Okla. 1979); *Small v. Gifford Memorial Hosp.*, 133 Vt. 552, 557, 349 A.2d 703, 706 (1975); *Holt v. Nelson*, 11 Wash. App. 230, 241, 523 P.2d. 211, 218 (1974); *Miller v. Kennedy*, 11 Wash. App. 272, 283-84, 522 P.2d 852, 861 (1974); *Trogun v. Fruchtman*, 58 Wis. 2d 569, 604, 207 N.W.2d 297, 315 (1973).

²⁰⁷464 F.2d 772, 791 (D.C. Cir.), *cert. denied*, 409 U.S. 1064 (1972).

²⁰⁸If you enjoy feeling frustration, take an afternoon off and try to find a general definition of "next of kin" as it relates to medical care or informed consent. Both *Ballentine's Law Dictionary* 849 (3d ed. 1969) and *Black's Law Dictionary* 941 (5th ed. 1979) define the term in terms of descent and distribution law or workmen's compensation law. *Words and Phrases* 208-48 (1955) (with 1985 Cumulative Annual Pocket Part) reveals no definition in the context of medical care or informed consent. Neither does the A.L.R. 3d-4th Quick Index (1980) (with the January 1986 supplement). *Corpus Juris Secundum*, General Index M-Q 302 (1981)

Taken literally, next of kin refers to the next person related by blood. At common law the term was used to designate those to whom personal property was distributed. "Heirs," on the other hand, received real property.²⁰⁹

The spouse was not considered to be "next of kin" under common law inasmuch as he or she was not related to the person by blood. Although this is still generally true under many modern intestate distribution statutes,²¹⁰ the spouse is intuitively considered to be the primary proxy for medical consent.

Many times the physician regards any available member of the immediate family as the next of kin, irrespective of the person's exact relationship to the patient. In some cases the courts have gone great distances to find and appoint distant relatives as guardians.²¹¹

The President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research has published guidelines concerning who should act as surrogate

refers you to "Relatives, this index." Checking that topic in *Corpus Juris Secundum*, General Index R-Z 122-34 (1981), you will find nothing related to medical care, informed consent, or doctors and physicians. 76 C.J.S. 623 (1952) states, "The word 'relative' is considered to be a broad, general, comprehensive, and indefinite term, which has often perplexed the courts. It has a flexible meaning, and is difficult of interpretation, since it has no hard-and-fast definition, and it should be interpreted in the light of the context in which it is employed." Later the text states, "'Relative' or 'relatives' has been held equivalent to, or synonymous with, 'friend' . . . and 'next of kin' . . . and has been compared with, or distinguished from, 'affinity' . . . and 'next of kin'" *Id.* at 625. *Corpus Juris Secundum* also defines the term in the context of descent and distribution. *See* 26A C.J.S. *Descent and Dist.* § 19, at 558 (1956).

²⁰⁹*See* 23 Am. Jur. 2d *Descent & Dist.* § 50 (1983).

²¹⁰*Id.* § 116. The spouse is often referred to as a "distributee." *See also* Karp v. Cooley, 493 F.2d 408 (1974); the court, in dicta, states that the "[c]onsent of the wife for the husband's operation has no significance under Texas law unless the person is legally authorized to give consent, a proposition having no support in the record. *The relationship of husband and wife does not itself create such a legal authorization.*" *Id.* at 421 (emphasis added).

²¹¹*See, e.g.,* Long Island Jewish-Hillside Medical Center v. Levitt, 73 Misc. 2d 395, 342 N.Y.S.2d 356 (1973). The eighty-four-year-old patient suffered from severe dehydration, arterial sclerotic peripheral vascular disease, and life-threatening gangrene, and was concededly unable to make judgments concerning his health. Before the case went to court the hospital had determined that the patient's **only** living next of kin was his sister, who herself was in such bad health that she could not "assume the responsibility of making the decision of whether or not to consent to the necessary operation." *Id.* at 396-97, 342 N.Y.S.2d at 357-58. Rather than simply appointing a guardian *ad litem*, The New York supreme court solved the problem by locating a niece of the patient and immediately arranging a conference call between the niece, the judge, the court reporter, the court clerk, the hospital administrator, the hospital counsel, and the attending physician. The judge explained the situation and the niece accepted the appointment as guardian and consented to the operation. *Id.* at 399, 342 N.Y.S.2d at 360-61.

decisionmaker in a particular case. Their first guideline is that, although some presumptive priority could be established,²¹² the medical practitioner is ultimately responsible for deciding who should act on behalf of the patient.²¹³

The Commission generally believes the proxy should be a member of the “family” because, among other things, the family is usually concerned about the patient’s best interests and is usually the most knowledgeable about the patient’s desires and **values**.²¹⁴ Note, however, that the Commission’s definition of family includes “closest relatives and intimate **friends**,”²¹⁵ because under some circumstances, particularly when immediate kin are absent, those most concerned for and knowledgeable about the patient may not be actual **relatives**.²¹⁶

The Commission recognizes that there are times when no family member can be appointed as proxy due to factors such as unresolved disagreement within the family, evidence of patient neglect or abuse by the family, substantial conflicts of interest between the family and the patient, or evidence that the family intends to disregard the patient’s competently expressed directions, values, and desires.²¹⁷ Nevertheless, the Commission believes that the family members should be consulted even though they are disqualified from making the decision.²¹⁸

There will of course be occasions when an incompetent patient will have no qualified family member available. Who, then, makes the decision? The common answer to this question is “a legally-appointed guardian.” This solution has its own problems, how-

²¹²The Commission refers to Uniform Probate Code § 5-410. President’s Commission, *supra* note 202, at 127 n.21. This list closely corresponds to those persons entitled to receive the patient’s property upon his death. As a result, it is a list of those persons having the greatest potential for a conflict of interest.

²¹³President’s Commission, *supra* note 202, at 127. The Commission indicates that the practitioner must therefore appoint the spokesperson (subject to institutional review) or **seek** judicial assistance.

²¹⁴*Id.* at 127-28.

²¹⁵The appointment of friends may become more common as the numbers of homeless and deserted older persons grow. As one attorney testified:

[T]he undeniable tragic fact of the matter is that many, many people, into the thousands, do not have a brother or sister, a mother, a parent, a daughter, or son who can be appointed guardian. There isn’t anybody. A lot of them are in institutions, and with the deinstitutionalization process, a lot of are now in the community. And there isn’t a person to appoint. And we have run out of volunteers.

Id. at 129-30.

²¹⁶*Id.* at 46 n.10.

²¹⁷*Id.* at 128.

²¹⁸*Id.*

ever. Take, for example, the guardian appointed by a patient pursuant to a power of attorney or a living will executed prior to the incapacitation. Does the instrument meet the requirements of local law? Is it durable, i.e., does it survive the incapacitation? Was it properly drawn and executed? Does the wording of the instrument clearly indicate that the appointed surrogate has medical, as well as financial, decisionmaking **authority**?²¹⁹ Court orders issued before the patient became ill may have similar problems. Is the order valid in this jurisdiction? Did the court convey medical, as well as financial, decisionmaking powers to the **guardian**?²²⁰

Other possible surrogate decisionmakers include the doctor, a state agency, or a (post-illness) court-appointed guardian. But these suggestions also have their drawbacks. For one thing, governmental agency action and judicial action normally take too much time and are too expensive for many people.²²¹ Without the assistance of family members, it is not likely that many physicians could assemble enough information to fully evaluate a medical situation from the patient's point of view.²²² The appointment of the doctor also defeats a major objective of the informed consent doctrine—self autonomy.

²¹⁹The general extent of the law concerning durable powers of attorney, living wills, and natural death acts is beyond the scope of this article. For an excellent discussion of the benefits and problems involved, see President's Commission, *supra* note 202, at 136-53, 309-437. See also Collin & Meyers, *Using a Durable Power of Attorney for the Authorization of Withdrawal of Medical Care*, 11 Estate Planning 282, 285 (1984) (authors provide excellent model of durable power of attorney for health care); Otten, *New 'Wills' Allow People to Reject Prolonging of Life in Fatal Illness*, Wall St. J., July 2, 1985, at 35, col. 3 (thirty-five states and the District of Columbia have passed some form of living will statute).

²²⁰The existence of a proper guardian with proper powers is still not going to make things easy in some cases. Often there is substantial bickering between the guardian and the family. Buchanan, *Medical Paternalism or Legal Imperialism: Not the Only Alternatives for Handling Saikewicz-type Cases*, 5 Am. J. L. & Med. 97, 111 (1979), has suggested that the family and the guardian should act together as principal decisionmakers. Should this fail, the family should be aware that they can go to court to challenge the guardian.

²²¹The President's Commission, *supra* note 202, suggests that "[r]ecourse to the courts should be reserved for the occasions when adjudication is clearly required by state law or when concerned parties have disagreements that cannot be resolved over matters of *substantial* import." *Id.* at 6. Lynn, *Roles and Functions of Institutional Ethics Committees: The President's Commission's View*, Institutional Ethics Committees and Health Care Decision Making 22, 23 (R. Cranford & A. Doudera ed. 1984), states that "[t]o contest the appropriateness of the surrogate, all the family's 'dirty linen' may have to come into public view. Sometimes that is a substantial cost."

²²²AR 40-3, para. 2-19, precludes appointment of a member of the hospital staff as proxy decisionmaker unless there is a personal relationship between the patient and the staff member.

2 Institutional Ethics Committees.

In the 1976 landmark decision *In re Quinlan*,²²³ the New Jersey Supreme Court endorsed a new concept in proxy decisionmaking—the institutional ethics committee. The court discussed, at some length, a law review article written by a pediatrician,²²⁴ and then stated:

The most appealing factor in the technique suggested by Dr. Teel seems to us to be the diffusion of professional responsibility for decision, comparable in a way to the value of multi-judge courts in finally resolving on appeal difficult questions of law. Moreover, such a system would be protective to the hospital as well as the doctor in screening out, so to speak, a case which might be contaminated by less than worthy motivations of family or physician.²²⁵

The President's Commission recommended that, "[t]he medical staff, along with the trustees and administrators of health care institutions, should explore and evaluate various formal and informal administrative arrangements for review and consultation, such as 'ethics committees,' particularly for decisions that have life-or-death consequences for incompetent patients."²²⁶ This recommendation has been supported by the American Medical

²²³70 N.J. 10, 355 A.2d 647 (1976).

²²⁴Teel, *The Physician's Dilemma—A Doctor's View: What the Law Should Be*, 27 *Baylor L. Rev.* 6, 8-10 (1975).

²²⁵70 N.J. at 50, 355 A.2d at 669.

²²⁶President's Commission, *supra* note 202, at 5. Such committees have been around since the early 1970s. But:

[The] Los Angeles [case], where two physicians were charged with first-degree murder for heeding the family's request to remove intravenous feeding tubes. . . [and] the *Infant Doe*. . . and *Baby Jane Doe* [cases] have generated an enormous amount of interest and publicity and provided a new impetus for institutional ethics committees.

Perhaps the most compelling impetus has been the final "Infant Doe" regulations promulgated by the United States Department of Health and Human Services (HHS) after a public comment period during which 16,739 comments were submitted—96.5 percent of which supported the rule. The regulations. . . strongly encourage, but do not mandate. . . infant care review committees. . . whose suggested functions are: (1) to develop hospital policies and guidelines for management of specific types of diagnoses; (2) to monitor adherence through retrospective record review; and (3) to review specific cases on an emergency basis when the withholding of life sustaining treatment is being considered."

Institutional Ethics, Committees and Health Care Decision Making 5 (R. Cranford & A. Doudera ed. 1984) [hereinafter *Institutional Ethics Committees*].

Association, the American College of Hospital Administrators, the American Hospital Association, the American College of Physicians, and many other organizations.²²⁷

It is not envisioned, however, that these committees will become surrogate decisionmakers.²²⁸ Rather the committee's function should involve "education, development of policies and guidelines, and consultation and review."²²⁹ Although the education and policy development functions are important, the consultation and case review function has the most appeal in that, "[i]n this role, the ethics committee or its members would help patients, families, attending physicians, and other health care providers to face and resolve the ethical dilemmas presented to them by modern health care."²³⁰ Such direct assistance would have to reduce anxiety, fear, and frustration as well as reduce the potential for litigation.²³¹

²²⁷See Institutional Ethics Committees, *supra* note 226, at 7-8. The Department of Health and Human Services has adopted an American Academy of Pediatrics proposal that institutions caring for handicapped infants establish such review committees as a condition precedent to participation in Medicare and Medicaid. The California Medical Association Council has advised all acute care hospitals to establish and support an ethics committee.

The American Medical Association supports the use of such committees on the basis that they not only assist family members and physicians in "making critical treatment decisions," but they also "provide a valuable educational role on options available for treatment and subsequent care." *Id.* at 7 (citing American Medical Association, Comments on Nondiscrimination on the Basis of Handicap: Procedures and Guidelines Relating to Health Care for Handicapped Infants 17 (A.M.A. Chicago) (Aug. 26, 1983)).

²²⁸The authors of Institutional Ethics Committees, *supra* note 226, indicate that "most proponents of ethics committees would suggest that they not be the final decisionmaker. . . . However, to be effective, an institutional ethics committee might require authority to postpone actions based on decisions it counseled against or to initiate judicial review of such decisions." *Id.* at 13. In a military setting the commander would have to exercise the authority to postpone action and only the Department of Justice has authority to initiate judicial proceedings on behalf of the United States.

²²⁹*Id.* at 11.

²³⁰*Id.* at 13.

²³¹Of the nurses who commented on the proposed Baby Doe regulations, an overwhelming 97.5 percent were in favor of the proposed rule. "This may be due to their feeling that they have nowhere to go when confronted by ethical dilemmas, and that the regulations provide an avenue for action." *Zd.* at 10; see also *supra* note 226.

An example of this frustration is provided in *Barber v. Superior Court*, 147 Cal. App. 3d 1006, 195 Cal. Rptr. 484 (1983). Two doctors complied with a family's request to turn off all life-support machines. The head nurse did not object to the removal of the respirator but did object to fact that the doctors had specifically ordered that no misting machine was to be provided for the patient. Believing this to be a violation of good nursing practice she had the house officer write the order. One of the patient's doctors was so furious, when he heard about this, that he phoned the nurse and a vicious fight ensued. Subsequently, the nurse xeroxed a copy of the records and complained to the director of nursing and the chief of

H. OTHER EXCEPTIONS AND DEFENSES

It has been suggested that the informed consent doctrine has other exceptions or defenses. Some of the theories provide that the doctor is protected if the patient waives disclosure or consent, or the matter to be disclosed is beyond the knowledge of the doctor or the medical community.²³²

The waiver concept is not an exception to the disclosure duty for two reasons. First, the concept is not, and should never be, initiated by the physician. Second, in the waiver situation, the roles are reversed and the patient decides whether or not disclosure will be made, not the doctor.²³³

The certainty of the "beyond the knowledge of the doctor" defense is somewhat questionable in light of the Ninth Circuit case, Harbeson v. Parke Davis, Inc.²³⁴ Mrs. Harbeson was diag

staff. Not getting the relief she desired, she later went to the district attorney. He charged the two doctors with first degree murder. See J. Paris, *The Decision to Withdraw Life-sustaining Treatment and the Potential Role of an IEC: The Case of People v. Barber and Nejdil*, in Institutional Ethics Committees, *supra* note 226, at 203-05.

²³²See Lidz, *supra* note 47, at 18; 3 President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, Making Health Care Decisions 198-201 (1982) [hereinafter 3 Health Care Decisions]; Exceptions, *supra* note 18, at 453-60; J. Ludlam, Informed Consent 36-37 (1978). See also Trogun v. Fruchtmann, 58 Wis. 2d 569, 207 N.W.2d 297 (1973) (drug's side effects not known to Milwaukee area doctors).

²³³It has been suggested that the doctor should not accept the patient's waiver unless he or she has determined that the patient has made a knowing and voluntary waiver similar to that required by *Miranda v. Arizona*, 384 U.S. 436 (1966). See Exceptions, *supra* note 18, at 453-58. Unfortunately this potentially leads to the conclusion that the doctor must advise the patient of his informed consent rights before the patient could waive them. This is a very dangerous idea; it "makes the doctor look too much like a policeman and the patient too much like a suspect, [and] interject[s] an unnecessary degree of adversariness into the doctor-patient relationship. Telling a patient that he has certain legal rights within the relationship is to state implicitly that the physician may not be trustworthy, that he may not be acting in the patient's best interests, and that the patient should therefore be on guard." *Id.* at 455-56. Furthermore, the idea fails to recognize that, unlike the policeman, the doctor does not need the patient's waiver to do his job.

In any event, a physician who relies on a patient's waiver to avoid disclosure is sitting on a time bomb. Absent one of the true exceptions to the informed consent doctrine (emergency, incompetency, or therapeutic privilege), there is no logical reason for a physician to take such action. For example, if the patient suggests that he does not want the information, the doctor has two courses of action available. He could stop the medical discussion and begin a purely legal discourse which should culminate in the patient signing a waiver. Alternately the doctor could simply tell the patient that it is in his best interests to listen to the information and make his own decision and then document the disclosure in the record. The physician would probably feel more comfortable performing this second alternative and in the long run it should save considerable time and effort.

²³⁴746 F.2d 517 (9th Cir. 1984).

nosed as having epilepsy and was prescribed Dilantin to control her seizures. The Harbesons wanted to have more children, so they specifically consulted a neurologist, an intern, and an obstetrics resident about the risks of taking Dilantin during pregnancy. They were informed that Dilantin could cause minor defects such as a surgically repairable cleft palate or hirsutism, a temporary condition of excess hair. In reliance on this advice the Harbesons had two more children who were later diagnosed as having growth deficiencies, developmental retardation, and other physical, mental, and developmental defects as a result of the Dilantin.²³⁵

The court initially noted that, "In responding to the Harbesons' inquiries, none of the doctors conducted a literature search or consulted other sources for specific information concerning the effect of Dilantin on an unborn child, with the possible exception of Dr. Green's consultation of the 'Physicians' Desk Reference' (PDR)."²³⁶ After first determining that there were several articles on the correlation of birth defects and Dilantin, the court states:

Medical knowledge should not be limited to what is generally accepted as a fact by the profession. To hold otherwise would defeat the purpose of the doctrine, give little weight to exploratory medical research, and invite impossible line drawing. . . . [Furthermore, to] justify ignorance of this type would insulate the medical profession beyond what is legally acceptable. Here, there is expert testimony of Dr. Scherz that it would be "just good basic medicine" to conduct a literature search or contact specialists in response to a direct question to a physician such as the one posed here.²³⁷

I. GENERAL STATUTORY DEVELOPMENT

At least thirty states have some form of medical consent statute.²³⁸ Most statutes were passed during the mid-1970s as a result of the medical malpractice crisis. Many of them were enacted to restrict plaintiff's ability to sue and to prevent judicial expansion of physicians' liability. Others were intended to resolve conflicting court decisions.²³⁹

²³⁵*Id.* at 519.

²³⁶*Id.*

²³⁷*Id.* at 525.

²³⁸3 Health Care Decisions, *supra* note 232, at 204-51, contains a detailed chart showing the judicial and statutory highlights for each state and the District of Columbia. See also J. Ludlam, Informed Consent 41 (1978).

²³⁹See J. Ludlam, Informed Consent 41-42 (1978).

Most states have followed one of two general statutory patterns—the evidentiary statute or the cause of action statute.²⁴⁰ The first approach specifies what information must be provided and then provides for a method of corroborating the disclosure so that the corroboration is either prime facie, presumptive, or conclusive evidence of the patient's informed consent.²⁴¹ The second approach merely sets forth the informed consent elements and possible defenses.²⁴²

The content of these statutes vary widely concerning the various aspects of the informed consent doctrine. For example, some states have adopted medical malpractice statutes that are based solely upon negligence theories and that have complex procedural mechanisms designed to limit the physician's malpractice liability. In some cases, malpractice is defined in a manner designed to bring informed consent actions under the statute. To that extent the statutes apparently abolish the assault and battery medical consent theory. Yet in many states the malpractice definition does not specifically include informed consent and it may still be possible to bring an action under an assault and battery theory.²⁴³

Similarly, these thirty states have enacted numerous variations governing other aspects of informed consent law to include standards of disclosure, causation, proxy decisionmakers, the therapeutic privilege, patient comprehension, documentary evidence, and the burden of proof.²⁴⁴ The result is an incalculable variety of rules and guidelines.

J. THE TEXAS STATUTE

A federal regulatory approach based upon the informed consent provisions of the Texas Medical Liability and Insurance Improvement Act (the Act)²⁴⁵ would have substantial advantages under

²⁴⁰*Id.* at 42-46.

²⁴¹*Id.* at 42-44. *See, e.g.*, Idaho Code §§ 39-4301-39-4306 (1985); Iowa Code Ann. § 147.137 (Supp. 1985); La. Rev. Stat. Ann. §§ 40:1299.40, 40:1299.50-58 (West 1977 & Supp. 1986); Nev. Rev. Stat. §§ 41A.100-120 (1985); Ohio Rev. Code Ann. § 2317.54 (Page 1981); Tex. Rev. Civ. Stat. Ann. art. 4590i, §§ 6.01-07 (Vernon 1986); Wash. Rev. Code. Ann. §§ 7.70.050-70-060 (Supp. 1986) (statute combines both approaches).

²⁴²J. Ludlam, Informed Consent 44-46 (1978). *See, e.g.*, Alaska Stat. § 09.55.556 (1985); Del. Code Ann. tit. 18, § 6852 (Supp. 1984); Neb. Rev. Stat. §§ 44-2816, 44-2820 (1984); Tenn. Code. Ann. § 29-26-118 (1980); Vt. Stat. Ann. tit. 12, § 1909 (Supp. 1985).

²⁴³J. Ludlam, Informed Consent 46-47 (1978).

²⁴⁴*Id.* at 47-56.

²⁴⁵Tex. Rev. Civ. Stat. Ann. art. 4590i, §§ 6.01-07 (Vernon 1986).

the Federal Tort Claims Act.²⁴⁶ Therefore, I intend to discuss the Texas statute in some detail.

Section 6.02 of the Act provides that “the only theory on which recovery may be obtained is that of negligence in failing to [adequately] disclose the risks or hazards that could have influenced a reasonable person in making a decision to give or withhold **consent**.”²⁴⁷ Whether or not this lay standard has been met in any given case will be determined by sections 6.05 and 6.06 of the Act. Before these sections can be fully understood, however, one must be aware of sections 6.03 and 6.04, the revolutionary provisions which create and empower the Texas Medical Disclosure Panel (the Panel).

The Panel consists of three lawyers and six doctors. Its primary duty is “to determine which risks and hazards related to medical care and surgical procedures must be disclosed . . . and to establish the general form and substance of such **disclosure**.”²⁴⁸ To accomplish this task the Panel must periodically “identify and make a thorough examination of **all** medical treatments and surgical procedures in which physicians and health care providers may be involved in order to determine which of those treatments and procedures do and do not require disclosure.”²⁴⁹ Having done this, the Panel is directed to prepare two lists for publication in the Texas **Register**.²⁵⁰ List A procedures require **full** disclosure of the specified risks while List B procedures require no disclosure of any **risks**.²⁵¹ Sections 6.06 and 6.05 of the Act specify the manner of disclosure and duty-of-disclosure rules concerning List A **procedures**.²⁵² Treatments and procedures not included on either List A or List B are subject to the general standard set out in Section 6.02 of the Act.²⁵³

²⁴⁶See *infra* notes 300-28 and accompanying text.

²⁴⁷**Tex. Rev. Civ. Stat. Ann. art. 4590i, § 6.02** (Vernon 1986). Section 6.02 does not, however, prohibit an assault and battery action for failure to obtain consent.

²⁴⁸*Id.* §§ 6.03(a)-.03(c).

²⁴⁹*Id.* §§ 6.04(a), .04(d) (at least annually).

²⁵⁰*Id.* §§ 6.04(b)-.04(c).

²⁵¹**Since** its creation in 1977, the Panel has published, reviewed, and updated the two required lists. See 9 Tex. Reg. 6002-03 (Nov. 23, 1984); 9 Tex. Reg. 2857-58, 2888-90 (May 25, 1984); 8 Tex. Reg. 5099 (Dec. 9, 1983); 7 Tex. Reg. 4161 (Dec. 3, 1982); 7 Tex. Reg. 3453-54, 3473-82 (Sep. 24, 1982); 6 Tex. Reg. 4668-78 (Dec. 15, 1981); 6 Tex. Reg. 3073-88 (Aug. 21, 1981).

Appendices A and B of the Addendum to this article are taken directly from these publications, up to and including the January 1985 (effective date) amendments. Appendix A, which corresponds to the Panel's List A, substantiates Mrs. White's claim that Dr. Burgundy should have told her about the risk of “uncontrollable leakage of urine.” See *supra* note 3 and accompanying text.

²⁵²**Tex. Rev. Civ. Stat. Ann. art. 4590i, §§ 6.05-.06** (Vernon 1986).

²⁵³**Section 6.07(b)** of the Act states, “If medical care or surgical procedure is

Section 6.06 of the Act sets out the disclosure requirements for List A procedures. Consent given for any treatment on that list is presumed effective if “it is given in writing, signed by the patient or a person authorized to give the consent and by a competent witness, and if the written consent specifically states the risks and hazards that are involved . . . in the form and to the degree required by the Panel.”²⁵⁴

The health care provider’s duty concerning List A procedures is set out in section 6.05 of the Act. Before a patient or authorized person gives consent to any listed treatment, the practitioner “shall disclose . . . the risks and hazards involved in that kind of care or procedure.”²⁵⁵ This section also provides that “[t]he physician or health care provider shall be considered to have complied with the requirements of this section if disclosure is made as provided in Section 6.06.”²⁵⁶

Section 6.07 of the Act provides that evidence of compliance with these two sections as well as the contents of List B “shall be admissible in evidence and shall create a rebuttable presumption that the requirements of Sections 6.05 and 6.06 of the [Act] have been complied with and this presumption shall be included in the charge to the jury.”²⁵⁷ Conversely, evidence of failure to comply with sections 6.05 and 6.06 creates a rebuttable presumption in favor of the patient unless the physician can show that disclosure

rendered with respect to which the panel has made no determination either way regarding a duty of disclosure, the physician or health care provider is under the duty otherwise imposed by law.” See *Peterson v. Shields*, 652 S.W. 2d 929 (Tex. 1983). See also Richards & Rathburn, *Informed Consent and the Texas Medical Disclosure Panel*, 46 Tex. B.J. 349, 350 (1983). But see Comment, *Texas Adopts an Objective Standard of Medical Disclosure: “Is There a Reasonable Layperson in the House?”*, 15 Tex. Tech L. Rev. 389, 402-415 (1984), where the author claims that the legislative history of the Act shows that the legislature meant for the “duty otherwise imposed by law” language to mean the pre-statute common law. Thus, the author concludes that the Texas Supreme Court erred in *Peterson* by departing from the professional standard established in *Wilson v. Scott*, 412 S.W. 299 (Tex. 1967).

²⁵⁴Tex. Rev. Civ. Stat. Ann. art. 4590i, § 6.06 (Vernon 1986). The Panel has adopted a specific form to be used by physicians and health care providers. See 6 Tex. Reg. 4668, 4669, 4679-80 (Dec. 15, 1981). The form contained in Appendix C of the Addendum is an adaptation of the Texas form.

²⁵⁵*Id.* § 6.05.

²⁵⁶*Id.*

²⁵⁷*Id.* § 6.07(a)(1). Elliot, *The Impact of the Texas Medical Liability and Insurance Improvement Act on Informed Consent Recovery in Medical Malpractice Litigation*, 10 Tex. Tech L. Rev. 381 (1979), points out that the initial draft of Section 6.07(a)(1) stated that compliance with Section 6.06 “shall be deemed to constitute compliance as a matter of law.” *Id.* at 383 (citing Tex. H.R.J. 1029 (1977)).

was not made due to an emergency or because it was not "medically **feasible**."²⁵⁸

In summation, the Texas statute establishes a community standard²⁵⁹ for certain procedures, no disclosure duty for certain procedures, and a lay standard for the remainder. It also provides the practitioner with a presumptive defense if he or she complies with the disclosure requirements of section 6.06 and provides the patient with a presumptive cause of action if the practitioner fails to meet those requirements.

As long as the Panel operates equitably to balance the needs of the medical profession and the right of patients to self-determination, the statutory scheme has merit. To the extent that List A and List B cover a particular procedure, the statute eliminates the difficult task of determining the lay standard's material risks or the professional standard's "community standard" and, in many cases, it will eliminate the need for expert testimony. The specific notice provided by the Act's list will benefit doctors by eliminating a lot of guesswork and anxiety. Patients will generally benefit as a class because the danger of a presumptive cause of action should encourage more disclosure in general. One of the biggest benefits should be a reduction in litigation. Attorneys will be able to readily ascertain the merits of a case, and either the plaintiff will drop the lawsuit, or the defendant will attempt to settle out of court.²⁶⁰

The statutory scheme is not without its faults. The required lists will take a tremendous amount of time and effort to formulate and update. Also, the statute only addresses "risks and hazards." This leaves open the question of what disclosure standard applies in Texas concerning the nature of the illness and alternative methods of care.²⁶¹

²⁵⁸Tex. Rev. Civ. Stat. Ann. art. 45093, § 6.07(a)(2) (Vernon 1986).

²⁵⁹This "standard" adopts a statewide approach. Using the "committee approach" in a military regulation could initiate a long-needed movement toward a national standard for informed consent.

²⁶⁰Since the Act was passed in 1977, there have been four reported cases: *Barclay v. Campbell*, 683 S.W.2d 498 (Tex. Civ. App. 1985) *reu'd*, 704 S.W.2d 8 (Tex. 1986); *Ford v. Ireland*, 699 S.W.2d 587 (Tex. Civ. App. 1985); *Nevauex v. Park Place Hosp., Inc.*, 656 S.W.2d 923 (Tex. Civ. App. 1983); and *Peterson v. Shields*, 652 S.W.2d 929 (Tex. 1983). None of these cases involved procedures contained on either of the Panel's lists.

²⁶¹Is it the common law professional standard or the general statutory lay standard? *See supra* note 253.

111. TERMINATION OF MEDICAL TREATMENT AND INFORMED CONSENT

It has been ten years since the New Jersey courts were faced with the landmark case, *In re Quinlan*.²⁶² Since then, much of the commentary has remained devoted to the question of whether it is right to terminate medical treatment²⁶³ in a given case. Relatively little has been written about the general everyday informed consent problems encountered by doctors, hospitals, families, and guardians in the normal uncontested, unpublicized termination case. Nevertheless, the courts that have been faced with these highly publicized cases have largely used basic informed consent principles to make their decision.

In 1976, the New Jersey Supreme Court concluded that Karen Ann Quinlan, a comatose patient existing in a chronic vegetative state, should be removed from life-supporting mechanisms pursuant to her father's request. In so doing, the court based its decision primarily on Karen's constitutional right to privacy, i.e., her right to self-determination.²⁶⁴ Additionally, the *Quinlan* court was forced to address several general informed consent issues that the parties and the lower courts encountered during the decisionmaking process.

For one thing, the parties stipulated that Karen was incompetent and that a surrogate decisionmaker was necessary.²⁶⁵ Reading between the lines it is apparent that Karen's father was initially the unanimous choice. After some period, however, Joseph Quinlan came to the conclusion that use of self-sustaining equipment should be terminated. When the hospital would not agree and began to disregard his decisions, he sought appointment from the courts as legal guardian. This was opposed by Karen's doctors, the hospital, the local prosecutor, the State, and the guardian *ad litem*, presumably on the sole ground that Mr. Quinlan's ultimate decision made him specifically incompetent.²⁶⁶ The trial court elected to bifurcate the guardianship. Joseph

²⁶²70 N.J. 10, 355 A.2d 647 (1976).

²⁶³Do-not-resuscitate orders and removal of life-support systems should be included under one inclusive term—termination of medical treatment. As such they constitute an alternative procedure and should therefore be considered as part of the classical elements of informed consent.

²⁶⁴70 N.J. at 38, 355 A.2d at 662. As a result, "removal of a respirator is [now] routinely performed without judicial intervention." Note, *The Current State of Termination of Medical Treatment Case Law*, 9 Nova L.J. 159, 159 (1984).

²⁶⁵70 N.J. at 21, 355 A.2d at 653.

²⁶⁶See *supra* notes 154-59 and accompanying text.

Quinlan was appointed “guardian of the trivial property but not the person of his **daughter**.”²⁶⁷ The guardian *ad litem* was directed to protect Karen’s personal best interests.²⁶⁸

The New Jersey Supreme Court reversed this decision, holding that there was no valid reason why Karen’s father should not be the guardian of her person. Specifically, the court held that “while Mr. Quinlan feels a natural grief, and understandably sorrows because of the tragedy which has befallen his daughter, his strength of purpose and character far outweighs these sentiments and qualifies him eminently for guardianship.”²⁶⁹

In reaching its decision on the withdrawal of life-support systems the court reviewed certain “constitutional and other legal issues” and stated that “[i]t is the constitutional right of privacy that has given us the most **concern**.”²⁷⁰ The court concluded that if Karen were “miraculously lucid for an interval . . . and perceptive of her irreversible condition, she could effectively decide upon discontinuance of the life-support apparatus, even if it meant the prospect of natural **death**.”²⁷¹ In other words, if

²⁶⁷70 N.J. at 21, 355 A.2d at 653.

²⁶⁸*Id.* at 18, 355 A.2d at 651. It should be noted that the first guardian ad litem resigned and was succeeded by another. No reason was given for the resignation and one might conclude that Karen was initially placed in the hands of a person who could not see her cause **all** the way through to the end.

On the other hand the Supreme Court concludes that the trial court had substantial evidence that:

The character and general suitability of Joseph Quinlan as guardian for his daughter, in ordinary circumstances, could not be doubted. The record bespeaks the high quality of familial love which pervaded the home of Joseph Quinlan. . .

The proofs showed him to be deeply religious, imbued with a morality so sensitive that months of tortured indecision preceded his belated conclusion . . . to seek termination of life-supporting measures sustaining Karen.

Id. at 29-30, 355 A.2d at 657. In other words, Mr. Quinlan was generally competent and he passed the first, second, and presumably the fourth specific competency tests. See *supra* notes 146-66, 266, and accompanying text.

²⁶⁹70 N.J. at 53, 355 A.2d at 671. The court was also sensitive to the physicians’ and the hospital’s concerns about the guardianship problem. As stated previously, the court was impressed with the concept of ethics committees as a possible solution to proxy decisionmaking problems. See *supm* notes 223-25 and accompanying text. In fact, the tone of opinion suggests that the committee should be the decisionmaker, and not merely an advisory body, in cases where the patient-doctor-family relationship fails to reach a decision. 70 N.J. at 50-51, 355 A.2d at 669. See *also* Institutional Ethics Committees, *supm* note 226, at 7.

²⁷⁰70 N.J. at 38, 355 A.2d at 662.

²⁷¹The court relied heavily upon the testimony of Dr. Korein, who described the “unwritten and unspoken standard of medical practice implied in the foreboding initials DNR.” *Id.* at 29, 355 A.2d at 657. The testimony involved the concept of allowing patients having metastatic cancer involving the lungs, the brain, the

Karen were competent and were given **full** disclosure of the facts, she would be able to consent to the withdrawal of the equipment.²⁷²

Finally, the court held that “Karen’s independent right of choice. . . may be asserted on her behalf by her guardian.”²⁷³ The court emphatically held, however, that the right belonged to the patient, not the parent or surrogate.²⁷⁴ This raises the question of what standard should be applied to determine what the patient would have chosen, had he or she chosen herself. This question was more clearly discussed in a more recent New Jersey case, *In re Conroy*.²⁷⁵

Ms. Conroy was an 84-year-old, bedridden, nursing home resident whose nephew²⁷⁶ sought permission to remove a nasogastric (NG) tube through which Ms. Conroy was given food and water. The nephew had made previous medical decisions for his aunt to include refusing to consent to the amputation of her gangrenous left leg. From the record it appears that he made this decision, as well as the request to remove the NG tube, because he was confident that she would not have wanted the surgery or the tube.²⁷⁷

liver, and multiple involvements the option to not be resuscitated or placed upon a respirator when they stopped breathing. *Id.*

²⁷²Specifically the court stated:

We perceive no thread of logic distinguishing between such a choice on Karen’s part and a similar choice which, under the evidence of this case, could be made by a competent patient terminally ill, riddled by cancer and suffering great pain; such a patient would not be resuscitated or put on a respirator in the example described by Dr. Korein, and a *fortiori* would not be kept *against his will* on a respirator.

Id. at 39, 355 A.2d at 663.

²⁷³*Id.* at 42, 355 A.2d at 664.

²⁷⁴*Id.*

²⁷⁵98 N.J. 321, 486 A.2d 1209 (1985).

²⁷⁶Ms. Conroy had been adjudicated incompetent in 1979 and her nephew had been appointed guardian. Nevertheless the court appointed a guardian *ad litem* for this action. *Id.* at 335-36, 486 A.2d at 1216. Ms. Conroy never married and had few close friends. She had been close to her three sisters but they predeceased her. The nephew was her only blood relative. He had known her for over fifty years and had visited her frequently in the last several years. *Id.* at 339, 486 A.2d at 1218.

²⁷⁷*Id.* at 336, 340, 486 A.2d at 1216, 1218.

[The nephew] testified that Ms. Conroy feared and avoided doctors and that, to the best of his knowledge, she had never visited a doctor until she became incompetent in 1979. He said that on the couple of occasions that Ms. Conroy had pneumonia, “[y]ou couldn’t bring a doctor in,” and his wife, a registered nurse, would “try to get her through whatever she had.” He added that once, when his wife took

Before it even addressed Ms. Conroy's constitutional right to privacy the court stated:

The starting point in analyzing whether life-sustaining treatment may be withheld or withdrawn from an incompetent patient is to determine what rights a competent patient has to accept or reject medical care... The doctrine of informed consent is a primary means developed in the law to protect this personal interest in the integrity of one's body... The patient's ability to control his bodily integrity through informed consent is significant only when one recognizes that this right also encompasses a right to informed refusal... Thus, a competent adult person generally has the right to decline to have any medical treatment initiated or continued.²⁷⁸

Subsequently, after reviewing the constitutional right to privacy and the state's right to limit a person's right to refuse treatment,²⁷⁹ the court held that, "life-sustaining treatment may be withheld or withdrawn from an incompetent patient when it is clear that the particular patient would have refused the treatment under the circumstances involved. The standard we are enunciating is a subjective one, ... not what a reasonable or average person would have **chosen**."²⁸⁰

The court proceeds, however, to state that humane action requires that two other tests be used, if necessary, to determine a patient's desires. In addition to the preferred subjective test, i.e., substituted-judgment **standard**,²⁸¹ the court held that "life-sustaining treatment may also be withheld or withdrawn from a patient in Claire Conroy's situation if either of two 'best interests'

Ms. Conroy to the hospital emergency room, "as foggy as she was she snapped out of it, she would not sign herself in and she would have signed herself out immediately." According to the nephew, "[a]ll [Ms. Conroy and her sisters] wanted was to ... have their bills paid and die in their own house."

Id. at 339-40, 486 A.2d at 1218.

²⁷⁸*Id.* at 346-47, 486 A.2d at 1221-22.

²⁷⁹*Id.* at 348-55, 486 A.2d at 1222-26. "Courts and commentators have commonly identified four state interests that may limit a person's right to refuse medical treatment: preserving life, preventing suicide, safeguarding the integrity of the medical profession, and protecting innocent third parties." *Id.* at 348-49, 486 A.2d at 1223.

²⁸⁰*Id.* at 360-61, 486 A.2d at 1229.

"See President's Commission, *supra* note 202, at 132-34. "The substituted judgment standard requires that a surrogate attempt to reach the decision that the incapacitated person would make if he or she were able to choose." *Id.* at 132.

tests—a limited-objective or a pure-objective test—is satisfied.”²⁸²

The *substituted-judgment standard* requires credible proof of the patient’s actual desires. Methods of proof include living wills, durable powers of attorney, clearly ascertainable oral directives given to family members or other proxies prior to the current period of incompetence, known reactions that the patient voiced concerning the treatment of other persons in a similar condition, the patient’s religious beliefs and the tenets of that religion, and the patient’s prior consistent pattern of conduct with respect to personal medical care.²⁸³ Furthermore, “since the goal is to effectuate the patient’s right of informed consent, the surrogate decisionmaker must have at least as much medical information upon which to base his decision about what the patient would have chosen as one would expect a competent patient to have before consenting to or rejecting treatment.”²⁸⁴

The *limited-objective test* combines the substituted-judgment test and the pure-objective test. It requires the surrogate to provide some evidence of what the patient would have actually desired as well as evidence that “the patient is suffering, and will continue to suffer throughout the expected duration of his life, unavoidable pain, and that the net burdens of his prolonged life . . . markedly outweigh any physical pleasure, emotional enjoyment, or intellectual satisfaction that the patient may still be able to derive from life.”²⁸⁵

The *pure-objective test* appears to be almost insurmountable. It requires the decisionmaker to show that “the recurring, unavoidable and severe pain of the patient’s life with the treatment should be such that the effect of administering life-sustaining treatment would be *inhumane*.”²⁸⁶ The court does not give any hints as to whether the mere NG feeding of Ms. Conroy, who was

²⁸²98 N.J. at 365, 486 A.2d at 1231-32.

²⁸³*Id.* at 361-62, 486 A.2d at 1229-30.

²⁸⁴*Id.* at 363, 486 A.2d at 1231. The court mandated that the medical evidence must conform to the “Claire Conroy pattern: an elderly, incompetent nursing home resident with severe and permanent mental and physical impairments and a life expectancy of approximately one year or less.” *Id.*; see also *id.* at 342 n.1, 486 A.2d at 1219 n.1.

²⁸⁵*Id.* at 365, 486 A.2d at 1232.

²⁸⁶*Id.* at 366, 486 A.2d at 1232. The court expressly refused to allow any proxy decision to be based on assessments of personal worth or social utility of the patient’s life, the actively hastening versus passively allowing death distinction, the enigmatic differences between ordinary and extraordinary treatment, or the withholding versus withdrawing of life-sustaining treatment distinction. *Id.* at 367-74, 486 A.2d at 1232-37.

severely mentally and physically **impaired**,²⁸⁷ was inhumane. In fact, the court held that the evidence presented by the nephew at trial was inadequate to satisfy any of the three tests. The court stated that, if Clair Conroy were still alive, the guardian would have to explore the issues further prior to reaching any decision.²⁸⁸

The substituted judgment standard is a required consideration for surrogate decisionmakers under the new Army regulation on termination of life-sustaining treatment (AR 40-3).²⁸⁹ This standard, as applied by AR 40-3, is currently being reviewed by the United States District Court for the Western District of Texas. In *Newman v. United States*,²⁹⁰ plaintiff asked the court to order the military doctors to remove his wife's nasogastric (NG) tube. The NG tube is used only to provide Mrs. Newman with food and water. Mrs. Newman is currently in a chronic persistent vegetative state and is incapable of making any decision on her own. The plaintiff was notified that Mrs. Newman could not continue to receive domiciliary care at the military facility.²⁹¹ Faced with potentially large medical expenses on his wife's behalf, plaintiff requested that the military doctors withdraw the NG tube and let Mrs. Newman die. If the doctors had agreed, an order would have been written and the NG tube would have been withdrawn, in accordance with AR 40-3.

The Army doctors refused to write the order, however, on ethical and moral grounds. The only medical care Mrs. Newman is receiving is limited to comfort measures, a Foley catheter to collect urine, and the NG tube for food and water. The doctors pointed out that Mrs. Newman would be able to swallow food and

²⁸⁷**Ms.** Conroy was bedridden and unable to move from a semi-fetal position. She suffered from diabetes, hypertension, and arteriosclerotic heart disease. She had several necrotic decubitus ulcers on her left foot, leg, and hip, and her left leg was gangrenous to the knee. She also had a urinary catheter in place at all times and could not control her bowels. Although she could not speak she moaned occasionally when moved or fed through the NG tube. She could move her head, neck, and hands to a minor degree and her eyes would sometimes follow individuals around the room. Occasionally she would smile when her hair was combed or when her body was rubbed. The doctors were not sure as to whether, or to what degree, she was experiencing pain. *Id.* at 337-38, 486 A.2d at 1217.

²⁸⁸*Id.* at 385-88, 486 A.2d at 1243-44.

²⁸⁹*See* Encl., DASG-PSQ Letter (1985), para. 4b(3).

²⁹⁰**No.** EP-86-CA-276 (W.D. Tex., filed Aug. 21, 1986).

²⁹¹10 U.S.C. § 1077(b)(1) (1982) states: "The following types of health care may not be provided under section 1076 [medical care for dependents] of this title: (1) Domiciliary or custodial care." AR 40-3, Glossary, defines domiciliary care as: "Care that normally is given in a nursing home, convalescent hospital, or similar institution to a patient who requires personal care rather than active and definitive treatment in a hospital for an acute medical or surgical condition."

water, if spoon-fed, even if the NG tube were removed. Furthermore, her thalamus, or mid-brain pain center, and her brain stem are both functioning. Thus, the doctors are not sure to what extent Mrs. Newman would suffer pain if starved to death.²⁹²

Plaintiff testified at the initial hearing that, on a previous occasion, he had discussed the issue of life-support with his wife and that she had made an agreement with him that "if the condition ever arose, [they] would not want to be maintained... on life-support equipment."²⁹³ Defendant has argued that this meager showing is not sufficient to meet the substituted judgment standard, as required by AR 40-3,²⁹⁴ and as defined by *In re Conroy*.²⁹⁵

A final example of the practical importance of securing informed consent in termination of medical treatment cases is demonstrated by the California case, *Barber v. Superior Court*.²⁹⁶ Dr. Nejdil performed a simple operation on Mr. Clarence Leroy Herbert. Later, in the recovery room, Mr. Herbert stopped breathing and eventually suffered irreversible brain damage. Upon hearing the prognosis, the family requested that all life-sustaining machines be turned off. Dr. Barber, the primary physician, asked the family to put this in writing. Mr. Herbert's wife and eight children eventually signed the request. The respirator was re-

²⁹²Brief for Defendant at 1-19, *Newman v. United States*, No. EP-86-CA-276 (W.D. Tex., filed Aug. 21, 1986).

²⁹³Transcript of Proceedings, August 25, 1986, at 13, *Newman v. United States*, No. EP-86-CA-276 (W.D. Tex., filed Aug. 21, 1986).

²⁹⁴Brief for Defendant at 4, *Newman v. United States*, No. EP-86-CA-276 (W.D. Tex., filed Aug. 21, 1986). Defendant also argued:

2. That Plaintiff does not appear to object to spoon feeding, only to tube feeding. But since Mrs. Newman would survive in either case, her "right to die" is not at issue here. Instead, this is a dispute over the mode of feeding—the manner in which she would be fed, rather than whether she would be fed at all. As such, the Plaintiff is essentially demanding that the hospital embark upon a far more costly, tedious, and time consuming process than is presently being used. Additionally, spoon feeding may lead to other invasive or resuscitation procedures, and/or unnecessary exposure of the Government to tort liability, should Mrs. Newman aspirate.

3. To achieve the actual result desired by Plaintiff, i.e., starvation and dehydration, Plaintiff is asking the court to order the Defendant to completely withhold food and water, even by spoon feeding, from a patient who is capable of eating. This exceeds not only the Army Regulation's definition of lifesustaining treatment, but every other known definition relating to lifesustaining treatment.

Id. at 4-5.

²⁹⁵*Id.* at 14-18; see *supra* notes 275-88.

²⁹⁶147 Cal. App. 3d 1006, 195 Cal. Rptr. 484 (1983).

moved, but Mr. Herbert continued to breathe on his own. Because the patient had the potential of living in a vegetative state for an unknown period of time, the family requested the intravenous nourishment be removed and the doctors agreed. Mr. Herbert died from dehydration a few days later and Doctors Barber and Nejdil were charged with murder.²⁹⁷

Although the charges were later dropped, “[t]he legal fees are already well in excess of \$650,000; the personal and professional lives of the physicians have been disrupted by the trauma of a criminal indictment; and the case has seriously hampered the practice of good medicine in the area.”²⁹⁸ Furthermore, questions were raised during the court hearings as to whether or not the physicians had an adequate basis on which to assess Mr. Herbert’s condition as irreversible. As a result:

The patient’s wife has filed a \$25 million malpractice suit against the physicians and the hospital. Her attorney, Melvin Belli, insists that Mrs. Herbert was told that her husband was brain-dead. He maintains that if she had known that was not the case, she would never have consented to the removal of the life-support systems. *Hence, we have a question as to how adequately the family was informed of the patient’s condition.*²⁹⁹

IV. IMPACT OF STATE INFORMED CONSENT LAW ON THE UNITED STATES ARMED FORCES³⁰⁰

At the very beginning of this article, I posed hypotheticals in which the Fort Leonard Wood, Missouri, and Fort Lee, Virginia, staff judge advocates (senior legal advisors) seek exigent assistance from the Army’s Litigation Division and The Judge Advocate General’s School.³⁰¹ Since the Federal Tort Claims Act

²⁹⁷*Id.* at 1010-11, 195 Cal. Rptr. at 486; *see also supra* note 231.

²⁹⁸Paris, *The Decision to Withdraw Life-sustaining Treatment and the Potential Role of an IEC: The Case of People v. Barber and Nejdil*, in *Institutional Ethics Committees*, *supm* note 226, at 205.

²⁹⁹*Id.* at 206.

³⁰⁰Although my analysis deals only with Army regulations and procedures, the general principles apply to all of the armed forces.

³⁰¹The Judge Advocate General’s School provides continuing legal education for Army judge advocates and civilian attorneys, as well as attorneys working for the other military departments. It is often consulted by attorneys working in the field inasmuch as its general mission requires it to remain current on all legal subjects affecting the Army as a whole.

The Litigation Division is an organization within the Office of The Judge Advocate General (Army) and is generally responsible for initiating, administering,

makes a thorough knowledge of state law crucial to resolving the **problems**,³⁰² however, and since the required research materials should be as readily available to the staff judge advocates as they are to The Judge Advocate General's School or Litigation Division, one might assume that staff judge advocates are in the best position to determine the governing law and answer the questions.

On the other hand, staff judge advocates are unlikely to find definitive answers in state law. Furthermore, the hypothetical situations involve unanswerable questions about the Army's current informed consent policies and regulations. Therefore, staff judge advocates are in "no-win" situations. Unless both situations are properly dealt with at this stage, they most likely will result in tort litigation against the United States, and thus will be around to haunt the command for some time.

It would be better if we did not allow very many of these dilemmas to arise. Fortunately, the discretionary function exception provides us with a means of doing just that.

Section **2674** of the Federal Tort Claims Act provides that "[t]he United States shall be liable. . . in the same manner and to the same extent as a private individual under like circumstances."³⁰³ Section 1346(b) further provides that the federal district courts have exclusive jurisdiction over claims against the United States arising "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."³⁰⁴ Therefore, for example, all government doctors assigned to the hospital at Fort Bliss, Texas, are required to comply with the Texas law on informed **consent**.³⁰⁵

supervising, and coordinating **all** litigation arising out of Department of the Army operations, subject, of course, to the statutory authority of the Attorney General of the United States. *See* 28 U.S.C. § 516 (1982) ("[T]he conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General."); *see also* 28 U.S.C. §§ 519, 547 (1982); Dep't of Army, Reg. No. 27-40, Litigation, para. 1-3 (4 Dec. 1985).

³⁰²28 U.S.C. §§ 1346(b), 2674 (1982).

³⁰³28 U.S.C. § 2674 (1982).

³⁰⁴28 U.S.C. § 1346(b) (1982). For a thorough discussion and extensive list of cases *see* 1 L. Jayson, *Handling Federal Tort Claims*, §§ 66 through 66.03 (1985); 2 *id.*, §§ 217-218.02 (1985).

³⁰⁵*See* 2 L. Jayson, *supra* note 304, § 218.01, at 9-218 through 9-222 (1985).

Using the Dr. Burgundy hypothetical (*supra* note 3 and accompanying text) as an example, the United States will most likely be held liable for Dr. Burgundy's failure to follow Texas law. *See supra* note 251 and accompanying text. **This** is true even though Dr. Burgundy fully complied with the current Army regulation

The Federal Tort Claims Act waives the sovereign immunity of the United States.³⁰⁶ But like any other waiver of sovereign immunity, it is subject to the restrictions and exceptions imposed by Congress.³⁰⁷ Section 2680(a) of the Act contains one such exception, which is especially critical to this discussion—the discretionary function exception.³⁰⁸

The discretionary function exception contains two limitations on governmental liability.³⁰⁹ The first of these excludes claims based upon the “due care” execution of a valid or invalid regulation or a statute.³¹⁰ The second limitation prohibits claims based upon the performance of some discretionary function by a government employee.³¹¹

Recently, in *United States v. Varig Airlines*,³¹² the Supreme

and apparently acted in a very reasonable manner.

³⁰⁶In *Rayonier, Inc. v. United States*, 352 U.S. 315 (1957), the Court goes so far as to say that “the very purpose of the Tort Claims Act was to waive the Government’s traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability.” *Id.* at 319. *But see* *Dalehite v. United States*, 346 U.S. 15, 24-25 (1953); *Feres v. United States*, 340 U.S. 135, 140 (1950).

³⁰⁷*See* *Dalehite v. United States*, 346 U.S. 15, 24-26 (1953); *United States v. Shaw*, 309 U.S. 495, 500-02 (1940).

³⁰⁸28 U.S.C. § 2680(a) (1982). *See generally* J. Axelrad, Department of Justice Torts Branch Monograph: *Discretionary Function* (1984); 2 L. Jayson, *supra* note 304, § 245 (1985); Zillman, *Regulatory Discretion: The Supreme Court Reexamines the Discretionary Function Exception to the Federal Tort Claims Act*, 110 *Mil L. Rev.* 115 (1985).

³⁰⁹*See* 2 L. Jayson, *supra* note 304, § 245 (1985); Zillman, *supra* note 308, at 116 n.2.

³¹⁰28 U.S.C. § 2680(a) (1982) provides that no action may be had on “[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid.”

³¹¹28 U.S.C. § 2680(a) (1982) also provides that no action may be had on “any claim. . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the Government, whether or not the discretion involved be abused.”

³¹²467 U.S. 797 (1984). The Court found that the Secretary of Transportation had the statutory duty to promote safety in air transportation by promulgation of reasonable rules and regulations. The Federal Aviation Administration, as the Secretary’s designee, promulgated a regulation requiring manufacturers to certify that they had complied with certain minimum safety requirements. *Id.* at 804-06. The Court later states:

The FAA’s implementation of a mechanism for compliance review is plainly discretionary activity of the “nature and quality” protected by sec. 2680(a). . . . Here, the FAA has determined that a program of “spot-checking” manufacturers’ compliance with minimum safety standards best accommodates the goal of air transportation safety and the reality of finite agency resources. Judicial intervention in such decisionmaking through private tort suits would require the courts to “second-guess” the political, social, and economic judgments of an

Court unanimously upheld both the Federal Aviation Administration's regulatory implementation of a certification review process for commercial aircraft (second limitation) and the individual employees' performance of random inspections, pursuant to that regulation (first limitation). Furthermore, the Court reviewed the legislative history of the discretionary function exception³¹³ and concluded that Congress did not intend "that the constitutionality of legislation, the legality of regulations, or the propriety of a discretionary administrative act should be tested through the medium of a damage suit for tort."³¹⁴

Applying these rules to our situation, the discretionary promulgation of a military regulation on informed consent, to include termination of medical treatment, would be protected under the second limitation.³¹⁵ Admittedly, the Department of Defense is not a regulatory agency in the same sense as the Federal Aviation Administration and it does not generally promulgate regulations which directly regulate the conduct of the public at large. Nevertheless, *Varig*, in reviewing the legislative history of the exception, rejected the contention that only certain agencies were covered. More specifically, the Court held that:

[I]t is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function

agency exercising its regulatory function. It was precisely this sort of judicial intervention in policymaking that the discretionary function exception was designed to prevent.

It follows that the acts of FAA employees in executing the "spot-check" program in accordance with agency directives are protected by the discretionary function exception as well.

Id. at 819-20.

³¹³The legislative history of section 2680(a) has repeatedly appeared in congressional reports. See Tort Claims, Jan. 29, 1942: Hearings Before the House Judiciary Committee on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess. 33 (1942) (statement of Assistant Attorney General Francis M. Shea) [hereinafter Judiciary Committee Hearings]; H.R. Rep. No. 1287, 79th Cong., 1st Sess. 5-6 (1945); H.R. Rep. No. 2245, 77th Cong., 2d Sess. 10 (1942); S. Rep. No. 1196, 77th Cong., 2d Sess. 7 (1942). See also 2 L. Jayson, *supra* note 304, § 246 (1985); Zillman, *supra* note 308, at 116 n.3.

³¹⁴467 U.S. at 809-10 (quoting from Assistant Attorney General Francis M. Shea's statement, Judiciary Committee Hearings, *supra* note 313, at 33).

³¹⁵One would assume that the Department of the Army relied on this exception to promulgate the current termination of medical treatment regulations inasmuch as termination of medical treatment has not been specifically adopted in all jurisdictions and the Army termination of medical treatment regulations do not mirror the law of any particular state that has adopted such procedures. See AR 40-3, chap. 19; Encl., DASG-PSQ Letter (1985). Furthermore, the Army's termination of medical treatment regulations do not defer to state law like the general informed consent regulation does. See *infra* note 335 and accompanying text.

applies in a given case. . . . Thus, the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee—whatever his or her rank—are of the nature and quality that Congress intended to shield from tort liability.³¹⁶

The Department of Defense, like the Department of Transportation, is an executive department of the United States.³¹⁷ The Secretary of Defense “is the principal assistant to the President in all matters relating to the Department of Defense. Subject to the direction of the President and to this title and section 2 of the National Security Act of 1947 (50 U.S.C. § 401), he has authority, direction, and control over the Department of Defense.”³¹⁸ Thus, the Secretary of Defense has direct statutory responsibility and authority, as well as indirect constitutional authority via the President’s powers as **Commander-in-Chief**,³¹⁹ to promulgate regulations for the military, and those that may have business with it. This would include regulations for the operation of military hospitals, the training and reassignment of military medical personnel, and the provision of quality medical care to military patients and their dependents.

That the Supreme Court would support a military directive on informed consent is further shown by *Varig’s* strong reaffirmance³²⁰ of *Dalehite v. United States*.³²¹ In *Dalehite*, the Court held that the discretionary function exception applied to the Tennessee Valley Authority’s decision to produce, store, and transport fertilizer for commercial purposes. In so doing, the *Dalehite* court stated that “[w]here there is room for policy judgment and decision there is **discretion**.”³²² Clearly there is a legitimate need for a uniform military policy on informed consent, the promulgation of which, via a discretionary decision of the Secretary of Defense, would be protected under the discretionary function exception’s second limitation.

Dalehite also stated that “the ‘discretionary function or duty’ that cannot form the basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. . . .

³¹⁶467 US. at 813.

³¹⁷10 U.S.C. § 131 (1982).

³¹⁸10 U.S.C. § 133 (1982).

³¹⁹U.S. Const. art. II, § 2, cl. 1.

³²⁰467 U.S. at 810-12.

³²¹346 U.S. 15 (1953).

³²²*Id.* at 36.

[A]cts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable."³²³ Therefore, the United States would generally be protected under section 2680(a)'s first limitation, so long as the health care practitioner exercised due care.³²⁴

Unfortunately, however, case law provides that medical discretion is not governmental discretion within the meaning of the

³²³*Id.* at 35-36.

³²⁴The statutory language clearly provides that the practitioner's failure to exercise due care would eliminate any discretionary function defense. *See* 28 U.S.C. § 2680(a) (1982); *supra* note 310.

In summarizing the analysis used by the court in *Hendry v. United States*, 418 F.2d 774, 782-83 (2d Cir. 1969), 2 L. Jayson, *supra* note 304, § 247, at 12-18, states that:

[I]t is pertinent to inquire whether the complaint attacks, on the one hand, the *nature* of rules which a government agency has formulated, or on the other the *way* in which the rules are applied. It is clear that the section was intended to protect the *validity* of governmental regulations from challenge in a tort action for damages. . . ; its language protects those decisions which either establish a rule for future governmental behavior or constitute an *ad hoc* determination which neither applies an existing rule nor establishes one for future cases. But. . . the section does not necessarily apply to those decisions which apply an existing rule to the facts of the case. . . [I]f the government official in executing the statute must act without reliance upon any readily ascertainable rule or standard, the judgment he makes is discretionary within the meaning of the exception. However, if all he does is to match facts against a clear rule or standard, his conduct is not protected by the Section and his negligence is actionable under the Act.

See also Hatahley v. United States, 351 U.S. 173, 180-81 (1956) (The Court limited the defense where government agents failed to exercise due care in providing written notice as required by the statute.); *Jayvee Brand, Inc. v. United States*, 721 F.2d 385, 389 (D.C. Cir. 1983) (Discretionary function does not apply if employee fails to follow directive that is itself an exercise of discretion.).

A situation involving a doctor's negligent failure to comply with a military regulatory duty could present a very complex legal question for the military litigator. Assume, for example, that the doctor fails to follow the regulation but otherwise complies with the applicable state law. Would the United States be able to assert the state law as a defense, i.e., a second bite at the apple, or would the plaintiff be able to prevail on a "regulatory tort" type action by alleging merely that the doctor failed to follow the regulation. The former would be consistent with the concept that state law applies absent some specific statutory exception and would be consistent with a line of federal cases which hold that a failure to enforce a federal regulatory statute, or an order issued by government officials pursuant to such a statute, does not raise a cognizable claim under the FTCA. On the other hand, a "regulatory tort" action might be available as a result of federal cases that have indicated that the failure to properly perform the federal duty was cognizable. For a nutshell discussion of the many cases dealing with this complex area of the law see J. Klapps, Department of Justice Torts Branch Monograph: Actionable Duty 18-30 (1982). *See also* 2 L. Jayson, *supra* note 304, § 218.01, at 9-214 ("[A] claim based wholly on violation of the Constitution or of federal statutes is not actionable under the FTCA.").

Federal Tort Claims Act.³²⁵ For example, in *Hitchcock v. United States*,³²⁶ the doctor decided not to disclose the potential risks and benefits of a vaccine. The Court ruled that his action did not involve public policy and was not protected by the discretionary function exception. On the other hand, the court stated, “[Had the *State* Department decided] not to disclose the risks and benefits of treatment. . . , for a health related reason, . . . the policy-related nature of the decision would [have] presented a different question and possibly a different result.”³²⁷

In *Hendry v. United States*,³²⁸ the court rejected the discretionary function defense where the Coast Guard relied on a government psychiatrist’s diagnosis and withheld the plaintiff’s license. The court concluded that the medical decision of unfitness for sea duty and the administrative decision to withhold the license were “for all practical purposes one and the same decision.”³²⁹

³²⁵The courts have indicated that the decision to admit a patient to the hospital *may* involve “governmental” discretion, depending on whether the decision is based on regulations for admission or is the result of a negligent diagnosis. *Compare* *Denny v. United States*, 171 F.2d 365 (5th Cir. 1948), *cert. denied*, 337 U.S. 919 (1949), *with* *Supchak v. United States*, 365 F.2d 844 (3rd Cir. 1966). But in any event, once that decision is made, the discretionary function exception has no application with regard to the medical aspects of the case. *See* *Rise v. United States*, 630 F.2d 1068, 1072 (5th Cir. 1980) (doctors’ decision to refer patient to a private hospital not accepted as discretionary); *Jackson v. Kelly*, 557 F.2d 735, 738 (10th Cir. 1977) (“We recognize that medical treatment involved judgment and discretion. This does not resolve the matter, however, because medical treatment by a government doctor does not necessarily involve governmental discretion.” The case is an official immunity case, not an FTCA case.); *Griggs v. United States*, 178 F.2d 1, 3 (10th Cir. 1949), *reu’d on other grounds sub. nom.* *Feres v. United States*, 340 U.S. 135 (1950) (“It is manifestly plain that the alleged acts of negligence, while involving **skill** and training, were nondiscretionary.”); *Surratt v. United States*, 582 F. Supp. 692, 700 (N.D. Ill. 1984) (medical decisions are not discretionary functions within the meaning of the FTCA); *Moon v. United States*, 512 F. Supp. 140, 144 (D. Nev. 1981) (diagnosis and treatment of patients is outside the scope of the discretionary function). *See generally* 2 L. Jayson, *supra* note 304, §§ 249.04(2)-04(3).

³²⁶665 F.2d 354 (D.C. Cir. 1981).

³²⁷*Id.* at 363 (emphasis added).

³²⁸418 F.2d 774 (2d Cir. 1969).

³²⁹*Id.* at 780. This is primarily why I propose that the military adopt a very detailed regulation on informed consent. *See infra* Addendum. But even a very detailed regulation will not solve all the problems for the military litigator. For instance, a government official cannot use the discretionary function exception and promulgate a regulation merely to determine what law will apply in a given case. To illustrate what I mean, assume that the Department of Defense (DOD) publishes a regulation containing rules and standards by which physicians practicing in DOD hospitals must provide disclosure to patients. The discretionary function exception provides that the courts should use these regulatory standards and not state law in determining whether or not the doctor adequately performed his duty. But, on the other hand, the courts would be fully justified in ignoring any provision in the DOD regulation directing them to apply the objective causation test in informed consent cases involving military physicians. In short,

Consequently, any regulation establishing uniform military informed consent procedures must preclude exercise of medical discretion to the maximum extent possible. Since informed consent is a legal doctrine, as opposed to a medical doctrine, however, a detailed governmental policy dictating how informed consent duties must be discharged should not interfere with the necessary exercise of medical discretion in providing treatment for patients. Accordingly, the regulation should pass "governmental discretion" muster and yet provide physicians with all the "medical treatment discretion" they need to treat their patients.

V. THE ARMY'S CURRENT INFORMED CONSENT REGULATIONS³³⁰

A. ORGANIZATION AND EFFECT

The United States Army's general informed consent provisions are contained in Chapter 2, Army Regulation (AR) 40-3,³³¹ and in Chapter 5, AR 600-20.³³² The former pertains to "nonmilitary patients" and the latter to "military members on active duty or active duty for training." Chapter 19, AR 40-3, contains the do-not-resuscitate directives,³³³ and a letter change to AR 40-3 provides for withdrawal of life-sustaining treatment.³³⁴

The first major question concerning the Army's regulations is, Why do they exist? Paragraph 2-19a, AR 40-3, indicates that the general rules pertaining to nonmilitary patients apply "worldwide, except as [they] may be modified by local law or international agreements."³³⁵ Every state and the District of Columbia has substantially modified the rules. The only place where the current regulation may operate without modification is overseas. In short, the Army's general informed consent regulation is a hollow set of rules which have no legal significance.

As it now stands, a military physician could finish the last year of his residency at Walter Reed Army Medical Center (District of

DOD can regulate the conduct of its employees but not the courts themselves.

³³⁰See supra note 300.

³³¹AR 40-3, para. 2-19.

³³²Dep't of Army, Reg. No. 600-20, Personnel-General: Army Command Policy and Procedures, paras. 5-29 through 5-31 (15 Oct. 1980) [hereinafter AR 600-20]; AR 600-20 at 1-2, 6-7 (105, 26 Aug. 1985).

³³³AR 40-3, chap. 19.

³³⁴Encl., DASG-PSQ Letter (1985).

³³⁵AR 40-3 at para. 2-19a(2). This language nullifies any possible discretionary function defense under the Federal Tort Claims Act. See supra notes 300-29 and accompanying text.

Columbia—Canterbury minority standard), go to Fort Riley, Kansas (*Natason* majority standard) for a normal assignment, and then on to Fort Sill, Oklahoma (*Scott* subjective patient standard), in a matter of four to five years. During this period, it is unlikely that he or she would receive any formal training concerning District of Columbia, Kansas, or Oklahoma informed consent law. It is more likely that this physician **will** elect to rely on the limited procedures set out in AR **40-3** rather than appropriately adjust his or her practice to comply with the widely disparate state informed consent laws.³³⁶ This complacent ignorance leaves the Army as a forest is in a drought. One can only hope that the policymakers make some changes before plaintiffs' lawyers start lighting matches.³³⁷

³³⁶**Earlier** in this article I devoted several pages to the historical development and differing standards of the informed consent doctrine. I did this under the assumption that my audience will include non-lawyer, military medical practitioners and hospital commanders. One point that I want to make to these readers is that, to understand the litigation system and to protect themselves from it, they must remember that almost every action a person takes is videotaped in the minds of those who see him. Later, during a lawsuit, the videotapes are screened before **an** audience (the courts) whose values may range from very paternalistic to very liberal depending on the locality in which the act was performed. Like any other performer, the physician must be aware of this audience and adapt his or her conduct accordingly.

This task is less onerous and less complicated for the normal civilian practitioner, who establishes his practice in one locality and remains there for most of his life, than for the military practitioner, who may move to many different worldwide locations in the course of a twenty- or thirty-year military career.

Let me make it very clear, however, that I am *not* saying that any physician, military or civilian, should play to an audience over the needs of the patient. First, I do not believe there is any need to. Second, none of the state standards, other than maybe the Texas statute, provide detailed guidance concerning the specific information the physician must disclose in a particular case. Thus, the physician is ultimately left to his or her best judgment in any event. Finally, regardless of the standard employed, certain exceptions allow the physician to tailor the disclosure to fit the special needs of each patient.

Nevertheless, both the military and the civilian physician, like any other reasonable person, have a right to know what the law *generally* expects of them so that they can act accordingly. Furthermore, a general knowledge of the law can effectively assist the physician by helping him to document the *how* and *why* of the disclosure in such a manner that the intended audience can reach the same conclusions the physician reached. This knowledge should, in turn help the physician be more efficient and relieve some of the anxiety about whether he or she is meeting the requirements of the law.

³³⁷**Certain** factors have thus far shielded the military from a multitude of informed consent lawsuits. One factor is the *Feres* doctrine, which precludes suits by military personnel against other employees of the military who were acting within the scope of their employment. See *Feres v. United States*, 340 U.S. 135 (1950). A second factor is the lack of understanding of the operation of state law under the Federal Tort Claims Act by inexperienced plaintiff's attorneys. Thirdly, the informed consent theory is a relatively new legal theory. See *supra* notes 45-57 and accompanying text. Finally, the military has only recently ventured into the

B. GENERAL INFORMED CONSENT PROVISIONS

1. Disclosure standards.

Army regulations impose no specified duty to provide any disclosure to, or to obtain any consent from, military personnel. A duty to obtain consent to medical treatment is implied from AR 600-20's statement that military members can be required to undergo certain medical procedures, even if they refuse to submit to the treatment.³³⁸ Disclosure is not routinely required, even by implication.³³⁹

The nonmilitary patient provisions of Chapter 2, AR 40-3, are grossly inadequate. They show antiquation on their face by expressly providing for the concept of implied consent³⁴⁰ while at the same time virtually ignoring the physician's affirmative disclosure duty.³⁴¹ The latter is the keystone of the informed consent doctrine. The former was an important doctrine under the pre-1960 consent-to-medical-treatment theory.³⁴² The only logical

termination of medical care business. These cases generate substantial media attention and potentially have the type of severe consequences capable of drawing large judgments.

³³⁸See AR 600-20, paras. 5-30 through 5-31; AR 600-20, at 1-2, 6-7 (IO5 26 Aug. 1985). In general:

An Army member on active duty or active duty for training will usually be required to submit to medical care considered necessary to preserve his life, alleviate undue suffering, or protect or maintain the health of others. A commanding officer may order the hospitalization of any member of his command or order him to submit to a medical examination when indicated. This is done with the concurrence of the medical treatment facility commander.

AR 600-20, para. 5-29. Although the regulation does not specifically say so, the basic concept supporting this forced medical care is the "inherent authority" of the commander to deny even constitutional rights in order to provide for the health, morale, safety and welfare of the military community. See generally Greer v. Spock, 424 U.S. 828, 838-40 (1976); Cafeteria Restaurant Workers Union v. McElroy, 367 U.S. 886, 889-94 (1961). The concepts of military readiness and national defense also figure heavily in this policy. See AR 600-20, paras. 5-30b(1)(a)-(d), 5-31a. The soldier is provided substantial due process through the use of a medical board proceeding and several levels of review. See AR 40-3, chap. 7.

³³⁹This is not good medical practice, nor is it acceptable from a public policy standpoint, even though, from a civil liability standpoint, military members are prohibited from suing the United States under the Federal Tort Claims Act. See Feres v. United States, 340 U.S. 135 (1950).

³⁴⁰AR 40-3, para 2-19b. See also W. Prosser, *supra* note 27, § 18, at 101-03; *supra* note 27 and accompanying text.

³⁴¹See *supra* notes 36-57 and accompanying text.

³⁴²See *supra* note 26. Admittedly, however, the implied consent provision is still valid, considering that the bottom line in all cases is the procurement of a valid

conclusion that can be drawn from this is that an Army physician who seeks guidance from the Army regulation is operating on legal concepts that changed twenty-six years ago!

Paragraph 2-19g, **AR 40-3**, provides that physicians “will counsel the patient or the consenting person as to the nature, or expected results, of the proposed **procedure**.”³⁴³ No guidance or standard is provided to accomplish this nor is there any regulatory requirement to disclose risks or alternatives to the proposed procedure.

The current regulations generally provide for oral consent, although written consent is required in certain situations.³⁴⁴ Standard Form **522**, Medical Record—Request for Administration of Anesthesia and for Performance of Operations and Other *Procedures*,³⁴⁵ is mandated on these occasions, and it is clear from the wording that the regulation is primarily concerned with documentation, i.e., evidence of consent. Indeed, the regulation’s entire approach is directed toward obtaining a consent form, not informed consent.

Standard Form **522** indicates that the patient has been advised of the nature and purpose of the operation, the alternative treatments, the risks involved, and the possibility of complications. It also appears to give the physician carte blanche to do whatever he or she desires to do once the procedure begins.³⁴⁶ Neither the form nor the supporting regulation provide any specific guidance on how these obligations and responsibilities are to be performed, however.

The Army’s separate provisions on termination of medical care do provide some specific information on when and how to approach the patient for a decision.³⁴⁷ But these directives fail to provide the health care practitioner with any specific guidance or standard as to the content of the patient-physician discussion.

consent to treatment. See *supra* notes 58-73 and accompanying text.

³⁴³Again, however, the provision is aimed only at validating the patient’s consent to medical treatment. There is no requirement placed on the practitioner to obtain an informed consent. See *supra* notes 340-42 and accompanying text.

³⁴⁴AR 40-3, paras 2-19c through 2-19e. Paragraphs 2-19d and 2-19e also contain language specifically addressed to dental and psychiatric consent procedures. I will not address specific problems related to these areas.

³⁴⁵SF 522 is reproduced *infra* as an appendix to this article.

³⁴⁶See *id*

³⁴⁷See AR 40-3, paras. 19-3 through 19-7; Encl., DASG-PSQ Letter (1985), para. 3-4.

2. Competency—In General.

Two-thirds of the Army's page and a half, nonmilitary patient, general consent regulation provides information relating to the legal capability of the person giving consent and the issue of proxy decisionmaking.³⁴⁸ At the beginning of this section, the regulation states, "Whether or not a person is legally capable of consenting will be determined by Federal law."³⁴⁹ Two sentences later the regulation states, "At facilities in the United States, legal capability will be determined by the law of the State in which the facility is located."³⁵⁰

AR 40-3 states that, "[w]hen a judicial determination of mental

³⁴⁸AR 40-3, para. 2-19f.

³⁴⁹*Id.* But because of the *Erie* doctrine, there is little federal law which would apply in this instance. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), where the Court held that "[e]xcept] in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. . . . There is no federal general law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or part of the law of torts."

Admittedly, *Erie* is a diversity case. FTCA litigation is, on the other hand, presumed to be federal question jurisdiction even though state law forms the basis for the cause of action. See generally C. Wright & K. Graham, *Federal Practice and Procedure*, Evidence § 5433 (1980); see also *Robinson v. Magovern*, 83 F.R.D. 79 (W.D. Pa. 1979). Still, the courts have not, and most likely will not, form any general federal informed consent law separate from the Constitution or federal statutes. Existing federal informed consent law (constitutional case law and statutory law) is set out below.

The regulation refers only to federal abortion cases limiting the authority of states to require spousal or parental consent. Apparently, the regulation is talking about cases such as *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983); and *Bellotti v. Baird*, 443 U.S. 622 (1979) (plurality opinion).

Contrary to the language in AR 40-3, the Court did not totally rule out parental or spousal consent requirements. In *Ashcroft*, the Court summarized the established legal standards for minority consent to abortion by citing *Bellotti* and quoting from *Akron Center for Reproductive Health*. Specifically the Court stated: "A State's interest in protecting immature minors will sustain a requirement of a consent substitute, either parental or judicial. It is clear, however, that 'the State must provide an alternative procedure whereby a minor may demonstrate that she is sufficiently mature to make the abortion decision herself.'" 462 U.S. at 490-91.

The regulation refers to no other "federal law" and there is no general federal informed consent law. There are a few other constitutional consent cases and a few statutes dealing with informed consent in limited circumstances. See *Carey v. Population Serv. Int'l.*, 431 U.S. 678 (1977) (The Court held that parental consent is not necessarily required for sale of contraceptives to those under 16 years of age. One could assume that prescriptions for contraceptives would now be subsumed under the mature versus immature distinction set out in *Ashcroft.*); 38 U.S.C. § 4131 (1982) (requires informed consent for certain Veteran's Administration medical prosthetics and medical research cases); 10 U.S.C. § 980 (1982) (requires informed consent in situations involving humans in experimental research).

³⁵⁰AR 40-3, para. 2-19f; see also *supra* note 335 and accompanying text.

incompetency has been made, consent must be obtained from the person appointed by the courts to act for the incompetent **patient**.”³⁵¹ No other guidance is given and the regulation does not question whether the court order includes medical decisionmaking, whether the incompetency still exists, or whether the order is legally sufficient. In the next paragraph, the general informed consent regulation provides that the advice of a legal officer be sought in cases where “a judicial determination of mental competency has not been **made**.”³⁵² Clearly, the regulation has these last two provisions reversed. The legal officer should be consulted concerning the court order (or a durable power of attorney or a living will), while the doctors should be tasked with determining competency in cases where the courts have not previously acted.

There are no other provisions in the general informed consent regulation that deal with the general problem of determining competency. The termination of medical care provisions do provide definitions as to whether or not a patient is competent or incompetent,³⁵³ but even they fail to provide any criteria for determining whether or not the patient meets either of these definitions.

3. *Competency of Minors.*

Paragraph 2-19f(1), AR 40-3, provides that where there is no preemptive federal law, state law will prevail as to the capacity of a minor to give a valid consent. Where no law exists, such as overseas, or where no law prohibits consent by a minor, the maturity of the minor must be determined. If the minor is held to be mature, then he or she must consent prior to the treatment.³⁵⁴ Special attention is drawn to the minor’s age, level of intelligence, and his or her understanding of the significance and seriousness of the proposed procedure.

The regulation also provides that, if not prohibited by state law, parents may grant powers of attorney “to mature minor children to consent to care for themselves and other minor

³⁵¹AR 40-3, para. 2-19f(6).

³⁵²*Id.* para. 2-19f(7).

³⁵³Both AR 40-3, paras. 19-2d through 19-2e, and Encl., DASG-PSQ Letter (1985), paras. 2e-f, define an incompetent patient as “a minor (17 years of age and under and not emancipated)...or someone who does not have the ability to reason and deliberate sufficiently well about the choices involved.” Both documents indicate that **certain** “mature” minors may be competent. *Id.*; see **also** *infra* note 356 and accompanying text.

³⁵⁴*Id.* para. 2-19f(1). The regulation fails to indicate who makes this determination.

children of the family.”³⁵⁵ This raises two questions. First, which state’s law applies, the one where the facility is located or the one where the power of attorney was executed? Second, who ultimately decides whether the child is mature enough to consent to a particular medical procedure, the doctor or the parent?

In the process of defining minority, the termination of medical care regulations indicate that a competent patient is one who is over 18 years of age or who is emancipated under state law.³⁵⁶ Later, in the same paragraph, the regulation provides that minors aged fourteen to eighteen may also be competent if determined to be mature. No criteria is given to gauge maturity, not even a reference to the provisions previously discussed.³⁵⁷

4. Proxy Decisionmaking.

AR 40-3 provides that “[e]xcept in an emergency, when a patient for some reason other than mental incompetency is unable to respond, the consent of the spouse or next of kin must be obtained.”³⁵⁸ Several questions immediately come to mind. First, does the regulation agree that a spouse is not normally included in the term “next of kin?”³⁵⁹ Second, what happens to the mentally incompetent in an emergency? Third, how can the physician, in all cases, distinguish between a mentally incompetent person and one otherwise unable to respond?

Who is “next of kin?” The general informed consent regulation provides no general definition or evaluation criteria. The regulation merely states that a person may not be furnished medical care without his or her consent or “[t]he consent of a person authorized to consent on the patient’s behalf according to local laws or the order of a court having jurisdiction over both the person and the facility concerned.”³⁶⁰

Concerning minor children, the general provisions provide that a “parent’s consent will be required. . . when it is determined that the minor’s consent alone is not legally sufficient.”³⁶¹ Parents, in

³⁵⁵ *Id.* para. 2-19f(4).

³⁵⁶ AR 40-3, para. 19-2d; Encl., DASG-PSQ Letter (1985) para. 2e; see also *supra* note 335 and accompanying text; *supra* note 353 and accompanying text.

³⁵⁷ See *supra* note 354 and accompanying text.

³⁵⁸ AR 40-3, para. 2-19f(5).

³⁵⁹ See *supra* note 210 and accompanying text.

³⁶⁰ AR 40-3, para. 2-19a through 2-19a(2).

³⁶¹ *Id.* para. 2-19f(1). Interestingly, the regulation continues by saying that: “Even in cases where the minor’s consent alone is not legally sufficient, his or her consent will be obtained along with the parent’s consent; this will be done whenever the minor is able to understand the significance of the proposed procedure.” *Id.* What happens if a thirteen-year-old understands the significance but refuses to consent?

turn, may authorize other persons to consent to medical care for their minor **children**.³⁶²

The general regulation does not delineate who can act as proxy decisionmaker for an incompetent adult patient except to say that, in an emergency, “[i]f the spouse or next of kin cannot be reached, the question of authority or need for consent will be referred to the judge advocate or legal **advisor**.”³⁶³ The do-not-resuscitate (DNR) provisions has one proxy consent provision that states: “An incompetent may have no family or legal guardian and the treating staff may feel that a DNR order is proper. If so, consultation should be undertaken with the chief of professional services and the ethics **panel**.”³⁶⁴ The withdrawal of life-sustaining treatment regulation has absolutely no provision for determining who is eligible to consent other than various references to the ubiquitous “next of kin.”

