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10773 HOUSE JUDICIARY

cessor liability issue, entered judgment in favor of distributor on its third-party claim, and denied successor's motion to substitute distributor's insurers for distributor as real parties in interest. Successor petitioned for review. The Supreme Court, Eastaugh, J., held that: (1) law of Alaska governed issue of liability of rifle manufacturer's successor; (2) genuine issues of material fact existed as to whether successor was liable for injuries caused by rifle; and (3) distributor's insurers were proper parties to prosecute third-party indemnity claim.

Reversed and remanded.

#### 1. Appeal and Error $\S$ 842(1)

The appropriate choice of law is a legal question to which the Supreme Court applies its independent judgment.

#### 2. Appeal and Error $\S$ 842(1)

The Supreme Court answers legal question of first impression by adopting the rule of law that is most persuasive in light of precedent, reason, and policy.

#### 3. Appeal and Error $\S$ 863

The Supreme Court will affirm a grant of summary judgment only if the record presents no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.

#### 4. Appeal and Error $\S$ 893(1), 949

Generally the Supreme Court will review rulings on joinder and ratification for abuse of discretion, but will review de novo the underlying legal questions, such as whether a party is a real party in interest.

#### 5. Action $\S$ 27(1)

In the context of a claim that a defective product has caused personal injury, successor liability is most appropriately characterized as a torts question.

#### 6. Weapons $\S$ 18(1)

Law of Alaska governed issue of liability of rifle manufacturer's successor in products liability action brought by father whose minor son was injured when allegedly defective rifle misfired, where father and son were Alaska residents, rifle was purchased in Alas-

ka, and injury occurred in Alaska, even though successor's purchase of manufacturer's business occurred in Texas.

#### 7. Corporations $\S$ 445.1

Generally, when one corporation sells all its assets to another, the acquiring corporation is not liable for the debts and liabilities of the selling company.

#### 8. Corporations $\S$ 445.1, 590(1)

There are four exceptions to the general rule of non-liability of successor corporations: (1) the purchaser has expressly or implicitly agreed to assume liability; (2) the asset purchase amounts to a consolidation or merger; (3) the purchasing corporation is a "mere continuation" of the selling corporation; or (4) the transfer amounts to little more than a "sham" transaction to avoid liabilities.

#### 9. Corporations $\S$ 445.1

Liability will be imposed on a successor corporation for the debts and liabilities of the selling company under the mere continuation exception where the successor continues to use the seller's name, location, and employees, and there exists a common identity of stockholders and directors.

#### 10. Corporations $\S$ 445.1

The "mere continuation" exception to successor nonliability is available to claimants seeking to impose liability on a successor corporation for defective products manufactured by the predecessor.

#### 11. Corporations $\S$ 445.1

Under the modern "continuity of enterprise" exception to successor nonliability, a successor corporation may be held liable for injuries caused by its predecessor's defective products where the totality of the transaction between the successor and the predecessor demonstrates a basic continuity of the predecessor enterprise.

#### 12. Corporations $\S$ 445.1

Under the modern "continuity of enterprise" exception to successor nonliability, the successor corporation may be held liable even though the sale of assets is for cash and there is no continuity of shareholders.

#### 13. Corporations $\S$ 445.1

The key factors under the "continuity of enterprise" exception are: (1) continuity of key personnel, assets, and business operations; (2) speedy dissolution of the predecessor corporation; (3) assumption by the successor of those predecessor liabilities and obligations necessary for continuation of normal business operations; and (4) continuation of corporate identity.

#### 14. Judgment $\S$ 181(15.1)

Genuine issues of material fact existed as to whether rifle manufacturer's successor was liable for injuries caused by misfire of allegedly defective rifle, precluding summary judgment on third party indemnification claim filed against successor by distributor in connection with underlying products liability action.

#### 15. Evidence $\S$ 244(7)

Statements attributed to successor corporation's chief executive officer that successor corporation held itself out to world as legal successor to rifle manufacturer whose assets it purchased were non-hearsay admissions of party-opponent with respect to third-party indemnity action brought by rifle distributor in connection with underlying products liability action against distributor and manufacturer. Rules of Evid., Rule 801(d)(2).

#### 16. Evidence $\S$ 244(7), 318(1)

To extent journal articles were offered to prove truth of assertion that statements attributed to chief executive officer, that corporation held itself out to world as legal successor to rifle manufacturer, were in fact made by officer, authors of articles were the declarants, and such articles could not qualify as non-hearsay admissions of party-opponent with respect to third-party indemnity action brought by rifle distributor in underlying products liability; if articles were offered for their truth on remand, trial court would have to address author-as-declarant issue. Rules of Evid., Rule 801(d)(2).

#### 17. Indemnity $\S$ 15(2)

Rifle distributor's insurers were proper parties to prosecute third-party indemnity claim brought by distributor against manu-

facturer's successor, where insurers had fully discharged distributor's liability in underlying products liability action. Rules Civ.Proc., Rule 17(a).

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Before MATTHEWS, Chief Justice, EASTAUGH, FABE, BRYNER, and CARPENETI, Justices.

#### OPINION

EASTAUGH, Justice.

#### 1. INTRODUCTION

Can a corporation that purchases assets of the manufacturer of a rifle sold in Alaska be held liable for personal injury caused in Alaska by a defect in the rifle? The superior court held that it could, and we agree. But we reverse and remand for application of the pertinent successor liability doctrines discussed below. We also hold that the indemnity claim brought by the rifle's distributor against the successor corporation must be prosecuted by the insurers which fully discharged the distributor's personal injury liability.

#### II. FACTS AND PROCEEDINGS

The relevant facts are few. Jack Taylor's minor son suffered personal injuries when a defective .22 caliber rifle discharged during target shooting near Nikiski. Savage Industries, Inc. manufactured the rifle, and Western Auto Supply Company, which claimed to have acquired the rifle from the manufacturer, sold it to a retail store in Maine; the rifle was eventually resold to Jack Taylor in Alaska. Taylor sued Savage Industries in 1990 for his son's injuries; in an amended complaint, he also sought recovery from Western Auto.

Western Auto filed a third-party complaint in its name seeking indemnity from Savage

Arms, Inc., which had purchased assets from Savage Industries in 1989. Western Auto settled with the Taylors in May 1995, and its insurers paid the entire settlement amount.

At issue here are three superior court orders. The first held that Alaska law governs the issue of successor liability. The second granted Western Auto summary judgment against Savage Arms, holding Savage Arms liable as "the legal successor to Savage Industries, Inc." The third denied Savage Arms' motion to substitute Western Auto's insurers for Western Auto as the real parties in interest, but required the insurers to ratify the litigation.

The superior court denied Savage Arms' motions for reconsideration. We granted Savage Arms' petitions for review and ordered full briefing. We review the three orders under AS 22.05.010 and Alaska Rule of Appellate Procedure 402.

### III. DISCUSSION

#### A. Standard of Review

[1-3] The appropriate choice of law is a legal question to which we apply our independent judgment.<sup>1</sup> The scope of successor liability in Alaska is a legal question of first impression, which we answer by adopting "the rule of law that is most persuasive in light of precedent, reason, and policy."<sup>2</sup> In applying rules of successor liability to this case, we will affirm Western Auto's summary judgment only if the record presents no genuine issues of material fact and Western

Auto is entitled to judgment as a matter of law.<sup>3</sup>

[4] Although we generally review rulings on joinder and ratification for abuse of discretion,<sup>4</sup> we review *de novo* the underlying legal questions,<sup>5</sup> such as whether a party is a real party in interest under Alaska Civil Rule 17(a).

#### B. Choice of Law

Savage Arms challenges the superior court's ruling that Alaska law governs the issue of successor liability. It argues that Texas law should apply because all transactions relevant to its purchase of Savage Industries' assets occurred in Texas. In Savage Arms' view, the case before the court deals with the transaction between Savage Arms and Savage Industries, and the underlying tort does not bear on the choice of law question.<sup>6</sup>

Western Auto defends the superior court's decision, contending that Alaska law should apply because the underlying injury occurred in Alaska. Western Auto also reasons that successor liability is but an extension of products liability law, which is itself a tort doctrine.

Texas statutory and case law seems to disfavor both traditional and modern doctrines of successor liability,<sup>7</sup> but neither this court nor the Alaska state legislature has resolved the successor liability questions presented in this case.

tion of interspousal tort immunity, even though the auto accident that inspired the tort suit occurred in Canada. *See id.* at 700-01. There, we treated the interspousal immunity question independently of the underlying tort question, and focused on the spousal relationship between the parties to the lawsuit. *See id.* But to apply the *Armstrong* approach here only begs the question of whether successor liability should be treated as wholly independent. *Armstrong* does not control.

7. *See* Tex. Bus. Corp. Act Ann. art. 5.10(B)(2) (Vernon 1997); *Mudrytt v. Passon Mach. Co.*, 709 S.W.2d 755, 758-59 (Tex.App.1986); *see also McKee v. American Transfer & Storage*, 946 F.Supp. 485, 487 (N.D.Tex.1996). *But see* *Western Resources Life Ins. Co. v. Gerhard*, 553 S.W.2d 783, 786 (Tex.Civ.App.1977) (making exceptions for merger, consolidation, and fraud).

We look to the Restatement (Second) of Conflict of Laws for guidance in resolving choice-of-law issues.<sup>8</sup> The Second Restatement requires a separate choice-of-law analysis for each issue presented.<sup>9</sup> We likewise follow this rule of *dépeçage*,<sup>10</sup> and determine the proper choice of law on the issue of successor liability without regard to other issues in the case.

Before we can address which state's law should apply to this issue, we must first determine whether successor liability is better characterized in terms of contract or tort.<sup>11</sup> In one sense, successor liability derives from corporate and contract law, because it may require the interpretation of the contracts that governed the transfer of assets between corporations. But successor liability is also a creature of tort law when it is claimed that the successor is liable because a product defect has caused injury or death.

Other jurisdictions are split as to whether successor liability should be evaluated using the choice-of-law rules governing tort or corporate and contract law. The Fifth Circuit, for example, has held that the law of the

state with the most significant corporate contacts should apply to successor liability questions.<sup>12</sup> The Seventh Circuit held similarly in *Ruiz v. Blenloch Corp.*<sup>13</sup> But several federal district courts have explicitly applied the law of the state with the most significant tort contacts,<sup>14</sup> and state courts have split on the question.<sup>15</sup>

[5] We decline to follow the Fifth and Seventh Circuits, because we believe that when a defective product causes personal injury, successor liability is most appropriately characterized as a torts question. Successor liability is essentially an expansion of products liability law, which derives from tort principles of negligence and strict liability, and rejects contract-derived requirements such as privity. The purpose of the modern strict liability regime "is to insure that the cost of injuries resulting from defective products [is] borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."<sup>16</sup> Treating a successor liability question solely as one of contract law would allow "the party who benefited from

13. 89 F.3d 320, 326 (7th Cir.1994).

14. *See, e.g., Ede v. Mueller Pump Co.*, 652 F.Supp. 656, 658 n.1 (D.Colo.1987), *discovered with on different grounds, Flamm v. Elbow Mfg.*, 867 F.2d 570, 579-80 (10th Cir.1989), *Reed v. Armstrong Cook Co.*, 577 F.Supp. 246, 248 (E.D.Ark.1983), *Kovetz v. Amsted Indus.*, 572 F.Supp. 136, 141-42 (E.D.Mich.1979), *declined to follow on other grounds, Johnson v. Vento Group, Inc.*, 191 F.3d 732, 746 (6th Cir.1999).

15. *See, e.g., In re Acheson Litigation (Bell)*, 517 A.2d 697, 699 (Del.Super.1986) (holding that corporate law should apply because key question was legal effect of contracts between corporations), *American Numismatist, Inc. v. Non Wovens Eng'g. S.R.L.*, 648 So.2d 565, 570 (Ala.1994) (holding that conflict rule for tort cases should apply to corporate successor liability issue). *See also* David W. Pollak, *Successor Liability in Asset Acquisitions*, 1126 PLI/Corp 85, 107-12 (1999) (discussing different jurisdictions' approaches to choice-of-law issues for successor liability claims).

16. *Caterpillar Tractor Co. v. Buck*, 593 P.2d 871, 878 (Alaska 1979) (quoting *Clay v. Fifth Ave. Chrysler Co., Inc.*, 454 P.2d 244, 248 (Alaska 1969)); *see also* *Gorham v. Yuba Power Prods., Inc.*, 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 697, 900-01 (1963).

8. *See, e.g., Palmer G. Lewis Co. v. ARCO Chemical Co.*, 904 P.2d 1221, 1227 (Alaska 1995) ("When choice of law issues arise, we commonly refer to the Restatement (Second) of Conflict of Laws.")

9. *See* Restatement (Second) of Conflict of Laws § 145, cmt. d (1971) ("The courts have long recognized that they are not bound to decide all issues under the local law of a single state."); *Ruiz v. Blenloch Corp.*, 89 F.3d 320, 324 (7th Cir.1996) (holding that under the Second Restatement test, "[a] court therefore conducts a separate choice-of-law analysis for each issue in a case, attempting to determine which state has the most significant contacts with that issue.")

10. *See* Black's Law Dictionary 448 (7th ed.1997) (defining *dépeçage* as "[a] court's application of different state laws to different issues in a legal dispute; choice of law on an issue-by-issue basis"); *see also* Bryan A. Garner, *A Dictionary of Modern Legal Usage* 2666 (2d ed.1995).

11. *See, e.g., Ruiz*, 89 F.3d at 326 ("[T]he courts of several states have struggled to decide whether [successor liability law] is a part of corporate law or tort law.")

12. *See* *Wahb v. Rodgers Mach. Mfg. Co.*, 750 F.2d 368, 374 (5th Cir.1985).

the bargain [to] escape liability even though the party who transferred the benefit would have been liable had not the contract been consummated." 45 Such a result would undermine the principles that govern our products liability law. And although Savage Arms argues that the public policy behind products liability law is of "little interest" here because Western Auto purchased liability insurance that fully protected it, Western Auto's suit does not pursue a commercial cause of action. Because Western Auto's insurers settled the personal injury suit, Western Auto now stands in the tort plaintiff's shoes.

Thus, in context of a claim that a defective product has caused personal injury, we think successor liability is more aptly treated as a matter of tort law.

[6] Having determined that successor liability in a products liability context is best characterized as part of the law of tort, we must now decide which state's laws should apply to the case at hand. The Second Restatement states that "with respect to an issue in tort," courts should look to the local law of the state with the "most significant relationship" to the parties and the occurrence.<sup>16</sup> We conclude that Alaska has the most significant torts contacts with this legal issue. We look in particular to the underlying tort action that gave rise to this litigation. Jack Taylor and his son were both Alaska residents when the accident occurred. Taylor purchased the rifle in Alaska, and the rifle was being used here, where its defect injured his son. The defect that injured Taylor's son potentially endangered any person within a lethal vicinity while the rifle was being used in Alaska. Finally, Jack Taylor litigated his suit against Western Auto in Alaska's state courts. Because the relation-

17. *Korner*, 472 F.Supp. at 141.

18. See Restatement (Second) of Conflict of Laws § 145(1). To determine the place of most significant relationship, we look to:

- the place where the injury occurred,
- the place where the conduct causing the injury occurred,
- the domicil, residence, nationality, place of incorporation and place of business of the parties, and

ship between the tort litigants is centered in Alaska, Alaska law should govern.

We therefore conclude that the superior court did not err by concluding that Alaska law applies to the issue of successor tort liability.

### C. Successor Liability

Savage Arms challenges Western Auto's summary judgment on the issue of successor liability. It argues that it should not be held liable even if Alaska law applies. This argument raises issues of first impression in Alaska.

[7, 8] Generally, when one company sells all its assets to another, the acquiring corporation is not liable for the debts and liabilities of the selling company.<sup>19</sup> Courts have traditionally recognized four exceptions to this rule of non-liability, where (1) the purchaser expressly or implicitly agrees to assume liability, (2) the asset purchase amounts to a consolidation or merger, (3) the purchasing corporation is a "mere continuation" of the selling corporation, or (4) the transfer amounts to little more than a "sham" transaction to avoid liabilities.<sup>20</sup> More recently, some courts have recognized three additional "modern" exceptions to the rule of non-liability: the "continuity of enterprise," "product line," and "duty-to-warn" exceptions.<sup>21</sup>

Western Auto argues that we should adopt any one of three different successor liability doctrines in this case: the traditional "mere continuation" exception and the modern "continuity of enterprise" and "product line" exceptions. We first identify which exceptions are available under Alaska law, and then remand for the factual analysis necessary to ascertain whether successor liability is proper in this case under any of the approved

(d) the place where the relationship, if any, between the parties is centered.

*Id.* § 145(2). We evaluate these factors and contacts in light of their "relative importance" to the particular issues in each case. *Id.*

19. See Pollak, *supra* note 15, at 99; see also Richard A. Epstein, *Torts* 400-02 (1999).

20. See Pollak, *supra* note 15, at 100-03.

21. See *id.* at 103-08.

exceptions. The superior court did not specify which exception justified its imposition of successor liability against Savage Arms.

### 1. The traditional "mere continuation" exception

[9] Courts have traditionally imposed liability on successor corporations where the successor corporation is "merely a continuation" of the selling corporation.<sup>22</sup> The primary elements of the "mere continuation" exception include use by the buyer of the seller's name, location, and employees, and a common identity of stockholders and directors.<sup>23</sup> This well-established exception stems from judicial refusal to honor a transaction which is "little more than a shuffling of corporate forms, lacking any fundamental change with independent significance."<sup>24</sup>

[10] The "mere continuation" exception is available to claimants seeking to impose liability on a successor corporation for products manufactured by a predecessor. Although Savage Arms argues that we should not adopt this exception, we disagree, because this is a well-recognized exception, and we see no reason to reject its application here. We therefore hold that it is available under Alaska law.

### 2. The modern "continuity of enterprise" exception

Western Auto also asks us to adopt the modern "continuity of enterprise" and "prod-

22. See *id.* at 101.

23. See *id.*; see also Phillip I. Blumberg, *The Continuity of the Enterprise Doctrine: Corporate Succession in United States Law*, 10 Fla. J. Int'l L. 365, 371 (1996) ("The doctrine ... is applicable only where the successor has the same stockholders as the predecessor and conducts the same business with the same management, facilities, employees, products, and trade names").