Each of the termination of medical treatment regulations create an ethics panel. Unfortunately, the two regulatory provisions conflict with each other and, on the whole, are grossly inadequate. For example, the DNR regulation states:

The ethics panel, convened on an ad hoc basis, will be composed of at least two physicians, a nurse, a chaplain, and a representative of the local staff judge advocate. The panel exists for the patient, and in those situations where there may be some doubt concerning the propriety of a DNR order, the panel will be convened to help resolve the problem if there is a lack of concurrence by the treating physicians, or members of the family among themselves or with the treating physicians.³⁶⁵

The only other mention of the ethics panel in the DNR regulation states that if “[a]n incompetent patient [has] no family or legal guardian and the treating staff may feel that a DNR order is proper, . . . consultation should be undertaken with the chief of professional services and the ethics **panel**.”³⁶⁶ The promulgators of the regulation have recognized the Commission’s

but refuses to consent?

³⁶²*Id.* para. 2-19f(4).

³⁶³*Id.* para. 2-19f(5). Depending on the definition of emergency, it is unlikely that there would be time to get the staff judge advocate’s advice. Thus, the provision is worthless.

³⁶⁴*Id.* para. 19-7b.

³⁶⁵*Id.* para. 19-2g.

³⁶⁶*Id.* para. 19-7b.

concept of an ethics committee³⁶⁷ but have provided absolutely no guidance for its operation. The resulting list of problems is almost endless. Who convenes the panel? What does it do? Is it a decisionmaking body or an advisory body, or both? Who can bring an issue before the committee? What are the procedural rights of the parties, if any? Must the panel reach a consensus or does it operate via majority vote? What should be the training and experience requirements for membership on the panel? What conflicts of interest are created for the panel members by the fact that the panel is supposed to operate in the patient's interest? Do all of the members have an equal vote? What happens if the legal representative votes no when the rest of the panel votes yes?

The withdrawal of life-support regulation answers the question of who convenes the panel.³⁶⁸ But the regulation provides no additional guidance about the operation of the panel. Furthermore, the makeup of the withdrawal of life-sustaining treatment panel is different than the DNR panel. Do the regulations therefore intend the hospital to have two separate ethics committees?

5. *General Exceptions.*

The general regulation defines emergency care as the "treatment of the patients with severe life-threatening or potentially disabling conditions. . . necessitat[ing] immediate care to prevent undue suffering or loss of life."³⁶⁹ As stated previously, the consent of the patient, spouse, or next of kin is apparently suspended in cases of emergency.³⁷⁰

³⁶⁷*Id.* para 19-1. *See generally* President's Commission, *supra* note 202.

³⁶⁸Paragraph 2i, Encl., Letter DASG-PSQ (1985), states:

An Ethics Panel is an ad hoc advisory committee composed of individuals from a variety of disciplines. Membership should be balanced, with no single individual, profession, or discipline dominating the committee. Committee membership may be drawn from administrative, medicine, nursing, pastoral care, social work or the community. A representative of the local staff judge advocate will, however, be a member. This committee is convened by the Commander or Deputy Commander of Clinical Services (DCCS) in those situations where there is doubt concerning the propriety of withdrawing life-sustaining treatment or where there is disagreement among the treating physicians, members of the family, or between the treating physicians and members of the family.

³⁶⁹AR 40-3, Glossary, at 78.

³⁷⁰AR 40-3, para. 2-19f(5); *see supra* note 358 and accompanying text; *see also* AR 40-3, paragraph 19-7c, where the do-not-resuscitate regulation states that "[i]n an emergency, time may not permit informing the NOK or legal guardian or helping them to make a decision. In these cases, treatment should ordinarily be given if no prior decision has been made to forego resuscitation."

None of the Army regulations discuss the therapeutic privilege, either directly or indirectly. This supports the conclusion that the Army does not currently require mandatory disclosure of all the risks involved and thus has never entered the informed consent era.³⁷¹

6. *Special Termination of Medical Treatment Provisions*³⁷²

The Army has recognized that, as a matter of **policy**,³⁷³ DNR orders and orders withholding or withdrawing life-sustaining treatment may be written for those patients who are irreversibly, terminally ill,³⁷⁴ or who are in a persistent or chronic vegetative state.³⁷⁵ In the process, the Army has promulgated two conflicting regulations. Each of the regulations contain a vast mixture of policy and procedural directives.

For example, the procedure of writing a DNR order may begin when the doctor concludes that the patient will not benefit from resuscitation. Balanced against this are the requirements that the physician justify and document his conclusion and that he gain the "concurrence of the patient or the next of kin (NOK) or legal guardian."³⁷⁶ The policy behind this is sound. A physician must be able to discuss openly all treatment alternatives, including termination of medical treatment, with the patient. On the other

³⁷¹See *supra* notes 340-42 and accompanying text.

³⁷²AR 40-3, chap. 19; Encl., DASG-PSQ Letter (1985) see *supra* note 263.

³⁷³The extent of the Army's policy is not clear. Both regulations begin with the comment that "[they implement] recommendations of the President's Commission for the Study of Ethical Problems in Medicine and Biomedical Behavioral Research to adopt appropriate policies with respect to direct patient care." AR 40-3, para. 19-1; Encl., DASG-PSQ Letter (1985), para. 1. Are these mere statements of fact or have the regulations approved and incorporated all the Commission's findings and recommendations by reference, thus making them binding on the Army Medical Department?

³⁷⁴The DNR regulation defines an irreversible, terminally ill patient as "any patient with a progressive disease or injury known to terminate in death and where no additional course of therapy offers any reasonable expectation of remission for the terminal condition." AR 40-3, para. 19-2c. The withdrawal of treatment regulations states that, "[t]erminal condition means an incurable condition resulting from injury or disease in which imminent death is predictable with reasonable medical certainty." Encl., DASG-PSQ Letter (1985), para. 2b.

Both definitions are somewhat disturbing in that they define life itself, and, based on the definitions, we could all be considered terminally ill. But doctors know what the language means. Given a fair reading, the language in either of the definitions is as clear and as workable as any I have found. See generally Institutional Ethics Committees, *supra* note 226, at 307-411; President's Commission, *supra* note 201, at 15-26.

³⁷⁵Both regulations state that "[t]he persistent or chronic vegetative state is a chronic state of diminished consciousness [sic] resulting from severe generalized brain injury in which there is no reasonable possibility of improvement to a cognitive state." AR 40-3, para. 19-2f; Encl., DASG-PSQ Letter (1985), para. 2c.

³⁷⁶See AR 40-3, paras. 19-3b, 19-6b.

hand, the physician should be aware that the regulation does not give him a procedural license to give the patient or the family the hard sell simply because he or she believes the order to be justified.³⁷⁷

Another example of the problem of sorting out procedure and policy is shown in paragraphs 19-2c and 19-6c of AR 40-3. During the DNR process the attending physician must determine that the patient is irreversibly, terminally ill, or in a persistent or chronic vegetative state. Any terminal illness diagnosis must be verified by the chief of the service or the chief of professional services.³⁷⁸ The persistent or chronic vegetative state apparently needs no verification. With either diagnosis the result is the same: a DNR order is written. So why have a verification procedure only for the terminal illness diagnosis?

Also, a DNR order requested by an irreversibly, terminally ill patient may be written before the chief of professional services is notified.³⁷⁹ What happens if the patient arrests before the chief has verified the diagnosis? Whether or not the attending physician was correct, the verification policy has been thwarted. So, why have a verification of the terminal illness diagnosis?

The reason for the verification, in general, is to ensure that the patient is qualified by diagnosis before a DNR order is written. Hence, both the terminal illness and chronic vegetative state situations should require verification, and the verification process should be completed before the order is written.

The most questionable aspect of the current Army regulation on withdrawal of life-sustaining treatment is its obvious conflict with the Reagan administration's policy relating to infants and the Child Abuse Amendments of 1984.³⁸⁰ Clearly, the Army regula-

³⁷⁷ *Id.*

³⁷⁸ *Id.* para. 19-2c.

³⁷⁹ *Id.* para. 19-6c.

³⁸⁰ 42 U.S.C. § 5101-07 (Supp. III 1985). The Amendments provide that any withholding of nutrition or hydration from a child under the age of 18 (or the age specified by state child protection laws) constitutes child neglect/maltreatment. *Id.* § 5102. See also Child Abuse and Neglect Prevention and Treatment Program; Notice of Proposed Rule Making, 49 Fed. Reg. 48, 101 (1984) (to be codified at 45 C.F.R. pt. 1340).

The controversy concerning infants surfaced with *In re Doe*, No. GV 8204-00 (Cir. Ct. Monroe County, Ind. Apr. 12, 1982), writ of mandamus dismissed *sub nom.* *Infant Doe v. Baker*, No. 482-5-140 (Ind. May 27, 1982) (case mooted due to infant's death). The case caused a large public outcry. The Reagan administration responded by declaring that it would withdraw federal financial support, pursuant to the Rehabilitation Act of 1973, 29 U.S.C. §§ 701, 794 (1982), from any medical facility that withheld from a "handicapped infant" any treatment that would

tion is not valid concerning the withdrawal of nutrition and hydration from children under the age of 18.

Most of the informed consent issues involved in the termination of medical treatment regulations have been previously discussed. I do not, therefore, intend to discuss the remaining policy directives contained in the termination of medical treatment regulations.³⁸¹

ordinarily be provided to a nonhandicapped infant. Thus, the Baby Doe regulations were promulgated. *See* Procedures Relating to Health Care for Handicapped Infants, 45 C.F.R. § 84.55 (1985). *See also supra* note 226. These regulations have since been ruled invalid on the basis that the Rehabilitation Act of 1973 does not provide statutory authority for their promulgation. *Bowen v. American Hospital Ass'n*, 106 S.Ct. 2101 (1986).

"This article is limited to a discussion of civil liability. There is also an unanswered criminal law question relating to the termination of medical treatment policy. The Surgeon General of the Army, and one or more of his doctors, could conceivably be charged with murder as a result of his directive.

The opening paragraph of both regulations purports to implement the recommendations of the President's Commission. *See supra* note 373. In the back of the Commission's report is a letter from a former Surgeon General, dated December 13, 1977, ordering that military physicians not implement local natural death acts in military medical treatment facilities. The basis for this letter was a concern that military doctors could be charged with criminal homicide under either state or federal law. *See* President's Commission, *supra* note 202, at 520-22.

In April 1982, an attorney-physician challenged the 1977 letter on the basis of the patient's constitutional right of privacy, the patient's right to refuse treatment, an erroneous conclusion about the personal liability of military physicians, and "eight major state court decisions" which had recognized the right of a third party to refuse treatment for an incompetent patient. *See id.* at 522-27. The physician also attempted to persuade the Surgeon General to change the policy because "[f]ears of criminal prosecution are unwarranted." *Id.* at 527. His basis for this conclusion was that there were no federal or military offenses against "assisting a suicide" and that in the 23 states that have statutes against assisting suicide, there are no reported prosecutions dealing with terminally ill patients and doctors.

Does he want to be the first? Has this attorney-physician forgotten about the Assimilative Crimes Act and other federal, military, and state offenses against murder, unpremeditated murder, and manslaughter? Is he aware of the "conduct prejudicial to the good order and discipline of the armed forces" offenses chargeable under Article 134 of the Uniform Code of Military Justice? Is he aware of the problems involved with federal jurisdiction over property and that states that have not adopted such liberal views on termination of medical treatment might be able to, and might want to, bring criminal charges against the physicians?

The writer was incorrect in his conclusion that military doctors would face personal *civil* liability for their actions if they failed to use termination of medical treatment procedures, and he was grossly wrong in his assertion that military doctors would not be personally responsible for *criminal* actions brought against them.

It is unlikely from a practical standpoint that military doctors would now be charged under either military or federal law, as a result of the conclusions of the President's Commission and the promulgation of the new termination of medical treatment regulations. I am not so sure about their avoiding state prosecution, *a la* Barber v. Superior Court, 147 Cal. App. 3d 1006, 195 Cal. Rptr. 484 (1983). *See supra* notes 296-300 and accompanying text. Even though Doctors Barber and

VI. PROPOSED MILITARY REGULATION

Enclosed as an addendum to this article is my proposed military regulation on informed consent and termination of medical treatment. Although the regulation is predominantly self-explanatory, I would like to discuss a few of the provisions.

The directive is to be established at the Department of Defense (DOD) level because in all lawsuits against a military physician cognizable under the Federal Tort Claims Act, the United States is substituted as the named defendant.³⁸² Hence, uniform rules would greatly assist the Department of Justice in defending informed consent actions against the armed forces. Furthermore, there is no plausible justification for having separate rules in the different military departments.

The directive creates the DOD Medical Disclosure Commission³⁸³ and individual facility ethics panels.³⁸⁴ Both organizations are commonly interested in balancing the diverse interests of the various parties and establishing policies to protect all of these interests. Both bodies are intended to perform discretionary, as opposed to medical, functions.³⁸⁵

The approaches taken by the panels and the commission differ, however. An ethics panel is not the ultimate decisionmaker. Also, an ethics panel's task will, in many cases, focus on an individual patient's problems. The Commission, on the other hand, is a decisionmaking body which will concentrate only on matters of general applicability.

The addendum imposes an affirmative duty on the physician to make disclosure and sets the standard for that disclosure.³⁸⁶ The new standard combines the lay standard and the professional standard (via the Medical Disclosure Commission) in an effort to equitably balance the interests of all concerned parties. One of the goals of this approach is to establish a military community standard that can be easily disseminated to all parties. This should eliminate many of the problems experienced by the states in their attempt to recognize and enforce the majority standard.

In addition to being readily identifiable, the military standard

Nejdl eventually avoided criminal prosecution, they paid a heavy price to defend the action. *See supra* note 298 and accompanying text.

³⁸²*See* 10 U.S.C. § 1089 (1982); *see also supra* note 58.

³⁸³*Infra* addendum, para. 3e.

³⁸⁴*Id.* para. 3f.

³⁸⁵*Cf. supra* notes 325-29 and accompanying text.

³⁸⁶*Infra* addendum, para. 4b(2).

should require little, if any, expert testimony concerning the risks involved. Expert testimony on the nature of the ailment, nature of the procedure, alternative treatments, and probability of success will be restricted to what constitutes a proper diagnosis and treatment, i.e., medical practice. Legal and factual matters relating to what constitutes proper disclosure and consent will be left to the judge.³⁸⁷

Until the Disclosure Commission can establish the military community standard for a particular procedure, the balance swings in favor of the patient. The physician is required to look at the situation from a reasonable patient's point of view and disclose that information which a reasonably prudent lay person would want to know before making a decision to accept or reject the proposed treatment. Also, inasmuch as the lay standard appears to be more protective of patients' rights than the professional standard, it is likely that the proposed directive will meet the disclosure requirements of all of the states and the District of Columbia. This could be important if a federal court would for some reason hold that the proposed directive fails to qualify for the discretionary function defense.

The directive requires that, in certain cases, the disclosure and consent be made in writing.³⁸⁸ Contrary to the current provision in **AR 40-3**,³⁸⁹ the patient must provide written informed consent in all termination of medical treatment cases. From a practical, as well as legal perspective, there is no reason for distinguishing between a patient signing an informed consent to terminate medical treatment and a patient signing an informed consent to a surgical procedure knowing that there is a very high probability that he or she may not live through the procedure.

The therapeutic privilege is greatly restricted under the directive.³⁹⁰ The standard for invocation of the privilege established by the proposed directive is based on the standard set out in *Canterbury v. Spence*.³⁹¹ The directive's procedural requirements are a result of combining the procedural rules announced in *Canterbury* and *Nishi v. Hartwell*.³⁹² Again, this approach provides some additional security that we will meet the requirements

³⁸⁷There is no jury trial option under the FTCA. See 28 U.S.C. § 2402 (1982).

³⁸⁸*Infra* addendum, para. 4b(2)(d).

³⁸⁹AR 40-3, para. 19-4.

³⁹⁰*Infra* addendum, para. 5c.

³⁹¹464 F.2d 772 (D.C. Cir), cert. denied, 409 U.S. 1064 (1972). See *supra* notes 185-207 and accompanying text.

³⁹²52 Haw. 188, 473 P.2d 116 (1970); see *supra* notes 185-207 and accompanying text.

of all of the states should the discretionary function defense fail.

The directive's approach to the waiver exception may be the most controversial provision.³⁹³ It is a pure policy statement and is based on a firm belief that, as a practical matter, waiver of disclosure would be more time-consuming and potentially dangerous than providing the disclosure.

Patient competency is addressed in paragraph 6 of the directive. Like the invocation of the therapeutic privilege, any finding of incompetence must be fully justified in writing by the primary physician. The evaluation criteria established by the University of Pittsburgh faculty members are incorporated in paragraph 6c.³⁹⁴ Also, based on the previous discussion of de jure incompetence, the directive provides for a careful review of all court orders, powers of attorney, and living wills relating to guardianship of an incompetent patient.³⁹⁵

Competency of minor children is addressed in paragraph 6d. In accordance with the guidance provided by the Supreme Court,³⁹⁶ the directive provides that any child under 17 years of age must ordinarily have the consent of a parent or guardian before any medical treatment will be provided. Exceptions are made for routine and emergency care, as defined by the regulation.³⁹⁷ The directive further provides that a minor may seek a determination from the facility commander, via the ethics panel, that he or she is mature enough to consent to the particular procedure or that the procedure is in his or her best interest.³⁹⁸ This provision is much more restrictive and definitive than the current AR 40-3 provision.³⁹⁹

The directive specifically defines who may provide informed consent on behalf of an incompetent patient.⁴⁰⁰ The directive also sets the standard by which the proxy is to act.⁴⁰¹ Unless the physician has actual knowledge that the proxy is violating this standard, the proxy is solely responsible for his or her decision.

Current Army regulations on DNR orders and withdrawal of life-sustaining treatment have been combined with the general

³⁹³*Infra* addendum, para. 5d.

³⁹⁴*See supra* notes 139-71 and accompanying text.

³⁹⁵*See supra* notes 141-43 and accompanying text.

³⁹⁶*See supra* note 349.

³⁹⁷*Infra* addendum, para. 6d(2).

³⁹⁸*Id.* para. 6d(3).

³⁹⁹AR 40-3, para. 2-19f; *see supra* note 349 and accompanying text.

⁴⁰⁰*Infra* addendum, para. 7a.

⁴⁰¹*Id.* para. 7e.

informed consent procedures and set out in paragraph 8 of the directive. Additional procedural requirements are provided in paragraph 8d to include, as a policy matter, certification of the diagnosis and prognosis by the Deputy Commander for Clinical Services or the Chief of the Medical Department.

Paragraph 8e was added to handle withdrawal of consent in termination of medical treatment cases. Current Army regulations have no similar provision.

VII. CONCLUSION

I set two primary goals before I began to write this article. First, I wanted to succinctly demonstrate the extreme diversity and complexity of the informed consent doctrine, as seen from the eyes of a federal officer. Second, I wanted to examine the current military informed consent regulations and present a workable proposal for change.

The law surrounding the issue of informed consent is extremely diverse and complex. Such a body of law is presently antagonistic to the military health care system due to the frequent rotation of military health care practitioners, the lack of training, and the lack of any real guidance or protection in the current regulations. As a result, military health care practitioners are not currently providing their patients with their informed consent rights. Consequently, it is only a matter of time before the military will be faced with many undefendable informed consent cases.

The need for change is obvious. The only question is, What should be done to correct the situation? Realistically, there are only two alternatives.

The first alternative would be to establish a regulation which would inform military doctors and hospital commanders about the law of each state. In theory this would provide the doctors with the information they need to fulfill their mission and would provide patients with their rights. But, given the extreme diversity and complexity of state informed consent law, such a regulation would be too cumbersome to maintain and too difficult and time-consuming to be used effectively. Health care practitioners would ignore the regulation in the same way they presently ignore state law. Most importantly, this type of regulation would fail to provide the uniformity needed by the armed forces to quickly, effectively, and economically (in terms of money and resources) train their constantly rotating staff of military medical personnel.

The second alternative is the most logical. The armed forces should adopt a uniform military informed consent directive. This directive should provide one standard to be applied by all military health care practitioners, regardless of where they are assigned. It should also provide physicians with the information they need to perform their mission and calm their apprehensions. Most importantly, it should protect the rights of patients to participate fully and intelligently in the decisionmaking process. The proposed directive contained in the addendum to this article meets all of these requirements and, as an additional benefit, provides a means by which we can minimize potential tort liability against the United States.

APPENDIX A

MEDICAL RECORD	REQUEST FOR ADMINISTRATION OF ANESTHESIA AND FOR PERFORMANCE OF OPERATIONS AND OTHER PROCEDURES
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A. IDENTIFICATION

1. OPERATION OR PROCEDURE _____

B. STATEMENT OF REQUEST

1. The nature and purpose of the operation or procedure, possible alternative methods of treatment, the risks involved, and the possibility of complications have been fully explained to me. I acknowledge that no guarantees have been made to me concerning the results of the operation or procedure. I understand the nature of the operation or procedure to be _____
(Description of operation or procedure in layman's language)

which #1 to be performed by or under the direction of Dr. _____

2. I request the performance of the above named operation or procedure and of such additional operations or procedures as are found to be necessary or desirable, in the judgment of the professional staff of the below named medical facility, during the course of the above named operation or procedure.

3. I request the administration of such anesthesia as may be considered necessary or advisable in the judgment of the professional staff of the below-named medical facility.

4. Exceptions to surgery or anesthesia, if any, are: _____
(If none, so)

5. I request the disposal by authorities of the below named medical facility of any tissues or parts which it may be necessary to remove

6. I understand that photographs and movies may be taken of this operation and that they may be viewed by various personnel under going training or indoctrination at this or other facilities. I consent to the taking of such pictures and observation of the operation by authorized personnel, subject to the following conditions:

- a. The name of the patient and his/her family is not used to identify said pictures
- b. Said pictures be used only for purposes of medical/dental study or research

(Or, written permission by patient or representative)

C. SIGNATURES

(Appropriate form in Part A used below has indicated to whom)

1. COUNSELING PHYSICIAN/DENTIST. I have counseled this patient as to the nature of the proposed procedure(s), attendant risks involved, and expected results as described above.

(Signature of Counseling Physician/Dentist)

2. PATIENT: I understand the nature of the proposed procedure(s), attendant risks involved, and expected results, as described above, and hereby request such procedure(s) be performed.

(Signature of Witness, excluding members of operating team)

(Signature of Patient)

(Date and Time)

3. SPONSOR OR GUARDIAN: When patient is a minor or unable to give consent) I, _____ sponsor/guardian of _____ understand the nature of the proposed procedure(s), attendant risks involved, and expected results, as described above, and hereby request such procedure(s) be performed.

(Signature of Witness, excluding members of operating team)

(Signature of Sponsor/Legal Guardian)

(Date and Time)

PATIENT'S IDENTIFICATION (For typed or written entries, give Name -last, first, middle, grade, date, hospital or medical facility)

REGISTER NO

WARD NO

STANDARD FORM 522 (Rev. 10-76)
General Services Administration &
Interagency Comm. on Medical Records
PMR 101-11.806-8
522-109

ADDENDUM

Proposed Department of Defense Directive

1. Authority and Mandate.

This directive supersedes all other directives, instructions and regulations promulgated by the Department of Defense and the military departments concerning informed consent, do-not-resuscitate orders, and removal of life-sustaining equipment. The directive shall be implemented in all Department of Defense medical treatment facilities worldwide. *No local supplementation or modification is authorized.* This directive is expressly designed to preempt the operation of state and local law in military medical facilities operating within the United States. Therefore, where state or local law conflicts with provisions of this Directive, this Directive takes precedence. Properly ratified treaties and international agreements may preempt the operation of this Directive in overseas facilities.

2. Definitions.

a. *Consent*, as opposed to *informed consent*, means the patient's agreement to the suggested procedure.

b. *Disclosure* means the legal duty to fully inform the patient, or the person authorized to give consent, of the nature of the patient's ailment, the alternative methods of treatment, the nature of the proposed treatment, the probability of success, and the incidence and severity of the risks.

c. An *emergency* exists if:

(1) The patient is suffering a severe life-threatening or potentially disabling condition which requires immediate care to prevent loss of life, loss of limb or permanent disfigurement; or

(2) The patient urgently needs medical treatment to prevent a life-threatening or potentially disabling condition from developing, the patient is incompetent, as defined in this regulation, and the consent of a proxy decisionmaker cannot be reasonably obtained.

d. *Informed consent* means that the patient, or the person authorized to give consent, has agreed to a certain

procedure after having been fully informed of the nature of the patient's ailment, the alternative methods of treatment, the nature of the proposed treatment, the probability of success, and the incidence and severity of the risks. Informed consent consists of two elements—disclosure and consent.

e. *Routine care.*

(1) *Routine care* consists of procedures that **all** reasonable patients are familiar with, to include knowing the benefits, reasons, risks and alternatives of the procedure, such as:

(a) Routine physical examinations.

(b) Routine laboratory tests and x-rays.

(c) Hygienic care.

(d) Preparatory nursing procedures.

(e) Administration of over-the-counter medications such as aspirin, Tylenol, Actifed, etc.

(2) *Routine care* does *not* include:

(a) Any surgical procedure, regardless of simplicity.

(b) Termination of medical treatment.

(c) Administration of any prescription medication, regardless of how commonly used by the medical community. This includes medications that the patient may have previously used but may not have used in combination with other medications now being administered.

f. The *primary physician* is the physician who directly performs a procedure. If no physician is directly involved in performing the procedure, the primary physician is the physician who ordered that the procedure be performed. If more than one physician is directly involved with the procedure, the physician having the most contact with the patient is the primary physician.

g. *Shall* and *will* are used in this directive in their imperative sense.

3. Responsibilities.

a. Medical facility commanders are ultimately responsible

for ensuring that **all** personnel are thoroughly trained concerning the provisions of this directive and that the provisions of the directive are strictly followed. Absent a valid court order to the contrary, the facility commander's decision on any matter covered by this directive is final. The authority given to the commander under this directive shall not be delegated to anyone except a properly designated acting commander.

b. The primary physician is ultimately responsible for insuring that the requirements contained in this directive are met for his or her particular patient.

4. General Informed Consent Rules.

a. Except as stated in paragraph 4a(1) below, all competent patients, military and civilian, have the legal and moral right to refuse medical treatment at any time, even if it is life-saving.

(1) Under certain limited circumstances, military personnel may be required to accept medical care, with or without their consent. See AR 600-20, Section III. This does not relieve the primary physician of his or her duty to provide disclosure to the patient, or the person authorized to give consent.

b. Except as stated in paragraph 4a(1) above and paragraph 5, below, no medical treatment will be performed on any person until such time as they have given their informed consent. Informed consent consists of two elements, each of which must be fully complied with.

(1) Disclosure. The primary physician shall disclose to the patient, or the person authorized to give consent, all material information which a reasonably prudent patient, in the same or similar circumstances, would want to know before making a decision to accept or reject the proposed treatment. At a minimum, the following information will be disclosed.

(a) Information about the nature of the ailment;

(b) Alternative methods of treatment;

(c) Information about the nature of the proposed treatment;

(d) The probability of success of the proposed treatment; *and*

(e) The incidence and severity of risks associated with the proposed treatment, as follows:

(i) The procedures listed in Appendix A require disclosure of the risks and hazards contained therein to the patient or the person authorized to give consent.

(ii) The procedures listed in Appendix B require no disclosure of risks or hazards.

(iii) If the proposed procedure is not contained in Appendix A or Appendix B, the physician will determine, based on a national medical standard, what risks and hazards are associated with the procedure. The physician will then disclose **all** such risks which a reasonably prudent patient, in the same or similar circumstances, would want to know before making a decision to accept or reject the proposed treatment.

(iv) If Appendix B applies, and no disclosure of risks or hazards is required, the other disclosure requirements listed above will be provided to the patient or the person authorized to give consent.

(f) Disclosure will be made in terms which are easily understood by the person authorized to give consent.

(g) Written disclosure will be made and recorded on the form shown at Appendix C for **all** procedures listed in Appendix A and for **all** cases involving the termination of medical treatment. The form, when signed by the patient or the person authorized to give consent, will constitute prima facie evidence that the informed consent requirements have been completed.

(h) Oral disclosure is permissible in all other situations. However, to the maximum extent possible, narrative summaries, progress notes, hand-drawn pictures shown to the patient, etc., will be included in the patient's chart as evidence of compliance with this directive.

(2) Consent. Although consent may be implied in certain situations, the primary physician and assisting personnel should, to the maximum extent possible, deter-

mine that the person giving consent has affirmatively agreed to the proposed procedure. Furthermore, consent to the procedures listed in Appendix A and to termination of medical treatment must be made in writing by the person authorized to give consent.

5. Exceptions to the General Rules.

a. Consent and disclosure requirements are totally suspended in **all** cases requiring emergency care, as defined in paragraph 2c of this directive.

b. Therapeutic privilege.

(1) As stated in paragraph 6a below, **all** patients are presumed competent to make their own decisions. All patients are also presumed capable of receiving all of the disclosure mandated by this directive without detriment to their condition. The primary physician must fully justify any decision to the contrary in writing and place a copy of the justification in the patient's chart. *In no case will the therapeutic privilege be used merely to substitute the physician's judgment for the patient's.*

(2) If the primary physician determines that the patient would become so ill or emotionally distraught on disclosure of certain information as to foreclose a rational decision, or complicate or hinder treatment, or cause psychological damage to the patient, *the physician shall obtain an informed consent from the person authorized to give consent* (see para. 7), rather than from the patient. Nevertheless, to avoid a traumatic reaction by the patient upon implementation of the procedure, the primary physician shall, if at all possible, disclose all nonsensitive information to the patient and obtain the patient's agreement.

d. Waiver.

(1) Except in an emergency, as defined in this directive, a patient cannot waive consent. He or she must either agree to the procedure or reject it. Although the patient may legally waive disclosure, a valid legal waiver would require that the physician stop the medical treatment process, and begin a legal discourse to advise the patient of his or her legal rights concerning informed consent, before the patient could "knowingly and voluntarily"

waive the right. **This** is not practical or wise. Therefore, waiver of disclosure is not recognized as an exception to the general rules listed in paragraph 4 above.

(2) If, for some reason, a patient should indicate that he or she does not desire disclosure, the primary physician shall indicate that the information is in his or her best interest and continue with the process of obtaining an informed consent.

(3) For cases involving waiver by proxy decisionmakers, see paragraph 7c below.

6. Patient Competency

a. Except for minors, all patients are presumed competent to make their own decisions concerning their medical care.

b. The primary physician is responsible for determining the competence of his or her patients. Any finding of incompetence must be fully justified in writing. A copy of the writing will be placed in the patient's chart. *This exception will not be used merely to substitute the physician's judgment for the patient's.*

c. In determining the competence of an adult patient, the primary physician shall consider the following criteria:

(1) Any court order declaring the patient incompetent shall be referred to the local staff judge advocate for legal review. In addition to sufficiency of jurisdiction, etc., the staff judge advocate shall closely review the court order to see if it appears that the court intended to include medical decisionmaking in the powers of the appointed guardian. If medical decisionmaking does not appear to be included in the court order, the staff judge advocate should so advise the guardian who, in turn, can elect to obtain clarification from the court. In the meantime, the primary physician will not consider a nonspecific order as conclusive proof of incompetence. Rather, it shall be considered along with the following factors.

(2) The physician must determine if any general qualities, such as severe intoxication, active psychosis, severe mental retardation, unconsciousness, or senility are present which, in turn, affect the patient's ability to give informed consent.

(3) In the course of conversation with the patient about his condition the physician should also be alert to specific medical decisionmaking factors such as: the patient's reluctance or inability to reach any decision about his care; the patient's inability to engage in a rational decisionmaking process; the patient's expressing a totally irrational decision; or the patient's inability to comprehend the information disclosed.

(4) With the exception of a valid, specific court order, none of the factors listed in paragraphs 6c(1)-(3) outweighs any other factor, and no factor listed in paragraph 6c(3) shall justify a finding of incompetence by itself. The primary physician shall evaluate the totality of the circumstances and, using these factors as evaluation criteria, justify any finding of incompetency in writing. A copy of the writing will be placed in the patient's chart.

d. Minors.

(1) Persons under the age of 17 are presumed to be incompetent to consent to any medical treatment other than routine care, as defined in this directive.

(2) Except as provided below, no person under the age of 17 shall be provided any medical care, other than routine or emergency care, without the informed consent of a parent, guardian or other person authorized to give consent.

(3) On a case by case basis, persons under the age of 17 may seek a determination from the hospital commander, via the ethics panel, that they are mature enough to consent to the proposed treatment, or that the treatment is otherwise in their best interests. The ethics panel must recommend that the commander approve or deny the medical treatment based upon findings that the minor is mature enough to consent to the procedure; the treatment is in the best interests of the immature minor; or the treatment is not in the best interests of the immature minor.

7. Proxy Decisionmakers (i.e., person authorized to give consent for an incompetent patient).

a. The following persons, listed in order of priority, are authorized to give informed consent, on behalf of an

incompetent patient, to all medical treatment procedures, to include termination of medical treatment orders.

(1) Court appointed guardian. But see paragraph 6c(1) above.

(2) Person designated by the patient in any of the following documents, in order of priority.

(a) Living will.

(b) Durable power of attorney.

(c) "Next of kin" designated by active duty military member on his or her DA Form 93.

(3) The patient's spouse (unless estranged from the patient).

(4) The patient's adult children.

(5) Parents.

(6) Brothers or sisters.

(7) Close friends who have resided with and cared for the patient for at least the preceding 12 months.

(8) Other relative by blood.

(9) Other relative by marriage.

b. The documents listed in paragraph 7a(2)(a) and 7a(2)(b) above shall be reviewed by the staff judge advocate for legal sufficiency before informed consent may be obtained for any procedure, especially termination of medical treatment. In urgent cases where the staff judge advocate or hospital judge advocate is not reasonably available, the administrative officer of the day will notify the military police to contact the on-call judge advocate.

c. As is the case with the patient, the proxy decisionmaker is not entitled to waive his or her right to disclosure under this directive. If the person authorized to give consent refuses to fully participate in the informed consent process, the next person on the list will be contacted for his or her informed consent. Only parents and legal guardians of immature minors may authorize someone else to exercise their right to give informed consent. This must be done via a properly executed special power of attorney.

d. Any questions concerning the proxy decisionmaker shall be referred to the medical facility commander, via the ethics panel. Absent a valid court order to the contrary and based upon the ethics panel's findings and recommendations, the commander may, for good reason and in the best interests of the patient, alter the priority list contained in paragraph 7a. The commander will record his reasoning for altering the priority list in the patient's chart.

e. Proxy decisionmaker's responsibilities and authority.

(1) In all cases except those involving minor children (to include the termination of medical treatment), proxy decisionmakers should be informed that they are required to act in accordance with the actual desires of the patient, if these desires can be established. In other words, they are to substitute the patient's judgment for their own and act accordingly. Proxy decisionmakers must therefore strongly consider any statements or beliefs expressed by the patient while he or she was competent.

(2) If the proxy decisionmaker is not reasonably able to ascertain the patient's actual desires, and the patient is *not* qualified for termination of medical treatment under paragraph 8 below, the proxy must objectively and reasonably consider whether the risks of the proposed treatment substantially outweigh the benefits to be gained.

(3) If the proxy decisionmaker is not reasonably able to ascertain the patient's actual desires, and the patient *is* qualified for termination of medical treatment under paragraph 8 below, the proxy must objectively and reasonably consider whether the net burdens of a prolonged life substantially outweigh any physical pleasure, emotional enjoyment, or intellectual satisfaction that the patient may still be able to derive from life.

(4) Although the primary physician must advise the proxy of these standards, the responsibility for following the standards is ultimately on the proxy decisionmaker. The primary physician should inquire, and subsequently document in the patient's chart, the basis for the proxy decisionmaker's decision. If the physician has actual knowl-

edge that the proxy's decision is contrary to the patient's desires, the physician shall contact the ethics panel for assistance in resolving the conflict.

8. Termination of Medical Treatment—Policies and Special Procedures.

a. *Termination of medical treatment* includes do-not-resuscitate orders as well as withholding or withdrawing life-sustaining treatment. Furthermore, the phrase includes medical procedures or interventions, such as intravenous therapies and gavage feedings, which serve only to artificially prolong a qualified patient's death. Medical interventions necessary to alleviate pain are not considered life-sustaining treatment.

b. A *qualified patient* is a patient diagnosed and certified as being afflicted with an irreversible, terminal condition or as being in a persistent or chronic vegetative state. The diagnosis will be made by the patient's primary physician (interns and residents excluded) and certified by the Deputy Commander for Clinical Services (DCCS) or the Chief of the Medical Department.

(1) An *irreversible, terminal condition* is a progressive disease or injury **known** to terminate in death for which no additional course of therapy offers any reasonable expectation of remission from the terminal condition.

(2) A *persistent or chronic Vegetative state* is a chronic state of diminished consciousness resulting from a severe, generalized brain injury in which there is no reasonable possibility of improvement to a cognitive state.

c. General policies.

(1) An order to provide lifesustaining treatment, to include cardiopulmonary resuscitation, is a standing order. If there is *any* conflict or disagreement as to the diagnosis, prognosis, or informed consent of the patient or person authorized to give consent, life-sustaining treatment will be continued.

(2) Due to the provisions of the Child Abuse Amendments, 42 U.S.C. §§ 5101-07 (1983), and the Procedures Relating to Health Care for Handicapped Infants, 45 C.F.R. § 84.55 (1985), food and water, provided via spoon, IV, nasogastric (NG) tube, or any other means,

will *not* be withdrawn or withheld from any patient under the age of 18.

(3) **All** DOD medical facilities are committed to supporting and sustaining life when it is reasonable to do so. Nevertheless, life-sustaining techniques and the application of medical technology may not, in all cases, cure a patient's disease or disability or reverse a patient's condition. Some patients who suffer from a terminal illness or a persistent or chronic vegetative state (i.e., qualified patients) may reach a point where continued or additional treatment is not only unwanted by the patient but medically unsound. In such cases, medical treatment **does** not prevent death but merely defers the moment of its occurrence. The primary physician and the Deputy Commander for Clinical Services, or Chief of the Medical Department, must decide whether continued efforts constitute a reasonable attempt at prolonging life or whether the patient's illness has reached such a point that further intensive, or extensive, care is merely postponing the moment of death that is otherwise imminent. Such choices are not always easy. When the physician finds the patient's preference to be morally unacceptable and is unwilling to participate in carrying out the choice, he or she should transfer responsibility for the patient to another physician. No questions will be asked and no comments will be made.

(4) Because of its grave nature and consequences, a termination of medical treatment decision should only be made under conditions that permit consultation and reasoned decision. The patient, or person authorized to give consent, shall not be pressured to make a decision.

(5) A termination of medical treatment order does not affect other treatment decisions. Specific attention should be paid to making respectful, responsible, competent care available for patients who choose to forego life-sustaining therapy. Therefore, orders for supportive care shall be written separately. **All** efforts to provide comfort and relief from pain will be provided.

(6) Neither the use of lifesustaining treatment, to include the use of mechanical support equipment, nor termination of that treatment is considered to be extraordinary medical practice. Rather, both actions are part of

the physician's ordinary medical practice. As such, the physician should feel free to approach the patient, or person authorized to give consent, concerning termination of medical treatment. Special care should be taken, however, not to apply any pressure on these individuals to accept a termination of medical treatment order.

d. All of the informed consent provisions set out in paragraphs 1-7 of this directive are applicable to termination of medical treatment cases. Additional procedural requirements for termination of medical treatment cases include:

(1) No order terminating medical treatment shall be written or entered into effect until the DCCS or Chief of the Medical Department has completed the certification of the patient's diagnosis and prognosis.

(2) An order to terminate medical treatment will be entered by the primary physician in the *Doctors Orders* section, timed, dated, and signed legibly. Documentation in the *Progress Notes* section will include:

(a) A description of the patient's medical condition corroborating the prognosis, including reference to any consultations relevant to the decision to terminate medical treatment.

(b) A summary of discussions with the patient or person authorized to give consent, ethics panel members, or any other person, concerning the medical prognosis and the termination of medical treatment.

(c) The competency status of the patient and the basis for any finding of incompetency. See paragraph 6 above.

(d) The authority upon which the final decision is based (e.g., informed consent of patient or person authorized to give consent or a court order). Summarize any input received from the ethics panel or facility commander. Include a legible copy of the consent form signed by the patient or the person authorized to give consent.

(3) The primary physician will promptly notify personnel who are responsible for the patient's care, particularly the nursing staff, about the decision to terminate medical treatment. A competent patient should **also** be asked if he

or she would like the physician to contact any other person, such as a legal assistance officer (for a will or durable power of attorney) or the chaplain.

(4) The primary physician will inform the patient of the contents of paragraph 8d(5) below and then ask the patient if his or her family should be immediately informed of the order. If the patient desires, the family **will** be so informed but will not be allowed to override the decision of the patient. If a competent patient requests that the family not be involved in, or immediately informed of, the decision, the patient's request for confidentiality will be documented in the medical record and honored until such time as the patient becomes incompetent.

(5) The person authorized to give consent will be automatically informed of the order once the patient becomes incompetent to act on his or her own behalf. This is necessary to allow the authorized person to properly perform their duties as proxy decisionmaker. See paragraph 7e above. In no case, however, will a competent patient's informed consent to terminate medical treatment be overturned after he or she becomes incompetent unless ordered by the facility commander or a valid court order, or unless there is positive reason to believe that the patient's choice would have changed due to a change in the medical circumstances.

e. If a competent patient withdraws his consent to the termination of medical treatment order, the senior nurse in charge of the ward will immediately cancel the termination order and notify all nursing personnel that the standing order for life-sustaining treatment is still in effect for that patient. The senior nurse will immediately contact the medical officer of the day, the primary physician, or the **DCCS**, and the chief nurse, in that order. If the person authorized to give consent indicates that he or she wants to withdraw the consent, the senior nurse will check the chart to see who originally consented to the order.

(1) If the person requesting the withdrawal was the person who originally consented to the order, the senior nurse should follow the steps listed in paragraph 7e above.

(2) If the patient consented while competent, or if the patient is still competent, the order shall not be canceled. The senior nurse will, instead, immediately contact the personnel named in paragraph 7d above.

9. Role of the Ethics Panel.

a. The ethics panel, as a body, is a member of the facility commander's personal staff. In general, the mission of the ethics panel is to assist the medical facility commander in his responsibility of ensuring that the requirements of this directive are met. The ethics panel's mission includes education, development of policies and guidelines, and consultation and review. The ethics panel is an advisory body, not a decisionmaking body.

b. The ethics panel will consist of seven to nine members, including, as a minimum, a staff physician from the department of medicine, a staff physician from the department of surgery, a psychiatrist or psychologist, a judge advocate, a chaplain, a representative of social work services or community health, a nurse (preferably from one of the medical wards), and a nonmedical, non-legal, civilian employee. The senior military member will act as president of the ethics panel. A quorum (three-fourths of the members) must be present at all meetings. A judge advocate must participate in all recommendations presented to the commander. The influence of superiority of rank or profession will not be employed in any manner in an attempt to control the independence of the members in the exercise of their own personal judgment. No rating official will give an unfavorable rating or comment regarding any member of the panel because he or she zealously presented his or her views during ethics panel meetings.

c. Ethics panel members will meet to investigate, discuss and recommend action concerning all ongoing informed consent problems raised by the commander, any patient (to include minors seeking a maturity determination), any employee of the facility, any member of the patient's immediate family, or any member of the ethics panel.

d. No party has an absolute right to appear before the ethics panel. Nevertheless, the ethics panel is encouraged to take personal statements from interested parties. Such

statements will be summarized in the ethics panel's reports.

e. Because time is of the essence in most cases, duty as a member of the ethics panel takes precedence over all other nonemergency, nonurgent medical situations, as defined by this directive, unless specifically ordered by the medical facility commander. Duty as a member also takes precedence over **all** nonmedical duties except courts-martial, unless otherwise specifically ordered by the general courts-martial convening authority.

f. The ethics panel should attempt to present a consensus opinion to the commander. If a consensus cannot be achieved, the majority opinion will be presented as the ethics panel's recommendation. Nevertheless, all dissenting opinions must be completely and accurately presented to the commander, especially those involving a medical or legal dissent. The ethics panel's findings, recommendations and dissenting opinions will be presented only to the facility commander.

10. Role of the DOD Medical Disclosure Commission

a. The Department of Defense Medical Disclosure Commission is created to determine which risks related to medical care and surgical procedures must be disclosed to persons authorized to give consent.

b. Operation of the Disclosure Commission is the responsibility of the Assistant Secretary of Defense for Health Affairs. A representative of that office will act as president of the Disclosure Commission.

c. The Disclosure Commission will consist of seven members: the president, three military physicians (one from each of the military departments), a military judge advocate (to be selected alternately from each of the military departments and the Marine Corps), an attorney from the DOD General Counsel's Office, and a nonmedical, nonlegal, civilian employee of the Department of Defense. Other than the president, no member should serve less than two, nor more than four, years on the Commission.

d. The date, time, place and duration of the Disclosure Commission's meetings will be determined by the president.

e. The Disclosure Commission is a decisionmaking body. The Commission's decisions will become effective **120** days following publication of its report unless specifically vetoed by the Assistant Secretary of Defense for Health Affairs or the Secretary of Defense.

f. The Disclosure Commission's decisions will be based on moral and ethical considerations as well as legal and medical considerations. The Commission is required to issue policy decisions that address the best interests of the patients **as well as** the best interests of the Department of Defense and the United States government. The influence **of** superiority of rank or profession will not be employed in any manner in an attempt to control the independence **of** the members in the exercise of their own personal judgment. No rating official will give an unfavorable rating or comment regarding any member of the panel because he or she zealously presented his or her views during Disclosure Commission meetings.

g. The Disclosure Commission is specifically tasked **as follows:**

(1)The Commission shall identify and make a thorough examination of all medical treatments and surgical procedures in which military health care providers may be involved in order to determine which of those treatments and procedures require disclosure of risks to the patient or person authorized to give consent.

(2) The Commission shall prepare separate lists of those medical treatments **and** surgical procedures that do require disclosure of risks and those medical treatments **and** surgical procedures that do not require disclosure of risks. For those treatments and procedures that do require disclosure the Commission shall also establish the degree of disclosure required.

(3) Lists prepared under paragraph 10g(2) above will be published in the Commission's written report and forwarded through the Assistant Secretary of Defense for Health Affairs to the Secretary of Defense. If not vetoed, the lists **will** be published as a permanent change to this directive (Appendices A and B) within 120 days of the date of the Commission's report. To allow for a complete

distribution of the change worldwide, the minimum effective day of implementation of all military medical facilities will be 60 days after the date of the change to this directive.

(4) The Commission will review national informed consent trends and change the body of this directive, as needed.

Appendix A To Addendum

The following treatments and procedures require disclosure of the designated risks and hazards by the physician or health care provider to the patient or person authorized to consent for the patient.

I. Anesthesia.

1. Epidural.

a. Risks are enumerated in the informed consent form (*Appendix C*, rule **601.3**).

2. General.

a. Risks are enumerated in the informed consent form (*Appendix C*, rule **601.3**).

3. spinal.

a. Risks are enumerated in the informed consent form (*Appendix C*, rule **601.3**).

11. Cardiovascular system.

(No procedures assigned at this time.)

111. Digestive system treatments and procedures.

1. Cholecystectomy with or without common bile duct exploration.

a. Pancreatitis.

b. Injury to the tube between the liver and the bowel.

c. Retained stones in the tube between the liver and the bowel.

d. Narrowing or obstruction of the tube between the liver and the bowel.

e. Injury to the bowel and/or the intestinal obstruction.

IV. Ear treatments and procedures.

1. Stapedectomy.

a. Diminished or bad taste.

b. Total or partial loss of hearing in the operated ear.

c. Brief or long-standing dizziness.

d. Eardrum hole requiring more surgery.

e. Ringing in the ear.

2. Reconstruction of auricle of ear for congenital deformity or trauma.

a. Less satisfactory appearance compared to possible alternative artificial ear.

b. Exposure of implanted material.

3. Tympanoplasty with mastoidectomy.

a. Facial nerve paralysis.

b. Altered or loss of taste.

c. Recurrence of original disease process.

d. Total loss of hearing in operated ear.

e. Dizziness.

f. Ringing in the ear.

V. Endocrine system treatments and procedures.

1. Thyroidectomy.

a. Injury to nerves resulting in hoarseness or impairment of speech.

b. Injury to parathyroid glands resulting in low blood calcium levels that require extensive medication to avoid serious degenerative conditions, such as cataracts, brittle bones, muscle weakness and muscle irritability.

c. Lifelong requirement of thyroid medication.

VI. Eye treatments and procedures.

1. Eye muscle surgery.

a. Additional treatment and/or surgery.

b. Double vision.

c. Partial or total loss of vision.

2. Surgery for cataract with or without implantation of intraocular lens.

a. Complications requiring additional treatment and/or surgery.

b. Need for glasses or contact lenses.

c. Complications requiring the removal of implanted lens.

d. Partial or total loss of vision.

3. Retinal or vitreous surgery.

a. Complications requiring additional treatment and/or surgery.

b. Recurrence or spread of disease.

c. Partial or total loss of vision.

4. Reconstruction and/or plastic surgical procedures of the eye and eye region, such as, blepharoplasty, tumor, fracture, lacrimal surgery, foreign body, abscess, or trauma.
 - a. Worsening or unsatisfactory appearance.
 - b. Creation of additional problems such as:
 - (1) Poor healing or **skin** loss.
 - (2) Nerve damage.
 - (3) Painful or unattractive scarring.
 - (4) Impairment of regional organs, such as, eye or lip function.
 - c. Recurrence of the original condition.
5. Photocoagulation and/or cryotherapy.
 - a. Complications requiring additional treatment and/or **sur-**
gery.
 - b. Pain.
 - c. Partial or total loss of vision.
6. Corneal surgery, such as corneal transplant, refractive **sur-**
gery and pterygium.
 - a. Complications requiring additional treatment and/or **sur-**
gery.
 - b. Possible pain.
 - c. Need for glasses or contact lenses.
 - d. Partial or total loss of vision.
7. Glaucoma surgery by any method.
 - a. Complications requiring additional treatment and/or **sur-**
gery.
 - b. Worsening of the glaucoma.
 - c. Pain.
 - d. Partial or total loss of vision.
8. Removal of the eye or its contents (enucleation or eviseration).
 - a. Complications requiring additional treatment and/or **sur-**
gery.
 - b. Worsening or unsatisfactory appearance.
 - c. Recurrence or spread of disease.
9. Surgery for penetrating ocular injury, including intraocular foreign body.

- a. Complications requiring additional treatment and/or surgery.
- b. Chronic pain.
- c. Partial or total loss of vision.

VII. Female genital system treatments and procedures.

1. Abdominal hysterectomy (total).

- a. Uncontrollable leakage of urine.
- b. Injury to bladder.
- c. Sterility.
- d. Injury to the tube between the kidney and the bladder.
- e. Injury to the bowel and/or intestinal obstruction.

2. Vaginal hysterectomy.

- a. Uncontrollable leakage of urine.
- b. Injury to bladder.
- c. Sterility.
- d. Injury to the tube between the kidney and the bladder.
- e. Injury to the bowel and/or intestinal obstruction.
- f. Completion of operation by abdominal incision.

3. Removal of fallopian tube(s) and ovary(ies) with possible hysterectomy.

- a. Uncontrollable leakage of urine.
- b. Injury to bladder.
- c. Sterility.
- d. Injury to the tube between the kidney and the bladder.
- e. Injury to the bowel and/or intestinal obstruction.
- f. Loss of normal ovarian hormonal function.

4. Abdominal endoscopy (peritoneoscopy, laparoscopy).

- a. Puncture of the bowel or blood vessel.
- b. Abdominal infection.
- c. Abdominal incision and operation to correct injury.

VIII. Hematic and lymphatic system.

(No procedures assigned at this time.)

IX. Integumentary system treatments and procedures.

1. Radical or modified radical mastectomy. (Simple mastectomy excluded.)

- a. Limitation of movement of shoulder and arm.
- b. Swelling of the arm.

- c. **Loss** of the **skin** of the chest requiring **skin** graft.
 - d. Recurrence of malignancy, **if** present.
 - e. Decreased sensation or numbness of the inner aspect of the arm and chest wall.
2. Reconstruction **and/or** plastic surgical operations of the face and neck.
- a. Worsening of unsatisfactory appearance.
 - b. Creation of several additional problems, such as:
 - (1) Poor healing skin **loss**.
 - (2) Nerve damage.
 - (3) **Painful** or unattractive scarring.
 - (4) Impairment of regional organs, such as, eye or lip function.
 - c. Recurrence of the original condition.

X. Male genital system.

- 1. Orchidopexy (reposition of **testis(es)**),
 - a. Removal of testicle.
 - b. Atrophy (shriveling) of testicle with loss of function.
- 2. Orchiectomy (removal of the **testis(es)**),
 - a. Decreased sexual desire.
 - b. Difficulties with penile erection.
- 3. Vasectomy.
 - a. **Loss** of testicle.
 - b. Failure to produce permanent sterility.

XI. Maternity and related cases.

(No procedures assigned at this time.)

XII. Musculoskeletal system treatments and procedures.

- 1. Arthroplasty of all joints with mechanical device.
 - a. Impaired function such as shortening or deformity of an arm or leg, limp or foot drop.
 - b. Blood vessel or nerve injury.
 - c. **Pain** or discomfort.
 - d. Fat escaping from bone with possible damage to a vital organ.
 - e. Failure of bone to heal.
 - f. Bone infection.

g. Removal or replacement of any implanted device or material.

2. Mechanical internal prosthetic device.

a. Impaired function such as shortening or deformity of an arm or leg, limp or foot drop.

b. Blood vessel or nerve injury.

c. **Pain** or discomfort.

d. Fat escaping from bone with possible damage to a vital organ.

e. Failure of bone to heal.

f. Bone infection.

g. Removal or replacement of any implanted device or material.

3. Open reduction with internal fixation.

a. Impaired function such as shortening or deformity of an arm or leg, limp or foot drop.

b. Blood vessel or nerve injury.

c. **Pain** or discomfort.

d. Fat escaping from bone with possible damage to a vital organ.

e. Failure of bone to heal.

f. Bone infection.

g. Removal or replacement of any implanted device or material.

4. Osteotomy

a. Impaired function such as shortening or deformity of an **arm** or leg, limp or foot drop.

b. Blood vessel or nerve injury.

c. **Pain** or discomfort.

d. Fat escaping from bone with possible damage to a vital organ.

e. Failure of bone to heal.

f. Bone infection.

g. Removal or replacement of any implanted device or material.

5. Ligamentous reconstruction of joints.

a. Failure of reconstruction to work.

b. Continued loosening of the joint.

c. Degenerative arthritis.

d. Continued pain.

- e. Increased stiffening.
 - f. Blood vessel or nerve injury.
 - g. Cosmetic and/or functional deformity.
6. Children's orthopedics (bone, joint, ligament or muscle).
- a. Growth deformity.
 - b. Additional surgery.

XIII. Nervous system treatments **and** procedures.

1. Craniotomy (craniectomy) for excision of brain tissue, tumor, vascular malformation and cerebral revascularization.

- a. Additional loss of brain function including memory.
- b. Recurrence or continuation of the condition that required this operation.
- c. Stroke.
- d. Blindness, deafness, inability to smell, double vision, coordination loss, seizures, pain, numbness and paralysis.

2. Craniotomy (craniectomy) for cranial nerve operation including neurectomy, avulsion, rhizotomy or neurolysis.

- a. Numbness, impaired muscle function or paralysis.
- b. Recurrence or continuation of the condition that required this operation.
- c. Seizures.

3. Spine operation. Including: laminectomy, decompression, fusion, internal fixation or procedures for nerve root or spinal cord compression; diagnosis; pain; deformity; mechanical instability; injury; removal of tumor, abscess or hematoma. (Excluding coccygeal operations.)

- a. Pain, numbness or clumsiness.
- b. Impaired muscle function.
- c. Incontinence or impotence.
- d. Unstable spine.
- e. Recurrence or continuation of the condition that required the operation.
- f. Injury to major blood vessels.

4. Peripheral nerve operation; nerve grafts, decompression, transposition or tumor removal; neurorrhaphy, neurectomy or neurolysis.

- a. Numbness.
- b. Impaired muscle function.

c. Recurrence or persistence of the condition that required the operation.

d. Continued, increased, or different pain.

5. Correction of cranial deformity.

a. Loss of brain function.

b. Seizures.

c. Recurrence or continuation of the condition that required the operation.

6. Transphenoidal hypophysectomy or other pituitary gland operation.

a. Spinal fluid leak.

b. Necessity for hormone replacement.

c. Recurrence or continuation of the condition that required the operation.

d. Nasal septal deformity or perforation.

7. Cerebral spinal fluid shunting procedure or revision.

a. Shunt obstruction or infection.

b. Seizure disorder.

c. Recurrence or continuation of the condition that required the operation.

XIV. Radiology.

1. Angiography, aortography, arteriography (arterial injection of contrast media-diagnostic).

a. Injury to artery.

b. Damage to parts of the body supplied by the artery with resulting loss of function or amputation.

c. Swelling, pain, tenderness or bleeding at the site of the blood vessel perforation.

d. Aggravation of the condition that necessitated the procedure.

e. Allergic sensitivity reaction to injected contrast media.

2. Myelography.

a. Chronic pain.

b. Transient headache, nausea, vomiting.

c. Numbness.

d. Impaired muscle function.

3. Angiography with occlusion techniques-therapeutic.

- a. Injury to artery.
- b. Loss or injury to body parts.
- c. Swelling, pain, tenderness or bleeding at the site of the blood vessel perforation.
- d. Aggravation of the condition that necessitated the procedure.
- e. Allergic sensitivity reaction to injected contrast media.

4. Angioplasty (intravascular dilation technique).

- a. Swelling, pain, tenderness or bleeding at the site of vessel puncture.
- b. Damage to parts of the body supplied by the artery with resulting loss of function or amputation.
- c. Injury to the vessel that may require immediate surgical intervention.
- d. Recurrence or continuation of the original condition.
- e. Allergic sensitivity reaction to injected contrast media.

5. Splenoportography (needle injection of contrast media into spleen).

- a. Injury to the spleen requiring transfusion and/or removal of the spleen.

XV. Respiratory system treatments and procedures.

1. Excision of lesion of larynx, vocal cords, trachea.

(No risks or hazards assigned at this time.)

2. Rhinoplasty or nasal reconstruction with or without septoplasty.

- a. Deformity of skin, bone or cartilage.
- b. Creation of new problems, such as septal perforation or breathing difficulty.

3. Submucosa resection of nasal septum or nasal septoplasty.

- a. Persistence, recurrence or worsening of the obstruction.
- b. Perforation of nasal septum with dryness and crusting.
- c. External deformity of the nose.

XVI. Urinary System.

1. Partial nephrectomy (removal of part of the kidney).

- a. Incomplete removal of stone(s) or tumor, if present.
- b. Obstruction of urinary flow.
- c. Leakage of urine at surgical site.

- d. Injury to or loss of the kidney.
 - e. Damage to adjacent organs.
2. Radical nephrectomy (removal of kidney and adrenal gland for cancer).
 - a. Loss of adrenal gland.
 - b. Incomplete removal of tumor.
 - c. Damage to adjacent organs.
 3. Nephrectomy (removal of kidney).
 - a. Incomplete removal of tumor if present.
 - b. Damage to adjacent organs.
 - c. Injury to or loss of the kidney.
 4. Nephrolithotomy and pyelolithotomy (removal of kidney stone(s)).
 - a. Incomplete removal of stone(s).
 - b. Obstruction of urinary flow.
 - c. Leakage of urine at surgical site.
 - d. Injury to or loss of the kidney.
 - e. Damage to adjacent organs.
 5. Pyeloureteroplasty (pyeloplasty or reconstruction of the kidney drainage system).
 - a. Obstruction of urinary flow.
 - b. Leakage of urine at surgical site.
 - c. Injury to or loss of the kidney.
 - d. Damage to adjacent organs.
 6. Exploration of kidney or perinephric mass.
 - a. Incomplete removal of stone(s) or tumor, if present.
 - b. Leakage of urine at surgical site.
 - c. Injury to or loss of the kidney.
 - d. Damage to adjacent organs.
 7. Ureteroplasty [reconstruction of ureter (tube between kidney and bladder)].
 - a. Leakage of urine at surgical site.
 - b. Incomplete removal of the stone or tumor (when applicable).
 - c. Obstruction of urine flow.
 - d. Damage to other adjacent organs.
 - e. Damage to or loss of the ureter.

8. Ureterolithotomy [surgical removal of stone(s) from ureter (tube between kidney and bladder)].
 - a. Leakage of urine at surgical site.
 - b. Incomplete removal of stone.
 - c. Obstruction of urine flow.
 - d. Damage to other adjacent organs.
 - e. Damage to or loss of ureter.
9. Ureterectomy [partial/complete removal of ureter (tube between kidney and bladder)].
 - a. Leakage of urine at surgical site.
 - b. Incomplete removal of tumor (when applicable).
 - c. Obstruction of urine flow.
 - d. Damage to other adjacent organs.
10. Ureterolysis [freeing of ureter (tube between kidney and bladder)].
 - a. Leakage of urine at surgical site.
 - b. Obstruction of urine flow.
 - c. Damage to other adjacent organs.
 - d. Damage to or loss of ureter.
11. Ureteral reimplantation [reinserting ureter (tube between kidney and bladder) into the bladder].
 - a. Leakage of urine at surgical site.
 - b. Obstruction of urine flow.
 - c. Damage to or loss of ureter.
 - d. Backward flow of urine from bladder into ureter.
 - e. Damage to other adjacent organs.
12. Prostatectomy (partial or total removal of prostate).
 - a. Leakage of urine at surgical site.
 - b. Obstruction of urine flow.
 - c. Incontinence (difficulty with urinary control).
 - d. Semen passing backward into bladder.
 - e. Difficulty with penile erection (possible with partial and probable with total prostatectomy).
13. Total cystectomy (removal of urinary bladder).
 - a. Probable loss of penile erection and ejaculation in the male.
 - b. Damage to other adjacent organs.
 - c. **This** procedure will require an alternate method of *urinary* drainage.

14. Partial cystectomy (partial removal of urinary bladder).
 - a. Leakage of urine at surgical site.
 - b. Incontinence (difficulty with urinary control).
 - c. Backward flow of urine from bladder into ureter (tube between kidney and bladder).
 - d. Obstruction of urine flow.
 - e. Damage to other adjacent organs.
15. Urinary diversion (ileal conduit, colon conduit).
 - a. Blood chemistry abnormalities requiring medication.
 - b. Development of stones, strictures or infection.
 - c. Routine lifelong medical evaluation.
 - d. Leakage of urine at surgical site.
 - e. Requires wearing a bag for urine collection.
16. Ureterosigmoidostomy (placement of kidney drainage tubes into large bowel).
 - a. Blood chemistry abnormalities requiring medication.
 - b. Development of stones, strictures or infection.
 - c. Routine lifelong medical evaluation.
 - d. Leakage of urine at surgical site.
 - e. Difficulty in holding urine in the rectum.
17. Urethroplasty (construction/reconstruction of drainage tube from bladder).
 - a. Leakage of urine at surgical site.
 - b. Stricture formation.
 - c. Additional operation(s).

Appendix B To Addendum

The following treatments and procedures require no disclosure by the physician or health care provider to the patient or person authorized to consent for the patient.

I. Anesthesia.

1. Local.
2. Other forms of regional anesthesia.

II. Cardiovascular system.

1. Excision and ligation of varicose veins of the leg.

III. Digestive system.

1. Appendectomy.
2. Hemorrhoidectomy with fistulectomy or fissurectomy.
3. Hemorrhoidectomy.
4. Incision or excision of perirectal tissue.
5. Local excision and destruction of lesion, anus and rectum.
6. Operations for correction of cleft palate.
7. Repair of inguinal hernia.
8. Repair and plastic operations on anus and rectum.
9. Resection of colon (segmental).
10. Tonsillectomy with adenoidectomy.
11. Tonsillectomy without adenoidectomy.

IV. Ear.

1. Myringotomy.
2. Reconstruction of auricle of ear for skin cancer.
3. Tympanoplasty without mastoidectomy.

V. Endocrine system.

(No procedures assigned at this time.)

VI. Eye.

1. Administration of topical, parenteral (such as IV), or **oral** drugs or pharmaceuticals, including, but not **limited** to fluorescein angiography, orbital injection or periorbital injections.
2. Removal of extraocular foreign bodies.
3. Chalazion excision.

VII. Female genital system.

1. Conization of cervix.

2. Dilatation and curettage of the uterus (diagnostic and therapeutic).

3. Removal of fallopian tube and ovary without hysterectomy.

VIII. Hematic and lymphatic system.

1. Biopsy of lymph nodes.

IX. Integumentary system.

1. Biopsy of breast.

2. Cutting and preparation of skin grafts or pedicle flaps.

3. Removal or treatment of local skin or subcutaneous lesion.

4. Excision of pilonidal sinus or cyst.

5. Suture of skin.

6. Wide or radical excision of skin lesion with or without grafts.

7. Z plasty without excision.

8. Biopsy of skin or mucus membrane.

9. Incision and drainage of skin or mucus membrane lesion.

10. Debridement of ulceration of the skin.

X. Male genital system.

1. Biopsy of testicle.

2. Placement of testicular prosthesis.

3. Hydrocelectomy (removal/drainage of cyst in scrotum).

4. Circumcision.

5. cystoscopy.

XI. Maternity and related cases.

1. Delivery (cesarean section).

2. Delivery (vaginal).

XII. Musculoskeletal system.

1. Arthrotomy.

2. Closed reduction without internal fixation.

3. Excision of lesion, muscle, tendon, fascia, bone.

4. Excision of semilunar cartilage of knee joint.

5. Needle biopsy or aspiration, bone marrow.

6. Partial excision of bone.

7. Removal of internal fixation device.

8. Traction or fixation without manipulation for reduction.

XIII. Nervous system.

1. Cranioplasty.

2. Lumbar puncture.

3. Closure of meningomyelocele.

4. Ventriculostomy with or without **air** ventriculogram.
5. Cysternal puncture (diagnostic).
6. Craniectomy or craniotomy for intracranial hematoma, abscess or penetrating injury.
7. Stereotaxic surgery for dystonia.
8. Insertion of skeletal tongs.
9. Intravenous cut-down.
10. Elevation **of** depressed **skull** fracture.
11. Cervical **1-2** puncture (diagnostic).

XIV. Radiology.

1. Injection of contrast media or imaging media into the spinal canal for diagnostic encephalography and/or cisternography.
2. Intravascular infusion technique-therapeutic.
3. Lymphangiography.
4. Percutaneous transhepatic (liver)catheter placement.
5. Discography.
6. Venography (Venogram)with contrast media.
7. Cholangiography with contrast media.
8. Urography (IVP)with contrast media.
9. Digital Subtraction Angiography with contrast media.
10. Radionuclide scans andlor blood flow studies.
11. G.I. Tract Radiography and Fluoroscopy.
12. Oral Cholecystography.
13. Fistula or sinus tract injection.
14. Sialography.
15. Dachrocystography.
16. Cystography, Cystourethrography.
17. Retrograde and antegrade urography.
18. Larynogography, Bronchography.
19. Hysterosalpingography.
20. E.R.C.P. (Endoscopic Retrograde Cholangio Pancreatography).
21. Galactography.
22. T-tube cholangiography.
23. Skeletal Radiography and/or Fluoroscopy (**skull**, mastoids, sinuses **and** facial bones; spine, ribs, pelvis; extremities).
24. Foreign Body Radiography and/or Fluoroscopy.
25. Chest and abdomen Radiography and Fluoroscopy.
26. Portable **Radiography/Fluoroscopy**.
27. Pelvimetry, Fetogram.
28. Computer tomography scan with and without contrast media.
29. Ultrasound and Doppler studies.

30. Laminography, polytomography.

31. Soft-tissue Radiography including Xerography and Zeromammography.

32. Kidney or bile duct stone manipulation through percutaneous tube or tube tract.

33. Pacemaker lead placement.

34. Arthrography.

35. Percutaneous nephrostogram and/or internal stent or external drainage of the kidney.

36. Percutaneous transhepatic cholangiogram and/or internal stent or external drainage of the liver.

37. Percutaneous abscess drainage.

XV. Respiratory system.

1. Aspiration of bronchus.

2. Biopsy of lesion of larynx, trachea, bronchus, esophagus.

3. Lung biopsy.

4. Needle biopsy, lung.

5. Segmental resection of lung.

6. Thoracotomy.

7. Thoracotomy with drainage.

8. Reduction of nasal fracture.

9. Tracheostomy.

XVI. Urinary system.

1. Nephrostomy (placement of drainage tubes).

2. Biopsy of prostate, bladder or urethra.

3. Cystolithotomy (surgical removal of stone(s) from the bladder).

4. Cystolitholopaxy (cystoscopic crushing and removal of bladder stone(s)).

5. Cystostomy (placement of tube into the bladder).

6. Urethrotomy (incision of the urethra).

7. Diverticulectomy of the bladder (removal of outpouching of the bladder).

8. Diverticulectomy or diverticulotomy of the urethra (repair or drainage of outpouching of the urethra).

Appendix C To Addendum

DISCLOSURE AND CONSENT

TO THE PATIENT OR PERSON AUTHORIZED TO GIVE CONSENT: You have a right to be informed about the nature of the illness or injury, the alternative methods of treatment, the nature of any surgical, medical, or diagnostic treatment proposed by the primary physician, the probability of success, and the incidence and severity of reasonably possible risks associated with the proposed treatment, so that you may make the decision whether or not to authorize the procedure. This disclosure is not meant to frighten you; it is simply an effort to make you better informed so that you may give or withhold your consent to the procedure. Not **all** of the provisions contained on this general purpose form will apply to every patient. Your physician will fill in the appropriate blanks and cross out any unnecessary clauses.

I voluntarily request Dr. _____ as my (the patient's) primary physician, and such other health care providers as he or she may deem necessary, to treat my (the patient's) condition, which has been explained to me as:

(medical diagnosis in medical and layman's terms)

I understand that the following alternative methods of treatment could be used to treat the condition:

(Describe using both medical and layman's terms)

I understand that the following surgical, medical, and/or diagnostic procedures are planned for me (the patient) and I voluntarily authorize these procedures:

(Describe using both medical and layman's terms)

No warranty or guarantee has been made to me as to the possible result or cure. Nevertheless, I have been told the following concerning the probability of success:

Just as there may be risks and hazards in continuing my (the patient's) present condition without treatment, there are also risks and hazards related to the performance of the surgical, medical, or diagnostic procedures planned for me (the patient). I realize that certain risks are common to surgical, medical, and/or diagnostic procedures. Among these risks are the potential for infection, blood clots in veins and lungs, hemorrhage, allergic reactions, and even death. I also realize that the following risks and hazards may occur in connection with the following named procedures:

(List the procedure in medical and layman's terms and then the risk in medical and layman's terms.)

I understand that anesthesia involves additional risks and hazards. But, I request the use of anesthesia for the relief and protection from pain during the planned procedures as well as during any necessary additional procedure. I realize that the anesthesia may have to be changed, possibly without explanation to me.

I understand that certain complications may result from the use of any anesthesia including respiratory problems, drug reaction, paralysis, brain damage, or even death. Other risks and hazards which may result from the use of general anesthesia range from minor discomfort to **injury** to vocal cords, teeth or eyes. I understand that other risks and hazards resulting **from** spinal or epidural anesthetics include headache and chronic pain.

I (do)(do not) consent to the use of blood and blood products as deemed necessary.

I request the disposal, by the appropriate authorities, of any tissues or parts which it may be necessary to remove.

I understand that photographs and movies may be taken of the

planned procedures, and that the procedures may be viewed by various personnel undergoing training or indoctrination at this or other facilities. I consent to the taking of such pictures and observation of the procedures by authorized personnel, subject to the following conditions:

- a. The name of the patient, or his or her family, will not be used to identify said pictures or movies.
- b. Said pictures or movies will be used only for purposes of medical/dental study or research.

I realize that I (the patient) have (has) been diagnosed by Dr. _____ as being irreversibly, terminally ill or as being in a persistent or chronic vegetative state. More specifically, the diagnosis is:

(Describe in medical and layman's terms)

The terminal illness, or chronic vegetative state, diagnosis has been verified by Dr. _____

I voluntarily authorize Dr. _____ to write (a) (do not resuscitate) (and) (removal of life support equipment) order(s) into my (the patient's) medical records, knowing that the end result will be my (the patient's) death.

I (do) (do not) intend for the removal of life support equipment order to include removal of equipment carrying food or water.

I have been given an opportunity to ask questions about my (the patient's) condition, alternate methods of treatment and anesthesia, risks of nontreatment, the procedures to be used, and the risks and hazards involved, and I believe that I have sufficient information to give this informed consent.

I certify that this form has been fully explained to me, that I have read it or have had it read to me, that **all** of the blank spaces have been either filled in or crossed out, *and* that I understand its contents.

DATE: _____ TIME: _____ A.M.
P.M.

Signature of Patient or Person Authorized to Give Consent

Name, permanent address, and relationship to patient of person giving consent

Witness signature (Witness is signing **only** as a witness to the signature, not that the person giving consent has been fully informed.)

Name and permanent address **of** the witness

EXPERT PSYCHOLOGICAL TESTIMONY ON CREDIBILITY ISSUES

by Major Thomas J. Feeney*

I. INTRODUCTION

Expert psychological evaluation of another witness' credibility has provided a rich and continuing source of controversy.¹ As early as 1908, Hugo Munsterberg indicated that the psychologist could provide valuable information about the witness testifying in court, and recommended that the social community devote its full attention to the field.² By 1940, Wigmore heralded the approach of methods for the psychological evaluation of witnesses: "If there is ever devised a psychological test for the valuation of witnesses, the law will run to meet it Whenever the Psychologist is ready for the Courts, the Courts are ready for him."³ Thirty years later, the herald still sounded his invitation: "Modern psychology is steadily progressing towards definite generalizations in that

*Judge Advocate General's Corps, United States Army: Currently Editor, Military Law Review, The Judge Advocate General's School, U.S. Army. Formerly assigned as Branch Chief, Defense Appellate Division, U.S. Army Legal Services Agency, 1983 to 1985; Litigation Attorney, Litigation Division, Office of The Judge Advocate General, 1980 to 1983; Trial Counsel, Administrative Law Attorney, Legal Assistance Officer, and Chief of Military Justice, Office of the Staff Judge Advocate, Fort Lee, Virginia, 1978 to 1980. S.B., Massachusetts Institute of Technology, 1975; J.D. (cum laude), University of Pennsylvania Law School, 1978. Honor Graduate, 34th Judge Advocate Officer Graduate Course, 1986; Honor Graduate, 87th Judge Advocate Officer Basic Course, 1978. Author of *The Complainant's Credibility: Expert Testimony and Rape Trauma Syndrome*, The Army Lawyer, Sept. 1985, at 33. Member of the bars of the Commonwealth of Pennsylvania, the United States Court of Appeals for the Fourth Circuit, the United States Court of Appeals for the Tenth Circuit, the United States Court of Military Appeals, the United States Army Court of Military Review, and the United States Supreme Court. This article was originally submitted in satisfaction of the thesis elective of the 34th Judge Advocate Officer Graduate Course.

¹See, e.g., Convis, *Testifying About Testimony; Psychological Evidence on Perceptual and Memory Factors Affecting the Credibility of Testimony*, 21 Duq. L. Rev. 579 (1983); Curran, *Expert Psychiatric Evidence of Personality Traits*, 103 U. Pa. L. Rev. 999 (1955); Holt, *Expert Testimony on Eyewitness Identification: Invading the Province of the Jury?*, 26 Ariz. L. Rev. 399 (1984); Juviler, *Psychiatric Opinions as to Credibility of Witnesses: A Suggested Approach*, 48 Cal. L. Rev. 648 (1960); Levine & Trapp, *The Psychology of Criminal Identification: The Gap from Wade to Kirby*, 121 U. Pa. L. Rev. 1079 (1973); Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 Stan. L. Rev. 969 (1977) [hereinafter *Stanford Note*]; Comment, *Unreliable Eyewitness Evidence: The Expert Psychologist and the Defense in Criminal Cases*, 45 La. L. Rev. 721 (1985); Comment, *The Psychologist as Expert Witness: Science in the Courtroom?*, 38 Md. L. Rev. 539 (1979).

²H. Munsterberg, *On the Witness Stand* 11-12 (1908).

³J. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* 368 (3d. ed. 1940).

field, and towards practical skill in applying precise tests. Whenever such principles and tests can be shown to be accepted in the field of science expert testimony should and will be freely admitted to demonstrate and apply them."⁴ Another modern commentator has noted similar thoughts: "Expert witnesses—i.e., psychiatrists and psychologists—may now be called to express their opinion to the witness' veracity. . . . [The expert] may speak freely in terms of traits of character to the extent that concept is meaningful in his discipline."⁵

In response to the call, lawyers have attempted to use psychological or psychiatric experts in a wide range of areas, e.g., to explain the impact of a mental condition on veracity,⁶ to fit a witness into a psychological profile which made the witness' story more or less believable,⁷ to describe various "syndromes" which corroborated one party's version of events,⁸ to venture opinions on the reliability of eyewitness identification,⁹ or merely as a general expert on truth-telling by other witnesses.¹⁰ Despite Wigmore's prediction, however, the courts have traditionally disfavored expert testimony on credibility issues.¹¹ More recently, however, there have been indications of a more receptive attitude¹² which may finally see the fruition of Wigmore's 1940 prediction.

⁴III A. J. Wigmore on Evidence § 935 (J. Chadbourn rev. 1970).

⁵3 J. Weinstein, Weinstein's Evidence ¶ 608[04] (1981).

⁶United States v. Hiss, 88 F.Supp. 559 (S.D.N.Y. 1950).

⁷United States v. Bamman, 737 F.2d 413 (4th Cir. 1984); United States v. Moore, 15 M.J. 354 (C.M.A. 1983); People v. Jones, 42 Cal.2d 219, 266 P.2d 38 (1954); State v. Woods, 20 Ohio Misc. 2d 1, 484 N.E.2d 773 (Ct. Comm. Pl. 1985).

⁸United States v. Tomlinson, 20 M.J. 897 (A.C.M.R. 1985) (rape trauma syndrome); Borders v. State, 433 So.2d 1325 (Fla. 1983); Sanders v. State, 251 Ga. 70, 303 S.E.2d 13 (1983); Smith v. State, 247 Ga. 612, 277 S.E.2d 678 (1981) (battered woman syndrome); Loebach v. State, 310 N.W.2d 58 (Minn. 1981) (battering parent syndrome).

⁹United States v. Fosher, 590 F.2d 381 (1st Cir. 1979); United States v. Amaral, 488 F.2d 1148 (9th Cir. 1973); Criglow v. State, 183 Ark. 407, 36 S.W.2d 400 (1931).

¹⁰United States v. Cameron, 21 M.J. 59 (C.M.A. 1985); United States v. Cox, 18 M.J. 72 (C.M.A. 1984); United States v. Adkins, 5 C.M.A. 492, 18 C.M.R. 116 (1955); United States v. Wagner, 20 M.J. 758 (A.F.C.M.R. 1985); United States v. Clark, 12 M.J. 978 (A.C.M.R. 1982).

¹¹See United States v. Barnard, 490 F.2d 907 (9th Cir. 1973), cert. denied, 416 U.S. 959 (1974); State v. Munro, 68 Or. App. 63, 680 P.2d 708 (1984); Jones v. State, 232 Ga. 762, 208 S.E.2d 850 (1974); Annotation, *Necessity and Admissibility of Expert Testimony as to Credibility of Witnesses*, 20 A.L.R. 3d 684 (1964).

¹²See, e.g., United States v. Roark, 753 F.2d 991 (11th Cir. 1985); United States v. Smith, 736 F.2d 1103 (6th Cir.), cert. denied, 105 S.Ct. 213 (1984); United States v. Hill, 655 F.2d 512 (3d Cir. 1981); United States v. Staggs, 553 F.2d 1073 (7th Cir. 1977); United States v. Partin, 493 F.2d 750 (5th Cir. 1974); United States v. Snipes, 18 M.J. 172 (C.M.A. 1984); United States v. Moore, 15 M.J. 354 (C.M.A. 1983); United States v. Arruza, 21 M.J. 621 (A.C.M.R. 1985); State v. Roberts, 139 Ariz. 177, 677 P.2d 280 (1983); Hawkins v. State, 326 So.2d 229 (Fla. Dist. Ct.

This article will examine the courts' historical treatment of expert psychological testimony affecting credibility issues and the various rationales for admitting or excluding such evidence. It will **look** at a number of situations where the psychologist can provide valuable information and then consider the changes which the Federal and Military Rules of Evidence made in this area. Finally, it will show how such testimony should be treated under the new rules of evidence and conclude that we can expect a continuing expansion of this form of expert testimony.

II. HISTORICAL PERSPECTIVE.

Before examining credibility issues, one must distinguish between a witness' credibility and his competency to testify. The two concepts are related and courts have at times confused the terms when considering credibility issues.¹³ "Competency" refers to a witness' qualifications to present evidence in **court**,¹⁴ and is decided by the trial judge alone.¹⁵ "Credibility" refers to the weight to be given admissible testimony,¹⁶ an issue which the jury, and not the court, decides.¹⁷ At common law, a number of disqualifications could make a witness incompetent, including mental infirmities, infamy, extreme youth, senility, bias, interest in the proceedings or official connection with the tribunal, spousal incapacity, or affiliation with a party.¹⁸ The common-law disqualifications have gradually disappeared.¹⁹ The Federal Rules of Evidence now presume that a person is competent to be a

App. 1976); *State v. Kim*, 64 Haw. 598, 645 P.2d 1330 (1982); *Terio v. McDonough*, 450 N.E.2d 190 (Mass. App. Ct. 1983); *State v. Woods*, 20 Ohio Misc. 2d 1,484 N.E.2d 773 (Ct. Comm. Pl. 1985).

¹³See, e.g., *State v. Roberts*, 139 Ariz. 117, 677 P.2d 280, 284 (1983) (trial judge confused competency with credibility in excluding expert testimony that a nine-year-old mentally retarded girl had a defective memory, impaired verbal ability, and a preoccupation with fantasies of hostility and violence; while the child was a competent witness, the testimony affected her credibility); *Mell v. State*, 133 Ark. 197, 202 S.W. 33 (1918); *State v. Whitsett*, 232 Mo. 511, 134 S.W. 555 (1911) (both holding that evidence of a witness' insanity could be excluded where no objection was made to the witness' competency).

¹⁴*United States v. Slozes*, 1 C.M.R. 47 (C.M.A. 1951); II J. Wigmore, *supra* note 4, §§ 478-88.