24. Blumberg, *supra* note 23, at 371.

25. Under the "product line" exception, a successor will be liable if it acquires substantially all of the predecessor's assets and undertakes essentially the same manufacturing operation of the same or similar products. See *Ray v. Alud Corp.*, 19 Cal.3d 22, 136 Cal.Rptr. 574, 580 P.2d 3, 3-11 (1977); 63 Am.Jur.2d *Products Liability* § 133 (1997); Pollak, *supra* note 15, at 104-16. Be-

net line" exceptions. We conclude that the facts in this case are ill-suited to the "product line" exception, and we therefore decline to consider it at this time.<sup>25</sup> We do, however, adopt the "continuity of enterprise" exception, for the reasons explained below.

[11, 12] The "continuity of enterprise" exception is an outgrowth of the traditional "mere continuation" theory of liability.<sup>26</sup> Under this exception, a successor corporation may be held liable for injuries caused by its predecessor's products where the totality of the transaction between the successor and the predecessor demonstrates a basic continuity of the predecessor enterprise.<sup>27</sup> The successor may be held liable even though the sale of assets is for cash and there is no continuity of shareholders.<sup>28</sup>

[13] Thus, whereas the traditional "mere continuation" exception depends on the existence of identical shareholders, the "continuity of enterprise" looks beyond that formal requirement and considers the substance of the underlying transaction.<sup>29</sup> The key factors under the "continuity of enterprise" exception, first articulated in *Turner v. Bituminous Casualty Co.*,<sup>30</sup> are: (1) continuity of key personnel, assets, and business operations; (2) specific dissolution of the predecessor corporation; (3) assumption by the successor of those predecessor liabilities and obligations necessary for continuation of normal business operations; and (4) continuation

cause the facts in this case seem ill-suited to this exception, we decline to evaluate the wisdom of adopting the "product line" theory at this time. Our decision today does not preclude further consideration of this exception in an appropriate case.

26. See Richard L. Cupp, Jr., *Redesigning Successor Liability*, 1999 U. Ill. L. Rev. 845, 846 & n. 16 (1999).

27. See 63 Am.Jur.2d *Products Liability* § 129.

28. See *Turner v. Bituminous Cas. Co.*, 397 Mich. 406, 244 N.W.2d 673, 883-84 (1976); Cupp, *supra* note 26, at 848-49.

29. See 63 Am.Jur.2d *Products Liability* § 130.

30. 397 Mich. 406, 244 N.W.2d 673 (1976). Be-

of corporate identity.<sup>31</sup> This is a limited exception that looks past the identity of shareholders and directors, and focuses on whether the business itself has been transferred as an ongoing concern.

Only a minority of courts have thus far adopted the "continuity of enterprise" exception.<sup>32</sup> And the American Law Institute recently declined to adopt both this exception and the "product line" exception for the Restatement (Third) of Torts.<sup>33</sup> The Third Restatement's commentary indicates that the vast majority of courts considering these modern exceptions have rejected them.<sup>34</sup> Although there is some dispute about exactly how many jurisdictions have decided the issue,<sup>35</sup> it is clear that a majority of jurisdictions have not adopted the "continuity of enterprise" exception.

Critics of the modern exceptions (such as "continuity of enterprise") argue primarily that expanding liability harms the overall economy by making it more difficult for companies to reorganize or sell their assets without destroying the value of the ongoing business enterprise.<sup>36</sup> For example, they assert that a buyer interested in purchasing substantially all of the assets of a corporation will, in some cases, decline to make the purchase if it will be forced to assume liability for past product defects as well. As a result,

some corporations will be unable to find purchasers, and will instead be forced to sell off the corporate assets on a piecemeal basis, squandering any accumulated goodwill.<sup>37</sup> Such a piecemeal sale would give a corporation certain economic advantages: the seller's shareholders would be able to receive full value for the remaining assets, and successor liability would not flow to the purchasers under any of the traditional or modern theories.<sup>38</sup> But a piecemeal sale would cause an ongoing business to be lost to society, and potential claimants would be no better off.

This argument, although compelling in theory, seems to paint an incomplete picture of the economic realities. If successor liability is expanded to include the "continuity of enterprise" exception, some companies indeed might be unable to find buyers for their ongoing businesses. But we have not been referred to any evidence that adopting this modern "continuity of enterprise" exception for the marginally more popular "product line" exception has in fact increased the number of corporate liquidations or piecemeal breakups, or that rejecting the modern exceptions has in fact decreased liquidations or piecemeal sales.<sup>39</sup> And our research has not disclosed studies that have so concluded.

We also note that permitting successor liability under the "continuity of enterprise"

lessor Copp states that courts interpreting the law of Mississippi, Ohio, and South Carolina have also recognized and adopted the "continuity of enterprise" exception. See Copp, *supra* note 26, at 854 n. 44.

36. See Restatement (Third) of Torts: Products Liability § 12 cmt. b, at 211; Epstein, *supra* note 19, at 400-01; Michael D. Green, *Fairness and Successor Liability: The Limits of the Common Law Process*, 8 Kan. J.L. & Pub. Pol'y. 119, 121 (1998).

37. See Epstein, *supra* note 19, at 401; Restatement (Third) of Torts: Products Liability § 12 cmt. b, at 211.

38. See Epstein, *supra* note 19, at 401-02; Restatement (Third) of Torts: Products Liability § 12 cmt. b, at 211.

39. See, e.g., Restatement (Third) of Torts: Products Liability § 12 cmt. b at 211 & Reporters' Note at 215-21; Epstein, *supra* note 19, at 400-02; Green, *supra* note 36, at 121.

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exception will not discourage large-scale transfers so long as anticipated successor liabilities do not exceed the value of the corporation's accumulated goodwill. Presumably, many corporations will continue to engage in efficient and productive transfers, with the purchasing firm merely factoring into the purchase price the cost of those successor liabilities.<sup>40</sup> When firms contract for an asset transfer where the basic enterprise is to be continued, they negotiate to a price that reflects the fair market value of the transfer, taking heed of the risk of future claims.<sup>41</sup> The purchasing firm will value any potential successor liability claims at least at the incremental cost of obtaining insurance coverage against successor liability for them.<sup>42</sup> Where that insurance is too expensive or is unavailable, negotiations could collapse, and the firm will either continue to exist (and be subject to liability claims) or liquidate (and future victims will receive no recovery). But in many cases, we would expect selling and purchasing firms simply to negotiate to a rational price that takes account of these potential claims. The posited negative effects on the overall economy are too indeterminate and speculative to outweigh the policy of compensating persons injured by product defects.<sup>43</sup>

The same reasoning applies to the Restatement authors' concerns regarding potential "windfalls."<sup>44</sup> In many cases, a predecessor manufacturing company will be purchased by a larger, more financially-sound corporation. The rule we adopt here does not limit injured plaintiffs' recovery to the value of the assets

purchased by the successor corporation, so there could conceivably be situations in which product defect victims would receive a larger recovery than they conceivably could have received had the predecessor company remained an ongoing concern, and been bankrupted by the total claims. The Restatement authors view the added recovery potential as an "injustice" to the successor corporation.<sup>45</sup> But we think the Restatement analysis defeats the assumptions behind tort law. We assume that meritorious claims will be paid; that they are sometimes not paid due to insolvency does not change that underlying assumption. To characterize as a "windfall" full recovery for losses caused by product defects unjustly challenges the legitimacy of the injuries suffered. And once again, purchasing corporations can attempt to account for this risk of loss in the purchase price.

The other objections to expanded successor liability rules are also not dispositive. Successor liability potentially conflicts with maximizing the value received for bankrupt estates.<sup>46</sup> But we see no persuasive reason to favor corporate creditors over claimants later injured by the seller corporation's products.<sup>47</sup> Also, some courts have argued that the modern exceptions impose liability on entities having no causal relationship with the harm.<sup>48</sup> But basic to the "continuity of enterprise" exception is the preservation of a substantial portion of the goodwill of the predecessor corporation; the successor is fundamentally the same enterprise as the predecessor. When a firm negotiates to purchase another corporation, keeping the

40. See Copp, *supra* note 26, at 861-77.

41. See Michael D. Green, *Successor Liability: the Superiority of Statutory Reform to Protect Product Liability Claimants*, 72 Cornell L.Rev. 17, 40 (1986).

42. See *id.* at 40; Copp, *supra* note 26, at 862 n. 90.

43. See Epstein, *supra* note 19, at 402 (explaining that corporations are learning to navigate modern successor liability rules).

44. See Restatement (Third) of Torts: Products Liability § 12 cmt. b, at 210-11.

45. *Id.* at 210.

46. See Michelle M. Morgan, *The Denial of Future Tort Claims in In Re Piper Aircraft: Will the Court's Quick-Fix Solution Keep the Debris Flying High or Bring it Crashing Down?*, 27 Loy. U. Chi. L.J. 27, 36-37 (1995).

47. Nonetheless, federal bankruptcy law may govern whether potential claims for injuries not yet incurred may be discharged in a bankruptcy proceeding. In this case, the First Circuit has ruled that there is no discharge of Western Auto's claims. See *infra* note 56.

48. See, e.g., *Polaris v. Clark Equip. Co.*, 802 F.2d 75, 82-83 (3d Cir. 1986); *Johnston v. Amsted Indus., Inc.*, 830 P.2d 1141, 1144 (Colo.App. 1992); see also Restatement (Third) of Torts: Products Liability § 12 cmt. b, at 210.