¹⁵Fed. R. Evid. 104(a); Mil. R. Evid. 104(a); II J. Wigmore, *supra* note 4, § 487.

¹⁶Fed. R. Evid. 104(a); Mil. R. Evid. 104(a).

¹⁷Fed. R. Evid. 104(e); Mil. R. Evid. 104(e).

¹⁸See S. Saltzburg, L. Schinasi & D. Schlueter, *Military Rules of Evidence Manual* 492 (2d ed. 1986).

¹⁹In 1883, the Supreme Court ruled that a lunatic could testify, provided he understood the oath and could give an account of the matters he had seen. *District of Columbia v. Armes*, 107 U.S. (17 Otto) 519 (1883).

witness,²⁰ subject only to the requirements that the person have personal knowledge of the matter at issue²¹ and be capable of swearing to tell the truth.²² The Rules now leave almost no categorical disqualifications of a witness.²³

Many of the rules which have governed the use of psychiatric or psychological testimony to impeach a witness can be traced to these now defunct categories of incompetent witnesses. As the common-law disqualifications disappeared, evidence once presented to the judge to disqualify the witness became admissible before the jury as affecting credibility. For example, courts have had little difficulty in admitting evidence of insanity,²⁴ mental disease,²⁵ mental deficiency,²⁶ drug use,²⁷ or intoxication,²⁸ all traditional common-law areas where a witness' competency might be called into question. Outside these areas, however, the courts prove far less accommodating, and often ban extrinsic expert evidence on credibility, leaving the party to develop the issue solely through cross-examination.²⁹ This distinction became so firmly entrenched that it has been quoted as the general rule:

²⁰Fed. R. Evid. 601; Mil. R. Evid. 601.

²¹Fed. R. Evid. 602; Mil. R. Evid. 602.

²²See *United States v. Saenz*, 747 F.2d 930 (5th Cir. 1984). Each witness must declare, either by oath or affirmation, that he or she will testify truthfully. Fed. R. Evid. 603; Mil. R. Evid. 603.

²³See, e.g., *United States v. Roach*, 590 F.2d 181, 185-86 (5th Cir. 1979) (noting that federal practice has abolished mental capacity as a ground to disqualify a witness); *United States v. Fuentes*, 18 M.J. 41 (C.M.A. 1984) (convicted felon is a competent witness); *United States v. Garcia*, 1 M.J. 26 (C.M.A. 1975) (witness not disqualified because he has an interest in the outcome of the case); *United States v. Lemere*, 16 M.J. 682 (A.C.M.R. 1983), *aff'd*, 22 M.J. 161 (C.M.A. 1986) (three and one-half-year-old child competent to testify). A striking example of the liberal competency rule is found in *United States v. Lightly*, 677 F.2d 1027 (4th Cir. 1982), where the court reversed a conviction after the trial judge refused to permit a defense witness to testify. The appellate court found the witness competent even though he was subject to hallucinations, was criminally insane, and had been found mentally incompetent to stand trial. *But see* *United States v. Harrington*, 18 M.J. 797 (A.C.M.R. 1984), where the court held that hypnotically refreshed testimony is not competent unless the hypnosis was "properly administered." Although not expressly stated, *Harrington* indicates that a judge may be able to find a witness incompetent under Mil. R. Evid. 403 if the witness' testimony is so unreliable that the potential prejudice substantially outweighs its probative effect.

²⁴*United States v. Hiss*, 88 F. Supp. 559 (S.D.N.Y. 1950).

²⁵*Id.*; *Mangum v. State*, 227 Ark. 381, 299 S.W.2d 80 (1957); *People v. Neely*, 228 Cal. App. 2d 16, 39 Cal. Rptr. 251 (1964);

²⁶*State v. Butler*, 27 N.J. 560, 143 A.2d 530 (1958).

²⁷*Chicago & Northwest R.R. Co. v. McKenna*, 74 F.2d 155 (8th Cir. 1934). *But see* *Kelly v. Maryland Casualty Co.*, 45 F.2d 782 (D.Va. 1929), *aff'd*, 45 F.2d 788 (4th Cir. 1930).

²⁸IIIA J. Wigmore, *supra* note 4, § 933.

²⁹*Id.* § 935; *see also* *People v. Bell*, 138 Cal. App. 2d 7, 291 P.2d 150 (1955).

Generally, expert testimony as to the credibility of a witness is admissible if the subject matter involves organic or mental disorders, such as insanity, hallucinations, nymphomania, retrograde amnesia, and testimony concerning physical maladies which tend to impair mental or physical faculties. If, however, the characteristic attacked does not involve some organic or mental disorder or some impairment of the mental or physical faculties by injury, disease, or otherwise, expert testimony is usually excluded.³⁰

One major flaw with this approach is that it often allows proof of an incapacitating condition without any corresponding explanation of the effect on credibility. The jury may then be left to speculate about the effects on the witness' capacity to observe, ability to remember, and ability or willingness to accurately relate the story.³¹ Thus, while the courts readily grasped the desirability of expert assistance in **this** limited area, they have not provided the fact-finder the **full** range of assistance which might be needed in particular cases.

There have been some scattered exceptions to the general rule where courts have allowed psychological testimony to attack the credibility of a witness based on defects in perception or memory, a heightened degree of emotional involvement, or suggestibility. One of the earliest instances of a psychologist commenting on the credibility of other testimony occurred in Belgium in 1910.³² On June 12, 1910, a ten-year-old girl named Cecile was murdered in a small Belgian town. Police that night interviewed two girlfriends, **ages** eight and ten, of the murdered girl. They described a tall, dark **man** with a black mustache who had taken the girl away. The next day the two girls gave accounts to a magistrate which differed greatly from their initial stories. The magistrate conducting the interview suggested several names to the children, and finally one of the girls stated that "Jan," the father of the other friend, had taken Cecile away. "Jan" Amand Van Payenbroeck faced a murder trial in January, 1911, based primarily on the two **girls'** testimony. The defense retained the Belgian psychologist, J. Vasendonck, to testify about the unreliability of child witnesses. Vasendonck prepared experiments designed to show whether

³⁰Jones v. State, 232 Ga. 762, 765, 208 S.E.2d 850, 853 (1974); see also Fries v. Berberich, 177 S.W.2d 640 (Mo. Ct. App. 1944); State v. Wilson, 8 Oh. App. 3d 216, 456 N.E.2d 1287 (1982); Annotation, *supra* note 11.

³¹See Juviler, *supra* note 1, at 652.

³²A description of this case is found in A. Yarmey, *The Psychology of Eyewitness Testimony* 196-97 (1979).

eight- to ten-year-old children would be unduly influenced by the type of interrogation used with the two girls. He presented his conclusions along with a survey of the literature, and his testimony contributed to an acquittal.³³

Several other cases foreshadowed the use of expert testimony to evaluate other witnesses. A Texas court held³⁴ that a witness' level of intelligence and mental capacity were important in determining credibility. Even where no organic or mental disorder was shown, extrinsic evidence could be used to impeach. The New York Court of Appeals granted a defendant in a murder prosecution the right to introduce expert testimony that he had the mind of a child and could be easily influenced.³⁵ In a Michigan sexual assault case, medical experts were allowed to testify that the complainant was "a pathological falsifier, a nymphomaniac, and a sexual pervert."³⁶

The seminal federal case allowing a psychiatric opinion of credibility is *United States v. Hiss*,³⁷ a perjury prosecution. The defendant, Alger Hiss, offered psychiatric testimony that the government's star witness, Whittaker Chambers, was a psychopathic personality who tended to make false accusations. The

³³Although Yarmey describes *Payenbroeck* as the first recorded instance of such testimony, earlier cases reflect similar attempts. Compare *Alleman v. Step*, 52 Iowa 626, 3 N.W. 636 (1879) (court allowed a physician to testify concerning the effect of an illness and operation on the defendant's memory) with *Ah Jong v. Easle Fruit Co.*, 112 Cal. 679, 45 Pac. 7 (1896) (excluding evidence of weak memory unless mental derangement involved); cf. *Commonwealth v. Cooper*, 87 Mass. (5 Allen) 497 (1862) (allowing evidence that the witness tended to mistake the identity of persons); *Mechanics' & Farmers' Bank v. Smith*, 19 Johns 115 (N.Y. 1821) (allowing question "whether he was in the habit of making mistakes" to show that a teller erred in making a particular entry).

³⁴*Boulder v. State*, 87 Tex. Crim. 419, 222 S.W. 555 (1920).

³⁵*People v. Joyce*, 233 N.Y. 61, 134 N.E. 836 (1922).

³⁶*People v. Cowles*, 246 Mich. 429, 431, 224 N.W. 387, 388 (1929); see also *Jeffers v. State*, 145 Ga. 74, 88 S.E. 571 (1916). Sexual assault cases are a major exception to the general disapproval of extrinsic psychiatric or psychological evidence. A defendant has traditionally been permitted a wider latitude in attacking the prosecutrix' credibility, see, e.g., *People v. Neely*, 228 Cal. App. 16, 39 Cal. Rptr. 251 (1964); *People v. Bastian*, 330 Mich. 457, 47 N.W.2d 692 (1951), apparently because of the fear that a defendant would be falsely accused by a hysterical or vindictive complainant. See *United States v. Roeder*, 17 C.M.A. 445, 38 C.M.R. 245 (1968). This fear generated periodic proposals to require psychiatric examinations of the prosecutrix in sex crimes to ensure against false complaints. Goldstein, *Credibility and Incredibility: The Psychiatric Examination of the Complaining Witness*, 137 Am. J. Psychiatry 1238 (1980); Orenstein, *Examination of the Complaining Witness in a Criminal Court*, 107 Am. J. Psychiatry 684 (1951); More recently, the advent of "rape trauma syndrome" has turned the tables in this area, with the prosecution using the results of psychiatric examinations to show the complaint is true. E.g., *State v. Marks*, 647 P.2d 1292 (Kan. 1982); *State v. LeBrun*, 587 P.2d 1044 (Ore. 1978). See *infra* text accompanying notes 48-62.

³⁷88 F. Supp. 559 (S.D.N.Y. 1950).

court allowed this form of impeachment on the basis of the numerous cases holding that a witness could be discredited by evidence of mental derangement and because the case turned on Chambers' testimony.³⁸

Although *Hiss* provided a breakthrough in federal practice, it started no general trend toward admitting expert testimony on credibility. After *Hiss*, scattered opinions continued to endorse expert testimony on credibility, particularly where the witness' mental condition or capacity was questioned.³⁹ Numerous other cases, however, determined that expert testimony was not admissible to determine the credibility of other witnesses,⁴⁰ and it remained especially difficult to persuade courts to sanction such evidence when the witness' mental capacity was not in question.

For example, in the 1960's and 1970's, criminal defendants began offering psychological evidence about perceptual, suggestive, and memory factors which might lead to unreliable eyewitness accounts of a crime.⁴¹ Until recently, appellate courts routinely approved the denial of expert testimony on these issues.⁴² Similar results followed attempts by defendants to raise

³⁸This impeachment did Hiss little good. His conviction was upheld on appeal. *United States v. Hiss*, 185 F.2d 822 (2d Cir. 1950), *cert. denied*, 340 U.S. 948 (1951). Compare *Hiss* with *United States v. Rosenberg*, 108 F.Supp. 798 (S.D.N.Y.), *aff'd*, 200 F.2d 666 (2d Cir. 1952), *cert. denied*, 345 U.S. 965 (1953), which excluded expert testimony concerning the impact of a limited education on a witness' testimony.

³⁹*United States v. Partin*, 493 F.2d 750 (5th Cir. 1974); *State v. Roberts*, 139 Ariz. 177, 677 P.2d 280 (1983); *People v. Neely*, 228 Cal. App. 2d 16, 39 Cal. Rptr. 251 (1964); *People v. Schuemann*, 190 Colo. 474, 548 P.2d 911 (1976); *People v. Borelli*, 624 P.2d 900 (Colo. Ct. App. 1980); *Hawkins v. State*, 326 So.2d 229 (Fla. Dist. Ct. App. 1976); *People v. Bastian*, 330 Mich. 457, 47 N.W.2d 692 (1951); *State v. Tafoya*, 94 N.M. 762, 617 P.2d 151 (1980); *State v. Jamm*, 16 Wash. App. 608, 559 P.2d 1 (1976).

⁴⁰*United States v. Jackson*, 576 F.2d 46 (5th Cir. 1978); *United States v. Bright*, 517 F.2d 584 (2d Cir. 1975); *United States v. Demma*, 523 F.2d 981 (9th Cir. 1975) (en banc); *United States v. Pacelli*, 521 F.2d 535 (2d Cir. 1975); *United States v. Wertis*, 505 F.2d 683 (5th Cir. 1974), *cert. denied*, 422 U.S. 1045 (1975); *United States v. Barnard*, 490 F.2d 907 (9th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974); *Holliday v. State*, 389 So.2d 679 (Fla. Dist. Ct. App. 1980); *Jones v. State*, 232 Ga. 762, 208 S.E.2d 859 (1974); *People v. Izzo*, 90 Mich. App. 727, 282 N.W.2d 10 (1979); *James v. State*, 546 S.W.2d 306 (Tex. Crim. App. 1977); *Hopkins v. State*, 480 S.W.2d 212 (Tex. Crim. App. 1972); *Smith v. State*, 564 P.2d 1194 (Wyo. 1977).

⁴¹*See* Buckhout & Greenwald, *Witness Psychology*, in E. Imwinkelried, *Scientific and Expert Evidence* 1291 (2d ed. 1981).

⁴²*See, e.g.*, *United States v. Purham*, 725 F.2d 450 (8th Cir. 1984); *United States v. Sims*, 617 F.2d 1371 (9th Cir. 1980); *United States v. Fosher*, 590 F.2d 381 (1st Cir. 1979); *United States v. Smith*, 563 F.2d 1361 (9th Cir. 1977), *cert. denied*, 434 U.S. 1021 (1978); *United States v. Amaral*, 488 F.2d 1148 (9th Cir. 1973); *United States v. Hulén*, 3 M.J. 275 (C.M.A. 1977); *United States v. Hicks*, 7 M.J. 561 (A.C.M.R. 1979); *People v. Johnson*, 38 Cal. App. 3d 1, 112 Cal. Rptr. 834 (1974);

an entrapment defense with expert testimony about their susceptibility to inducement,⁴³ or to produce psychological testimony about their capacity to commit a crime. For example, in *United States v. West*⁴⁴ a prison guard was charged with accepting a bribe from an inmate. The defendant offered expert testimony of his limited intelligence to show that when he accepted a car it was unlikely that he realized it was a bribe, or that a quid pro quo would be expected in return. The court had little difficulty rejecting this testimony, holding that West's limited intelligence was readily apparent to the jury without expert assistance. In a second case,⁴⁵ another defendant, charged with receipt of stolen checks from her boyfriend, presented a psychiatrist ready to testify that she had a passive-dependent personality disorder which prevented her from realizing the checks were stolen. According to the psychiatrist, the defendant had a "need to deny the possibility that the men involved would in any way take advantage of her."⁴⁶ The court rejected the testimony as going beyond the bounds of conventional psychiatric testimony.⁴⁷

One area has provided a vehicle for the increased use of psychological/psychiatric evidence—sexual crimes. The traditional view held that rape complainants were highly suspect—that rape was an "accusation easy to be made, hard to be proved, but harder to be defended by the party accused, though innocent."⁴⁸ The fear that an innocent man might be victimized by a delusional or vindictive prosecutrix led to a heightened evaluation of her credibility.⁴⁹ A number of jurisdictions would not permit a

State v. Sims, 3 Oh. App. 3d 321, 445 N.E.2d 235 (1981). *But see* *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985); *United States v. Smith*, 736 F.2d 1103 (6th Cir.), cert. denied, 105 S.Ct. 213 (1984); *State v. Chapple*, 135 Ariz. 281, 660 P.2d 1208 (1983); *People v. McDonald*, 37 Cal. 3d 351, 208 Cal. Rptr. 236, 690 P.2d 709 (1984) (all holding erroneous the exclusion of expert testimony on eyewitness identification).

⁴³*United States v. Lord*, 711 F.2d 887 (9th Cir. 1983); *United States v. Benveniste*, 564 F.2d 335 (9th Cir. 1977). *But see* *United States v. Hill*, 655 F.2d 512 (3d Cir. 1981).

⁴⁴70 F.2d 675 (7th Cir.), cert. denied *sub nom.* *King v. United States*, 457 U.S. 1124 (1982).

⁴⁵*United States v. Bright*, 517 F.2d 584 (2d Cir. 1975).

⁴⁶*Id.* at 586.

⁴⁷*Id.*; *see also* *United States v. Byers*, 730 F.2d 568 (9th Cir. 1984); *United States v. Ellsworth*, 738 F.2d 333 (8th Cir. 1984) (both rejecting expert testimony, in prosecution for failure to file income tax returns, that defendant believed filing and payment of taxes was voluntary); *United States v. Demma*, 523 F.2d 981 (9th Cir. 1975) (en banc) (rejecting psychiatric testimony that defendant had a "penchant" for forming "grandiose schemes" in drug distribution prosecution).

⁴⁸*United States v. Roeder*, 17 C.M.A. 445, 448, 38 C.M.R. 245, 248 (1968).

⁴⁹III J. Wigmore, *supra* note 4, § 924a. A relatively recent article set forth this attitude in bald terms: "Women often falsely accuse men of sexual attacks to extort money, to force marriage, to satisfy a childish desire for notoriety, or to

conviction based solely on the prosecutrix' testimony, and adopted a corroboration rule that required extrinsic evidence to support the charge.⁵⁰ Defendants had a much wider latitude in sex crimes to attack the credibility of the **prosecutrix**,⁵¹ and frequently used expert testimony to do so. In one **case**,⁵² a statutory rape conviction was reversed because the trial court excluded a physician's testimony that he believed the prosecutrix to be a sexual psychopath, and that the credibility of such an individual is very poor.⁵³ In this limited area, the almost universal disapproval of expert testimony vanished. Indeed, the courts leaped to embrace it, and leading commentators repeatedly called for a mandatory psychiatric evaluation of the prosecutrix' credibility in every case.⁵⁴

The rationale of the more liberal rules for expert testimony in sex crimes was the perceived need to isolate and identify factors which might cause the prosecutrix to falsely accuse an individual.⁵⁵ Later studies, however, turned this reasoning on its head. In 1974, Holmstrom and Burgess published their landmark study of rape victims.⁵⁶ Their study set out an identifiable set of

attain personal revenge. Their motives include hatred, a sense of shame after consenting to illicit intercourse. . . and delusion." Comment, *The Corroboration Rule and Crimes Accompanying a Rape*, 118 U. Penn. L. Rev. 458, 460 (1970).

⁵⁰See generally Note, *Corroborating Charges of Rape*, 67 Colum. L. Rev. 1137 (1967); see also *People v. Moore*, 29 App. Div. 2d 570, 286 N.Y.S.2d 296 (1967), *aff'd*, 23 N.Y.2d 565, 245 N.E.2d 710, 297 N.Y.S.2d 944, *cert. denied*, 394 U.S. 1006 (1969). In *Moore* the defendant allegedly took a coin purse from his victim, pushed her into the back seat of a taxi, and attacked her. The victim's testimony led to convictions for attempted rape, robbery, and grand larceny. On appeal, the court threw out the rape conviction for lack of corroboration. Nevertheless, it affirmed the convictions for robbery and larceny, even though they were based on the same uncorroborated testimony. Because these crimes stood independently of the attempted rape, they fell outside the corroboration rule. *United States v. Sandoval*, 18 M.J. 55 (C.M.A. 1984), notes the demise of the corroboration rule in military practice.

"*People v. Neely*, 228 Cal. App. 2d 16, 39 Cal. Rptr. 251 (1964).

"*People v. Bastian*, 330 Mich. 457, 47 N.W.2d 692 (1951).

⁵¹See also *People v. Neely*, 228 Cal. App. 2d 16, 39 Cal. Rptr. 251 (1964); *Mosley v. Commonwealth*, 420 S.W.2d 679 (Ky. 1967); *People v. Cowles*, 246 Mich. 429, 224 N.W. 387 (1929); *Derwin v. Parsons*, 52 Mich. 425, 18 N.W. 200 (1884); *Miller v. State*, 49 Okla. Crim. 133, 295 P. 403 (1930). *But see State v. Driver*, 88 W.Va. 479, 107 S.E. 189 (1921) (proper to exclude psychiatrist's testimony, based solely on courtroom observation, that prosecutrix was a "moron" and unworthy of belief).

⁵²See IIIA J. Wigmore, *supra* note 4, § 924a ("No judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified physician"); Goldstein, *supra* note 36; Orenstein, *supra* note 36.

⁵³IIIA J. Wigmore, *supra* note 4, § 924a.

⁵⁶*Burgess & Holstrom, Rape Trauma Syndrome*, 131 Am. J. Psychiatry 981 (1974) [hereinafter *Rape Trauma Syndrome*].

psychological symptoms experienced by a rape complainant which one would not expect to result from consensual intercourse.⁵⁷ The identification of "rape trauma syndrome" turned the psychiatric examination of the complaining witness from its original purpose—to protect defendants from hysterical, delusional, or vindictive accusers—into a powerful prosecutorial tool. It also ushered in the first widespread use of psychological testimony to support, rather than undercut, the credibility of a witness. An expert could now link a witness' psychological symptoms to a specific event, and testify that because the victim exhibited these symptoms,⁵⁸ her testimony about the event was more likely to be true.

Prosecutors soon attempted to use this new weapon, with mixed results. Some courts gave wholehearted approval to such testimony and placed no limits on its use. For example, in *State v. Marks*⁵⁹ a psychiatrist testified in a sexual assault prosecution that the complainant suffered from "rape trauma syndrome." Based upon his examination of the complainant, the psychiatrist indicated that, in his opinion, the complainant had been the victim of a "frightening assault, an attack." The state supreme court held that the presence of rape trauma syndrome was detectable and provided probative evidence to buttress the complainant's claim that she did not consent.⁶⁰

Other courts flatly banned its use,⁶¹ concluding that rape trauma syndrome was not a reliable diagnostic device and that the use of expert testimony did not surpass the "common sense evaluation" of a jury.⁶² The majority of courts, however, adopted a middle approach which recognized both the usefulness and the limitations of the psychological testimony.⁶³ These courts permitted the expert to describe the existence of the syndrome, and the

⁵⁷Later studies confirmed the existence of this phenomenon. See Kilpatrick, Vermen & Resnick, *Assessment of the Aftermath of Rape: Changing Patterns of Fear*, 1 J. Behav. Assessment 133 (1979); Norris & Feldman-Summers, *Factors Related to the Psychological Impacts of Rape on the Victim*, 90 J. Abnormal Psychology 562 (1981).

⁵⁸The symptoms include fear, guilt, anger, embarrassment, excessive motor activity, nightmares, and phobic reaction. See *Rape Trauma Syndrome*, *supra* note 56, at 982-84.

⁵⁹231 Kan. 645, 647 P.2d 1292 (1982).

⁶⁰*Id.* at 1298-99; see also *United States v. Snipes*, 18 M.J. 172 (C.M.A. 1984).

⁶¹*State v. Saldana*, 324 N.W.2d 227 (Minn. 1982). But see *State v. Myers*, 359 N.W.2d 604 (Minn. 1984) (upholding similar testimony when victim is a child).

⁶²*State v. Saldana*, 324 N.W. 2d 227, 230 (Minn. 1982).

⁶³*United States v. Tomlinson*, 20 M.J. 897 (A.C.M.R. 1985); *People v. Bledsoe*, 36 Cal. 3d 236, 203 Cal. Rptr. 450, 681 P.2d 291 (1984); *State v. Taylor*, 663 S.W.2d 235 (Mo. 1984) (en banc).

expected reactions of an individual suffering from it. While acknowledging that rape trauma syndrome was not direct evidence that a rape occurred, this approach allowed the testimony to dispel common misperceptions by the average layman about the reactions of an individual who had been sexually attacked.⁶⁴

III. CREDIBILITY TESTIMONY IN THE MILITARY.

The military approach to expert psychological testimony generally mirrors the ambivalent approach of the civilian courts. Prior to the promulgation of the Military Rules of Evidence in 1980, the Manual for Courts-Martial⁶⁵ contained one explicit endorsement of expert credibility testimony. If an accused was charged with malingering,⁶⁶ either party could produce a qualified medical expert to "testify concerning his opinion as to whether a purported illness of the accused was feigned. . ."⁶⁷ *United States v. Izard*⁶⁸ found that this provision explicitly endorsed expert psychiatric testimony on whether an accused's claim that he suffered from a phobia was true. Izard had been charged with feigning an injury to avoid his transfer overseas. He presented a psychiatrist to testify that he had a disabling phobia about flying. The trial judge excluded the testimony, and the Air Force Board of Review, citing the Manual provision, held the exclusion erroneous.⁶⁹

⁶⁴*United States v. Tomlinson*, 20 M.J. 897, 902 (A.C.M.R. 1985); *People v. Bledsoe*, 36 Cal. 3d at 247-48, 203 Cal. Rptr. at 457-58, 681 P.2d at 298. *But see United States v. Carter*, 22 M.J. 771 (A.C.M.R.), *petition filed*, 22 M.J. 414 (C.M.A. 1986). With a child victim in a sexual assault case, the courts have been far more liberal, both in allowing testimony to be presented, and in the scope of its use. *See, e.g.*, *State v. Kim*, 64 Haw. 598, 645 P.2d 1330 (1982); (13-year-old); *State v. Middleton*, 294 Or. 427, 657 P.2d 1215 (1983) (14-year-old). One court takes opposite viewpoints depending on whether the victim is an adult or a child. *Compare State v. Saldana*, 324 N.W.2d 227 (Minn. 1982) (rape trauma syndrome testimony not admissible where adult is the victim) *with State v. Myers*, 359 N.W.2d 604 (Minn. 1984) (similar testimony admissible with child victim).

⁶⁵Manual for Courts-Martial, United States 1969 (Rev. ed.) [hereinafter MCM, 1969].

⁶⁶Article 115, Uniform Code of Military Justice, 10 U.S.C. § 915 (1982), defines malingering: "Any person subject to this chapter who for the purpose of avoiding work, duty, or service (1) feigns illness, physical disablement, mental lapse, or derangement; or (2) intentionally inflicts self-injury shall be punished as a court-martial may direct."

⁶⁷MCM, 1969, para 194; *see also* Manual for Courts-Martial, United States, 1951, para. 194.

⁶⁸4 C.M.R. 782 (A.F.B.R.), *petition denied*, 4 C.M.R. 173 (C.M.A. 1952).

⁶⁹The board of review held the error to be harmless. *Id.* at 798-99. *Similar* issues often arise in tort actions when the question is whether an accident victim is feigning pain in order to increase a "pain and suffering" award. *See* Annotation, *supra* note 11.

Other cases have allowed experts on both sides of the issue to present testimony. In *United States v. Hodges*⁷⁰ the accused faced charges of carnal knowledge of his fifteen-year-old daughter, Zona. After Zona testified, the defense heavily impeached her with witnesses who said her credibility was poor and they would not believe her under oath. One witness, an attorney, testified without objection that Zona “had a mental and emotional problem and had no real conception as to the distinction between truth and falsehood.”⁷¹ The government responded with a psychiatrist who testified that Zona had a character disorder which caused difficulties in getting along with others. He stated, however, that he had “no feeling that the witness was not telling the **truth**.”⁷² The psychiatrist also explained that he classified the witness **as** a schizoid personality rather than a sociopath because, although both had a greater than average possibility of not telling the truth, the schizoid had a desire to tell the truth.⁷³ The United States Court of Military Appeals allowed this expert testimony without giving any general endorsement, holding that the defense had “opened the **door**.”⁷⁴ Similar testimony gained approval in *United States v. Arruza*,⁷⁵ where the accused, charged with sexually molesting a female child, objected to testimony from the treating psychiatrist that supported the credibility of the victim.⁷⁶ In *United States v. Iturrade-Aponte*,⁷⁷ the Court of Military Appeals held it erroneous for a trial judge to exclude, in a murder prosecution, testimony from a psychiatrist that the deceased was a “disturbed boy who saw aggression and manipulation to be the **only** means by which he would gain **importance**.”⁷⁸ The accused had offered the testimony to buttress his claim of self-defense.

The high point of judicial acceptance of psychological testimony in the military can be found in *United States v. Moore*⁷⁹ and *United States v. Snipes*,⁸⁰ both sexual assault prosecutions. In *Moore* the defense claimed that the victim had consented to

⁷⁰14 C.M.A. 23, 33 C.M.R. 235 (1963).

⁷¹*Id.* at 29, 33 C.M.R. at 240.

⁷²*Id.*, 33 C.M.R. at 241.

⁷³*Id.*

⁷⁴*Id.* at 30, 33 C.M.R. at 242.

⁷⁵21 M.J. 621 (A.C.M.R. 1985); see also *United States v. Silva*, 37 C.M.R. 803 (A.F.B.R. 1966).

⁷⁶The court held that the defense had opened the door by eliciting testimony on the victim's credibility and ability to fabricate a story, the psychiatrist's opinion of the truth of the victim's story, and the term “sexual molestation.”

⁷⁷1 M.J. 196 (C.M.A. 1975).

⁷⁸*Id.* at 196 n.1.

⁷⁹15 M.J. 354 (C.M.A. 1983).

⁸⁰18 M.J. 172 (C.M.A. 1984).

sexual intercourse. Three psychologists testified on behalf of the government that the victim might unknowingly place herself in a sexually compromising situation and that a man meeting her might feel he was being lured into sexual activities, but that it was unlikely that if the victim consented to intercourse she would later cry rape. The Court of Military Appeals upheld this testimony, although there was no majority opinion.

In *Snipes* the government alleged that the accused sexually molested a young girl. A psychologist testified for the defense about the victim's personality and character traits, including a propensity to lie and make sexual accusations to gain revenge.⁸¹ The government responded with a battery of experts, including a social worker, a counselor, and a forensic and clinical psychologist. They testified that, in their opinion, the victim had made truthful statements, that her personality was consistent with sexual abuse, and that there could be no other explanation for the victim's **personality**.⁸² The court again upheld the use of this testimony, but noted that the defense had "opened the door" by initially presenting similar testimony, that there was no defense objection to the type of testimony, and that each witness skirted the "ultimate issue" of guilt.⁸³

In areas outside of sexual crimes, there has been far less accommodation. In *United States v. Fields*⁶⁴ the defense wished to impeach a prosecution witness with a psychologist who would testify about the witness' emotional state and its effect on veracity. The Court of Military Appeals affirmed the trial judge's exclusion of this testimony and held that there was an insufficient showing that the expert was qualified to classify the witness' character traits.⁸⁵ In *United States v. Hulen*⁸⁶ the accused failed in his attempt to introduce expert testimony on the unreliability of eyewitness identification. The court found that no "demonstrable scientific principle" underlay the proposed testimony. It noted that the expert had conducted only one experiment and determined that there was no showing that his efforts had progressed

⁸¹*Id.* at 176.

⁸²*Id.* at 177.

⁸³*Compare Snipes and United States v. Carter*, 22 M.J. 771 (A.C.M.R.), *petition filed*, 22 M.J. 414 (C.M.A. 1986) *with United States v. Cameron*, 21 M.J. 59 (C.M.A. 1985) *and United States v. Tomlinson*, 20 M.J. 897 (A.C.M.R. 1985).

⁸⁴3 M.J. 27 (C.M.A. 1977).

⁸⁵*Compare Fields with United States v. Moore*, 15 M.J. 354 (C.M.A. 1983); *see United States v. Moore*, 12 M.J. 854 (A.F.C.M.R. 1981) (proper for trial judge to restrict defense counsel from cross-examining witness about her mental health record).

⁸⁶3 M.J. 275 (C.M.A. 1977).

beyond the experimental stage.⁸⁷ In *United States v. Hicks*⁸⁸ the Army Court of Military Review followed *Hulen's* lead and rejected expert testimony on eyewitness identification. The Army court went even further, though, and held that even if a demonstrated scientific principle could be shown, the testimony would be of no use to the panel members.⁸⁹

Military courts have repeatedly condemned direct comments on the veracity of particular testimony. *United States v. Adkins*⁹⁰ involved a prosecution for consensual homosexual sodomy. The defense successfully impeached the main government witness, the accused's alleged sodomy partner. The government then called a naval intelligence agent who testified that, in his experience, an active homosexual was 100% truthful in naming the individual with whom he had sex, that homosexuals came from backgrounds similar to that of the accused, and that a "passive" homosexual was usually bisexual.⁹¹ The Court of Military Appeals had little difficulty rejecting this testimony, finding that the "expert" had no medical or scientific training and his opinion had no reasonable relation to any empirical observations.⁹² Identical reasoning caused the Army Court of Military Review to reject testimony that an Army police investigator believed the accused was untruthful based on an analysis of "body movements."⁹³

⁸⁷The court based its ruling on the failure of the expert to meet the "general acceptance" standard of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The court considered only the one experiment which the defense expert conducted when it made this determination. There are actually numerous studies documenting the unreliability of eyewitness identification. See, e.g., A. Yarmey, *supm* note 32 (surveying the field); Buckhout, *Eyewitness Testimony*, 231 Sci. Am. 23 (Dec. 1974); Levine & Trapp, *supm* note 1; Loftus, *Reconstructing Memory: The Incredible Eyewitness*, 8 Psychology Today 116 (Dec. 1974). But see McCloskey & Egeth, *Eyewitness Identification: What Can a Psychologist Tell a Jury?*, 38 Am. Psychologist 550 (May 1983).

⁸⁸7 M.J. 561 (A.C.M.R. 1979); see also *United States v. Dodson*, 16 M.J. 921 (N.M.C.M.R. 1983), *rev'd in part on other grounds*, 21 M.J. 237 (C.M.A. 1986) (excluding testimony from a psychological expert on perception and memory).

⁸⁹7 M.J. at 566.

⁹⁰5 C.M.A. 492, 18 C.M.R. 116 (1955).

⁹¹*Id.* at 496, 18 C.M.R. at 120.

⁹²*Id.* at 497-98, 18 C.M.R. at 121-22; see also *United States v. Parks*, 17 C.M.A. 37, 37 C.M.R. 351 (1967); *United States v. Jeffries*, 12 C.M.A. 259, 30 C.M.R. 259 (1961) (rejecting expert testimony as to whether the accused's denials of the crime were truthful).

⁹³*United States v. Clark*, 12 M.J. 978 (A.C.M.R. 1982); see *United States v. Azure*, 801 F.2d 336 (8th Cir. 1986); *cf.* *United States v. Cox*, 18 M.J. 72 (C.M.A. 1984) (curative instruction cured any error in allowing doctor to testify that he thought victims of sexual offenses were truthful); *United States v. Perner*, 14 M.J. 181 (C.M.A. 1982) (enlisted psychiatric technician who had seen witness professionally on only three occasions did not enjoy a sufficiently close relationship to be able to express an opinion as to her truthfulness).

United States *v. Wagner*⁹⁴ and United States *v. Cameron*⁹⁵ also involved direct comments on the truthfulness of particular statements. In *Wagner*, the accused recanted his prior confession at trial. In rebuttal the prosecution called a military investigator and qualified him as an expert in “truth-telling in confessions” based on his interrogative experience and an investigator’s course. The investigator then stated his “impression” that the accused was telling the truth when he confessed.⁹⁶ The Air Force Court of Military Review found this testimony erroneous and held that the evidence rules did not contemplate opinion evidence on the guilt or innocence of the accused, or the truthfulness of a particular witness.⁹⁷

In *Cameron* the Court of Military Appeals considered almost identical testimony. The accused allegedly molested his stepdaughter. After the stepdaughter testified and was heavily impeached, the prosecution called a social worker who had interviewed her once. The social worker established her credentials and testified that she thought the stepdaughter was truthful when she accused her stepfather.⁹⁸ The Court of Military Appeals endorsed *Wagner*’s rejection of such testimony and noted that the Military Rules of Evidence limited evidence on a witness’ credibility to character issues and not the truth of particular testimony.⁹⁹

Thus, in the military, as in the civilian courts, one sees a limited recognition of the value of psychological testimony in the areas of witness capacity and sexual assaults. Outside these limited areas, it is extremely difficult to discover any clear endorsement of the expert who testifies on credibility issues.

IV. REASONS FOR EXCLUDING TESTIMONY.

Typically, the appellate courts have not taken a definitive stand either excluding or approving the use of expert testimony. Instead, one finds the appellate authority deferring to the trial courts’ discretion. The appellate courts note that the trial court has “broad discretion” in admitting testimony: “[T]he District Court has wide discretion in its determination to admit and

⁹⁴20 M.J. 758 (A.F.C.M.R.1985).

⁹⁵21 M.J. 59 (C.M.A.1985).

⁹⁶20 M.J. at 759-60.

⁹⁷*Id.* at 761.

⁹⁸United States *v. Cameron*, 21 M.J. at 61-62.

⁹⁹*Id.* at 61.

exclude evidence, and this is particularly true in the case of expert testimony."¹⁰⁰ On appeal, the district court will be upheld unless "manifestly **erroneous**"¹⁰¹ or in "plain **error**."¹⁰² This standard of review allows the trial court a wide, and sometimes unwarranted, latitude in admitting or excluding testimony. When the trial judge's decision is based on facts peculiar to the case before the court, the "broad discretion" standard provides an appropriate means of recognizing the judge's superior position in resolving those facts. When the decision is based on factors going beyond the issues peculiar to the case at hand, however, the trial judge has no entitlement to deference, and the appellate courts should step in to set standards. With expert testimony, this is particularly true when the court decides the reliability of a particular scientific method rather than its application to a particular set of facts. Whether a scientific principle is valid is not a question which varies from case to case; trial courts should not be **free** to reach conflicting decisions on the proven reliability of the scientific theory underlying proposed expert testimony.¹⁰³

Appellate courts, in affirming rulings refusing the admission of expert testimony, usually focus on reasons such as: **1)** the testimony invades the province of the **jury**,¹⁰⁴ **2)** the testimony adds nothing to the "common sense" understanding of the **jury**,¹⁰⁵ **3)** a general mistrust of the scientific methods **used**,¹⁰⁶ **4)** avoiding a "battle of the experts" or sidetracking the case on a collateral **issue**,¹⁰⁷ **5)** the point addressed by the expert was adequately established by other **evidence**,¹⁰⁸ and **6)** a fear that the

¹⁰⁰*Stillwell Manufacturing Co. v. Phelps*, 130 U.S. 520, 527 (1889); *accord Hamling v. United States*, 418 U.S. 87 (1974); *United States v. Johns*, 734 F.2d 657 (11th Cir. 1984).

¹⁰¹*See, e.g.*, *Salem v. United States Lines Co.*, 370 U.S. 31 (1961); *United States v. Schmidt*, 711 F.2d 595 (5th Cir. 1983); *United States v. Costa*, 691 F.2d 1358 (11th Cir. 1982); *United States v. Barnard*, 490 F.2d 907 (9th Cir. 1973), *cert. denied*, 416 U.S. 959 (1974).

¹⁰²*United States v. Pacelli*, 521 F.2d 535 (2d Cir. 1975).

¹⁰³*See, e.g.*, *United States v. Awkward*, 597 F.2d 667, 669 (9th Cir. 1979), where the court ruled that the admissibility of hypnotically refreshed testimony had been established in the Ninth Circuit, so that there was no need for an expert to establish the validity of the scientific principle in each case. But *see United States v. Fosher*, 590 F.2d 381, 383 (1st Cir. 1979), where the First Circuit held that "a trial court can, in its discretion, conclude that scientific evaluation either has not reached, or perhaps cannot reach a level of reliability such that Scientific analysis of a question of fact surpasses the quality of common sense evaluation inherent in jury deliberations."

¹⁰⁴*E.g.*, *United States v. Jackson*, 576 F.2d 46 (1978).

¹⁰⁵*E.g.*, *United States v. Pacelli*, 521 F.2d 535 (2d Cir. 1975).

¹⁰⁶*E.g.*, *United States v. Fosher*, 590 F.2d 381 (2d Cir. 1979).

¹⁰⁷*E.g., id.*

¹⁰⁸*E.g.*, *United States v. Pacelli*, 521 F.2d 535 (2d Cir. 1975).

jury will find themselves overwhelmed by the expert and abrogate their function as the finder of **fact**.¹⁰⁹

In *United States v. Jackson*¹¹⁰ the defendant, a doctor, was charged with **42** counts of distributing controlled substances to **drug** abusers. He requested the court to order psychiatric evaluations of thirteen witnesses who testified how they obtained prescriptions from the defendant. The court refused to order the examinations and the defendant appealed, claiming this evidence would be relevant to both competency and credibility. The appellate court first held that narcotics use would not disqualify a witness¹¹¹ and then went on to flatly reject the credibility issue: "Psychiatric opinions as to a witness' reliability in distinguishing truth from fantasy is inadmissible for impeachment purposes, for it invades the jury's province to make credibility determinations."¹¹²

*United States v. Fosher*¹¹³ reflects a multitude of the concerns of the appellate courts. Fosher was a bank robbery prosecution which rested almost entirely on the testimony of two eyewitnesses. The defendant tried to offer expert testimony on the unreliability of eyewitness identification. The appellate court rejected this evidence because the defendant's offer of proof did not show it was based on any mode of scientific analysis which met the pertinent standards of reliability. Furthermore, there was no relationship shown between the proffered expert testimony and the specific testimony of the witnesses to the bank robbery.¹¹⁴ The court went on to note that the trial court was within its discretion when it found the issue within the competence of the jury and concluded by adding "to the trial court's articulated concerns our own conviction that a trial court has the discretion to avoid imposing upon the parties the time and expense involved in a battle of **experts**."¹¹⁵

When a witness has already been adequately impeached by other evidence, the appellate courts will uphold the denial of

¹⁰⁹*E.g.*, *United States v. Alexander*, 526 F.2d 161 (8th Cir. 1975); *United States v. Hicks*, 7 M.J. 561 (A.C.M.R.1979).

¹¹⁰576 F.2d 46 (5th Cir. 1978).

¹¹¹*Id.* at 48.

¹¹²*Id.* at 49; see also *United States v. Roshier*, 78 F.2d 429 (9th Cir. 1983); *United States v. Wertis*, 505 F.2d 683 (5th Cir. 1974), *cert. denied*, 422 U.S. 1045 (1975); *People v. Williams*, 6 N.Y.2d 18, 187 N.Y.S.2d 750, 159 N.E.2d 549 (1959).

¹¹³590 F.2d 381 (1st Cir. 1979).

¹¹⁴*Id.* at 383.

¹¹⁵*Id.*; see also *United States v. Ellsworth*, 738 F.2d 333 (8th Cir. 1984); *United States v. Moten*, 564 F.2d 620 (2d Cir.), *cert. denied*, 434 U.S. 959 (1977).

expert testimony. In *United States v. Pacelli*¹¹⁶ the trial court denied the defendant's request to impeach the main prosecution witness with testimony that he was psychopathic. The appellate court upheld the trial judge, noting that the court instructed the jury that the witness was an accomplice and therefore his testimony was suspect, that the expert testified during the offer of proof that the average person would realize without the help of a psychiatrist that the witness' testimony had to be reviewed "very carefully," and finally that ample evidence of the witness' eccentric behavior appeared in the evidence presented.¹¹⁷

Fear of overwhelming the jury is also a common theme. According to the United States Court of Appeals for the Eighth Circuit, scientific evidence "is likely to be shrouded with an aura of near infallibility, akin to the ancient oracle of Delphi."¹¹⁸ The United States Court of Appeals for the Sixth Circuit expressed similar sentiments: "A courtroom is not a research laboratory. The fate of a defendant . . . should not hang on his ability to successfully rebut scientific evidence which bears an 'aura of special reliability and trustworthiness,' although in reality, the witness is testifying on the basis of an unproved hypothesis."¹¹⁹

A leading federal case on eyewitness identification is *United States v. Amaral*.¹²⁰ *Amaral* involved a bank robbery in which several eyewitnesses identified the defendant as the robber. The defense attempted to introduce expert testimony on the general unreliability of eyewitness identification and the effect of stress on perception. The trial judge rejected the testimony. The judge

¹¹⁶521 F.2d 535 (2d Cir. 1975).

¹¹⁷Included in the long list of oddities cited by the appellate court were the defendant's actions in: shooting out his television set because the picture rolled; throwing his bathroom scales into the bay because he could not lose weight; losing his temper at inanimate objects, and banging his head against a jailhouse wall because he was angry at a police officer. 537 F.2d at i40-41. See *United States v. West*, 670 F.2d 675 (7th Cir.), cert. denied sub nom. King v. United States, 457 U.S. 1124 (1982), in which a prison guard tried to introduce psychiatric testimony of his limited intelligence to support his claim that he did not know that a car he received as a "gift" was actually a bribe. The court rejected the testimony because West's limited intelligence was "clearly apparent" when he testified. See also *United States v. Barnard*, 490 F.2d 907 (9th Cir. 1973), cert. denied, 416 U.S. 959 (1974), where the Court of Appeals for the Ninth Circuit upheld the exclusion of psychiatric evidence on the credibility of a codefendant, in part because the co-defendant's credibility was already suspect in that the evidence showed he had perjured himself before the grand jury.

¹¹⁸*United States v. Alexander*, 526 F.2d 161, 168 (8th Cir. 1975).

¹¹⁹*United States v. Brown*, 557 F.2d 541, 556 (6th Cir. 1977); see also *United States v. Cameron*, 21 M.J. 59, 61 (C.M.A. 1985); *United States v. Tomlinson*, 20 M.J. 897 (A.C.M.R. 1985).

¹²⁰488 F.2d 1148 (9th Cir. 1973).

determined that the weight to be given the eyewitness identification was a matter for the jury, and emphasized that any differences in the eyewitness accounts should be revealed by **cross-examination**.¹²¹

On appeal, the circuit court affirmed the trial judge's **ruling**, but adopted a four-part test for the admissibility of expert testimony on eyewitness identification. The proponent of the testimony must show: 1) a qualified expert, 2) a proper subject, 3) a generally accepted scientific theory to support the testimony, and 4) that the probative value of the testimony outweighs its prejudicial effect.¹²² While the court gave a qualified approval to expert testimony on eyewitness identification, it continued to emphasize the dangers caused by "its aura of special reliability and **trustworthiness**."¹²³

In *United States v. Thevis*¹²⁴ two airline pilots placed the defendants near a murder scene around the time of the murders. The defendants produced a psychologist, Dr. Robert Buckhout, who offered to testify about the general unreliability of eyewitness identification. The trial court rejected the testimony and concluded that the accuracy of any identification was an issue within the province of the jury. Because of this, any probative value would be outweighed by the possible prejudice.¹²⁵

The circuit court **affirmed** the trial judge. The appellate court noted that the expert had no plans to testify specifically on the particular identifications made by the pilots; instead, he intended to limit his testimony to general problem areas in eyewitness identification. Moreover, allowing the testimony would permit the expert to comment indirectly on the weight of the pilots' testimony.¹²⁶ Finally, the court found that cross-examination was

¹²¹The idea that cross-examination, rather than expert testimony, is the appropriate vehicle for discrediting witnesses is **also** a common theme. *E.g.*, *United States v. Fosher*, 590 F.2d 381 (1st Cir. 1979).

¹²²488 F.2d at 1153; *see also* *United States v. Hicks*, 7 M.J. 561 (A.C.M.R. 1979) (applying *Amaral* in the **military**).

¹²³488 F.2d at 1152. *Amaml* was decided before the Federal Rules of Evidence took effect. The Rules are likely to be more accommodating to such testimony. *See* *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985); *United States v. Smith*, 735 F.2d 1103 (6th Cir.), *cert. denied*, 105 S. Ct. 213 (1984); *infra* text accompanying notes 225-293.

¹²⁴665 F.2d 616 (5th Cir.), *cert. denied*, 456 U.S. 1008 (1982).

¹²⁵*Id.* at 641.

¹²⁶*Id.* The court did not explain why this was offensive. Any type of rebuttal evidence, expert or otherwise, indirectly comments on the weight of other testimony.

an adequate means to identify any specific problems with the pilots' identifications.¹²⁷

*United States v. Hicks*¹²⁸ applied the *Amaral* four-part test in a military case. In *Hicks* an Air Force Sergeant and his guest were robbed as they walked along Waikiki beach in Honolulu on a moonlit night. The two victims identified Hicks as one of the robbers at a police lineup conducted four days later. They also identified the accused at the pretrial investigation¹²⁹ and again at trial.¹³⁰ The defense requested the government to produce Dr. Robert Buckhout to testify as an expert on "social and perceptual factors in eyewitness identification." His proposed testimony covered two areas: the unreliability of eyewitness identification under stress and suggestive factors at the police lineup. The military judge denied the request and the Army Court of Military Review affirmed. The appellate court rejected the argument that the admissibility of Dr. Buckhout's testimony rested solely on proving an underlying scientific principle which supported his conclusions.¹³¹ The court surveyed the federal case law and noted the additional concerns that such testimony would invade the province of the jury, create a danger of prejudice and confusion because of the "aura of special reliability and trustworthiness," and have limited probative value because of its general nature. The court found no abuse of discretion when it applied the *Amaral* test.¹³²

V. THE FOCUS OF EXPERT TESTIMONY.

Wigmore¹³³ identifies three functions that bring a witness' story from the occurrence of an event to the jury's factual determination in the courtroom. First, the actual observation of the event by the witness; second, the witness' ability to record and reconstruct the event in his memory; and third, the communication of the witness' recollection to the trier of fact.¹³⁴ For a fact-finder to make an accurate determination, several things must happen. The witness' perception of the event must first be accurate (the witness must "see" what is actually there). The witness must then retain an accurate memory of the perception. The witness' courtroom testimony must accurately convey what

¹²⁷665 F.2d at 641.

¹²⁸7 M.J.561 (A.C.M.R.1979).

¹²⁹See Article 32, Uniform Code of Military Justice, 10 U.S.C. § 832 (1982).

¹³⁰7 M.J.at 562.

¹³¹*Id.* at 563.

¹³²*Id.* at 566.

¹³³I J. Wigmore, *supra* note 4, §§ 492-494.

¹³⁴See also A. Yarney, *supra* note 32, at 2-3.

he or she has remembered. Finally, the trier of fact must give credence to the account the witness presents. When the fact-finder comes to an inaccurate resolution, one of two things happens: either the witness' capacity to perceive, remember, and communicate broke down in one or more of these areas *and* the fact-finder failed to appreciate the breakdown, or the witness *did* accurately perceive, remember, and communicate, *but* the fact-finder improperly discounted the testimony.

Numerous psychological studies point out the pitfalls of inaccurate testimony.¹³⁵ It is easy to find anecdotal accounts of criminal convictions generated by witness accounts, accepted by a jury, which later proved to be inaccurate.¹³⁶ Yarmey¹³⁷ describes the multiple erroneous convictions of Adolf Beck in London, England, at the turn of the century. In December 1895, Beck was charged with taking money and jewelry from "loose women" under false pretenses. Ten women identified him at his trial in March 1896 as the man who committed the crimes, and he was convicted. In 1898, Beck secured his release by showing that the witnesses had mistaken him for another man, John Smith. *Six* years later, while Beck was visiting London, an additional series of similar crimes occurred. Once again, Beck was charged and several women identified him at his trial in April 1904. He received a sentence of five years in prison. In July 1904, while Beck was still in jail, yet another series of similar crimes were committed. John Smith was arrested and convicted for these crimes. The court decided that Smith was also the guilty party for the prior crimes and Beck was released and declared innocent. He eventually received an indemnity fund to compensate him for his wrongful convictions.

Borchard¹³⁸ provides an account of the robbery conviction of Elmer Jacobs in 1928. Jacobs was arrested after four taxicab drivers reported that a pair of men robbed them and stole their cabs over a five-day period. Each driver identified Jacobs as one of the robbers. It turned out that they mistook Jacobs for two other men. Actually, two pair of robbers committed the crimes, one pair robbing three of the taxi drivers while the other pair robbed the fourth.

¹³⁵See, e.g., E. Loftus, *Eyewitness Testimony* (1979); L. Taylor, *Eyewitness Identification* (1982); A. Yarmey, *supra* note 32; Buckhout & Greenwald, *supra* note 41; Buckhout, *Eyewitness Testimony*, 231 *Sci. Am.* 23 (Dec. 1974) [hereinafter *Eyewitness Testimony*]; Convis, *supra* note 1.

¹³⁶E. Borchard, *Convicting the Innocent* (1932); E. Block, *The Vindicators* (1963); E. Gardner, *The Court of Last Resort* (1952).

¹³⁷A. Yarmey, *supra* note 32, at 4-8.

¹³⁸E. Borchard, *supra* note 136, at 340-41.

Buckhout¹³⁹ recounts a case where a police officer identified the defendant as the man who shot a murder victim. The killer stood in a darkened doorway 120 feet from the officer. Other witnesses could barely define a person's silhouette at that distance and later measurements showed the lighting to be less than 1/5 candlepower. Buckhout concludes that such identifications must rest on some factor other than what the witness actually perceived.¹⁴⁰

Eyewitness testimony is tremendously persuasive to a jury. Dr. Elizabeth Loftus¹⁴¹ conducted a study in which three groups of 50 mock jurors heard evidence of a simulated robbery. On Friday, November 12, 1970, a robber went into Mr. X's grocery store, pointed a gun at him, and demanded money. Mr. X gave him \$110 and the robber started out of the store. The robber suddenly turned and fired two shots, killing Mr. X and his five-year old granddaughter. The police arrested a subject two-and-one-half hours later and charged him with murder and robbery.

The first set of jurors heard only circumstantial evidence. The robber was seen running into an apartment house—the same apartment house where the defendant lived. The defendant had \$123.00 in his room; his shoes had traces of ammonia, which was used to clean the floor of the store; and paraffin tests indicated that there was a slight possibility he had fired a gun. On the other hand, the defendant testified he did not commit the crime; that he had saved the \$123.00 over a two-month period; that he worked as a delivery boy and could have obtained the ammonia tracings anywhere; and that he had never fired a gun in his life.

The second fifty jurors also heard a store clerk's testimony that he saw the defendant shoot the victims.

The third fifty jurors heard the defense impeach the store clerk by showing that he was not wearing his glasses at the time he claimed to have seen the defendant and, since his vision was less than 20/400, the witness could not possibly have seen the robber's face.

¹³⁹*Eyewitness Testimony*, *supra* note 135, at 24-25.

¹⁴⁰A common technique used to demonstrate the inaccuracies of eyewitness accounts is the "staged crime." Hugo Munsterberg used this technique in his pioneering studies. H. Munsterberg, *On the Witness Stand* 49-54 (1908). More recently, Dr. Buckhout showed a videotape of a simulated mugging on the nightly news show of a New York television station. Immediately afterward, the viewers saw a lineup of six men and were asked to identify the robber by calling the station. Only one in seven of the 2,000 viewers who called correctly identified the mugger. Buckhout & Greenwald, *supra* note 41, at 1297-98.

¹⁴¹E. Loftus, *supra* note 135, at 9-10.

The first 50 jurors found the circumstantial evidence unconvincing. Only 18 percent judged the defendant guilty. Adding the eyewitness identification, however, boosted the conviction rate dramatically. Seventy-two percent of the second fifty jurors would have found the defendant guilty. The third group demonstrates the impact of even unreliable eyewitness testimony. Sixty-eight percent of the third fifty jurors voted for guilt, even though the *credible* evidence was indistinguishable from that seen by the first

Two other studies show a tendency for eyewitness testimony to be not only persuasive, but also flatly wrong. In one, Dr. Buckhout staged an assault for students in a **classroom**.¹⁴³ Seven weeks later the students were asked to identify the assailant from a display of six photographs, which included the assailant and an innocent person who had been standing nearby. Forty percent of the witnesses correctly identified the assailant. The remaining witnesses, however, did not merely fail to identify the assailant, but forty percent of them (or nearly one-fourth of the witnesses) chose the photograph of the innocent bystander.

In a more recent experiment,¹⁴⁴ Dr. Loftus showed subjects a film about a crime and then asked them three days later to identify the criminal from a set of five photographs. The photographic display had a picture of an incidental character in the film, but it did not contain a photograph of the criminal. Sixty percent of the subjects identified the incidental character as the criminal. Less than a quarter correctly refused to identify anyone.

At one time, psychologists assumed that the brain acted as a recording device.¹⁴⁵ A person perceived an event and imprinted that perception in his mind, where it remained dormant until needed. At the appropriate time, the person recalls the pertinent memory recording and “plays” it to reconstruct the events.¹⁴⁶ Later research shows that this is not true. Each of the four stages—perception, memory, retrieval and communication, and

¹⁴²This also indicates that cross-examination may not be the effective impeachment tool the appellate courts believe it to be. The overwhelming majority of the third set of jurors convicted even though the cross-examination completely undermined the credibility of the testimony.

¹⁴³*Eyewitness Testimony*, *supra* note 135, at 29–30.

¹⁴⁴See L. Taylor, *supra* note 135, at 40.

¹⁴⁵*Stanford Note*, *supra* note 1, at 975–76.

¹⁴⁶Many laypersons subscribe to this “videotape” version of perception, memory, and recall, which may account for the great weight given eyewitness testimony. See *Eyewitness Testimony*, *supra* note 135, at 171.

evaluation is a dynamic process involving both conscious and subconscious influences which can affect the witness' testimony and the fact-finder's ultimate resolution.

A. PERCEIVING THE EVENT.

A witness' perception of an event may be most heavily influenced by his inherent physical limitations. Sensory deficiencies, such as color blindness, lack of depth perception, a deficiency in visual acuity, or difficulties in dark adaptation can lead to inaccurate observations.¹⁴⁷ Witnesses may be unaware of these deficiencies,¹⁴⁸ which can cause them to testify about events they could not possibly have observed.¹⁴⁹

The human brain only selectively stores what is present in the environment at any particular time. The mind selects particular details from the variety of events which may be presented¹⁵⁰ These details form a "blueprint" which the person later uses to reconstruct the observation. A person subconsciously develops methods for selecting which details will be recorded and concentrates on the most important.

While this method works well for the routine functions in life, it can lead to distortions, particularly when the importance of the event changes sometime later. Details which the witness ignored or dismissed suddenly become crucial. The individual then must bridge gaps in perception for which insufficient data exists. Inferential "leaps" replace actual perception, leading to a distorted version of the event. Once again, the witness may be totally unaware of the distortions. An individual asked to recall an innocuous event tends to give an incomplete and unreliable account; the person may be certain of details having no basis in fact.¹⁵¹

1. Time Perception.

Witnesses have great difficulty in accurately measuring the passage of time. In this case, however, the error is nearly always

¹⁴⁷A. Yarmey, *supra* note 32, at 38-39.

¹⁴⁸*Id.* Yarmey describes how a color-blind person might adapt by using inferences and logical conclusions to correct for this deficiency. For example, a red-green color-blind person might "see" a red traffic light because he knows it is the top light on the signal.

¹⁴⁹Buckhout, *Psychology & Eyewitness Identification*, 2 *Law and Psychology Rev.* 75, 80 (1976)[hereinafter *Psychology & Eyewitness Identification*].

¹⁵⁰E. Loftus, *supra* note 135, at 25-30.

¹⁵¹*Psychology and Eyewitness Identification*, *supra* note 149, at 77.

one-sided: one overestimates the amount of time an event took.¹⁵² Viewers tend to judge the passage of time by the amount of activity which they see. In a fast-moving, action-packed event such as a crime scene, a witness will invariably overestimate the length of time of the event merely because the level of activity causes them to believe a significant amount of time has passed.¹⁵³ This effect is heightened when the viewer is under **stress**.¹⁵⁴

Time estimates can be critical to the outcome of a case. A premeditation issue in a first-degree murder prosecution may turn on the amount of time the defendant had to consider the consequences of his actions. Jurors hearing varying estimates of time duration from different witnesses might be surprised to hear that *all* the estimates are likely to be significantly overstated. Yet ignorance of this one fact could lead to a wrongful conviction.¹⁵⁵

2. *Observation Conditions.*

The physical conditions existing at the time of the incident will also affect the quality of observation. Not surprisingly, the amount of observation time is inversely proportional to the reliability of observation—a witness who has more time to perceive the event will do so more accurately, since the witness can identify and select the salient features of the event to store in his or her **memory**.¹⁵⁶ When the event occurs and passes suddenly, however, the witness is unprepared to focus attention on these important features.¹⁵⁷

¹⁵²E. Loftus, *supra* note 135, at 30.

¹⁵³Stanford Note, *supra* note 1, at 977-78.

¹⁵⁴*Id.* One study by Dr. Buckhout indicated that eyewitness estimates can be almost three times the actual length of the event. One hundred forty-one witnesses asked to describe an event estimated its duration at nearly a minute and a half, on the average. The event actually lasted just over 30 seconds. Buckhout, *supra* note 149, at 89; *see also* E. Loftus, *supra* note 135, at 29-31; J. Marshall, *Law and Psychology in Conflict* 19 (1966).

¹⁵⁵Dr. Loftus describes one case in which she worked with the Seattle Public Defender's Office to defend a woman who had killed her boyfriend. The undisputed evidence showed that during an argument, the woman ran to the bedroom, grabbed a gun, and shot her boyfriend six times. The prosecution sought a first-degree murder conviction, while the woman claimed self-defense. During the trial, a dispute arose over how much time passed between the grabbing of the gun and the first shot. The defendant and her sister testified it was two seconds, while a prosecution witness said five minutes. The exact time was crucial, since the defense claimed the killing occurred suddenly, in fear, and without hesitation. In this case, the jury must have discounted the prosecution witness' estimate, because it acquitted the defendant. E. Loftus, *supra* note 135, at 31.

¹⁵⁶L. Taylor, *supra* note 135, at 28-29.

¹⁵⁷*See* Levine & Trapp, *supra* note 1, at 1097 n.2.

Poor lighting, distance, intervening obstacles, and distracting noises also affect the perceptual reliability of a witness.¹⁵⁸ Research has established threshold limits of efficient functioning for the senses. As these thresholds are approached and passed, eyewitness descriptions become increasingly inaccurate.¹⁵⁹

3. *Stress.*

A common belief is that stress heightens a witness' observation powers and "burns" an image of the scene into the mind. The witness may experience an increase in adrenaline levels, accompanied by an increased heart rate, respiratory rate, and blood pressure.¹⁶⁰ These changes can result in a belief that perception and memory have also improved, expressed by phrases such as "I could never forget that **face**."¹⁶¹

Psychological research contradicts this assumption. Perceptual abilities actually decrease in a highly stressful situation, and the person under stress is less reliable than he or she would be otherwise.¹⁶² Such a witness becomes less capable of remembering details, less accurate in reading dials, and less certain in detecting signals.¹⁶³ The witness tends to concentrate on relatively few features of the environment, while ignoring others. An eyewitness faced with a dangerous situation may be able to concentrate only on the possibilities of escape, and be completely unable to accurately remember the assailant or other aspects of the situation.¹⁶⁴

4. *Expectations.*

What a witness "sees" during an event is heavily influenced by prior conditioning and experience—"[w]e tend to see and hear

¹⁵⁸*Psychology and Eyewitness Identification*, *supra* note 140, at 78.

¹⁵⁹*Id.*

¹⁶⁰This reaction is known as the General Adaptation Syndrome, and it prepares the individual for "fight or flight," i.e., to take the steps necessary to ensure survival. See H. Selye, *The Stress of Life* (rev. ed. 1976).

¹⁶¹L. Taylor, *supra* note 135, at 28; *Psychology and Eyewitness Identification*, *supra* note 149, at 78.

¹⁶²*Stanford Note*, *supra* note 1, at 979.

¹⁶³Buckhout & Greenwald, *supra* note 41, at 1302-05. One theory indicates that moderate levels of stress or arousal increase performance up to a point. Under this theory, known as the Yerkes-Dodson law, perceptual performance follows a U-shaped curve. At very low levels of arousal, the senses are not yet functioning fully. Performance peaks at moderate levels of arousal and then declines as the stress increases further. See E. Hilgard, R.C. Atkinson, & R.L. Atkinson, *Introduction to Psychology* 357 (1975); L. Taylor, *supra* note 135, at 32.

¹⁶⁴Dr. Loftus describes the phenomenon of "weapon focus," in which a crime victim faced with a criminal brandishing a gun tends to focus on the gun to the exclusion of other aspects of the situation. See E. Loftus, *supra* note 135, at 35.

what we expect to see and hear.”¹⁶⁵ Since a person can process and store only a small portion of what is present at any one time, the individual develops an ability to form conclusions about what was seen based on only a limited store of information. The witness integrates the fragmentary bits of data into a coherent whole by reliance on what he or she has seen, heard, and been told in the past—the witness reconstructs what *has* happened from what he or she believes *must* have happened.¹⁶⁶

Expectations affect perception in three ways. When the sensory data is ambiguous, the observer resolves the ambiguity in accordance with his expectations. In this situation, observers with different expectations may see vastly different things.¹⁶⁷

When the sensory data is non-existent, the witness may unconsciously “invent” perceptions to account for the gaps in the information. This can occur when the observers do not pay close attention or when they are functioning at the limits of their sensory capabilities. In one case,¹⁶⁸ a group of fifty high school students testified that they had seen a mid-air collision between a private plane and an Allegheny Airlines jet while playing football in a nearby field.¹⁶⁹ These witnesses reported details about the numbers and lettering on the planes, falling bodies and luggage, and the failure of the commercial jet to take any evasive action before the crash.¹⁷⁰

The flight recorder data showed that the planes were in the clouds overhead when they collided, and that the sound of the crash would have taken six seconds or more to reach the football field. Further, the distance from the crash to the football field made the luggage and the numbers on the plane too small for a normal human observer to perceive them. Here, although it was virtually impossible for the students to have seen what they

¹⁶⁵Whipple, *The Obtaining of Information: Psychology of Observation and Report*, 15 *Psychological Bull.* 217, 228 (1918), quoted in E. Loftus, *supra* note 135, at 37.

¹⁶⁶Loftus identifies four different types of expectations: 1) cultural expectations or stereotypes; 2) expectations from past experience; 3) individual prejudices; and 4) temporary biases. E. Loftus, *supra* note 135, at 36-48.

¹⁶⁷*Id.* The hunter who accidentally shoots a man, believing him to be a deer, illustrates the phenomenon. The hunter, eagerly looking for his prey, interprets the shape, movement, and noises he perceives as a deer. Yet a policeman who tests the hunter's claim of mistake by observing under identical conditions may honestly report back that he unmistakably could see a man. See Sommer, *The New Look on the Witness Stand*, 8 *Can. Psychologist* 94 (1959).

¹⁶⁸*Allegheny Airlines v. United States*, 504 F.2d 104 (7th Cir. 1974), cert. denied, 421 U.S. 978 (1975).

¹⁶⁹See Buckhout & Greenwald, *supra* note 41, at 1302.

¹⁷⁰*Id.*

testified to, they constructed a plausible sequence of events which would account for a mid-air collision.¹⁷¹

Finally, when the sensory data conflicts with witness expectations, the witness may ignore the contrary data or become confused about what was seen. Bruner and Postman¹⁷² performed an experiment in which subjects saw a display of playing cards containing twelve aces from all four suits. After a quick look, most subjects reported seeing three aces of spades. Actually, there were five—but two were colored red. Most subjects did not see the red spades at all. A few described them as “purple” or “rusty black,” colors more in line with their expectations. Other subjects simply got upset. The experimenters concluded that, in the face of contrary stimuli, “the perceiver’s behavior can be described as resistance to the recognition of the unexpected or incongruous.”¹⁷³

A classic 1947 study¹⁷⁴ demonstrated the extent to which cultural expectations or biases influence perception. Witnesses saw a picture of a subway train filled with people. Two men, one white, the other black, stood on a train talking to each other. The black man was well-dressed, wearing a suit and tie, while the white man held a razor blade by his side. The witness saw this scene, then told a second person as much as they could about it. The second person passed the information to a third, and so on through six or seven people.

In over half the experiments with the picture, the final report states that the black man, not the white man, held the knife. Several reports had the black man “brandishing it wildly” or “threatening the white man.”¹⁷⁵

5. Cross-Racial Identifications.

There is no proof that members of different races show any difference in relative eyewitness abilities.¹⁷⁶ There exists a significant difference, however, in the ability of members of one race to identify a person of another race as opposed to their own. People

¹⁷¹*Id.* The district court later entered a judgment against the airline after finding that the flight crew failed to use reasonable care in the operation of the jetliner. *Allegheny Airlines v. United States*, 420 F.Supp. 1339 (S.D.Ind. 1976) (on remand).

¹⁷²Bruner and Postman, *On the Perception of Incongruity: A Paradigm*, 18 J. Personality 206-23 (1949).

¹⁷³*Id.* at 222.

¹⁷⁴G. Allport and L. Postman, *The Psychology of Rumor* 57 (1947).

¹⁷⁵*Id.* Loftus describes this experiment in E. Loftus, *supra* note 135, at 37-39.

¹⁷⁶L. Taylor, *supra* note 135, at 19.

are generally poorer at distinguishing among members of different races.¹⁷⁷ This may happen because witnesses concentrate on features which differentiate between the two racial groups rather than features which distinguish among members within the other race.¹⁷⁸ An individual's skin color, for example, is a valuable piece of information in distinguishing between individuals of different races, but relatively unimportant when considering members of the same race. Moreover, contrary to what one might expect, the ability to make cross-racial identifications does not necessarily improve because of increased exposure to the other race.¹⁷⁹

6. Age and Sex.

Sensory abilities decline with age. The ability to see fine details declines after age 40,¹⁸⁰ and by age 70 loss in visual acuity for both far and near objects is common. Moreover, the lens of the eye takes on a yellowing hue as it ages, filtering out more of the blue-violet light.¹⁸¹ This causes visual perception to "tilt" toward the brighter colors; older people see things as less blue. It also causes increased difficulty in distinguishing among blues, greens, and violets.¹⁸²

Time perception changes in the elderly. Time appears to pass more slowly for younger persons,¹⁸³ which causes the same absolute time period to seem longer for the young than for the elderly. Hearing ability also decreases with age, particularly in the high pitched tones above 10,000 cycles per second.¹⁸⁴ Many cognitive abilities, however, remain unimpaired by age.¹⁸⁵

¹⁷⁷*Id.*; E. Loftus, *supra* note 135, at 136-42; A. Yarmey, *supra* note 32, at 130-36; *Stanford Note*, *supra* note 1, at 982.

¹⁷⁸See A. Yarmey, *supra* note 32, at 136.

¹⁷⁹L. Taylor, *supra* note 135, at 20. Apparently the quality of a person's exposure to the other race can make a difference. White subjects who reported having black friends were superior in recognizing black faces over white subjects who merely attended school with blacks or grew up in an integrated neighborhood. A. Yarmey, *supra* note 32, at 134.

¹⁸⁰L. Bischof, *Adult Psychology* (1976).

¹⁸¹A. Yarmey, *supra* note 32, at 219; Convis, *supra* note 1, at 591-92.

¹⁸²Convis, *supra* note 1, at 591-92. There is less difficulty in differentiating among the reds, oranges, and yellows. A. Yarmey, *supra* note 32, at 219.

It also takes longer for elderly persons' eyes to adjust when entering a dark room, and they will not be as sensitive to poor light conditions. This will cause increased difficulty when an elderly person operates in the dark, since it takes longer to recover from passing lights (e.g., car headlights). A. Yarmey, *supra* note 32, at 218.

¹⁸³Cohen, *Psychological Time*, 211 *Sci. Am.* 116 (Nov. 1964).

¹⁸⁴A. Yarmey, *supra* note 32, at 220.

¹⁸⁵E. Loftus, *supra* note 135, at 160.

Loftus¹⁸⁶ has found a sexual difference in the recognition of specific items in a scene. Twenty-five men and twenty-five women looked at a sequence of twenty-four slides depicting a wallet-snatching incident. Each subject completed a questionnaire, read a “suggestibility” paragraph designed to introduce inaccurate information about four critical items, and then took a final accuracy test. Overall, there were no significant sex-based differences in total accuracy. Specific questions did produce differences, however. Women were more accurate and less susceptible to suggestion on “female-oriented” items (e.g., women’s clothing or actions) while men produced better results on “male-oriented” items (e.g., the thief’s clothing and the surroundings).

B. FACTORS AFFECTING MEMORY.

The brain does not simply store a memory, leaving it unaltered in the mind until it needs to be recalled. A number of things affect a memory in the time between its storage at the time of the event and its recall at trial. The memory is not permanent; all or part can be lost. More importantly, intervening events and perceptions will affect the memory. Additional data and thoughts can distort what was originally perceived, leaving a “memory” which has been drastically changed. This change can be a subconscious process, leaving the witness firmly convinced that alterations were part of the original perception.¹⁸⁷

Memory deteriorates over time.¹⁸⁸ Memory loss has been diagrammed on a “forgetting curve” which shows a very rapid loss of memory immediately after an event, becoming more and more gradual as time passes.¹⁸⁹ Clerical workers tested for recognition of pictures after intervals of two hours to four months showed a 100% correct recognition after the two-hour delay. Four months later, however, their recognition dropped to only 57%, little better than chance.¹⁹⁰

In addition to the actual loss of memory, recall may be affected by the witness’ own thought processes. One such process acts to transform uncertainty into certainty. A witness who is unsure of a pertinent fact may answer “I think this is what happened, but I

¹⁸⁶*Id.* at 156–59.

¹⁸⁷L. Taylor, *supra* note 135, at 41.

¹⁸⁸*Id.*; Buckhout & Greenwald, *supra* note 41, at 1311.

¹⁸⁹E. Loftus, *supra* note 135, at 53.

¹⁹⁰*Id.* The recognition test consisted of showing single pictures to the subjects and asking whether they recognized the picture as one they had seen earlier. Since only a yes/no response was needed, someone who had never seen the pictures could guess right 50% of the time.

am not sure” when first asked about the event. The next time the witness considers the issue, however, he or she is more sure, and by the time of trial, the initial guess has become a certainty. This witness has exhibited the “guessing syndrome.”¹⁹¹ At first the witness guesses at an answer; that guess is then stored in the memory. The next time the witness recalls the event, the first guess accompanies the original ambiguous or unclear observations. Two things happen: the guess becomes part of the witness’ memory of the event, and because the witness now “sees” the guess in his memory, confidence in the accuracy of the guess rises.¹⁹² By the time of trial, after the witness has considered the event many times, he or she presents a highly credible, self-assured account of something which could be entirely wrong.¹⁹³ In this situation, the witness’ demeanor on the stand will be useless to the jury in evaluating the credibility of the testimony. The witness honestly reports his or her memory of the event, but the memory itself has changed because of a subconscious process. Many times a witness, asked why the trial testimony is so much more complete and certain than a pretrial statement, will answer “I went home and thought about it some more, and remembered additional details.” This answer may convince the trier of fact that the testimony is credible and reliable, but a psychologist would treat such an explanation skeptically.

The “guessing syndrome” shows only one way that memory can be influenced by post-event occurrences. The witness places **all** the information acquired about an event into a single “drawer” in the mind, which makes it difficult to distinguish the original observation from later information.¹⁹⁴ A witness exposed to post-event data can incorporate that information into the “memory” of the event. Loftus showed that these effects can be powerful enough to change a “stop” sign into a “yield” sign in a witness’ memory of a car accident.¹⁹⁵

¹⁹¹E. Loftus, *supra* note 135, at 82-84.

¹⁹²*Id.*; L. Taylor, *supra* note 135, at 44.

¹⁹³L. Taylor, *supra* note 135, at 44.

¹⁹⁴Stanford Note, *supra* note 1, at 983.

¹⁹⁵E. Loftus, *supra* note 135, at 58-63. Loftus showed that asking a witness a question which assumed the existence of an untrue “fact” made it more likely that the “fact” would become part of the witness’ memory. After viewing a film of an accident, college students asked about the speed of a car as it passed a barn were more likely to say later that they had seen a barn, even though no barn actually existed.

Another study showed that witnesses to a staged theft who heard the “victim” say “my tape recorder is missing” were able to produce descriptions of the tape recorder, even though it did not actually exist. *Id.* at 61-62.

This effect will be enhanced because of a tendency of a witness to incorporate **all** the data received into a single, integrated image. To reduce uncertainties and eliminate inconsistencies witnesses tend not only to fill memory gaps with extraneous details, but also subconsciously to change their mental picture of the event so that everything “makes **sense**.”¹⁹⁶ Post-event information will be incorporated into this process, and may not only enhance existing memories, but also change a witness’ memory and even add non-existent details to a previous memory. The mere wording of a question can introduce information that affects both the immediate answer and also the general memory of the event. In one example, witnesses to a traffic accident were asked one of two questions. Half were asked “How fast were the cars going when they *hit* each other?” The others were asked “How fast were the cars going when they *smashed* into each other?” Witnesses answering the second question reported much higher estimates of the car’s **speed**.¹⁹⁷ In addition, the latter witnesses were more than twice as likely to respond to a later question by stating they saw broken glass at the accident scene, even though there was no broken glass. Using the word “smashed” in the earlier question introduced a new piece of information for the witness: the cars “smashed” into one another. This information became part of the integrated picture in the witness’ mind. Later, because broken glass normally results from a severe accident, the witness was more likely to think that occurred, because the scenario “makes **sense**.”¹⁹⁸

The results suggest that even routine interrogation of a witness can plant suggestions which unconsciously become part of the witness’ memory of the event. This effect will be exaggerated as police officers, investigators, and attorneys return to reinterrogate the witness to clear up conflicting or ambiguous points, shed light on new information, or simply review the witness’ **statement**.¹⁹⁹ A witness who feels an obligation to produce more and more details of the event is likely to take information from the questions asked and incorporate them into the description of the **scene**.²⁰⁰

¹⁹⁶Stanford Note, *supra* note 1, at 983.

¹⁹⁷E. Loftus, *supra* note 135, at 77-78; L. Taylor, *supra* note 135, at 47-48.

¹⁹⁸E. Loftus, *supra* note 135, at 78.

¹⁹⁹*Id.* at 74-77.

²⁰⁰For example, if police find a gun near a crime scene, they are likely to return to the witnesses to determine what they know about the gun. Even if the original eyewitness accounts made no mention of a weapon, simply asking the question “Did you see a gun?” increases the probability that the witness will later testify about the gun. The effect is heightened with a declarative question, i.e., “Did you see *the* gun?” L. Taylor, *supra* note 135, at 58-60.

What happens when new information conflicts with the witness' memory of the event? Instead of having new data which merely bridges a memory gap the witness now must determine 1) that the original memory is accurate; 2) the new data is accurate; or 3) the "accurate" picture lies somewhere in between. It appears that, where possible, the witness will attempt to harmonize both pieces of information, and correct the memory to a compromise between the two. In one **experiment**,²⁰¹ witnesses viewed a film of eight demonstrators disrupting a university class, and then saw contradictory information in a questionnaire. Half the students were asked to describe the leader of the *four* demonstrators: the other half described the leader of the *twelve* demonstrators. One week later, each witness answered a new set of questions, including one which asked how many demonstrators they saw. The first group reported seeing an average of **6.4** people, while the second group remembered seeing an average of 8.9 people. Each group compromised between their original perception and the later data they received.

Where the conflicting data cannot be reconciled, the witness can actually be convinced to abandon totally the original memory, and simply substitute the later information.²⁰²

A witness' demeanor at trial may give no indication that his testimony may be inaccurate. Confidence in the details of a memory of an event does not necessarily indicate the accuracy of a witness' recollection.²⁰³ Indeed, a negative correlation sometimes exists between confidence and accuracy.²⁰⁴ Witnesses often become more confident of their memory of an event as time passes, even though memory becomes less accurate over time.²⁰⁵ This may be due to the process of memory enhancement and modification described above. As the witness considers the event numerous times, incorporates new information and suppositions, bridges gaps in the original recollection, resolves conflicting data, and smoothes the rough edges, the witness' memory becomes more comfortably adjusted to what the witness feels "must" have happened. This in turn, reinforces the person's confidence that the memory is accurate.

²⁰¹E. Loftus, *supra* note 135, at 56-58.

²⁰²*See supra* note 186.

²⁰³A. Yarmey, *supm* note 32, at 150-51, 155.

²⁰⁴*Id.*; *See also* E. Loftus, *supra* note 135, at 100-01. Loftus cites a number of studies, some showing a correlation between confidence and accuracy, while others show that witnesses are often confident and wrong.

²⁰⁵*Stanford Note, supra* note 1, at 985.

Paradoxically, however, the same process which leads to increased confidence also can introduce tremendous inaccuracies in the eyewitness account. The confident, self-assured witness who provides a detailed account of events at trial, and is most likely to be convincing to a jury, can form this account through a process guaranteed to introduce variations from the witness' original perception. The unsure witness, on the other hand, who acknowledges many limitations on his or her original perception and qualifies the trial testimony, can find that testimony rejected, even though it may be the more accurate description of what the witness actually saw.²⁰⁶

C. RETRIEVAL OF INFORMATION.

To provide an account of an event, the witness first retrieves the information from his or her memory, and then places it into whatever form is needed: translating the memory into words, for example, if the observer is testifying or giving a statement about the event; or comparing the mental image to a physical object, a photograph, or a suspect in a lineup.

A person's recall can be affected by something as mundane as the person's location at the time he or she is asked to remember what happened. Students taking a test do better when the test is given in their usual classroom. They do much worse when tested in a different room.²⁰⁷ A new environment tends to inhibit recall, while memory improves as the similarity of the witness' present location to the scene he is asked to remember increases. One writer²⁰⁸ went so far as to recommend that eyewitness identification be made by bringing the suspect and the witness back to the scene of the crime, where the witness would view the suspect in the same surroundings and at the same angle as before. While this suggestion is not practical in most cases, it does provide some understanding why a witness may not be able to accurately identify an object or provide as complete an account in unfamiliar surroundings.

Interrogation of the witness provides a primary means of influencing recall. Taylor points out that interrogation is a two-way exchange of information.²⁰⁹ A witness' recollection can be

²⁰⁶*Id.*; A. Yarmey, *supra* note 32, at 180.

²⁰⁷Abernathy, *The Effect of Changed Environmental Conditions Upon the Results of College Examinations*, 10 *J. Psychology* 293-301 (1940).

²⁰⁸Feingold, *The Influence of Environment on Identification of Persons and Things*, 5 *J. Crim. Law and Criminology* 39-51 (1914); see E. Loftus, *supra* note 135, at 89-90; L. Taylor, *supra* note 135, at 55-56.

²⁰⁹L. Taylor, *supra* note 135, at 53-55.

affected by the individual questioning him, how questions are phrased, and the environment of the interrogation. The interrogator's expectations and attitudes, and any attempts to confirm a theory about the case, will convey themselves to the witness. The tone of voice, the way questions are asked, and encouraging feedback (e.g., "that's very helpful") will "clue" the witness to the type of answers the interrogator desires. The witness will subconsciously try to detect what answers are helpful and will respond accordingly.²¹⁰ The interrogator, on the other hand, can subconsciously slant questions to obtain the desired answers, and filter the witness' responses to fit into the theory of the case.²¹¹ A distorted picture of the witness' perception is likely to result.²¹²

A police investigator can adopt three different methods of questioning a witness. The investigator might ask open-ended questions, such as "What happened?" or "Tell me what you remember." This type of question, known as the narrative, or free report form, leaves the witness free to report any details he or she desires. Using a second method, the investigator may focus the witness' attention on one area by asking the witness to "Describe what your assailant was wearing." A response to this question provides a controlled narrative of the event. Finally, the investigator might have chosen multiple choice questions—"Did he have light or dark clothes?" "Blue jeans or slacks?" "Brown eyes or blue?" This last type of question is called the interrogatory report form. The method of questioning exerts a strong influence on the quality of the answer.²¹³

The most unstructured question—the free narrative—provides the most accurate responses from a witness, with a minimum of errors.²¹⁴ Unfortunately, because the examiner exercises little control over the witness, the responses are less complete and often result in insufficient useful information.²¹⁵ A controlled narrative produces reports that are less accurate than a free narrative, but somewhat more complete. The interrogatory report form produces an even more complete report, but at an additional

²¹⁰*Id.* at 55.

²¹¹*Id.*

²¹²This situation feeds on itself, since the results of the interrogation are then stored in the witness' memory, distorting and even replacing the original recollection. Subsequent interrogations may then find the witness more certain of the interrogator's theory as he or she recalls the first interrogation rather than what he or she actually saw and heard. *Id.* at 55-56.

²¹³E. Loftus, *supra* note 135, at 90-91.

²¹⁴*Id.*; *Stanford Note, supra* note 1, at 985-86.

²¹⁵*Stanford Note, supra* note 1, at 986.

sacrifice in accuracy.²¹⁶ In one study,²¹⁷ subjects viewed a film showing a park scene in which a man was suddenly shot and robbed. The investigators listed 150 details which a witness might observe and then tested the subjects with narrative and interrogatory forms of questions. Using a narrative form, the subjects were 91 percent accurate in the details they recalled. However, they remembered only 21 percent of the details in the film. Interrogatory reports were 75 percent complete but only 56 percent of the answers were accurate.

Changing even one word in a question can dramatically change the answer. Witnesses describing a basketball player said his height was 79 inches when asked "How tall was the basketball player?" When the question was "How *short* was the basketball player?", however, the average answer dropped by nearly a foot—to 69 inches.²¹⁸ Similar deviations were found in subjects asked to estimate the length of a movie. The question "How long was the movie?" brought an average response of 130 minutes. The length of the movie dropped by one-half hour when the question was "How short was the movie?"—the average response was 100 minutes.²¹⁹

Lineups, showups, and photo spreads provide tremendous areas for these distorting factors to operate. The danger of suggestive influences in such techniques is well known,²²⁰ but even a well-run lineup bears a significant chance of error. The lineup is a multiple-choice recognition test, and is really a type of the interrogatory report form of questioning.²²¹ With this form of questioning, we can expect both more identifications and more inaccuracies since the witness tends to choose, even inaccurately, when faced with a multiple choice forced response. In theory, the witness may understand that the actual criminal may not be in the lineup. Nevertheless, many witnesses feel that the police would not conduct the lineup unless they had arrested a likely suspect. Thus, the witnesses, even though honestly attempting to find the true criminal, may end up choosing the person in the

²¹⁶*Id.*

²¹⁷Lipton, *On the Psychology of Eyewitness Testimony*, 62 *J. Applied Psychology* 90-93 (1977); see E. Loftus, *supra* note 135, at 92.

²¹⁸Harris, *Answering Questions Containing Marked and Unmarked Adjectives and Adverbs*, 97 *J. Experimental Psychology* 399-401 (1973).

²¹⁹*Id.*

²²⁰See, e.g., E. Loftus, *supra* note 135, at 144-152; A. Yarmey, *supra* note 32, at 152-61; Gilligan, *Eyewitness Identification*, 58 *MIL. L. Rev.* 183 (1972); Levine & Trapp, *supra* note 1.

²²¹E. Loftus, *supra* note 135, at 144.

lineup who best matches their recollection of the perpetrator.²²²

A reliable lineup identification, then, depends heavily upon the similarity of the suspect and the other individuals (the distractors) in the lineup. In an ideal lineup, the distractors would resemble the suspect closely enough that a person totally unconnected with the case, with only a general description of the criminal, would have an equal chance of selecting any of the individuals. A grossly suggestive lineup may be rejected on constitutional grounds.²²³ Even where a lineup meets constitutional muster, though, psychologists can detect inherent biases, based on the “functional size” of a lineup.²²⁴

The “functional size” determines the actual number of real choices an individual has in selecting a person to identify in a lineup. For example, in a lineup of six persons, if five people are grossly different from the suspect (different races or sexes, for example), the eyewitness’ choice boils down to only the suspect—the functional size of the lineup is one. To determine functional size, a group of non-witnesses to the case are shown a photograph of the lineup, along with a description of the criminal’s gross physical characteristics.²²⁵ If the lineup is completely fair, the choices of the non-witnesses should be randomly distributed among the participants in the lineup.²²⁶ On the other hand, if the suspect is the only individual who closely matches the gross description, then the suspect will receive a disproportionate share of identifications. The functional size is calculated by dividing the total number of nonwitnesses by the number who chose the suspect. For example, if there were 40 non-witnesses, and 10 chose the suspect, the functional size of the lineup is four.

When the functional size of a lineup equals its actual size, then one could conclude that there were no obvious clues to distinguish the suspect from the distractors. Where the functional size is much smaller than the actual size, however, it would appear that the lineup was biased, with clues to point out the suspect.²²⁷ In

²²²*Stanford Note, supra* note 1, at 986.

²²³*Manson v. Brathwaite*, 432 U.S. 98 (1977); *Neil v. Biggers*, 409 U.S. 188 (1972); *United States v. Quick*, 3 M.J. 70 (C.M.A. 1977).

²²⁴*E. Loftus, supra* note 135, at 148 (citing an unpublished 1977 study by G.L. Wells and colleagues at Ohio State University).

²²⁵*Id.* A typical description might be, e.g., male, twenty-one to twenty-three years old, five foot seven to five foot eight inches tall, 150 to 160 pounds, with black, medium-length hair.

²²⁶The number of non-witnesses must be large enough to obtain a statistically valid sample.

²²⁷It is possible that the functional size might even exceed the actual size of the lineup. This would occur when the lineup is biased toward one of the distractors.

either case, the functional size provides a ready tool for both the police and a trial jury to measure the effectiveness of the lineup.

An additional source of error in lineups is the photo-biased lineup. A witness commonly will be asked to inspect a photo spread one or more times before viewing anyone in a lineup. If the suspect in the lineup was seen in a photo spread, his chances of being "identified" in a later lineup increase dramatically. **This** is true even if the witness simply passed over the suspect in the photo spread and did not identify him there. One experiment showed that as many as 20 percent of the witnesses to a staged "crime" would identify a totally innocent person at a lineup simply because his picture appeared in an earlier photo spread.²²⁸ When a photo spread precedes a lineup, the crucial identification is made at the photo spread. A witness who picks a suspect, rightly or wrongly, from a photo array, is not likely to select anyone else in a later identification procedure.²²⁹

D. JURY EVALUATION OF THE WITNESS.

The final phase in translating an event from a crime scene to the courtroom is the jury's evaluation of testimonial accuracy and witness credibility.²³⁰ At this point, the jury decides whether to accept the witness' testimony as an accurate reflection of what actually happened. To make this determination, jurors are expected to rely on their "common sense," "knowledge of human nature and the ways of the world," and "the inherent probability or improbability of the evidence" in light of **all** the circumstances of the case.²³¹

Several errors can occur in the jury evaluation process. Jurors are instructed to evaluate a witness' credibility based on his or

²²⁸**Brown**, Deffenbacher & Sturgill, *Memory for Faces and the Circumstances of Encounter*, 62 *J. Applied Psychology* 311-18 (1977) *see* **E. Loftus**, *supra* note 135, at 150-51.

²²⁹**E. Loftus**, *supra* note 135, at 150-52.

²³⁰**Testimonial** accuracy and witness credibility are distinct concepts. Witness credibility looks to determine a witness' honesty—whether the witness is stating what he or she believes to be the truth. Testimonial credibility, on the other hand, focuses on the objective accuracy of the facts related in light of the other evidence at trial. A highly credible witness may be honestly mistaken and testify inaccurately, especially when subconscious influences act to affect perception or memory. On the other hand, a witness with low credibility may relate perfectly accurate testimony. The distinction is important in determining what evidence may be used to impeach or bolster the witness. *See, e.g.*, Mil. R. Evid. 608(a) (limiting attacks on witness credibility to the witness' character for truthfulness or untruthfulness).

²³¹**Dep't of Army**, Pam. No. 27-9, Military Judges' Benchbook, para. 2-29 (May 1982).

her “sincerity and conduct in court.”²³² When the witness’ demeanor reflects a misplaced confidence in the accuracy of the testimony, the jury is likely to overvalue the testimony. This can be particularly true when the witness’ memory is distorted by the subconscious processes outlined earlier. Moreover, in such a situation, cross-examination is not likely to be an effective tool to undermine credibility.²³³ Without assistance, the jury may be unable to adequately evaluate the witness. In extreme cases, where an organic or mental disorder affects a witness’ ability to testify accurately or honestly, the expert’s contribution has already been recognized.²³⁴ This recognition needs to be extended to the otherwise normal witness whose testimony has been affected by the psychological processes described above.

A second source of error arises when the jury’s “common knowledge” leads to erroneous conclusions about the believability of a witness’ testimony. A witness who relates a story which is internally inconsistent will probably have his or her entire testimony rejected by the jury. Yet an expert may be able to demonstrate that the inconsistencies vanish when more closely examined. For example, a jury hearing a rape victim’s testimony may reject her claim of lack of consent if her story shows that she did not escape from the assailant despite opportunities to do so, that she failed to cry out or warn other people, or that she returned to the assailant at a later time. Yet each of these reactions can readily be explained as a manifestation of “rape trauma syndrome,” an expected psychological reaction to the trauma of a sexual attack.²³⁵ Similar “inconsistencies” may appear in a case involving a child victim of sexual abuse.²³⁶

A jury may also reject a witness’ testimony because it finds that part of the story conflicts with other evidence. If the jury decides the witness is wrong on any particular point, it may decide that the witness is untrustworthy or unreliable in general

²³²*Id.*, para. 7-7.

²³³*Stanford Note*, *supra* note 1, at 994-95.

²³⁴*See supra* text accompanying notes 23-30; *see also* Juviler, *Psychiatric Opinions on the Credibility of Witnesses: A Suggested Approach*, 48 Cal. L. Rev. 648, 671-73 (1960) (discussing testimony by the psychopathic witness); *Stanford Note*, *supra* note 1, at 1020 n.235.

²³⁵*See* United States v. Tomlinson, 20 M.J. 897 (A.C.M.R. 1985); People v. Bledsoe, 36 Cal. 3d 236, 203 Cal. Rptr. 450, 681 P.2d 291 (1984); Burgess & Holmstrom, *Rape Trauma Syndrome*, 131 Am. J. Psychiatry 981 (Sep. 1974); J. Ross, *The Overlooked Expert in Rape Prosecutions*, 14 U. Tol. L. Rev. 707 (1983).

²³⁶Wells, *Child Sexual Abuse Syndrome; Expert Testimony: To Admit or Not to Admit*, 57 Fla. B.-J. 673 (1983); *see also* State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983) (pointing out that the reactions of a victim of sexual abuse might at first glance “seem to be at odds with behavioural norms”).

and disbelieve other portions of the testimony. Yet in certain cases such suspicion may be totally unwarranted. For example, consider two witnesses who testify about an accident. One states he saw one car pull out into an intersection five seconds before the incident while the other says it was thirty seconds. Both witnesses cannot be objectively correct. Nonetheless, both may be accurately reporting what they perceive. It is possible for observers viewing a scene from different observation points to perceive varying time periods due to stress.²³⁷ If a jury knows this, they are less likely to ascribe the discrepancy to bias or dishonesty on the part of one witness, thus preserving the credibility of other testimony.

E. SUMMARY.

A witness' perception of, reaction to, memory of, and subsequent recounting of a crime scene can be affected by a multitude of psychological factors which have a bearing on the credibility of the witness' testimony. While all the factors qualifying the reliability of a witness' testimony are not present in every case, they can be an important factor in the jury's evaluation. An expert who explains these factors and how they operate in a given case can be a valuable adjunct to the fact-finding process. The next part of this article focuses upon the Federal and the Military Rules of Evidence²³⁸ and the extent to which expert testimony on credibility issues should be admitted under the Rules.

VI. ADMISSIBILITY UNDER THE RULES OF EVIDENCE.

The Federal Rules of Evidence were approved by the Supreme Court in November, 1972, reviewed by Congress, and enacted into law effective July 1, 1975.²³⁹ The rules made several changes from the common law and provide a foundation for increased use of

²³⁷See *supra* text accompanying notes 151-54.

²³⁸The Military Rules of Evidence are based on the Federal Rules. The pertinent sections relating to relevant testimony (Mil. R. Evid. 401-405), expert testimony (Mil. R. Evid. 701-705), and impeachment (Mil. R. Evid. 607-608) are nearly indistinguishable from the corresponding federal rules. Because of this, this article will not distinguish between a military rule and its corresponding federal rule unless otherwise noted.

²³⁹Congress refused to approve the new rules when it first reviewed them. Pub. L. 93-12, 87 Stat. 9 (1973), prevented the proposed rules from taking effect without Congress' express sanction. Final Congressional approval came on January 2, 1975. Pub. L. 93-595, 88 Stat. 1926 (1975). The Military Rules of Evidence became effective, after Presidential approval, on September 1, 1980. Exec. Order No. 12,198, 3. C.F.R. 151 (1981).

expert testimony. Rule **702** states: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, **skill**, experience, training, or education, may testify thereto in the form of an opinion or **otherwise.**”²⁴⁰ The rules also provide **an** explicit foundation for opinion testimony on credibility issues. Rule 608 **allows** the credibility of a witness to be attacked or supported “by evidence in the form of opinion or **reputation,**”²⁴¹ thus providing a vehicle for the expert to give his opinion on witness credibility issues.²⁴² A witness may also provide general character evidence, where appropriate, in the form of an **opinion.**²⁴³ This blessing of opinion evidence gives an open invitation to the use of appropriate experts when credibility issues are **raised.**²⁴⁴ Nonetheless, the trial judge will retain a wide latitude to determine the propriety of admitting evidence. Under Rule 403,²⁴⁵ even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. A trial judge’s decision under this rule is reviewable only for an abuse of discretion.²⁴⁶

Rule 702 requires that expert testimony help to understand the evidence or determine a “fact in issue.” The credibility of a witness is always in issue: in cases with little physical evidence it may be the crucial point in **issue.**²⁴⁷ Testimonial accuracy and

²⁴⁰Fed. R. Evid. 702.

²⁴¹Fed. R. Evid. 608.

²⁴²**Military** law had previously allowed a witness to give opinion testimony on another’s credibility. MCM, 1969, para. 138f. The pre-Rules federal practice, however, limited witnesses to reputation evidence, *see* United States v. Curtis, 644 F.2d 263, 267 (3d Cir. 1981), which arguably might have barred an expert from offering opinion evidence on credibility issues. The Federal Rules removed this potential barrier. See S. Saltzburg, L. Schinasi & D. Schlueter, Military Rules of Evidence Manual 188 (1981). [hereinafter Military Manual]; D. Louisell & C. Mueller, Federal Evidence § 303 (1979) [hereinafter Federal Evidence]; S. Saltzburg & K. Redden, Federal Rules of Evidence Manual 346–47 (3d ed. 1982) [hereinafter Federal Manual].

²⁴³Mil. R. Evid. 405; Fed. R. Evid. 405.

²⁴⁴**If** any lay person may freely give an opinion on credibility, it **makes** little sense to decide that experts, out of the entire universe of persons who might have an opinion, would know **so** little about the area that they should be banned **from** testifying. *See* Barefoot v. Estelle, 463 U.S. 880, 896–97 (1983); United States v. Hill, 655 F.2d 512, 516 (3d Cir. 1981); Federal Evidence, *supra* note 242, § 382, at 646.

²⁴⁵Mil. R. Evid. 403; Fed. R. Evid. 403.

²⁴⁶United States v. Mukes, 18 M.J. 358, 359 (C.M.A. 1984); United States v. Tomlinson, 20 M.J. 897, 900 (A.C.M.R. 1985). In this respect, the standard of appellate review is little changed **from** the pre-Rules practice. See *supra* text accompanying notes 100–103.

²⁴⁷**The** credibility of witnesses is always in issue in every case.” United States v. Ryan, 21 M.J. 627, 629 (A.C.M.R. 1985).

witness credibility questions fit well within the range of potential expert testimony.

The rules also lay to rest one of the major objections to credibility testimony—that the testimony invades the province of the jury.²⁴⁸ Expert testimony does not have to relate to issues completely unanswerable by the trier of fact alone. The Rules “are intended to broaden the admissibility of expert testimony”²⁴⁹ and the expert need only be able to assist the jury. The standard is helpfulness—“whether the untrained layman would be qualified to determine intelligently and to the best possible degree, the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute.”²⁵⁰

The final two words of Rule 702, “may testify thereto in the form of an opinion *or* otherwise,” indicate that experts are not limited to expressing their opinions based upon hypothetical facts which a party expects to prove. Where relevant to the case, the expert is encouraged to “give a dissertation or exposition of scientific or other principles . . . leaving the trier of fact to apply them to the facts.”²⁵¹

The leading federal case to decide the use of psychological testimony on credibility issues under the Federal Rules is *United States v. Downing*.²⁵² In *Downing* the defendant sought reversal of his fraud conviction. The government evidence indicated that a group of individuals known as the Universal League of Clergy (U.L.C.) sent representatives to national trade shows, where they contacted manufacturers expressing an interest in their product line. By using forged credit and bank references, the U.L.C. representatives induced the manufacturers to ship goods on credit. U.L.C. then sold the goods, without making any payment to the manufacturers. Twelve witnesses identified *Downing* as a man they knew as “Reverend Claymore.”²⁵³ *Downing* contended that the witnesses were mistaken in their identification, and claimed on appeal that the trial judge erred by refusing to permit expert testimony on the unreliability of eyewitness testimony. The

²⁴⁸This ground for excluding evidence has been criticized as a “shibboleth which . . . would deprive the jury of important information.” P. Wall, *Eyewitness Identification in Criminal Cases* 213 (1975).

²⁴⁹*United States v. Snipes*, 18 M.J. 172, 178 (1984).

²⁵⁰Fed. R. Evid. 702 advisory committee’s note; *Stanford* Note, *supra* note 1, at 1016-17; see also Fed. R. Evid. 704 (doing away with the “ultimate issue” objection to an expert’s testimony).

²⁵¹Fed. R. Evid. 702 advisory committee’s note.

²⁵²753 F.2d 1224 (3d Cir. 1985).

²⁵³*Id.* at 1227.

United States Court of Appeals for the Third Circuit, noting that the case presented a question of first impression in the circuit, vacated the conviction and remanded the case for further consideration of the issue.

Downing held that in deciding whether novel expert testimony meets the “helpfulness” standard, a trial court should focus on these areas: the reliability of the scientific principles upon which the expert testimony rests; the likelihood that introduction of the testimony may in some way overwhelm or mislead the jury; and whether the expert testimony is sufficiently tied to the facts of the case that it aids in resolving the factual dispute.²⁵⁴

Downing also noted that evidence meeting the standards of Rule 702 could be excluded under Rule 403, which gives the trial court discretion to exclude relevant evidence if the probative value is substantially outweighed by the danger of unfair prejudice; confusion of the issues or misleading the members; or undue delay, waste of time, or needless presentation of cumulative evidence.²⁵⁵ Rule 403 allows the trial court to consider, for example, the extent to which other evidence addresses the point the expert will make, whether other evidence and witnesses completely vitiate the expert’s testimony, and whether the expert testimony is central to the critical issues in the case.

A second case used the four-part test set out in *United States v. Amaral*²⁵⁶ to evaluate psychological testimony. In *United States v. Smith*,²⁵⁷ the United States Court of Appeals for the Sixth Circuit considered an issue similar to Downing. Smith had been convicted of bank robbery after three bank employees identified Smith as one of the robbers. Smith unsuccessfully tried to have an expert testify on the unreliability of these eyewitness identifications. The three employees, three weeks after the robbery, viewed a photo array containing six photos, including Smith’s. None picked him out. Four months later, the FBI requested the three to view a lineup. At the lineup, **all** three employees identified Smith, and they repeated their identification in court. The defense expert, Dr. Fulero, was prepared to testify that the later lineup was not independent of the photo array, and that under hypothetical facts identical to the actual case, the witness viewing the lineup could pick the defendant out because

“Other courts have focused on similar concerns when considering psychological testimony. See *supra* text accompanying notes 104-132.

²⁵⁴Fed. R. Evid. 403.

²⁵⁵488 F.2d 1148 (9th Cir. 1973).

²⁵⁷736 F.2d 1103 (6th Cir.), *cert. denied*, 105 S. Ct. 213 (1984).

he had been in the photo array, and not because he was in the **bank**.²⁵⁸

The circuit court focused on the four *Amaral* factors: 1) qualified expert; 2) proper subject; 3) conformity to a generally accepted explanatory theory; and 4) probative value versus prejudicial effect. The court noted that the psychologist had been acknowledged as an expert and found that his testimony concerned a proper subject. In addition, the expert did not just generally discuss eyewitness testimony, but focused upon factors present in the facts of the case before the court. Moreover, those factors might have refuted common assumptions about the reliability of eyewitness identification.

The court also noted that the field of psychology had progressed far enough that “the day may have arrived when [this] testimony can be said to conform to a generally accepted explanatory theory.”²⁵⁹ Finally, the court found the evidence was not unduly prejudicial²⁶⁰ and concluded the trial court had erred in excluding the testimony.²⁶¹

Do *Smith* and *Downing* foreshadow a new era where psychological testimony will receive a wholesale embrace from the courts? Can we expect to see expert testimony in every case in which an eyewitness account is furnished? Undoubtedly not. The two cases, while reflecting a healthy recognition for the potential value of expert testimony, still leave substantial hurdles for the psychological expert to clear.

First, a party who offers the psychological expert solely to call attention to the general unreliability of eyewitness identification will probably find the evidence excluded. This has been a common failing thus far. The expert typically provides a “laundry list” of factors which might affect perception, memory, and recall to support the theory that eyewitness accounts are not always accurate.²⁶² Such testimony, however, does not provide the guideposts needed by the trier of fact. The jury must decide

²⁵⁸*Id.* at 1105-06.

²⁵⁹*Id.* at 1106-07.

²⁶⁰The court determined that the “prejudice” test of Rule 403 meant only prejudice to the defendant, not to the government. *Id.* at 1107.

²⁶¹The court found the error harmless, however. Smith’s palm print was found at one bank teller’s counter. This evidence alone was enough to destroy Smith’s alibi defense and render the expert testimony superfluous. *Id.*

²⁶²Dr. Robert Buckhout has prepared a list of fifteen factors which he presents to the court when he is called to testify. Buckhout & Greenwald, *supra* note 41, at 1299-1300.

whether a *particular* witness account is **accurate**.²⁶³ Eyewitnesses do provide accurate accounts, sometimes under amazingly adverse conditions.²⁶⁴ Expert testimony is helpful only to the extent it assists the jury in separating the accurate eyewitness accounts from the unreliable ones.

Both *Smith* and *Downey* reject any wholesale endorsement of psychological testimony without regard to the facts of the particular case being tried. *Downey* requires the proponent of expert testimony to “make an on-the-record detailed proffer to the court, including an explanation of precisely how the expert’s testimony is relevant to the eyewitness identifications under consideration.”²⁶⁵ General testimony will not suffice. “The offer of proof should establish the presence of factors (e.g., stress, or differences in race or age as between the eyewitness and the defendant) which have been found by researchers to impair the accuracy of eyewitness identifications.”²⁶⁶ *Smith* noted that the expert’s testimony was specifically related to the case being tried, that the expert “offered proof based upon the *facts* of this case,”²⁶⁷ and the testimony was “relevant to the exact *facts* before the court.”²⁶⁸

McCloskey and Egeth note that general denigrations of eyewitness testimony will tend to make jurors more skeptical of eyewitness testimony without necessarily improving their ability to distinguish between accurate and inaccurate witnesses.²⁶⁹ The net result would be a decline in convictions with no assurance that the jurors are making any better decisions in separating the

²⁶³ See Convis, *supra* note 1, at 578–79.

²⁶⁴ **Kaplan** describes one such event at Stanford University. Ten students disrupted a faculty meeting and were photographed in the act. The university began trying to identify the students for disciplinary action. Members of the administration knew some of the students, but one demonstrator proved to be elusive—until a police officer saw the picture. He said he had seen her once before, at night, several weeks earlier, amid a large crowd of demonstrating students who were throwing rocks through the library windows. He did not approach her at the time, but wrote down the license number of her car. The car belonged to a Stanford student who turned out to be the person in the photograph.

Kaplan summed up this experience: “To this day, I cannot understand how the police officer identified the woman after seeing her on one fleeting occasion, at a moment of considerable stress, with bad visibility as well—but he had indisputably done it.” E. Loftus, *supra* note 135, at viii–ix (foreword by J. Kaplan).

²⁶⁵ *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985).

²⁶⁶ *Id.*

²⁶⁷ *United States v. Smith*, 736 F.2d 1103, 1106 (6th Cir.), *cert. denied*, 105 S. Ct. 213 (1984) (emphasis in original).

²⁶⁸ *Id.*

²⁶⁹ **McCloskey & Egeth**, *Eyewitness Identification: What Can a Psychologist Tell a Jury*, 38 *Am. Psychologist* 550, 551–52, 555 [May 1983].

guilty from the innocent.²⁷⁰ In part, this is because general denigrations focus on the wrong question. Such testimony may provide a wealth of reasons *why* any eyewitness account *might* be inaccurate while ignoring the question of *whether* the *particular* eyewitness at hand is reliable.²⁷¹

This error can also be found in other uses of psychological testimony. For example, in *United States v. Moore*,²⁷² an accused in a rape prosecution claimed that the victim had consented to intercourse, and produced considerable evidence that the victim had provided little resistance to his advances. Three psychologists testified on behalf of the government that the victim might unknowingly place herself in a sexually compromising situation and that because of an early history of parental abuse she might not resist an authority figure as much as other women would. While the majority approved the testimony, Chief Judge Everett correctly pointed out in dissent that the experts were addressing the wrong question. The testimony could readily explain *why* the victim would grant a request for intercourse, but it had little relevance to determine *whether* she did.²⁷³

A similar mistaken focus has occurred in entrapment cases. In *United States v. Hill*,²⁷⁴ a defendant charged with narcotics distribution claimed that the government informant had induced him to arrange narcotics sales to two other government agents. He offered expert psychological testimony to establish his “unique susceptibility to inducement” to support his entrapment defense.²⁷⁵ The Court of Appeals for the Third Circuit held that the trial judge erred in excluding the testimony because it could assist the jury “to properly evaluate the effect of appellant’s subnormal intelligence and psychological characteristics on the existence of inducement or predisposition. . . .”²⁷⁶ Once again this conclusion misses the mark. A person’s “unique susceptibility to inducement” does explain *why* he or she would be predisposed to readily accept an invitation to join a criminal venture. But that is not the question the jury decides. If an individual is predisposed, it matters little whether the predisposition results from a “unique

²⁷⁰ *Id.*

²⁷¹ *See* *United States v. Hulen*, 3 M.J. 275, 277 (C.M.A. 1977) (Cook, J., concurring).

²⁷² 15 M.J. 354 (C.M.A. 1983).

²⁷³ *Id.* at 373.

²⁷⁴ 655 F.2d 512 (3d Cir. 1981); *see also* *State v. Woods*, 20 Oh. Misc. 2d 1, 484 N.E.2d 773 (Ct. Comm. Pl. 1985).

²⁷⁵ 655 F.2d at 514-15.

²⁷⁶ *Id.* at 516.

susceptibility” or simply common greed.

Thus, expert testimony on credibility issues should not be admitted merely because another witness has provided evidence. The party offering the expert must be able to point to facts proven at trial, which, when combined with the expert’s testimony, resolve specific issues about that particular witness’ believability on points pertinent to the outcome of the case.

The second hurdle which the proponent of expert testimony must overcome is to then show the reliability of the particular factors which the expert will use to point the jury toward a particular conclusion. *Downing* abandoned the *Frye*²⁷⁷ standard in favor of a more flexible approach designed to recognize new scientific advances. *Downing* advises the trial judge to consider a number of factors, including scientific acceptance or rejection, the relationship of the new technique to established modes of scientific analysis, the existence of specialized literature dealing with the technique, the qualifications of the expert, the non-judicial uses to which the scientific technique is put,²⁷⁸ and the frequency of erroneous results.²⁷⁹

This standard does not require that the scientific technique be perfect. At the one extreme, if the scientific technique yields erroneous results as often as correct ones, the “technique” is no better than guesswork and fails to meet even the minimal relevance standards of Rule 401.²⁸⁰ On the other hand, a technique which is 100% accurate is certain to be found “reliable.”²⁸¹ Within these two extremes, however, “reliability” cannot

²⁷⁷*Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), required that a scientific technique have obtained a “general acceptance in the particular field to which it belongs” before it was admissible in court.

²⁷⁸The requirement to consider the non-judicial uses of the scientific technique can make the reliability determination dependent upon the inference which the jury is expected to draw. For example, some courts considering the admissibility of expert testimony on “rape trauma syndrome” have allowed the testimony when the defense has argued that the victim’s actions immediately after the incident were inconsistent with her claimed lack of consent. Those courts allowed this testimony because the expert could identify these apparently inconsistent actions as manifestations of the syndrome. The same courts, however, rejected rape trauma syndrome testimony as direct evidence that a rape occurred. The courts noted that the syndrome was not a diagnostic device and that the psychologists treating victims were encouraged to avoid objective determinations inconsistent with the victim’s claim. *See generally* *United States v. Tomlinson*, 20 M.J. 897 (A.C.M.R. 1985); *People v. Bledsoe*, 36 Cal. 3d 236, 203 Cal. Rptr. 450, 651 P.2d (1984).

²⁷⁹*United States v. Downing*, 753 F.2d 1224, 1238–39 (3d Cir. 1985).

²⁸⁰*Mil. R. Evid.* 401.

²⁸¹*See generally* Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States A Half-Century Later*, 80 Colum. L. Rev. 1197 (1980).

be an objective standard, but must be assessed in light of the potential use of the scientific technique by the jury.

The courts have continually expressed the fear that a jury will be overwhelmed by expert testimony based on an inadequate methodology.²⁸² Where the scientific technique does not always yield perfect results, the possibility exists that the jury will take the expert testimony for more than it is worth, and ignore other probative evidence. To solve this problem, one writer suggests evaluating reliability in terms of jury expectations.²⁸³ *Downing* also advocates this type of analysis to help determine whether the expert testimony will confuse or mislead the jury.²⁸⁴ Under this approach, reliability is measured by comparing the absolute accuracy of the methodology against jury expectations. If the absolute accuracy meets the jury's expectations, then the technique is "reliable"—the jury will give the testimony its proper weight in evaluating the evidence. Under this standard, a technique which is uncertain or has a relatively high error rate might be "reliable" if the jury understands its weaknesses and takes them into account. On the other hand, even a relatively accurate technique will be rejected if it has become "shrouded with an aura of near infallibility akin to the ancient oracle of Delphi."²⁸⁵

The trial judge would engage in a two-step process to determine reliability. First, the research literature, studies, theories underlying the technique, and the non-judicial uses of the technique must allow the court to conclude that the technique has some probative value with respect to the issues in the case, and, within very broad limits, how accurate the technique is. "Accuracy" does not have to be defined by any type of mathematical certainty, so long as it provides some basis for measurement against juror expectations. The court would then determine if the technique can be presented to the jury in a manner such that the jury's expecta-

²⁸²See *supra* text accompanying notes 118-119.

²⁸³*Moenssens, Admissibility of Scientific Evidence—An Alternative to the Frye Rule*, 25 Wm. & Mary L. Rev. 545 (1984).

²⁸⁴*United States v. Downing*, 753 F.2d 1224, 1239 (3d Cir. 1985).

²⁸⁵*United States v. Alexander*, 526 F.2d 161, 168 (8th Cir. 1975). This type of analysis would explain why some relatively accurate scientific methods continue to be rejected by the courts. For example, studies show that polygraphs, in the hands of trained operators, are accurate in detecting deception up to 90% of the time. See S. Abrams, *Polygraphy*, in E. Imwinkelried, *Scientific and Expert Evidence*, 755-804 (1981). The general rejection of polygraph testimony may be related to a judicial conclusion that jurors would treat it as infallible. See *id.*; *United States v. Masri*, 547 F.2d 932 (5th Cir.), *cert. denied*, 431 U.S. 932 (1977); *United States v. Marshall*, 526 F.2d 1349 (9th Cir. 1975).

tions will not cause them to overvalue the technique.²⁸⁶

Research on testimonial accuracy and witness credibility has reached the point where many of its conclusions should be regarded as "reliable." Since the turn of the century, psychologists have investigated the factors of perception, reaction, memory, recall, and evaluation that influence testimony.²⁸⁷ Psychologists are uncovering particular factors which can and do affect the reliability of witness accounts. A substantial body of "specialized literature now exists."²⁸⁸ The *Smith* court noted that the American Psychological Association has developed a sub-field in the area of eyewitness identification and that the discipline contains "the exactness, methodology, and reliability of any psychological research."²⁸⁹

Moreover, it is difficult to believe that the jury is likely to overvalue such testimony. The psychologist does not testify about novel theories or devices which a jury may regard as "magic," but points out basic psychological factors which affect a witness or victim. The psychologist testifying on witness credibility should not express an ultimate opinion on the accuracy of the testimony, but should merely outline the relevant psychological findings and factors which may influence the believability of the witness' account. The trial judge can limit any unjustified "aura of scientific reliability" by cautioning the jurors that the expert's testimony forms only one piece of the evidence they must consult, by limiting the expert to those particular factors which affect the witness' account in the case before the court,²⁹⁰ by insuring that the expert has sufficient qualifications to recognize and discuss the limitations of the scientific technique,²⁹¹ and by requiring the

²⁸⁶Where the court fears that the accuracy of a technique is not up to jury expectations, it may be possible to lower those expectations rather than exclude the evidence. If the experts, in their testimony, outline both the strengths and weaknesses of the technique, the jury may gain an appreciation of the limitations within which they should consider the testimony. In such a case, the court should apply a higher standard to qualify the expert, in order to be sure that the expert can adequately deal with the issues without misleading the jury. See *Stanford Note*, *supra* note 1, at 1014-16; cf. *People v. Russell*, 70 Cal. Rptr. 210, 443 P.2d 794, 801 (1968) (expert testimony on credibility must be presented in a form which ensures that the knowledge it contains can be effectively communicated to the jury).

²⁸⁷See *supra* text accompanying notes 133-238.

²⁸⁸See, e.g., E. Loftus, *supra* note 135; L. Taylor, *supra* note 135; A. Yarmey, *supra* note 32; Buckhout & Greenwald, *supra* note 41; McCloskey & Egeth, *supra* note 269.

²⁸⁹*United States v. Smith*, 736 F.2d 1103, 1106 (6th Cir.), *cert. denied*, 105 S. Ct. 213 (1984).

²⁹⁰See *supra* text accompanying note 265.

²⁹¹See *supra* note 286.

expert to set out the facts and data which underlay any conclusions.²⁹²

Finally, accepting the reliability of psychological testimony in general does not require a trial court to admit such testimony in every case, regardless of the factors the expert claims are operating. The impact of some factors upon an eyewitness are well known and verifiable; for example, the effect of stress on perception or the tendency to overestimate time periods.²⁹³ For other factors, however, conflicting studies or divergence of opinion may make it impossible to conclude that the factor has any probative value for the jury. For example, the relative abilities of field-independent and field-dependent persons to remember faces have been the subject of numerous conflicting studies. Two studies, one in 1958 and one in 1964, tested the ability of male and female subjects to recognize photographed faces.²⁹⁴ Each found a strong correlation between field dependence and accuracy, with the field-dependent persons significantly better at remembering the photographs. However, later studies performed in the late 1970's produced opposite results.²⁹⁵ In these studies, field-independent persons, especially males, were significantly more accurate. In light of these results, a trial judge would be fully justified in refusing to permit an expert to testify that field-dependence or independence affected the accuracy of an eyewitness identification.²⁹⁶

The third hurdle which the proponent of expert testimony must overcome is showing that expert assistance would help the jury to properly evaluate the testimony. Expert testimony must assist the jury to understand the evidence or determine a fact in issue.²⁹⁷ If the expert would merely confirm commonly held assumptions about the witness, then the testimony is neither helpful nor necessary. For instance, psychological studies show that the longer a person views an object, the more accurate his

²⁹²See Mil. R. Evid. 705 (expert can be required to disclose facts and data underlying his conclusions).

²⁹³See *supra* text accompanying notes 160-64; 152-55.

²⁹⁴The studies are summarized in A. Yarmey, *supra* note 32, at 128-30. Field-dependence measures how an individual's perception of an item is affected by an organized field surrounding the item. A field-independent person tends to ignore the surroundings and deal with the item as an individual unit. See *id.* at 128-29.

²⁹⁵*Id.*

²⁹⁶After describing these studies, Yarmey concludes that "it is difficult to draw a firm conclusion regarding the relationship of cognitive types and facial recognition. Certainly more research. . . must be done." *Id.* at 129-30.

²⁹⁷Mil. R. Evid. 702.

recollection will be later.²⁹⁸ From the scientific standpoint, this study, which confirms the common assumption about the relation between exposure time and recollection, provides valuable information for the psychologist. It does not, however, tell the jury anything it does not already know. In other cases, the jury may only need to have the particular factor highlighted by the party presenting the evidence. Once brought to the jury's attention, the significance may be readily apparent. In this situation, the expert might be valuable in advising the attorney what points to develop and highlight in the presentation of the case. The expert would not, however, need to testify before the jury.

One of the most common reasons for excluding psychological testimony is that jurors are fully capable of evaluating the witness testimony without expert assistance.²⁹⁹ Conversely, virtually every case which has approved such testimony has mentioned that it would be valuable in exploding misconceptions about the average witness' reactions and perceptions.³⁰⁰ In light of the importance that the courts place on this issue, a key element in any offer of proof for expert psychological testimony should be evidence that the average juror is unlikely to comprehend or will improperly evaluate the factors that the expert will highlight. Yet there are few psychological studies to rely upon in this area. After her testimony was excluded from a 1971 trial on the grounds that it would not provide any information the jury did not already know, Loftus conducted a study at the University of Washington in 1977 and 1978.³⁰¹ Five hundred students filled out a questionnaire designed to test their knowledge of some of the factors

²⁹⁸E. Loftus, *supra* note 135, at 23.

²⁹⁹*See supra* text accompanying notes 61-62, 105, 124. Indeed, one commentator states that one of the reasons the courts have difficulty accepting psychological testimony is that many of the psychologist's conclusions appear self-evident when they are brought to the court's attention. *See Webster, On Gaining Acceptance: Why the Courts Accept Only Reluctantly Findings from Experimental and Social Psychology*, 7 Int'l J. Law and Psychiatry 407, 408 (1984).

³⁰⁰*See, e.g.*, United States v. Downing, 753 F.2d 1224, 1231-32 (3d Cir. 1985); United States v. Smith, 736 F.2d 1103, 1106 (6th Cir.), *cert. denied*, 105 S. Ct. 213 (1984) (expert would have refuted otherwise common assumptions about the reliability of eyewitness identification); United States v. Tomlinson, 20 M.J. 897, 902 (A.C.M.R. 1985) (expert testimony that emotional trauma may cause lapses or inconsistencies in testimony can play a useful role in disabusing widely held misconceptions about victims); State v. Chapple, 135 Ariz. 281, 660 P.2d 1208 (1983) (some of the "variables" in eyewitness identification directly contradict "common sense"); People v. Bledsoe, 36 Cal. 3d 236, 203 Cal. Rptr. 236, 681 P.2d 291 (1984) (expert can dispel common misconceptions); People v. McDonald, 37 Cal. 3d 351, 208 Cal. Rptr. 236, 690 P.2d 709 (1984) (factors bearing on eyewitness identification may be unknown, misunderstood, or contrary to intuitive beliefs of most).

³⁰¹*See* E. Loftus, *supra* note 135, at 171-77.

affecting eyewitness testimony.³⁰² The questionnaire results showed widely varying results. Over ninety percent of the students were aware that the wording of a question affects the answer that the witness is likely to give.³⁰³ Two-thirds knew that stress interferes with a person's ability to process information, and just over half were aware that cross-racial identifications were more difficult to make than same-race identifications.³⁰⁴ On the other hand, only eighteen percent knew that a violent event will be harder to remember than a non-violent one. Two-thirds of the students erroneously believed that increased violence improved the witness' ability to perceive and remember.³⁰⁵ The results, although far from **conclusive**,³⁰⁶ suggest that the courts and experts cannot merely assume that juror's preconceived notions do or do not correspond to the facts. Sometimes the common beliefs held by people conform to the psychological research, while in other cases they do not. A court faced with deciding whether expert testimony will assist the trier of fact will need evidence that demonstrates that the expert's conclusions are counter-intuitive or that without the expert the jurors are likely to misconceive the import of the factors affecting the eyewitness account.

In conclusion, Rule 702 provides a flexible standard for evaluating expert testimony. Under this standard, the courts should find that psychology has a valid scientific basis for evaluating various factors affecting testimonial accuracy and witness credibility. This will not, however, automatically permit a psychologist to testify in every case. Rather such testimony will depend upon showing: 1) the specific factors which relate to

³⁰²The questionnaire covered six factors: 1) cross-racial identifications; 2) the effect of stress on perception; 3) how the violence of the event affects perception; 4) how the wording of a question affects the witness' response; 5) how post-event information can alter the witness' memory of the event; 6) weapon focus.

³⁰³The questionnaire asked the students to compare the question "Did you *see* the broken headlight?" with "Did you see *a* broken headlight?" Ninety percent of the students answered that it made a difference which question was asked, since the first question assumed that there was a broken headlight.

³⁰⁴E. Loftus, *supra* note 135, at 173.

³⁰⁵*Id.* at 173-74.

³⁰⁶Since the subjects of the study were **all** university students, it is impossible to know if the same results follow in the general population. In addition, the study surveyed only a few of the myriad factors which might affect witnesses and how the average juror treats them. Loftus concludes that more research in this area is "badly needed." Loftus, *supra* note 135, at 177. *See also* Deffenbacher & Loftus, *Do Jurors Share a Common Understanding Concerning Eyewitness Behavior?*, 6 *Law & Hum. Behav.* 15-30 (1982) (discussing three later studies in the area); **Rahaim & Brodsky**, *Empirical Evidence Versus Common Sense: Juror and Lawyer Knowledge of Eyewitness Accuracy*, 7 *Law & Psychology Rev.* 1 (1982).

issues in the case being tried, 2) the relationship between those factors and the accuracy of the witness' account, and 3) that jurors will not normally understand how to evaluate those factors.

VII. OTHER CONSIDERATIONS IN THE RULES OF EVIDENCE.

A. *RULE 403.*

Rule 403 permits a trial court to exclude otherwise relevant evidence if its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."³⁰⁷ The rule provides the trial judge with discretion³⁰⁸ to reject evidence that does not advance the fact-finding function of the jury.

With respect to expert testimony, some of the considerations underlying Rule 403 are subsumed in the reliability test of rule 702.³⁰⁹ Fears that a party will be "unfairly prejudiced" because the jury will be overwhelmed by the expert's presentation or will not understand the limitations of the methodology used become part of the reliability inquiry. The trial judge, by ensuring that the expert phrases his testimony in terms the jury can easily understand and by defining "reliability" in terms of juror expectations,³¹⁰ minimizes the danger that the jury will give undue weight to the expert.

A second issue under rule 403, however, arises when an area of proposed expert testimony has been adequately addressed by other, non-expert evidence. When this occurs, the expert testimony should be rejected in favor of lay evidence. Expert testimony is relatively time-consuming and expensive. Where the testimony is merely cumulative on a point which has already been established by non-expert testimony, there is no reason for the expert.³¹¹ This might occur, for example, when a party offers an expert to impeach a witness' character for truth and veracity after lay evidence, prior convictions, contradictions in the testi-

³⁰⁷Mil. R. Evid. 403.

³⁰⁸See Federal Evidence, *supra* note 242, § 125.

³⁰⁹See *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985).

³¹⁰See *supra* text accompanying notes 282-286.

³¹¹In *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1101 (8th Cir. 1982), the appellate court upheld the exclusion of expert testimony, partly because the testimony was largely cumulative evidence and rule 403 "expressly permits testimony to be excluded" for this reason.

mony, etc., have already established the foundation needed to argue that the witness is untrustworthy.³¹²

B. RULES 404 AND 608.

Rule 404³¹³ generally bans evidence of character traits, whether expert or otherwise, to prove that a person "acted in conformity therewith on a particular occasion." Three exceptions are allowed; the third³¹⁴ permits "evidence of the character of a witness" meeting the standards of Rules 607,³¹⁵ 608,³¹⁶ and 609.³¹⁷

One of these rules, Rule 608(a),³¹⁸ allows the credibility of a witness to be attacked or supported by reputation or opinion evidence, subject to two limitations: 1) the evidence must relate solely to character for truthfulness or untruthfulness and 2) evidence of truthful character is admissible only when the witness' character for truthfulness has been attacked. The rule provides both a foundation and a limitation on the use of expert testimony.

By expressly endorsing opinion evidence, rule 608 removes an obstacle in federal practice to the use of expert testimony concerning witness veracity. American common law traditionally limited such impeachment to evidence of reputation in a relevant community; a witness' personal opinion was irrelevant.³¹⁹ The rule eliminates the distinction between reputation evidence and opinion evidence, which presented a continued barrier to expert testimony.³²⁰

An expert who sets out to attack another witness' credibility³²¹ may formulate, on the basis of tests, observations, and techniques, an opinion concerning the witness' disposition toward truthfulness or untruthfulness. This opinion falls well within the rule, assuming it meets the standards of Rule 702. Any person

³¹² See *supra* text accompanying notes 116-117.

³¹³ Mil. R. Evid. 404.

³¹⁴ The other two exceptions permit an accused to place his pertinent character traits in issue and either the accused or the prosecution (in limited instances) to place pertinent character traits of the victim in issue. Mil. R. Evid. 404(a)(1), (2).

³¹⁵ Mil. R. Evid. 607.

³¹⁶ Mil. R. Evid. 608.

³¹⁷ Mil. R. Evid. 609.

³¹⁸ Mil. R. Evid. 608(a). Rule 607 provides that any party may impeach a witness, while Rule 609 sets forth standards for using prior convictions to impeach.

³¹⁹ Federal Evidence, *supra* note 242, § 304. Military practice, even before the Military Rules of Evidence, permitted opinion testimony, in contrast to the prevailing federal practice at the time. See para. 138f(1), MCM, 1969.

³²⁰ Federal Evidence, *supra* note 242, § 304.

³²¹ "Credibility" in this sense refers to witness credibility—is the witness honest or dishonest? Testimonial credibility—whether an honest witness' testimony is accurate—does not fall within the rule. *Id.*; see *supra* note 230.

who has had an adequate opportunity to observe the witness³²² may testify as to his opinion. Where virtually anyone can give an opinion, there is no reason to exclude the expert opinion based upon a "reliable" methodology.³²³

The expert might also, based on instruments, tests, methodology, and observations of the witness, form an opinion about the witness' truthfulness in what he or she actually testifies to at trial or in a pretrial statement. This type of testimony does not fall within the rule: it is not character evidence, but merely an expert diagnosis whether the witness is lying on the stand.³²⁴ Since the rule limits opinion testimony to the witness' character, this second type of opinion will be excluded.³²⁵ Expert testimony that a witness has lied or told the truth on any particular occasion is unlikely to find approval under the rules of evidence, no matter how reliable it may be under Rule 702.³²⁶

The distinction between the two types of testimony becomes especially important when considering the expert opinion. Typically, the only requirement placed on a character witness is that the witness have had an adequate opportunity to observe the person whose character is in issue.³²⁷ This ensures that the witness has been sufficiently exposed to the person so that the witness' opinion is truly based on character traits, rather than a small number of incidents which may or may not accurately portray the person's character. Where the witness' contacts are minimal and fleeting, the witness will not be allowed to testify.³²⁸

³²²If the person's contacts with the witness were so fleeting that he or she would not have gained a reliable opinion of the witness' character he or she will not be permitted to testify. See *infra* text accompanying notes 327-28.

³²³See *Barefoot v. Estelle*, 463 U.S. 880, 896-97 (1983).

³²⁴Federal Evidence, *supra* note 242 § 304.

³²⁵*Id.*

³²⁶*Id.*; see also *United States v. Azure*, 801 F.2d 336 (8th Cir. 1986); *United States v. Cameron*, 21 M.J. 59 (C.M.A. 1985); *United States v. Wagner*, 20 M.J. 758 (A.F.C.M.R. 1985). The issue is currently before the United States Court of Military Appeals. See *United States v. Gipson*, 19 M.J. 301 (C.M.A. 1985), where the court specified the following issue: "Whether the military judge abused his discretion in not allowing the defense an opportunity to lay a proper foundation for the admission of the results of appellant's polygraph examination into evidence?" *Cf.* *United States v. Cox*, 18 M.J. 72 (C.M.A. 1984) (in dicta, court assumed Mil. R. Evid. 608 bars direct testimony that a particular story was truthful).

³²⁷See *United States v. Tomchek*, 4 M.J. 66, 72 (C.M.A. 1977).

³²⁸Compare *United States v. Perner*, 14 M.J. 181 (C.M.A. 1982) (psychiatric technician who had seen witness professionally on three occasions had an insufficient basis to testify about her truthfulness) and *United States v. McClure*, 11 C.M.A. 552, 29 C.M.R. 368 (1960) (investigating officer who only saw witness at the Article 32 investigation could not testify as to witness' character) with *United States v. Evans*, 36 C.M.R. 735 (A.B.R. 1966); *United States v. Cromwell*, 6 M.J.

With expert testimony, the courts must strictly enforce this requirement to maintain the distinction between a witness' character for truthfulness and the veracity of particular statements the witness made. It is easy to conceive of an expert who forms an opinion of an individual's character for truthfulness at a single encounter where the witness related details of the crime now being tried in court.³²⁹ If this expert testifies, any opinion on the individual's character must necessarily be based on the expert's judgment that the individual's story about the crime was truthful or deceitful. Such testimony would obliterate the distinction between truthful character and the veracity of particular statements. In such a case, the trial judge should utilize his or her discretion under Rule 403 and exclude the testimony as unfairly prejudicial, confusing, and misleading.³³⁰ Evidence is "unfairly prejudicial" when it is apt to be used for something other than its logical, probative force.³³¹ Here the legitimate inference from such expert testimony—that the witness has a truthful (or a dishonest) character—is inseparable from the illegitimate use of the testimony to imply that the witness' story was the truth (or a lie). Moreover, the illegitimate use is likely to weigh most heavily with the jury.³³² Only a strict requirement that the expert base an opinion on something more than a single story or account can preserve the integrity of the rule.

VIII. CONCLUSION.

Expert testimony on witness credibility traces its origins to the common law testimonial disqualifications of a witness. As the testimonial disqualifications vanished, the focus shifted from the witness' capacity to the credibility of the witness' testimony before the trier of fact. Expert testimony that once had been presented to the judge to disqualify a witness then went before the jury to impeach. More recently, this shift has accelerated as the courts and psychologists recognize that psychological considerations can affect the accuracy and believability of testimony from even "normal" witnesses. Two factors will continue to promote this shift: the court's recognition that psychology, as a science, has progressed to the point that hypotheses about human

944 (A.C.M.R. 1979); and *United States v. Spence*, 3 M.J. 831 (A.F.C.M.R.1977) (five, seven, and nine months exposure, respectively, to an accused provides sufficient foundation for reputation testimony).

³²⁹*E.g.*, *United States v. Cameron*, 21 M.J. 59 (C.M.A. 1985).

³³⁰*Mil. R. Evid.* 403.

³³¹*United States v. Williams*, 17 M.J. 548, 550 (A.C.M.R.1983), *petition denied*, 18 M.J. 432 (C.M.A. 1984).

³³²*United States v. Tomlinson*, 20 M.J. 897, 901-02 (A.C.M.R.1985).

behavior may be put forth, critically examined, and tested for reliability; and the expanded scope of expert testimony under rule **702**. As psychologists uncover the links which affect a witness' perception, memory, and recitation of an event, and demonstrate that the average juror will misunderstand the import of those links, we will see a gradually expanding scope to expert testimony on credibility issues.

THE CIVIL LIABILITY OF SOLDIERS FOR THE ACTS OF THEIR MINOR CHILDREN

Captain L. Sue Hayn*

I. INTRODUCTION

A. PURPOSE AND SCOPE OF ANALYSIS

You have been asked to provide legal advice to a soldier who enters your office and informs you as follows:

I had been in the field for two weeks. I arrived home to my government quarters, dropped my TA-50 and muddy boots in the corner, and prepared for the traditional onslaught. My emotionally exhausted spouse began: "While you were away, our youngest child wrote her name with indelible ink on the school's bathroom wall, the twelve-year-old found your revolver and shot up the living room, including the government furniture and a playmate; and our teenager was so frightened by this commotion that she sped away from the house in the family car, skidded around the corner next to the headquarters building, and collided with an oncoming car, damaging the other car and injuring its occupants."

As my mind whirled, I paused long enough to wonder if the children had been injured, if they *would* be injured when I got my hands on them, and whether I am liable for these various incidents of damage, destruction, and personal injury. My concern regarding my liability brings me to you for advice.

*Judge Advocate General's Corps, United States Army. Currently assigned as Instructor, Administrative & Civil Law Division, The Judge Advocate General's School, U.S. Army. Formerly assigned as Commissioner, U.S. Army Court of Military Review, 1984 to 1985; Action Attorney and Branch Chief, Defense Appellate Division, U.S. Army Legal Services Agency, 1982 to 1984; Chief, Legal Branch, 7th Army—Combined Arms Training Center, Vilseck, Federal Republic of Germany, 1980 to 1982; Trial Counsel, Legal Assistance Officer, and Claims Officer, Southern European Task Force, Vicenza, Italy, 1979 to 1980. B.A., University of Oklahoma, 1975; J.D., University of Virginia, 1978; attended University of Massachusetts, 1971 to 1972, and University of Grenoble, France, 1973. Completed 34th Judge Advocate Officer Graduate Course, 1986; 89th Judge Advocate Officer Basic Course, 1979. Member of the bars of the State of Illinois, the United States Army Court of Military Review, the United States Court of Military Appeals, and the United States Supreme Court. This article was originally submitted in satisfaction of the thesis elective of the 34th Judge Advocate Officer Graduate Course.

You know that your new client's children haven't a penny, so they are likely to be unsatisfactory defendants. Obviously, the wage-earning soldier is the next best target for the plaintiff who is seeking relief in damages. Is the soldier parent pecuniarily liable for the damage caused by the soldier's children?

This article develops an analytical framework that a practitioner can use to determine parents' civil liability for their dependents' misconduct. It is not feasible to include every case that has considered this issue or to discuss every statute which may impose liability on the soldier parent. This article will, rather, examine the bases of parental civil liability for the acts of minor children by identifying cases and state statutes representative of common and statutory law and by addressing federal law and military regulations which bear on this issue.¹

B. TOPICS NOT COVERED

This article will address only the civil liability of soldiers within the continental United States. It will not consider the soldier's criminal liability or liability of any sort overseas. This discussion also excludes consideration of acts done by children at the direction of, with the consent or ratification of, or as agents for their parents. The article will discuss only those acts of which the parent is unaware at the time the act is committed. The article makes this distinction because it presumes that soldiers do not intend that their children cause injury or damage, but it acknowledges that children engage in activities that parents do not, and often cannot, anticipate.

11. METHOD OF ANALYSIS

A. OFF-POST INCIDENTS

To discern a parent's liability for the acts of a minor child, one must first determine what law applies to the given incident. The simplest situation exists when the child's misconduct occurs in territory that is exclusively under state control (as opposed to an area subject to federal legislative jurisdiction) and the parents reside in this state-controlled territory.

¹To facilitate the practitioner's use of this discussion, the cases contained in footnotes are arranged alphabetically by state and complete citations are included in each case reference. Parenthetical case explanations are included only when the point made in the case is not entirely consistent with the related text or when the case is of unusual significance as precedent.

This situation would occur, for example, where the family lives off post and the incident occurs off post in the same state as that in which the parents reside. In such a case, the applicable law obviously would be that of the state involved. Where the state of parental residence and the state in which the incident occurs are different, the practitioner must apply choice of law principles to determine which state law will apply.

B. ON-POST INCIDENTS

More complicated questions arise when the incident occurs on an installation. If state law remains operative on the installation and the parents live either on the installation or off post in the state in which the installation is located, the law of the state in which the installation is located will govern. If the installation is subject to exclusive federal jurisdiction, however, the practitioner must identify the specific nature of the plaintiff's cause of action in order to determine the applicable law.

By federal statute, current wrongful death and personal injury state laws apply as federal law on territories subject to exclusive federal jurisdiction.² Consequently, if the issue involves death or personal injury, the current state law will apply on the federal reservation.

Because this statute applies only to death and personal injury,³ however, the law governing property damage on areas of exclusive federal jurisdiction, in the absence of federal law in the given substantive legal area, is the state law extant at the time federal jurisdiction is obtained. When the state cedes jurisdiction to the

²16 U.S.C. § 457 (1982) states:

In the case of the death of any person by the neglect or wrongful act of another within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any State, such right of action shall exist as though the place were under the jurisdiction of the State within whose exterior boundaries such place may be; and in any action brought to recover on account of injuries sustained in any such place the right of the parties shall be governed by the laws of the State within the exterior boundaries of which it may be.

³See, e.g., *Vasina v. Grumman Corp.*, 644 F.2d 112 (2d Cir. 1981) (applying 16 U.S.C. § 457 (1976), the court found that the laws applicable on a federal reservation in wrongful death and personal injury actions are those of the state in which the reservation is located).

federal government, this state law remains effective and becomes federal law.⁴

To determine the applicable substantive law on a federal enclave, one must first identify the legal question involved. Where the laws of more than one jurisdiction are involved (as, for example, where a child steals a car off post and then drives onto a federal enclave and damages property), the practitioner must determine the applicable law under choice of law principles.

111. CHOICE OF LAWS

Within recent history, the bases for determining the applicable law have included the law of the place where the tort was committed,⁵ the law of the place of the wrong,⁶ the law of the state which has the most "significant relationship" to or the most "significant interest" in the occurrence and the parties,⁷ and other standards. Because the parental liability that this article discusses is sometimes based on the child's misconduct, rather than on the parent's negligence in supervising or controlling the child, the practitioner should note that jurisdictions that apply the "significant relationship" standard of liability to the tortfeasor will likely also apply this standard to determine vicarious liability.*

Given the substantial turmoil with respect to choice of law principles applicable to torts,⁹ the practitioner will be best able to resolve this issue by identifying relevant case law from the

⁴*See generally* Altieri, *Federal Enclaves, The Impact of Exclusive Legislative Jurisdiction Upon Civil Litigation*, 72 Mil. L. Rev. 55, 86-90 (1976); Dep't of Army, Pamphlet No. 27-21, Legal Services—Military Administrative Law, para. 2-12 (1 Oct. 1985); *see also* Arlington Hotel v. Fant, 278 U.S. 439 (1929); Chicago, Rock Island & Pacific Ry. v. McGlinn, 114 U.S. 542 (1885); Stokes v. Adair, 265 F.2d 662 (4th Cir. 1959).

⁵*See* 2 Beale, Cases on the Conflict of Laws § 378.1 (1902).

⁶*See* Restatement of Conflict of Laws § 377 (1934).

⁷The following states have adopted conflicts rules which focus either on the state's significant relationship to the occurrence and parties or upon the state's significant interest in the incident: Alabama, Arizona, California, District of Columbia, Illinois, Indiana, Iowa, Louisiana, Massachusetts, Maine, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, and Wisconsin. *See* A. Ehrnezweig, Conflicts in a Nutshell 217-18 (3d ed. 1974); *see also* Restatement (Second) of Conflict of Laws § 145 (1971).

⁸*See* Restatement (Second) of Conflict of Laws § 174 (1971).

⁹A current hornbook introduces its discussion of these principles as follows:

It is in the area of choice of law for torts that current ferment in conflict of laws thinking is most visible. In this chapter there is first focus on the traditional territorial rule, then a view of transitional cases reflecting dissatisfaction with the established rule and finally, a

applicable jurisdictions regarding the incident under consideration¹⁰ or by employing some basic principles of conflicts applicable to tort law.¹¹

To determine parental liability for acts of juvenile misconduct such as vandalism, misuse of a gun, and reckless driving, the practitioner must consider several bases of liability, including those recognized at common law and those created by statute. In analyzing parental liability under most circumstances, the most logical and thorough approach would be first to consider whether the parents are liable for the acts of their children pursuant to a general statutory scheme, then to examine any statutory schemes that impose parental liability under particular circumstances or for specific offenses, and finally to determine whether general liability is imposed at common law. Because offenses involving automobiles include a complex mixture of common and statutory law, they will be considered last.

IV. EMANCIPATION

When confronted with possible parental liability for the misconduct of a minor, the practitioner who has identified the applicable law must next determine whether the tortfeasor is, indeed, a "child" under the applicable statutory or common law definition.¹² Although most courts find parents liable only for the acts of minor children residing with them,¹³ some courts have held that

look at new approaches to choice-of-law problems in the tort area and at the questions these approaches have raised.

E. Scoles & R. Weintraub, *Conflict of Laws* 428 (2d ed. 1972).

¹⁰See, e.g., *Watkins v. Cupit*, 130 So. 2d 720 (La. Ct. App. 1961) (holding the nonresident father of a minor son who committed a tort in Louisiana liable in damages under the Louisiana parental responsibility statute, even though under the laws of the state of the father's domicile a parent would not be held liable for the torts of a minor child); *Memorial Lawn Cemeteries Assocs., Inc. v. Carr*, 540 P.2d 1156 (Okla. 1975) (in an action against the parents of a 16-year-old girl for damage she caused in a cemetery in Kansas, where the action was served on the parents in Oklahoma, the court held that when parental vicarious liability was based entirely on a Kansas parental responsibility statute it did not fall within the provisions of the state's long-arm statute that required, as a condition of valid personal service on a party outside the state, that such party committed tortious acts within Kansas in person or through an agent or instrumentality).

¹¹See D. Cavers, *The Choice-of-Law Process* 139-80 (1965).

¹²This inquiry is unnecessary where the parent's liability is based on the parent's own negligence, because in such a case the child's age is irrelevant except as it affects the standard of care that the parent owes or as it influences the harm which the parents should reasonably foresee the child inflicting.

¹³See, e.g., *Miranne v. New*, 381 So. 2d 584 (La. Ct. App. 1980) (holding defendant father not liable for damages to a car that were sustained while defendant's son was driving the car, where the son was living with and working for the fishing group that owned the car, had permission from a group member to drive the car, and was beyond the authority of his father).

the residence of the child continues to be that of the father unless changed in some manner prescribed by law, even where the child is living and working in another state.¹⁴

The courts in at least one jurisdiction have also determined that a mother will not be held responsible for a child's misconduct while the father is alive unless there has been a divorce or a legal separation and the mother either has been awarded custody of the child or has been appointed the child's tutrix.¹⁵ Such gender-based determinations of liability would likely not survive recent Supreme Court decisions that elevate the standard for review of gender-based classifications.¹⁶

When the law terminates or interrupts parental authority, parental responsibility is also terminated or interrupted with it.¹⁷ The majority of the state parental responsibility statutes provide either that parents are responsible only for the acts of their "minor" children or that judicial emancipation of a child over eighteen years old terminates parental authority and control and precludes finding the parents personally liable for such a child's torts.¹⁸ The practitioner should, however, refer to the law of the jurisdiction involved to ensure that the law in that jurisdiction is consistent with this norm.¹⁹

¹⁴See, e.g., *Watkins v. Cupit*, 130 So. 2d 720 (La. Ct. App. 1961) (where a father and his minor son had been residing in separate states for several months, the court held that the mere physical separation of father and son was not sufficient to relieve the father of responsibility under the statute for damages caused by the son's torts).

¹⁵See, e.g., *Guidry v. State Farm Mut. Auto. Ins. Co.*, 201 So. 2d 534 (La. Ct. App.) (holding that a mother who divorced the child's father and took the child with her to another state was not responsible for the child's tort because the father was still alive and the divorce judgment made no mention of custody), application denied, 251 La. 225, 203 So. 2d 557 (1967).

¹⁶See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976); *Reed v. Reed*, 404 U.S. 71 (1971).

¹⁷See, e.g., *Simmons v. Sorenson*, 71 So. 2d 377 (La. Ct. App. 1954) (holding a father not responsible for the torts of his minor son, where the son was in the military service though home on furlough at the time of the accident).

¹⁸See *infra* note 23.

¹⁹*Illinois*—*Cf.* *Conrad v. Dickerson*, 31 Ill. App. 3d 1011, 335 N.E.2d 67 (1975) (in an action brought under a state statute designed to hold the parents of an unemancipated minor who resides with such parents liable for any willful or malicious acts of such minor which cause injury to person or property, the court held that the burden was upon defendants to prove, as an affirmative defense, that their son was in fact emancipated).

Louisiana—See generally Annot., 8 A.L.R.3d 612, 618-20 (1966).

Maryland—See, e.g., *In re James D.*, 295 Md. 314, 455 A.2d 966 (1983) (finding that the trial court erred in ordering the parents to pay for damage done to a model home by their minor child because the juvenile had been removed from the parents' care and custody by court order, had been residing in a juvenile home

V. STATUTORY PARENTAL LIABILITY

A. *IN GENERAL*

In the absence of parental ratification, consent, or negligence, the common law generally relieved the parent of liability for his or her children's torts.²⁰ Because the common law remedies often proved inadequate to compensate the victim for the child's misconduct, all states except New Hampshire statutorily impose pecuniary liability on parents for their children's torts.

These statutes, which place upon parents the obligation to control their minor children and to prevent their children from harming others, typically hold parents responsible for the willful, malicious, intentional, or unlawful acts of their minor children.²¹ Among these statutes are parental liability statutes (which typically hold parents liable for the malicious and willful torts of their children), consent statutes (which hold the owner of a motor vehicle liable for injuries and property damage caused by other drivers of the car), and dram shop acts (some of which hold social hosts liable for injuries caused by intoxicated drivers whom the host permitted to drive while intoxicated).²²

from which he had escaped at the time of the incident, and had had no contact with the parents from the time of such escape until his arrest).

Ohio—See *Albert v. Ellis*, 59 Ohio App. 2d 152, 154, 392 N.E.2d 1309, 1311-12 (1978) (holding that “where a minor child is married, has established his own residence apart from his parents, and is self-supporting, he is no longer within the custody and control of his parents and the state parental responsibility statute fails to impose liability upon his parents”).

²⁰See *infra* notes 49-85 and accompanying text.

²¹See Frankel, *Parental Liability for a Child's Tortious Acts*, 81 Dick. L. Rev. 755, 762 (1977).

²²Although this article will not discuss dram shop acts, the practitioner should consult current state law regarding such liability when the child commits the offense while intoxicated from drinking liquor provided by the parent. See generally Graham, *Liability of the Social Host for Injuries Caused by the Negligent Acts of Intoxicated Guests*, 16 Willamette L. Rev. 561 (1980); Special Project, *Social Host Liability for the Negligent Acts of Intoxicated Guests*, 70 Cornell L. Rev. 1058 (1985); Note, *Social Host Liability Under the Common Law: Kelly v. Gwinnet*, 1985 Det. C.L. Rev. 97 (1985); Comment, *The Liability of Social Hosts for Their Intoxicated Guests' Automobile Accidents—An Extension of the Law*, 18 Akron L. Rev. 473 (1985); Comment, *Kelly v. Gwinnet: Imposing Third-party Liability on Social Hosts*, 5 Pace L. Rev. 809 (1985); Comment, *Social Host Liability for Furnishing Alcohol: A Legal Hangover?*, 10 Pac. L.J. 95 (1978); Comment, *Social Host Liability and Missouri Tort Law*, 29 St. Louis U.L.J. 509 (1985); Comment, *Liability of Commercial Vendors, Employers, and Social Hosts for Torts of the Intoxicated*, 19 Wake Forest L. Rev. 1013 (1983); Comment, *Recognizing the Liability of Social Hosts Who Knowingly Allow Intoxicated Guests to Drive: Limits to Socially Acceptable Behavior*, 60 Wash. L. Rev. 389 (1985); Recent Decisions, *Torts-Negligence-Social Host Liability: Kelly v. Gwinnet*, 23 Duq. L. Rev. 1307 (1985); Annot., 53 A.L.R.3d 1285 (1973).

Although most of these statutes have been enacted within the past three decades, Louisiana and Hawaii have had such statutes for more than 100 years.²³ Most of these statutes apply only to

²³See generally Menyuk, *New Jersey Public School Parental Liability Act Held Constitutional: Board of Education v. Caffiero*, 34 Rutgers L. Rev. 220 (1981); Reagan, *A Constitutional Caveat on the Vicarious Liability of Parents*, 87 Notre Dame Law. 1321 (1972); Note, *Statutory Vicarious Parental Liability: Review and Reform*, 32 Case W. Res. 559 (1982) [hereinafter *Review and Reform*]; Note, *The Iowa Parental Responsibility Act*, 55 Iowa L. Rev. 1037, 1037-45 (1970) [hereinafter *Iowa Act*]. See also the following state statutes:

Alabama—Ala. Code § 6-5-380 (1975); enacted: 1965; age limit: 18; maximum recovery: \$500; personal injury not covered. The statute expressly retains other bases of recovery.

Alaska—Alaska Stat. § 34.50.020 (1985); enacted: 1957; age limit: 18; maximum recovery: \$2,000; personal injury not covered. This statute does not state whether the remedies it provides are additional to those provided by other statutes or at common law.

Arizona—Ark. Rev. Stat. Ann. § 12-661 (1985); enacted: 1956; age limit: minor; maximum recovery: \$2,500; personal injury covered. "The liability imposed by this section is in addition to any liability otherwise imposed by law."

Arkansas—Ark. Stat. Ann. § 50-109 (Supp. 1985); enacted: 1959; age limit: 18; maximum recovery: \$2,000; personal injury not covered. This statute does not state whether the remedies it provides are additional to those provided by other statutes or at common law.

California—Cal. Civ. Code § 1714.1 (West 1985); enacted: 1955; age limit: minor; maximum recovery: \$10,000; personal injury covered. "The liability imposed by this section is in addition to any liability now imposed by law."

Colorado—Colo. Rev. Stat. § 13-21-107 (Supp. 1985); enacted: 1959; age limit: 18; maximum recovery: \$3,500; personal injury covered. This statute specifically allows recovery for damage done to property belonging to or used by a school district. It does not, however, state whether the remedies it provides are additional to those provided by other statutes or at common law.

Connecticut—Conn. Gen. Stat. Ann. § 52-572 (West Supp. 1985); enacted: 1955; age limit: minor; maximum recovery: \$3,000; personal injury covered. "The liability provided for in this section shall be in addition to and not in lieu of any other liability which may exist at law."

Delaware—Del. Code Ann. tit. 10, § 3922 (Supp. 1984); enacted: 1953; age limit: 18; maximum recovery: \$5,000; personal injury not covered. This statute does not state whether the remedies it provides are additional to those provided by other statutes or at common law.

Florida—Fla. Stat. Ann. § 741.24 (West 1984); enacted: 1967; age limit: 18; maximum recovery: \$2,500; personal injury not covered. This statute does not state whether the remedies it provides are additional to those provided by other statutes or at common law.

Georgia—Ga. Code Ann. § 51-2-3 (Supp. 1985); enacted: 1956; age limit: 18; maximum recovery: \$5,000; personal injury not covered. "This Code section shall be cumulative and shall not be restrictive of any remedies now available . . . under the 'family-purpose car doctrine' or any statutes now in force and effect in the state."

Hawaii—Haw. Rev. Stat. § 577-3 (1976); enacted: 1958; age limit: minor; maximum recovery: no limit; while the statute does not specifically allow recovery

unemancipated minors above a specified age. Currently, eighteen

for personal injuries, it holds the parents jointly and severally liable "in damages for tortious acts committed by their children." This statute does not state whether the remedies it provides are additional to those provided by other statutes or at common law.

Idaho—Idaho Code § 6-210 (1979); enacted: 1957; age limit: 18; maximum recovery: \$1,500; personal injury not covered. This statute does not state whether the remedies it provides are additional to those provided by other statutes or at common law.

Illinois—Ill. Ann. Stat. ch. 70, §§ 51-57 (Smith-Hurd Supp. 1985); enacted 1969; age limit: 11-19; maximum recovery: \$1,000; personal injury covered. Section 56 of this chapter provides: "This Act shall not affect the recovery of damages in any other cause of action where the liability of the parent or legal guardian is predicated on a common law basis."

Indiana—Ind. Code Ann. § 34-4-31-1 (Bums Supp. 1985); enacted: 1957; age limit: none, although the parent must have custody of the child and the child must be living with the parent; maximum recovery: \$2,500; personal injury covered. This statute does not state whether the remedies it provides are additional to those provided by other statutes or at common law.

Iowa—Iowa Code Ann. § 613.16 (West Supp. 1985); enacted 1969; age limit: 18; maximum recovery: \$1,000; personal injury covered. This statute does not state whether the remedies it provides are additional to those provided by other statutes or at common law.

Kansas—Kan. Stat. Ann. § 38-120 (Supp. 1980); enacted: 1959; age limit: 18; maximum recovery: \$1,000 unless the court finds that the child's act is the result of parental neglect, in which case there is no limit; personal injury covered. This statute does not state whether the remedies it provides are additional to those provided by other statutes or at common law.

Kentucky—Ky. Rev. Stat. § 405.025 (Michie/Bobbs-Merrill 1984); enacted 1968; age limit: minor; maximum recovery: \$2,500; personal injury not covered. "Nothing in this section is intended to or shall limit . . . the liability of a person to whom the negligence of a minor is imputed, . . . nor shall this section limit the liability set forth in any other statute to the contrary."

Louisiana—La. Civ. Code Ann. art. 2318 (West 1986); enacted: 1804; age limit: minor; maximum recovery: no limit; while the statute does not specifically allow recovery for personal injuries, it assigns parental responsibility for "damage occasioned by their minor or unemancipated children." This statute does not state whether the remedies it provides are additional to those provided elsewhere.

Maine—Me. Rev. Stat. Ann. tit. 19, § 217 (1981); enacted: 1959; age limit: 7-17; maximum recovery: \$800; personal injury covered. This statute does not state whether the remedies it provides are additional to those provided by other statutes or at common law.

Maryland—Md. Cts. & Jud. Proc. Code Ann. § 3-829 (1984); enacted: 1957; age limit: minor; maximum recovery: \$5,000; personal injury covered. This statute does not state whether the remedies it provides are additional to those provided by other statutes or at common law.

Massachusetts—Mass. Gen. Laws Ann. ch. 231 § 85G (West 1985); enacted: 1969; age limit: 7-18; maximum recovery: \$2,000; personal injury covered. This statute does not state whether the remedies it provides are additional to those provided by other statutes or at common law.

Michigan—Mich. Comp. Laws Ann. § 600.2913 (West Supp. 1985); enacted: 1953;

states allow recovery only for property damage and thirty-one

age limit: minor; maximum recovery: \$2,500; personal injury covered. This statute does not state whether the remedies it provides are additional to those provided by other statutes or at common law.

Minnesota—Minn. Stat. Ann. § 540.18 (West Supp. 1986); enacted: 1967; age limit: 18; maximum recovery: \$500; personal injury covered. "The liability provided in this subdivision is in addition to and not in lieu of any other liability which may exist at law."

Mississippi—Miss. Code Ann. § 93-13-2 (Supp. 1985); enacted: 1978; age limit: 10-18; maximum recovery: \$2,000; personal injury not covered. "The action authorized in this section shall be in addition to all other actions which the owner is entitled to maintain and nothing in this section shall preclude recovery in a greater amount . . . for damages to which such minor or other person would otherwise be liable."

Missouri—Mo. Ann. Stat. § 537.045 (Vernon Supp. 1986); enacted: 1965; age limit: 18; maximum recovery: \$2,000; personal injury covered. This statute does not state whether the remedies it provides are additional to those provided by other statutes or at common law.

Montana—Mont. Code Ann. §§ 40-6-237 to -238 (1985); enacted: 1957; age limit: 18; maximum recovery: \$2,500; personal injury not covered. This statute does not state whether the remedies it provides are additional to those provided by other statutes or at common law.

Nebraska—Neb. Rev. Stat. § 43-801 (1984); enacted: 1951; age limit: minor; maximum recovery: limited to \$1,000 for personal injury, no other limits stated. This statute does not state whether the remedies it provides are additional to those provided by other statutes or at common law.

Nevada—Nev. Rev. Stat. § 41.470 (1986); enacted: 1957; age limit: minor; maximum recovery: \$10,000; personal injury covered. "The liability imposed by this section is in addition to any liability now imposed by law."

New Hampshire—No parental responsibility statute has been enacted.

New Jersey—N.J. Rev. Stat. §§ 2A:53A-14 to -17 (West Supp. 1985); enacted: 1965; age limit: 18; maximum recovery: no limit; personal injury not covered. Because this statute renders a parent responsible for the willful, malicious, or unlawful acts of a child only when the parent "fails or neglects to exercise reasonable supervision and control" over the conduct of the child, the statute changes the common law little. This statute does not state that the remedies it provides are additional to those provided by other statutes and at common law. *See also* N.J. Stat. Ann. § 18A:37-3 (West Supp. 1985), which holds parents liable for damage done by minor children to school property.

New Mexico—N.M. Stat. Ann. § 32-1-46 (1981); enacted: 1953; age limit: minor; maximum recovery: \$2,500; personal injury covered. This statute does not state whether the remedies it provides are additional to those provided by other statutes or at common law.

New York—N.Y. Gen. Oblig. Law § 3-112 (McKinney Supp. 1986); enacted: 1970; age limit: 10-18; maximum recovery: \$2,500; personal injury not covered. This statute does not state whether the remedies it provides are additional to those provided by other statutes or at common law.

North Carolina—N.C. Gen. Stat. § 1-538.1 (1983); enacted: 1961; age limit: minor; maximum recovery: \$1,000; personal injury covered. "This act shall not preclude or limit recovery of damages from parents under common law remedies available in this State."

states permit actions for both property damage and personal

North Dakota—N.D. Cent. Code § 32-03-39 (1976); enacted: 1957; age limit: minor; maximum recovery: \$1,000; personal injury not covered. This statute does not state whether the remedies it provides are additional to those provided by other statutes or at common law.

Ohio—Ohio Rev. Code Ann. §§ 3109.09-.10 (Anderson 1980); enacted: 1967; age limit: **18**; maximum recovery: \$3,000 for property damage, \$2,000 for personal injury. Although section 3109.09, regarding property damage committed by a minor, additionally permits the property owner to deal with the loss of property through actions in replevin, the section limits compensatory damages for property damage to \$3,000.

Oklahoma—Okla. Stat. Ann. tit. 23, § 10 (West Supp. 1985); enacted: 1957; age limit: **18**; maximum recovery: \$2,500; personal injury covered. This statute does not state whether the remedies it provides are additional to those provided by other statutes or at common law.

Oregon—Or. Rev. Stat. § 30.765 (1983); enacted: 1959; age limit: minor; maximum recovery: \$5,000; personal injury covered. The recovery permitted by this statute is “[i]n addition to any other remedy provided by law.”

Pennsylvania—Pa. Stat. Ann. tit. 11, §§ 2001-2005 (Purdon Supp. 1985); enacted: 1967; age limit: **18**; maximum recovery: \$300 in single plaintiff cases, \$1,000 in multiple plaintiff cases; personal injury covered. Section 2005 provides that “[t]he liability imposed upon parents by this act shall not limit the common law liability of parents for damages caused by a child.”

Rhode Island—R.I. Gen. Laws § 9-1-3 (1985); enacted: 1956; age limit: minor; maximum recovery: \$1,500; personal injury covered. “The liability herein provided for shall be in addition to and not in lieu of any other liability that may exist at law.”

South Carolina—S.C. Code Ann. § 20-7-340 (Law. Co-op. 1985); enacted: 1965; age limit: 17; maximum recovery: \$1,000; personal injury not covered. “[N]othing herein contained shall in any way limit the application of the family purpose doctrine.”

South Dakota—S.D. Codified Laws Ann. § 25-5-15 (1984); enacted: 1957; age limit: 18; maximum recovery: \$750; personal injury covered. While this statute does not state whether the remedies it provides are additional to those provided by state statutes or at common law, the statute does state that its provisions do not “apply to damages proximately caused through the operation of a motor vehicle by said minor child or children.”

Tennessee—Tenn. Code Ann. §§ 37-1001 to -1003 (Supp. 1985); enacted: 1957; age limit: 18; maximum recovery: **\$10,000**; personal injury covered. This statute imposes parental liability “where the parent or guardian knows, or should know, of the child’s tendency to commit wrongful acts . . . where the parent or guardian has an opportunity to control the child but fails to exercise reasonable means to restrain the tortious conduct.” The statute does not, however, state whether the remedies it provides are additional to those provided by other statutes or at common law.

Texas—Tex. Fam. Code Ann. tit. 2, §§ 33.01 to 33.03 (Vernon Supp. 1981); enacted: 1957; maximum recovery: \$15,000; personal injury not covered. This statute includes recovery for the willful and malicious conduct of a child between 12 and 18 years old and for a child’s negligent torts (without specified age limit) if the child’s misconduct is attributable to negligent parental control. This statute does not state whether the remedies it provides are additional to those provided by other statutes or at common law.

injury.²⁴ Some statutes have recently broadened the scope of parental liability,²⁵ and numerous statutes have been revised to increase the damages recoverable from parents for juvenile misconduct.²⁶

Utah—Utah Code Ann. §§ 78-11-20 and -21 (1977); enacted: 1977; age limit: minor; maximum recovery: \$1,000; personal injury not covered. This statute does not state whether the remedies it provides are additional to those provided by other statutes or at common law. The statute does, however, provide that a parent will not be held liable if the parent “made a reasonable effort to supervise and direct [the] minor child, or . . . made a reasonable effort to restrain” the child’s tortious conduct.

Vermont—Vt. Stat. Ann. tit. 15, § 901 (1974); enacted: 1959; age limit: 17; maximum recovery: \$250; personal injury covered. “The remedy herein provided shall be in addition to, and not in lieu of, any other remedy which may exist at law.”