31. See *id.* at 883-84; see also Pollak, *supra* note 15, at 103; 63 Am.Jur.2d *Products Liability* § 132.

32. See Restatement (Third) of Torts: Products Liability § 12, Reporters' Note at 215-19 (1998).

33. See *id.* § 12 cmt. b at 210 & Reporters' Note at 215-19.

34. See *id.* § 12, Reporters' Note at 217-18. The Restatement identifies only three states where courts have adopted the "continuity of enterprise" exception: Alabama, Michigan, and New Hampshire. See *id.* at 219.

35. The Third Restatement lists twenty-two states in which state courts (or federal courts applying state law) have rejected both the "continuity of enterprise" and "product line" exceptions. See *id.* § 12, Reporters' Note at 217-18. But one commentator estimates that only eighteen jurisdictions as of mid-1998 had actually rejected the modern exceptions, when considering those states whose highest courts had yet to rule on the issue. See Copp, *supra* note 26, at 852-54. Pro-

"enterprise" intact, it must anticipate any potential successor liabilities and negotiate an appropriate price. To permit the successor, which presumably negotiated a discount for potential successor liabilities when dickering over the purchase price, to avoid liability based on lack of causation would give the successor an unwarranted windfall.

Finally, this new rule will also have the effect of encouraging existing corporations to produce safer products, in keeping with the public policy goals that underlie product liability law generally.<sup>49</sup> Corporations are currently motivated to correct defects to reduce their own exposure to liability, but the traditional successor liability regime undermines that incentive by giving the manufacturing corporation another option: offering itself for sale to a new investor. Without successor liability, the original shareholders can receive full compensation for the current value of the firm, without sharing the burden caused by any defective products manufactured before the sale. The rule we announce today will give manufacturing corporations additional incentives to market non-defective products, in order to maximize the corporations' market value in event of sale.<sup>50</sup>

Some commentators,<sup>51</sup> including the Restatement authors,<sup>52</sup> reason that legislatures are better situated than courts to define the parameters of successor liability. But we think this is an appropriate subject for judicial decision because it is directly related to products liability law, a doctrinal road long traveled by courts.<sup>53</sup> For example, the four traditional exceptions were created by the courts.<sup>54</sup> There is also some suggestion that

legislation in other states has failed to address these problems.<sup>55</sup> We see no reason to await legislation before addressing this issue.

We therefore adopt the "continuity of enterprise" exception to the general rule of nonliability for corporate successors.

### 3. Propriety of the summary judgment order

[14] Although we here approve the "mere continuation" and "continuity of enterprise" exceptions, it is nonetheless necessary to reverse Western Auto's summary judgment order for two reasons. First, material factual disputes remain unresolved. Many key facts are uncontested, but certain important facts (such as the percentage of stock former shareholders in Savage Industries own in Savage Arms) are not established by the record. Second, the uncertainty regarding the proper legal standard governing successor liability appears to have prevented the parties from developing the record to address the applicable legal tests. We consequently remand for consideration of the "mere continuation" and "continuity of enterprise" exceptions in the context of this case.

We also note that Savage Arms is not shielded from liability by the fact that it purchased Savage Industries' assets through a bankruptcy proceeding. The First Circuit ruled in a related aspect of this case<sup>56</sup> that Western Auto and Taylor were not "afforded appropriate notice of the material terms of the all-asset transfer, nor of the chapter 11 plan" and therefore that the parties to the transfer, Savage Industries and Savage

Arms, "are not entitled to rely on the protective jurisdiction of the bankruptcy court."<sup>57</sup> The failure to give proper notice and to seek approval of the plan from the bankruptcy court "precluded a legitimate basis for joining the Alaska state court action."<sup>58</sup>

### D. Journal Articles as Inadmissible Hearsay

[15, 16] Savage Arms argues that the superior court abused its discretion by considering journal articles Western Auto submitted in support of its summary judgment motion. These articles included statements attributed to Savage Arms' chief executive officer supporting Western Auto's argument that Savage Arms holds itself out to the world as the legal successor to Savage Industries. Savage Arms asserts that the articles contain multiple levels of hearsay. Since we remand for other reasons, it is unnecessary to discuss this issue at length. But we address it briefly here because it may recur on remand. For purposes of our discussion, we assume that the CEO uttered the statements attributed to him.

In effect, the statements were uttered at least twice, first by Savage Arms' CEO and ultimately by the articles' authors upon publication. When the statements were first uttered, the declarant was Savage Arms' CEO and the statements were not hearsay, because they were admissions by a party-opponent.<sup>59</sup> But when the articles were offered to prove the truth of their assertions—that the CEO had made the statements the articles attributed to him—their authors became the declarants whose out-of-court statements were being offered into evidence. If the articles were offered for their truth, they normally would have been inadmissible hearsay.<sup>60</sup> The superior court rejected Savage

Arms' hearsay objection, but so far as we can tell from the record, did not address the author-as-declarant issue. Whether it must do so on remand depends on whether the articles are offered for the truth of the matters they assert.

### E. Real Parties in Interest

[17] Western Auto's liability insurers, Allstate Insurance Company and Certain Underwriters at Lloyd's of London (Underwriters), fully paid the expenses of defending and settling the Taylor lawsuit against Western Auto. Savage Arms moved to substitute the insurers as the plaintiffs in Western Auto's indemnity action. Savage Arms claimed that the insurers were the only real plaintiffs in interest under Alaska Civil Rule 17(a).<sup>61</sup> The superior court denied the motion, but at Western Auto's suggestion allowed the insurers to ratify the action or be subject to substitution.

We agree with Savage Arms that it was error not to substitute Western Auto's insurers as the real parties in interest. Western Auto admits that Allstate and the Underwriters are its fully subrogated insurers. Western Auto has identified no possible remaining interest it has in the indemnity claim. The superior court reasoned that Western Auto had an interest in the claim that was "difficult to define," and that joinder of the insurers might present an inaccurate picture to the jury. The court did not explain what Western Auto's interest was.

Although we have not previously addressed the proper procedural treatment of fully subrogated insurers, we held in *Municipality of Anchorage v. Rough Construction & Engineering Co.*<sup>62</sup> that ratification by partially subrogated insurers is an acceptable

whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought. . . . [R]atification, joinder, or substitution [of the real party in interest] shall have the same effect as if the action had been commenced in the name of the real party in interest.

57. *Id.*

58. *Id.* at 722.

59. See Alaska R. Evid. 801(d)(2) (defining statements by party opponents as non-hearsay).

60. Alaska R. Evid. 802.

61. Alaska Civil Rule 17(a) provides in relevant part:

Every action shall be prosecuted in the name of the real party in interest. . . . [A] party with

62. 722 P.2d 919 (Alaska 1986).

49. See Cupp, *supra* note 26, at 860-63 (arguing that greater successor liability will channel responsibility back to original product manufacturer).

50. See *id.* This incentive holds true until the firm knows that its liabilities will outstrip any goodwill available to be sold. But companies in that position would not be relevant to this successor liability issue, because no buyer would pay for an ongoing concern valued at less than its assets.

51. See, e.g., Green, *supra* note 41.

52. See Restatement (Third) of Torts, Products Liability § 12, Reporters' Note at 216-17.

53. See Cupp, *supra* note 26, at 877-79.

54. See Cupp, *supra* note 26, at 878.

55. See Cupp, *supra* note 26, at 879-83.

56. In April 1992 Western Auto filed a third-party complaint against Savage Arms for indemnification or apportionment of damages. Savage Arms contended that Western Auto's claims were barred by the terms of Savage Industries' bankruptcy. The First Circuit Court of Appeals ultimately resolved the issue in Western Auto's favor in December 1994. See *Western Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.)*, 43 F.3d 714, 723 (1st Cir. 1994).

substitute for joinder.<sup>63</sup> We there reasoned that Rule 17(a) did not require joinder of a partially subrogated insurer because ratification satisfied the policy concerns underlying that rule.<sup>64</sup> We explained that ratification is generally adequate in cases involving partially subrogated insurers because it protects against multiple lawsuits, ensures that the interested party makes a formal appearance in court, ensures that the party is subject to any court orders concerning discovery or attorney's fees, and assures that all interested parties bear the burdens of claims litigated on their behalf.<sup>65</sup> Implicitly acknowledging the key distinction between partially and fully subrogated insurers, we noted that the insured party was not a sham plaintiff because its claim had not been paid in full by the insurer:

We further note that [the insurer's] absence as a named party in this case does not mean that the action would be prosecuted by a sham plaintiff. The municipality was a real party in interest as the amount of its claim had not been paid in full by [the insurer].<sup>66</sup>

This language implies that where, as here, the insurer has paid the full amount, the insured would be a sham plaintiff.

We have relied before on a Montana Supreme Court case, *State ex rel. Naud's T.V. & Appliance Inc. v. District Court*,<sup>67</sup> in determining the proper procedural treatment of insurers.<sup>68</sup> The plaintiffs in *Naud's T.V.* had received varying levels of compensation from their partly and fully subrogated insurers.<sup>69</sup> Although the court held that partially subrogated insurers could opt for ratification rather than substitution or joinder, it effectively upheld a lower court's ruling requiring substitution of fully subrogated insurers.<sup>70</sup>

Critical commentary bears out the significance of this distinction:

63. See *id.* at 926.

64. See *id.* at 925-26.

65. See *id.*

66. *Id.* at 926.