Virginia—Va. Code Ann. § 8.01-44 (1984); enacted: 1960; age limit: 18; maximum recovery: \$500; personal injury not covered. “The provisions of this statute shall be in addition to, and not in lieu of, any other law imposing upon a parent liability for the acts of his minor child.” *See also* Va. Code Ann. § 8.01-43 (1984).

Washington—Wash. Rev. Code Ann. § 4.24.190 (Supp. 1986); enacted: 1961; age limit: 18; maximum recovery: \$3,000; personal injury covered. “This section shall in no way limit the amount of recovery against the parent or parents for their own common law negligence.”

West Virginia—W. Va. Code § 55-7A-2 (Supp. 1985); enacted: 1957; age limit: minor; maximum recovery: \$2,500; personal injury covered. “The right of action and remedy granted herein shall be in addition to and not exclusive of any rights of action and remedies therefor against a parent or parents for the tortious acts of his or their children heretofore existing under the provisions of any law, statutory or otherwise, or now so existing independently of the provisions of this article.”

Wisconsin—Wis. Stat. Ann. § 895.035 (West 1983); enacted: 1957; age limit: minor; maximum recovery: \$1,000; personal injury covered. This provision applies only where the parents “may not be otherwise liable under the common law.”

Wyoming—Wyo. Stat. § 14-2-203 (1978); enacted: 1965; age limit: 10-17; maximum recovery: \$300; personal injury not covered. This action is “in addition to all other actions that the owner is entitled to maintain.”

²⁴*See* the statutory references *supra* note 23.

²⁵*See, e.g.* Ga. Code Ann. § 105-113 (Supp. 1981), in which the Georgia legislature deleted the words “of vandalism” from its statute so that liability would include personal injury, reversing the following cases: *Vort v. Westbrook*, 221 Ga. 39, 40-41, 142 S.E.2d 813, 814-15 (1965) (holding a statute referring to “willful and wanton acts of vandalism” resulting in “injury or damage to the person or property of another” inapplicable to acts resulting in personal injuries only, on the grounds that such acts do not constitute “vandalism”); *Bell v. Adams*, 111 Ga. App. 819, 143 S.E.2d 413 (1965) (holding that the statute must be strictly construed because it is in contravention of common law and, as so construed, does not impose liability for personal injury where the child’s purpose was such injury rather than property damage); *Browder v. Sloan*, 111 Ga. App. 693, 143 S.E.2d 13 (1965) (holding that the statute did not apply to the willful torts of a minor under 17 which are directed against the persons of others rather than against property).

²⁶*Compare* the statutory references *supra* note 23, *with* *Menyuk*, *supra* note 23, at 224-26 (1981); *Review and Reform*, *supra* note 23, at 565-66 (1982); *and Iowa Act*, *supra* note 23, at 1037-38 (1970).

Most of the statutes that base parental liability on the act of a minor child premise recovery on "malicious" or "willful" tortious acts of the child, although a few of these statutes permit recovery against the parents for negligent acts committed by the child.²⁷ Even those statutes that hold parents liable for the child's negligent acts have often been judicially interpreted to preclude parental liability when the child is under the "age of discernment" or is of "tender years."²⁸

Where the statute requires that the child's act be willful, wanton, or grossly negligent, courts have often found children "of tender years" to be personally incapable of such malicious or volitional acts because of the child's incapacity to discern the consequences of the act. Some courts have held, however, that even in the absence of the child's liability, the child's parents may nonetheless be statutorily liable for the damage occasioned by the child's act if the child would have been liable for the act but for this disability.²⁹ These courts have, however, adopted divergent interpretations in applying this standard.

²⁷For statutes that hold parents liable for the negligent acts of their children, see the statutory references for Delaware, Hawaii, Iowa, Louisiana, Maryland, Oklahoma, and Texas, *supra* note 23.

²⁸See generally Marvin, *Discerning the Parent's Liability for the Harm Inflicted by a Nondiscerning Child*, 44 La. L. Rev. 1213, 1213 (1984).

²⁹**Connecticut**—See *Luttelman v. Martin*, 20 Conn. Supp. 371, 135 A.2d 600 (1957) (based on its finding that the child's act was neither willful nor malicious, the court held the father of a nine-year-old boy not liable for damage resulting from a fire set by the boy, construing the statute as holding the parent liable only "in those cases where the child himself might be required to respond in damage for his own tort"); *Walker v. Kelly*, 6 Conn. Cir. Ct. 715, 314 A.2d 785 (1973) (In an action against the parents of a five-year-old girl for injuries sustained by the plaintiff's eight-year-old son when the girl threw a rock and hit the boy, the court concluded that the girl did not willfully or maliciously intend to injure the boy, as required by the parental responsibility statute, where the evidence indicated that the girl was too young and immature to appreciate the risk involved in throwing a rock at the bicycle and that she did not intend to strike the boy but, rather, intended to hit his bicycle.).

Hawaii—See *Day v. Day*, 8 Haw. 715 (1890) (Where defendant's two-year-old child destroyed plaintiff's property by setting it afire, the court found that the child had not intentionally set the fire because it would be "monstrous" to hold an infant of such tender years capable of intentionally causing such damage. Moreover, the father could not be held liable where the child was not responsible under common law.). But see *Victoria v. Palama*, 15 Haw. 127 (1903) (Where defendant's seven-year-old son shot plaintiff with a shotgun, the court found that the shooting was not accidental but, rather, was done in thoughtless or careless wantonness. Holding that infancy alone was not a sufficient defense, the court found as a matter of law that the infant was liable for the injury inflicted and that, consequently, the granting of a directed verdict against the infant's father was not error.).

Louisiana—See *infra* note 37.

Some courts have held that plaintiffs need show only the child's willful or malicious intent with respect to the initial act of misconduct, and require no showing that defendant's child possessed a willful or malicious intent to cause injury or damage as a result of the misconduct.³⁰ Other courts have required a showing of willful or malicious intent with respect to both the initial act of misconduct and the subsequent damage.³¹

New Mexico—See *Ortega v. Montoya*, 97 N.M. 159, 637 P.2d 841 (1981) (An eight-year-old boy threatened to shoot the victim, pointed a pellet gun at him, and shot him in the eye. The court found that the child's act was willful and malicious within the meaning of the statute providing for parental responsibility, and held the father liable for damages caused by his son, notwithstanding the child's young age.).

Nebraska—See *Connors v. Pantano*, 165 Neb. 515, 86 N.W.2d 367 (1957) (The court held the father of a four-year-old child not liable under a statute making parents responsible for the willful and intentional destruction of property by their minor children because it found that a child not yet five years old was incapable of negligence.).

³⁰Connecticut—See *Lamb v. Peck*, 183 Conn. 470, 441 A.2d 14 (1981) (holding the parents of four minors liable for injury to a fifth youth where all four were assisting and encouraging the assault, even though only one child caused the victim's loss of teeth); *Groton v. Medbery*, 6 Conn. Cir. Ct. 671, 301 A.2d 270 (1972) (finding parents not liable for injuries caused in a high speed automobile chase where the claim asserted only acts of willful and malicious misconduct, which alone does not establish willful or malicious injury, because an essential characteristic of willful and malicious injury is a design or intent to injure).

Georgia—See *Landers v. Medford*, 108 Ga. App. 525, 133 S.E.2d 403 (1963) (holding the minor's mother liable for her son's willful and wanton misconduct where her son secretly took plaintiff's automobile, drove it at a high rate of speed, and eventually wrecked it).

New Mexico—See *Potomac Ins. Co. v. Torres*, 75 N.M. 129, 401 P.2d 308 (1965) (where defendant's minor son stole a car and wrecked it during a high speed chase with police, the court found that the child's intentional taking of the car was done with the requisite statutory malice or willfulness, indicating that only the child's initial act, and not the subsequent injury or damage, need be performed willfully or maliciously in order to render the parents statutorily liable).

Ohio—See *Central Mut. Ins. Co. v. Rabideau*, 60 Ohio App. 2d 5, 395 N.E.2d 367 (1977) (where a minor child stole an automobile and, in attempting to elude the owner and others seeking to thwart his theft, threw the automobile gears into reverse, floored the gas pedal, and backed the automobile over the curb into a tree, damaging the car, the minor's recklessness constituted "willfully" damaging the property of the "owner" within the meaning of the applicable state statute, causing the parents having custody and control of such minor to be liable under the statute for the damage caused by the minor).

³¹Arkansas—See *Farm Bureau Mut. Ins. Co. v. Henley*, 275 Ark. 122, 628 S.W.2d 301 (1982) (the parents of boys who threw matches in a trash bin were held not liable for the resulting damage to a gift shop where the court found the state statute that made parents liable for minors' willful destruction of property inapplicable because the boys did not intend to set fire to the shop, despite the fact that they willfully threw the matches in the bin).

Colorado—See *Crum v. Groce*, 192 Colo. 185, 556 P.2d 1223 (1976) (holding a parent not liable under a statute imposing liability for malicious or willful

The requisite parental culpability under the statutes varies substantially. Some statutes, for example, impose liability on the parent irrespective of parental knowledge of the minor's act or of any allegation that a parental act or omission was the proximate cause of plaintiff's injury,³² while at least one statute requires

destruction of property where the damage was caused by a minor child's negligence in running a stop sign, since child's act in riding the motorcycle was not malicious or willful, even though the use of the vehicle, contrary to wishes of the parent, may have been malicious or willful).

Connecticut—See *Town of Groton v. Medbery*, 6 Conn. Cir. Ct. 671, 673, 301 A.2d 270, 272 (1972) (requiring that “[n]ot only the action producing the injury but the resulting injury must be intentional”); *Rogers v. Doody*, 119 Conn. 532, 178 A. 51 (1935).

Michigan—See *McKinney v. Caball*, 40 Mich. App. 389, 198 N.W.2d 713 (1972) (parents were held not liable when their 17-year-old daughter took car keys from plaintiff's purse, drove plaintiff's car, and damaged the car, where there was no evidence that the car was driven at a high rate of speed or in any unusual manner, and, therefore, there was no proof of malicious or willful intent in damaging the car).

Ohio—See *Peterson v. Slone*, 56 Ohio St. 2d 255, 383 N.E.2d 886 (1978) (holding parents not liable where their son took plaintiff's car without permission and subsequently damaged it, finding that, although the child intended to drive the car without the requisite experience, he had not intended to damage it); *Motorists Mut. Ins. Co. v. Bill*, 56 Ohio St. 2d 258, 383 N.E.2d 880 (1978) (interpreting the statutory requirement of willful damage to property as necessitating a showing that the child performed both the initial act and the subsequent damage intentionally, the court found the parents not liable for their child's tortious act); *Travelers Indem. Co. v. Brooks*, 60 Ohio App. 2d 37, 395 N.E.2d 494 (1977) (the parents were held not liable for property damage caused by their child when the child misappropriated an automobile consigned to the school for repairs and was involved in an accident, even though the taking of the vehicle was a willful act, where the property damage was not willful).

³²**Georgia**—See *Stanford v. Smith*, 173 Ga. 165, 159 S.E. 666 (1931) (where defendant's son negligently burned plaintiff's son with sulfuric acid in a high school chemistry laboratory, the court held defendant not liable because the tortious act was not committed by his command or with his consent and because he derived no benefit therefrom); *Chastain v. Johns*, 120 Ga. 977, 978, 48 S.E. 343, 343 (1904) (where a father's alleged liability for his son's malicious act in shooting a neighbor's livestock, in the absence of the father's knowledge of this act or his negligence in supervising his son, was based upon a statute creating liability “for torts committed by his wife, and for torts committed by his child, or servant by his command, or in the prosecution and within the scope of his business,” the court construed the statute as meaning that the father's liability for the torts of his child, like his liability for those of his servant, arises only when the commission of the tort was “by his command, or in the prosecution and within the scope of his business”).

New Mexico—See *Alber v. Nolle*, 98 N.M. 100, 645 P.2d 456 (N.M. Ct. App. 1982) (upholding the constitutionality of the state's parental responsibility act and applying it even where the minor was almost 18 years of age and a constant runaway who was, at the time of the tort, living with her boyfriend).

New York—See *Izzo v. Gratton*, 86 Misc. 2d 233, 383 N.Y.S.2d 523 (1976) (although a 15-year-old boy's act in striking at another teenager constituted an assault, and thus was willful and unlawful conduct within the meaning of the state

parental knowledge or encouragement of the child's act of misconduct as a prerequisite for finding parental liability.³³ Because these statutes are contrary to common law, however, courts have usually required that they be strictly construed.³⁴

Parental liability statutes do not necessarily displace common law liability. For example, a parent might still be liable for negligent supervision of a child under common law. Even if the common law precluded such recovery, however, a plaintiff may still have a valid cause of action against the parent based upon the parent's statutory vicarious liability for the child's act.³⁵

Twenty-one statutes specifically state that they do not preclude the injured party's additional use of common-law remedies against the parent and child.³⁶ The practitioner is, therefore, advised to consider both the parent's statutory vicarious liability and the parent's common-law liability based on the parent's own negligence.

statute making a parent or legal guardian civilly liable for such damage, the court held that the guardian could not be held liable for the property damage caused during the assault where he had no control over the boy's assault and had no notice of either the boy's altercations with others or his continuing dispute with the assaulted teenager).

North Carolina—See *Gen. Ins. Co. v. Faulkner*, 259 N.C. 317, 130 S.E.2d 645 (1963) (holding that irrespective of any act or omission on the part of the parents which could constitute proximate cause, the parents' liability was established under the parental responsibility statute when damage resulted from the willful and malicious act of their child).

Texas—See *Kelly v. Williams*, 346 S.W.2d 434 (Tex. Civ. App. 1961) (holding that the state's parental responsibility statute imposed vicarious liability upon the parents of a minor who willfully and maliciously destroyed the property of another irrespective of parental knowledge of the minor's act or of any neglect or parental authority).

³³See, e.g., *Fanton v. Byrum*, 26 S.D. 366, 128 N.W. 325 (1910) (absent evidence that the child's act was committed under the direction or with the consent of his parents, the father was held not liable for damages resulting from the child's willful acts in setting prairie land on fire based on a statute providing that "neither parent nor child is answerable as such for the act of the other").

³⁴See, e.g., *Travelers Indem. Co. v. Brooks*, 60 Ohio App. 2d 37, 395 N.E.2d 494 (1977) (holding that because a statute rendering parents liable for their child's willful damage to property was contrary to common law, the statute must be strictly construed).

³⁵See, e.g., *Board of County Comm'rs v. Harkey*, 601 P.2d 125 (Okla. Ct. App. 1979) (where defendant's minor son destroyed a tractor owned by the county using blasting caps which defendant had stored negligently, the court held that the common-law and statutory claims could be joined in a single action to seek damages).

³⁶See statutory references *supra* note 23.

B. STATUTORY LIABILITY IN LOUISIANA

Louisiana presents an unusual situation because the Louisiana parental liability statute, which first appeared in an unofficial codification of the state's laws in 1808,³⁷ has rarely been enforced according to its terms. Although the statute imposes absolute liability upon parents or tutors for the tortious acts of minors under their custody, without regard to whether the child is under the parent's control at the time of the offense or whether the child's act is intentional or unintentional,³⁸ the courts rarely have imposed such broad parental liability. Instead, they often hold that for the minor's act to establish grounds for parental liability, the act must constitute "fault" or an "offense or quasi-offense" on the part of the minor.³⁹

³⁷See generally Annot., 8 A.L.R.3d 612, 617 (1966). Early cases construed the Louisiana statute as rendering the parent liable irrespective of whether the parent was personally present at the time the injury was inflicted. See *Mullins v. Blaise*, 37 La. Ann. 92 (1885); *Marionneaux v. Brugier*, 35 La. Ann. 13 (1883); *Cleveland v. Mayo*, 19 La. 414 (1841). Subsequently, the courts have held that in order for a parent to be liable for a child's intentional torts under this statute when the parent was absent from and uninvolved with the incident, the plaintiff must prove that the child's act was the result of insufficient discipline, paternal influence, or authority. See *Miller v. Meche*, 111 La. 143, 35 So. 491 (1903). The judiciary has also construed this statute in other respects. See *Underwood v. Am. Employers Ins. Co.*, 262 F. Supp. 423 (E.D. La. 1966) (despite apparent strict liability imposed by the Louisiana statute making parents responsible for damage caused by their minor children, parental liability may be imposed only where someone is at fault, either the child or the parent). *But* see *Turner v. Bucher*, 308 So. 2d 270 (La. 1975) (Where a six-year-old boy injured a 62-year-old woman while the boy was riding his bicycle on the sidewalk near his home, the boy's parents were held liable under a statute that provides that legal fault is determined without regard to whether the parent could or could not have prevented the act of the child, that is, without regard to the parent's negligence, under a theory of strict liability. The court held that this liability may be escaped only where a parent shows the harm was caused by the fault of the victim, by the fault of a third person, or by a fortuitous event.).

³⁸Under the French Civil Code, the parents were responsible for damage caused by their unemancipated minor children only where the parents failed to establish that they were unable to prevent the act that caused the damage. When a derivative statute was incorporated into the Louisiana Civil Code, however, this parental savings clause was not included, rendering parents liable for damages caused by their unemancipated minor children under any circumstances. A strict reading of the Louisiana Civil Code provides for parental liability even if the parent could not have prevented the child's actions if either the parent or the child were negligent or at fault, establishing parental liability based strictly on the parent-child relationship without respect to any act or omission on the part of the parents. See generally Annot., 54 A.L.R. 3d 974, 1025 (1973); see also *Ryle v. Potter*, 413 So. 2d 649 (La. Ct. App. 1982); *Scott v. Behrman*, 273 So. 2d 661 (La. Ct. App. 1973); and *Deshotel v. Travelers Indem. Co.*, 231 So. 2d 448 (La. Ct. App. 1970), *aff'd*, 257 La. 567, 243 So. 2d 259 (1971), all of which held that Louisiana parents are strictly and vicariously liable for the torts of their children.

³⁹Louisiana—See *Horn v. Am. Employers' Ins. Co.*, 386 F.2d 360 (5th Cir. 1967) (since under Louisiana law children up to seven years of age have "absolute

C. CHOICE OF LA W

All state parental responsibility statutes allow recovery for property damage occasioned by a child's intentional tortious acts. Consequently, if the applicable law is that of an installation on which federal exclusive jurisdiction is exercised, the practitioner must determine the status of the state law at the time jurisdiction was ceded to the federal government, because the applicable

freedom from negligence," a three-year-old child who allegedly caused her grandmother to fall by pulling on her dress could not be negligent, and therefore there could be no imputation of negligence to parents under a Louisiana statute imposing responsibility on parents for damage occasioned by the torts of their children); *Underwood v. Am. Employers Ins. Co.*, 262 F. Supp. 423 (E.D. La. 1966) (finding that since Louisiana jurisprudence holds that children under the age of four cannot be negligent, parental liability can be imposed only if the parents themselves were negligent); *Johnson v. Butterworth*, 180 La. 586, 157 So. 121 (1934) (The court held the parents not liable for injury which their four-year-old daughter inflicted on her nurse when she bit the nurse, absent evidence that the daughter had a dangerous disposition of which the father failed to warn the nurse. The court's decision apparently was based upon the theory that a child under four years of age cannot be deemed guilty of an offense or a quasi-offense and, because there can be no tort liability without fault or negligence on the part of someone, no liability could be found on the part of the parents.); *Toca v. Rojas*, 152 La. 317, 93 So. 108 (1921) (the court found that parents can be held liable only for the offenses and quasi-offenses of their minor children, reasoning that although the law imputes the fault of the minor to the parents, there must necessarily be some fault, actual or legal, in the act of the minor before the parent can be held liable); *Faia v. Landry*, 249 So. 2d 317 (La. Ct. App. 1971) (construing the state's parental responsibility statute as imposing parental liability only for damages occasioned by offenses or quasi-offenses of minor children when fault or negligence is established); *Lumbermens Mut. Casualty Co. v. Quincy Mutual Fire Ins. Co.*, 220 So. 2d 104 (La. Ct. App. 1969) (construing the state's statute as precluding parental responsibility for torts committed by minor children unless the damage was caused by negligence or fault of the child or by the independent negligence of a parent or other person in whose care the child was placed, and therefore finding that where a fire which damaged plaintiff's house was started by children two and three years old who were legally incapable of negligence, the father could not be held liable on the theory that the children were at fault); *Polk v. Trinity Universal Ins. Co.*, 115 So. 2d 399 (La. App. 1959) (holding that the liability of a parent for the actions of a minor child was not absolute and that negligence on the part of the child must be established). *But see* *Turner v. Bucher*, 308 So. 2d 270 (La. 1975) (under a statute providing parental responsibility for damage caused by a minor unemancipated child, the court held that even though a child of tender years may be incapable of committing legal offenses because of his lack of capacity to discern the consequences of his act, the parent may nevertheless be held liable for the child's act if the act of a child would be an offense except for this disability); *Richard v. Boudreaux*, 347 So. 2d 1298 (La. Ct. App. 1977) (where a child sat on top of an overturned automobile shell while other children rocked the car, causing a heavy motor automobile part to drop on a younger child, the court found that since the responsible child atop the car could be held liable for the younger child's injuries if the responsible child were not of tender years, the court could therefore hold the responsible child's parents liable for the child's acts).

law with respect to property damage⁴⁰ will be the state law in effect at that time.⁴¹

To find the state law in effect at the time jurisdiction was ceded, the practitioner must identify both the date on which the given state statute was enacted and the subsequent dates on which it was significantly changed. Because the trend has been toward substantially higher limits on maximum recovery⁴² and extension of coverage to personal injury,⁴³ the soldier's liability will likely be most limited on enclaves to which exclusive federal jurisdiction was ceded long ago.

D. CONSTITUTIONALITY OF STATE STATUTES

Although the constitutionality of state parental responsibility statutes rarely has been questioned, it could be argued that these statutes deprive the parent of property without due process of law by imposing liability without the fault of the parent. In most cases, however, the courts have held that the statutory imposition of parental liability is rationally related to the legitimate compensatory and deterrent goals of the legislature and that the imposition of such parental liability comports with due process.⁴⁴

⁴⁰Note, however, that current state law applies on the federal reservation with respect to wrongful death and personal injury. 16 U.S.C. § 457 (1982).

⁴¹See *supra* note 4 and accompanying text.

⁴²In the past ten years, maximum recovery has increased from an average of \$749 with five states (Georgia, Hawaii, Louisiana, Maryland, and Nebraska) establishing no recovery limit to an average of \$2,780 with four states (Hawaii, Louisiana, Nebraska and New Jersey) identifying no limit (although Nebraska limits personal injury recovery to \$1,000, it places no limit on recovery for property damage). Since 1970, three additional states (Mississippi, New York, and Utah) have enacted parental responsibility statutes. Compare *Iowa* Act, *supra* note 23, at 1037-38, with the statutory references *supra* note 23.

⁴³Currently, twenty-four statutes allow recovery for property damage only and twenty-five states permit actions for both property damage and personal injury. See statutory references *supra* note 23.

⁴⁴Connecticut—See *Watson v. Gradzik*, 34 Conn. Supp. 7, 373 A.2d 191 (C.P. 1977) (though the parents contended that the statute interfered with their fundamental right to bear and raise children, the court declined to accept this claim and noted that the parental right was accompanied by a duty to see that one's children are properly raised to respect the property rights of others).

Florida—See *Stang v. Waller*, 415 So. 2d 123 (Fla. Dist. Ct. App. 1982) (finding that Fla. Stat. Ann. § 741.24 (West Supp. 1982), which imposes strict vicarious liability up to \$2,500 upon the parents of minor children who maliciously or willfully destroy or steal property of another, is reasonably related to the legitimate state interest in reducing juvenile delinquency and is neither arbitrary nor capricious).

Georgia—But see *Corley v. Lewless*, 227 Ga. 745, 749, 182 S.E.2d 766, 769 (1971)

VI. VANDALISM STATUTES

If the statutory remedy under these general parental liability statutes proves unavailable *or* inadequate in a given situation, the

(holding that a statute imposing unlimited liability on a parent or other person in loco parentis for the willful torts of his minor children resulting in death, injury, or damage to the person or property, or both, of another, contravenes the due process clauses of the state and federal constitutions and is void. The Georgia legislature has since amended the statute to provide for limited liability for property damage only. See Ga. Code Ann. § 51-2-3 (Supp. 1985).

Hawaii—See *Bryan v. Kitamura*, 529 F. Supp. 394 (D. Haw. 1982) (applying Hawaii law).

Illinois—See *Vanthournout v. Burge*, 69 Ill. App. 3d 193, 387 N.E.2d 341 (the parents unsuccessfully asserted that educators, law enforcement officers, and other relatives of the child are among the societal groups that have a strong influence on the conduct of children and that the statute that held only parents liable for the acts of minors violated equal protection), cert. denied, 79 Ill. 2d 618 (1979).

Maryland—See *In re Sorrell*, 20 Md. App. 179, 315 A.2d 110 (1974) (finding that the statute did not exceed constitutional limits because there was a “legitimate state interest in a matter affecting the general welfare” and that the means selected by the legislature to protect that interest were not unreasonable), cert. denied, 271 Md. 740, 744 (1974).

New Mexico —See *Alber v. Nolle*, 98 N.M. 100, 645 P.2d 456 (N.M. Ct. App. 1982) (finding that the state statute, which imposes liability based on the parents’ status even absent their control or custody of their child, did not violate due process or equal protection).

North Carolina—See *Gen. Ins. Co. v. Faulkner*, 259 N.C. 317, 130 S.E.2d 645 (1963) (finding N.C. Gen. Stat. § 1-538.1 (1969) constitutional with respect to both the state constitution and the fifth amendment of the U.S. Constitution, the court found a cause of action against the parents of an 11-year-old boy who willfully and maliciously set fire to the drapes in the school auditorium, where the child was under 18 years old and was living with his parents at the time of the incident).

Ohio—See *Rudnay v. Corbett*, 53 Ohio App. 2d 311, 374 N.E.2d 171 (1977) (finding that a state statute providing a civil cause of action against parents for property damage caused by minors is compensatory rather than penal in nature, but, since it imposes a limit on the liability of parents and bears a real and substantial relation to compensation of innocent victims of juvenile misconduct and the curbing of juvenile delinquency by imposing greater parental guidance, the statute is constitutional).

South Carolina—See *Standard v. Shine*, 278 S.C. 337, 295 S.E.2d 786 (1982).

Texas—See *Kelly v. Williams*, 346 S.W.2d 434, 438 (Tex. Civ. App. 1961) (Appellants attacked the constitutionality of Tex. Rev. Civ. Stat. art. 5923-1 (Supp. 1969-70), which provided that a property owner may recover damages up to \$300 from the parents of any minor over 10 and under 18 years of age who maliciously and willfully damaged or destroyed property, real, personal, or mixed, belonging to such owner, on the basis that it was unreasonable, arbitrary, capricious, and discriminatory. The court found the statute reasonable and, therefore, constitutional, because it accomplished “public justice.”).

Wyoming—See *Mahaney v. Hunter Enters., Inc.*, 426 P.2d 442 (Wyo. 1967) (finding Wyo. Stat. Ann. § 14-5.1-3 (1957) constitutional based upon *Gen. Ins. Co. v. Faulkner*, 259 N.C. 317, 130 S.E.2d 645, 650 (1963), and *Kelly v. Williams*, 346 S.W.2d 434, 438 (Tex. Civ. App. 1961)).

parents of a tortfeasor may nonetheless be statutorily liable under one or more of the particularized statutory schemes that deals with a specific aspect of conduct. For example, parents may be strictly liable for acts of vandalism committed by their children on school or other **property**.⁴⁵

Frequently, these statutes limit parental liability to the intentional acts of their children,⁴⁶ are interpreted as limiting the offense of vandalism to property **damage**,⁴⁷ or are otherwise limited by judicial **interpretation**.⁴⁸

⁴⁵See generally Menyuk, *supra* note 23.

Arizona—See Ariz. Rev. Stat. Ann. § 15-446 (1975).

California—See Cal. Educ. Code § 48909 (West Supp. 1981). This statute limits recovery to \$5,000.

Hawaii—See Hawaii Rev. Stat. § 298-27 (Supp. 1979). This statute requires that the conduct of the child be willful or malicious or that the damage result from an act of vandalism. Additionally, the statute limits recovery to \$2,000 if so agreed by the parties, but the state may elect to bring judicial action for full recovery.

Maine—See Me. Rev. Stat. Ann. tit. 20, § 3772 (1965). Under this statute, parents are liable for double the damage caused by the child.

Mississippi—See Miss. Code Ann. § 37-11-19 (1973). This statute requires either that the conduct of the child be willful or malicious or that the damage result from an act of vandalism.

Montana—See Mont. Rev. Code Ann. § 75-6310 (1971).

New Jersey—See N.J. Stat. Ann. § 18A:37-3 (1968). The specific reference to cutting or defacing was eliminated in the present Act, which imposes liability for the student's injury to the property without an express requirement of fault on behalf of the student.

New York—See N.Y. Educ. Law §§ 1604(35), 2503(18), 2554(16-b), and 2590-g(15) (McKinney 1981 & Supp. 1981). These statutes require that the conduct of the child be willful or malicious or that the damage result from an act of vandalism. Additionally, the statute limits recovery to \$1,000.

Oregon—See Or. Rev. Stat. § 339.270 (1979). This statute requires that the conduct of the child be willful or malicious or that the damage result from an act of vandalism. Additionally, the statute limits recovery to \$5,000.

Washington—See Wash. Rev. Code § 28A.87.120 (1970).

⁴⁶See, *e.g.*, the statutes of Hawaii, Mississippi, New York, and Oregon referenced *supra* note 45.

⁴⁷Louisiana—See *Ducote v. United States Fidelity and Guar. Co.*, 241 La. 677, 130 So. 2d 649 (1961) (limiting the offense of "vandalism" to property damage).

Massachusetts—See *Pintsoopolous v. Home Ins. Co.*, 340 Mass. 734, 166 N.E.2d 559 (1960) (limiting the offense of "vandalism" to property damage).

⁴⁸Louisiana—See *Hayward v. Carraway*, 180 So. 2d 758 (La. Ct. App. 1965), writ refused, 248 La. 909, 182 So. 2d 662 (1966).

Maryland—See *In re John H.*, 293 Md. 295, 443 A.2d 594 (1982) (in the state's action seeking restitution against parents for their child's vandalism of elementary schools, the court found that the parents were properly assessed the maximum amount permitted under the statute for each of two separate incidents where two separate schools were vandalized).

VII. PARENTAL LIABILITY AT COMMON LAW

A. *IN GENERAL*

In the absence of state statutory law pursuant to which parents can be found liable for the tortious acts of their children regardless of any parental knowledge or fault,⁴⁹ parents are not responsible at common law for damages caused by their children unless the damages can be attributed to some action or inaction of the parent.⁵⁰ In *Gissen v. Goodwill*,⁵¹ for example, an

New Jersey—See *Bd. of Educ. v. Caffiero*, 86 N.J. 308, 431 A.2d 799 (holding that the state statute, as construed to apply only to those persons having legal custody and control over a child enrolled in the public schools whose willful and malicious acts have caused damage to such school property, was consistent with due process and not violative of equal protection), appeal *dismissed*, 454 U.S. 1025 (1981); *Bd. of Educ. v. Hansen*, 56 N.J. Super. 567, 153 A.2d 393 (1959) (the court found parents liable under a state statute providing that the parents or guardian of any pupil injuring school property was liable “to the amount of the injury”). Based on the *Caffiero* decision, the state legislature enacted N.J. Stat. Ann. § 18A:37-3 (West Supp. 1985), which renders parents liable in damages if a minor child damages either a public or a private school, regardless of whether the child was a student at the damaged school.

South Dakota—See *Lamro Indep. Consol. School Dist. v. Cawthorne*, 76 S.D. 106, 73 N.W.2d 337 (1955) (holding that statutes that contravene common law must be strictly construed, the court found defendant parents not liable for damage done by their 16-year-old son to the school where the statute permitted recovery against the parents for damage to school property “on the complaint of the teacher,” and in the instant case the damage was done during the nighttime and not under the supervision of a teacher).

⁴⁹See *supra* notes 23 & 38. *But* see *Richard v. Boudreaux*, 347 So. 2d 1298 (La. Ct. App. 1977).

⁵⁰See generally *Iowa Act*, *supra* note 23, at 1038-39 (1970); W. Prosser & W. Keeton, *The Law of Torts* § 123 (5th ed. 1984).

Alabama—See *Winfrey v. Austin*, 260 Ala. 439, 71 So. 2d 15 (1954); *Gray v. Meadows*, 24 Ala. App. 487, 136 So. 876 (1931).

Arizona—See *Parsons v. Smithey*, 109 Ariz. 49, 504 P.2d 1272 (1973).

Arkansas—See *Bieker v. Owens*, 234 Ark. 97, 350 S.W.2d 522 (1961); *Richardson v. Donaldson*, 220 Ark. 173, 246 S.W.2d 551 (1952); *Bonner v. Surman*, 215 Ark. 301, 220 S.W.2d 431 (1949).

California—See *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955); *Weispart v. Flohr*, 260 Cal. App. 2d 281, 67 Cal. Rptr. 114 (1968); *Casas v. Maulhardt Buick, Inc.*, 258 Cal. App. 2d 692, 66 Cal. Rptr. 44 (1968); *Figone v. Guisit*, 43 Cal. App. 606, 185 P. 694 (1919).

Colorado—See *Horton v. Reaves*, 186 Colo. 149, 526 P.2d 304 (1974); *Hice v. Pullum*, 130 Colo. 302, 275 P.2d 193 (1954); *Kirkpatrick v. McCarty*, 112 Colo. 588, 152 P.2d 994 (1944); *Mitchell v. Allstate Ins. Co.*, 36 Colo. App. 71, 534 P.2d 1235 (1975).

Connecticut—See *LaBonte v. Fed. Mut. Ins. Co.*, 159 Conn. 252, 268 A.2d 663 (1970).

eight-year-old **girl** slammed a hotel room door on the hand of a

Delaware—See *Markland v. Baltimore & O. R.R.*, 351 A.2d 89 (Del. Super. Ct. 1976); *Rovin v. Connelly*, 291 A.2d 291 (Del. Super. Ct. 1972).

Florida—See *Gissen v. Goodwill*, 80 So. 2d 701 (Fla. 1955); *Thorne v. Ramirez*, 346 So. 2d 121 (Fla. Dist. Ct. App. 1977); *Southern Am. Fire Ins. Co. v. Maxwell*, 274 So. 2d 579 (Fla. Dist. Ct. App.), cert. dismissed, 279 So. 2d 32 (Fla. 1973); *Spector v. Neer*, 262 So. 2d 689 (Fla. Dist. Ct. App. 1972); *Seabrook v. Taylor*, 199 So. 2d 315 (Fla. Dist. Ct. App.), cert. denied, 204 So. 2d 331 (Fla. 1967); *Bullock v. Armstrong*, 180 So. 2d 479 (Fla. Dist. Ct. App. 1965).

Georgia—See *Corley v. Lewless*, 227 Ga. 745, 182 S.E.2d 766 (1971) (noting that at common law parents were not liable in damages for the torts of their minor children solely based on the parent-child relationship); *Calhoun v. Pair*, 197 Ga. 703, 30 S.E.2d 180 (holding not liable a father who furnished to his minor son a bicycle to be used to go to and from school, where the son injured a third person through the negligent use of the bicycle), conforming to answer to certified question, 71 Ga. App. 211, 30 S.E.2d 776 (1944); *Stanford v. Smith*, 173 Ga. 165, 159 S.E. 666, conforming to answer to certified question, 43 Ga. App. 747, 160 S.E. 93 (1931); *Chastain v. Johns*, 120 Ga. 977, 48 S.E. 343 (1904); *Carter v. Kearse*, 142 Ga. App. 251, 235 S.E.2d 755 (1977); *Shaw v. Buice*, 130 Ga. App. 876, 204 S.E.2d 798 (1974); *Sagnibene v. State Wholesalers, Inc.*, 117 Ga. App. 239, 160 S.E.2d 274 (1968); *Browder v. Sloan*, 111 Ga. App. 693, 143 S.E.2d 13 (1965); *Bell v. Adams*, 111 Ga. App. 819, 143 S.E.2d 413 (1965); *Herrin v. Lamar*, 106 Ga. App. 91, 126 S.E.2d 454 (1962); *Yancey v. Munda*, 93 Ga. App. 230, 91 S.E.2d 204 (1956); *Skelton v. Gambrell*, 80 Ga. App. 880, 57 S.E.2d 694 (1950); *Hulsey v. Hightower*, 44 Ga. App. 455, 161 S.E. 664 (1931).

Idaho—See *Gordon v. Rose*, 54 Idaho 502, 33 P.2d 351 (1934).

Illinois—See *White v. Seitz*, 342 Ill. 266, 174 N.E. 371 (1931); *Arkin v. Page*, 287 Ill. 420, 123 N.E. 30 (1919); *Wilson v. Garrard*, 59 Ill. 51 (1871) (holding a father not liable for the mischievous acts of his minor children in maltreating plaintiffs hogs); *Paulin v. Howser*, 63 Ill. 312 (1872); *Malmberg v. Bartos*, 83 Ill. App. 481 (1899).

Indiana—See *Broadstreet v. Hall*, 168 Ind. 192, 80 N.E. 145 (1907); *Moore v. Waitt*, 157 Ind. App. 1, 298 N.E. 2d 456 (1973).

Iowa—See *Sultzbach v. Smith*, 174 Iowa 704, 156 N.W. 673 (1916); *Jolly v. Doolittle*, 169 Iowa 658, 149 N.W. 890 (1914).

Kansas—See *Capps v. Carpenter*, 129 Kan. 462, 283 P. 655 (1930); *Zeeb v. Bahnmaier*, 103 Kan. 599, 176 P. 326 (1918); *Smith v. Davenport*, 45 Kan. 423, 25 P. 851 (1891); *Sharpe v. Williams*, 41 Kan. 56, 20 P. 497 (1889) (defendant father was found liable for his sons' assault on their schoolteacher where he originally approved the sons' plan for the attack even though he subsequently advised against the plan).

Kentucky—See *Hauert v. Speier*, 214 Ky. 46, 281 S.W. 998 (1926); *Stower v. Morris*, 147 Ky. 386, 144 S.W. 52 (1912); *Pauley's Guardian v. Drain*, 6 S.W. 329 (Ky. 1888) (where a 12-year-old child defamed plaintiffs ward, the court held the child's father not liable absent evidence that the father instigated, procured, indorsed, or repeated it).

Maine—See *Beedy v. Reding*, 16 Me. 362 (1839) (defendant father was held liable for the acts of his minor sons where the court found that he must have been aware of his sons' repeated trespass on his neighbor's property to steal wood for defendant's use but failed to stop his children's misconduct).

Maryland—See *Kerrigan v. Carroll*, 168 Md. 682, 179 A. 53 (1935); *In re Sorrell*, 20 Md. App. 179, 315 A.2d 110 (1974).

hotel employee, severing one of his fingers. Finding the parents

Massachusetts—See *DePasquale v. Dello Russo*, 349 Mass. 655, 212 N.E.2d 237 (1965); *McGowan v. Longwood*, 242 Mass. 337, 136 N.E. 72 (1922).

Michigan—See *Dortman v. Lester*, 380 Mich. 80, 155 N.W.2d 846 (1968); *Muma v. Brown*, 1 Mich. App. 373, 136 N.W.2d 696 (1965), *aff'd*, 378 Mich. 637, 148 N.W.2d 760 (1967).

Minnesota—See *Republic Vanguard Ins. Co. v. Buehl*, 295 Minn. 327, 204 N.W.2d 426 (1973); *Knutson v. Nielsen*, 256 Minn. 506, 99 N.W.2d 215 (1959); *Clarine v. Addison*, 182 Minn. 310, 234 N.W. 295 (1931).

Mississippi—See *Tatum v. Lance*, 238 Miss. 156, 117 So. 2d 795 (1960).

Missouri— See *Murphy v. Loeffler*, 327 Mo. 1244, 39 S.W.2d 550 (1931); *Hays v. Hogan*, 273 Mo. 1, 200 S.W. 286 (1917); *Paul v. Hummel*, 43 Mo. 119 (1868); *Baker v. Haldeman*, 24 Mo. 219 (1857); *Nat'l Dairy Prods. Corp. v. Freschi*, 393 S.W.2d 48 (Mo. Ct. App. 1965); *Bassett v. Riley*, 131 Mo. App. 676, 111 S.W. 596 (1908).

New Jersey—See *Guzy v. Gandel*, 95 N.J. Super. 34, 229 A.2d 809 (App. Div. 1967).

New Mexico—See *Lopez v. Chewiwie*, 51 N.M. 421, 186 P.2d 512 (1947); *Ross v. Souter*, 81 N.M. 181, 464 P.2d 911 (Ct. App. 1970) (In an action against the parents of a minor child for injuries sustained by plaintiff's son in a fight with defendants' child, the court stated that in the absence of statutory law to the contrary, the mere relationship of parent and child imposes no liability on parents for the torts of their minor children. The court also held that a father's investment in orthodontic work on his child's teeth is not "property" under a statute permitting recovery for damage to property.).

New York—See *Fessler v. Brunza*, 89 A.D.2d 640, 453 N.Y.S.2d 81 (1982); *Massapequa Free School Dist. No. 23 v. Regan*, 63 A.D.2d 727, 405 N.Y.S.2d 308 (1978); *Staruck v. Otsego County*, 285 A.D. 476, 138 N.Y.S.2d 385 (1955); *Napiearski v. Pickering*, 278 A.D. 456, 106 N.Y.S.2d 28 (1951), motion denied, 303 N.Y. 905, 105 N.E.2d 492 (1952); *Steinberg v. Cauchois*, 249 A.D. 518, 293 N.Y.S. 147 (1937) (where the parents permitted their child to operate his bicycle on the sidewalk in violation of a municipal ordinance, resulting in injury to a child walking on the sidewalk, the court acknowledged that parental liability may be imposed under various circumstances, including negligent parental supervision or discipline, but found insufficient evidence to impose such parental liability on these facts); *Shaw v. Roth*, 54 Misc. 2d 418, 282 N.Y.S.2d 844 (Sup. Ct. 1967); *Linder v. Bidner*, 50 Misc. 2d 320, 323, 270 N.Y.S.2d 427, 430 (1966) (finding that "a parent is negligent when there has been a failure to adopt reasonable measures to prevent a definite type of harmful conduct on the part of the child, but that there is no liability on the part of the parents for the general incorrigibility of a child") (emphasis in original); *Schuh v. Hickis*, 37 Misc. 2d 477, 236 N.Y.S.2d 214 (Sup. Ct. 1962); *Frellesen v. Colburn*, 156 Misc. 254, 281 N.Y.S. 471 (1935); *Littenberg v. McNamara*, 136 N.Y.S.2d 178 (Sup. Ct. 1954) (in an action for injuries caused when defendant's seven-year-old son threw a rock at another child, the court found that there was no cause of action where there was no allegation that the parent was sufficiently close to the boy to exercise dominion or control over the boy in order to prevent the injury); *Tiftt v. Tiftt*, 4 Denio 175 (N.Y. 1847) (the defendant father was held not liable for the tort of his minor daughter based merely on the parent-child relationship where, absent the parent's authority or approval, the child encouraged the parent's dog to attack the plaintiff's hog and the dog chased the hog until it died).

North Carolina—See *Cronenberg v. United States*, 123 F. Supp. 693 (E.D.N.C. 1954); *Anderson v. Butler*, 284 N.C. 723, 202 S.E.2d 585 (1974); *Pleasant v. Motors Ins. Co.*, 280 N.C. 100, 185 S.E.2d 164 (1971); *Smith v. Simpson*, 260 N.C.

not liable for their daughter's misconduct, the court stated that it

601, 133 S.E.2d 474 (1963); *Gen. Ins. Co. of Am. v. Faulkner*, 259 N.C. 317, 130 S.E.2d 645 (1963) (stating that at common law, with which the North Carolina decisions were in accord, the mere relationship of parent and child was not considered a proper basis for imposing vicarious liability upon the parents for the torts of the child); *Langford v. Shu*, 258 N.C. 135, 128 S.E.2d 210 (1962) (The court found the mother of a 12-year-old-boy liable where she stood silently by while the boy played a practical joke on a neighbor, scaring the neighbor and causing her to flee, resulting in a serious fall. The court based its holding of parental liability on the parent's failure to restrain the child, finding that this failure amounted to consent to the child's prank.); *Lane v. Chatham*, 251 N.C. 400, 111 S.E.2d 598 (1959); *Staples v. Bruns*, 218 N.C. 780, 11 S.E.2d 460 (1940) (where defendant's son struck and injured plaintiff while riding his bicycle on a sidewalk in violation of a city ordinance, the court found the evidence insufficient to impose parental liability in light of the general rule that a parent is not liable for the torts of a child); *Bowen v. Mewborn*, 218 N.C. 423, 11 S.E.2d 372 (1940); *Patterson v. Weatherspoon*, 17 N.C. App. 236, 193 S.E.2d 585 (1972).

North Dakota—See *Peterson v. Rude*, 146 N.W.2d 555 (N.D. 1966).

Ohio—See *Levin v. Bourne*, 117 Ohio App. 269, 192 N.E.2d 114 (1962); *Joseph v. Peterson*, 108 Ohio App. 519, 160 N.E.2d 420 (1959); *White v. Page*, 105 N.E.2d 652 (Ohio Ct. App. 1950); *Hill v. Harris*, 39 Ohio Op. 267, 87 N.E.2d 97 (1948).

Oklahoma—See *Sawyer v. Kelly*, 194 Okla. 516, 153 P.2d 97 (1944).

Pennsylvania—See *Condel v. Savo*, 350 Pa. 350, 39 A.2d 51 (1944); *In re Weiner*, 176 Pa. Super. 255, 106 A.2d 915 (1954) (finding that there is no common-law liability on the parents of a delinquent child to make restitution to the owners of homes burglarized by the child).

South Dakota—See *Lamro Indep. Consol. School Dist. v. Cawthome*, 76 S.D. 106, 73 N.W.2d 337 (1955); *Johnson v. Glidden*, 11 S.D. 237, 76 N.W. 933 (1898).

Tennessee—See *Bocock v. Rose*, 213 Tenn. 195, 373 S.W.2d 441 (1963); *Highsaw v. Creech*, 17 Tenn. App. 573; 69 S.W.2d 249 (1933).

Texas—See *Chandler v. Deaton*, 37 Tex. 406 (1872) (the court held the father not liable for the act of his minor son in shooting the plaintiff's mules, noting that there was no presumption growing out of the domestic relation of parent and child which would hold the father responsible for a crime or tort committed by his minor child unless it were shown that the father was in some way implicated as a principal or accessory); *Aetna Ins. Co. v. Richardelle*, 528 S.W.2d 280 (Tex. Civ. App. 1975); *Miller v. Pettigrew*, 10 S.W.2d 168 (Tex. Civ. App. 1928); *Ritter v. Thibodeaux*, 41 S.W. 492 (Tex. Civ. App. 1897) (where a father had no knowledge that his minor son was out with an air gun, since the child did not own one and his father did not permit him to use one, but where the child borrowed the gun from a neighbor and shot plaintiff, the court held the father not liable in damages for the son's tort because it was committed without the father's knowledge, consent, participation, or sanction).

Vermont—See *Giguere v. Rosselot*, 110 Vt. 173, 3 A.2d 538 (1939).

Virginia—See *Nixon v. Rowland*, 192 Va. 47, 63 S.E.2d 757 (1951); *Hackley v. Robey*, 170 Va. 55, 195 S.E. 689 (1938); *Green v. Smith*, 153 Va. 675, 151 S.E. 282 (1930).

Washington—See *Coffman v. McFadden*, 68 Wash. 2d 954, 416 P.2d 99 (1966); *Pflugmacher v. Thomas*, 34 Wash. 2d 687, 209 P.2d 443 (1949); *Norton v. Payne*, 154 Wash. 241, 281 P. 991 (1929).

West Virginia—See *Mazzocchi v. Seay*, 126 W. Va. 490, 29 S.E.2d 12 (1944).

⁸⁰80 So. 2d 701 (Fla. 1955).

was basic and established law that a parent was not liable for the tort of a minor child merely based on paternity. The court noted, however, that

there are certain broadly defined exceptions wherein a parent may incur liability: 1. Where he intrusts his child with an instrumentality which, because of the lack of age, judgment, or experience of the child, may become a source of danger to others. 2. Where a child, in the commission of a tortious act, is occupying the relationship of a servant or agent of its parents. 3. Where the parent knows of his child's wrongdoing and consents to it, directs or sanctions it. 4. Where he fails to exercise parental control over his minor child, although he knows or in the exercise of due care should have known that injury to another is a probable consequence.⁵²

As noted in *Gissen*, three common-law recovery theories are generally available: **agency**,⁵³ parental consent or **ratification**,⁵⁴ and parental negligence⁵⁵ either by failing adequately to supervise

⁵²*Id.* at 703.

⁵³This agency relationship, which should be considered under traditional agency analysis, is beyond the scope of this discussion. It should be noted, however, that in some instances a familial relationship will create a presumption in favor of an agency relationship. See, e.g., *Commonwealth v. Slavski*, 245 Mass. 405, 140 N.E. 465 (1923).

⁵⁴**Ratification** will not be included in this discussion, which is limited to situations in which the parent lacks specific knowledge of the child's tortious activity.

⁵⁵**Arkansas**—See *Bieker v. Owens*, 234 Ark. 97, 350 S.W.2d 522 (1961).

District of Columbia—See *Bateman v. Crim*, 34 A.2d 257 (D.C. 1943).

Florida—See *Gissen v. Goodwill*, 80 So. 2d 701 (Fla. 1955); *Snow v. Nelson*, 450 So. 2d 269 (Fla. Dist. Ct. App. 1984), approved, 475 So. 2d 225 (Fla. 1985); *Southern Am. Fire Ins. Co. v. Maxwell*, 274 So. 2d 579 (Fla. Dist. Ct. App.) (where the parents carefully supervised their five-year-old daughter for the first six weeks as she learned to ride a bicycle but stopped such supervision approximately five days before the girl struck and injured the 79-year-old plaintiff who was walking on the sidewalk, the court found the parents liable for plaintiff's injuries based on the parents' failure to exercise due care under the circumstances), cert. dismissed, 279 So. 2d 32 (Fla. 1973); *Seabrook v. Taylor*, 199 So. 2d 315 (Fla. Dist. Ct. App.), cert. denied, 204 So. 2d 331 (Fla. 1967); *Bullock v. Armstrong*, 180 So. 2d 479 (Fla. Dist. Ct. App. 1965).

Georgia—See *Assurance Co. of Am. v. Bell*, 108 Ga. App. 766, 134 S.E.2d 540 (1963); *Skelton v. Gambrell*, 80 Ga. App. 880, 57 S.E.2d 694 (1950); *Hulsey v. Hightower*, 44 Ga. App. 455, 161 S.E. 664 (1931); *Davis v. Gavalas*, 37 Ga. App. 242, 139 S.E.577 (1927) (where parents permitted their five-year-old son to ride a bicycle on the public sidewalk at night, the parents were held liable for resulting injuries to a pedestrian based on the parents' negligence in permitting the child to ride the bicycle where, because of his youth, the child was unable to ride the bicycle with sufficient care and diligence as to prevent injury to the pedestrian).

the minor or by entrusting the minor with a dangerous instrumentality.

B. PARENTAL FAILURE TO SUPER VISE MINORS

The courts have long recognized that the law imposes upon parents a general duty to supervise their minor children. The Restatement (Second) of Torts identifies this parental responsibility as follows:

A parent is under a duty to exercise reasonable care to control his minor child so as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent (a) knows or has reason to know that he has the ability to control his child, and (b) knows or should know of the necessity and opportunity for exercising such control.⁵⁶

Typically, the courts have found such control "necessary" when the parent knows, or in the exercise of due care should know, that injury to another is a probable consequence of the child's activity. In this regard, however, the parent's liability is based upon the ordinary rules of negligence rather than upon the relationship between parent and child.⁵⁷ Conversely, the courts are hesitant to

Kansas—See *Mitchell v. Wiltfong*, 4 Kan. App. 2d 231, 604 P.2d 79 (1979) (finding that a complaint alleging that plaintiff's child was beaten by defendant's child states a valid claim since parents may be held liable for tortious acts caused by their own negligence in failing to exercise reasonable care to control their child).

New Mexico—See *Ross v. Souter*, 81 N.M. 181, 464 P.2d 911 (Ct. App. 1970) (construing parental failure to act to prevent child's tort as approval of the child's conduct).

New York—See *Steinberg v. Cauchois*, 249 A.D. 518, 293 N.Y.S. 147 (1937); *Conley v. Long*, 21 Misc. 2d 759, 192 N.Y.S.2d 203 (Sup. Ct. 1959); *Frellesen v. Colburn*, 156 Misc. 254, 281 N.Y.S. 471 (1935).

Ohio—See *McGinnis v. Kinkaid*, 1 Ohio App. 3d 4, 437 N.E.2d 313 (1981) (involving parental failure to exercise control over a minor child).

Pennsylvania—See *Condell v. Savo*, 350 Pa. 350, 39 A.2d 51 (1944) (parental failure to act to prevent child's tort construed as approval); *Fox v. Harding*, 43 Del. Co. 39, 6 Pa. D. & C. 2d 785 (1955) (the court held the parents liable for negligently permitting their daughter to ride her bike on the sidewalk in violation of a municipal ordinance where the daughter negligently struck and injured a pedestrian).

West Virginia—See *Mazzocchi v. Seay*, 126 W. Va. 490, 29 S.E.2d 12 (1944).

Wisconsin—See *Statz v. Pohl*, 266 Wis. 23, 62 N.W.2d 556 (1954).

⁵⁶Restatement (Second) of Torts § 316 (1966).

⁵⁷Arkansas—See *Bieker v. Owens*, 234 Ark. 97, 350 S.W.2d 522 (1961).

find liability on the theory that the child is the conduit of the parent's negligence where the parent has no reason to believe that the child will commit the act resulting in injury.⁵⁸ A child's deed

California—See *Poncher v. Brackett*, 246 Cal. App. 2d 769, 55 Cal. Rptr. 59 (1966) (considering the grandfather's liability for the acts of a grandchild under his supervision, the court noted that it is the ability to control the child, rather than the parent-child relationship as such, upon which this "parental" liability is based); *Ellis v. D'Angelo*, 116 Cal. App. 2d 310, 253 P.2d 675 (1953).

Connecticut—See *Jarboe v. Edwards*, 26 Conn. Supp. 350, 223 A.2d 402 (Super. Ct. 1966); *Gillespie v. Gallant*, 1 Conn. Cir. Ct. 594, 190 A.2d 607 (1963); *Repko v. Seriani*, 3 Conn. Cir. Ct. 374, 214 A.2d 843 (1965).

Florida—See *Gissen v. Goodwill*, 80 So. 2d 701 (Fla. 1955) (although the court acknowledged the rule that a parent is not liable for the torts of his minor child due merely to the fact of paternity, it noted that a parent may incur liability where the parent fails to exercise parental control over his minor child although the parent knows or in the exercise of due care should know that injury to another is a probable consequence of the child's conduct); *Spector v. Neer*, 262 So. 2d 689 (Fla. Dist. Ct. App. 1972) (employing the analysis stated in *Gissen*).

Georgia—See *Hill v. Morrison*, 160 Ga. App. 151, 286 S.E.2d 467 (1981).

Kansas—See *Mitchell v. Wiltfong*, 4 Kan. App. 2d 231, 604 P.2d 79 (1979).

Kentucky—See *Moore v. Lexington Transit Corp.*, 418 S.W.2d 245 (Ky. 1967).

Michigan—See *Dortman v. Lester*, 380 Mich. 80, 155 N.W.2d 846 (1968).

New Jersey—See *Mazzilli v. Selger*, 13 N.J. 296, 99 A.2d 417 (1953); *Guzy v. Gandel*, 95 N.J. Super. 34, 229 A.2d 809 (App. Div. 1967); *Stoelting v. Hauck*, 56 N.J. Super. 386, 153 A.2d 339 (1959), *reu'd on other grounds*, 32 N.J. 87, 159 A.2d 385 (1960).

North Carolina—See *Moore v. Crumpton*, 306 N.C. 618, 295 S.E.2d 436 (1982) (overruling *Hawes v. Haynes*, 219 N.C. 535, 14 S.E.2d 503 (1941); *Robertson v. Aldridge*, 185 N.C. 292, 116 S.E. 742 (1923), and other cases).

Oregon—See *Gossett v. Van Egmond*, 176 Or. 134, 155 P.2d 304 (1945).

Pennsylvania—See *Condell v. Savo*, 350 Pa. 350, 39 A.2d 51 (1944) (finding that a parent's failure to restrain a child may amount to parental sanction or consent to the child's acts).

Tennessee—See *Bocock v. Rose*, 213 Tenn. 195, 373 S.W.2d 441 (1963).

West Virginia—See *Mazzocchi v. Seay*, 126 W. Va. 490, 29 S.E.2d 12 (1944).

Wisconsin—See *Gerlat v. Chistianson*, 13 Wis. 2d 31, 108 N.W.2d 194 (1961); *Statz v. Pohl*, 266 Wis. 23, 62 N.W.2d 556 (1954); *Hoverson v. Noker*, 60 Wis. 511, 19 N.W. 382 (1884) (holding the defendant father liable for his children's act in frightening a team of horses, finding that a parent may be held liable for a child's tort where the parent knows that the child is persisting in a course of conduct likely to result in injury to another).

⁵⁸**Arizona**—See *Parsons v. Smithey*, 109 Ariz. 49, 54, 504 P.2d 1272, 1277 (1973) (notwithstanding prior apprehensions of defendant's son for assault, arson, joyriding, larceny, and running away from home, his parents were held not liable for his vicious attack on a mother and her two daughters with a hammer, knife, and belt buckle because "[i]n this case it appears that the evidence of the son's past behavior would not have led a reasonable parent to conclude that he could commit such a violent and vicious act").

which is unrelated to any previous acts will usually not render the

Arkansas—See *Bieker v. Owens*, 234 Ark. 97, 350 S.W.2d 522 (1961).

Georgia—See *Corley v. Lewless*, 227 Ga. 745, 182 S.E.2d 766 (1971); *Hatch v. O'Neill*, 133 Ga. App. 624, 212 S.E.2d 11 (1974); *Scarboro v. Lauk*, 133 Ga. App. 359, 210 S.E.2d 848 (1974); *Sagnibene v. State Wholesalers, Inc.*, 117 Ga. App. 239, 160 S.E.2d 274 (1968); *Hulsey v. Hightower*, 44 Ga. App. 455, 161 S.E. 664 (1931).

Illinois—See *Malmberg v. Bartos*, 83 Ill. App. 481 (1898) (father found not negligent, and therefore not liable for his son's conduct, where he left an axe on the sidewalk within easy reach of his young four-year-old son, who deliberately chopped off the finger of another child with the axe, because the father had no reason to suppose that his son would engage in such a malicious act); *Wilson v. Gerrard*, 59 Ill. 51 (1871) (defendant father held not liable for the trespasses of his minor children where the acts of trespass were committed without the knowledge or assent of the father).

Kentucky—See *Hauert v. Speier*, 214 Ky. 46, 281 S.W. 998 (1926) (although the court found that parents may be held liable for the misconduct of their children where their negligence in permitting an irresponsible child to roam without supervision poses a menace to society, defendant parents were held not liable for an assault by their 20-year-old son since the son was a mature, intelligent, and responsible person possessed of sufficient discretion to appreciate the probable results of his actions).

Louisiana—See *Batiste v. Iberia Parish School Bd.*, 401 So. 2d 1224 (La. Ct. App.), *writ denied*, 405 So. 2d 531 (La. 1981).

Michigan—See *Muma v. Brown*, 1 Mich. App. 373, 136 N.W.2d 696 (1965), *aff'd*, 378 Mich. 637, 148 N.W.2d 760 (1967).

Missouri—See *National Dairy Prods. Corp. v. Freschi*, 393 S.W.2d 48, 55 (Mo. Ct. App. 1965) (where a three-year-old wandered away from home as he had done before, started the engine of a parked *milk* truck, and caused a collision, the court found that plaintiffs had failed to state a cause of action against the boy's parents, noting that "if plaintiffs are unable to prove that said minor child had climbed into and started automobiles or trucks before, they certainly cannot prove that the parents of said minor child failed and refused to restrain the said minor child in that propensity"); *Bassett v. Riley*, 131 Mo. App. 676, 111 S.W. 596 (1908) (defendant father held not liable for his son's shooting of a trespassing dog absent evidence that the father knew or should have known of the act or that he sanctioned or approved it).

New Jersey—See *Stoelting v. Hauck*, 56 N.J. Super. 386, 153 A.2d 339 (1959), *rev'd on other grounds*, 31 N.J. 87, 59 A.2d 385 (1960).

North Carolina—See *Anderson v. Butler*, 284 N.C. 723, 202 S.E.2d 585 (1974) (finding that the test of responsibility in cases involving parents and children, as in *all* negligence actions, is whether an injurious result could have been foreseen by a person of ordinary prudence); *Bowen v. Mewborn*, 218 N.C. 423, 11 S.E.2d 372 (1940) (defendant father was held not liable for his minor son's malicious and lustful attack on plaintiff, notwithstanding defendant's repeated suggestions to his son advising that the son indulge in illicit sexual intercourse, because the son's assault was not a reasonably foreseeable consequence of the father's immoral advice and it was not alleged that the father encouraged or advised his son to commit an assault on anyone or that the father's advice related to the injury of which plaintiff complained).

Ohio—See *Cluthe v. Swendsen*, 9 Ohio Dec. Reprint 458, (1885) (parent held not liable for the death of a child resulting from his son's assault in the absence of

parent liable, though an act that climaxes a course of conduct involving similar acts may do so.⁵⁹

C. PARENTAL DUTY TO WARN OF A CHILD'S DANGEROUS PROPENSITIES

The courts generally have found that mere negligent parental supervision or control is not a tort⁶⁰ and that parents are not

evidence that he knew of his son's dangerous and demented condition and nonetheless failed to maintain proper supervision over him); Ringhaver v. Schlueter, 23 Ohio App. 355, 155 N.E. 242 (1927).

Oklahoma—See Stumpf v. Montgomery, 101 Okla. 257, 226 P. 65 (1924); NcNeal v. McKain, 33 Okla. 449, 126 P. 742 (1912).

Pennsylvania—See Condel v. Savo, 350 Pa. 350, 39 A.2d 51 (1944) (finding that parental failure to act to prevent a child's tort may be construed as approval and noting that parental liability will not be found unless the injury committed by the child is one which the parent should reasonably have foreseen as likely to flow from the parent's negligence).

South Dakota—See Fanton v. Byrum, 26 S.D. 366, 128 N.W. 325 (1910); Johnson v. Glidden, 11 S.D. 237, 76 N.W. 933 (1898).

Texas—See Chandler v. Deaton, 37 Tex. 406 (1872) (defendant father was held not liable for the act of his minor son in shooting plaintiff's mules absent a showing that the father was implicated in, counseled, or abetted the wrongful act, since there was no presumption growing out of the parent-child relationship which would hold the father responsible for a tort committed by his minor child unless it were shown that the father was himself in some way implicated as a principal or accessory); Ritter v. Thibodeaux, 41 S.W. 492 (Tex. Civ. App. 1897) (Defendant father held not liable for injury caused by his son while using an air gun which the child borrowed from a neighbor, since the child did not own such a gun and was not permitted by his father to use one. The court followed the prevailing rule that the father is not liable in damages for the torts of his child committed without his knowledge, consent, participation, or sanction, and when not committed in the course of the child's employment by the father.).

Vermont—See Giguere v. Rosselot, 110 Vt. 173, 3 A.2d 538 (1939).

Washington—See Norton v. Payne, 154 Wash. 241, 281 P. 991 (1929); Birch v. Abercrombie, 74 Wash. 486, 133 P. 1020, *modified and reh'g denied*, 135 P. 821 (Wash. 1913).

Wisconsin—See Hopkins v. Droppers, 184 Wis. 400, 198 N.W. 738 (1924), *aff'd in part and reu'd in part*, 191 Wis. 334, 210 N.W. 684 (1926); Schaefer v. Osterbrink, 67 Wis. 495, 30 N.W. 922 (1886).

⁵⁹*See, e.g.*, Gissen v. Goodwill, 80 So. 2d 701 (Fla. 1955).

⁶⁰Michigan—See Paige v. Bing Constr. Co., 61 Mich. App. 480, 233 N.W.2d 46 (1975).

New York—See Patton v. Carnrike, 510 F. Supp. 625 (N.D.N.Y. 1981); Holodook v. Spencer, 364 N.Y.S.2d 859, 36 N.Y.2d 35, 324 N.E.2d 338 (1974); Ryan v. Fahey, 43 A.D.2d 429, 352 N.Y.S.2d 283 (1974); Marks v. Thompson, 18 A.D.2d 731, 234 N.Y.S.2d 391 (1962), *aff'd*, 13 N.Y.2d 1029, 195 N.E.2d 311, 245 N.Y.S.2d 601 (1963); Hairston v. Broadwater, 73 Misc. 2d 523, 342 N.Y.S.2d 787 (1973).

Maryland—See Lanterman v. Wilson, 277 Md. 364, 354 A.2d 432 (1976) (superceded by statute as stated in *In re James D.*, 295 Md. 314, 455 A.2d 966 (1983)).

required to keep their children under constant surveillance.⁶¹ The courts have, however, typically held parents responsible for their children's torts when the parent is recklessly unaware of the child's propensity to commit tortious acts or when the parent is aware of such a propensity, but has failed to control the child or to warn others of the child's dangerous traits.⁶²

“Georgia—See *Hatch v. O’Neill*, 133 Ga. App. 624, 212 S.E.2d 11 (1974) (in determining whether a parent is liable for injuries caused by a child, the issue is whether the circumstances of the given case place the parents on notice that they have a duty to anticipate that the child may injure another, but the parents are not negligent in simply failing to keep constant and unremitting watch and restraint over the child); *Scarboro v. Lauk*, 133 Ga. App. 359, 210 S.E.2d 848 (1974).

New Hampshire—See *Ross v. Robert’s Exp. Co.*, 100 N.H. 98, 120 A.2d 335 (1956).

New York—See *Knopf v. Muntz*, 121 N.Y.S.2d 422 (Sup. Ct. 1952) (a parent’s knowledge that the play of children may at any moment become hazardous to themselves, their playmates, or passersby does not make the parent liable to a party injured by such play); *Staruck v. Otsego County*, 285 A.D. 476, 138 N.Y.S.2d 385, reh’g denied, 286 A.D. 976, 144 N.Y.S.2d 720 (1955).

⁶²Arkansas—See *Farm Bureau Mut. Ins. Co. v. Henley*, 275 Ark. 122, 628 S.W.2d 301 (1982) (parental knowledge of the child’s dangerous propensities not shown); *Bieker v. Owens*, 234 Ark. 97, 350 S.W.2d 522 (1961) (Where defendant parents’ minor children dragged the minor plaintiff from a car and assaulted him, the court held the parents liable because the parents were aware of prior similar acts but had failed to exercise parental authority to control the malicious conduct of their sons. The court found that parents should be held responsible for injuries inflicted by their children when the parents had the opportunity and ability to control the minor child; knew of the child’s tendency to commit acts which would be expected to cause injury; and having such opportunity, ability, and knowledge, failed to exercise reasonable means of controlling the minor or of reducing the likelihood of injury due to the minor’s acts.).

Arizona—See *Parsons v. Smithey*, 109 Ariz. 49, 504 P.2d 1272 (1973) (notwithstanding some prior minor misconduct by their son, the parents were held not liable for a violent assault by their son upon a mother and her two daughters where the court concluded that the prior misconduct was insufficient to alert the parents that their son would commit such violent and vicious acts); *Seifert v. Owen*, 10 Ariz. App. 483, 460 P.2d 19 (1969).

California—See *Singer v. Marx*, 144 Cal. App. 2d 637, 301 P.2d 440 (1956) (where a nine-year-old boy threw a rock, injuring an eight-year-old girl, the court found that there was sufficient evidence that the mother had notice of the boy’s dangerous proclivities in throwing rocks and that she had failed to administer effective discipline for the question of the mother’s liability to go to the jury, but where there was no evidence that the father had any personal knowledge of the rock throwing, the court held that there was insufficient evidence to go to the jury on the issue of his liability for the child’s misconduct); *Martin v. Barrett*, 120 Cal. App. 2d 625, 261 P.2d 551 (1953); *Ellis v. D’Angelo*, 116 Cal. App. 2d 310, 317–18, 253 P.2d 675, 679 (1953) (where the parents knew of their four-year-old child’s habit of violently attacking and throwing himself against others but failed to warn a new baby-sitter of the child’s violent characteristics, the court found the parents liable for the injuries caused by the child because they failed to exercise reasonable measures to restrain or discipline the child); *Weisbart v. Flohr*, 260 Cal. App. 2d 281, 67 Cal. Rptr. 114 (1968) (The parents of a seven-year-old boy were held not

D. THE CHILD'S ACCESS TO NGER IE . IES

The Restatement (Second) of Torts indicates:

It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the

liable for injuries sustained by a five-year-old neighborhood girl, where the boy shot the girl with his bow and arrow because she refused to leave his yard. The court based its finding on the absence of evidence that the parents were aware or should have been aware of any tendencies of the child which made it likely that he would misuse the bow and arrow, as well as evidence indicating that the boy had been taught how to handle a bow and arrow by his father, that the boy was generally obedient and a good student in school, that he usually played acceptably with other children, and that he had previously been friendly with the victim.).

Colorado—See *Horton v. Reaves*, 186 Colo. 149, 526 P.2d 304 (1974) (The court found the defendant mother not liable for injuries sustained by an infant when her child dropped the infant, even though the mother was aware that the child had previously engaged in similar conduct, because the mother had previously reprimanded her child for such behavior. The court reasoned that mere knowledge by the parent of a child's mischievous or reckless disposition is not sufficient to impose liability on the parent for injury inflicted by the child absent additional evidence that the parent failed to exercise reasonable measures to control the child.); *Hice v. Pullum*, 130 Colo. 302, 275 P.2d 193 (1954); *Mitchell v. Allstate Ins. Co.*, 36 Colo. App. 71, 534 P.2d 1235 (1975).

Connecticut—See *La Bonte v. Fed. Mut. Ins. Co.*, 159 Conn. 252, 268 A.2d 663 (1970); *Jarboe v. Edwards*, 26 Conn. Supp. 350, 223 A.2d 402 (Super. Ct. 1966) (finding the parents liable for injuries sustained by the minor plaintiff when their two-year-old son stuffed papers into the plaintiff's trousers and lighted the papers with matches, where the evidence indicated that the parents were aware of their child's fascination with fire and had taken matches from him on several occasions); *Lutteman v. Martin*, 20 Conn. Supp. 371, 135 A.2d 600 (C.P. 1957); *Toohey v. Colonis*, 15 Conn. Supp. 299 (1948); *Repko v. Seriani*, 3 Conn. Cir. Ct. 374, 214 A.2d 843 (1965) (holding the father liable even though his son was technically in state custody for acts of juvenile delinquency, where the son had been sent home by the state on an experimental basis but had run away from home prior to the incident); *Gillespie v. Gallant*, 24 Conn. Supp. 357, 1 Conn. Cir. Ct. 594, 190 A.2d 607 (1963).

Delaware—See *Mancino v. Webb*, 274 A.2d 711 (Del. Super. Ct. 1971) (defendant parents were found not liable for injuries sustained by a nine-year-old girl when their 12-year-old son maliciously hit her on the head with a dirt clod, absent allegations in the complaint regarding the minor child's prior mischievous and reckless acts or regarding the parents' knowledge of any such acts or failure to exercise proper control over the child).

Florida—See *Gissen v. Goodwill*, 80 So. 2d 701 (Fla. 1955) (where an eight-year-old girl severed the finger of a hotel employee by slamming a hotel door on his finger, the court found that the complaint failed to state a cause of action where it alleged neither that the child was in the habit of doing the particular type of wrongful act that resulted in the injury complained of nor that the parents failed in their duty to exercise parental discipline and control over their daughter); *Spector v. Neer*, 262 So. 2d 689 (Fla. Dist. Ct. App. 1972) (finding that the complaint against defendant parents was insufficient to state a cause of action for damage caused to plaintiff's house when defendant's child set it afire because the

actor, if the actor **knows** or should **know** that such **person**

complaint failed to allege that the child had the habit of engaging in this type of misconduct and failed to allege a connection between the parents' lack of control over the child and the injury caused by the child); *Seabrook v. Taylor*, 199 So. 2d 315 (Fla. Dist. Ct. App.), cert denied, 204 So. 2d 331 (Fla. 1967).

Georgia—See *Poythress v. Walls*, 151 Ga. App. 176, 259 S.E.2d 177 (1979) (parental knowledge of the child's dangerous propensities not shown); *Salter v. Roan*, 161 Ga. App. 227, 291 S.E.2d 46 (1982) (parental knowledge of the child's dangerous propensities not shown); *Scarboro v. Lauk*, 133 Ga. App. 359, 210 S.E.2d 848 (1974) (holding the parents of a minor child not liable for injuries sustained by another child who was struck in the eye by a rock thrown by the minor child, where neither parent knew of any previous occurrence of rock throwing or similar activity by their son and the child denied an intention to hit anyone); *Dunaway v. Kaylor*, 127 Ga. App. 586, 587, 194 S.E.2d 264, 265 (1972) (where a 14-year-old stabbed his neighbor with an ice pick, plaintiff was unable to prove parental knowledge of the child's propensity for violence even though the parent had previously admitted that his son was troublesome because, according to the court, "[m]erely admitting that he know [his son] would have 'problems' could not be a reasonable basis for inferring previous knowledge of violent traits"); *Gilbert v. Floyd*, 119 Ga. App. 670, 168 S.E.2d 607 (1969) (finding the evidence insufficient to establish parental knowledge of a child's dangerous propensities).

Idaho—See *Ryley v. Lafferty*, 45 F.2d 641 (D. Idaho 1930) (holding the parents liable for their son's assault on another child where the parents were aware of their child's habit of persuading smaller boys into secluded places away from adults and beating these boys, and where the parents impliedly acquiesced in these acts and encouraged their **son** to engage in such assaults by resisting the admonitions of other adults and by failing to protect the other boys from their son's acts).

Indiana—See *Broadstreet v. Hall*, 168 Ind. 192, 80 N.E. 145 (1907) (noting that since the ultimate question is whether the parent exercised reasonable care under all the circumstances, evidence that the parent knew of the child's former reckless conduct is admissible to prove negligence on the part of the parent).

Kansas—See *Capps v. Carpenter*, 129 Kan. 462, 283 P. 655 (1930); *Mitchell v. Wiltfong*, 4 Kan. App. 2d 231, 604 P.2d 79 (1979) (where the parents of a nine-year-old child allegedly knew of the child's dangerous propensities and of their ability to control the child's actions, but failed to exert the necessary degree of control, the parents were held liable for the child's malicious actions).

Kentucky—See *Moore v. Lexington Transit Corp.*, 418 S.W.2d 245 (Ky. 1967).

Louisiana—See *Shaw v. Hopkins*, 338 So. 2d 961 (La. Ct. App. 1976) (holding the parents of an adult child not liable for injuries sustained when the child attacked a third party despite the contention that the child's known vicious propensities created a duty in the parents to commit the child to an institution).

Massachusetts—Although common-law rule was subsequently modified by Mass. Gen. Laws Ann. ch. 231, § 85G (West 1985), initially enacted in 1969 and substantially modified in 1972, 1975, 1979, and 1983, see *Spence v. Gormley*, 387 Mass. 258, 439 N.E.2d 741 (1982), the following cases reflect the common law before its modification by statute: *Sabatinelli v. Butler*, 363 Mass. 565, 296 N.E.2d 190 (1973) (holding a father not liable for his son's unprovoked shooting of the victim where over a period of several years the father had observed his 20-year-old son take a gun and go hunting without mishap, where the father had properly warned the son about the dangers of guns, and where there was no evidence that the father knew or should have known of the son's misuse or propensity for misuse of guns or other weapons, notwithstanding that the father knew his son needed psychiatric help and had a drinking problem, since there was no evidence

 intends or is likely to use the thing or to conduct himself

these problems manifested themselves to the father in terms of a propensity of reckless or vicious behavior); *DePasquale v. Dello Russo*, 349 Mass. 655, 212 N.E.2d 237 (1965)(The court held defendant parents not liable for burns sustained by plaintiff when defendants' son lit the wicks of three smoke bombs that were protruding from plaintiff's pants pocket, in light of evidence the parents had cautioned their son to be careful on two prior occasions when he was careless with fireworks. The court found that a contrary holding would tend to expose parents to liability for the torts of their children solely because of their parenthood.); *Caldwell v. Zaher*, 344 Mass. 590, 183 N.E.2d 706 (1962)(imposing liability on a father for his son's tortious misconduct, where the father knew of his son's tendency to assault and molest young children but nonetheless failed to restrain this type of misconduct); *Gudziewski v. Stemplesky*, 263 Mass. 103, 160 N.E. 334 (1928).

Michigan—See *May v. Goulding*, 365 Mich. 143, 111 N.W.2d 862 (1961).

Missouri—See *Nat'l. Dairy Prods. Corp. v. Freschi*, 393 S.W.2d 48 (Mo. Ct. App. 1965) (noting that a parent will not be held liable for mere lack of supervision where the child has shown no previous propensity for the type of act which caused the injury). But see *Paul v. Hummel*, 43 Mo. 119 (1868)(defendant father held not liable for injury inflicted by his 11-year-old son on plaintiff's six-year-old son, even though plaintiff had complained to defendant that his son displayed a vicious and destructive temper accompanied by sudden and causeless fits of anger which were dangerous to plaintiff and her children and defendant failed thereafter to control his son); *Baker v. Haldeman*, 24 Mo. 219, 69 Am. Dec. 430 (1857)(defendant father held not liable for an assault committed by his minor son, even though the father knew the son habitually committed vicious acts).

New Jersey—See *Carey v. Davison*, 181 N.J. Super. 283, 437 A.2d 338 (1981); *Guzy v. Gandel*, 95 N.J. Super. 34, 229 A.2d 809 (App. Div. 1967); *Mazzilli v. Selger*, 13 N.J. 296, 302, 99 A.2d 417, 420 (1953). But see *Zuckerbrod v. Burch*, 88 N.J. Super. 1, 6, 210 A.2d 425, 427 (App. Div.) (defendant mother was held not liable for injuries sustained by a child when her son threw a metal rod at the child, even though the mother knew of the child's propensity to throw stones and other objects; the mother had punished the child for such conduct and the court found that the child "could not be kept away from rocks, sticks or other objects, or from other children, unless he was locked up or sent away"), *cert. denied*, 45 N.J. 593, 214 A.2d 30 (1965).

New Mexico—See *Ross v. Souter*, 81 N.M. 181, 464 P.2d 911 (Ct. App. 1970) (although there was evidence from which it could be found that parents were aware of their child's disposition to engage in fights and to injure other children, the parents were held not liable for injuries sustained by another child in a fight with their child in the absence of evidence showing that the parents had failed to make a reasonable effort to correct or restrain their child).

New York—See *Scherer v. Westmoreland Sanctuary, Inc.*, 95 A.D.2d 803, 463 N.Y.S.2d 522 (1983)(in a personal injury action to recover for injuries sustained by an infant who was hit in the eye by a piece of burning wood thrown by defendant's child, the court found that summary judgment should have been granted for defendant where defendant's affidavit established that he was totally unaware of his child's dangerous propensities if, in fact, any such propensities existed, where there was nothing in the record to indicate that vicious conduct was a factor in the incident); *Gordon v. Harris*, 86 A.D.2d 948, 448 N.Y.S.2d 598 (1982); *Staruck v. Otsego County*, 285 A.D. 476, 138 N.Y.S.2d 385, reh'g denied, 286 A.D. 976, 144 N.Y.S.2d 720 (1955); *Knopf v. Muntz*, 121 N.Y.S.2d 422 (Sup. Ct. 1952); *Zuckerberg v. Munzer*, 277 A.D. 1061, 100 N.Y.S.2d 910 (1950); *Littenberg v. McNamara*, 136 N.Y.S.2d 178 (Sup. Ct. 1954) (requiring that a complaint asserting parental responsibility for injuries sustained when a seven-

in the activity in such a manner as to create an unreasonable risk of ~~harm~~ to others.⁶³

year-old child threw a rock at plaintiff be correctly drafted to assert that the child had a dangerous propensity, that the parent was aware of such propensity, and that the parent failed to restrain the child from vicious conduct imperiling others); *Izzo v. Gratton*, 86 Misc. 2d 233, 383 N.Y.S.2d 523 (1976) (the parent of a minor child was held not liable for the replacement cost of glasses broken during a fight between the minor child and another where the parent had no knowledge of the child's hostile propensities, previous altercations, or continuing dispute with the victim based upon which the parent could have anticipated the altercation); *Shaw v. Roth*, 54 Misc. 2d 418, 282 N.Y.S.2d 844 (1967); *Linder v. Bidner*, 50 Misc. 2d 320, 270 N.Y.S.2d 427 (1966) (holding the parents of a minor liable for injuries caused when he assaulted another child where the parents knew of their son's habit of mauling, pummeling, assaulting, and mistreating smaller children and encouraged their son in this behavior by resenting the admonitions of the parents of the assaulted children and by failing to exercise any control over their child's misbehavior).

North Carolina—See *Moore v. Crumpton*, 306 N.C. 618, 295 S.E.2d 436 (1982) (before a court may find that parents knew or should have known of the necessity for exercising control over a child, it must be shown that the parents knew or, in the exercise of due care, should have known of the child's dangerous propensities and that the parents could reasonably have foreseen that their failure to control those propensities would result in injurious consequences); *Lane v. Chatham*, 251 N.C. 400, 111 S.E.2d 598 (1959); *Ballinger v. Rader*, 153 N.C. 488, 69 S.E. 497 (1910) (parents, whose son was discharged from a hospital for the insane, were held not liable for a homicide subsequently committed by the son absent evidence that they could reasonably have anticipated his act based on a change in his behavior since discharge from the hospital).

North Dakota—See *Peterson v. Rude*, 146 N.W.2d 555 (N.D. 1966).

Ohio—See *Landis v. Condon*, 95 Ohio App. 28, 116 N.E.2d 602 (1952).

Oregon—See *Gossett v. Van Egmond*, 176 Or. 134, 155 P.2d 304 (1945).

Pennsylvania—See *Condell v. Savo*, 350 Pa. 350, 39 A.2d 51 (1944) (defendant parents were held liable for their son's assault where, having full knowledge of their son's previous assaults on small children, they took no steps to correct or restrain their son's vicious propensities, allowing the court to find that the parent's negligence was the proximate cause of the injury).

South Carolina—See *Howell v. Hairston*, 261 S.C. 292, 199 S.E.2d 766 (1973) (where an 11-year-old child's reputation indicated that he possessed a malicious disposition, his parents were charged with notice of the child's harmful tendencies).

South Dakota—See *Johnson v. Glidden*, 11 S.D. 237, 76 N.W. 933 (1898) (The court held the father liable for injuries to plaintiff when his child fired a gun in front of plaintiff's colt, scaring the horse and causing it to run, entangling plaintiff in its rope and dragging plaintiff over the prairie. The finding of liability was based on evidence that the father was aware of his son's improper use of a gun which the father had given him but nonetheless did nothing to correct the child's conduct.).

Tennessee—See *Bocock v. Rose*, 213 Tenn. 195, 373 S.W.2d 441 (1963) (holding the parents liable for the assaults of their minor sons, the court found that parental liability was properly imposed when the parent has the opportunity and ability to control the child; the parent has knowledge or, in the exercise of due care, should have knowledge of the child's tendency to commit specific wrongful acts; the specific acts would normally be expected to injure others; and the parents failed to exercise reasonable means of restraining the child).

Parental negligence consequently may be found when the parent entrusts a child with an instrument which is per se dangerous,⁶⁴ when the parent permits the child to use an instrument that the child has demonstrated a propensity to misuse, or when the parent entrusts the child with an instrumentality, that, because of the youth, inexperience, or disposition of the child, may become a source of danger to others.⁶⁵ The parent may even be liable

Texas—See *Moody v. Clark*, 266 S.W.2d 907 (Tex. Civ. App. 1954).

Washington—See *Eldredge v. Kamp Kachess Youth Services, Inc.*, 90 Wash. 2d 402, 583 P.2d 626 (1978); *Norton v. Payne*, 154 Wash. 241, 281 P. 991 (1929) (defendant parents were held liable for injuries sustained by a five-year-old child when defendants' child struck him in the eye with a stick, because the parents knew of the child's tendency to commit such acts and, though they did not know of this particular incident, they made no effort to restrain the child's habitual behavior).

Wisconsin—See *Gerlat v. Christianson*, 13 Wis. 2d 31, 108 N.W.2d 194 (1961); *Seibert v. Morris*, 252 Wis. 460, 32 N.W.2d 239 (1948); *Hoverson v. Noker*, 60 Wis. 511, 19 N.W. 382 (1884) (holding the defendant father liable for his children's act in frightening a team of horses that was transporting plaintiff past defendant's home based on the court's finding that the father had permitted such activities often in the past).

⁶³Restatement (Second) of Torts § 308 (1966).

⁶⁴Automobiles have not generally been classified as inherently dangerous instrumentalities. See *Reagan, A Constitutional Caveat on the Vicarious Liability of Parents*, 87 Notre Dame Law. 1321, 1329 (1972). *But* see *Southern Cotton Oil Co. v. Anderson*, 80 Fla. 441, 86 So. 629 (1920); *Gossett v. Van Egmond*, 176 Or. 134, 146-47, 155 P.2d 304, 309-10 (1945) (finding parents liable for permitting their son to use an instrument which the child had shown a propensity to misuse where they entrusted the use of the family car to their mentally incompetent minor son). Consequently, recovery for damages sustained as a result of vehicular accidents should be sought through the several statutes addressing motor vehicle liability or through alternative common-law causes of action.

⁶⁵Connecticut—See *LaBonte v. Federal Mut. Ins. Co.*, 159 Conn. 252, 268 A.2d 663 (1970); *Jarboe v. Edwards*, 26 Conn. Supp. 350, 223 A.2d 402 (Super. Ct. 1966) (noting that there is an exception to the common-law principle that parents are not liable for the torts of their children where the parents have entrusted a dangerous instrumentality to their children and finding that a parent may be held negligent for entrusting to a child a thing which the child has shown a propensity to misuse); *Lutteman v. Martin*, 20 Conn. Supp. 371, 135 A.2d 600 (Super. Ct. 1957); *Repko v. Seriani*, 3 Conn. Cir. Ct. 374, 214 A.2d 843 (1965).

District of Columbia—See *Bateman v. Crim*, 34 A.2d 257 (D.C. 1943).

Florida—See *Gissen v. Goodwill*, 80 So. 2d 701 (Fla. 1955) (although generally a parent is not liable for the torts of minor children based on the mere fact of paternity, a parent may be liable when the parent entrusts the child with an instrumentality which, because of the child's age, judgment, or experience, may become a source of danger to others); *Wyatt v. McMullen*, 350 So. 2d 1115 (Fla. Dist. Ct. App. 1977); *Southern Am. Fire Ins. Co. v. Maxwell*, 274 So. 2d 579 (Fla. Dist. Ct. App.), cert. dismissed, 279 So. 2d 32 (Fla. 1973); *Spector v. Neer*, 262 So. 2d 689 (Fla. Dist. Ct. App. 1972) (finding insufficient to state a cause of action a complaint which failed to allege parental negligence, prior similar misconduct by the child, or a causal relationship between the parents' failure to exercise appropriate discipline and the damage done by the child); *Seabrook v. Taylor*, 199

merely **for** leaving the dangerous instrumentality accessible to the

So. 2d 315 (Fla. Dist. Ct. App.) (finding that the question of whether placing a loaded pistol where a 14-year-old son had access to it during times of unsupervised activity rendered the parents liable for injuries inflicted by the son on his playmates was appropriate for consideration by the jury), cert. denied, 204 So. 2d 331 (Fla. 1967); *Bullock v. Armstrong*, 180 So. 2d 479 (Fla. Dist. Ct. App. 1965).

Georgia—See *Hill v. Morrison*, 160 Ga. App. 151, 286 S.E.2d 467 (1981); *Muse v. Ozment*, 152 Ga. App. 896, 264 S.E.2d 328 (1980); *Hulsey v. Hightower*, 44 Ga. App. 455, 161 S.E. 664 (1931) (finding that a father should not be held liable for knife wounds intentionally inflicted by his son on plaintiff, notwithstanding that the injuries were inflicted with a knife given to the son by his father, absent a showing either that the boy's reckless indifference to the rights of others should have put the father on notice that the child would engage in such a criminal and intentional use of the knife or that plaintiff's injuries were traceable to any negligence on the part of the father).

Illinois—See *Rautbord v. Ehmann*, 190 F.2d 533 (7th Cir. 1951) (applying Illinois law), modified, 197 F.2d 323 (7th Cir. 1952).

Kansas—See *Capps v. Carpenter*, 129 Kan. 462, 283 P. 655 (1930) (court's decision as to defendant father's liability for injuries sustained by plaintiff when defendant's son intentionally shot plaintiff in the eye with an air gun in which a pellet was loaded turned upon whether the son had a malignant disposition such that he would likely shoot some playmate and whether his father knew, or from the facts should have known, that the son had such a disposition).

Massachusetts—See *Gudziewski v. Stemplesky*, 263 Mass. 103, 160 N.E. 334 (1928) (defendant parents were held liable for injuries sustained by a 10-year-old boy when their 13-year-old son shot the boy in the eye with a pellet propelled by an air gun where the parents had actual knowledge that their son had used the air gun indiscriminately and mischievously to bully other children).

Michigan—See *Moning v. Alfonso*, 400 Mich. 425, 254 N.W.2d 759 (1977).

Minnesota—See *Republic Vanguard Ins. Co. v. Buehl*, 295 Minn. 327, 204 N.W.2d 426 (1973).

Missouri—See *Dinger v. Burnham*, 360 Mo. 465, 228 S.W.2d 696 (1950) (parents found liable because they had entrusted their child with an instrumentality which they reasonably should have known could cause injury in the child's hands); *Charlton v. Jackson*, 183 Mo. App. 613, 167 S.W. 670 (1914) (where the evidence indicated that shortly before the incident resulting in plaintiff's injuries the defendant's 13-year-old son had pointed the gun at plaintiff, the court found the father liable, noting that if a father knows that his indiscreet minor son is using a firearm in a careless, negligent manner so as to endanger others, it is the father's duty to interpose parental authority to prevent such injury).

New York—See *Holodook v. Spencer*, 36 N.Y.2d 35, 324 N.E.2d 338, 364 N.Y.S.2d 859 (1974); *Mulcahy v. Monroe County*, 78 A.D.2d 1012, 433 N.Y.S.2d 664 (1980); *Heritage Mut. Ins. Co. v. Hunter*, 63 A.D.2d 200, 406 N.Y.S.2d 625 (1978); *Masone v. Gianotti*, 54 A.D.2d 269, 388 N.Y.S.2d 322 (1976); *Zuckerberg v. Munzer*, 277 A.D. 1061, 100 N.Y.S.2d 910 (1950) (involving a baseball bat); *Steinberg v. Cauchois*, 249 A.D. 518, 293 N.Y.S. 147 (1937); *Middleton v. Nichols*, 114 Misc. 2d 596, 452 N.Y.S.2d 157 (1982); *Stasky v. Bernardon*, 81 Misc. 2d 1067, 367 N.Y.S.2d 449 (1975); *Beekman Estate v. Midonick*, 44 Misc. 2d 11, 252 N.Y.S.2d 885 (1964).

North Carolina—See *Anderson v. Butler*, 284 N.C. 723, 202 S.E.2d 585 (1974); *Smith v. Simpson*, 260 N.C. 601, 133 S.E.2d 474 (1963); *Lane v. Chatham*, 251 N.C. 400, 111 S.E.2d 598 (1959) (where there was evidence of notice to the defendant mother of prior occasions on which her son had shot at people, the court

child, but such accessibility does not always amount to negligence.⁶⁶

held the mother liable for allowing her nine-year-old son to keep an air rifle; in so doing she breached her legal duty to exercise reasonable care to prohibit, restrict, or supervise the son's use of the rifle and she reasonably should have foreseen that her son, in his unrestricted use of the rifle, was likely to use the rifle in such a manner as to inflict injury); *Honea v. Bradford*, 39 N.C. App. 652, 251 S.E.2d 720 (1979).

Oregon—See *Gossett v. Van Egmond*, 176 Or. 134, 155 P.2d 304 (1945).

Pennsylvania—See *Mendola v. Sambol*, 166 Pa. Super. 351, 71 A.2d 827 (1950).

Rhode Island—See *Salisbury v. Crudale*, 41 R.I. 33, 102 A. 731 (1918).

South Carolina—See *Howell v. Hairston*, 261 S.C. 292, 199 S.E.2d 766 (1973) (finding the question of parental liability for injuries sustained by a nine-year-old when defendants' 11-year-old son shot him in the eye with an air rifle to be appropriate for resolution by the jury where the parents permitted their son to have unsupervised possession of the gun and where they were aware that their son possessed an aggressive and malicious disposition).

South Dakota—See *Johnson v. Glidden*, 11 S.D. 237, 76 N.W. 933 (1898) (finding the father liable for injuries resulting from his 13-year-old son's use of a shotgun where the father not only countenanced his son's reckless and careless use of the gun but actually encouraged the continuation of such conduct).

Texas—See *Moody v. Clark*, 266 S.W.2d 907 (Tex. Civ. App. 1954).

Vermont—See *Giguere v. Rosselot*, 110 Vt. 173, 3 A.2d 538 (1939) (holding that, notwithstanding the common-law rule against parental liability for the acts of minor children, a parent may be guilty of actionable negligence in entrusting firearms or making them accessible to minor children who lack the capacity to use such weapons properly).

Wisconsin—See *Bankert v. Threshermen's Mut. Ins. Co.*, 105 Wis. 2d 438, 313 N.W.2d 854 (Wis. Ct. App. 1981), *aff'd*, 110 Wis. 2d 469, 329 N.W.2d 150 (1983); *Hoverson v. Noker*, 60 Wis. 511, 19 N.W. 382 (1884) (where defendant had observed his two minor sons shouting and firing pistols in front of their house when people passed on the highway in front of the house and where the father had failed to discipline the boys or to control such conduct, the court found that the father was liable for injuries resulting from such behavior).

“California—See *Figone v. Guisti*, 43 Cal. App. 606, 185 P. 694 (1919) (holding a father not liable when his son injured another with a revolver kept in a drawer under the bar counter of the saloon which the father owned and in which the son worked, absent evidence that the boy was likely to misuse the gun, where the gun was kept in the saloon as protection against robbers and where the son believed the victim intended him harm).

Florida—See *Seabrook v. Taylor*, 199 So. 2d 315 (Fla. Dist. Ct. App.) (where defendants' 14-year-old son shot minors with a pistol defendants kept in an unlocked closet accessible to their son, who knew of the gun's location, the court found that any liability based upon the parent's failure to exercise due care under the circumstances was a question properly submitted to the jury), *cert. denied*, 204 So. 2d 331 (Fla. 1967).

Louisiana—See *Marionneaux v. Brugier*, 35 La. Ann. 13 (1883) (gun fired in city street); *Mullins v. Blaise*, 37 La. Ann. 92 (1885) (finding the defendant father liable for injuries which his six-year-old son caused by firing a roman candle at a crowd of children, notwithstanding the child's tender age and the father's absence from the home at the time of the incident); *Polk v. Trinity Universal Ins. Co.*, 115 So.

The majority of the courts considering this issue have held that it is parental negligence to permit an inexperienced or irresponsible child to have a dangerous gun or to leave a gun in a place

2d 399 (La. Ct. App. 1959) (where the evidence showed that the minor was clearly guilty of negligence in striking and injuring a smaller child with a baseball bat, the minor's father was found liable in damages based on the parent's negligence in leaving the bat within the child's access when surrounding circumstances indicated that damage might result); *Phillips v. D'Amico*, 21 So. 2d 748 (La. Ct. App. 1945) (pellet gun); *Wright v. Petty*, 7 La. App. 584 (1927) (pellet gun shot in city street).

Mississippi—See *Tatum v. Lance*, 238 Miss. 156, 117 So. 2d 795 (1960) (parents held not liable for injuries inflicted by their seven-year-old son with a pellet gun where the father had emphatically admonished the son not to use the rifle without supervision and where the parents could not have foreseen that the child would be inadvertently left alone in the house or that the child would find the ammunition which was hidden in the father's dresser drawer).

New Jersey—See *Mazzilli v. Selger*, 13 N.J. 296, 99 A.2d 417 (1953) (permitting the jury to determine both the defendant mother's negligence in having a shotgun and shells in her house and whether, as a result of the mother's negligence, the son's conduct in discharging the shotgun at plaintiff was reasonable conduct for a child of his age).

New York—See *Frellesen v. Colburn*, 156 Misc. 254, 281 N.Y.S. 471 (1935) (defendant father held not liable when his 16-year-old son shot a neighbor's dog, where the father stored the shotgun and ammunition in two different places, had no knowledge of the incident, and was in no way negligent with respect to the incident).

Pennsylvania—See *Fleming v. Kravitz*, 260 Pa. 428, 103 A. 831 (1918) (finding a father not liable for minor injuries to the victim's eye sustained when his six-year-old son shot a match stem at the victim with his toy air gun, where the father's negligence amounted only to permitting his immature and inexperienced son to possess such a plaything).

Tennessee—See *Prater v. Burns*, 525 S.W.2d 846 (Tenn. Ct. App. 1975) (where the mother had trained her 13-year-old son in handling firearms and allowed him free access to a shotgun for hunting purposes, and the son thought the gun was unloaded just prior to accidentally shooting and killing his 14-year-old friend, the question of the mother's negligent entrustment of a dangerous instrumentality was found appropriate for the jury's consideration).

Wisconsin—See *Gerlat v. Christianson*, 13 Wis. 2d 31, 108 N.W.2d 194 (1961) (finding negligence where a father purchased an air gun for his 10-year-old son, instructed him to use it only in the basement and never to point it at anyone, but left the gun accessible in an open cabinet and permitted his son to use it without adult supervision; a playmate was shot while the children were playing with the gun in the basement); *Siebert v. Morns*, 252 Wis. 460, 32 N.W.2d 239 (1948) (where the mother had no expert knowledge of bows and arrows and it appeared that her children were required to seek cover before her son shot arrows into the air, the mother was found not liable for injury to a 10-year-old boy who had taken cover but stuck his head out of the garage and was struck in the eye); *Taylor v. Seil*, 120 Wis. 32, 97 N.W. 498 (1903) (where plaintiff's son was killed by a shot which defendant's seven-year-old son discharged from a .22 caliber rifle, the defendant father was found not negligent where the father had given the gun to his 17-year-old son for use in hunting, where the seven-year-old son was permitted to carry the rifle unloaded on hunting excursions, and where neither of these practices was unusual).

where it is foreseeable that it may come into the hands of such a child.⁶⁷ Additionally, some courts have specifically found parents liable for failing to remove a gun from a child's possession when

⁶⁷Colorado—See *Dickens v. Barnham*, 69 Colo. 349, 194 P. 356 (1920).

Kentucky—See *Meers v. McDowell*, 110 Ky. 926, 62 S.W. 1013 (1901) (finding appropriate a cause of action against the defendant father of a feeble-minded child who permitted the child to possess a rifle and who gave the child intoxicating liquor, where the child wounded plaintiff's son while intoxicated).

Louisiana—See *Sutton v. Champagne*, 141 La. 469, 75 So. 209 (1917) (Where a nine-year-old boy was killed by a .22 caliber rifle, the court found a valid cause of action against the parents of both the boy who shot the rifle and the boy who provided the rifle. The court additionally found, however, that the parents of the boy who shot the rifle could recover their portion of the judgment against the parents of the boy who provided the rifle, because in allowing their son access to the rifle those parents were liable as though they, and not their 14-year-old son, had handed the rifle to the inexperienced youth who shot the deceased child. Under such circumstances, the court found that these parents thereby assumed the risks incidental to their son's inexperience and lack of skill in handling the dangerous instrument.).

Massachusetts—See *Sojka v. Dlugosz*, 293 Mass. 419, 200 N.E. 554 (1936); *Souza v. Irome*, 219 Mass. 273, 106 N.E. 998 (1914) (finding that a father is negligent in allowing his son to have gun and ammunition when the son is not fit to be entrusted with such dangerous articles, and finding that the son's negligent or wrongful use of the gun should have been foreseen and guarded against by the father, the court held that under such circumstances the father could be held liable for the natural consequences following directly from such negligence).

Michigan—See *May v. Goulding*, 365 Mich. 143, 111 N.W.2d 862 (1961) (holding that whether parents were negligent in giving a semi-automatic rifle to a mentally-ill, 15-year-old son was a question for the jury).

Minnesota—See *Kunda v. Briarcombe Farm Co.*, 149 Minn. 206, 183 N.W. 134 (1921).

Missouri—See *Charlton v. Jackson*, 183 Mo. App. 613, 167 S.W. 670 (1914).

New Jersey—See *Stoelting v. Hauck*, 56 N.J. Super. 386, 153 A.2d 339 (1959) (the parents were found liable where they permitted their 15-year-old daughter, who had no training in the use of small arms other than one visit to the firing range, to handle automatic revolvers and to sleep in a room where a loaded gun was kept in an unlocked desk), *reud on other grounds*, 32 N.J. 87, 159 A.2d 385 (1960).

New Mexico—See *Ortega v. Montoya*, 97 N.M. 159, 637 P.2d 841 (1981) (holding the father liable for damages caused when his son shot the victim in the eye with a pellet gun where the son had previously threatened to shoot the victim and had pointed the gun at the victim before shooting him and where the son's act was willful and malicious within the meaning of a statute providing for parental responsibility, despite the fact that the son was only eight years old at the time of the incident).

New York—See *Lichtenthal v. Gawoski*, 44 A.D.2d 771, 354 N.Y.S.2d 267 (1974) (finding a cause of action against the parent for negligently entrusting a pellet gun to a son, where the parent knew of the son's propensities to use the gun dangerously and where the parent failed to properly instruct the son in the gun's use); *Kucklik v. Feuer*, 239 A.D. 338, 267 N.Y.S. 256 (1933), *aff'd*, 264 N.Y. 542, 191 N.E. 555 (1934).

North Carolina—See *Brittingham v. Stadiem*, 151 N.C. 299, 66 S.E. 128 (1909) (finding defendant negligent in permitting her 12-year-old son to handle pistols

the child is found with the gun.⁶⁸ The courts in several states, however, have held that merely permitting a minor to have a gun, or access thereto, does not make the parents liable for injuries inflicted by the minor with the gun.⁶⁹

that were left on the counter of her pawnshop and consequently finding her liable in damages to plaintiff, who was shot by the son when plaintiff entered the store to pawn his watch).

North Dakota—See *Olson v. Hemsley*, 48 N.D. 779, 187 N.W. 147 (1922).

Oklahoma—See *Hart v. Lewis*, 187 Okla. 394, 103 P.2d 65 (1940).

Pennsylvania—See *Kuhns v. Brugger*, 390 Pa. 331, 135 A.2d 395 (1957) (in an action against the grandfather of a 12-year-old boy for injuries sustained by the boy's 12-year-old cousin when the boy shot him with a .22 caliber rifle obtained from an unlocked dresser drawer in the grandfather's bedroom, the court held that the question was not whether the grandfather was responsible for the child's tort but was, rather, whether the grandfather was guilty of negligence in permitting a highly dangerous instrumentality to be in a place where it might come into the hands of an incautious child); *Mendola v. Sambol*, 166 Pa. Super. 351, 71 A.2d 827 (1950) (holding the father of an 11-year-old boy liable for injuries inflicted by the boy with a .22 caliber rifle that the father had left loaded behind a door); *Archibald v. Jewell*, 70 Pa. Super. 247 (1918); *Guerra v. Hiduk*, 16 Pa. D. & C. 417, 11 Wash. Co. 121 (1930) (finding the father liable for knowingly permitting his immature 12-year-old son to possess and use a .22 caliber rifle where the son shot and killed a seven-year-old boy).

Rhode Island—See *Salisbury v. Crudale*, 41 R.I. 33, 102 A. 731 (1918) (where defendant, having broken the stock of a loaded rifle, threw it under his bed, the place from which his 12-year-old child subsequently obtained the gun, the court found the question of defendant's negligence in leaving the loaded gun in such an accessible place to be appropriate for jury consideration with respect to plaintiff's resulting injuries).

South Dakota—See *Johnson v. Glidden*, 11 S.D.237, 76 N.W. 933 (1898).

Vermont—See *Giguere v. Rosselot*, 110 Vt. 173, 3 A.2d 538 (1939) (In an action against a father to recover damages for a fatal shooting, the court rejected defendant's claim that he could not be held liable for the torts of his children. The court found, rather, that the father was guilty of actionable negligence when he made a firearm accessible to a minor child who lacked the capacity to use it properly.).

Wisconsin—See *Pawlak v. Mayer*, 266 Wis. 55, 62 N.W.2d 572 (1954); *Hoverson v. Noker*, 60 Wis. 511, 19 N.W. 382 (1884). But see *Taylor v. Seil*, 120 Wis. 32, 97 N.W. 498 (1903).

“Massachusetts—See *Gudziewski v. Stemplesky*, 263 Mass. 103, 160 N.E. 334 (1928).

Missouri—See *Bassett v. Riley*, 131 Mo. App. 676, 111 S.W. 596 (1908).

New York—See *Kuchlik v. Feuer*, 239 A.D. 338, 267 N.Y.S. 256 (1933), *aff'd*, 264 N.Y. 542, 191 N.E. 555 (1934).

Rhode Island—See *Salisbury v. Crudale*, 41 R.I. 33, 102 A. 731 (1918).

South Dakota—See *Johnson v. Glidden*, 11 S.D. 237, 76 N.W. 933 (1898).

⁶⁸California—See *Hagerty v. Powers*, 66 Cal. 368, 5 P. 622 (1885) (holding that the defendant who permitted his 11-year-old child to have a loaded pistol in his possession was not liable for injuries inflicted by such child in handling the pistol);

In determining whether a parent is negligent in permitting a minor child to have a gun or access thereto, the courts have taken into consideration the parent's knowledge of the child's possession

Martin v. Barrett, 120 Cal. App. 2d 625, 261 P.2d 551 (1953); Figone v. Guisti, 43 Cal. App. 606, 185 P. 694 (1919).

Connecticut—See Wood v. O'Neil, 90 Conn. 497, 97 A. 753 (1916) (finding the parents not liable when their 16-year-old son shot another with a shotgun because the claim of parental negligence was based solely upon evidence that the parents had entrusted their son with the shotgun).

Georgia—See Shaw v. Buice, 130 Ga. App. 876, 204 S.E.2d 798 (1974); Skelton v. Gambrell, 80 Ga. App. 880, 57 S.E.2d 694 (1950).

Kansas—See Capps v. Carpenter, 129 Kan. 462, 283 P. 655 (1930).

Louisiana—See Daigle v. Goodwin, 311 So. 2d 921 (La. Ct. App.) (holding the father of a boy who loaned his rifle to another not liable when his son's friend injured a third person, absent evidence that the friend had mishandled that rifle or other rifles, where the father had instructed his son on the proper handling of guns and had placed reasonable restrictions on his son's use of guns), *writ refused*, 314 So. 2d 738 (La. 1975).

Massachusetts—See Norlin v. Connolly, 336 Mass. 553, 146 N.E.2d 663 (1957) (holding the parents not liable when their 14-year-old son injured the eye of a playmate with an *air* gun where the parents had instructed their son to use the gun only for target practice in the yard under parental supervision and the parents had no reason to suspect that the child would not comply with these restrictions).

Minnesota—See Clarine v. Addison, 182 Minn. 310, 234 N.W. 295 (1931) (holding a father who furnished a 19-year-old son with a pistol not liable where the father had no knowledge that, because of youth, mental deficiency, recklessness, or other cause, it was unsafe to entrust the son with the pistol).

Missouri—See Bassett v. Riley, 131 Mo. App. 676, 111 S.W. 596 (1908) (where the evidence established that a father saw his 17-year-old son with a gun and asked him what he was going to do, to which the son replied that he was going to scare a dog, and the father then walked away from the son and was not in the son's presence when the son subsequently killed plaintiff's dog, the court held that the father was not liable for his son's act). *But* see Charlton v. Jackson, 183 Mo. App. 613, 167 S.W. 670 (1914) (finding the defendant father liable where his son had pointed the gun at plaintiff and had been reprimanded by his father shortly before the incident resulting in injury to plaintiff).

New Mexico—See Lopez v. Chewiwie, 51 N.M. 421, 186 P.2d 512 (1947) (absent parental knowledge that a minor child was indiscreet or reckless in the handling of firearms, the mere keeping of a loaded gun on the premises and leaving such child alone there did not make the parent liable for an injury inflicted by the child with the gun).

New York—See Conley v. Long, 21 Misc. 2d 759; 192 N.Y.S.2d 203 (Sup. Ct. 1959) (merely placing a gun in the hands of a child who possessed a hunting license and who had been schooled in the use of firearms does not constitute negligence on the part of the parents since they were entitled to assume that it was safe to permit him to use the gun).

North Carolina—See Lane v. Chatham, 251 N.C. 400, 111 S.E.2d 598 (1959) (holding that parents are not liable merely for giving their son an *air* rifle).

North Dakota—See Peterson v. Rude, 146 N.W.2d 555 (N.D. 1966) (where the father was not present when his 11-year-old son accidentally inflicted injuries with

or prior use of the gun,⁷⁰ the experience,⁷¹ disposition,⁷² and age

an air rifle his father had given him, the court found the father not liable absent a showing that his son had used the rifle in a dangerous manner and that the father was aware of such negligent use).

South Dakota—See *Johnson v. Glidden*, 11 S.D. 237, 76 N.W. 933 (1898).

Wisconsin—See *Treptow v. Ruffedt*, 254 Wis. 534, 36 N.W.2d 681 (1949) (when a hunter died from shots fired by defendant's son, the father was held not liable for negligently failing to take precautions to prevent the son from injuring others where the son had been committed to a mental hospital at intervals of several years but had been released by authorities in each instance after short periods of confinement, had worked for the father for years and had exhibited no homicidal tendencies, was an experienced and skillful hunter, and had hunted for years without an accident); *Taylor v. Seil*, 120 Wis. 32, 97 N.W. 498 (1903). **But see** *Hoverson v. Noker*, 60 Wis. 511, 19 N.W. 382 (1884).

⁷⁰Kansas—See *Capps v. Carpenter*, 129 Kan. 462, 283 P. 655 (1930).

Massachusetts—See *Gudziewski v. Stemplesky*, 263 Mass. 103, 160 N.E. 334 (1928) (finding the defendant parents liable when their 13-year-old son shot the victim with an air gun, injuring the victim's eye, because the boy had previously used the gun carelessly in his yard and the parents were therefore chargeable with knowledge of the boy's prior careless use of the gun).

South Dakota—See *Johnson v. Glidden*, 11 S.D. 237, 76 N.W. 933 (1898) (defendant father was held liable for injuries resulting from his son's mischievous use of a gun in light of evidence that defendant knew that his son habitually used the gun which defendant had given him in a dangerous manner but nonetheless permitted the son to continue in this course of action).

Tennessee—See *Highsaw v. Creech*, 17 Tenn. App. 573, 69 S.W.2d 249 (1933).

Texas—See *Ritter v. Thibodeaux*, 41 S.W. 492 (Tex. Civ. App. 1897) (finding the defendant father not liable where defendant's son wounded plaintiff with an air gun that he had borrowed from a neighbor and the evidence established that defendant did not permit his son to have or to use a gun).

Wisconsin—See *Pawlak v. Mayer*, 266 Wis. 55, 62 N.W.2d 572 (1954) (finding the defendant father not liable for injuries to another child's eye when defendant's 13-year-old son shot the child with an air gun, where the father had taken the gun from his son and hidden it in the attic upon receipt of a complaint regarding the son's careless use of the rifle and where the father had no reason to believe that his son had retrieved the gun or would use it to injure another).

⁷¹Kansas—See *Parman v. Lemmon*, 119 Kan. 323, 244 P. 227 (1925) (where it appeared that defendant's son was thoroughly familiar with the use, care, and handling of shotguns and rifles, the court found that the father was not negligent in entrusting the gun to his son on the occasion on which plaintiff was injured).

Massachusetts—See *Sabatinelli v. Butler*, 363 Mass. 565, 296 N.E.2d 190 (1973) (finding a father not liable for injuries inflicted by his son where the son was 20 years old, an Army veteran, an experienced hunter, and where the father was unaware of other violent acts committed by the son).

Michigan—See *Klop v. Vanden Bos*, 263 Mich. 27, 248 N.W. 538 (1933) (finding the father of an 18-year-old boy not liable for the death of plaintiff's 12-year-old son resulting from the 18-year-old boy's discharge of a double-barreled rifle where it appeared that the son was thoroughly familiar with the use and mechanism of the gun and had two years' experience in the use thereof).

Oregon—See *Herndobler v. Rippen*, 75 Or. 22, 146 P. 140 (1915) (finding the defendant parents not liable for injuries sustained by the 16-year-old victim when defendant's 16-year-old son discharged his .32 caliber rifle while cleaning it, where

of the child;⁷³ the type of gun involved;⁷⁴ and, in accessibility cases, the place where the gun is kept.⁷⁵

the evidence indicated that the son was familiar with the use of firearms and had owned and used a rifle since the age of nine and where the parents had not participated in the acts of which plaintiff complained).

"California—See *Martin v. Barrett*, 120 Cal. App. 2d 625, 261 P.2d 551 (1953) (finding no cause of action against the father when his 12-year-old son injured another child by shooting him in the eye with an air rifle because it was alleged neither that the father knew that other children were in the yard when his son used the gun nor that the father knew that the son had previously used the gun in a careless manner).

Georgia—See *Skelton v. Gambrell*, 80 Ga. App. 880, 57 S.E.2d 694 (1950) (where defendant's 14-year-old son shot and killed the victim with a .38 caliber pistol, the court found that the parent's knowledge that their son had pointed the pistol at others a few days prior to the shooting was insufficient to place the parents on notice that their son would commit the criminal offense of murder or manslaughter).

Kansas—See *Capps v. Carpenter*, 129 Kan. 462, 283 P. 655 (1930) (in an action against the father of an eight-year-old who shot the seven-year-old plaintiff in the eye with a pellet gun, where the complaint alleged that the son had a vicious disposition and that the father was aware of this fact, the court found that the father could not be held liable unless these facts were proven since in the absence of such proof there was no evidence of parental negligence in allowing the son to have such a gun).

Michigan—See *May v. Goulding*, 365 Mich. 143, 111 N.W.2d 862 (1961) (where parents left accessible to their mentally ill 15-year-old son a rifle and several hundred rounds of ammunition, notwithstanding that the child had been committed to a state institution for the mentally ill and, after his release, had been belligerent, vicious, and aggressive, the court found that the question of parental negligence was properly submitted to the jury).

Missouri—See *Charlton v. Jackson*, 183 Mo. App. 613, 167 S.W. 670 (1914) (where defendant's 13-year-old son was permitted to have a shotgun and the evidence indicated that the boy was indiscreet and reckless and that shortly before the incident resulting in plaintiff's injuries the son had pointed the gun at plaintiff and had been reprimanded by his father, the court found the father liable, noting that if a father knows that his indiscreet minor son is using a firearm in a careless, negligent manner so as to endanger others, it is the father's duty to interpose parental authority to prevent such injury).

South Carolina—See *Howell v. Hairston*, 261 S.C. 292, 199 S.E.2d 766 (1973) (where the evidence indicated that the child entrusted with an air rifle had a general reputation for possessing a malicious disposition, the parents were held chargeable with knowledge of this reputation).

Tennessee—See *Highsaw v. Creech*, 17 Tenn. App. 573, 69 S.W.2d 249 (1933) (holding that the question of whether the defendant parents knew that their son was irresponsible, vicious, and high-tempered was properly directed to the jury and noting that evidence of specific instances of misconduct were not admissible since the question was whether the parents knew the reputation of their son).

⁷³Georgia—See *Glean v. Smith*, 116 Ga. App. 111, 156 S.E.2d 507 (1967) (finding that a loaded pistol in the hands of a minor child too young to understand its nature is a dangerous instrumentality, the court found that it was for the jury to consider whether defendant was negligent to keep a loaded pistol in the top drawer of a child-sized bureau in the playroom, where defendant's three-year-old son found the weapon, discharged it, and injured the six-year-old plaintiff).

Evidence that a parent has left a loaded gun in a place accessible to a child too immature or indiscreet to exercise the required care in the control of such **an** instrument, and that the parent knew or should have known that the child had such access, raises a jury question as to the parent's responsibility for injuries inflicted by the **child**.⁷⁶ This may also be true with respect to an

West Virginia—See *Mazzocchi v. Seay*, 126 W. Va. 490, 29 S.E.2d 12 (1944) (finding that the parents were properly charged with negligence when they entrusted their four-year-old son with an **air** gun which they knew to be a harmful and dangerous instrumentality in their son's hands because of his extreme youth and inability to exercise judgment, care, and discretion in the rifle's use).

⁷⁴**Kansas**—See *Parman v. Lemmon*, 119 Kan. 323, 244 P. 227 (1925) (holding that the language "or other dangerous weapon" as used in a statute relating to the furnishing of weapons to minors did not include a shotgun).

Pennsylvania—See *Guerra v. Hiduk*, 16 Pa. D. & C. 417, 11 Wash. Co. 121 (1930) (finding the father liable when his 12-year-old son shot and killed a seven-year-old boy with a .22 caliber rifle, where the court found that the rifle was capable of taking the life of a person at a substantial distance and should therefore be considered a dangerous firearm).

⁷⁶**California**—See *Reida v. Lund*, 18 Cal. App. 3d 698, 96 Cal. Rptr. 102 (1971) (finding the question of parental liability for negligently safeguarding a dangerous weapon appropriate for the jury where a 16-year-old boy took his father's military rifle and its telescopic sight to the top of a hill and fired upon cars passing on the highway below, killing three people and seriously wounding others, in light of evidence that the son knew the location of two keys to the locked cabinet in which the weapon was kept).

Georgia—See *Glean v. Smith*, 116 Ga. App. 111, 156 S.E.2d 507 (1967) (finding that it was for the jury to consider whether defendant was negligent in keeping a loaded pistol in the top drawer of a child-sized bureau in the playroom).

Kentucky—See *Spivey v. Sheeler*, 514 S.W.2d 667 (Ky. 1974) (finding that whether placing a loaded pistol in a locked gun case with a clear glass window and leaving the key on top was a sufficient precaution where children were unattended in the house was a question for the jury).

North Carolina—See *Brittingham v. Stadiem*, 151 N.C. 299, 66 S.E. 128 (1909) (finding defendant negligent in permitting her 12-year-old son to handle pistols that were carelessly left on the counter of her pawnshop).

Oregon—See *Thomas v. Inman*, 282 Or. 279, 578 P.2d 399 (1978) (where the father kept a loaded shotgun in the home because of an attempted burglary but attempted to conceal the gun from his children by hiding the gun in a bedroom and instructing the children not to enter that room, the court found that the question of the father's negligence was appropriate for the jury's consideration in a wrongful death action resulting from the 11-year-old son's use of the gun).

Pennsylvania—See *Mendola v. Sambol*, 166 Pa. Super. 351, 71 A.2d 827 (1950) (holding the father of an 11-year-old boy liable for injuries inflicted by the boy with a .22 caliber rifle which the father had left loaded behind a door).

Rhode Island—See *Salisbury v. Crudale*, 41 R.I. 33, 102 A. 731 (1918) (defendant's negligence was a jury question where defendant's 12-year-old child obtained the loaded rifle from under defendant's bed, where the defendant had thrown the gun after he broke the stock).

⁷⁸**Florida**—See *Seabrook v. Taylor*, 199 So. 2d 315 (Fla. Dist. Ct. App.) (finding that it was for the jury to determine whether placing a loaded pistol where a

unloaded gun if ammunition is also accessible to the child.⁷⁷ Even if a given instrument is not inherently dangerous (e.g., an air

14-year-old son had access to it during times of unsupervised activity rendered the parents liable for injuries inflicted by the son on his playmates), cert. denied, 204 So. 2d 331 (Fla. 1967).

Georgia—See *Glean v. Smith*, 116 Ga. App. 111, 156 S.E.2d 507 (1967) (finding that a loaded pistol in the hands of a minor child too young to understand its nature is a dangerous instrumentality).

Kentucky—See *Spivey v. Sheeler*, 514 S.W.2d 667 (Ky. 1974) (finding that it was for the jury to determine whether placing a loaded pistol in a locked gun case with a clear glass window and leaving the key on top was a sufficient precaution where children were unattended in the house).

New Jersey—See *Stoelting v. Hauck*, 56 N.J. Super. 386, 153 A.2d 339 (1959) (the parents were found liable where they permitted their 15-year-old daughter, who had no training in the use of small arms other than one visit to the firing range, to handle automatic revolvers and to sleep in a room where a loaded gun was kept in an unlocked desk), *reud on* other grounds, 32 N.J. 87, 159 A.2d 385 (1960).

New Mexico—See *Lopez v. Chewiwie*, 51 N.M. 421, 186 P.2d 512 (1947) (holding that absent parental knowledge that a minor child was indiscreet or reckless in the handling of firearms, the mere keeping of a loaded gun on the premises and leaving such child alone there did not make the parent liable for an injury inflicted by the child with the gun).

Pennsylvania—See *Mendola v. Sambol*, 166 Pa. Super. 351, 71 A.2d 827 (1950) (holding the father of an 11-year-old boy liable for injuries inflicted by the boy with a .22 caliber rifle which the father had left loaded behind a door).

Rhode Island—See *Salisbury v. Crudale*, 41 R.I. 33, 102 A. 731 (1918) (where defendant, having broken the stock of a loaded rifle, threw it under his bed, the place from which his 12-year-old child subsequently obtained the gun, the court found the question of defendant's negligence in leaving the loaded gun in such an accessible place to be appropriate for jury consideration with respect to plaintiff's resulting injuries).

Arkansas—See *Williams v. Davidson*, 241 Ark. 699, 409 S.W.2d 311 (1966) (finding that a jury question arose as to the father's negligence in leaving an unloaded pellet gun and ammunition in a closet from which his children took it without permission and injured a playmate).

California—See *Reida v. Lund*, 18 Cal. App. 3d 698, 96 Cal. Rptr. 102 (1971) (where defendant's 16-year-old son killed three people, the court found the question of parental liability for negligently safeguarding a dangerous weapon to be appropriate for the jury where the father kept his rifle and its ammunition together in the garage in a locked cabinet and where the evidence indicated that the son knew the location of two keys to the locked cabinet in which the weapon was kept).

Colorado—See *Dickens v. Barnham*, 69 Colo. 349, 194 P. 356 (1920) (finding the defendant father liable for injuries caused by his eight-year-old son where the father had allowed his 14-year-old son to purchase and care for a high-powered repeating rifle but had not inquired into how or where the rifle and ammunition were kept, and the younger son gained access to both the gun and the ammunition).

Massachusetts—See *Sojka v. Dlugosz*, 293 Mass. 419, 200 N.E. 554 (1936) (finding the defendant father liable when his nine-year-old son shot plaintiff where the father had left the unloaded rifle in the pantry and the rifle shells in the pocket of a sweater hung in the living room).

gun), the parent may still be liable if the parent knows that the child's use of the instrument may make it dangerous.⁷⁸

To reduce the subjectivity of determining parental liability in such cases, some courts have focused initially on whether the instrument itself constitutes a "dangerous instrumentality" rather than on the parental state of mind or the child's disposition or maturity level.⁷⁹ Other courts have found that parental violation

New Jersey—See *Mazzilli v. Selger*, 13 N.J. 296, 99 A.2d 417 (1953) (permitting the jury to determine the defendant mother's negligence in having a shotgun and shells in her house).

New York—See *Napiearliski v. Pickering*, 278 A.D. 456, 106 N.Y.S.2d 28 (1951) (finding the defendant father not liable when his nine-year-old son obtained a .22 caliber rifle from behind a board behind defendant's bed, where the shell which the child shot was dissimilar from those which defendant kept hidden for use with the gun, since there was no evidence as to how the child obtained the ammunition and the father asserted that he had put the gun away unloaded three years prior to the incident), motion denied, 303 N.Y. 905, 105 N.E.2d 492 (1952); *Frellesen v. Colburn*, 156 Misc. 254, 281 N.Y.S. 471 (1935) (defendant father held not liable when his 16-year-old son shot a neighbor's dog in light of evidence that the father stored the shotgun and ammunition in two different places, had no knowledge of the incident, and was in no way negligent with respect to the incident).

⁷⁸**Michigan**—See *Whalen v. Bennett*, 4 Mich. App. 81, 143 N.W.2d 797 (1966) (the court's finding that a pellet gun is not inherently dangerous such that it was negligence per se to allow a young boy access to the gun did not bar the court's consideration of parental liability for injury caused by the weapon).

West Virginia—See *Mazzocchi v. Seay*, 126 W. Va. 490, 29 S.E.2d 12 (1944).

⁷⁹**Connecticut**—See *Jarboe v. Edwards*, 26 Conn. Supp. 350, 223 A.2d 402 (Super. Ct. 1966) (permitting the jury to determine whether matches constitute a dangerous instrumentality); *Lubitz v. Wells*, 19 Conn. Supp. 322, 113 A.2d 147 (Super. Ct. 1955) (finding golf clubs not inherently dangerous).

Kansas—See *Capps v. Carpenter*, 129 Kan. 462, 283 P. 655 (1930) (recognizing that air guns are not inherently dangerous and finding that the determination as to the defendant-father's liability for his son's use of an air gun turned upon whether the son had a malicious disposition and whether his father knew or should have known that the son had such a disposition).

Louisiana—See *Phillips v. D'Amico*, 21 So. 2d 748 (La. Ct. App. 1945) (finding air rifles inherently dangerous).

Michigan—See *Chaddock v. Plummer*, 88 Mich. 225, 50 N.W. 135 (1891) (finding that air rifles are not so intrinsically dangerous that it would be negligence to give one to a nine-year-old child).

New York—See *Young v. Dalidowicz*, 92 A.D.2d 242, 460 N.Y.S.2d 82 (1983) (finding that a skateboard is not a dangerous instrument).

North Carolina—See *Lane v. Chatham*, 251 N.C. 400, 111 S.E.2d 598 (1959) (recognizing that air rifles are not inherently dangerous and holding that parents are not liable merely for giving their son an air rifle).

Ohio—See, *White v. Page*, 105 N.E.2d 652 (Ohio Ct. App. 1950) (in an action against parents for injuries sustained by plaintiff from an arrow shot at him by their son, the court stated that a bow and arrow used by an 11-year-old child could not be classified as a dangerous instrumentality).

of statutory prohibitions regarding the accessibility of dangerous instrumentalities may constitute negligence per se.⁸⁰ The practitioner should note, however, that in such cases any parental liability that the courts may impose is a consequence of the parent's own negligence rather than vicarious responsibility for the act of the child.⁸¹ This is particularly significant when the applicable state statute provides that liability under the statute does not preclude the imposition of liability under other statutes or the common law.

E. PROXIMATE CAUSE

Of course, even if the parent were negligent in permitting the child to have a dangerous instrument or in leaving such an

Tennessee—See *Saunders v. State*, 208 Tenn. 347, 370, 345 S.W.2d 899, 909 (1961) (finding that “of course, *air* rifles are classed as toys and are bought for small boys”); *Highsaw v. Creech*, 17 Tenn. App. 573, 69 S.W.2d 249 (1933) (finding *air* rifles to be toys rather than inherently dangerous instrumentalities and holding that it was not negligence per se for the parents to give their nine-year-old son an *air* rifle because, in the absence of a statute to the contrary, parents were not generally liable for the torts of minor children).

West Virginia—See *Mazzocchi v. Seay*, 126 W. Va. 490, 29 S.E.2d 12 (1944) (finding *air* rifles not inherently dangerous).

Wisconsin—See *Harris v. Cameron*, 81 Wis. 239, 51 N.W. 437 (1892) (finding that *air* guns are not inherently dangerous). But see *Gerlat v. Christianson*, 13 Wis. 2d 31, 108 N.W.2d 194 (1961) (noting that *air* guns are placed in the same statutory category as firearms).

Michigan—But See *Whalen v. Bennett*, 4 Mich. App. 81, 143 N.W.2d 797 (1966) (holding that a statute prohibiting anyone under 21 years of age from using or possessing spring, gas, or *air* propelled pellet guns is directed toward the offending minors themselves and does not create civil liability on the part of the parents of offenders).

New York—See *Sullivan v. O’Ryan*, 206 Misc. 212, 132 N.Y.S.2d 211 (1954) (where the defendant father’s son had been given an *air* gun by another, the father was nonetheless held liable for damages inflicted by the son because the father knew that his son was using the *air* gun in violation of a statute and permitted him to do so).

Ohio—See *Taylor v. Webster*, 12 Ohio St. 2d 53, 231 N.E.2d 870 (1967) (holding that the mother of a 10-year-old boy violated a statute prohibiting the owner or one having charge or control of an *air* gun from knowingly permitting it to be used by a minor under 17 years of age when she permitted her son to use the *air* gun and, as a consequence, she was guilty of negligence as a matter of law).

Washington—See *Schatter v. Bergen*, 185 Wash. 375, 55 P.2d 344 (1936) (where the defendant parents bought their child an *air* rifle in violation of a city ordinance which prohibited any parent from permitting a child under 18 years of age to carry such a gun, the court held that the violation of the ordinance by the parents constituted negligence per se, noting that any parent who violated the provisions of the ordinance by giving a minor child an *air* gun for use within the city would be subject to civil liability for any injuries resulting as a natural and probable consequence of the violation of the ordinance).

⁸¹See e.g., *Kuhns v. Brugger*, 390 Pa. 331, 135 A.2d 395 (1957).

instrument accessible to the child, the parent would still not be liable unless the parent's negligence was the proximate cause of both the child's harmful act and plaintiff's consequential injury. Courts have routinely held, for example, that liability may not be predicated on the parent's failure to supervise more closely where such supervision would not have made the parent aware of the possibility of the child's tortious conduct.⁸²

⁸²**Arkansas**—See *Bieker v. Owens*, 234 Ark. 97, 350 S.W.2d 522 (1961) (finding a parent's mere knowledge of a child's heedless or vicious disposition insufficient to impose liability on the parent with respect to the child's torts).

Arizona—See *Parsons v. Smithey*, 109 Ariz. 49, 504 P.2d 1272 (1973).

California—See *Ellis v. D'Angelo*, 116 Cal. App. 2d 310, 253 P.2d 675 (1953).

Colorado—See *Dickens v. Barnham*, 69 Colo. 349, 194 P. 356 (1920) (where the defendant father had allowed his 14-year-old son to purchase and care for a high-powered repeating rifle but had not inquired into how or where the rifle and ammunition were kept, and where defendant's eight-year-old son gained access to both the gun and the ammunition, the father's negligence in failing to supervise the care of the gun was held the proximate cause of injuries inflicted with the gun by the younger son).

Connecticut—See *Buell v. Brooks*, 28 Conn. Supp. 106, 251 A.2d 183 (Super. Ct. 1969) (finding that although parents are responsible for exercising control over their minor children, the law does not impose upon parents the duty to immunize their 20-year-old daughter against an "affaire d'amour" with another woman's husband, and holding that the parents were not liable in an alienation of affections suit based on their failure to control their daughter).

District of Columbia—See *Bateman v. Crim*, 34 A.2d 257 (**D.C.**1943).

Florida—See *Williams v. Youngblood*, 152 So. 2d 530 (Fla. Dist. Ct. App. 1963) (finding that a statute providing a penalty for permitting a child to use a pellet gun was a criminal measure designed to protect the public generally and was not designed to protect members of any particular class, so that parental negligence with respect to the degree of care exercised in keeping a gun out of the hands of minors was a necessary element of proof in plaintiff's attempt to recover for injuries caused by the child).

Georgia—See *Corley v. Lewless*, 227 Ga. 745, 182 S.E.2d 766 (1971); *Hatch v. O'Neill*, 133 Ga. App. 624, 212 S.E.2d 11 (1974); *Scarboro v. Lauk*, 133 Ga. App. 359, 210 S.E.2d 848 (1974) (where the parents were aware of nothing which would indicate the necessity for keeping constant watch over a child, the parents were not held liable when the child, while playing in his yard, threw a rock which struck another child in the eye); *Shaw v. Buice*, 130 Ga. App. 876, 204 S.E.2d 798 (1974); *Sagnibene v. State Wholesalers, Inc.*, 117 Ga. App. 239, 160 S.E.2d 274 (1968) (the mere fact that a child escapes parental supervision does not constitute actionable negligence by the parent); *Glean v. Smith*, 116 Ga. App. 111, 156 S.E.2d 507 (1967) (finding that the true test is whether a duty is created by a parent's anticipation that in the absence of parental supervision a particular type of injury to another may result, and whether the parent consequently exercised reasonable care to control and supervise the child to prevent such injury); *Assurance Co. of Am. v. Bell*, 108 Ga. App. 766, 134 S.E.2d 540 (1963); *Hulsey v. Hightower*, 44 Ga. App. 455, 161 S.E. 664 (1931) (holding that the father's knowledge that his son was reckless, very indiscreet, and indifferent as to the rights of others did not render the father liable, on the basis of negligence, for an assault inflicted by his

The question of proximate cause is typically a factual matter

son with a knife given the son by his father); *Davis v. Gavalas*, 37 Ga. App. 242, 139 S.E. 577 (1927).

Idaho—See *Ryley v. Lafferty*, 45 F.2d 641 (D. Idaho 1930) (finding the parents negligent in the performance of their duty to instruct the child in the accepted modes of behavior).

Illinois—See *Malmberg v. Bartos*, 83 Ill. App. 481 (1898) (where the court held the defendant father not liable when his four-year-old son intentionally cut off a finger of the seven-year-old plaintiff with an axe which defendant had left accessible, based on the court's finding that the child's act was the proximate cause of the injury rather than defendant's negligence).

Kentucky—See *Moore v. Lexington Transit Corp.*, 418 S.W.2d 245 (Ky. 1967).

Massachusetts—See *Gudziewski v. Stemplesky*, 263 Mass. 103, 160 N.E. 334 (1928).

Michigan—See *Muma v. Brown*, 378 Mich. 637, 148 N.W.2d 760 (1967); *Chaddock v. Plummer*, 88 Mich. 225, 50 N.W. 135 (1891) (holding the defendant father not liable where the father gave his young son an air gun and shot, cautioning him as to the gun's use, and another boy took the gun without permission and recklessly shot and injured the plaintiff); *Whalen v. Bennett*, 4 Mich. App. 81, 143 N.W.2d 797 (1966) (finding that a statute making the use of a pellet gun without adult supervision a misdemeanor is directed toward minors and creates no civil liability on the part of parents).

Minnesota—See *Gordon v. Hoffman*, 303 N.W.2d 250 (Minn. 1981) (finding that although the parent was negligent in leaving a loaded gun in a bedroom closet accessible to children, that negligence was not the direct cause of an accident in which a five-year-old child was killed while children were handling the gun); *Republic Vanguard Ins. Co. v. Buehl*, 295 Minn. 327, 204 N.W.2d 426 (1973).

Mississippi—See *Tatum v. Lance*, 238 Miss. 156, 117 So. 2d 795 (1960); *Herrman v. Maley*, 159 Miss. 538, 132 So. 541 (1931).

Missouri—See *National Dairy Prods. Corp. v. Freschi*, 393 S.W.2d 48 (Mo. Ct. App. 1965).

New Jersey—See *Vallency v. Rigillo*, 91 N.J.L. 307, 102 A. 348 (1917); *Stoelting v. Hauck*, 56 N.J. Super. 386, 153 A.2d 339 (1959), *rev'd on other grounds*, 31 N.J. 87, 59 A.2d 385 (1960).

New York—See *Scharfman v. Ambrosino*, 269 A.D. 960, 58 N.Y.S.2d 255 (1945), *aff'd*, 295 N.Y. 776, 66 N.E.2d 177 (1946); *Kuchlik v. Feuer*, 239 A.D. 338, 267 N.Y.S. 256 (1933), *aff'd*, 264 N.Y. 542, 191 N.E. 555 (1934); *Connelly v. Wheaton*, 59 Misc. 2d 257, 298 N.Y.S.2d 842 (Sup. Ct. 1969), *aff'd*, 35 A.D.2d 689, 315 N.Y.S.2d 405 (1970); *Linder v. Bidner*, 50 Misc. 2d 320, 270 N.Y.S.2d 427 (Sup. Ct. 1966) (finding parents not liable for the general incorrigibility of a minor child).

North Carolina—See *Anderson v. Butler*, 284 N.C. 723, 202 S.E.2d 585 (1974); *General Ins. Co. of Am. v. Faulkner*, 259 N.C. 317, 130 S.E.2d 645 (1963); *Langford v. Shu*, 258 N.C. 135, 128 S.E.2d 210 (1962).

Ohio—See *Taylor v. Webster*, 12 Ohio St. 2d 53, 231 N.E.2d 870 (1967); *Wery v. Seff*, 136 Ohio St. 307, 25 N.E.2d 692 (1940); *Levin v. Bourne*, 117 Ohio App. 269, 192 N.E.2d 114 (1962).

Oklahoma—See *Sawyer v. Kelly*, 194 Okla. 516, 153 P.2d 97 (1944).

Oregon—See *Gossett v. Van Egmond*, 176 Or. 134, 155 P.2d 304 (1945).

Pennsylvania—See *Condell v. Savo*, 350 Pa. 350, 39 A.2d 51 (1944) (finding a

that depends upon the circumstances of each case.⁸³ In some

parent's mere knowledge of a child's mischievous and reckless disposition insufficient to impose liability on the parent as a result of the child's torts but holding defendant parents liable for their son's assault where, having full knowledge of their son's previous assaults on small children, they took no steps to correct or restrain their son's vicious propensities, allowing the court to find that the parents' negligence was the proximate cause of the injury).

Tennessee—See *Bocock v. Rose*, 213 Tenn. 195, 373 S.W.2d 441 (1963).

Washington—See *Norton v. Payne*, 154 Wash. 241, 281 P. 991 (1929) (the parents were found negligent in the performance of their duty to instruct the child in the accepted modes of behavior).

Wisconsin—See *Pawlak v. Mayer*, 266 Wis. 55, 62 N.W.2d 572 (1954); *Harris v. Cameron*, 81 Wis. 239, 51 N.W. 437 (1892).

⁸³Colorado—See *Dickens v. Barnham*, 69 Colo. 349, 194 P. 356 (1920) (finding that the father may be held liable on the ground that his own act in permitting his child to have access to a dangerous instrumentality was, in light of the child's inability properly to manage it, the proximate cause of the resulting injury).

Georgia—See *Bell v. Adams*, 111 Ga. App. 819, 143 S.E.2d 413 (1965) (absent allegation that the defendant father had reason to anticipate his son's act of shooting another, and in light of evidence that the killing was intentional, the court found that the son's independent and unforeseeable criminal act was the direct and proximate cause of damage for which the father was not liable, because liability does not arise merely from the parent-child relationship); *Skelton v. Gambrell*, 80 Ga. App. 880, 57 S.E.2d 694 (1950) (in an action seeking recovery from the parents of a 14-year-old boy for a death resulting from the boy's use of a .38 caliber pistol that the parents kept in their grocery store, the court found that the boy's intervening criminal act, which the parents could not reasonably have foreseen, was the proximate cause of the damage).

Kentucky—See *Dick v. Higgason*, 322 S.W.2d 92 (Ky. 1959) (holding that leaving a rifle standing in defendant's office, with the cartridges in a desk drawer, was not a proximate cause of the injuries to one shot by a 12-year-old who entered the office and took the gun and shells without permission).

Michigan—See *Chaddock v. Plummer*, 88 Mich. 225, 50 N.W. 135 (1891) (where the defendant father had purchased an air gun for his nine-year-old son and had carefully instructed him in the use of the gun, the court found the father not liable for injuries caused when a friend of defendant's son borrowed the gun from defendant's wife while neither defendant nor his son were home, finding that it was not negligence per se for defendant to buy the air gun for his son and that there were too many intervening causes between buying the gun and inflicting the injury to find that defendant's purchase of the gun was the proximate cause of the injury).

Minnesota—See *Kunda v. Briarcombe Farm Co.*, 149 Minn. 206, 183 N.W. 134 (1921) (finding that defendant's act of furnishing a shotgun to a 13-year-old employee with which the employee was to shoot blackbirds constituted the proximate cause of the employee's injury when the gun accidentally discharged and wounded him in the foot).

New Jersey—See *Stoelting v. Hauck*, 56 N.J. Super. 386, 153 A.2d 339 (1959), *rev'd on other grounds*, 32 N.J. 87, 159 A.2d 385 (1960) (where defendants' 15-year-old daughter was permitted to handle automatic revolvers and to sleep in a room where a loaded gun was kept in an unlocked desk, the court held that the parents' responsibility for injuries extended not only to those which were foreseen but also to those which could have been foreseen and which were the natural and probable result of parental negligence).

cases in which the child intentionally engaged in a criminal act, the courts have regarded the child's willful act as an intervening cause that the parent could not foresee.⁸⁴ Some courts have,

North Carolina—See *Lane v. Chatham*, 251 N.C. 400, 111 S.E.2d 598 (1959) (finding that where parents entrust their nine-year-old son with an air rifle and the son injures another with the rifle, the parents will be held liable based on their own negligence if, under the circumstances, they could or, by the exercise of due care, should reasonably have foreseen that their son was likely to use the air rifle in such a manner as to cause injury and nonetheless failed to exercise reasonable care to prohibit, restrict, or supervise the son's use of the gun).

North Dakota—See *Olson v. Hemsley*, 48 N.D. 779, 187 N.W. 147 (1922) (although the shot which killed a 16-year-old boy was fired not by defendant but, rather, by defendant's 13-year-old employee, the court found the employee could not have fired the fatal shot if defendant had not carelessly and negligently left the loaded revolver in a place accessible to the employee, who was known by defendant to be careless and reckless, and the court therefore held that defendant's negligence was the proximate cause of the injury).

Pennsylvania—See *Kuhns v. Brugger*, 390 Pa. 331, 135 A.2d 395 (1957) (in an action seeking damages for personal injuries sustained by the 12-year-old plaintiff when he was shot with a .22 caliber pistol that his 12-year-old cousin had removed from an unlocked drawer in their grandfather's unlocked bedroom in his summer cottage, the court stated that the grandfather was negligent in leaving this weapon in a place frequented by young children; the intervening act of his young grandson in removing the pistol from the drawer did not break the chain of causation between his negligence and the injury which occurred because this injury was a natural and probable result to be anticipated from the original negligence): *Mendola v. Sambol*, 166 Pa. Super. 351, 71 A.2d 827 (1950) (finding that the father's negligence in leaving a loaded .22 caliber rifle behind a door was the proximate cause of the subsequent injury because the injury was the natural and probable consequence of the gun's accessibility and because the father should have foreseen the likelihood of harm to others under the circumstances).

Vermont—See *Giguere v. Rosselot*, 110 Vt. 173, 3 A.2d 538 (1939) (finding the defendant father guilty of actionable negligence when he made a firearm accessible to a minor child who lacked the capacity to use it properly: the court rejected defendant's claim that the injuries were caused by the son shooting plaintiff rather than by the father's negligence, noting that there may be more than one proximate cause of an injury and whenever the separate and independent acts or negligence of several persons, by concurrence, produce a single and indivisible injury that would not have occurred without such concurrence, each is responsible for the entire result).

Washington—See *Schatter v. Bergen*, 185 Wash. 375, 55 P.2d 344 (1936) (where the parents of a minor boy admitted their violation of an ordinance prohibiting the furnishing of an air gun to a child under 18 years of age, establishing their negligence per se, the court held that this parental negligence was the proximate cause of the subsequent injury; the evidence indicated that the neighborhood children habitually played with the gun and that the child who shot the gun knew it was loaded).

⁸⁴Georgia—See *Bell v. Adams*, 111 Ga. App. 819, 143 S.E.2d 413 (1965) (although the court found that defendant's minor son intentionally killed another with defendant's rifle and that defendant was negligent in allowing his son access to the rifle, it nonetheless held the father not liable for the victim's death because the independent criminal act of his son, which the father could not reasonably have foreseen, intervened between the father's negligence and the injury to the victim); *Skelton v. Gambrell*, 80 Ga. App. 880, 57 S.E.2d 694 (1950) (notwithstanding

recognized, however, that this rule would not apply if the parent had reasonable grounds for apprehending that the criminal act would be committed.⁸⁵

VIII. CHILDREN'S ACTS INVOLVING AUTOMOBILES

A. *INGENERAL*

As automobiles and, consequently, automobile accidents have become more prevalent, states have devised various responses, all of which are designed both to reduce the number of irresponsible drivers on the road and to eliminate "judgment-proof" defendants who are unable to compensate victims due to minority, insolvency, or insurance ineligibility.

Because the states' responses have sometimes been limited to judicial interpretations of existing laws and, in other cases, have involved one or more statutory schemes, the practitioner must review several aspects of liability when the injury is caused by the operation of an automobile. In advising a soldier as to potential liability, the practitioner should consider possible liability under the general common law and statutory approaches, including the parent's potential liability based on the parent's negligence in entrusting the car to the minor child, as well as the common and statutory law dealing specifically with automobiles.

ing their violation of an ordinance concerning permits to deal in pistols, the parents of a 14-year-old boy who maliciously "caused" a revolver to be fired at the victim were found not liable for the child's act because the child's criminal act intervened between the parent's negligent acts and the damage sustained by plaintiff); *Hulsey v. Hightower*, 44 Ga. App. 455, 161 S.E. 664 (1931) (finding that a father should not be held liable for knife wounds intentionally inflicted by his son where the father was not on notice that the child would engage in such a criminal and intentional use of the knife).

Illinois—See *Malmberg v. Bartos*, 83 Ill. App. 481 (1898) (defendant father found not liable when his four-year-old son cut off a finger of the seven-year-old plaintiff with an axe which defendant had left accessible because the court found that the father had no reason to suppose that the child would engage in such malicious conduct and because the court identified the cause of the injury as the boy's willful intention to injure plaintiff rather than the accessibility of the axe).

⁸⁵See e.g., *Bell v. Adams*, 111 Ga. App. 819, 143 S.E.2d 413 (1965) (although in this case the court found the defendant father not liable when his minor son intentionally killed the victim because the father could not reasonably have foreseen the child's criminal act).

B. RULES OF COMMON LAW LIABILITY

Consistent with the general common law rules of parental responsibility for the acts of minors,⁸⁶ the owner of a motor vehicle normally is not liable at common law for the vehicle's negligent operation by another who is using the vehicle with the owner's permission merely based on the ownership of the vehicle.⁸⁷ Consequently, the owner will not be held liable for the negligent operation of the vehicle by another unless the operator was acting as the owner's agent or servant, the owner and operator were engaged in a joint enterprise, the owner was present in the vehicle and maintained some control over its

⁸⁶This discussion does not consider torts committed by a minor driving a parent's automobile where the parent is riding as a passenger in the vehicle at the time of the injury.

⁸⁷Alabama—See *Downes v. Norrell*, 261 Ala. 430, 74 So. 2d 593 (1954).

Arizona—See *Peterson v. Feldman*, 7 Ariz. App. 75, 436 P.2d 169 (1968).

Arkansas—See *Mullally v. Carvill*, 234 Ark. 1041, 356 S.W.2d 238 (1962).

Delaware—See *Smith v. Callahan*, 34 Del. 129, 144 A. 46 (1928).

Iowa—See *Neubrand v. Kraft*, 169 Iowa 444, 151 N.W. 455 (1915)

Kansas—See *Zeeb v. Bahnmaier*, 103 Kan. 599, 176 P. 326 (1918).

Kentucky—See *Higgins v. Deskins*, 263 S.W.2d 108 (Ky. 1953).

Michigan—See *Hartley v. Miller*, 165 Mich. 115, 130 N.W. 336 (1911).

Missouri—See *Hays v. Hogan*, 273 Mo. 1, 200 S.W. 286 (1917).

New Jersey—See *Maiswinkle v. Penn Jersey Auto Supply Co.*, 121 N.J.L. 349. 2 A.2d 593 (1938).

New York—See *Selles v. Smith*, 4 N.Y.2d 412, 151 N.E.2d 838, 176 N.Y.S.2d 267 (1958); *Potts v. Pardee*, 220 N.Y. 431, 116 N.E. 78 (1917).

Ohio—See *Williamson v. Eclipse Motor Lines, Inc.*, 145 Ohio St. 467, 62 N.E.2d 339 (1945).

Oregon—See *Kantola v. Lovell Auto Co.*, 157 Or. 534, 72 P.2d 61 (1937) (where the evidence indicated that the driver was not acting for or in the business of the vehicle owner and the owner was not present at the time of the accident and had no control over the operation of the vehicle, any inference that the jury might have drawn that the driver was engaged in the business of the vehicle owner was rebutted).

Rhode Island—See *Gemma v. Rotondo*, 62 R.I. 293, 5 A.2d 297 (1939).

Utah—See *McFarlane v. Winters*, 47 Utah 598, 155 P. 437 (1916).

Virginia—See *Blair v. Broadwater*, 121 Va. 301, 93 S.E. 632 (1917).

Washington—See *Dixon v. Haynes*, 146 Wash. 163, 262 P. 119 (1927).

West Virginia—See *Ritter v. Hicks*, 102 W. Va. 541, 135 S.E. 601 (1926).

operation, or the owner entrusted the vehicle's operation to an incompetent or unfit person.⁸⁸

C. *NEGLIGENT ENTRUSTMENT*

At common law, a family relationship between the owner of a motor vehicle and the person driving it at the time of an accident does not impose liability upon the owner for the negligence of the driver. Consequently, when a parent entrusts a vehicle to a child who is an unfit driver, any common law liability that may be imposed upon the parent must be found in a source other than the relationship between the parties.⁸⁹ Such liability may result

⁸⁸See generally 7A Am. Jur. 2d Automobiles and Highway Traffic §§ 641-45 (1980); Annot., 26 A.L.R.2d 1320, 1321 (1952).

⁸⁹**Alabama**—See *Gardiner v. Solomon*, 200 Ala. 115, 75 So. 621 (1917) (finding that the owner of an automobile is not liable for an injury inflicted by his adult son while operating the car for his own purpose with the owner's consent, as implied from the relationship of the parties and previously permitted use).

California—See *Spence v. Fisher*, 184 Cal. 209, 193 P. 255 (1920).

Delaware—See *Smith v. Callahan*, 34 Del. 129, 144 A. 46 (1928).

Idaho—See *Gordon v. Rose*, 54 Idaho 502, 33 P.2d 351 (1934).

Illinois—See *White v. Seitz*, 342 Ill. 266, 174 N.E. 371 (1930); *Arkin v. Page*, 287 Ill. 420, 123 N.E. 30 (1919).

Iowa—See *Sultzback v. Smith*, 174 Iowa 704, 156 N.W. 673 (1916) (finding that a parent cannot be held liable at common law for the negligent operation of the parent's motor vehicle by a child who has taken the vehicle for the child's own purpose and against the parent's wishes).

Kansas—See *Zeeb v. Bahnmaier*, 103 Kan. 599, 176 P. 326 (1918).

Maine—See *Pratt v. Cloutier*, 119 Me. 203, 110 A. 353 (1920).

Maryland—See *Myers v. Shipley*, 140 Md. 380, 116 A. 645 (1922) (finding that a parent cannot be held liable at common law for the negligent operation of the parent's motor vehicle by a child who has taken the vehicle for the child's own purpose and without the parent's knowledge or consent).

Massachusetts—See *McNeil v. Powers*, 266 Mass. 446, 165 N.E. 385 (1929); *Field v. Evans*, 262 Mass. 315, 159 N.E. 751 (1928).

Michigan—See *Dortman v. Lester*, 3 Mich. App. 600, 143 N.W.2d 130 (1966), *re'u'd* on other grounds, 380 Mich. 80, 155 N.W.2d 846 (1968).

Missouri—See *Hays v. Hogan*, 273 Mo. 1, 200 S.W. 286 (1917) (finding that common law liability cannot be imposed against a parent for a child's negligent operation of the parent's vehicle where the child took the vehicle against the parent's wishes).

New Hampshire—See *Carr v. Orrill*, 86 N.H. 226, 166 A. 270 (1933).

New Jersey—See *Doran v. Thomsen*, 76 N.J.L. 754, 71 A. 296 (1908).

Ohio—See *Elliott v. Harding*, 107 Ohio St. 501, 140 N.E. 338 (1923).

Oklahoma—See *McNeal v. McKain*, 33 Okla. 449, 126 P. 742 (1912).

Tennessee—See *King v. Smythe*, 140 Tenn. 217, 204 S.W. 296 (1918).

from the vehicle owner's act of entrusting the vehicle to one whose incompetence or recklessness is known or should be known to the owner.⁹⁰

Texas—See *Trice v. Bridgewater*, 125 Tex. 75, 81 S.W.2d 63 (1935).

Utah—See *Mugleston v. Glaittli*, 123 Utah 238, 258 P.2d 438 (1953); *McFarlane v. Winters*, 47 Utah 598, 155 P. 437 (1916).

West Virginia—See *Ritter v. Hicks*, 102 W. Va. 541, 135 S.E. 601 (1926).

Wisconsin—See *Hopkins v. Droppers*, 184 Wis. 400, 198 N.W. 738 (1924), *aff'd* in part and *rev'd* in part, 191 Wis. 334, 210 N.W. 684 (1926).

⁹⁰See generally Annotation, Liability of Donor of Motor Vehicle for Injuries Resulting from Owner's Operation, 22 A.L.R.4th 739, 740 (1983).

Alabama—See *McGowin v. Howard*, 246 Ala. 553, 21 So. 2d 683 (1945); *Spurling v. Fillingim*, 244 Ala. 172, 12 So. 2d 740 (1943); *Rush v. McDonnell*, 214 Ala. 47, 106 So. 175 (1925); *Gardiner v. Solomon*, 200 Ala. 115, 75 So. 621 (1917).

Arizona—See *Powell v. Langford*, 58 Ariz. 281, 119 P.2d 230 (1941).

Arkansas—See *Rook v. Moseley*, 236 Ark. 290, 365 S.W.2d 718 (1963).

California—See *Weber v. Pinyan*, 9 Cal. 2d 226, 70 P.2d 183 (1937); *Syah v. Johnson*, 247 Cal. App. 2d 534, 55 Cal. Rptr. 741 (1966) (holding that an owner who entrusted his vehicle to an epileptic may be held liable without respect to any negligence on the part of the operator).

Colorado—See *Hertz Driv-Ur-Self System v. Hendrickson*, 109 Colo. 1, 121 P.2d 483 (1942).

Delaware—See *Smith v. Callahan*, 34 Del. 129, 144 A. 46 (1928).

Georgia—See *Tolbert v. Jackson*, 99 F.2d 513 (5th Cir. 1938); *Fulton v. Chattanooga Publishing Co.*, 101 Ga. App. 706, 114 S.E.2d 923 (1960).

Idaho—See *R.J. Reynolds Tobacco Co. v. Newby*, 145 F.2d 768 (9th Cir. 1944), *aff'd*, 153 F.2d 819 (9th Cir. 1946).

Illinois—See *Arkin v. Page*, 287 Ill. 420, 123 N.E. 30 (1919).

Iowa—See *Krausnick v. Haegg Roofing Co.*, 236 Iowa 985, 20 N.W.2d 432 (1945).

Kentucky—See *Wilhelmi v. Burns*, 274 Ky. 618, 119 S.W. 625 (1938); *Brady v. B. & B. Ice Co.*, 242 Ky. 138, 45 S.W.2d 1051 (1931); *Bradley v. Schmidt*, 223 Ky. 784, 4 S.W.2d 703 (1928).

Louisiana—See *Bailey v. Simon*, 199 So. 185 (La. Ct. App. 1940).

Maryland—See *Snowwhite v. State*, 243 Md. 291, 221 A.2d 342 (1966).

Massachusetts—See *Leblanc v. Pierce Motor Co.*, 307 Mass. 535, 30 N.E.2d 684 (1940).

Michigan—See *Dortman v. Lester*, 380 Mich. 80, 155 N.W.2d 846 (1968).

Minnesota—See *Republic Vanguard Ins. Co. v. Buehl*, 295 Minn. 327, 204 N.W.2d 426 (1973).

Mississippi—See *Gooch v. Dillard*, 187 Miss. 660, 193 So. 619 (1940).

Missouri—See *Saunders v. Prue*, 235 Mo. App. 1245, 151 S.W.2d 478 (1941).

Nevada—See *Department of Water & Power v. Anderson*, 95 F.2d 577 (9th Cir.), *cert. denied*, 305 U.S. 607 (1938).

New Jersey—See *Hala v. Worthington*, 130 N.J.L. 162, 31 A.2d 844 (1943); *Doran v. Thomsen*, 76 N.J.L. 754, 71 A. 296 (1908).

Automobiles ordinarily are not considered dangerous instrumentalities under the common law principle that one who permits access to such instrumentalities will be liable for their negligent use.⁹¹ Nevertheless, some courts have applied this common law

New York—See *Nolechek v. Gesuale*, 46 N.Y.2d 332, 385 N.E.2d 1268, 413 N.Y.S.2d 340 (1978) (where the parents permitted their son to ride a motorcycle although they knew that he was blind in one eye and had uncorrectable vision in the other eye, the court found that parents owe a duty to shield third parties from their child's improvident use of a dangerous instrument, particularly where the parent is aware of and capable of controlling its use).

North Carolina—See *Honea v. Bradford*, 39 N.C. App. 652, 251 S.E.2d 720 (1979) (finding the father negligent for entrusting a minibike to his 12-year-old son in light of evidence that the child was of "below average" intelligence, where the father had provided no instructions in safety or the rules of traffic and where the father did not restrict his son's use of the minibike).

Ohio—See *Williamson v. Eclipse Motor Lines, Inc.*, 145 Ohio St. 467, 62 N.E.2d 339 (1945).

Oklahoma—See *Barger v. Mizel*, 424 P.2d 41 (Okla. 1967).

Oregon—See *Gossett v. Van Egmond*, 176 Or. 134, 155 P.2d 304 (1945).

Pennsylvania—See *Chamberlain v. Riddle*, 155 Pa. Super. 507, 38 A.2d 521 (1944).

South Dakota—See *Bock v. Sellers*, 66 S.D. 450, 285 N.W. 437 (1939).

Tennessee—See *V.L. Nicholson Constr. Co. v. Lane*, 177 Tenn. 440, 150 S.W.2d 1069 (1941); *King v. Smythe*, 140 Tenn. 217, 204 S.W. 296 (1918).

Texas—See *Seinsheimer v. Burkhart*, 132 Tex. 336, 122 S.W.2d 1063 (1939); *McIntire v. Sellers*, 311 S.W.2d 886 (Tex. Civ. App. 1958); *Allen v. Bland*, 168 S.W. 35 (Tex. Civ. App. 1914) (the court held a father liable for damage done by his 11-year-old son where the father permitted his son to purchase a car and drive it without restriction, finding that a father must be held to have known that a boy of that age with only a few months' driving experience was inclined to be adventuresome when entrusted with a vehicle, and that danger necessarily attached to his use of the car under such conditions).

Utah—See *Reid v. Owens*, 98 Utah 50, 93 P.2d 680 (1939).

Virginia—See *Harrison v. Carroll*, 139 F.2d 427 (4th Cir. 1943); *Blair v. Broadwater*, 121 Va. 301, 93 S.E.632 (1917).

Washington—See *Smith v. Nealey*, 162 Wash. 160, 298 P. 345 (1931).

West Virginia—See *Crockett v. United States*, 116 F.2d 646 (4th Cir. 1940), cert. denied, 314 U.S. 619 (1941).

Wisconsin—See *Canzoneri v. Heckert*, 223 Wis. 25, 269 N.W. 716 (1936).

⁹¹**Florida**—*But* see, e.g., *Koger v. Hollahan*, 144 Fla. 779, 198 So. 685 (1940); *Greene v. Miller*, 102 Fla. 767, 136 So. 532 (1931); *Southern Cotton Oil Co. v. Anderson*, 80 Fla. 441, 86 So. 629 (1920).

Illinois—See *Arkin v. Page*, 287 Ill. 420, 123 N.E. 30 (1919).

Kentucky—See *Bradley v. Schmidt*, 223 Ky. 784, 4 S.W.2d 703 (1928).

Michigan—See *Hartley v. Miller*, 165 Mich. 115, 130 N.W. 336 (1911).

Oregon—See *Eklof v. Waterston*, 132 Or. 479, 285 P. 201 (1930).

Wisconsin—See *Hopkins v. Droppers*, 184 Wis. 400, 198 N.W. 738 (1924), *affd in part* and *rev'd in part*, 191 Wis. 334, 210 N.W. 684 (1926).

principle where the owner permits the operation of a motor vehicle **by** one whom the owner knows or should know to be so incompetent, inexperienced, or reckless as to make the vehicle a dangerous instrumentality when operated by such a person.⁹²

If the driver's incompetence is not known to the owner at the time of entrustment, an injured plaintiff must affirmatively show that the owner knew facts that should have alerted him to the driver's **incompetence**.⁹³ Although such knowledge may be established by proving that the owner knew of specific instances of carelessness or recklessness on the part of the **driver**,⁹⁴ evidence of incompetence typically has been found insufficient where it reveals only that the driver's incompetence was generally known in the community⁹⁵ or that the child previously had been arrested

"Alabama—See *Parker v. Wilson*, 179 Ala. 361, 60 So. 150 (1912).

Michigan—See *Cebulak v. Lewis*, 320 Mich. 710, 32 N.W.2d 21 (1948).

Missouri—See *Dinger v. Burnham*, 360 Mo. 465, 228 S.W.2d 696 (1950) (finding that parents may be liable for resulting injuries where they entrust an instrumentality that is capable of becoming a source of danger to others to an incompetent or reckless child or where the law prohibits entrusting the instrumentality to a child).

New York—See *Nolechek v. Gesuale*, 46 N.Y.2d 332, 385 N.E.2d 1268, 413 N.Y.S.2d 340 (1978) (finding that a motorcycle is a dangerous instrumentality when entrusted to a child whom the parents know to be blind in one eye and to have uncorrectable vision in the other eye).

North Carolina—See *Honea v. Bradford*, 39 N.C. App. 652, 251 S.E.2d 720 (1979) (where the father entrusted a minibike to his 12-year-old son, who was of "below average" intelligence, the court found that, although a parent is not ordinarily liable for the torts of **his** minor child, the parent may be liable if the parent negligently permits the child to own or possess a dangerous instrumentality or one that becomes dangerous because of the child's immaturity or lack of judgment).

Ohio—See *Williamson v. Eclipse Motor Lines, Inc.*, 145 Ohio St. 467, 62 N.E.2d 339 (1945); *Elms v. Flick*, 100 Ohio St. 186, 126 N.E. 66 (1919).

Oregon—See *Gossett v. Van Egmond*, 176 Or. 134, 155 P.2d 304 (1945).

⁹³**Hawaii**—See *Abraham v. S.E. Onorato Garages*, 50 Haw. 628, 446 P.2d 821 (1968).

Ohio—See *Gulla v. Straus*, 154 Ohio St. 193, 93 N.E.2d 662 (1950).

⁹⁴**Oregon**—See *Guedon v. Rooney*, 160 Or. 621, 87 P.2d 209 (1939).

⁹⁵**Louisiana**—See *Bailey v. Simon*, 199 So. 185 (La. Ct. App. 1940).

Mississippi—See *Vanner v. Dalton*, 172 Miss. 183, 159 So. 558 (1935) (finding that, as a matter of law, an owner is not liable for entrusting a motor vehicle to an incompetent person where the only evidence of incompetency is the driver's general reputation).

Oregon—But see *Guedon v. Rooney*, 160 Or. 621, 87 P.2d 209 (1939).

for minor traffic offenses.⁹⁶ Where the evidence is in conflict as to whether the child to whom the use of a vehicle was entrusted was in fact incompetent or reckless, resolution of this issue is within the jury's province.⁹⁷

If the owner entrusts the vehicle to one whom the owner knows to be unfit or incompetent to drive the vehicle, the owner's liability for any resulting damage or injury is quite broad. Under the common law theory of negligent entrustment, vehicle owners may be held liable for injuries negligently inflicted by the driver's use of the vehicle even though the driver's use at the time of the injury is beyond the scope of the owner's consent.⁹⁸

⁹⁶Maryland—*But* see *Kahlenberg v. Goldstein*, 290 Md. 477, 431 A.2d 76 (1981) (finding a father liable for injuries caused by his son where the father purchased the car for his son notwithstanding the father's knowledge of his son's numerous traffic violations).

Texas—See *Mayer v. Johnson*, 148 S.W.2d 454 (Tex. Civ. App. 1941).

Wyoming—See *Kimble v. Muller*, 417 P.2d 178 (Wyo. 1966) (where the son used the defendant father's vehicle for unauthorized joyriding, the court held the father not liable for negligent entrustment of the vehicle to his son; the father knew of the son's three convictions for speeding and careless driving and had prohibited the son from driving without permission).

⁹⁷California—See *Allen v. Toledo*, 109 Cal. App. 3d 415, 167 Cal. Rptr. 270 (1980).