67. 168 Mont. 456, 543 P.2d 1336 (1975).

68. See *Raugh*, 722 P.2d at 926.

The general rule in the federal courts is that if the insurer has paid the entire claim, it is the real party in interest and must sue in its own name. If no money or enforceable promise to pay money has been advanced, then there has not been any subrogation and the insured remains the real party in interest. This seems sound since it is logical that an insured who has no interest in the outcome of the litigation may not bring suit.<sup>71</sup>

We find this reasoning persuasive, and conclude that it was error not to require the insurers to substitute for their insured.

#### IV. CONCLUSION

We REVERSE the order denying Savage Arms' motion to require Western Auto's insurers to substitute for Western Auto, VACATE the orders imposing successor liability on Savage Arms, and REMAND for application of the doctrines adopted today and for further proceedings.



Sally K. SLOANE, Appellant,

v.

George R. SLOANE, Appellee.

No. S-9195.

Supreme Court of Alaska.

March 2, 2001.

Rehearing Denied April 4, 2001.

Divorce judgment was entered by the Superior Court, Third Judicial District, An-

69. See *Naud's T.V.*, 543 P.2d at 1337.

70. See *id.* at 1338-39.

71. 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1546, at 355-56 (2d ed 1990) (footnotes omitted).

chorage, Eric T. Sanders, J., and wife appealed. The Supreme Court, Carpeneti, J., held that: (1) record supported finding that \$25,000 note that husband received from parties' son in connection with his purchase of parties' business was worth \$10; (2) record supported assignment of 57% of marital property to wife; (3) wife was not entitled to have husband pay her future medical costs; (4) wife was not entitled to bifurcation of legal divorce; (5) wife was not entitled to travel and living expenses incurred by attending trial in Alaska; and (6) attorney fee award to wife of \$3,186 was sufficient.

Affirmed.

#### 1. Divorce ⇨252.1

The trial court has broad discretion in fashioning property divisions in divorce actions. AS 25.24.160(a)(4).

#### 2. Divorce ⇨286(8)

The valuation of marital property is a factual determination which will not be set aside on appeal unless it is clearly erroneous. AS 25.24.160(a)(4).

#### 3. Divorce ⇨286(8)

A valuation of marital property is clearly erroneous and should be set aside if the reviewing court is left with a definite and firm conviction on the entire record that a mistake has been made. AS 25.24.160(a)(4).

#### 4. Divorce ⇨286(5)

The superior court's equitable distribution of property is reviewable under the abuse of discretion standard, and will not be disturbed on appeal unless it is clearly unjust. AS 25.24.160(a)(4).

#### 5. Divorce ⇨223, 286(4)

The award of attorney's fees in divorce actions is within the broad discretion of the trial court, and the court's decision in that regard will not be reversed unless it is arbitrary, capricious, or manifestly unreasonable.

#### 6. Divorce ⇨253(3)

Record in divorce case supported finding that, for equitable distribution purposes, \$25,000 note that husband received from parties' son in connection with his purchase of

parties' business was worth \$10; husband signed sale agreement under time constraints on terms determined unilaterally by wife's attorney, and wife presented no evidence to refute husband's claim that business would not have sufficient funds to repay note. AS 25.24.160(a)(4).

#### 7. Divorce ⇨253(2)

Record in divorce case supported assignment of 57% of marital property to wife, despite her claim that trial court did not sufficiently consider wife's age, i.e., 60; court did not find wife's age to be important because husband was of comparable age and both were approaching retirement. AS 25.24.160(a)(4).

#### 8. Divorce ⇨282, 283

Wife waived appellate of her claim that, in awarding wife only 57% of marital estate, trial court did not consider wife's station in life during marriage; wife neither raised that issue before superior court nor presented evidence or argument in her briefs that would have made her station in life relevant to property distribution. AS 25.24.160(a)(4).

#### 9. Divorce ⇨253(2)

Record did not support claim that, in awarding wife only 57% of marital estate, trial court did not consider wife's health; court simply was not convinced that wife needed any surgeries that she alleged, court also commented that wife's treatment might have been overly expensive, and court concluded that wife's health concerns were not so serious as to prevent her from continuing to work in future. AS 25.24.160(a)(4).

#### 10. Divorce ⇨286(9)

Even if trial court incorrectly concluded in divorce case that wife was capable of being gainfully employed, any such error was harmless with respect to marital property division, as court valued wife's future earnings at zero. AS 25.24.160(a)(4).

#### 11. Divorce ⇨239

Record in divorce case supported trial court's refusal to require husband to pay wife's future medical costs; superior court found that because wife received in excess of 50% of marital estate and because she was

# Alaska Supreme Court rewrites liability law?

By Jim DeWitt and Aisha Tucker Bray

**O**n June 30, 2000, the Alaska Supreme Court significantly re-wrote the law of products liability as it affects a business that purchases the assets, but not the liabilities, of another. A business that purchases assets as an ongoing concern will be liable for the product liability claims of its seller, despite what the purchase documents may say.

In *Savage Arms, Inc. v. Western Auto Supply Co.*, Opinion No. 5293, (June 30, 2000) a minor was injured by an allegedly defective .22 rifle manufactured by Savage Industries, Inc. Savage Industries, Inc. sold its assets to Savage Arms, Inc. in 1990, apparently after the rifle in dispute had been manufactured. The court acknowledged that "[g]enerally, when one company sells all its assets to another, the acquiring corporation is not liable for the debts and liabilities of the selling company," subject to four exceptions not relevant to the case. *Savage Arms*, No. 5293, slip op. at 9.

But the court elected to follow a minority rule, a rule that was rejected by the American Law Institute's Restatement (Third) of Torts and the majority of courts to consider it, that greatly expands the liability of a purchaser for the torts of the seller. *Id.* at 13. The court articulated a new "continuity of enterprise" theory as looking beyond the formal requirement of identical shareholders and considering the substance of the underlying transaction. *Id.* at 12.

The key factors under the "continuity of enterprise" exception, first articulated in *Turner v. Bituminous Casualty Co.*, [244 N.W.2d 873 (Mich. 1976)] are: (1) continuity of key personnel, as-

on whether the business itself has been transferred as an ongoing concern.

*Id.* at 12 (internal footnotes omitted).

Critics may argue that the court would be better off leaving significant expansions of product liability to the Legislature,<sup>1</sup> but this article focuses instead on what appears to be a seriously flawed analysis of the benefits and detriments of adopting such an expansion.

The flaw is this: each of the rationales advanced by the court for adopting the "continuity of enterprise" standard logically argues only for prospective application, yet the court gives this new policy retroactive application.

The court first notes that the "continuity of enterprise" rationale has been criticized for its impact on the value of businesses which, for one reason or another, are attempting to sell the business as a whole or in substantial parts.

Critics of the modern exceptions (such as "continuity of enterprise") argue primarily that expanding liability harms the overall economy by making it more difficult for companies to reorganize or sell their assets without destroying the value of the ongoing business enterprise.

*Id.* at 14. The court's treatment of this concern is less than complete:

But we have not been referred to any evidence that adopting this modern "continuity of enterprise" exception (or the marginally more popular "product line" exception) has in fact increased the number of corporate liquidations or piecemeal breakups, or that rejecting the modern exceptions has in fact decreased liquidations or piecemeal sales. And our research has not disclosed studies

is surprising, however, and could be criticized as conclusive.

The court next looks to the economic effects of imposing the "continuity of enterprise" rule:

We also note that permitting successor liability under the "continuity of enterprise" exception will not discourage large-scale transfers so long as anticipated successor liabilities do not exceed the value of the corporation's accumulated goodwill. Presumably, many corporations will continue to engage in efficient and productive transfers, with the purchasing firm merely factoring into the purchase price the cost of those successor liabilities.

*Id.* at 15. The court's reasoning here is sound, but only provided the rule is given prospective and not retrospective application.

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The flaw is this: each of the rationales advanced by the court for adopting the "continuity of enterprise" standard logically argues only for prospective application.

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In fact, negotiations for the sale of assets can and usually do take the risk of liability into account. But for sales that were conducted under the old rule, negotiations are no longer possible, and the purchasers in those transactions will now find themselves saddled with a class of risks they did not assume. Indeed, in many cases, the sales would have been "asset sales" only, without liabilities - including contingent product liability claims - intentionally leaving the risk of such claims on the seller. For the court to simply state "we would ex-

for this risk of loss in the purchase price," is meaningless as to consummated transactions. *Id.* at 17.

The court acknowledges that this new rule will create complications in bankruptcy, where the goal is to maximize the value of assets for the creditors. *Id.* at 17. While the court is being a little presumptive in concluding federal law won't sell assets free and clear of all claims, including unknown tort claims, 11 U.S.C. § 365, the court's treatment of the issue borders on flippant.

But we see no persuasive reason to favor corporate creditors over claimants later injured by the seller corporation's products.

*Id.* at 17. It does not seem to occur to the court that the "creditors" in bankruptcy can include tort claimants. In effect, the court proposes to diminish the bankruptcy recovery of known claimants for the benefit of potential future tort claimants. And, again, it is impossible to find justification for retrospective application in the court's arguments.

The court acknowledges that there may not be a causal relationship between the harm created and the purchaser, but argues that the "goodwill" it believes is inherent in an asset purchase justifies holding the purchaser liable. *Id.* at 17-18. It is in that context that the court comes closest to recognizing the retrospection problem:

When a firm negotiates to purchase another corporation, keeping the "enterprise" intact, it must anticipate any potential successor liabilities and negotiate an appropriate price. To permit the successor, which presumably negotiated a discount for potential successor liabilities when dickering over the purchase price, to avoid liability based on lack of

Institute's Restatement (Third) of Torts and the majority of courts to consider it, that greatly expands the liability of a purchaser for the torts of the seller. Id. at 13. The court articulated a new "continuity of enterprise" theory as looking beyond the formal requirement of identical shareholders and considering the substance of the underlying transaction. Id. at 12.

The key factors under the "continuity of enterprise" exception, first articulated in *Turner v. Bituminous Casualty Co.*, 1244 N.W.2d 873 (Mich. 1976) are: (1) continuity of key personnel, assets, and business operations; (2) speedy dissolution of the predecessor corporation; (3) assumption by the successor of those predecessor liabilities and obligations necessary for continuation of normal business operations; and (4) continuation of corporate identity. This is a limited exception that looks past the identity of shareholders and directors, and focuses

destroying the value of the ongoing business enterprise.

Id. at 14. The court's treatment of this concern is less than complete:

But we have not been referred to any evidence that adopting this modern "continuity of enterprise" exception (or the marginally more popular "product line" exception) has in fact increased the number of corporate liquidations or piecemeal breakups, or that rejecting the modern exceptions has in fact decreased liquidations or piecemeal sales. And our research has not disclosed studies that have so concluded.

Id. at 14-15 (internal footnote omitted). As the court acknowledged earlier, this doctrine has been recognized in only a few states, and only relatively recently. Id. at 13. It's hardly surprising that the court has not been able to find studies demonstrating its economic effects. For the court to rely upon the absence of data

appreciated.

In fact, negotiations for the sale of assets can and usually do take the risk of liability into account. But for sales that were conducted under the old rule, negotiations are no longer possible, and the purchasers in those transactions will now find themselves saddled with a class of risks they did not assume. Indeed, in many cases, the sales would have been "asset sales" only, without liabilities - including contingent product liability claims - intentionally leaving the risk of such claims on the seller. For the court to simply state, "we would expect selling and purchasing firms simply to negotiate to a rational price that takes account of these potential claims" begs the question of how that is to be accomplished in a completed transaction. Id. at 16.

Put another way, a purchaser of assets that consist of a line of manufacturing or perhaps an entire company has presumably paid fair market value for those assets. The court in *Savage Arms* has changed the definition of "assets" to include a large class of "liabilities." As a result, the true fair market value of the "assets" necessarily changes. If the seller has subsequently distributed its assets to its shareholders, as is its right, and has subsequently dissolved itself, as is also its right, the purchaser has been deprived of the benefit of its bargain, and has no meaningful recourse.

If a purchaser is larger and wealthier than a seller, then the "pocket is deeper" for a tort plaintiff under the court's new rule. The court concludes that is only fair. Id. at 16-17. Without going into the justice of the situation, or whether or not this results in a "windfall" to a tort plaintiff, by giving this new rule retroactive application the new rule is made patently unfair. A large tort claim, unknown and perhaps unknowable to the purchaser, will simply deprive the purchaser of its bargain. The court's offhand comment in this regard, that "once again, purchasing corporations can attempt to account

will" it believes is inherent in an asset purchase justifies holding the purchaser liable. Id. at 17-18. It is in that context that the court comes closest to recognizing the retrospective problem:

When a firm negotiates to purchase another corporation, keeping the "enterprise" intact, it must anticipate any potential successor liabilities and negotiate an appropriate price. To permit the successor, which presumably negotiated a discount for potential successor liabilities when dickering over the purchase price, to avoid liability based on lack of causation would give the successor an unwarranted windfall.

Id. at 18. The verb tenses are instructive: "must" and "would give;" again the court's justification speak to prospective application yet *Savage Arms* involves retrospective application.

Finally, the court concludes that the new doctrine will encourage the traditional purposes of products liability law: it will encourage manufacturers to create safer, defect-free products to maximize their business value for the future. Id. But in the cases of completed sales, the policy is preposterous.

For businesses that have already made asset purchases, the only option now is to purchase insurance or other suitable risk management solutions to take into account the new classes of claims that the court has created.<sup>1</sup> Those insurance premiums and similar costs are an unfair, unreasonable burden, but unless the court recognizes that its reasoning only justifies prospective and not retroactive application, the alternatives are even worse.

<sup>1</sup> An argument rejected by the court. "The cause [successor liability] is directly related to products liability law, a doctrinal road long traveled by courts." *Savage Arms*, No. 8203, at 19.

<sup>2</sup> While the decision is limited to products liability, long-time observers of the court might anticipate the sale being given credit to cover vice as well as products, and since kinds of claims besides torts.

LEXSTAT Torts Third Products Liab. 12

Restatement of the Law, Third, Torts: Products Liability

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Case Citations

Chapter 3 - Liability of Successors and Apparent Manufacturers

Restat 3d of Torts: Products Liability, § 12

**§ 12 Liability of Successor for Harm Caused by Defective Products Sold Commercially by Predecessor**

A successor corporation or other business entity that acquires assets of a predecessor corporation or other business entity is subject to liability for harm to persons or property caused by a defective product sold or otherwise distributed commercially by the predecessor if the acquisition:

- (a) is accompanied by an agreement for the successor to assume such liability; or
- (b) results from a fraudulent conveyance to escape liability for the debts or liabilities of the predecessor; or
- (c) constitutes a consolidation or merger with the predecessor; or
- (d) results in the successor becoming a continuation of the predecessor.

**COMMENTS & ILLUSTRATIONS:** Comment:

a. History. The rule that a corporation or other business entity is not, in the absence of the circumstances described in Subsections (a) through (d), subject to liability for harm caused by defective products sold by a corporation from which it purchases productive assets derives from both products liability and corporate law principles. When the alleged successor purchases the assets piecemeal with little or no further continuity of operations between the two corporations or other business entities, the nonliability of the alleged successor derives primarily from the fact that the successor is not within the basic liability rule in § 1 of this Restatement: "one . . . who sells or distributes a defective product is subject to liability for harm . . . caused by the defective product."@ (Emphasis added.)@ Thus, when one corporation commercially sells products, some of which are defective, and later transfers its productive assets to another corporation that uses those assets to manufacture products of its own, the purchaser of the assets is not liable for harm caused by a defective product sold earlier by the transferor because the transferee did not "sell or distribute" the defective product that caused the harm. When the alleged successor receives value in the form of the transferor's goodwill and continues to manufacture products of the same sort as manufactured earlier by the predecessor, and thus to some extent constitutes a continuation of the predecessor, the general rule of nonliability derives primarily from the law governing corporations, which favors the free alienability of corporate assets and limits shareholders' exposures to liability in order to facilitate the formation and investment of capital.

When the transferor goes out of business upon, or shortly after, a transfer of productive assets, the rights of plaintiffs injured by defective products sold earlier by the transferor may be adversely affected. For tort plaintiffs who have existing judgments outstanding against the predecessor at the time of transfer and dissolution, the law governing corporations and other business entities provides, within limits, legal protection. Creditors, including tort creditors, who hold existing judgments against a corporation that is in the process of transferring its assets and going out of business may satisfy those claims out of the proceeds from the transfer of assets. Moreover, if the proceeds from the transfer of assets are distributed to shareholders of the transferor corporation in violation of applicable state corporation law or fraudulent transfer law, existing creditors of the corporation may pursue the proceeds in the hands of the transferor's shareholders. These rules, in some states expressed in statutes, are designed to protect, within the limits of practicality, creditors who are identifiable at the time of the transfer of the predecessor's assets to the successor corporation and the

transferor's dissolution. The same principles have been applied to the transfer of assets of proprietorships, partnerships, and other business entities.

Tort claimants who, as a result of defective products sold by a predecessor corporation, seek recovery only after transfer of assets to a successor corporation often face difficulties in attempting to bring their claims within the foregoing legal rules. Their claims typically accrue after the predecessor corporation has lawfully distributed to its shareholders the proceeds from the transfer of assets and has ceased to exist. Under these circumstances, tort claimants who were not existing creditors at the time of the transfer of assets ordinarily have no recourse against the predecessor's shareholders. Unless they can pursue their claims against the successor corporation, or can reach other funds provided by existing insurance or by a statute, their only practical remedy lies with retailers and wholesalers in the predecessor's distributive chain, who may not be available as a practical matter. Statutes and judicial precedents governing the rights of creditors after a corporate assets transfer and dissolution generally do not address this problem of post-transfer claims accrual.

Few precedents recognize tort claims against the successor corporation for harm caused by defective products sold by the predecessor unless the transaction by which productive assets are acquired meets criteria established by one of several traditional exceptions. These exceptions apply generally to creditors whose claims accrue after dissolution of the predecessor, and are not limited to products liability claimants. They fall into two basic categories: those in which some conduct of the successor, in addition to acquiring the predecessor's assets, justifies holding the successor responsible (the successor either contractually agrees to be liable or knowingly participates in a fraudulent asset transfer); and those in which the successor itself can be said to have sold or distributed the defective products because the successor constitutes the same juridical entity as the predecessor, perhaps in somewhat different form (the successor merges with, or constitutes a "mere continuation" of, the predecessor). Under this Section, a products liability claimant has a recognized claim against a successor for harm caused by defective products distributed by the predecessor in these circumstances.