Ohio—See *Elliott v. Harding*, 107 Ohio St. 501, 140 N.E. 338 (1923); *Buckingham v. Gilbert*, 29 Ohio App. 216, 163 N.E. 306 (1928).

⁹⁸Alabama—See *Spurling v. Fillingim*, 244 Ala. 172, 12 So. 2d 740 (1943).

Arkansas—See *Breeding v. Massey*, 378 F.2d 171 (8th Cir. 1967); *Sanders v. Walden*, 214 Ark. 523, 217 S.W.2d 357 (1949).

California—See *Weber v. Pinyan*, 9 Cal. 2d 226, 70 P.2d 183 (1937).

Iowa—See *Krausnick v. Haegg Roofing Co.*, 236 Iowa 985, 20 N.W.2d 432 (1945).

Kansas—See *Priestly v. Skourup*, 142 Kan. 127, 45 P.2d 852 (1935).

Maryland—See *Curley v. Gen. Valet Serv., Inc.*, 270 Md. 248, 311 A.2d 231 (1973); *Snowwhite v. State*, 243 Md. 291, 221 A.2d 342 (1966).

Michigan—See *Kruutari v. Hageny*, 75 F. Supp. 610 (W.D. Mich. 1948); *Naudzius v. Lahr*, 253 Mich. 216, 234 N.W. 581 (1931). *But cf.* *Chapman v. Buder*, 14 Mich. App. 13, 165 N.W.2d 436 (1968).

Mississippi—See *Dukes v. Sanders*, 239 Miss. 543, 124 So. 2d 122, *error* overruled, 239 Miss. 560, 125 So. 2d 294 (1960).

Nevada—See *Department of Water & Power v. Anderson*, 95 F.2d 577 (9th Cir.), cert. denied, 305 U.S. 607 (1938).

North Carolina—See *Heath v. Kirkman*, 240 N.C. 303, 82 S.E.2d 104 (1954).

Ohio—See *Gulla v. Straus*, 154 Ohio St. 193, 93 N.E.2d 662 (1950).

Oregon—See *Guedon v. Rooney*, 160 Or. 621, 87 P.2d 209 (1939).

Virginia—See *Crowell v. Duncan*, 145 Va. 489, 134 S.W. 576 (1926).

Washington—See *Mitchell v. Churches*, 119 Wash. 547, 206 P. 6 (1922).

The practitioner must distinguish this common law doctrine of negligent entrustment, under which the court will decide whether the owner has negligently entrusted the vehicle to the child according to general principles of negligence,⁹⁹ from the theory of vicarious liability, which is statutorily imposed in some states. This distinction is important because a vehicle owner who loans a vehicle to an incompetent or unfit driver may be both vicariously liable under applicable statutes and personally liable under the common law as the result of damage caused by the driver's operation of the owner's vehicle.¹⁰⁰ Where permitted under the terms of applicable state statute, this could subject the vehicle owner to dual theories of liability for a single incident where the court finds that different standards of care have been violated.

D. THE FAMILY PURPOSE DOCTRINE

1. *In General.*

In addition to these recognized common law and statutory bases of parental liability, the courts in many states have expanded parental liability for negligent and willful misconduct involving automobiles. Among these jurisdictions, some have additionally based parental liability on the "family car" or "family purpose" doctrine whereby the owner of an automobile who permits members of the household to drive the car for their own pleasure or convenience is regarded as making such a family purpose the car owner's own "business," so that the driver is treated as the vehicle owner's servant.¹⁰¹ Under the family

⁹⁹See, e.g., *Roland v. Golden Bay Chevrolet*, 161 Cal. App. 3d 102, 207 Cal. Rptr. 413 (1984); *Hartford Accident & Indem. Co. v. Abdullah*, 94 Cal. App. 3d 81, 156 Cal. Rptr. 254 (1979).

¹⁰⁰California—See *Allen v. Toledo*, 109 Cal. App. 3d 415, 167 Cal. Rptr. 270 (1980).

Iowa—See *Krausnick v. Haegg Roofing Co.*, 236 Iowa 985, 20 N.W.2d 432 (1945).

Michigan—See *Perin v. Peuler*, 373 Mich. 531, 130 N.W.2d 4 (1964) (finding that a vehicle owner may be held responsible pursuant to the state's owner liability statute for the negligence of one whom the owner permits to drive the owner's vehicle and at the same time be held responsible for personal negligence arising out of the owner's negligent entrustment of such motor vehicle); *Haring v. Myrick*, 368 Mich. 420, 118 N.W.2d 260 (1962).

¹⁰¹See generally *W. Prosser & W. Keeton, The Law of Torts* § 73 (5th ed. 1984) (indicating that approximately a dozen states recognize this doctrine, including Arizona, Colorado, Connecticut, Georgia, Nebraska, New Mexico, North Carolina, North Dakota, Oregon, South Carolina, Washington, and West Virginia); *Annot.*, 8 A.L.R.3d 1191 (1966).

Alaska—See *Burns v. Main*, 87 F. Supp. 705 (D. Alaska 1950).

Arizona—See *Mortensen v. Knight*, 81 Ariz. 325, 305 P.2d 463 (1956).

purpose doctrine, the owner's liability is generally governed by

Colorado—See *Appelhans v. Kirkwood*, 148 Colo. 92, 365 P.2d 233 (1961); *Schledewitz v. Consumers Oil Co-op, Inc.*, 144 Colo. 518, 357 P.2d 63 (1960); *Morrison v. District Court of Denver*, 143 Colo. 514, 355 P.2d 660 (1960); *Hutchins v. Haffner*, 63 Colo. 365, 167 P. 966 (1917).

Connecticut—See *Silverman v. Silverman*, 145 Conn. 663, 145 A.2d 826 (1958); *Smart v. Bissonette*, 106 Conn. 447, 138 A. 365 (1927); *Harlow v. Frietas*, 25 Conn. Supp. 35, 195 A.2d 769 (Super. Ct. 1963) *Levy v. Senofonte*, 2 Conn. Cir. 650, 204 A.2d 420 (1964).

Georgia—See *Ferguson v. Gurley*, 218 Ga. 276, 127 S.E.2d 462 (1962); *Dunn v. Caylor*, 218 Ga. 256, 127 S.E.2d 367 (1962); *Hubert v. Harpe*, 181 Ga. 168, 182 S.E. 167 (1935); *Griffin v. Russell*, 144 Ga. 275, 87 S.E. 10 (1915); *Southern v. Hunt*, 107 Ga. App. 876, 132 S.E.2d 132 (1963); *Marques v. Ross*, 105 Ga. App. 133, 123 S.E.2d 412 (1961); *Myrick v. Alexander*, 101 Ga. App. 1, 112 S.E.2d 697 (1960).

Kentucky—See *Lawhorn v. Holloway*, 346 S.W.2d 302 (Ky. 1961); *Wireman v. Salyer*, 336 S.W.2d 349 (Ky. 1960); *Daniel v. Patrick*, 333 S.W.2d 504 (Ky. 1960); *Robinson v. Lunsford*, 330 S.W.2d 423 (Ky. 1959); *Higgans v. Deskins*, 263 S.W.2d 108 (Ky. 1953); *Webb v. Daniel's Adm'r*, 261 Ky. 810, 88 S.W.2d 926 (1935); *Myers' Adm'x v. Brown*, 250 Ky. 64, 61 S.W.2d 1052 (1933); *Stowe v. Morris*, 147 Ky. 386, 144 S.W. 52 (1912).

Nebraska—See *Garska v. Harris*, 172 Neb. 339, 109 N.W.2d 529 (1961); *Christensen v. Rogers*, 172 Neb. 31, 108 N.W.2d 389 (1961); *Barajas v. Parker*, 165 Neb. 444, 85 N.W.2d 894 (1957); *Bartek v. Glasers Provisions Co.*, 160 Neb. 794, 71 N.W.2d 466 (1955); *Hogg v. MacDonald*, 128 Neb. 6, 257 N.W. 274 (1934).

Nevada—See *Jones v. Golick*, 46 Nev. 10, 206 P. 679 (1922).

New Mexico—See *Burkhart v. Corn*, 59 N.M. 343, 284 P.2d 226 (1955) (emphasizing that the age of the driver is immaterial in considering liability under the "family purpose" doctrine); *Boes v. Howell*, 24 N.M. 142, 173 P. 966 (1918).

North Carolina—See *Kight v. Seymour*, 263 N.C. 790, 140 S.E.2d 410 (1965); *Smith v. Simpson*, 260 N.C. 601, 133 S.E.2d 474 (1963); *Chappell v. Dean*, 258 N.C. 412, 128 S.E.2d 830 (1963); *Griffin v. Pancoast*, 257 N.C. 52, 125 S.E.2d 310 (1962); *Westmoreland v. Gregory*, 255 N.C. 172, 120 S.E.2d 523 (1961); *Grindstaff v. Watts*, 254 N.C. 568, 571, 119 S.E.2d 784, 786-87 (1961) ("[T]he family purpose doctrine . . . constitutes an exception to the common law rule [that the parent is not liable] for the torts of his minor child, in automobile cases. . . . In this State it is not the result of legislative action, but is a rule of law adopted by the Court. 'The doctrine undoubtedly involves a novel application of the rule of *respondeat superior* and may, perhaps, be regarded as straining that rule unduly.'"); *Elliott v. Killian*, 242 N.C. 471, 87 S.E.2d 903 (1955); *Vaughn v. Booker*, 217 N.C. 479, 8 S.E.2d 603 (1940).

North Dakota—See *Brewer v. Stolz*, 121 N.W.2d 624 (N.D. 1963); *Michaelsohn v. Smith*, 113 N.W.2d 571 (N.D. 1962).

Oklahoma—See *McNeal v. McKain*, 33 Okla. 449, 126 P. 742 (1912).

Oregon—See *Kraxberger v. Rogers*, 231 Or. 440, 373 P.2d 647 (1962); *Wiebe v. Seely*, 215 Or. 331, 335 P.2d 379 (1959); *Gossett v. Van Egmond*, 176 Or. 134, 155 P.2d 304 (1945).

South Carolina—See *Murphy v. Smith*, 243 F. Supp. 1006 (E.D.S.C. 1965); *Norwood v. Parthemos*, 230 S.C. 207, 95 S.E.2d 168 (1956); *Davis v. Littlefield*, 97 S.C. 171, 81 S.E. 487 (1914).

Tennessee—See *Adkins v. Nanney*, 169 Tenn. 67, 82 S.W.2d 867 (1935); *Meinhardt*

the rules of principal and agent and of master and servant.¹⁰²

2. *Elements of the Family Purpose Doctrine.*

To impose liability on the car owner under the family purpose doctrine, a plaintiff must initially show that the driver was a member of the car owner's immediate household¹⁰³ and that the car was used for a "family purpose."¹⁰⁴ The car must have been

v. Vaughn, 159 Tenn. 272, 17 S.W.2d 5 (1929); King v. Smythe, 140 Tenn. 217, 204 S.W. 296 (1918); Driver v. Smith, 47 Tenn. App. 505, 339 S.W.2d 135 (1959); Harber v. Smith, 40 Tenn. App. 648, 292 S.W.2d 468 (1956); Redding v. Barker, 33 Tenn. App. 132, 230 S.W.2d 202 (1950) (noting that the family purpose doctrine involves a novel application of the rule of respondeat superior).

Washington—See Foran v. Kallio, 56 Wash. 2d 769, 355 P.2d 544 (1960); Mylnar v. Hall, 55 Wash. 2d 739, 350 P.2d 440 (1960); Jerdal v. Sinclair, 54 Wash. 2d 565, 342 P.2d 585 (1959); Birch v. Abercrombie, 74 Wash. 486, 133 P. 1020 (1913), modified on other grounds and reh'g denied, 135 P. 821 (Wash. 1913).

West Virginia—See Eagon v. Woolard, 122 W. Va. 565, 11 S.E.2d 257 (1940); Watson v. Burley, 105 W. Va. 416, 143 S.E. 95 (1928).

¹⁰²Georgia—See Griffin v. Russell, 144 Ga. 275, 87 S.E. 10 (1915).

Kentucky—See Stowe v. Morris, 147 Ky. 386, 144 S.W. 52 (1912).

North Carolina—See Vaughn v. Booker, 217 N.C. 479, 8 S.E. 2d 603 (1940).

South Carolina—See Davis v. Littlefield, 97 S.C. 171, 81 S.E. 487 (1914).

Tennessee—See Long v. Tomlin, 22 Tenn. App. 607, 125 S.W.2d 171 (1938).

Washington—See Birch v. Abercrombie, 74 Wash. 486, 133 P. 1020 (1913), modified on other grounds and reh'g denied, 135 P. 821 (Wash. 1913).

¹⁰³Colorado—See Lee v. Degler, 169 Colo. 226, 454 P.2d 937 (1969) (requiring that the responsible person be the head of the household).

Connecticut—See Smart v. Bissonette, 106 Conn. 447, 138 A. 365 (1927) (applying the doctrine to the use of a car by the housekeeper of a Catholic priest).

Kentucky—See Rutherford v. Smith, 284 Ky. 592, 145 S.W.2d 533 (1940) (including a grandson in the definition of the owner's immediate household).

Oregon—See Heenan v. Perkins, 278 Or. 583, 564 P.2d 1354 (1977).

¹⁰⁴Colorado—See Morrison v. District Court of Denver, 143 Colo. 514, 355 P.2d 660 (1960) (holding the owner's denial that the car was used for a family purpose insufficient to avoid liability); Greenwood v. Kier, 125 Colo. 333, 243 P.2d 417 (1952).

Connecticut—See Levy v. Senofonte, 2 Conn. Cir. 650, 204 A.2d 420 (1964) (noting that the frequency of the vehicle's use was one criterion to consider when determining whether a car is maintained for family use).

Georgia—See Dunn v. Caylor, 218 Ga. 256, 127 S.E.2d 357 (1962) (stressing that each case depends on what the owner had decided regarding the family purpose of the car); Southern v. Hunt, 107 Ga. App. 876, 132 S.E.2d 132 (1963); Ferguson v. Gurley, 105 Ga. App. 575, 125 S.E.2d 218, aff'd, 218 Ga. 276, 127 S.E.2d 462 (1962) (noting that one of the primary tests is whether the automobile was provided for the pleasure, comfort, and convenience of the family or any member thereof).

Washington—See Mylnar v. Hall, 55 Wash. 2d 739, 350 P.2d 440 (1960) (finding that the car was not intended for a "family purpose" where the son paid for the car and where the car was intended for the son's exclusive use).

made available to family members for general use and not merely to take out on a particular occasion.¹⁰⁵ Courts have found, however, that to hold the owner of the vehicle liable, the car need not actually be driven by the person to whom the driver gave permission if that person is present in the car.¹⁰⁶ If the evidence presents a question whether the vehicle was provided for the use or convenience of the family, this issue must be presented to the jury for resolution.¹⁰⁷

In addition to the owner's consent and the "family purpose" of the vehicle, a plaintiff proceeding under the family purpose doctrine must prove that the owner consented or acquiesced in the driver's use of the car,¹⁰⁸ although a plaintiff need not prove

¹⁰⁵Colorado—See *Greenwood v. Kier*, 125 Colo. 333, 243 P.2d 417 (1952).

Connecticut—See *Constanzo v. Sturgill*, 145 Conn. 92, 139 A.2d 51 (1958); *Levy v. Senofonte*, 2 Conn. Cir. 650, 204 A.2d 420 (1964).

Georgia—See *Duckworth v. Oliver*, 112 Ga. App. 371, 145 S.E.2d 115 (1965); *Studdard v. Turner*, 91 Ga. App. 318, 85 S.E.2d 537 (1954).

South Carolina—See *Lucht v. Youngblood*, 266 S.C. 127, 221 S.E.2d 854 (1976).

Tennessee—See *Harber v. Smith*, 40 Tenn. App. 648, 292 S.W.2d 468 (1956); *Redding v. Barker*, 33 Tenn. App. 132, 230 S.W.2d 202 (1950). *But see* *Driver v. Smith*, 47 Tenn. App. 505, 339 S.W.2d 135 (1959).

¹⁰⁶Connecticut—See *Dibble v. Wolff*, 135 Conn. 428, 65 A.2d 479 (1949).

Georgia—See *Dixon v. Phillips*, 236 Ga. 271, 223 S.E.2d 678 (1976), *aff'g* 135 Ga. App. 161, 217 S.E.2d 331 (1975); *Rucker v. Frye*, 151 Ga. App. 415, 260 S.E.2d 373 (1979) (holding the family purpose doctrine inapplicable when the child to whom permission was given was not in the car); *Myrick v. Alexander*, 101 Ga. App. 1, 112 S.E.2d 697 (1960).

Kentucky—See *Daniel v. Patrick*, 333 S.W.2d 504 (Ky. 1960); *Turner v. Hall's Adm'x*, 252 S.W.2d 30 (Ky. 1952).

South Carolina—See *Norwood v. Parthemos*, 230 S.C. 207, 95 S.E.2d 168 (1956) (finding that since the father's car was maintained for and furnished to his son it was immaterial that, at the time of the accident the car was driven by the son's companion).

Tennessee—See *Driver v. Smith*, 47 Tenn. App. 505, 339 S.W.2d 135 (1959).

West Virginia—See *Eagon v. Woolard*, 122 W. Va. 565, 11 S.E.2d 257 (1940); *Watson v. Burley*, 105 W. Va. 416, 143 S.E. 95 (1938) (inferring the owner's consent from his failure to protest frequent violations of his orders not to use the Car).

¹⁰⁷Connecticut—See *Sutphen v. Hagelin*, 32 Conn. Supp. 158, 344 A.2d 270 (Super. Ct. 1975).

Kentucky—See *Daniel v. Patrick*, 333 S.W.2d 504 (Ky. 1960).

Washington—See *Coffman v. McFadden*, 68 Wash. 2d 954, 416 P.2d 99 (1966).

¹⁰⁸Georgia—See *Kurtz v. Williams*, 136 Ga. App. 628, 222 S.E.2d 145 (1975).

Kentucky—See *Todd v. Hargis*, 299 Ky. 841, 187 S.W.2d 739 (1945) (finding that negligently leaving the car unlocked does not constitute the owner's consent).

Nebraska—See *Dow v. Legg*, 120 Neb. 271, 231 N.W. 747 (1930).

that the driver had the express permission of the owner to drive the vehicle at the precise time and place of the accident.¹⁰⁹

For example, at least one court has held that if a parent generally permits a child to use an automobile for the child's own pleasure, the family purpose doctrine applies even if on a particular occasion the parent restricts the child's use of the vehicle to a particular destination and the child exceeds the limits of the restriction. The family purpose doctrine applied because the restriction imposed was not considered a limitation on the purpose for which the vehicle was being used. The car was still being used for the purpose for which the consent was given: the child's pleasure. The court found, rather, that as long as the child used the vehicle for the purposes of pleasure, comfort, and enjoyment, the parents were liable for the child's resulting tortious conduct.¹¹⁰

The better result would be to permit parents to avoid this harsh result by placing some general limitations on the car's use or by prohibiting the use of the car in certain localities. Such restrictions should effectively alter the scope of the owner's "business" to providing enjoyment for family members only in permitted locations, rendering the parent liable only for the use of the vehicle within the limits of these restrictions.¹¹¹

New Jersey—See *Marriner v. Somay*, 114 N.J.L. 164, 176 A. 149 (1935), *aff'd*, 116 N.J.L. 411, 184 A. 818 (1936).

North Carolina—See *Chappell v. Dean*, 258 N.C. 412, 128 S.E.2d 830 (1963).

Oregon—See *Truck Ins. Exch. v. Alliance Plumbing, Inc.*, 274 Or. 435, 547 P.2d 90 (1976); *Kraxberger v. Rogers*, 231 Or. 440, 373 P.2d 647 (1962).

Tennessee—See *Redding v. Barker*, 33 Tenn. App. 132, 230 S.W.2d 202 (1950); *Long v. Tomlin*, 22 Tenn. App. 607, 125 S.W.2d 171 (1938).

Washington—See *Gotcher v. Rowell*, 2 Wash. App. 615, 468 P.2d 1004 (1970).

“Kentucky—See *Turner v. Hall's Adm'x*, 252 S.W.2d 30 (Ky. 1952).

Nebraska—See *Jennings v. Campbell*, 142 Neb. 354, 6 N.W.2d 376 (1942) (holding the father liable where he knew his son had the keys, the car, and a propensity to drive the car, and where there was evidence that the father should have known that the son would use the car exactly as he did use it).

Oregon—See *Gossett v. Van Egmond*, 176 Or. 134, 155 P.2d 304 (1945) (finding that even though the son may not have had permission to use his father's car on the night of the accident, the father had a legal duty to take such positive measures as might reasonably be necessary to prevent the son's use of the vehicle where the child was an unemancipated minor, a member of the father's household, mentally incompetent, and unlicensed, all of which the father knew).

¹⁰⁹See *Evans v. Caldwell*, 184 Ga. 203, 190 S.E. 582 (1937).

¹¹⁰See, e.g., *Vaughn v. Booker*, 217 N.C. 479, 8 S.E.2d 603 (1940).

3. States That Do Not Endorse The Family Purpose Doctrine.

While numerous states permit the imposition of liability under a family purpose doctrine, most states currently decline to recognize any form of the family purpose doctrine.¹¹²

¹¹²Alabama—See *Winfrey v. Austin*, 260 Ala. 439, 71 So. 2d 15 (1954).

Arkansas—See *Bieker v. Owens*, 234 Ark. 97, 350 S.W.2d 522 (1961); *Waller v. Yarbrough*, 232 Ark. 258, 337 S.W.2d 641 (1960); *Richardson v. Donaldson*, 220 Ark. 173, 246 S.W.2d 551 (1952); *Norton v. Hall*, 149 Ark. 428, 232 S.W. 934 (1921).

California—See *Idemoto v. Scheidecker*, 193 Cal. 653, 226 P. 922 (1924); *Spence v. Fisher*, 184 Cal. 209, 193 P. 255 (1920); *Johnson v. Peterson*, 38 Cal. App. 3d 619, 113 Cal. Rptr. 445 (1974).

Delaware—See *Smith v. Callahan*, 34 Del. 129, 144 A. 46 (1928).

Idaho—See *Gordon v. Rose*, 54 Idaho 502, 33 P.2d 351 (1934).

Illinois—See *Taylor v. Bennett*, 323 F.2d 607 (7th Cir. 1963) (applying Illinois law); *Parrino v. Landon*, 8 Ill. 2d 468, 134 N.E.2d 311 (1956), *aff'g* 6 Ill. App. 2d 375, 128 N.E.2d 356 (1955); *White v. Seitz*, 342 Ill. 266, 174 N.E. 371 (1930); *Arkin v. Page*, 287 Ill. 420, 125 N.E. 30 (1919); *Schuth v. Kuntz*, 346 Ill. App. 334, 105 N.E.2d 523 (1952).

Indiana—See *Grinter v. Haag*, 168 Ind. App. 595, 344 N.E.2d 320 (1976); *Pierce v. Horvath*, 142 Ind. App. 278, 233 N.E.2d 811 (1968); *McGoran v. Cromwell*, 86 Ind. App. 107, 156 N.E. 413 (1927); *Smith v. Weaver*, 73 Ind. App. 350, 124 N.E. 503 (1919).

Iowa—See *Houlahan v. Brockmeier*, 258 Iowa 1197, 141 N.W.2d 545 (1966), opinion supplemented, 258 Iowa 1205, 141 N.W.2d 924 (1966); *McMartin v. Saemisch*, 254 Iowa 45, 116 N.W.2d 491 (1962).

Kansas—See *Daily v. Schneider*, 118 Kan. 295, 234 P. 951 (1925), later appealed, 124 Kan. 381, 260 P. 609 (1927); *Watkins v. Clark*, 103 Kan. 629, 176 P. 131 (1918).

Louisiana—See *Martin v. Brown*, 240 La. 674, 124 So. 2d 904, *aff'g* 117 So. 2d 665 (La. Ct. App. 1960); *Traders & Gen. Ins. Co. v. Robison*, 289 So. 2d 178 (La. Ct. App. 1973).

Maine—See *Robinson v. Warren*, 129 Me. 172, 151 A. 10 (1930).

Maryland—See *Williams v. Wheeler*, 252 Md. 75, 249 A.2d 104 (1969); *Talbott v. Gegenheimer*, 245 Md. 186, 225 A.2d 462 (1967); *Schneider v. Schneider*, 160 Md. 18, 152 A. 498 (1930).

Massachusetts—See *Dennis v. Glynn*, 262 Mass. 233, 159 N.E. 516 (1928).

Michigan—See *Shaler v. Reynolds*, 360 Mich. 688, 104 N.W.2d 779 (1960).

Minnesota—See *Jacobsen v. Dailey*, 228 Minn. 201, 36 N.W.2d 711 (1949) (holding that because a recent state statute that made a car owner liable when the car was driven by another with the owner's consent effectively replaced the family purpose doctrine, the doctrine was no longer needed).

Mississippi—See *Dement v. Summer*, 175 Miss. 290, 165 So. 791 (1936).

Missouri—See *Mount v. Naert*, 253 S.W. 966 (Mo. 1923); *Hays v. Hogan*, 273 Mo. 1, 200 S.W. 286 (1917).

Montana—See *Clawson v. Schroeder*, 63 Mont. 488, 208 P. 924 (1922).

E. CONSENT STATUTES

1. In General.

In addition to the various forms of common law liability, nine states have passed automobile consent statutes.¹¹³ These consent statutes are quite broad because they make the owner of an automobile liable for injuries to third persons caused by an negligence of any person, whether or not a family member, who is operating the vehicle with the owner's express or implied consent.¹¹⁴ By holding the owner responsible for the negligence of

New Hampshire—See *Grimes v. Labreck*, 108 N.H. 26, 226 A.2d 787 (1967); *Pickard v. Morris*, 91 N.H. 65, 13 A.2d 609 (1940); *LaFond v. Richardson*, 84 N.H. 288, 149 A. 600 (1930).

New Jersey—See *Schank v. Cerniglia*, 113 N.J.L. 306, 174 A. 730 (1934).

New York—See *Cherwien v. Geiter*, 272 N.Y. 165, 5 N.E.2d 185 (1936); *VanBlaricom v. Dodgson*, 220 N.Y. 111, 115 N.E. 443 (1917); *Harper v. Parker*, 12 A.D.2d 327, 211 N.Y.S.2d 325 (1961), *aff'd*, 11 N.Y.2d 1095, 184 N.E.2d 310, 230 N.Y.S.2d 719 (1962); *Maher v. Benedict*, 123 A.D. 579, 108 N.Y.S. 228 (1908).

Ohio—See *Ross v. Burgan*, 163 Ohio St. 211, 126 N.E.2d 592 (1955); *Wilson v. Herd*, 1 Ohio App. 2d 195, 204 N.E.2d 389 (1965); *Hartough v. Brint*, 101 Ohio App. 350, 140 N.E.2d 34 (1955).

Oklahoma—See *Allen v. Hickman*, 383 P.2d 676 (Okla. 1963).

Pennsylvania—See *Haskey v. Williams*, 360 Pa. 78, 60 A.2d 32 (1948); *Piquet v. Wazelle*, 288 Pa. 463, 136 A. 787 (1927).

Rhode Island—See *Landry v. Richmond*, 45 R.I. 504, 124 A. 263 (1924).

South Dakota—See *Flanagan v. Slattery*, 74 S.D. 92, 49 N.W.2d 27 (1951); *Behseleck v. Andrus*, 60 S.D. 204, 244 N.W. 268 (1932).

Texas—See *Seinsheimer v. Burkhart*, 132 Tex. 336, 122 S.W.2d 1063 (1939); *Trice v. Bridgewater*, 125 Tex. 75, 81 S.W.2d 63 (1935); *Hanson v. Green*, 339 S.W.2d 381 (Tex. Civ. App. 1960); *Campbell v. Swinney*, 328 S.W.2d 330 (Tex. Civ. App. 1959).

Utah—See *Reid v. Owens*, 98 Utah 50, 93 P.2d 680 (1939).

Vermont—See *Jones v. Knapp*, 104 Vt. 5, 156 A. 399 (1931).

Virginia—See *Hackley v. Robey*, 170 Va. 55, 195 S.E. 689 (1938).

Wisconsin—See *Burant v. Studzinski*, 234 Wis. 385, 291 N.W. 390 (1940).

Wyoming—See *Wyoming Dept. of Revenue v. Wilson*, 400 P.2d 144 (Wyo. 1965); *Cook Ford Sales, Inc. v. Benson*, 392 P.2d 307 (Wyo. 1964); *Sare v. Stetz*, 67 Wyo. 55, 214 P.2d 486 (1950).

"See *W. Prosser & W. Keeton, The Law of Torts* § 73, at 527-28 (5th ed. 1984), which indicates that California, Connecticut, Idaho, Iowa, Michigan, Minnesota, Nevada, New York, and Rhode Island have enacted such consent statutes.

"California—See *Weber v. Pinyan*, 9 Cal. 2d 226, 70 P.2d 183 (1937).

Iowa—See *Johnston v. Johnson*, 225 Iowa 77, 279 N.W. 139 (1938).

Michigan—See *Moore v. Palmer*, 350 Mich. 363, 86 N.W.2d 585 (1957); *Stapleton v. Independent Brewing Co.*, 198 Mich. 170, 175, 164 N.W. 520, 521 (1917) ("The

those whom the owner permits to drive the vehicle, these statutes encourage the owner to take special care to place the vehicle only in proper hands.¹¹⁵

2. *Constitutionality of Consent Statutes.*

Courts generally have upheld the constitutionality of consent statutes,¹¹⁶ except where these statutes attempt to hold an owner liable for the negligence of a driver who takes the owner's vehicle without the owner's knowledge or consent.¹¹⁷

3. *Importance of the Owner's Consent.*

Liability under these statutes is premised upon the owner's consent. Consequently, the owner is not liable for the negligent operation of the vehicle outside the terms of such consent¹¹⁸ and

owner of an automobile is supposed to know, and should know, about the qualifications of the person he allows to . . . drive his automobile, and if he has doubts of the competence or carefulness of the driver he should refuse to give his consent to the use by him of the machine.”)

Minnesota—See *Flaugh v. Egan Chevrolet*, 202 Minn. 615, 279 N.W. 582 (1938).

New York—See *Naso v. Lafata*, 4 N.Y.2d 585, 152 N.E.2d 59, 176 N.Y.S.2d 622 (1958).

¹¹⁵See, e.g., *Weber v. Pinyan*, 9 Cal. 2d 226, 70 P.2d 183 (1937).

¹¹⁶Federal—See *Young v. Masci*, 289 U.S. 253 (1933).

Connecticut—See *Levy v. Daniels' U-Drive Auto Renting Co.*, 108 Conn. 333, 143 A. 163 (1928).

Iowa—See *Robinson v. Bruce Rent-A-Ford Co.*, 205 Iowa 261, 215 N.W. 724 (1927).

Michigan—See *Bowerman v. Sheehan*, 242 Mich. 95, 219 N.W. 69 (1928) (upholding a provision of a consent statute that created an irrebuttable presumption that a vehicle driven by a member of the owner's family is so driven with the owner's consent and knowledge).

Nebraska—See *Bridgeford v. U-Haul Co.*, 195 Neb. 308, 238 N.W.2d 443 (1976).

“See, e.g., *Daugherty v. Thomas*, 174 Mich. 371, 140 N.W. 615 (1913).

¹¹⁷California—See *Burgess v. Cahill*, 26 Cal. 2d 320, 158 P.2d 393 (1945); *Hosking v. Robles*, 98 Cal. App. 3d 98, 159 Cal. Rptr. 369 (1979) (where there was no consent because the driver acquired the car through theft).

Connecticut—But see *Tassinary v. Moore*, 38 Conn. Supp. 327, 446 A.2d 13 (Super. Ct. 1982) (holding that an action would not be dismissed on the basis of legally insufficient allegations where the complaint alleged that the parents' minor son took plaintiff's automobile without permission and subsequently damaged it, finding that such a complaint describes a classic cause of action in common law conversion).

Idaho—See *Colborn v. Freeman*, 98 Idaho 427, 566 P.2d 376 (1977) (where the driver “purchased” the car from a dealer with bad checks, the owner's consent was vitiated by fraud).

Iowa—See *Krausnick v. Haegg Roofing Co.*, 236 Iowa 985, 20 N.W.2d 432 (1945).

Michigan—See *Fout v. Dietz*, 75 Mich. App. 128, 254 N.W.2d 813, *aff'd*, 401 Mich.

liability will not be imposed upon the vehicle owner when the car is used at a time, in a place, or for a purpose that is clearly beyond the scope of the permission granted to the driver.¹¹⁹ Because there is no formula to determine whether a motor vehicle was operated with the implied consent of the owner, the existence of such consent will be a question of fact for the jury unless the evidence dictates only one reasonable conclusion.¹²⁰ As with the family purpose doctrine, however, minimal deviations from the vehicle's permitted use and minor violations of the owner's

403, 258 N.W.2d 53 (1977)(no owner consent found where a house guest sneaked into the owner's room and removed the car keys from a dresser).

Minnesota—See *Shelby Mut. Ins. Co. v. Kleman*, 255 N.W.2d 231 (Minn. 1977) (no consent found where the owner's son sneaked out with the car).

New York—See *Psota v. Long Island R.R. Co.*, 246 N.Y. 388, 159 N.E. 180 (1927); *Grant v. Knepper*, 245 N.Y. 158, 156 N.E. 650 (1927); *Aetna Casualty & Sur. Co. v. Brice*, 72 A.D.2d 927, 422 N.Y.S.2d 203 (1979). *aff'd mem.*, 50 N.Y.2d 958. 431 N.Y.S.2d 528, 409 N.E.2d 1000 (1980)(finding that consent may be presumed).

¹¹⁹California—See *Engstrom v. Auburn Auto. Sales Corp.*, 11 Cal. 2d 64, 77 P.2d 1059 (1938); *Henrietta v. Evans*, 10 Cal. 2d 526, 75 P.2d 1051 (1938) (where the car was used in a place other than that authorized by the owner); *DiRebaylio v. Herndon*, 6 Cal. App. 2d 567, 44 P.2d 581 (1935) (where the car was used at a time other than that authorized by the owner).

Iowa—See *Krausnick v. Haegg Roofing Co.*, 236 Iowa 985, 20 N.W.2d 432 (1945) (where the car was used for a purpose not authorized by the owner); *Robinson v. Shell Petroleum Corp.*, 217 Iowa 1252, 251 N.W. 613 (1933) (where the car was used at a time and in a place not authorized by the owner); *Heavilin v. Wendell*, 214 Iowa 844, 241 N.W. 654 (1932) (where the car was used for a purpose other than that authorized by the owner).

Michigan—See *Muma v. Brown*, 378 Mich. 637, 148 N.W.2d 760 (1967) (where the car was used for a purpose not authorized by the owner); *Union Trust Co. v. American Commercial Car Co.*, 219 Mich. 557, 189 N.W. 23 (1922) (finding that there was no issue for the jury as to whether the owner's automobile was operated by a third party with the owner's consent where the uncontradicted evidence indicated that the owner had loaned the vehicle to another, that it had not been returned within the time agreed upon, that the accident occurred after that time, and that the vehicle was being driven by a third party for his own purposes without the permission of either the owner or the borrower at the time of the accident).

Minnesota—But see *Milbank Mut. Ins. Co. v. United States Fidelity and Guar. Co.*, 332 N.W.2d 160 (Minn. 1983) (holding that under the Minnesota Safety Responsibility Act, when a vehicle owner initially consents to the vehicle's use by a permittee, subsequent use by the permittee short of conversion or theft remains permissive).

New York—See *Chaika v. Vandenberg*, 252 N.Y. 101, 169 N.E. 103 (1929) (where the car was used in a place other than that authorized by the owner).

¹²⁰California—See *Peterson v. Grieger, Inc.*, 57 Cal. 2d 43, 367 P.2d 420. 17 Cal. Rptr. 828 (1961).

New York—See *Carr v. Sciandra*, 281 A.D. 1072, 122 N.Y.S.2d 132 (1953).

specific instructions as to the manner in which the car is to be operated will not absolve the owner of liability.¹²¹

F. THE IMPACT OF STATUTORY PROHIBITIONS ON THE ENTRUSTMENT OF VEHICLES TO MINORS

1. In General.

In some jurisdictions a parent who entrusts a motor vehicle to a minor who is too young or who is otherwise unqualified to be lawfully licensed to drive the vehicle may be held liable for damages if the child negligently uses the vehicle.¹²²

2. Applicable Standard of Negligence.

In some of these cases, the courts have found that such entrustment is negligence per se because the licensing statutes render an underage person incompetent to drive a motor vehicle as a matter of law.¹²³ In most jurisdictions, however, the violation

¹²¹California—See *Herbert v. Cassinelli*, 61 Cal. App. 2d 661, 143 P.2d 752 (1943) (involving a violation of the owner's instructions).

Michigan—See *Sweeney v. Hartman*, 296 Mich. 343, 296 N.W. 282 (1941) (involving a violation of the owner's instructions); *Kieszkowski v. Odlewany*, 280 Mich. 388, 273 N.W. 741 (1937) (involving a minor deviation from the permitted use).

Minnesota—But see *Ballman v. Brinker*, 211 Minn. 322, 1 N.W.2d 365 (1941) (finding that deviation from the prescribed route does relieve the owner from liability for the negligent acts of the driver during the course of the deviation).

New York—See *Grant v. Knepper*, 245 N.Y. 158, 156 N.E. 650 (1927) (involving a violation of the owner's instructions).

¹²²California—See *Kostecky v. Henry*, 113 Cal. App. 3d 362, 170 Cal. Rptr. 197 (1980).

Delaware—See *McHugh v. Brown*, 50 Del. 154, 125 A.2d 583 (1956).

Idaho—See *Gordon v. Rose*, 54 Idaho 502, 33 P.2d 351 (1934).

Kansas—See *Jacobs v. Hobson*, 148 Kan. 107, 79 P.2d 861 (1938).

Kentucky—See *Falender v. Hankins*, 296 Ky. 396, 177 S.W.2d 382 (1944).

Oklahoma—See *Greenland v. Gilliam*, 206 Okla. 85, 241 P.2d 384 (1952).

Utah—See *Lowder v. Holley*, 120 Utah 231, 233 P.2d 350 (1951).

Virginia—See *Hannabass v. Ryan*, 164 Va. 519, 180 S.E. 416 (1935).

¹²³Arkansas—See *Carter v. Montgomery*, 226 Ark. 989, 296 S.W.2d 442 (1956).

Missouri—See *Dinger v. Burnham*, 360 Mo. 465, 228 S.W.2d 696 (1950) (where a mother permitted her 15-year-old son to drive her car while she was a passenger therein, notwithstanding state statutes that provided that no person under 16 years of age shall operate a motor vehicle and that no person shall authorize or knowingly permit a motor vehicle under the owner's control to be driven by an unauthorized person, the court found that the son was the active agent of the

of such statutes is merely evidence of negligence that may be rebutted by additional facts; the parent is not strictly liable for the negligence of an underage child in operating the vehicle.¹²⁴

mother, that the mother breached a duty that the law imposed upon her for the protection of the public by permitting her son to operate the vehicle, and that the son's negligence was therefore imputable to the mother); *Thomasson v. Winsett*, 310 S.W.2d 33 (Mo. Ct. App. 1958).

Montana—See *Sedlacek v. Ahrens*, 165 Mont. 479, 530 P.2d 424 (1974) (holding liable a father who entrusted his 12-year-old son with a motorbike where a state statute prohibited the issuance of a license to anyone under 13 years old: the court found that the statute constituted a legislative declaration that minors under the licensing age are incompetent drivers who do not possess sufficient care and judgment to operate motor vehicles within the state).

Nebraska—See *Walker v. Klopp*, 99 Neb. 794, 157 N.W. 962 (1916).

Ohio—See *Wery v. Seff*, 136 Ohio St. 307, 25 N.E.2d 692 (1940)

Texas—See *Mundy v. Pirie-Slaughter Motor Co.*, 146 Tex. 314, 206 S.W.2d 587 (1947).

Wisconsin—See *Kempf v. Boehrig*, 95 Wis. 2d 435, 290 N.W.2d 562 (Ct. App. 1980).

¹²⁴ California—See *Owens v. Carmichael's U-Drive Autos, Inc.*, 116 Cal. App. 348, 2 P.2d 580 (1931); *Arrelano v. Jorgensen*, 52 Cal. App. 622, 199 P. 855 (1921) (finding that liability for injuries caused by operation of a vehicle could not be based upon a statute forbidding operation of the vehicle without a license unless violation of the statute contributed directly to the injury).

Louisiana—See *Elmendorf v. Clark*, 143 La. 971, 79 So. 557 (1918) (finding that the owner of an automobile who permitted it to be operated by one not possessing the age qualifications required by municipal ordinance was not liable for injuries inflicted by the car upon a boy who dashed in front of it from the sidewalk so suddenly that no one could have avoided striking him).

Massachusetts—See *LeBlanc v. Pierce Motor Co.*, 307 Mass. 535, 30 N.E.2d 684 (1940).

Nebraska—See *Keller v. Welensiek*, 186 Neb. 201, 181 N.W.2d 854 (1970).

New York—See *Schultz v. Morrison*, 91 Misc. 248, 154 N.Y.S. 257 (1915), *aff'd*, 172 A.D. 940, 156 N.Y.S. 1144 (1916).

North Dakota—*Cf. Rau v. Kirschenman*, 208 N.W.2d 1 (N.D. 1973) (holding that entrustment of a vehicle by a father to his unlicensed minor son, standing alone, was insufficient evidence to constitute gross negligence under a guest statute).

Ohio—See *Crabtree v. Shultz*, 57 Ohio App. 2d 33, 384 N.E.2d 1294 (1977) (although the parents entrusted their son with a minibike in violation of a statute prohibiting the operation of such vehicles at his age, the court found the parents not liable for resulting injuries absent evidence that the parents had acted imprudently in entrusting the minibike to their son where there was no indication that the child was irresponsible or reckless in his operation of the vehicle and where the evidence indicated that the child was an experienced operator at the time of the accident).

Wisconsin—See *Hopkins v. Droppers*, 184 Wis. 400, 198 N.W. 738 (1924), *aff'd* in part and *reu'd* in part, 191 Wis. 334, 210 N.W. 684 (1926) (although the court initially held a father liable for injuries caused by his minor son while the son was operating a motorcycle, noting that operation of motor vehicles at the son's age was made unlawful by state statute, the court subsequently found the father not

For example, the courts in several jurisdictions have found that merely lending a motor vehicle to one who does not have a license to drive but who does meet the age requirements for an operator's license does not render the owner liable for injuries caused by this driver absent proof that the owner knew that the driver was actually incompetent to drive the **vehicle**.¹²⁵

3. Statutory Requirement for Parental Signatures on the Driver's License Applications of Minors.

In addition to statutory liability based on negligent entrustment, several states require a minor who applies for a driver's license to have a parent or other custodian sign the application and assume liability for the licensee's negligence or willful misconduct in the operation of a vehicle.¹²⁶ In such jurisdictions, parents may be liable for damage caused by the minor driver even in the absence of a family purpose doctrine, a state consent statute, a general state parental responsibility statute, or parental negligence in entrusting a vehicle to the child.

liable because the father had forbidden his son to use the motorcycle unless accompanied by an adult and there was no evidence that the child was unduly or repeatedly disobedient when given parental instructions).

¹²⁵**Arizona**—See *Lutfy v. Lockhart*, 37 **Ariz.** 488, 295 P. 975 (1931) (noting that the lack of an operator's license is no evidence that a driver is not a capable, skilled, and safe driver).

Connecticut—See *Greeley v. Cunningham*, 116 **Conn.** 515, 165 A. 678 (1933).

New Jersey—See *Patterson v. Surpless*, 107 **N.J.L.** 305, 151 A. 754 (1930) (finding that a vehicle owner could not be held liable for an accident involving an unlicensed driver to whom the owner had loaned the vehicle in the absence of proof that the unlicensed driver was an incompetent driver); *Pugliese v. McCarthy*, 10 **N.J. Misc.** 601, 160 **A.** 81 (1932) (finding the vehicle owner not liable for an accident in which his brother was involved where there was no evidence that the brother was incompetent to drive the car, notwithstanding evidence that the owner had loaned his car to his brother knowing that the brother had no driver's license).

¹²⁶**Arkansas**—See *Vaught v. Ross*, 244 **Ark.** 1218, 428 **S.W.2d** 631 (1968), appeal following remand, 246 **Ark.** 1002, 440 **S.W.2d** 540 (1969).

California—Cf *Bosse v. Marye*, 80 **Cal. App.** 109, 250 P. 693 (1926) (finding that the jury's failure to return a verdict against the minor did not relieve from liability the parent who signed her application for a driver's license, since the minor was not exonerated by the mere failure to return a verdict against her).

Florida—See *Gracie v. Deming*, 213 **So. 2d** 294 (Fla. Dist. Ct. App. 1968).

Montana—Cf *Moore v. Jacobsen*, 127 **Mont.** 341, 263 **P.2d** 713 (1953) (noting that under the Montana statute parental liability is assumed only where the minor does not file proof of financial responsibility).

Tennessee—Cf *Leggett v. Crossnoe*, 206 **Tenn.** 700, 336 **S.W.2d** 1 (1960) (finding that a minor's parents who sign the application for the minor's driver's license are not liable for the minor's negligent operation of a motor vehicle where the minor has filed proof of financial responsibility).

Utah—See *Rogers v. Wagstaff*, 120 **Utah** 136, 232 **P.2d** 766 (1951).

Contrary to the rules governing the parent's common law liability for the acts of a child, the child's emancipation may be ineffective to relieve the parent who assumes statutory liability by co-signing the child's driver's license **application**.¹²⁷ For example, neither the parents' loss of control or custody of the minor due to the minor's marriage, the divorce of the parents, nor a change in legal custody of the minor will relieve the co-signing parents of liability for injuries or damage resulting from the minor's negligent or willful misconduct involving a vehicle.¹²⁸

4. *Proximate Cause.*

While courts typically do not require that a plaintiff prove a causal connection between an owner's statutory violation in providing the vehicle to an unlicensed driver and the subsequent injury, the courts in most jurisdictions hold that the plaintiff must establish that the injury complained of was proximately caused by the driver's incompetence or **unfitness**.¹²⁹

¹²⁷California—See *Easterly v. Cook*, 140 Cal. App. 115, 35 P.2d 164 (1934); *Sgheiza v. Jakober*, 132 Cal. App. 57, 22 P.2d 19 (1933).

Florida—See *Gracie v. Deming*, 213 So. 2d 294 (Fla. Dist. Ct. App. 1968).

Utah—See *Rogers v. Wagstaff*, 120 Utah 136, 232 P.2d 766 (1951) (finding that the marriage of a minor under the age of eighteen does not exempt from statutory liability the parents who signed the minor's license application under a statute imputing to the signer the negligence or willful misconduct of a minor under eighteen years of age while such a minor is driving on the highway).

¹²⁸See cases cited *supra* note 127.

¹²⁹Arkansas—See *Carter v. Montgomery*, 226 Ark. 989, 296 S.W.2d 442 (1956) (noting that although the father was negligent per se for buying his 13-year-old son an automobile and permitting him to drive it, the father was not liable for injuries sustained by another child who ran his bike into the back of the son's car, because it would be manifestly unfair to hold a parent absolutely liable for the negligent acts of a third party where the parent's child was operating the vehicle with due care and regard for his safety and that of others).

Kentucky—See *Brady v. B. & B. Ice Co.*, 242 Ky. 138, 45 S.W.2d 1051 (1931).

North Carolina—See *Dinkins v. Booe*, 252 N.C. 731, 114 S.E.2d 672 (1960).

Ohio—See *Gulla v. Straus*, 154 Ohio St. 193, 93 N.E.2d 662 (1950) (finding that the lack of a driver's license was not a proximate cause of the damage and therefore concluding that the one entrusting a motor vehicle to an unauthorized person could not be found liable on the basis of the violation of a statute prohibiting such entrustment).

Oklahoma—See *Anthony v. Covington*, 187 Okla. 27, 100 P.2d 461 (1940).

Texas—See *Mundy v. Pirie-Slaughter Motor Co.*, 146 Tex. 314, 206 S.W.2d 587 (1947) (relaxing the causal requirement by holding that sufficient causal connection exists between the entrustment to an unauthorized person and the injury or damage where the entrustment of a motor vehicle to an unauthorized person in violation of a statute is shown and it is also shown that the negligence of the operator caused the injury or damage); *McIntire v. Sellers*, 311 S.W.2d 886 (Tex. Civ. App. 1958) (finding that it is not necessary to show specifically that the

IX, LIABILITY IMPOSED BY ARMY REGULATION

A. *IN GENERAL*

While parental liability imposed under common law and state statutes involves only the parents' liability to the victims or their representatives, soldier-parents may also be liable directly to the United States, pursuant to military regulation, for their children's acts. Federal statutes permit the Secretary of the Army to "prescribe regulations for the accounting for Army property and the fixing of responsibility for that **property**,"¹³⁰ and allow designated officers to act upon reports of survey and vouchers pertaining to the loss of, destruction of, "or damage to property of the United States under the control of the Department of the **Army**."¹³¹ Using this authority, the Secretary of the Army promulgated a **regulation**¹³² that provides "procedures to be used when Department of the Army property is discovered to be lost, damaged, or destroyed through causes other than fair wear and tear."¹³³

B. *DAMAGE TO GOVERNMENT QUARTERS*

With respect to property under Department of the Army control that is lost or damaged, parents are most likely to be found pecuniarily liable for their children's acts when the damage done by the child is to government quarters or furnishings, because liability for such damage is specifically recognized by

entrustment of the motor vehicle to an unlicensed person was a proximate cause of the accident).

Virginia—See *Laughlin v. Rose*, 200 Va. 127, 104 S.E.2d 782 (1958) (finding that the lack of a driver's license was not a proximate cause of the damage and therefore concluding that the one entrusting a motor vehicle to an unauthorized person could not be found liable on the basis of the statutory provision prohibiting such entrustment).

West Virginia—See *Payne v. Kinder*, 147 W. Va. 352, 127 S.E.2d 726 (1962).

¹³⁰10 U.S.C. § 4832 (1982).

¹³¹10 U.S.C. § 4835 (1982). See also 37 U.S.C. § 1007(e) (1982), which permits deductions from a soldier's pay for indebtedness to the United States, including any damage "to arms or equipment caused by the abuse or negligence of a member of the Army."

¹³²Dep't of Army, Reg. No. 735-11, Property Accountability—Accounting for Lost, Damaged, or Destroyed Property (1 May 1985) [hereinafter AR 735-11].

¹³³AR 735-11, para. 1-1.

both federal statute¹³⁴ and Army regulation.¹³⁵ Pursuant to the implementing regulation,

persons occupying assigned Government quarters or having been issued Government property for use in quarters may be charged with a loss of or damage to furnishings or to the quarters resulting from the occupant's negligence. This includes cases where the loss is related to an act of a member of the household, guest of the household, or pet of either the household member or guest. However, losses resulting from fair wear and tear or an act of God are not included.¹³⁶

Although a soldier's liability for damage to government property normally is limited to one month's basic pay,¹³⁷ the soldier may be liable for the full amount of the loss, damage, or destruction if the survey officer finds that the Government quarters or furnishings were damaged as a result of "the gross negligence or willful misconduct of the soldier, his or her dependents, guests, or pets."¹³⁸

Apparently, then, a soldier may be held liable for the full amount of any damage caused by the soldier's child when the child damages the quarters or its furnishings willfully or through

¹³⁴10 U.S.C. § 2775 (1982), amended by Pub. L. No. 98-407, § 801(a)(1), 98 Stat. 1517 (1984) provides as follows:

(a) A member of the armed forces shall be liable to the United States for damage to any family housing unit or unaccompanied personnel housing unit, or damage to or loss of any equipment or furnishings of any family housing unit, assigned to or provided such member if it is determined, under regulations prescribed by the Secretary of Defense, that the damage or loss was caused by the abuse or negligence of the member (or a dependent of the member) or of a guest of the member (or a dependent of the member).

The 1984 amendment expanded the liability of members of the armed forces to include liability for damages caused by the abuse or negligence of a guest of the member as well as abuse or negligence by a dependent of the member. The prior provision stated:

A member of the armed forces shall be liable to the United States for damage to any family housing unit, or damage to or loss of any equipment or furnishing of any family housing unit, assigned to or provided such member if it is determined, under regulations issued by the Secretary of Defense, that such damage or loss was caused by the abuse or negligence of such member or a dependent of such member.

10 U.S.C. § 2775(a) (1982) (emphasis added).

¹³⁵AR 735-11, para. 3-17.

¹³⁶*Id.*

¹³⁷*Id.*, para. 4-18.

¹³⁸*Id.*, para. 4-10a(1)(d); see also *id.*, para. 4-15c.

gross negligence, irrespective of the soldier's knowledge of the child's act, or negligence in supervising the child. Such limitless strict vicarious liability is obviously a substantial departure from the common law and subjects the parent to far greater liability than that imposed by the majority of the state statutes concerning either general parental responsibility or responsibility for a child's acts of vandalism.¹³⁹

C. DAMAGE TO OTHER GOVERNMENT PROPERTY

A strict reading of the language in Army Regulation 735-11 indicates that the soldier's liability for a child's acts may not be limited to the damage caused to government housing and furnishings. With respect to government property other than government quarters and furnishings, an assessment of pecuniary liability "will result when a person's negligence or willful misconduct is the proximate cause of any loss, damage, or destruction of Government property."¹⁴⁰

"Government property" includes "all property under DA [Department of the Army] control except property accounted for as owned by an NAF [Nonappropriated Fund] activity."¹⁴¹ Such property would include such on-post facilities as clubs, recreation centers, and schools, regardless of who owns these facilities. The regulation provides, however, that a soldier is liable for the loss or destruction of such property only when the soldier's negligence or willful misconduct is the proximate cause of such loss or damage. "Proximate cause" is defined as the

[clause which, in a natural and continuous sequence unbroken by a new cause, produces loss or damage and without which loss or damage would not have occurred. Further explained as primary moving cause, or predominating cause, from which injury follows as a natural, direct, and immediate consequence, and without which it would not have occurred.]¹⁴²

¹³⁹Although it is beyond the scope of this discussion, imposing such limitless strict liability on the soldier for the acts of guests, guests' dependents, and guests' pets also renders the liability imposed by AR 735-11 far more severe than that provided by the common law or any state statute.

¹⁴⁰AR 735-11, para. 4-15a.

¹⁴¹Unit Supply Update, Issue No. 8 (10 Nov. 1985), Consolidated Glossary at 11.

¹⁴²*Id.* at 13.

This regulatory language indicates that a parent may be held pecuniarily liable for the acts of a minor dependent based on the soldier's act or omission under a proximate cause test similar to that recognized at common law.¹⁴³ The factors to be considered in determining parental negligence would include such factors as the parent's knowledge of the child's destructive tendencies and whether the degree of parental supervision was reasonable under the circumstances.

X. RESOLVING THE HYPOTHETICAL SCENARIOS

A. IN GENERAL

The paragraph beginning this article identified three incidents involving property damage and personal injury. While this discussion cannot identify the parent soldier's specific civil liability with respect to these incidents without knowing in which jurisdiction they occurred, it can suggest a methodology that will assist the practitioner in resolving such issues.

B. VANDALISM OF THE SCHOOL'S WALL

The first hypothetical incident concerned a young child's decision to autograph the school's bathroom wall with indelible ink. Analytically, the practitioner must first determine what law will be applied in resolving a plaintiff's potential claims. In this hypothetical situation, it is unclear whether the school is located on post or off post. If the school is off post, determination of the applicable law is relatively easy because it will likely be the law of the state in which the school is located under any of the choice of law principles previously identified, including the prevailing "significant relationship" test.

While ownership of the school usually is relevant only to determining who might have a cause of action, rather than whether or not the soldier might be liable in any such action, ownership could be relevant to the question of whether any municipal ordinances might affect the parent's liability where the school is owned by a municipal government. Consequently, the practitioner should review the complaint carefully, verifying both the school's ownership and the existence of any city or county ordinances which might affect the soldier's liability.

¹⁴³W. Prosser & W. Keeton, *The Law of Torts* § 41, at 267 (5th ed. 1984).

If the school is located on the installation, the practitioner must next determine what type of jurisdiction exists on the reservation. If the installation is subject to concurrent jurisdiction, current state law will generally govern tort actions because there is no federal common law with respect to torts. In such a case, the method of identifying the applicable law would be similar to that indicated for an off-post offense.

If the enclave is one of exclusive federal jurisdiction, the practitioner must next identify under what legal theory the plaintiff is expected to proceed. With respect to the school vandalism, which involves no personal injury or wrongful death, the applicable law will be that which existed at the time jurisdiction was ceded to the federal government. Identification of this law will pose a substantial challenge for the practitioner (although plaintiff will bear the burden of identifying the law under which the action is taken), because the applicable law may include both common law and statutory law.

While the statutory law may have changed numerous times since the federal government acquired jurisdiction, and may consequently be difficult to discern, the common law will likely have remained relatively constant. As previously discussed, the parent will normally not be held liable for the damage to the school under common law unless the parent was in some way negligent.

Since indelible ink cannot be considered a dangerous instrumentality, contrary to school's likely claim, the only parental negligence that may subject the soldier to common law liability is negligent supervision. The practitioner should be aware of any prior occasions on which the child committed the same or similar acts of misconduct and be prepared to identify the disciplinary steps that the soldier took to prevent recurrences of the misconduct.

The practitioner may also recall from an earlier discussion that if the school is located on a military installation and is subject to Department of the Army control, the soldier may be found liable in an amount of up to one month's basic pay for damage to such property caused by a minor child if the damage is the result of the soldier's negligence or willful misconduct. According to the Army regulation, the standards of proximate cause and parental negligence in supervision that will be applied in the report of

survey action will be similar to those generally applicable at common law.¹⁴⁴

Fortunately for the practitioner who is advising the soldier forced to respond to a civil suit in damages, it is the plaintiff who must identify the statute pursuant to which any statutory liability is alleged. In this regard, the practitioner's best likelihood of success will be in proving that the asserted statute did not constitute the law at the time jurisdiction was ceded. Because several statutes may apply to the same incident, including, for example, general parental responsibility statutes, vandalism statutes, and statutes specifically prohibiting damage to school property, the practitioner should carefully consider timeliness requirements such as the statute of limitations when preparing responses to any erroneously based claims by plaintiff.

If statutory liability initially appears to have been properly alleged, the practitioner should explore the possibility that the soldier is nonetheless absolved of statutory liability under the terms of the statute. The soldier may be able to prove, for example, that the child was emancipated at the time of the incident, particularly if there has been a divorce and custody was judicially awarded to the other parent.

C. DAMAGE AND PERSONAL INJURY CAUSED BY A CHILD WITH A GUN

The second hypothetical incident discussed in the introductory paragraph was caused by the soldier's twelve-year-old child, who found the soldier's revolver and fired it in the living room, causing damage to the government quarters and furnishings and injuring the child's playmate. With respect to the injured playmate, the obvious question for the courts in such a case will be whether the parent was negligent in leaving the gun in a place to which the twelve-year-old child had access.

If, for example, the soldier left the weapon in a locked case to which only another adult was permitted access, the soldier likely will not be held liable if that other adult negligently left the gun accessible to the child. If, however, the soldier had given the gun to his twelve-year-old child but had provided no guidance as to its use, the soldier likely would be found liable for damage resulting from the child's misuse of the gun.

¹⁴⁴Compare *id.* § 41 (regarding the definition of proximate cause) and § 30 (regarding the definition of negligence) with Unit Supply Update, Issue No. 8 (10 Nov. 1985), Consolidated Glossary at 13 (proximate cause) and at 12 (negligence).

Because determinations of parental negligence will necessarily be fact-specific, the practitioner should be prepared to address issues such as the child's age, where the weapon and its ammunition were kept, who had access to the gun and ammunition, the nature and extent of any instruction provided by the parent regarding the instrument's use, and any restrictions placed on the child's use of the gun, such as requirements for adult supervision and prohibitions on handling such weapons in the presence of other children. The practitioner should also identify any prior experience the child might have involving such weapons. If, for example, this were a remarkable twelve-year-old who had won several awards in shooting contests and who had never exhibited a reckless attitude toward or use of the gun, the parent might be relieved of common law liability for an accident involving the gun even if the parent had given both the gun and the ammunition to the child as a gift. The practitioner should remain aware, however, that even if the parent were otherwise not negligent in entrusting the child with the weapon under these circumstances, and therefore not liable for the resulting damage at common law, the parent may nonetheless be statutorily liable if the applicable law renders the parent negligent per se for allowing a child under a specified age to have access to a gun.

While the parental liability resulting from the injury sustained by the playmate may be more costly, the soldier's liability with respect to the damage which the twelve-year-old caused to the government quarters and furnishings may be more difficult to escape. As previously discussed, the soldier may be liable in an amount of up to one month's basic pay if the damage to the quarters or furnishings is caused by the soldier's negligence, and the soldier may be liable for the full amount of the damage if the damage is caused by either the soldier's or the child's gross negligence or willful misconduct.

Apparently, then, the soldier in the hypothetical may be liable to the government for up to one month's pay if the soldier leaves the gun locked in a cabinet but negligently allows the cabinet key to remain in a place accessible to the child. If, however, the soldier leaves the loaded gun on a bedroom bureau when the soldier leaves for the field exercise, the soldier may be liable for the full amount of the damage to both the government quarters and the furnishings if this act is construed as gross negligence.

According to the regulation, however, the soldier may also be liable for the full amount of the damage if the child willfully and

maliciously fires the gun within government quarters. This may be so even if the child obtained the gun from a neighbor through no fault of the soldier, because the regulation does not require that there be any knowledge or fault on the part of the soldier if the soldier's dependent commits the destructive act willfully or through gross negligence. In such a case, the practitioner may wish to argue that the child was "under the age of discernment" or of such "tender years" that the child was unable to commit a willful or culpably negligent act.

D. DAMAGE RESULTING FROM A CHILD'S USE OF AN AUTOMOBILE

The last hypothetical incident posed in the introductory paragraph concerned a teenager's use of the family car, resulting in a collision and damage to another car and injury to that car's occupants. As previously discussed, car owners are not typically liable at common law for the negligent operation of their cars by others. There is, however, an important exception to this common law rule regarding automobiles similar to the general common law principle of negligent entrustment.

According to this exception, if the parent gives a child permission to use the family car notwithstanding the child's substantial history of drunk or reckless driving, or if the child has a physical or medical condition of which the parent is or should be aware and this condition impairs the child's ability to drive the car safely, the parent may be held to have negligently entrusted the car to the child. Such negligent entrustment may render the soldier parent liable at common law for any resulting injuries or damage. The soldier may also be liable at common law for the resulting property damage and personal injury pursuant to the family purpose doctrine, an additional basis of liability recognized in more than a dozen states.

In addition to this potential common law liability, the soldier may be subject to statutory liability based upon a consent statute. These statutes, which have been enacted in approximately twelve states, render the vehicle owner who permits another to drive his or her car liable for injuries to third persons which are caused by the negligence of the driver.

After identifying any additional statutes which might provide such general vicarious liability, the practitioner should finally consider whether the child met all the statutory requirements for driving the vehicle. For example, if the child were driving with the

soldier's permission but without a valid driver's license either because the child was too young to obtain a license or because the child was otherwise unqualified to be licensed in that state, the soldier may be statutorily liable for the resulting collision. Some states have enacted additional statutes that require a parent of a minor applying for a driver's license to sign the child's application and thus assume liability for any accidents in which the child might subsequently be involved.

XI. CONCLUSION

While it may initially appear that a soldier is subject to liability for even the most unpredictable acts of his or her minor child, liability is most typically imposed when the parent fails either to discipline a child for misconduct or to provide sufficient guidance and training when the child is using vehicles or dangerous instrumentalities. Because parents generally have been found not liable for the acts of their minor children at common law, it is only when a given hazard has been grave enough to attract the attention of the legislature that parental liability has been statutorily imposed. Because legislators, like soldiers, have unpredictable offspring, it is unlikely that parental liability statutes will be drafted so as to impose upon parents an impossible task.

RIGHT WARNINGS IN THE MILITARY: AN ARTICLE 31(b) UPDATE

by Captain John R. Morris*

I. INTRODUCTION

On 5 May 1985, Article 31 of the Uniform Code of Military Justice (UCMJ) celebrated its thirty-fifth anniversary as the cornerstone of the protection against compelled self-incrimination in the military.¹ The history of this provision has been an interesting—albeit complex—one, reflecting an intense effort to ensure the fairness of military interrogations.²

For the past three and one-half decades, Article 31 has provided the following mandate to the armed services:

Art. 31. Compulsory self-incrimination prohibited

(a) No person subject to this [code] may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this [code] may interrogate, or request any statement from, an accused or a person

*Judge Advocate General's Corps, United States Army. Currently assigned as a responsible attorney in the Military Personnel Law Branch, Administrative Law Division, Office of The Judge Advocate General, 1985-present. Formerly assigned as Attorney-Advisor to the Assistant General Counsel for Legal Counsel, Office of the Secretary of Defense, 1983-1985; Officer-in-Charge, Gelnhausen Legal Center, Office of the Staff Judge Advocate, 3d Armored Division, 1982-83; Trial Counsel, Hanau Legal Center, Office of the Staff Judge Advocate, 3d Armored Division, 1982; Defense Counsel, U.S. Army Trial Defense Service, Europe, with duty at Hanau Legal Center, 1981-82. J.D. (with honors), University of Oklahoma, 1977. Completed 94th Army Judge Advocate Officer Basic Course, 1980. Author of *Opening Statement: An Opportunity for Effective Defense Advocacy*, The Army Lawyer, Sep. 1986, at 10; *Rehabilitative Potential of the Accused: Have the Floodgates Been Opened on Sentencing?*, 16 The Advocate 75 (1984); *MRE 404(b): A Case Study in "Whodunit?"*, 16 The Advocate 51 (1984); *The Parameters of Judicial Conduct During an Oklahoma Jury Trial of a Criminal Defendant*, 53 Okla. B. J. 1307 (1982); *Constitutional Law: Substantive Due Process and the Incompetent Organ Donor*, 33 Okla. L. Rev. 126 (1980); *Constitutional Law: A Constitutional Analysis of the New Oklahoma Abortion Statute*, 32 Okla. L. Rev. 138 (1979). Members of the bars of the United States Supreme Court, United States Court of Appeals for the Tenth Circuit, United States Court of Military Appeals, and the State of Oklahoma.

¹The Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (1982) [hereinafter UCMJ] was enacted on 5 May 1950. Pub. L. No. 81-506, 64 Stat. 118 (1950). Since its enactment, Article 31, 10 U.S.C. § 831, has never been changed in either form or content.

²See Lederer, *Rights Warnings in the Armed Services*, 72 Mil. L. Rev. 1, 2-9 (1976).

suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(c) No person subject to this [code] may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

Between 1951 and 1975, military courts struggled to find the proper scope and effect of this Article, particularly with regard to subsection (b).³ Since 1975, the Court of Military Appeals and the courts of military review have continued to grapple with the intricacies of the Article 31(b) protection. This article will review military decisions of the past ten years that have interpreted Article 31(b), articulate current guidelines utilized by military courts,⁴ and offer examples of legislative, executive, and judicial actions that may improve this codal privilege for the future.

11. THE REQUIREMENTS OF ARTICLE 31(b)

Any analysis of the types of problems confronting judicial attempts to interpret Article 31(b) must begin with the language of subsection (b) itself. Professor Robert Maguire created the following matrix reflecting the four basic elements of this provision:

ELEMENTS	<u>ARTICLE 31(b)</u>
(1) Who must warn?	No person subject to this [code]
(2) When is a warning required?	may interrogate, or request any statement from,
(3) Who must be warned?	an accused or a person suspected of an offense

³*Id.* at 9-45, 52-54.

⁴The Military Rules of Evidence, which codified rights warnings and procedures in the armed forces, will also be discussed in this article.

ELEMENTSARTICLE 31(b)

- (4) What warning is required? without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.⁵

Notwithstanding the apparent clarity of these elements, the answers to the questions they present have proved to be far from simple. Ten years ago, one writer concluded that the first twenty-five years of litigation and judicial interpretation made only one point clear: virtually nothing involving Article 31(b) has a plain meaning.⁶ During the past ten years, a “plain meaning” has remained elusive,⁷ but progress has been made to establish a logical framework in which answers are attainable. Further work, however, remains ahead.

A. *WHO MUST WARN?*

By its terms, Article 31(b) applies anytime *any* soldier questions a suspect. Military courts, however, have been unwilling to apply Article 31 in such a literal fashion. In some of the earliest cases following enactment of the Uniform Code of Military Justice, the Court of Military Appeals fashioned the “official capacity” test to gauge the requirement that “[n]o person subject to [the UCMJ]” may question a suspect or an accused until rights warnings are given.⁸ This test focused on the “officiality” of the questioner’s motives at the time of the questioning. If the questioner was acting in an “official capacity” on behalf of the military, the interrogation fell within the scope of Article 31(b) and warnings

⁵Maguire, *The Warning Requirement of Article 31(b): Who Must Do What to Whom and When?*, 2 Mil. L. Rev. 1, 4 (1958).

⁶Lederer, *supra* note 2, at 11 (cases through 1975).

⁷*United States v. Jones*, 19 M.J. 961, 966 (A.C.M.R.1985) (cases from the Court of Military Appeals demonstrate that the interpretation of Article 31(b) is “anything but ‘plain’”).

⁸*E.g.*, *United States v. Gibson*, 3 C.M.A. 746, 752, 14 C.M.R. 164, 170 (1954).

were required.⁹ On the other hand, if the questioner acted because of purely personal considerations (such as friendship with the suspect), Article 31 would not be triggered.¹⁰

Unfortunately, the “official capacity” test did not completely resolve the “who must warn” issue, for it failed to analyze whether the questioner’s military position or status could have caused the accused or suspect to respond,” or whether the suspect or accused even perceived that official questioning was taking place.¹²

In 1975, then-Chief Judge Fletcher, in *United States v. Dohle*,¹³ rejected the traditional “official capacity” test and sought instead to institute a “position of authority” standard to determine who must warn.¹⁴ This test focused on the state of mind of the suspect or accused by asking whether the position of the questioner could have subtly pressured the suspect or accused into responding to the **inquiry**.¹⁵ If so, the questioner fell within the scope of Article 31(b).

Although the “position of authority” test seemed to more closely reflect the intent behind Article 31(b) than did the “official capacity” test, it too was flawed. First, a questioner’s “position” should be relevant only if it is tied to *rank or* position differences between the questioner and the suspect or accused in accordance with the spirit of Article 31(b);¹⁶ the fact that the questioner is,

⁹*Id. See* *United States v. Seay*, 1 M.J. 201, 203 & n.3 (C.M.A. 1975).

¹⁰*See* *United States v. Beck*, 15 C.M.A. 333, 338-39, 35 C.M.R. 305, 310-11 (1965).

¹¹*Compare* *United States v. Wheeler*, 27 C.M.R. 981, 994 (A.F.B.R. 1959) (civilian police officer bound by Article 31(b)) *with* *United States v. Gibson*, 3 C.M.A. 746, 752-53, 14 C.M.R. 164, 170-71 (1954) (private first class not within scope of Article 31(b)). *See* Lederer, *supra* note 2, at 13.

¹²Lederer, *supra* note 2, at 13-14, 20-23.

¹³1 M.J. 223 (C.M.A. 1975) In *Dohle*, a private first class in custody responded to questions from a sergeant in his unit who had been detailed as a guard. Despite the sergeant’s testimony that Dohle was a “good friend” and his questions were motivated solely by his personal concern and bewilderment about the allegations, the Court of Military Appeals held the interrogation violated Article 31.

¹⁴*Id.* at 226 (Fletcher, C.J., with Cook, J., and Ferguson, S.J., concurring in the result by separate opinions).

¹⁵*Id.* at 225, 226 & n.4.

¹⁶*See* *United States v. Gibson*, 3 C.M.A. 746, 752, 14 C.M.R. 164, 170 (1954) (“presumptive coercion” implicit in military discipline and superiority); *see also* *United States v. Harris*, 19 M.J. 331, 343 n.3 (C.M.A. 1985) (Cox, J., concurring in the result by separate opinion); *United States v. Parker*, 15 M.J. 146, 153-54 (C.M.A. 1983) (Cook, J., concurring by separate opinion); *United States v. Schneider*, 14 M.J. 189, 193 (C.M.A. 1982); *United States v. Lewis*, 12 M.J. 205, 206 (C.M.A. 1982); *United States v. Ravenel*, 20 M.J. 842, 845 (A.C.M.R. 1985); *United States v. McDonald*, 14 M.J. 684, 686 (A.F.C.M.R. 1982), *petition denied*, 15 M.J. 171 (C.M.A. 1983).

for example, a guard, and that the suspect is in his custody does not necessarily mean that the requisite “subtle military pressures” are at work to coerce a **response**.¹⁷ Moreover, the “position of authority” approach ignored the point (reflected in the “official capacity” test) that the motivation of the questioner is also relevant to the scope of Article 31(b).¹⁸

Because a majority of the Court of Military Appeals was unable to agree on the “position of authority” test advocated by then-Chief Judge Fletcher, trial and appellate judges continued to engage in judicial “hair-splitting”¹⁹ of such issues as the motives of military questioners; their status, positions, and capacity at the time of questioning; and the effect of their actions on the suspect or accused being questioned.²⁰ For every situation seemingly

“At times, military appellate courts have confused the concept of Article 31(b)’s “subtle military pressure” with other types of “pressure” and deemed particular situations to require 31(b) rights warnings before questioning. *E.g.*, United States v. Alexander, 18 M.J. 84, 87 (C.M.A. 1984) (questioning by a military physician unrelated to treatment); United States v. Milburn, 8 M.J. 110, 112-13 (C.M.A. 1979) (questioning by military defense counsel); United States v. Babbidge, 18 C.M.A. 327, 332, 40 C.M.R. 39, 44 (1969) (questioning by psychiatrist); United States v. Lacy, 16 M.J. 777, 780 (A.C.M.R. 1983) (questioning by medical personnel); United States v. Hill, 13 M.J. 882, 885, 886 & n.3 (A.C.M.R. 1982) (questioning, unrelated to treatment, by physician and social worker).

¹⁸See, e.g., United States v. Seay, 1 M.J. 201, 204-05 (C.M.A. 1975) (Cook, J., concurring).

¹⁹United States v. Kelley, 8 M.J. 84, 92 (C.M.A. 1979) (summary disposition denying petition for review) (Fletcher, C.J., dissenting). See Lederer, *supra* note 2, at 17-20.

²⁰*E.g.*, United States v. Kirby, 8 M.J. 8, 10-11 (C.M.A. 1979) (Perry, J., with Fletcher, C.J., concurring in the result without opinion and Cook, J., concurring in the result by separate opinion) (questioning of a suspect by his roommate with the knowledge and consent of agents of the Air Force Office of Special Investigations); United States v. Milburn, 8 M.J. 110, 112-13 (C.M.A. 1979) (questioning of an unrepresented suspect by military defense counsel); United States v. Nargi, 2 M.J. 96, 98-99 (C.M.A. 1977) (questioning conducted during “counseling session”); United States v. Lovell, 8 M.J. 613, 618-19 (A.F.C.M.R. 1979), *petition denied*, 9 M.J. 17 (C.M.A. 1980) (questioning of robbery suspect by chief master sergeant in order to uncover illegal gambling in the barracks); United States v. Johnson, 6 M.J. 716, 718 (A.F.C.M.R. 1978) (master sergeant’s questioning of airman; questioning was done because NCO was “sincerely interested” in helping the airman face his disciplinary problems); United States v. Johnstone, 5 M.J. 744, 746-48 (A.F.C.M.R. 1978), *aff’d* by summary *disposition*, 11 M.J. 88 (C.M.A. 1981) (informant); United States v. Pierce, 2 M.J. 654, 657-58 (A.F.C.M.R. 1976) (questioning of member of open mess with regard to his dishonored checks); United States v. Mraz, 2 M.J. 266, 267 (A.F.C.M.R. 1976) (questioning of technical sergeant by chief of military pay division, accounting and finance office, regarding the former’s obtaining BAQ while simultaneously residing in government quarters); United States v. Weston, 1 M.J. 789, 792-93 (A.F.C.M.R. 1976) (questioning of E5 by technical sergeant concerning unlawfully opened **mail**); United States v. Terrell, 5 M.J. 726, 729 (A.C.M.R. 1978) (questioning of PFC by acting supply sergeant [specialist five] to recover missing property); United States v. Singleton, 4 M.J. 864, 866-67 (A.C.M.R. 1978), *petition denied*, 5 M.J. 216 (C.M.A. 1978) (E5’s questioning of “close friend”/E4); United States v. Elliott, 3 M.J. 1080, 1082

resolved by these courts, a corresponding "exception" was created. Military superiors generally had to warn subordinates before questioning, although circumstances could legitimize not doing so.²¹ Investigating officers,²² as well as military defense counsel,²³ likewise faced warning requirements, and dicta in one case even placed a potential duty on trial counsel and military judges.²⁴ Civilian authorities, both foreign²⁵ and domestic,²⁶ were obligated to render the military rights advisement in some settings. Conversely, questioning by peers or friends²⁷ and by informants or covert law enforcement agents²⁸ was generally held to be

(A.C.M.R. 1977) ("counseling session"); *United States v. Kelley*, 3 M.J. 535, 537-38 (A.C.M.R. 1977) *grant of review vacated & petition denied*, 8 M.J. 84 (C.M.A. 1979) (staff sergeant's questioning of captain with regard to the latter's missing record of nonjudicial punishment); *United States v. Hale*, 4 M.J. 693, 696 (N.C.M.R. 1977) (questioning of suspect by larceny victim); *United States v. Fountain*, 2 M.J. 1202, 1216-17 (N.C.M.R. 1976) (first lieutenant conversing with Marine PFC while the letter was holding hostages).

²¹*Compare* *United States v. Johnson*, 6 M.J. 716, 718 (A.F.C.M.R. 1978) (warnings required) and *United States v. Terrell*, 5 M.J. 726, 729 (A.C.M.R. 1978) (same) with *United States v. Nargi*, 2 M.J. 96, 98-99 (C.M.A. 1977) (no warnings required); *United States v. Lovell*, 8 M.J. 613, 618-19 (A.F.C.M.R. 1979), *petition denied*, 9 M.J. 17 (C.M.A. 1980) (same); *United States v. Singleton*, 4 M.J. 864, 866-67 (A.C.M.R. 1978), *petition denied*, 5 M.J. 216 (C.M.A. 1978) (same); *United States v. Sims*, 2 M.J. 499, 501-02 (A.C.M.R. 1976) (same); *United States v. Hale*, 4 M.J. 693, 696 (N.C.M.R. 1977) (same); and *United States v. Fountain*, 2 M.J. 1202, 1216-17 (N.C.M.R. 1976) (same).

²²*E.g.*, *United States v. Williams*, 9 M.J. 831, 833-35 (A.C.M.R. 1980) (Article 32, UCMJ, investigating officer must warn a "suspect" who testifies).

²³*E.g.*, *United States v. Milburn*, 8 M.J. 110, 112-13 (C.M.A. 1979); *United States v. Rexroad*, 9 M.J. 959, 960 (A.F.C.M.R.), *petition denied*, 10 M.J. 193 (C.M.A. 1980).

"*United States v. Milburn*, 8 M.J. 110, 114 (C.M.A. 1979) (dictum). A similar duty is contemplated in Mil. R. Evid. 301(b)(2) (judicial advice, to an "apparently uninformed" witness, out of the hearing of the panel), although—usually—neither a witness nor the accused need be warned before testifying. Manual for Courts-Martial, *United States*, 1984, Mil. R. Evid. 305(c) analysis at A22-13 [hereinafter Mil. R. Evid. 305(c) analysis]. It is ethically improper, however, for counsel to call a witness with the intent of having the latter claim a valid privilege against self-incrimination in open court. Mil. R. Evid. 301(f)(1) analysis at A22-6.

²⁴*E.g.*, *United States v. Jones*, 6 M.J. 226, 228-29 (C.M.A. 1979) (German authorities); *United States v. Talavera*, 2 M.J. 799, 801-02 (A.C.M.R. 1976), *aff'd*, 8 M.J. 14 (C.M.A. 1979) (Japanese police). Mil. R. Evid. 305(h)(2) contains the current standard for warnings by foreign authorities (absent military "participation" in foreign questioning, Article 31(b) rights warnings are not required).

²⁵*E.g.*, *United States v. Kellam*, 2 M.J. 338, 342 (A.F.C.M.R. 1976) (warnings required). Mil. R. Evid. 305(h)(1) sets out the current standard for warnings by nonmilitary questioners (entitlement to rights warnings is determined by federal criminal law). See Mil. R. Evid. 305(b)(1) (definition of a "person subject to the code").

²⁷*E.g.*, *United States v. Kirby*, 8 M.J. 8, 9-11 (C.M.A. 1979) (Perry, J., with Fletcher, C.J., concurring in the result without opinion and Cook, J., concurring in the result by separate opinion); *United States v. Singleton*, 4 M.J. 864, 866.67 (A.C.M.R. 1978), *petition denied*, 5 M.J. 216 (C.M.A. 1978).

²⁸*E.g.*, *United States v. Kirby*, 8 M.J. 8, 11-13 (C.M.A. 1979) (Cook, J.,

beyond the scope of Article 31(b), although certain circumstances could create a duty to warn.²⁹

On 26 January 1981, the Court of Military Appeals, in *United States v. Duga*,³⁰ formulated a new test to determine who fell within the “who must warn” element of Article 31(b). Relying heavily on legislative history to discern the true intent of Congress, Chief Judge Everett, speaking for himself and Judge Fletcher, declared:

[L]ong ago in *United States v. Gibson*, 3 U.S.C.M.A. 746, 14 C.M.R. 164 (1954), this Court concluded, after a careful study of [Article 31(b)'s] purpose and legislative history, that Congress did not intend a literal application of that provision:

Taken literally, this Article is applicable to interrogation by all persons included within the term “persons subject to the code” . . . or any other who is suspected or accused of **an** offense. However, this phrase was used in a limited sense. In our opinion, in addition to the limitation referred to in the legislative history of the requirement, there is a definitely restrictive element of officiality in the choice of the language “interrogate, or request any statement,” wholly absent from the relatively loose phrase “person subject to this code,” for military persons not assigned to investigate offenses, do not ordinarily interrogate nor do they request statements from others accused or suspected of crime. . . . This is not the sole limitation upon the Article’s applicability, however. Judicial discretion indicates a necessity for denying its application to a situation not considered by its framers, and wholly unrelated to the reasons for its creation.

Careful consideration of the history of the requirement of warning, compels a conclusion that its purpose is to avoid impairment of the constitutional guarantee against

concurring in the result); *United States v. Cartledge*, 1 M.J. 669, 672-73 (N.C.M.R. 1975).