A minority of jurisdictions impose liability on a successor corporation based on a broader concept of continuation of the business enterprise, even when there is no continuity of shareholders, officers, or directors. Some courts hold that the continuation of a predecessor's product line by the successor is sufficient to support imposition of successor liability for harm caused by defects in products sold before the assets transfer.

b. Rationale. Limiting the liability of successor corporations to the circumstances described in this Section is supported by fairness and efficiency considerations. An alleged successor that purchases the predecessor's productive assets piecemeal, other than as part of a going concern, cannot, by that fact alone, be said to have either manufactured or sold defective products distributed by the predecessor before the transfer of assets. In the absence of circumstances in which the successor could be said to constitute a continuation of the predecessor, or somehow to have prejudiced subsequent tort plaintiffs by its own pre-acquisition conduct, imposing liability on a business entity that did not make or distribute the defective products that caused harm could be justified only because it increases the amount of money available post-acquisition out of which to satisfy plaintiffs' claims. But that alone cannot be justification for successor liability. Thus, imposing liability on the piecemeal purchase of productive assets would, for no compelling reason, impede the free alienability of corporate assets, thereby discouraging shareholder investment of capital and increasing social costs.

Imposing liability on successor corporations constitutes acceptable public policy when the successor either agrees to be liable or is implicated in the transfer of assets in a way that, without such liability, would unfairly deprive future products liability plaintiffs of the remedies that would otherwise have been available against the predecessor. Subsections (a) through (d) describe the types of corporate asset transfers that have been determined to justify imposing liability on the successor. Subsection (a) recognizes that contractual promises by the successor to pay subsequent tort claims, for which promises the successor has presumably been compensated, should be honored. Subsection (b) provides that when a business entity makes a fraudulent transfer in which the transferee is implicated, successor liability is appropriate for the same reason that liability would be imposed in favor of other creditors. Thus, a predecessor may arrange an asset transfer at an artificially deflated price, accompanied by an agreement by the successor to compensate either the predecessor, its owners, or its managers in ways that escape easy detection; or a successor may knowingly participate in an asset transfer coupled with a liquidating dividend by the predecessor to its shareholders for the purpose of leaving tort plaintiffs without remedy. If those transfers are fraudulent under applicable state law, imposing tort liability on the transferee for having knowingly participated in such transfers is justified.

Subsections (c) and (d) deal with successors that, in a real sense, did produce and distribute the product that caused the harm, though in a somewhat different organizational form. Subsection (c) deals with the transferor corporation that merges by law or in fact into the transferee, typically with no substantial change in corporate management or ownership. Subsection (d) concerns the transfer of corporate assets in the context of a transaction involving only a change in organizational form. In both these situations, liability for harm caused by defective products distributed previously should be imposed on the business entity that emerges from the transaction. In substance, if not in form, the post-transfer entity distributed the defective products and should be held responsible for them. If mere changes in form were allowed to control substance, corporations intending to continue operations could periodically wash themselves clean of potential liability at practically zero cost, in sham transactions, and thereby unreasonably undermine incentives for producers and distributors to invest in product safety and unfairly deny tort plaintiffs adequate remedies when defective products later cause harm.

A small minority of courts have fashioned successor liability rules more advantageous to products liability claimants than the rules stated in this Section. Those minority rules, in effect, extend the "change in form only" exception just described to include circumstances in which the successor continues a product line previously distributed by the predecessor. The minority position is based on the belief that a successor who purchases productive assets should not be allowed to benefit from receiving the goodwill and reputation of the predecessor's business without the burden of responding in tort to claims for harm caused by products sold by the predecessor prior to transfer. An argument advanced to support this minority view is that holding successors liable reduces the price that predecessors receive for transferring assets, thereby helping to strengthen incentives for the managers to invest in care before the transfer of the business.

This reasoning has proven unpersuasive to a substantial majority of courts that have considered the issue. Extending successor liability beyond the exceptions set forth in Subsections (a) through (d) would, in the judgment of most courts, be unfair and socially wasteful. Posttransfer plaintiffs harmed by pre-transfer defects have a right to expect that a transfer of assets will not be allowed to prejudice financially their chances of satisfying a judgment; they have no legitimate claim that the transfer should increase those chances over what they would have been if no transfer had occurred. In the likely event that the successor is financially stronger than the predecessor, imposing a broader liability for pre-transfer product defects would unjustifiably increase the funds available to those injured by such defects compared with what would have been available to them if no transfer had taken place.

As courts have recognized, it would be difficult, and often impossible, to implement and administer a liability rule that attempted to limit post-transfer plaintiffs' rights to an aggregate amount equal to the net value of the predecessor before transfer. Tort judgments are imposed independently of one another, in various jurisdictions; no central authority exists to assure that, in the aggregate, tort judgments do not exceed a predetermined total amount. Thus, the expanded successor liability rules in a minority of states, not limited to time-of-transfer net value, replace one risk of injustice -- that the assets transfer may unfairly reduce plaintiffs' recoveries in cases that do not satisfy the traditional exceptions (reflected in Subsections (a) through (d)) -- with another, possibly greater, injustice: that the transfer may give tort plaintiffs a windfall at the expense of companies who engage in asset transfers and, in turn, at the expense of the consuming public.

Moreover, a majority of courts have concluded that the substantial social costs of a more expansive liability rule would be incurred without actually benefiting very many tort plaintiffs. In most instances, the magnitude of future liability for products distributed pretransfer is difficult, if not impossible, to assess. As a majority of courts have recognized, the result of imposing successor liability as a general rule would be to depress the prices for transferred assets to the point that piecemeal disposition of assets, which clearly would not subject the buyers to liability, would be a preferable alternative to sale of the assets as part of a going concern. In that event, the products liability claimant harmed by a pre-transfer product defect would still run the risk of ending up with an uncollectible judgment. The benefits to society of preserving the predecessor's assets as a going concern would be sacrificed, with no commensurate benefits to tort claimants.

And even if a more expansive successor liability rule did not invariably lead to piecemeal asset transfers, such a liability rule would depress the prices received for going-concern transfers to an extent that would threaten to undermine the objectives of the law governing corporations. One of the purposes served by the corporate structure is to provide limitation and certainty of risk to shareholders in order to encourage capital formation. Thus, the shareholders' initial risk is limited to the value of their shares of stock and they are able to withdraw from an investment by sale of the stock without incurring future potential liability. A more expansive successor liability rule might threaten shareholders'

investments by significantly restraining corporate assets transfers, thereby tending to frustrate corporation law's objective of encouraging shareholder investment.

Some critics of the majority rule argue that, when the successor continues to manufacture the same products as the predecessor, often under the same trademark, consumers have legitimate expectations that the successor will stand behind the predecessor's products. Disappointing these expectations is unfair, according to the critics, quite apart from the effects of successor liability upon the formation of capital. But this argument overlooks the reality that the predecessor's products that cause harm in these cases were distributed prior to the assets transfer, when there could be no reliance by consumers on the financial viability of the successor. One cannot logically rely on post-transfer expectations regarding the successor to justify the imposition of liability on the successor for pre-transfer distributions by the predecessor.

c. Nonliability in the absence of special circumstances. In the absence of the circumstances described in Subsections (a) through (d), a successor company that buys productive assets from another company is not liable for harm caused by a defective product sold or otherwise distributed by the predecessor prior to the successor's acquisition of assets. When the assets are purchased piecemeal, the alleged successor did not "sell or distribute" the product under the liability rule stated in § 1; and attempts to establish continuation of the corporate entity are recognized only under the terms set forth in this Section. The successor is liable under § § 1-4 for harm caused by defective products it sells after acquisition. In the absence of the circumstances described in this Section, however, the successor is not liable for defective products sold by another prior to that time.

Illustrations:

1. ABC Corp., which manufactures and sells lawn mowers, transfers all its assets to XYZ Corp., a manufacturing corporation with different officers, directors, and shareholders, for cash. ABC then dissolves, distributing the proceeds of the sale to its shareholders. ABC complies with all statutes governing its dissolution, and none of the exceptions in this Section applies. XYZ retains most of ABC's employees and managers and continues to manufacture lawn mowers, some of which are the same as previously manufactured by ABC. A defective lawn mower made and distributed by ABC prior to the transfer of assets to XYZ harms a user three years after the transfer. XYZ is not subject to liability for the harm to the user of the lawn mower.

2. The same facts as Illustration 1, except that a defective lawn mower made and distributed by XYZ after the transfer of assets harms a user three years after the transfer. XYZ is subject to liability for the harm to the user of the lawn mower.

d. Agreement for successor to assume liability. When the successor agrees to assume liabilities for defective products sold by its predecessor, liability is imposed under Subsection (a) in accordance with the terms of the agreement. As a general matter, contract law governs the application of this exception. Courts have interpreted general statements that the successor agrees to assume the liabilities of the predecessor to include products liability claims even though the agreement makes no specific mention of products liability. However, assumption of products liability is not implied by the successor's assumption of specific duties with regard to product service or replacement.