²⁹*E.g.*, *United States v. Johnstone*, 5 M.J. 744, 746-48 (A.F.C.M.R. 1978), *aff’d by summary disposition*, 11 M.J. 88 (C.M.A. 1981) (Article 31 violated where informant questioned suspect using questions supplied by OSI agent). Where a suspect or an accused is represented by counsel, the sixth amendment may further restrict questioning by covert agents. *Compare* *United States v. Henry*, 447 U.S. 264, 271-75 (1980) (infringement upon sixth amendment presented by facts) *with* *United States v. Duga*, 10 M.J. 206, 208 n.4 (C.M.A. 1981). *See generally* Mil. R. Evid. 305(d),(e) (right to counsel and preinterrogation notice to counsel); Lederer, *supra* note 2, at 26-28.

³⁰10 M.J. 206 (C.M.A. 1981).

compulsory self incrimination. Because of the effect of superior rank or official position upon one subject to military law, the mere asking of a question under certain circumstances is the equivalent of a command. A person subjected to these pressures may rightly be regarded as deprived of his freedom to answer or to remain silent. Under such circumstances, we do not hesitate to reverse convictions whenever the accused has been deprived of the **full** benefit of the rights granted him by Congress. . . . By the same token, however, it is our duty to see to it that such rights are not extended beyond the reasonable intendment of the Code at the expense of substantial justice and on grounds that are fanciful or unsubstantial. . . . It may be reasonably inferred [then] that Congress did not consider a warning to be a *sine qua non*, but rather a precautionary measure introduced for the purpose of counteracting the presence of confinement, or other circumstances [of “presumptive coercion,” implicit in military discipline and superiority], which might operate to deprive an accused of his free election to speak or to remain silent.

More recently. . . , [we] again observed that

The purpose of Article 31(b) apparently is to provide servicepersons with a protection which, at the time of the Uniform Code’s enactment, was almost unknown in American courts, but which was deemed necessary because of subtle pressures which existed in military society. . . . Conditioned to obey, a serviceperson asked for a statement about an offense may feel himself to be under a special obligation to make such a statement. Moreover, he may be especially amenable to saying what he thinks his military superior wants him to say—whether it is true or not. Thus, the serviceperson needs the reminder required under Article 31 to the effect that he need not be a witness against himself. . . . To paraphrase a remark by Mr. Justice Steward in *Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682, 1688, 64 L. Ed. 2d 297 (1980), “[t]he concern of the [Congress] in [enacting Article 31(b)] was that the ‘interrogation environment’ created by the interplay of interrogation and [military relationships] would ‘subjugate the individual to the will of the examiner’ and thereby undermine the privilege against compulsory incrimination” contained in Article

31(a) of the Uniform Code of Military Justice.

Therefore, in light of Article 31(b)'s purpose and its legislative history, the Article applies only to situations in which, because of military rank, duty, or other similar relationship, there might be subtle pressure on a suspect to respond to an inquiry. . . . Accordingly, in each case it is necessary to determine whether (1) a questioner subject to the Code was acting in an official capacity in his inquiry or only had a personal motivation; and (2) whether the person questioned perceived that the inquiry involved more than a casual conversation. . . . Unless both prerequisites are met, Article 31(b) does not **apply**.³¹

The *Duga* decision did not radically alter the existing scope of judicial inquiry, as the motives of the questioner and the perceptions of the person questioned remained crucial to the ultimate judicial resolution of each case.³² Chief Judge Everett concluded his inquiry into the facts of *Duga* by stating that no rights warnings are required unless (1) a questioner subject to the UCMJ was acting in an official capacity in his inquiry, and (2) the person questioned perceived that the inquiry involved more than a

³¹*Id.* at 208-10 (citations and footnotes omitted).

³²*See e.g.*, United States v. Alexander, 18 M.J. 84, 87 (C.M.A. 1984) (questions, unrelated to child's medical treatment, by physician to parents suspected of child abuse; holding avoided addressing the precise issue of "who must warn?"); United States v. Olson, 17 M.J. 176, 177 (C.M.A. 1984) (questioning by guard/assistant platoon sergeant "out of curiosity;") Court presumed questions were subject to Article 31(b) without discussion); United States v. Butner, 15 M.J. 139, 141-43 (C.M.A. 1983) (conversation between technical sergeant, who was the non-commissioned officer in charge of security police investigations, and suspect); United States v. Mayo, 12 M.J. 286, 293-94 (C.M.A. 1982) (questioning by a charge-of-quarters); United States v. Lewis, 12 M.J. 205, 207-08 (C.M.A. 1982) (questioning of private by second lieutenant); United States v. McDonald, 14 M.J. 684, 686 (A.F.C.M.R. 1982), *petition denied*, 15 M.J. 171 (C.M.A. 1983) (questioning by staff sergeant of an airman/friend); United States v. Dean, 13 M.J. 676, 678-79 (A.F.C.M.R. 1982) ("counseling" by first sergeant); United States v. Jones, 11 M.J. 829, 831 (A.F.C.M.R. 1981) (questioning by civilian store detective employed by post exchange); United States v. Pansoy, 11 M.J. 811, 812-14 (A.F.C.M.R.), *petition denied*, 12 M.J. 194 (C.M.A. 1981) (same); United States v. Barrett, 11 M.J. 628, 631 (A.F.C.M.R. 1981) (PFC questioning E2/co-worker); United States v. Lacy, 16 M.J. 777, 780 (A.C.M.R. 1983) (questioning by medic); United States v. Whitehouse, 14 M.J. 643, 644 n.2 (A.C.M.R. 1982) (questioning by roommate); United States v. Hill, 13 M.J. 882, 885, 886 & n.3 (A.C.M.R. 1982) (questioning by physician and social worker); United States v. Flowers, 13 M.J. 571, 572 (A.C.M.R. 1982), *reu'd on other grounds*, 17 M.J. 53 (C.M.A. 1983) (questioning by covert agent); United States v. Lejeune, 13 M.J. 563, 564 (A.C.M.R. 1982) (questioning of suspect by NCO building occupant who saw the suspect tampering with the door to a room in which the latter did not live); United States v. Foley, 12 M.J. 826, 831-32 (N.M.C.M.R. 1981) (questioning by civilian police).

casual **conversation**.³³ Where both factors are met the questioning has created the kind of “subtle military pressures” that Article 31(b) was designed to overcome.³⁴

An example of the value of *Duga* was provided in 1984 by the Navy-Marine Corps Court of Military Review in *United States v. Richards*.³⁵ In *Richards*, an enlisted clerk conferred with a Navy chaplain (a lieutenant) in the latter’s capacity as a clergyman. As a result of these discussions, the chaplain learned incriminating **information**.³⁶ The court of military review held that no rights warnings were required because the situation did not bring to bear upon the person being questioned the subtle military pressures that were contemplated by the legislative history of Article 31(b) and the *Duga* decision.³⁷

Military courts will continue to be faced with troublesome factual questions concerning a questioner’s motives, status, or capacity, or the perceptions of the person questioned. For example, what is the capacity of a military chaplain who counsels his or her enlisted assistant concerning the latter’s unprofessional, off-duty conduct? What are the likely perceptions of the assistant during these discussions? The current Military Rules of Evidence do not attempt to provide a solution to these types of questions. Rule 305(b)(1), for example, defines a “person subject to the code” as including any person acting as a “knowing agent” (a term itself left undefined) of a military unit or of a person who is himself subject to the UCMJ, such as a civilian member of one of the military law enforcement agencies,³⁸ yet the definition of a “person subject to the code” is actually—and circuitously—limited to mean a “person subject to the code *who is required to give warnings under Article 31*.”³⁹ Thus, in difficult cases (such as one

³³10 M.J. at 210.

³⁴See *id.* at 208-10.

³⁵17 M.J. 1016 (N.M.C.M.R. 1984).

³⁶*Id.* at 1018.

³⁷*Id.* at 1019-20. The court was heavily influenced by the priest-penitent privilege in Mil. R. Evid. 503. Because Richards’ discussion with the chaplain was a confidential, privileged communication, it would have been anomalous to require the chaplain to warn, for example, that Richards’ statements could be used as evidence in a trial. The court also noted that the chaplain was not acting “with an investigatory intent to elicit incriminating responses in anticipation of criminal prosecution.” *Id.* at 1019. See also *United States v. Moreno*, 20 M.J. 623 (1985).

³⁸See Mil. R. Evid. 305(b)(1) analysis at A22-12. From this, it might appear that virtually any law enforcement agent or any individual subject to the UCMJ who is acting in an “official disciplinary capacity” over the suspect or accused must warn before questioning. See also Mil. R. Evid. 304(a) analysis at A22-9.

³⁹Mil. R. Evid. 305(c) (emphasis added). The drafters of the Military Rules of Evidence conceded that they did not purport to answer the “who must warn” issue. Mil. R. Evid. 305(c) analysis at A22-12 to -13.

involving a chaplain and his enlisted assistant), the key to Article 31(b) may simply be whether the surrounding circumstances created the kind of subtle military pressures that Congress intended to overcome by enacting Article 31(b). If the answer is yes, a duty to warn may exist.

After five years with *Duga*, several important matters remain unresolved. For example, will the “perceptions” of the person questioned be judged on a subjective basis, on an objective basis, or by a combination of the two?⁴⁰ If the subjective standard alone controls, the government must meet the difficult task of convincing the military judge that the accused did not perceive that the conversation was official in nature but arose from the personal motivation of the questioner, or that the accused did not perceive the conversation as more than casual.

Another question requiring judicial attention arises in cases in which an individual may feel coerced—but not because of any military situation. It should be apparent that questioning by exchange detectives, roommates, co-workers, spouses, physicians or medics, social workers, or attorneys may produce a “pressure” on a suspect or accused to respond to questioning,⁴¹ but Article 31(b) will be triggered only if military rank, duty, or a similar relationship created the subtle coercion to answer.⁴² While questioning of a subordinate by a member of one of the recognized professions could indeed create an Article 31(b) situation, courts must do more than merely assume, without analysis or discussion, that such a case gave rise to the requisite subtle military coercion. Without such a finding, the questioning may be insufficient to trigger Article 31(b).⁴³

Unfortunately, military courts historically have extended the requirement for Article 31(b) rights warnings without expressly finding that the necessary “subtle military pressures” caused the

⁴⁰“See, e.g., *United States v. Duga*, 10 M.J. 206, 211 (C.M.A. 1981) (individual “could not possibly have perceived his interrogation as being official in nature”); *United States v. McDonald*, 14 M.J. 684, 686 (A.F.C.M.R.1982), *petition denied*, 15 M.J. 171 (C.M.A. 1983) (same).

⁴¹“See, e.g., *Oregon v. Hass*, 420 U.S. 714, 722-23 (1975) (interrogation by police). “Custodial questioning by police, whether military or civilian, will implicate an individual’s fifth amendment rights. See *United States v. Ravenel*, 20 M.J. 842, 845 (A.C.M.R. 1985) (the only difference between fifth amendment and Article 31 is the latter’s insulation against subtle military pressures created by rank or duty).

⁴²“This is particularly true if the suspect or accused is subjectively unaware that official questioning is taking place. See, e.g., *United States v. Hill*, 13 M.J. 882, 885, 886 & n.3 (A.C.M.R. 1982) (questioning by physician and social worker). See also *Lederer*, *supra* note 2, at 13-14, 20-23.

suspect or accused to respond to the questioning.⁴⁴ While the courts might expand the military's protection against self-incrimination by invoking such concepts as due process or fundamental fairness,⁴⁵ those warnings are clearly beyond the intended parameters of Article 31(b) itself. Thus, in non-custodial situations, the key to whether Article 31 warnings are required—and whether the evidentiary limitations imposed by Article 31 will apply—should be whether the suspect or accused responded to a question because the questioner was “a doctor,” “a lawyer,” or “a clergyman” rather than because of the uniquely military pressures with which Article 31(b) is concerned. If such pressures are absent, Article 31(b) should not come into play.⁴⁶

B. WHEN IS THE WARNING REQUIRED?

Determining whether a questioner fell within the class of persons required to give 31(b) warnings (i.e., Maguire's “who must warn?” element) provides only the first piece of the Article 31(b) puzzle; ultimately, each of the three remaining elements must be addressed:

- (1) Was *questioning* conducted? (Maguire's “when is a warning required?” element⁴⁷);
- (2) Must *this* soldier have been warned? (Maguire's “who must be warned?” element); and,
- (3) Was the warning *adequate*? (Maguire's “what warning is required?” element).

In the first of these three remaining inquiries, the analysis focuses on whether there was “interrogation” of or a “request for any statement from” the suspect or accused.

“Interrogation”—the word evokes stereotypical mental images

⁴⁴*E.g.*, United States v. Alexander, 18 M.J. 84, 87 (C.M.A. 1984) (physician's questioning of parents suspected of child abuse); United States v. Milburn, 8 M.J. 110, 112-13 (C.M.A. 1979) (pretrial questioning of a suspect, unrepresented by his own counsel, by military defense counsel); United States v. Johnstone, 5 M.J. 744, 746-48 (A.F.C.M.R. 1978), *affd* by *summary disposition*, 11 M.J. 88 (C.M.A. 1981) (questioning of suspect by informant at the request of and with questions actually supplied by Air Force OSI agent).

⁴⁵*See, e.g.*, United States v. Milburn, 8 M.J. 110 (C.M.A. 1979).

⁴⁶On such an issue, the government bears the burden of proof by a preponderance of the evidence. Mil. R. Evid. 304(e)(1) (burden of proof in evidentiary hearing concerning confessions and admissions).

⁴⁷Maguire's description of this element of Article 31(b) should not be interpreted as focusing on whether Article 31(b) warnings must be given but rather addresses, more generally, the issue of what actions in a specific, factual setting **will** be tantamount to “questioning” under Article 31.

of intense lights, smoke-filled rooms, and shadowy figures engaged in the relentless pursuit of incriminating information. "Requesting any statement from," on the other hand, creates the impression of a more polite, take-it-or-leave-it situation lacking any overt pressure on the person being questioned. For the purposes of Article 31(b), however, no distinction need be drawn between these concepts.⁴⁸ If a person who is required to warn says or does anything that is either designed to elicit an incriminating response or which is reasonably likely to produce such a result, then there was indeed "questioning."⁴⁹ Two interrelated issues are of major concern: (1) What is a "statement?," and (2) What is "questioning?"

1. What is a "Statement?"

Less than ten years ago, the concept of a "statement" made in response to "questioning" was one of the most confusing aspects of the more general "when is the warning required?" element of Article 31(b). Because a suspect or accused was making a "statement" when giving a specimen of either blood⁵⁰ or urine⁵¹ in response to an official request or order, all resulting laboratory findings were inadmissible absent proper Article 31(b) warnings.⁵²

Today, military courts have adopted the more widely accepted

⁴⁸The distinction can be important if the facts reveal the presence of coercion or unlawful inducement or influence. In these situations, an Article 31(a) violation occurs, and Article 31(d) requires exclusion of any subsequent statements even if the questioner gave the Article 31(b) warnings. See, e.g., *United States v. Butner*, 15 M.J. 139, 141, 143 (C.M.A. 1983) (threat by police that they would reveal that the person being questioned had been a "snitch" for them if he did not tell them what they wanted to know).

The Military Rules of Evidence make no distinction between "requests for statements" and "interrogations." Only the term "interrogation" is defined. Mil. R. Evid. 305(b)(2) (defined as including any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning).

⁴⁹E.g., *United States v. Butner*, 15 M.J. 139, 142 (C.M.A. 1983); *United States v. Lewis*, 12 M.J. 205, 207 (C.M.A. 1982); *United States v. Muldoon*, 10 M.J. 254, 257 (C.M.A. 1981); *United States v. Dowell*, 10 M.J. 36, 40 (C.M.A. 1980); accord, Mil. R. Evid. 305(b)(2).

⁵⁰E.g., *United States v. Musguire*, 9 C.M.A. 67, 68-69, 25 C.M.R. 329, 330-31 (1958); *United States v. Jordan*, 7 C.M.A. 452, 454-55, 22 C.M.R. 242, 244-45 (1957).

⁵¹E.g., *United States v. Ruiz*, 23 C.M.A. 181, 182, 48 C.M.R. 797, 798 (1974).

⁵²Although, generally, an order to produce such a specimen was not a lawful one, *United States v. Ruiz*, 23 C.M.A. 181, 182-83, 48 C.M.R. 797, 798-99 (1974), an order was lawful—and a response required without recourse to Article 31—prior to taking a blood or urine sample under circumstances in which criminal prosecution was impossible. E.g., *United States v. Broady*, 12 M.J. 963, 964-65 (A.F.C.M.R. 1982) (Air Force Regulation 30-2 prohibited use of certain evidence to support punitive action or any administrative separation resulting in less than honorable discharge).

view⁵³ that only testimonial, communicative evidence is protected by the privilege against self-incrimination.⁵⁴ Thus, the production of body fluids,⁵⁵ handwriting⁵⁶ and voice⁵⁷ exemplars, and dental impressions,⁵⁸ as well as other nontestimonial acts,⁵⁹ need not be preceded by Article 31(b) warnings. Similarly, although more in keeping with traditional military law, a suspect or accused may legitimately be required to give certain information or make certain reports without triggering Article 31(b).⁶⁰ Some reporting requirements, however, simply go too far and are unenforceable when in conflict with Article 31(b).⁶¹

⁵³A view that generally began with *Schmerber v. California*, 384 U.S. 757, 761, 764-65 (1966) (medical removal of blood sample).

⁵⁴*United States v. Harden*, 18 M.J. 81, 82-83 (C.M.A. 1984); *United States v. Lloyd*, 10 M.J. 172, 174-75 (C.M.A. 1981); *United States v. Armstrong*, 9 M.J. 374, 377-78 (C.M.A. 1980). *Accord* Mil. R. Evid. 301(a) analysis at A22-5 (Article 31(b) applies only to evidence of a testimonial or communicative nature; primary purpose behind the self-incrimination privilege is to shield the soldier's thought processes from government inquiry and permit an individual to refuse to *create* evidence to be used against him).

⁵⁵*Murray v. Haldeman*, 16 M.J. 74, 80-81 (C.M.A. 1983); *United States v. Lloyd*, 10 M.J. 172, 174-75 (C.M.A. 1981) (dictum); *United States v. Armstrong*, 9 M.J. 374, 377-78 (C.M.A. 1980). *See* Mil. R. Evid. 312(d) (seizure of body fluids).

⁵⁶*United States v. Harden*, 18 M.J. 81, 82-83 (C.M.A. 1984); *United States v. Lloyd*, 10 M.J. 172, 174-75 (C.M.A. 1981); *United States v. Thompson*, 14 M.J. 721, 723 (A.F.C.M.R. 1982).

⁵⁷*United States v. Armstrong*, 9 M.J. 374, 377-78 (C.M.A. 1980) (dictum); *United States v. Akgun*, 19 M.J. 770, 771 (A.C.M.R. 1984).

⁵⁸*United States v. Martin*, 9 M.J. 731, 739-40 (N.C.M.R. 1979), *aff'd*, 13 M.J. 66 (C.M.A. 1982).

⁵⁹*E.g.*, *United States v. Cain*, 5 M.J. 844, 846-47 (A.C.M.R. 1978) (examination of accused's gold tooth believed to match that of robber); *United States v. Culver*, 44 C.M.R. 564, 566 (A.F.C.M.R. 1971) (comparison of tooth fragment with accused's broken tooth). *Accord* Mil. R. Evid. 301(a) analysis at A22-5 (exhibition of physical characteristics is not protected by the privilege against self-incrimination).

⁶⁰*E.g.*, *United States v. Harris*, 19 M.J. 331, 343 (C.M.A. 1985) (Cox, J., concurring in the result by separate opinion) (suspect's being required to respond to the question of whether he has already received his rights warnings); *United States v. Leiffer*, 13 M.J. 337, 342 n.2, 344 (C.M.A. 1982) (Cook, J., with Everett, C.J., concurring and Fletcher, J., concurring in the result) (identifying oneself); *United States v. Davenport*, 9 M.J. 364, 369 (C.M.A. 1980) (Everett, C.J., with Cook, J., concurring in the result by separate opinion and Fletcher, J., dissenting) (same); *United States v. French*, 14 M.J. 510 (A.C.M.R. 1982) (regulation requiring accounting for the possession and disposition of duty-free items); *United States v. Lindsay*, 11 M.J. 550, 551 (A.C.M.R.), *petition denied*, 11 M.J. 361 (C.M.A. 1981) (reporting the disposition of controlled items); *United States v. Horton*, 17 M.J. 1131, 1134-35 (N.M.C.M.R. 1984) (regulation requiring the reporting of any contacts with citizens of communist countries). *Accord* Mil. R. Evid. 301(a) analysis at A22-5 (privilege against self-incrimination does not protect the compelled disclosure of incriminating records or writings under one's control, if the individual acts in a representative, rather than a personal, capacity, e.g., the custodian of a non-appropriated fund).

⁶¹*E.g.*, *United States v. Heyward*, 22 M.J. 35 (C.M.A. 1986) (Air Force regulation requiring airmen to report drug abuse of other airmen is valid, but the privilege against self-incrimination protects against conviction for dereliction of duty where

The continuing validity of some of the traditional “reporting” requirements, particularly the one concerning an order to identify oneself, has been open to challenge since 1980. At that time, and at the suggestion of the Department of Justice, the Military Rules of Evidence adopted the view that a suspect or accused must be warned of the absolute right to remain silent, not merely that he or she has the right to refuse to make any statement “regarding the offense” of which he or she is suspected or accused.⁶² It is likely, however, that an order requiring a military member—even a suspect or accused—to identify himself or herself will retain its validity, either under the theory that such an order lies outside the scope of the protection against **self-incrimination**,⁶³ or on the basis that “military necessity” requires that such an order be excepted from the rule’s application.⁶⁴

When is an **act** a “statement?” As noted before, “verbal acts” were traditionally held to be “statements,” although more recent military cases limit the term to actions with a testimonial component. As a result, when a suspect or accused is simply told to empty his or her pockets⁶⁵ or to hand over the contents of a **wallet**,⁶⁶ such nonverbal actions, standing alone, are not “**statements**.”⁶⁷ The controlling factor is whether the request for the

“at the time the duty to report arises, the witness to drug abuse is already an accessory or principal to the illegal activity that he fails to report.”); *United States v. Tyson*, 2 M.J. 583, 585 (N.C.M.R. 1976) (Navy regulation which required sailors to report offenses committed by naval personnel could not be applied to a sailor who would incriminate himself by filing the report).

⁶²*See* Mil. R. Evid. 305(c)(2); Mil. R. Evid. 305(c)(2) analysis at A22-13.

⁶³*See, e.g.*, *United States v. Leiffer*, 13 M.J. 337, 344 (C.M.A. 1982) (Cook, J., with Everett, C.J., concurring and Fletcher, J. concurring in the result). *See also* *Washington v. Chrisman*, 455 U.S. 1, 6 n.3 (1982) (individual’s act of returning to his room, accompanied by a police officer, to retrieve the former’s identification card after his arrest for suspected unlawful possession of alcoholic beverages was neither “incriminating” nor a “testimonial communication” triggering the protections against self-incrimination, notwithstanding that the production of the identification would establish an element of the offense, i.e., that the person was underage); *California v. Byers*, 402 U.S. 424, 431-32, 434 (1971) (plurality decision) (a “neutral act,” not testimonial in nature); *United States v. Camacho*, 506 F.2d 594, 595-96 (9th Cir. 1974) (not testimonial or otherwise within fifth amendment protection).

⁶⁴*See* *United States v. Earle*, 12 M.J. 795, 797-98 (N.M.C.M.R. 1981) (dictum); *see also* *United States v. Lloyd*, 10 M.J. 172, 175 (C.M.A. 1981) (production of identification as an “independent duty to account”).

⁶⁵*E.g.*, *United States v. Cuthbert*, 11 C.M.A. 272, 274, 29 C.M.R. 88, 90 (1960).

⁶⁶*E.g.*, *United States v. Mann*, 1 M.J. 479, 480-81 (A.C.M.R. 1975) (upholding the validity of an agent’s request for a suspect to give him a \$20.00 bill that the agent knew the suspect had and that was believed to have been taken during a robbery; action deemed an “innocuous entree” to the search itself).

⁶⁷The act of consenting to a search or seizure traditionally has been excluded from Article 31(b)’s “nonverbal communications” category. *E.g.*, *United States v.*

suspect to act was merely incident to a search or seizure, or whether the suspect was communicating a response by his actions. If a situation falls into the former category, then it is properly subject to fourth amendment—but not fifth amendment—analysis, while those in the latter category permit both search and seizure and self-incrimination limitations to be applied.⁶⁸ Of course, courts are free in the latter cases to protect a soldier under purely fourth amendment guarantees, thereby avoiding the self-incrimination question completely.⁶⁹

On the other hand, if by his or her own conduct the suspect acknowledges knowing **possession**,⁷⁰ identifies a substance,⁷¹ or otherwise makes a testimonial **communication**,⁷² an Article 31(b) “response to questioning” may exist.⁷³ One early attempt to explain the application of the verbal acts doctrine focused on whether a specific item was requested from the suspect or accused under circumstances tantamount to admitting knowledge of its possession.⁷⁴ While *any* act of surrendering property may include an implicit admission of knowing possession or a belief as to the

Mota Aros, 8 M.J. 121, 122 (C.M.A. 1979); *United States v. Morris*, 1 M.J. 352, 353-54 (C.M.A. 1976) (Fletcher, C.J., with Cook J., concurring in the result by separate opinion and Ferguson, S.J., dissenting); *United States v. Roa*, 20 M.J. 867, 869-70 (A.F.C.M.R. 1985); *United States v. Butcher*, 1 M.J. 554, 556 (A.F.C.M.R. 1975); *United States v. George*, 9 M.J. 607, 609 (A.C.M.R. 1980).

⁶⁸*E.g.*, *United States v. Kinane*, 1 M.J. 309, 311 n.1 (C.M.A. 1976) (request for nonverbal act deemed to be violative of both Article 31 and the 4th Amendment); *United States v. Corson*, 18 C.M.A. 34, 36-37, 39 C.M.R. 34, 36-37 (1968) (suspect was told “I think you know what I want, give it to me” and thereupon surrendered a marijuana cigarette; court found no probable cause to search suspect, and, in dictum, said suspect’s response also violated Article 31); *United States v. Nowling*, 9 C.M.A. 100, 25 C.M.R. 362 (1958) (suspect’s production of a pass in response to an air policeman’s request was a “statement”; Article 31 violation found); *see Lederer, supra* note 2, at 37-38; S. Saltzburg, L. Schinasi, & D. Schlueter, *Military Rules of Evidence Manual* 90 (2d ed. 1986).

⁶⁹*E.g.*, *United States v. Mota Aros*, 8 M.J. 121, 122-23 (C.M.A. 1979) (consent to search issue; court found no consent to search the trunk of a car because the accused produced the car keys only in response to investigator’s demand); *see United States v. Roa*, 20 M.J. 867, 869-70 (A.F.C.M.R. 1985) (consent to search held not to be a “statement” for Article 31 purposes, so request for consent was not “interrogation”).

⁷⁰*E.g.*, *United States v. Whipple*, 4 M.J. 773, 777-78 (C.G.C.M.R. 1978) (suspect surrendered bag of cocaine while verbally admitting that he was its possessor).

⁷¹*E.g., id.* (actions identified substance as cocaine).

⁷²*E.g.*, *United States v. Holmes*, 6 C.M.A. 151, 156-57, 19 C.M.R. 277, 282-83 (1955) (suspect pointed out clothing he had worn earlier in the day); *United States v. Taylor*, 5 C.M.A. 178, 181-83, 17 C.M.R. 178, 181-83 (1954) (same).

⁷³If the suspect does not make the nonverbal statement in *response* to official questioning, or if he or she did not perceive that more than a casual conversation was occurring, no rights warnings are necessary. *E.g.*, *United States v. Wiggins*, 13 M.J. 811, 812 (A.F.C.M.R. 1982) (drug transaction).

⁷⁴*Lederer, supra* note 2, at 36-40 (proper to tell a suspect to take everything out of his pockets but not to tell him to give up a single, specific item).

identity of the substance surrendered, exclusion of the entire, unwarned act from evidence is unnecessary so long as the suspect's responsive conduct was nondiscretionary and, in effect, simply an easier, more peaceful method of effectuating a lawful search or seizure.⁷⁵ To strike a proper balance between the rights of a suspect and the practicalities of carrying out searches or seizures, the litigants—as part of their pretrial preparation of the relevant Article 31(b) and fourth amendment issues—should sever the single act of, for example, surrendering a bag of cocaine, into its more basic elements, i.e., the actual surrender of the contraband and the tacit admission of knowing possession or belief as to its identity as cocaine. Thereafter, the military judge may properly admit the physical evidence itself if he or she concludes that it was obtained lawfully, while either excluding or limiting the remaining components of the verbal act.⁷⁶ Of course, the parties, following a ruling by the judge that the evidence was not the product of an unlawful search or seizure, could simply stipulate that the evidence “was obtained from the pocket of the accused” and thus avoid delving into the potentially inadmissible aspect of the accused's act. At trial, of course, proper inferences

⁷⁵See *United States v. Kinane*, 1 M.J. 309, 318 (C.M.A. 1976) (Cook, J., dissenting) (peaceful execution of a lawful search does not violate the protection against self-incrimination merely by involving the suspect in the action); *United States v. Cuthbert*, 11 C.M.A. 272, 275, 29 C.M.R. 88, 91 (1960) (Latimer, J., concurring by separate opinion, concluded that it was a lawful search—not a matter of Article 31(b)—for a commander of postal unit, upon receiving a report that one of his postal workers had been seen putting a letter into his pocket, to request that the suspect empty his pocket. This less offensive method of effecting a lawful search—i.e., requesting production rather than physically searching—was insufficient to cause the act to fall within the scope of Article 31, as the suspect had no choice but to surrender possession of any incriminating evidence he possessed.); *United States v. Nowling*, 9 C.M.A. 100, 105-06, 25 C.M.R. 362, 367-68 (1958) (Latimer, J., dissenting, concluding that the suspect's act—surrendering his pass—was beyond the scope of Article 31 because it was not an admission that the suspect *alone* could give; on the facts, the suspected pass violator lawfully could have been searched and his invalid pass seized, so his consensual conduct had no relation to Article 31); cf. *United States v. Dickinson*, 38 C.M.R. 463, 465-66 (A.B.R. 1968) (requirement that suspect point out his locker was permissible because it merely amounted to “preliminary assistance”; had the suspect refused, the location of his locker would have been discovered by alternate means).

⁷⁶See *United States v. Lewis*, 12 M.J. 205, 208 n.4 (C.M.A. 1982) (limiting instruction concerning Article 31(b) evidence); *United States v. Whipple*, 4 M.J. 773, 781-82 (C.G.C.M.R. 1978) (Lynch, J., concurring, in part and dissenting in part, advocating the separation of a single “response” into admissible and inadmissible components under Article 31). See also *New York v. Quarles*, 104 S.Ct. 2626, 2638-39 (1984) (O'Connor, J., concurring in part and dissenting in part, collecting and analyzing cases in which the United States Supreme Court utilized a bifurcated approach resulting in a *nontestimonial* element of an act being admitted into evidence at trial against a defendant but a *testimonial* element being excluded).

may continue to be drawn from the fact that an item was actually taken from the accused.⁷⁷

2. What is "Questioning?"

Rather than consume judicial energy distinguishing between an "interrogation" and a "request for a statement," military appellate courts have asked, more fundamentally, "what is 'question-in'?" The resolution of this issue requires a full, factual exposition of each particular case to discern whether any actions taken or words said either were designed to elicit an incriminating statement or could reasonably be expected to result in such a response.⁷⁸ If questioning or its functional equivalent occurs, Article 31(b) warnings are required.⁷⁹ Of course, a so-called "spontaneous statement," that is, one not made in *response* to questioning, is admissible regardless of whether it was preceded by a rights warning.⁸⁰

Just as "spontaneous statements" are beyond the protections of Article 31(b), so, too, are responses that clearly exceed the logical bounds of a "reply." For example, if a military superior questions a subordinate concerning a particular offense but the subordinate responds with disrespect or a threat or offers a bribe, the suspect's words and conduct are fully admissible to prove the offense of disrespect, making a threat, or offering a bribe.⁸¹ Such "responses" constitute violations of the UCMJ distinct from those of which the soldier was originally suspected; the truth,

⁷⁷*See, e.g.*, *Barnes v. United States*, 412 U.S. 837, 846-48 (1973) (inference that recently stolen property found in one's possession was known to have been stolen); *Turner v. United States*, 396 U.S. 398, 417-19 (1970) (inference that heroin found in one's possession was known by the possessor to have been illegally imported).

⁷⁸A nonaccusatory, nonincriminating question should be deemed to be beyond the purview of the type of "questioning" contemplated by Article 31(b). *See United States v. Harris*, 19 M.J. 331, 343 (C.M.A. 1985) (Cox, J., concurring in the result by separate opinion) (questioning suspect to determine whether he has already received the rights advisement).

⁷⁹*See* UCMJ art. 31(d).

⁸⁰*E.g.*, *United States v. Miller*, 7 M.J. 90 (C.M.A. 1979); *United States v. Lovell*, 8 M.J. 613, 618-19 (A.F.C.M.R. 1979), *petition denied*, 9 M.J. 17 (C.M.A. 1980) (following search, airman came to the first sergeant and confessed to robbery); *United States v. Barnes*, 19 M.J. 890, 892-93 (A.C.M.R. 1985) (first sergeant merely provided the "opportunity" for the suspect to confess); *United States v. Seeloff*, 15 M.J. 978, 980-81 (A.C.M.R. 1983) ("I just murdered someone."); *United States v. Sims*, 2 M.J. 499, 501-02 (A.C.M.R. 1976) (finance fraud); *United States v. Foley*, 12 M.J. 826, 830-32 (N.M.C.M.R. 1981) ("I just killed a man."). *Accord* Mil. R. Evid. 304(a) analysis at A22-9; Mil. R. Evid. 305(c) analysis at A22-13.

⁸¹*E.g.*, *United States v. Olson*, 17 M.J. 176, 177 (C.M.A. 1984) (threat); *United States v. Lewis*, 12 M.J. 205, 207-08 (C.M.A. 1982) (disrespect to senior commissioned officer); *United States v. Carter*, 4 M.J. 758, 760 (A.C.M.R. 1977), *petition denied*, 5 M.J. 155 (C.M.A. 1978) (offering a bribe).

falsity, or reliability of the statement—vis-a-vis the *suspected* offense—cannot alter the fact that a separately actionable offense occurred.⁸² The Court of Military Appeals appears to categorize such “replies” as quasi-spontaneous, unprotected responses because they are separately actionable without regard to the original questioning concerning the suspected offense. This simple logic can be overextended to the point of abusing, if not ignoring, the statutory proscriptions of Article 31. For example, the Army Court of Military Review held that a statement made falsely under oath regarding the offense of which the soldier was initially suspected and questioned was admissible as evidence of the accused’s guilt *of the offense of false swearing*.⁸³ While this result may be *constitutionally correct*,⁸⁴ the Army court misapplied the controlling precedent and negated the effect of Article 31(d) when it held the inextricably-intertwined offense of false swearing was separately actionable.⁸⁵

Because questioning is obviously easier to identify when it is actually designed to elicit an incriminating response,⁸⁶ the majority of the appellate decisions seeking to define “questioning” have focused on the so-called “functional equivalent” prong—whether the questioner’s actions could reasonably be expected to result in

⁸²United States v. Olson, 17 M.J. 176, 177 (C.M.A. 1984); United States v. Lewis, 12 M.J. 205, 208 (C.M.A. 1982).

⁸³United States v. Laurin, 18 M.J. 711, 712-13 (A.C.M.R. 1984).

⁸⁴See, e.g., United States v. Wong, 431 U.S. 174, 178-80 (1977) (lack of effective fifth amendment warnings to a non-English-speaking grand jury witness who was under investigation for possible criminal activity did not bar the admission of her responses in a later prosecution for perjury; the fifth amendment does not protect a suspect who, even under legal compulsion, gives false testimony). See also United States v. Yarborough, 18 M.J. 452, 456-57 (C.M.A. 1984) (assurance that the government will not offer certain evidence does not grant the accused a license to testify falsely without fear of contradiction); United States v. Williams, 20 M.J. 686, 688 (A.C.M.R. 1985) (Mil. R. Evid. 304(d)(1), pertaining to disclosure of **all** the accused’s previous statements, is not a shield for an accused who intends to commit perjury).

⁸⁵See United States v. Davenport, 9 M.J. 364, 369 (C.M.A. 1980) (Everett, C.J., with Cook, J., concurring in the result by separate opinion and Fletcher, J., dissenting) (“no leeway” to use a statement obtained in violation of Article 31 to prove the making of a false statement); see also Mil. R. Evid. 304(b); Mil. R. Evid. 304(b) analysis at A22-9; Lederer, supra note 2, at 50-51; cf. United States v. Philpot, 10 M.J. 230, 237 n.3 (C.M.A. 1981) (use of silence); United States v. Pierce, 2 M.J. 654, 656-57 (A.F.C.M.R. 1976) (use as impeachment); Mil. R. Evid. 301(f)(3), 304(h)(3) (limitations of the use of silence or the prior invocation of the protections against self-incrimination).

⁸⁶E.g., United States v. Reeves, 20 M.J. 234, 235-36 (C.M.A. 1985) (Everett, C.J., with Cox, J., concurring in the result by separate opinion) (in-person questioning); United States v. Butner, 15 M.J. 139, 142 (C.M.A. 1983) (telephonic questioning); United States v. Lewis, 12 M.J. 205, 207 (C.M.A. 1982) (in-person questioning).

an incriminating response.⁸⁷ Activities held to be the functional equivalent of questioning include telling a suspect or accused that he or she may want to “cop a deal” as soon as possible to take advantage of a “first-come, first-served” pretrial agreement policy;⁸⁸ visiting a subordinate in pretrial confinement to discuss the basis for the confinement;⁸⁹ or advising the soldier of additional charges which have been preferred;⁹⁰ demanding a contemporaneous explanation from one suspected of committing an offense;⁹¹ advising a suspect that he or she has already been implicated by an accomplice or witness to the crime;⁹² contacting a suspect to talk about specific stolen goods that the individual believes are in the suspect’s possession;⁹³ and discussing dishonored checks⁹⁴ or specific misconduct⁹⁵ during “counseling sessions” with a suspect or accused.⁹⁶

Some of the decisions in the “functional equivalent” area rest upon seemingly illogical bases. For example, “counseling” a suspect concerning the circumstances of an offense or his or her involvement in it may not be questioning if the suspect or accused is not “required” to respond.⁹⁷ These cases overlook,

⁸⁷For nonmilitary analyses of whether particular actions were tantamount to “interrogation,” compare *Rhode Island v. Innis*, 446 U.S. 291, 302-303 (1980) (off-hand remarks insufficient) with *Brewer v. Williams*, 430 U.S. 387, 400-401 (1977) (“Christian burial speech” was “interrogation”).

⁸⁸*United States v. Hartstock*, 14 M.J. 837, 839 (A.C.M.R. 1982). See *United States v. Forbes*, 19 M.J. 954 (A.F.C.M.R. 1985) (investigating agent told suspect that the interview was an opportunity for him to “tell his side of the story” and that any explanation he offered would be brought to his commander’s attention; court assumed, without discussion, that “questioning” occurred and thereupon focused on the sufficiency of the rights warnings).

⁸⁹*United States v. Carter*, 13 M.J. 886, 888 (A.C.M.R. 1982).

⁹⁰*United States v. Dowell*, 10 M.J. 36, 40 (C.M.A. 1980).

⁹¹*United States v. Lejeune*, 13 M.J. 563, 564 (A.C.M.R. 1982).

⁹²*United States v. Muldoon*, 10 M.J. 254, 257 (C.M.A. 1981).

⁹³*E.g.*, *United States v. Butner*, 15 M.J. 139, 141-43 (C.M.A. 1983) (stolen television); *United States v. Johnson*, 6 M.J. 716, 717-18 (A.F.C.M.R. 1978) (stolen toolbox).

⁹⁴*E.g.*, *United States v. Seay*, 1 M.J. 201, 203 (C.M.A. 1975) (Fletcher, C.J., with Cook, J., and Ferguson, S.J., separately concurring) (commanding officer); *United States v. Dean*, 13 M.J. 676, 678-79 (A.F.C.M.R. 1982) (first sergeant); *United States v. Pierce*, 2 M.J. 654, 657-58 (A.F.C.M.R. 1976) (civilian day manager of open mess); *United States v. Wolff*, 5 M.J. 923, 926-27 (N.C.M.R. 1978), petition denied, 6 M.J. 305 (C.M.A. 1979) (executive officer).

⁹⁵*E.g.*, *United States v. Elliott*, 3 M.J. 1080, 1082 (A.C.M.R. 1977) (questioning done by work supervisor regarding subordinate’s alleged marijuana possession).

⁹⁶Other situations involving the functional equivalent of questioning include the use of investigative ploys, *e.g.*, *United States v. Hanna*, 2 M.J. 69, 71-73 (C.M.A. 1976) (“Just between you and me, what happened?”), and appeals to the conscience or the use of trick or artifice to produce a statement, *e.g.*, *United States v. Davis*, 6 M.J. 874, 879 (A.C.M.R. 1979), petition denied, 8 M.J. 234 (C.M.A. 1980).

⁹⁷Compare *United States v. Seay*, 1 M.J. 201, 203 (C.M.A. 1975) (Fletcher, C.J., with Cook, J., and Ferguson, S.J., separately concurring) (CO’s counseling of

however, that because the term “interrogation” includes actions which are reasonably likely to produce an incriminating response, courts must concentrate on human nature and the probability that a response, whether required or not, would result. Even when the realities of human nature have been considered by the military courts, the results have not been altogether clear. For example, a commander’s visit to pretrial confinement to advise the accused of additional charges caused “responses to questioning,”⁹⁸ while no such “response” was found when a suspect made an incriminating statement following his commander’s unwarned advice as to what the subordinate should expect to occur—with regard to the military justice process—following the subordinate’s interview with law enforcement agents who suspected him of selling heroin.⁹⁹ While each of these results may have been proper under the circumstances, full analysis of the facts of record must be made by the court in its opinion if the precedent is to be of any value. Moreover, because of the seemingly irreconcilable purposes that are often present when a military superior discusses criminal allegations with a subordinate, and because of the ease with which the warnings can be given, any real conflict should be resolved in favor of requiring rights warnings¹⁰⁰ unless the command chooses to forego any potential use of the discussions in subsequent prosecutions.¹⁰¹

subordinate concerning dishonored checks deemed “interrogation” because the subordinate was required to respond by regulation *with* United States v. Mraz, 2 M.J. 266, 268-69 (A.F.C.M.R. 1976) (finding no duty to warn prior to a finance sergeant’s advising a suspect of the latter’s rights and obligations with regard to a previous overpayment of a quarters allowance; the court emphasized, however, that the member had no duty to respond to the sergeant).

⁹⁸United States v. Dowell, 10 M.J. 36, 40 (C.M.A. 1980) (commander’s visit to accused in pretrial confinement to advise him of additional charges was held to be the functional equivalent of interrogation because the “underlying fact of human nature [is] that one who is notified of serious charges against him will feel a need to say something in response to those charges”). *See* United States v. Carter, 13 M.J. 886, 888 (A.C.M.R. 1982) (functional equivalent of interrogation found in commander’s visit to accused in pretrial confinement to discuss the “basis for the confinement”).

⁹⁹United States v. Mason, 4 M.J. 585, 587-88 (A.C.M.R. 1977), *petition denied*, 4 M.J. 291 (C.M.A. 1978). *Cf.* United States v. Reeves, 20 M.J. 234, 235-36 (Everett, C.J., with Cox, J., concurring in the result by separate opinion) (statement to commanding officer visiting accused in pretrial confinement as part of a periodic command visitation requirement; on the facts, “questioning” was clearly present, as the commander advised the accused of his rights and began seeking potentially incriminating responses).

¹⁰⁰*See, e.g.,* United States v. Seay, 1 M.J. 201, 203 (C.M.A. 1975) (Fletcher, C.J. with Cook, J., and Ferguson, S.J., separately concurring); United States v. Tyson, 2 M.J. 583, 585 (N.C.M.R. 1976).

¹⁰¹*See* United States v. Seay, 1 M.J. 201, 205 (C.M.A. 1975) (Cook, J., separately concurring) (regulatory requirement that a soldier discuss debts or dishonored checks should carry with it an implicit grant of immunity against the subsequent

One can respond to a suspect's own questions without subjecting the conversation to the rigors of Article 31(b).¹⁰² Likewise, rights warnings may not be necessary before asking a military suspect or accused direct, albeit nonaccusatory, questions.¹⁰³ Unfortunately, some results have strained the credibility of this "innocent question" doctrine,¹⁰⁴ while others have missed the point completely.¹⁰⁵ Because the Military Rules of Evidence define an interrogation in terms of the likelihood of its generating an "incriminating response,"¹⁰⁶ and because the Rules' drafters

use of his statements at trial); *see also* *Piccirillo v. New York*, 400 U.S. 548, 562 (1971) (Brennan, J., joined by Marshall, J., dissenting) (fifth amendment privilege requires that **any** jurisdiction that compels a person to incriminate himself grant him absolute immunity under its laws from prosecution for any transaction revealed in that testimony).

¹⁰²*E.g.*, *United States v. Peyton*, 10 M.J. 387, 389-90 (C.M.A. 1981) (simple responses to suspect's questions concerning seriousness of allegations and likely punishment was deemed, under the facts, to fall outside even the "functional equivalent" of questioning); *United States v. Ray*, 12 M.J. 1033, 1035-36 (A.C.M.R. 1982) (response to suspect's question "**Does** my CO have to find out?" held not to be tantamount to "interrogation"); *United States v. Fox*, 8 M.J. 526, 529 (A.C.M.R. 1979), *aff'd in part & reu'd in part*, 10 M.J. 176 (C.M.A. 1981) (suspect asked investigator what would happen with his case, to which the agent replied that he was not sure and would not know until the weapon and fingerprints thereon had returned from the lab; the court upheld the admission at trial of the suspect's statement that he thought that he had wiped his fingerprints off of the weapon).

¹⁰³*See, e.g.*, *United States v. Harris*, 19 M.J. 331, 343 (C.M.A. 1985) (Cox, J., concurring in the result by separate opinion) (questioning suspect to determine whether rights warning had previously been given); *United States v. Goodson*, 18 M.J. 243, 253 (C.M.A. 1984) (Everett, J., dissenting) (questioning suspect concerning "neutral subjects, like rank, social security number, and age," may fall outside the purview of Article 31 and the fifth amendment) (*dicta*), *vacated*, 105 S. Ct. 2129 (1985). *See Lederer, supra* note 2, at 32-33 (Article 31 was designed to prohibit the solicitation of **incriminating** information).

¹⁰⁴*E.g.*, *United States v. Seeloff*, 15 M.J. 978, 980-81 (A.C.M.R. 1983) (desk clerk's response to individual's entering police station and stating "I just killed someone" was to ask the question "Where's the body?"; no warnings required because the inquiry was deemed to have been merely an attempt to ensure that the statement was not a prank); *United States v. Foley*, 12 M.J. 826, 830-32 (N.M.C.M.R. 1981) (same; police response of "Where?" was held not to have been designed to obtain an incriminating response but rather only to express a concern about the possibility of an injured person's being alone and in need of help); *see United States v. Jones*, 19 M.J. 961, 968 n.13 (A.C.M.R. 1985) (once suspect admitted a stabbing, Article 31(b) was triggered; "rescue doctrine" excused failure to give rights warnings).

¹⁰⁵*E.g.*, *United States v. Lovell*, 8 M.J. 613, 618-19 (A.F.C.M.R. 1979), *petition denied*, 9 M.J. 17 (C.M.A. 1980) (upholding the admission at trial of statements obtained by a non-commissioned officer questioning a subordinate who was suspected of robbing an in-barracks poker game; the court's conclusion that the questioning was only designed to accomplish the first sergeant's legitimate interest in ferreting out gambling in the barracks missed the entire point of Article 31(b)).

"Mil. R. Evid. 305(b)(2) defines "interrogation" as including "any formal or informal questioning in which an **incriminating response** either is sought or is a reasonable consequence of such questioning" (emphasis added), but the drafters

intentionally left open the “innocent question” issue,¹⁰⁷ counsel and the courts must scrutinize the facts and circumstances unique to each case to determine whether “questioning” has occurred.¹⁰⁸

C. WHO MUST BE WARNED?

For the purposes of Article 31(b), only an “accused” or a “suspect” need be warned before questioning takes place. An “accused” is relatively easy to identify: once charges are preferred,¹⁰⁹ the soldier so charged has become an accused.¹¹⁰

On the other hand, whether a soldier is a “suspect” is a purely factual matter requiring a retrospective analysis of the circumstances known to the questioner at the time of the questioning.¹¹¹ If the questioner either subjectively believed that the person being questioned violated the UCMJ or should reasonably have so suspected, then the individual questioned was in fact a “suspect” within the meaning of Article 31(b).¹¹² Some cases have applied these standards to reach clear results;¹¹³ other have not.¹¹⁴

clearly stated that more than just the putting of questions to an individual is encompassed by this term. Mil. R. Evid. 305(b)(2) analysis at A22-12.

¹⁰⁷Mil. R. Evid. 305(b)(2) analysis at A22-12 (“innocent questioning”).

¹⁰⁸*E.g.*, United States v. Barnes, 19 M.J. 890, 892-93 (A.C.M.R. 1985) (suspect approached first sergeant and asked to speak with him, whereupon first sergeant cleared the room and advised the suspect that talking might be detrimental to his case; ultimate statement to first sergeant was not the product of “questioning,” because the first sergeant actions merely constituted an opportunity, not an inducement, to speak).

¹⁰⁹Manual for Courts-Martial, United States, 1984, Rules for Courts-Martial 202(c)(2), 307, 308 [hereinafter R.C.M.].

¹¹⁰The situation could be complicated by a convening authority’s withdrawal of charges subsequent to referral, R.C.M. 604; or by their dismissal by either a commander, R.C.M. 306(c)(1), 401(c)(1), or a court, R.C.M. 907. In such cases, however, the question will be whether the soldier remained subject to criminal penalty for the offenses in question, because removal of all possible criminal penalties for specific conduct also removes the corresponding protection against self-incrimination. *See* United States v. Carter, 4 M.J. 758, 760 (A.C.M.R. 1977), *petition denied*, 5 M.J. 155 (C.M.A. 1978); Mil. R. Evid. 301(c) analysis at A22-5.

¹¹¹*See e.g.*, United States v. Ravenel, 20 M.J. 842, 844 (A.C.M.R. 1985).

¹¹²United States v. Leiffer, 13 M.J. 337, 343 (C.M.A. 1982) (Cook, J., with Everett, C.J., concurring and Fletcher, J., concurring in the result); United States v. Morris, 13 M.J. 297, 298 (C.M.A. 1982) (Fletcher, J., with Everett, C.J., and Cook, J., concurring in the result); United States v. Ravenel, 20 M.J. 842, 844-45 (A.C.M.R. 1985); United States v. Lacy, 16 M.J. 777, 780 (A.C.M.R. 1983); United States v. Poole, 15 M.J. 883, 886-87 (A.C.M.R. 1983); United States v. Trotter, 9 M.J. 584, 585-86 (A.F.C.M.R.), *petition denied*, 9 M.J. 244 (C.M.A. 1980); *see also* United States v. Summers, 11 M.J. 585, 587-88 (N.C.M.R. 1981) (administrative qualifiers such as “possible,” “potential,” or “prime,” used to categorize suspects, are not binding during the judicial analysis of Article 31(b)).

¹¹³*E.g.*, United States v. Lewis, 12 M.J. 205, 206-207 (C.M.A. 1982) (personal observation); United States v. Dean, 13 M.J. 676, 678-79 (A.F.C.M.R. 1982) (official notice); United States v. Lejeune, 13 M.J. 563, 564 (A.C.M.R. 1982) (personal observation).

¹¹⁴*E.g.*, United States v. Lavine, 13 M.J. 150, 151-52 (C.M.A. 1982) (tax-free

As in the “who must warn?” element of Article 31(b), important facets of the “who is a suspect?” inquiry remain unaddressed. For example, how close must the “finger of suspicion” point to a specific individual before he or she becomes a “suspect” entitled to Article 31(b) warnings?¹¹⁵ If a commander believes there is drug abuse in his unit, are all members of the unit suspects? Must the commander give a public rights warning before requesting unit members to provide information or witness statements? While the answer in a particular case may lie in analyzing whether, for example, this was “questioning” or whether a “response” should have been anticipated, clear judicial guidance is lacking.

Should knowledge of an offense be imputed among certain classes of questioners?¹¹⁶ Similarly, should “suspicion” itself be imputed to determine whether it was reasonable not to suspect that the individual being “interviewed” had committed a crime?¹¹⁷ Where the more knowledgeable individual and the actual questioner actively interrelate in the same military unit (e.g., the company commander and the company first sergeant) or in the same branch of the local office of an investigatory agency (e.g., an installation’s drug units of the MPI and CID), imputing knowledge of the commission of offenses to the actual questioner—if not actual suspicion vis-a-vis a particular service member—would

import violation; individual not a “suspect”); *United States v. Seeloff*, 15 M.J. 978, 980-81 (A.C.M.R. 1983) (statement “I just killed someone” did not cause speaker to become a “suspect” initially); *United States v. Wilson*, 7 M.J. 997, 1001 (A.C.M.R.), *petition denied*, 8 M.J. 181 (C.M.A. 1979) (soldier not suspected of being an accessory after the fact to use of heroin because the questioning agent did not realize “what an Article 78 offense looked like”); *United States v. Foley*, 12 M.J. 826, 830-32 (N.M.C.M.R. 1981) (*Seeloff* situation; speaker not a “suspect”); *United States v. Whipple*, 4 M.J. 773, 777-78 (C.G.C.M.R. 1978) (sailor became “suspect” when, without being questioned but after a ship-wide address concerning drugs aboard the vessel, he approached a military superior and tearfully said that he had “something to turn in”).

¹¹⁵*See* *United States v. Whipple*, 4 M.J. 773, 777-78 (C.G.C.M.R. 1978) (shipwide remarks concerning the illegal use of drugs aboard the Coast Guard vessel; court declined to address the issue); *United States v. Wilson*, 2 C.M.A. 48, 54-55, 8 C.M.R. 48, 54-55 (1953) (individuals were in a group suspected of a shooting); Lederer, *supra* note 2, at 31.

¹¹⁶*See* *United States v. Dickerson*, 6 C.M.A. 438, 453, 20 C.M.R. 154, 169 (1955) (deemed to be a factual issue focusing on more than mere lines of command); *see also* *United States v. Harris*, 19 M.J. 330, 338-40, 342-45 (C.M.A. 1985) (Everett, C.J., with Cox, J., concurring in the result by separate opinion) (discussing the appropriateness of imputing knowledge to a law enforcement agent that the suspect being questioned has previously asserted, to another agent, the right to the presence of counsel).

¹¹⁷*See* *United States v. Dickerson*, 6 C.M.A. 438, 453, 20 C.M.R. 154, 169 (1955) (factual determination).

be entirely appropriate.¹¹⁸ Indeed, to permit a contrary result could encourage both military and civilian authorities to “hide the ball” and use less-informed individuals as questioners. The authorities could then avoid the Article 31(b) requirements by claiming that the actual questioner had no “knowledge” that the individual being “interviewed” had committed a criminal offense or had committed one different from that for which the questioning was being conducted.¹¹⁹ Likewise, imputing actual suspicion would avoid a situation in which, as between two fully knowledgeable individuals who differ in their subjective beliefs of whether a particular soldier is a “suspect,” the individual who does not so “suspect” is chosen to conduct an “interview.” In such a case, the questioner need not give Article 31(b) warnings unless his subjective belief was **unreasonable**,¹²⁰ but should a reviewing court second-guess the reasons for the other individual’s *not* being detailed to conduct the interview (which would have resulted in the rendition of the rights warning)? Answers to these difficult questions have not yet been attempted.

D. WHAT MUST THE WARNINGS CONTAIN?

1. The Nature of the Accusation.

A rights advisement pursuant to Article 31(b) must inform the suspect or accused of the “nature of the accusation.” The suspect or accused must receive sufficient information to apprise him or her of the general offense under **investigation**.¹²¹ However, as the

¹¹⁸See Lederer, *supra* note 2, at 31-32; see also United States v. Harris, 19 M.J. 330, 333-34 (C.M.A. 1985) (MP, MPI, and CID agents were colocated and part of the same general office in Hanau, Federal Republic of Germany).

¹¹⁹See Lederer, *supra* note 2, at 31-32. *But see* United States v. Harris, 19 M.J. 330, 342 n.2 (C.M.A. 1985) (Cox, J., concurring in the result by separate opinion, providing an example and advocating the adoption of a test focusing on the questioner’s state of mind). *Cf.* United States v. Lavine, 13 M.J. 150, 151-52 (C.M.A. 1982) (transfer of merchandise information from one local official to another with the latter to question the airman in issue); United States v. Willeford, 5 M.J. 634, 636 (A.F.C.M.R.), *petition denied*, 6 M.J. 83 (C.M.A. 1978) (investigating agent, as the questioning official, actually knew of separate offenses of which airman was suspected; query the effect of a lesser rights warning had this investigator utilized a second agent to perform the questioning but only mentioned to the latter the facts involving the first of the two separate criminal acts before the second official began interrogating the “suspect” as to his whereabouts and activities on the single night in question).

¹²⁰This would be true because an interviewee is a “suspect” for Article 31 purposes only if the questioner subjectively suspected him or her of having committed a crime or reasonably should have so suspected at the time of the questioning. *See, e.g.*, United States v. Leiffer, 13 M.J. 337, 343 (C.M.A. 1982) (Cook, J., with Everett, C.J., concurring and Fletcher, J., concurring in the result).

¹²¹*E.g.*, United States v. Nitschke, 12 C.M.A. 489, 491-92, 31 C.M.R. 75, 77-78 (1961).

Court of Military Appeals explained in *United States v. Davis*:¹²²

Advice as to the nature of the charge need not be spelled out with the particularity of a legally sufficient specification; it is enough if, from what is said and done, the accused knows the general nature of the charge., . . . A partial advice, considered in light of the surrounding circumstances and the manifest knowledge of the accused, can be sufficient to satisfy this requirement of Article 31. . . .¹²³

Likewise, in *United States v. Rice*,¹²⁴ the court declared:

The purpose of informing a suspect or accused of the nature of the accusation is to orient him to the transaction or incident in which he is allegedly involved. It is not necessary to spell out the details of his connection with the matter under inquiry with technical nicety.¹²⁵

Applying the foregoing standards, military appellate courts have held that rights advisements concerning the "(nature of the accusation)" will be tested against the "totality of the information" furnished to the suspect or accused.¹²⁶ Thus, for example, it was sufficient to have warned a soldier that he was suspected of "larceny" with regard to missing funds even though he was actually suspected of both larceny and the wrongful appropriation of those funds over a period of time.¹²⁷ In addition, otherwise deficient warnings have been saved by the government's establishing that the suspect had "constructive notice" of the nature of the accusation and could thereby intelligently weigh the consequences of responding to the official inquiry.¹²⁸

¹²²8 C.M.A. 196, 24 C.M.R. 6 (1957).

¹²³*Id.* at 198, 24 C.M.R. at 8 (citations omitted).

¹²⁴11 C.M.A. 524, 29 C.M.R. 340 (1960).

¹²⁵*Id.* at 526, 29 C.M.R. at 342.

¹²⁶*E.g.*, *United States v. Willeford*, 5 M.J. 634, 636 (A.F.C.M.R.), *petition denied*, 6 M.J. 83 (C.M.A. 1978).

¹²⁷*United States v. Quintana*, 5 M.J. 484, 486-87 (C.M.A. 1978); *accord* *United States v. Willeford*, 5 M.J. 634, 636 (A.F.C.M.R.), *petition denied*, 6 M.J. 83 (C.M.A. 1978) (warnings sufficient where airman suspected of unlawfully entering the home of his victim, raping her, and committing indecent acts upon her was advised that he was suspected of "rape").

¹²⁸*E.g.*, *United States v. Annis*, 5 M.J. 351, 352-53 (C.M.A. 1978) (Fletcher, C.J., with Cook and Perry, JJ., concurring in the result by separate opinions) (suspect questioned at the scene concerning nonrequisitioned meat found in his vehicle); *United States v. Newvine*, 48 C.M.R. 188, 191 (A.F.C.M.R. 1974) (murder suspect advised only that he was suspected of a "serious incident that happened in Mexico"; warnings held sufficient to apprise him of the murder offense because he contemporaneously saw a photograph of a victim, recognized it, and generally knew what the accusation was prior to making his statement). *See* Lederer, *supra* note 2, at 11-12.

On the other hand, an incomplete rights warning may cause a suspect's statement to be excluded from evidence at trial. For example, it has been held inadequate to advise a soldier of only one of a series of crimes that he or she is suspected of committing at the same general time and place, but against different victims.¹²⁹ Similarly, it is insufficient to warn a soldier suspected of both unauthorized absence from the unit and of specific criminal acts committed during the absence by merely advising that he or she is suspected of "AWOL."¹³⁰ Questions may also arise as to whether knowledge or suspicion should be imputed to an actual questioner to determine whether particular warnings were adequate. In this context, the imputed knowledge of the questioner can determine, not only who is a "suspect," but also how broad the Article 31 warning must be.¹³¹

2. Statements "Regarding the Offense".

Not **all** "statements" fall under Article 31(b). The statement must be one "regarding the offense" of which the soldier is accused or suspected. If it is, proper warnings, if otherwise necessary, are required; if not, then Article 31(b) does not apply.

A traditional example of this distinction is provided by a soldier's conduct in response to an official request or order to identify himself. Generally, requiring a suspect to identify himself, whether verbally¹³² or by showing **an identification card**,¹³³ has

"United States v. Willeford, 5 M.J. 634, 636 (A.F.C.M.R.), *petition denied*, 6 M.J. 83 (C.M.A. 1978) (insufficient only to warn an airman that he was suspected of "rape" when, in fact, he was suspected of raping a first victim and, later the same evening, unlawfully entering another room—in the same building—of a second victim and committing indecent acts upon her as well).

¹³⁰United States v. Reynolds, 16 C.M.A. 403, 405, 37 C.M.R. 23, 25 (1966).

¹³¹These issues were factually raised, but left unanswered, in the unreported decision of United States v. Henson, CM 443457 (A.C.M.R. 30 November 1983), *opinion withdrawn & rehearing ordered on other grounds* (A.C.M.R. 22 February 1985).

In *Henson*, the accused and a fellow warrant officer were suspected of conspiring to sell several kilograms of cocaine and hashish to a covert agent of the Army CID. The conspiracy allegedly occurred over several weeks, but, in the end, no cocaine and only 145 grams of hashish were produced by Henson's co-accused for sale. Both warrant officers were apprehended, but because of unforeseen events all of the drug agents who had been monitoring the case were unavailable to question Henson. As a result, one of the apprehending agents was assigned to interrogate Henson. At trial, Henson moved to suppress his "confession" on the ground that the questioning agent's limited advice, together with Henson's belief that he had done no wrong, caused him to give a far more detailed statement—concentrating on the actions of his fellow officer—than would have been the case with full and adequate warnings.

¹³²*E.g.*, United States v. Leiffer, 13 M.J. 337, 343 (C.M.A. 1982) (Cook, J., with Everett, C.J., concurring and Fletcher, J., concurring in the result); United States

been held *not* to be a statement “regarding an offense,” and no Article 31(b) warning need accompany the order. While this has been true even if the soldier was suspected of an unauthorized absence offense,¹³⁴ a contrary result occurred when a suspected pass violator was told to produce his pass.¹³⁵ While these concepts remain viable today, it is equally important to address the foundational issues of whether, as previously discussed, a specific act is tantamount to a nonverbal communication, and, if so, whether the resulting “statement” was one made in response to official “questioning.”

Finally, a statement falls within the scope of Article 31(b) only if it is a response regarding the offense(s) of which the soldier was, or should have been, suspected *at the time of questioning*.¹³⁶ If a duty to warn arose at that time, failing to give proper and adequate warnings to the member renders the resulting statement inadmissible against him or her in *any* court-martial, regardless of whether he or she is being tried for that offense or some other crime.¹³⁷ Upon timely objection or motion by the defense at trial, such statements will be excluded from evidence for all purposes.¹³⁸

¹³³*E.g.*, United States v. Thomas, 10 M.J. 687, 692 (A.C.M.R. 1981); United States v. Earle, 12 M.J. 795, 796-97 (N.M.C.M.R. 1981).

v. Davenport, 9 M.J. 364, 365-66, 368 (C.M.A. 1980) (Everett, C.J., with Cook, J., concurring in the result by separate opinion and Fletcher, J., dissenting).

¹³⁴*See* United States v. Davenport, 9 M.J. 364, 366-69 (C.M.A. 1980) (Everett, C.J., with Cook, J., concurring in the result by separate opinion and Fletcher, J., dissenting) (member suspected of having escaped from custody). *See also* Washington v. Chrisman, 455 U.S. 1, 6 n.3 (1982) (production of suspect's identification established that the individual was underage and thus in unlawful possession of alcoholic beverages; act held to be neither “incriminating” nor a “testimonial communication” triggering fifth amendment protections).

¹³⁵United States v. Nowling, 9 C.M.A. 100, 103, 25 C.M.R. 362, 365 (1958) (rationale was that the action constituted an incriminating response in and of itself and that the pass could not otherwise have been lawfully seized by the questioner).

¹³⁶It is possible for a court to miss this point entirely. *E.g.*, United States v. Wolff, 5 M.J. 923, 926-27 (N.C.M.R. 1978), *petition denied*, 6 M.J. 305 (C.M.A. 1979) (upholding the use, to prove motive in a later robbery-murder trial, of prior unwarned statements made by an “indebtedness” suspect in response to official “counseling” concerning his debts and dishonored checks).

¹³⁷UCMJ art. 31(d); *accord* United States v. Singleton, 4 M.J. 864, 866-67 (A.C.M.R.), *petition denied*, 5 M.J. 216 (C.M.A. 1978).

¹³⁸The Military Rules of Evidence support this general result—and actually go beyond it—by declaring that a statement is inadmissible if it is obtained through the use of coercion or unlawful influence or inducement, *or* if it is obtained in violation of Article 31, the privilege against self-incrimination or due process clause of the fifth amendment, or Mil. R. Evid. 302(a), Mil. R. Evid. 304(c)(3). *See* Mil. R. Evid. 304(a) analysis at A22-9; Mil. R. Evid. 304(c)(3) analysis at A22-9 to -10.

E. SUMMARY

Litigating the admissibility of a statement under Article 31(b) often presents a difficult, factually complex task. The government bears the burden of proof, but it may establish the admissibility of the statement by demonstrating that any one of four major elements of Article 31(b) was absent. The defense, on the other hand, can prevail only if every element of Article 31(b) has been satisfied and, then, only if the circumstances mandated a greater warning than the one actually received by the soldier. For the courts, the process is equally challenging: rules must be clear and concise, and critical issues not yet resolved must be answered when the opportunity is presented.

III. SUGGESTIONS FOR THE FUTUTRE OF ARTICLE 31(b)

In addition to the unresolved definitional problems involving Article 31(b), two final matters are of concern. The first focuses on the potential abuse of this protection; the second centers on the need for practical exceptions to this statutory privilege.

A. POTENTIAL ABUSE: THE SHIELD BECOMES A SWORD

Although Article 31(b) mandates *when* rights warnings are required in the military, Article 31(d) enforces the privilege against self-incrimination:

(d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

The Supreme Court has declared that the constitutional shield against self-incrimination¹³⁹ was never intended to be “perverted to a license [for the accused] to testify inconsistently, or even perjuringly, free from the risk of confrontation with prior inconsistent **utterances**.¹⁴⁰ While Article 31(b) provides a greater protection than the **Constitution**,¹⁴¹ it should be equally clear that

¹³⁹U.S. Const. amend. V. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁴⁰*Oregon v. Hass*, 420 U.S. 714, 722 (1975) (questioning continued after suspect requested counsel; statement properly used in rebuttal); accord *Harris v. New York*, 401 U.S. 222, 226 (1971) (proper to use a statement obtained in violation of *Miranda* for impeachment purposes if it otherwise satisfies the standards of trustworthiness; here, the suspect was not warned of his right to counsel).

¹⁴¹*United States v. Lewis*, 12 M.J. 205, 206-207 (C.M.A.1982); *United States v.*

Congress never intended the Article 31 privilege to be a "license to lie."¹⁴² At present, however, any statement obtained from a military suspect or accused in violation of Article 31 may not be used at his or her court-martial—not even to contradict an inconsistent, in-court version of the facts of the case.¹⁴³

In light of the public interest in protecting the integrity of the judicial forum against **perjury**,¹⁴⁴ the current effect of Article 31(d) should be reconsidered. As the Supreme Court has noted, it is important to remember that "[w]e are, after **all**, always engaged in a search for truth in a criminal case so long as the search is surrounded with the safeguards provided by our **Constitution**."¹⁴⁵

Modification of the language of Article 31 is long overdue. Limited use of statements obtained in violation of Article 31 would recognize the legitimate needs of the military to the same extent as those of its civilian counterparts,¹⁴⁶ as well as protecting the integrity of the **military**¹⁴⁷ judicial forum. To begin the

Williams, 9 M.J. 831, 833-35 (A.C.M.R. 1980). *See* United States v. Harden, 18 M.J. 81, 83 (C.M.A. 1984) (Cook, S.J., concurring); Mil. R. Evid. 301(a) analysis at A22-5.

"United States v. Aronson, 8 C.M.A. 525, 529, 25 C.M.R. 29, 33 (1957), *cited with approval* in United States v. Davenport, 9 M.J. 364, 369 (C.M.A. 1980) (Everett, C.J., with Cook, J., concurring in the result by separate opinion and Fletcher, J., dissenting).

¹⁴³*See, e.g.*, United States v. Pierce, 2 M.J. 654, 656-57 (A.F.C.M.R. 1976); Mil. R. Evid. 304(b).

One could argue that because Article 31(d) only prohibits *receiving into evidence* an improperly-obtained statement, the use of such statements solely to impeach should not violate Article 31. *See* E. Cleary, McCormick on Evidence § 34, at 67 (2d ed. 1972) (matters used solely to impeach a witness are generally not admitted into evidence). Nevertheless, the current Military Rules of Evidence make clear that a statement may not be used as impeachment *or* in a later prosecution for perjury, false swearing, or the making of a false official statement if it was obtained in violation of the warnings prescribed by the Rules *unless* it was "involuntary" **only** in terms of noncompliance with subsections (d), (e), or (g) of Rule 305 (requirements concerning the right to counsel). Mil. R. Evid. 304(b). *But see* United States v. Lausin, 18 M.J. 711, 712-13 (A.C.M.R. 1984) (permitting a statement obtained after a potentially involuntary waiver of Article 31(b) rights to be used *as substantive evidence* to prove the declarant's guilt of the charged offense of false swearing).

"*See, e.g.*, United States v. Wong, 431 U.S. 174, 178-80 (1977); Oregon v. Hass, 420 U.S. 714, 722 (1975); Harris v. New York, 401 U.S. 222, 226 (1971); United States v. Yarborough, 18 M.J. 452, 456-57 (C.M.A. 1984); United States v. Williams, 20 M.J. 686, 688 (A.C.M.R. 1985).

"Oregon v. Hass, 420 U.S. 714, 722 (1975).

¹⁴⁶*See* United States v. Remai, 19 M.J. 229, 233 (C.M.A. 1985) ("harmless error" standard applies to appellate review of statements obtained in violation of Article 31).

¹⁴⁷The present situation encourages civilian tribunals, which are bound only by federal and state constitutions and not the additional rigors of Article 31(d) and the Military Rules of Evidence, to exert their own jurisdiction over military accused.

process of reworking Article 31, Congress should amend Article 31(d) by adding at the end of the current language the following text:

Provided, however, that an otherwise trustworthy statement that is deemed inadmissible solely because of the failure to have advised a suspect or accused as required by section (b) of this article may nevertheless be used as evidence against the suspect or accused in a trial by court-martial to impeach by contradiction his inconsistent, in-court testimony or in a subsequent prosecution for perjury, false swearing, or the making of a false official statement,

By this action, Congress would place a military accused in the same tactical position as a civilian defendant who chooses to speak in his or her own defense before or during trial.¹⁴⁸ Moreover, a specific reference in Article 31(d) to Article 31(b) will permit limited use of statements obtained in “technical violation” of either provision if the statements nevertheless exhibit the necessary degree of factual **trustworthiness**.¹⁴⁹ In conjunction with obtaining congressional action, the executive branch must modify appropriate portions of the current Military Rules of Evidence.¹⁵⁰

Finally, the military judiciary must clarify its decisions by articulating the precise bases for its rulings in rights warnings cases, both as to why Article 31 applies to the facts of a case, and what effect Article 31(d) has on the proffered use of the statement at trial.

¹⁴⁸See *United States v. Harris*, 19 M.J. 331, 343 (C.M.A. 1985) (**Cox, J.**, concurring in the result by separate opinion) (courts need not permit a military suspect or accused to benefit from his or her own falsehoods); *United States v. Remai*, 19 M.J. 229, 233 (C.M.A. 1985) (failure to respect suspect’s request for counsel; the court stated, “We perceive no reason why...a convicted servicemember should receive a windfall not available to his civilian counterpart.”); see also *Michigan v. Tucker*, 417 U.S. 433, 445-46, 450-52 (1974) (upholding the admission of fruits of a *Miranda* violation where the violation was the “technical-[ity]” that the suspect had not been warned of his right to free counsel if he could not afford private counsel); cf., *United States v. Havens*, 446 U.S. 620, 626-28 (1980) (proper to use evidence obtained by an unlawful search or seizure to impeach the defendant’s in-court testimony; the Court’s holding emphasized that when a defendant testifies, he must either testify truthfully or suffer the consequences); Mil. R. Evid. 311(b) (use of evidence obtained by an unlawful search or seizure to impeach by contradiction the in-court testimony of the accused).

¹⁴⁹See, e.g., *Oregon v. Hass*, 420 U.S. 714, 722 (1975); *Michigan v. Tucker*, 417 U.S. 433, 445-46, 450-52 (1974); *Harris v. New York*, 401 U.S. 222, 226 (1971).

¹⁵⁰E.g., Mil. R. Evid. 304(b), 304(c)(3), and 305(a).

B. EXCEPTIONS TO THE EXISTING RULE

Another potential problem in the Article 31(b) area is the dilemma in which a questioner, particularly a military superior, may find himself or herself when preparing to question a subordinate: does the commander seek the unwarned and likely incriminating response of the subordinate in order to correct that individual or protect the health and safety of his or her command, or does the commander render a rights warning and hope that the subordinate will waive the protection and give the necessary reply? While the Military Rules of Evidence grant commanders some fourth amendment freedom in conducting inspections of unit personnel and property for the health and safety of the individual and the unit as a whole,¹⁵¹ no such latitude is permitted under Article 31(b). Recent legal developments underscore the need for flexibility under Article 31 to permit certain types of questioning under circumstances that are consistent with the constitutional protection against self-incrimination.

In *New York v. Quarles*,¹⁵² the Supreme Court held that rights warnings that are constitutionally required in the civilian sector do not apply to the initial questioning of a suspect under circumstances creating a concern for the public safety.¹⁵³ While *Quarles* did not directly affect military practice under Article 31(b),¹⁵⁴ its legitimacy in the military cannot be disputed. The conditions and circumstances surrounding the conduct of military affairs make a "public safety" exception in the military logical,¹⁵⁵ particularly where weapons or munitions are involved.

Although the military appellate courts have not yet decided the applicability of the "public safety" exception to Article 31, the Army Court of Military Review, in *United States v. Jones*,¹⁵⁶ did

¹⁵¹Mil. R. Evid. 313(b).

¹⁵²104 S. Ct. 2626 (1984).

¹⁵³*Id.* at 2632 (if the officer's questions could reasonably be said to have been prompted by a concern for public safety, then the action passes constitutional scrutiny—regardless of his subjective motives for the questioning).

¹⁵⁴*See, e.g.*, *United States v. Lewis*, 12 M.J. 205, 206-07 (C.M.A. 1982).

¹⁵⁵*See New York v. Quarles*, 104 S. Ct. 2626, 2633 (1984) (in recognizing a "public safety exception" to the *Miranda* warnings, the Court concluded that the "need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination"); *United States v. Harris*, 19 M.J. 331, 343 n.3 (C.M.A. 1985) (Cox, J., concurring in the result by separate opinion, stating that additional judicial safeguards engrafted onto Article 31 "must be modified to meet the exigencies and realities of the military environment and military missions"); *cf. United States v. Dohle*, 1 M.J. 223, 226 (C.M.A. 1975) (theft of M-16 rifles).

¹⁵⁶19 M.J. 961 (A.C.M.R.) *petition granted*, 20 M.J. 393 (C.M.A. 1985).

adopt a narrower “rescue exception” to both the fifth amendment and Article 31. This exception, the court declared, is available if the possibility exists for saving human life or avoiding serious injury by rescuing one in danger, and if no course of conduct other than questioning a suspect promises relief.¹⁵⁷ The court balanced the benefit of reducing the coerciveness of military interrogations against the cost of serious injury or the loss of human life, and concluded:

[T]he Fifth Amendment scales tilt decisively in favor of the latter even without considering the cost of a reduction in the convictions of the guilty. . . . As with *Miranda*, the underlying purpose of Article 31(b) is not offended when the occasion for unwarned questioning is to save a human life or avoid serious injury.¹⁵⁸

The Jones court recognized that its “rescue” exception was narrower than the “public safety” exception adopted by the Supreme Court in *Quarles*,¹⁵⁹ yet on the “single person in danger” facts presented in Jones, the court’s choice not to adopt a broader exception than the one needed is understandable as a cautious step forward. Nevertheless, the “rescue” exception will not cover many of the “public safety” situations generated by, for example, the loss of a weapon or the possible theft of munitions. It also contains an additional test—that no other course of conduct except questioning the suspect promised relief—that Quarles does not require. In light of the immediate and subjective decisions that must be made at the time the danger existed,¹⁶⁰ the “rescue” doctrine should, for now, be limited to its facts, and the Quarles exception adopted at the first available opportunity. Jones, however, demonstrates the possible value of exceptions to Article 31(b)—the artificiality of the more strained judicial decisions is no longer necessary.¹⁶¹

¹⁵⁷*Id.* at 967.

¹⁵⁸*Id.*

¹⁵⁹*Id.*

¹⁶⁰*See* New York v. Quarles, 104 S. Ct. 2626, 2632 (1984) (holding that the subjective motives of the questioning police officer will not be examined and that the test will be an objective one to determine whether concern for public safety could reasonably be said to have prompted the questioning).

¹⁶¹19 M.J. at 968 n.13. For examples of the types of creativity spawned by the existing state of the law, *see id.* at 964 (at trial in *Jones*, the military judge ruled that the accused’s act of revealing the location of his victim did not need to be suppressed, because his motive in responding to official questions concerning the victim’s location was either to assist the victim or to lessen his own culpability); United States v. Fountain, 2 M.J. 1202, 1216-17 (N.C.M.R. 1976) (pre-*Duga* conversation between a marine officer and a marine private first class while the latter was holding hostages after having shot a staff sergeant; rights warnings

IV. CONCLUSION

Over the past thirty-five years, the meaning, scope, and effect of Article 31—particularly Article 31(b)—have been shaped by judicial action. At a time when some constitutional protections against self-incrimination may be eroding,¹⁶² Article 31(b) remains a stalwart guarantee in the unique world of the military.¹⁶³ Nevertheless, even the best-intentioned statutory provisions may, in time, require modification, and Article 31 is no exception. By recognizing problem areas affecting Article 31 and reacting to them, the courts, Congress, and the President will be able to maintain the vitality this statutory privilege has in military law.¹⁶⁴

were deemed unnecessary because the officer was not acting "in an official capacity" nor "in a position of authority" over the suspect); *cf.* *United States v. Foley*, 12 M.J. 826, 830-32 (N.M.C.M.R. 1981) (follow-up questions by police to an individual who declared "I just killed a man" held to be proper even without rights warnings because (1) the individual was not a "suspect" at the time, and (2) the questions were motivated by a concern for the possibility that an injured person was alone and helpless). If a Fountain situation arose today and the questioner was, for example, the suspect's battalion commander, difficult issues would be presented—ones which a *Quarles*/"public safety" exception could resolve. See Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 *Calif. L. Rev.* 929, 949 (1965) (discussing the "social cost" of administering rights warnings prior to interrogation that is designed to discover and terminate on-going criminal activity such as kidnapping).

¹⁶²*E.g.*, *Minnesota v. Murphy*, 104 S. Ct. 1136 (1984) (fifth amendment privilege against compelled self-incrimination deemed inapplicable to incriminating statements made by a probationer to his probation officer, who called the probationer to her office to discuss information concerning an earlier rape-murder; ruling discounted facts that this probationer was a "suspect" and that he had a duty to be present and respond truthfully to the questions he was asked).

¹⁶³The uniqueness of military society gave birth to the concept of "military necessity," a matter arising chiefly in the context of search and seizure law. *E.g.*, *United States v. Acosta*, 11 M.J. 307, 313 (C.M.A. 1981); *United States v. Hayes*, 11 M.J. 249, 250-51 (C.M.A. 1981); *United States v. Middleton*, 10 M.J. 123, 126-27 (C.M.A. 1981). "Military necessity" has been discussed in only one published opinion with regard to Article 31, and even then the reference was only in dictum. *United States v. Earle*, 12 M.J. 795, 797-98 (N.M.C.M.R. 1981). With the possible unsettling of previously resolved matters concerning, for example, an order to identify oneself, the judicial use of "military necessity" vis-a-vis the privilege against self-incrimination may become more widespread. See *United States v. Harris*, 19 M.J. 331, 343 n.3 (C.M.A. 1985) (Cox, J., concurring in the result by separate opinion); *cf.* *United States v. Schneider*, 14 M.J. 189, 192-93 (C.M.A. 1982) (obligation to report for purpose of giving information, without consideration of the existence of probable cause to detain, is a valid military duty if properly related to a military mission); *United States v. Lloyd*, 10 M.J. 172, 175 (C.M.A. 1981) (producing one's identification deemed to be an "independent duty to account").

¹⁶⁴See *United States v. Harris*, 19 M.J. 331, 343 n.3 (C.M.A. 1985) (Cox, J., concurring in the result by separate opinion); *United States v. Gibson*, 3 C.M.A. 746, 752, 14 C.M.R. 164, 170 (1954) (exhortation for the courts to limit Article 31 to the scope intended by Congress and not permit a greater extension of this protection "at the expense of substantial justice and on grounds that are fanciful and unsubstantial").

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