Illustration:

3. The same facts as Illustration 1, except that the transfer-of-assets agreement contains a promise by XYZ to assume all of ABC's liabilities. XYZ is subject to liability for the harm to the user of the lawn mower.

e. Fraudulent transfer in order to avoid debts or liabilities. Subsection (b) incorporates by reference the relevant state law governing fraudulent conveyances and transfers. In contexts other than successor products liability, fraudulent transfers can be set aside on behalf of existing creditors of the transferor. In this context, fraudulent transfers provide a basis for holding successors liable to post-transfer tort plaintiffs. The fact that general creditors are pursuing remedies against the transferee does not prevent tort plaintiffs from pursuing remedies under Subsection (b). What constitutes a fraudulent conveyance or transfer is determined by reference to applicable state law.

Illustration:

4. The same facts as in Illustration 1, except that the transfer of assets by ABC to XYZ is made as part of a plan between ABC and XYZ to leave tort claimants harmed by ABC's defective products without enforceable remedies. If a transaction constitutes a fraudulent transfer under applicable state law, XYZ is subject to liability for harm to the user of the lawn mower.

f. Consolidation or merger. When statutory consolidation or merger of two corporations takes place, products liability devolves on the successor corporation under Subsection (c). A more difficult question is whether, absent statutory merger, a de facto merger has taken place. Local law governing de facto mergers is determinative. Whether a de facto merger under Subsection (c) has occurred generally depends on whether: (1) there is a continuity of management, employees, location, and assets; (2) the successor corporation acquires the assets of the predecessor with shares of its own stock so that shareholders of the transferor corporation become shareholders of the transferee corporation; (3) the predecessor corporation ceases its ordinary business operations immediately or shortly after the transfer of assets; and (4) the successor assumes those liabilities and obligations of the predecessor necessary for the uninterrupted continuation of the normal operations of the predecessor.

Illustrations:

5. The same facts as Illustration 1, except that the transfer of assets is for stock in XYZ and constitutes a statutory merger of ABC and XYZ under applicable state law. XYZ is subject to liability to the user of the lawn mower.

6. The same facts as Illustration 1, except that the transfer of assets is for stock in XYZ, with which ABC redeems its own stock from its shareholders. ABC then ceases to operate its own business, which XYZ resumes with the same management and employees, at the same location. If it is determined under applicable state law that a de facto merger between ABC and XYZ has occurred, XYZ is subject to liability for harm to the user of the lawn mower.

g. Continuation of the predecessor. The exception recognized in Subsection (d), referred to by many courts as the "mere continuation" exception, applies when there has been a formal redesignation of the predecessor corporate entity but little or no change in underlying substance. The most important indicia of continuation, in addition to the continuation of the predecessor's business activities, are common identities of officers, directors, and shareholders in the predecessor and successor corporations. A minority of jurisdictions recognize a broader exception, referred to as the "continuity of enterprise" exception, that imposes liability on the successor for continuing the business activities of the predecessor even when the corporate form of the successor is different from the predecessor. This Section does not follow that minority position.

Illustration:

7. The same facts as Illustration 1, except that XYZ is a corporation with the same officers, directors, and shareholders as ABC. After the assets transfer, XYZ continues the same manufacturing and distribution operations as ABC did previously. If XYZ is determined to constitute a "mere continuation" of ABC under Subsection (d), XYZ is subject to liability to the user of the lawn mower.

h. Necessity for the predecessor to transfer all of its assets and go out of business. Almost all of the reported decisions applying the bases of successor liability stated in this Section involve predecessors that transfer all of their assets to successors and then dissolve or otherwise cease operations. Indeed, the predecessor's termination is the circumstance that, as a practical matter, most often gives rise to the need for a post-transfer tort plaintiff to look to the successor for recovery. The exceptions set forth in Subsections (c) and (d), merger and continuation, most frequently have significance when the predecessor has transferred all of its assets to the successor and, at least formally, has ceased to exist. But there is no reason that the exceptions set forth in Subsections (c) and (d) might not arise in connection with the transfer of a division of a large company, leaving the company in existence after the transfer. And the exceptions in Subsections (a) and (b) could arise in connection with transfers involving less than all of the predecessor's assets where the predecessor continues in existence after the transfer.

i. Relationship between the rule in this Section and the successor's independent duty to warn. This Section deals with a successor's liability for harm caused by the predecessor's defective products and is not premised on post-transfer wrongdoing by the successor itself. For the rules governing the liability of a successor for its own post-transfer failure to warn its predecessor's customers, see § 13.

Comment c. Nonliability in the absence of special circumstances. The following jurisdictions have limited the liability of successor corporations to the four exceptions set forth in § 12 and would reject both the "continuity of enterprise" approach (*Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873 (Mich.1976)) and the "product line" exception (*Ray v. Alad Corp.*, 560 P.2d 3 (Cal.1977)). See, e.g., *Arkansas* (*Swayze v. A.O. Smith Corp.*, 694 F.Supp. 619, 623 (E.D.Ark.1988); *Reed v. Armstrong Cork Co.*, 577 F.Supp. 246, 247-48 (E.D.Ark.1983)); *Colorado* (*Florum v. Elliott Mfg.*, 867 F.2d 570 (10th Cir. 1989) (applying Colorado law); *Johnston v. Amsted Indus., Inc.*, 830 P.2d 1141 (Colo.Ct.App.1992)); *Florida* (*Bernard v. Kee Mfg. Co.*, 409 So.2d 1047 (Fla. 1982)); *Georgia* (*Bullington v. Union Tool Corp.*, 328 S.E.2d 726 (Ga.1985)); *Illinois* (*Gonzalez v. Rock Wool Eng'g & Equip. Co.*, 453 N.E.2d 792

(Ill.App.Ct.1983); *Domine v. Fulton Iron Works*, 395 N.E.2d 19 (Ill.App.Ct.1979)); Iowa (*Pancratz v. Monsanto Co.*, 547 N.W.2d 198 (Iowa 1996)); Kentucky (*Conn v. Fales Div. of Mathewson Corp.*, 835 F.2d 145 (6th Cir. 1987) (applying Kentucky law)); Maryland (*Nissen Corp. v. Miller*, 594 A.2d 564 (Md.Ct.Spec.App.1991)); Massachusetts (*Guzman v. MRM/Elgin*, 567 N.E.2d 929 (Mass.1991)); Minnesota (*Costello v. Unipress Corp.*, No. C6-95-2341, 1996 WL 106215 (Minn.Ct.App., Mar. 12, 1996); *Cooper v. Lakewood Engineering & Mfg. Co.*, 45 F.3d 243 (8th Cir.1995) (applying Minnesota law)); Missouri (*Bozell v. H & R 1871, Inc.*, 916 F.Supp. 951 (E.D.Mo.1996)); Wallace v. Dorsey Trailers Southeast, Inc., 849 F.2d 341, 343 (8th Cir.1988) (applying Missouri law)); Nebraska (*Jones v. Johnson Mach. & Press Co.*, 320 N.W.2d 481 (Neb.1982)); North Carolina (*Budd Tire Corp. v. Pierce Tire Co., Inc.*, 370 S.E.2d 267 (N.C.Ct.App.1988); Comment, *Beyond Budd Tire: Examining Corporate Successor Liability in North Carolina*, 30 Wake Forest L. Rev. 889 (Winter 1995)); North Dakota (*Downtowner Inc. v. Acrometal Prods., Inc.*, 347 N.W.2d 118 (N.D.1984)); Ohio (*Welco Indus., Inc. v. Applied Co.*, 617 N.E.2d 1129 (Ohio 1993)); Oklahoma (*Goucher v. Parmac, Inc.*, 694 P.2d 953 (Okla.Ct.App.1984)); South Dakota (*Hamaker v. Kenwel-Jackson Mach., Inc.*, 387 N.W.2d 515 (S.D.1986)); Texas (*Griggs v. Capitol Mach. Works, Inc.*, 690 S.W.2d 287 (Tex.Ct.App.1985); *Mudgett v. Paxson Mach. Co.*, 709 S.W.2d 755 (Tex.Ct.App.1986)); Vermont (*Ostrowski v. Hydra-Tool Corp.*, 479 A.2d 126 (Vt. 1984)); Virginia (*Harris v. T.I., Inc.*, 413 S.E.2d 605 (Va.1992)); West Virginia (*Jordan v. Ravenswood Aluminum Corp.*, 455 S.E.2d 561 (W.Va.1995) (per curiam)); Wisconsin (*Fish v. Amsted Indus., Inc.*, 376 N.W.2d 820 (Wis.1985)); District of Columbia (*LeSane v. Hillenbrand Indus.*, 791 F.Supp. 871, 873-74 (D.D.C.1992) (applying District of Columbia law)); Virgin Islands (*Polius v. Clark Equip. Co.*, 802 F.2d 75 (3d Cir.1986, V. I.)). Only a few states appear to have adopted liability based on the successor corporation's continuation of the predecessor's line of products: California (*Ray v. Alad Corp.*, 560 P.2d 3 (Cal.1977)); New Jersey (*Ramirez v. Amsted Indus.*, 431 A.2d 811 (N.J. 1981); (but see possible limit to "product line" exception recognized in dicta in *Leo v. Kerr-McGee Chem. Corp.*, 37 F.3d 96, 100-01 (3d Cir.1994) (applying New Jersey law) ("It seems apparent that, except perhaps in design defect cases, a defect in a product when the manufacturer distributed the product is likely to manifest itself and cause injury within a reasonable time after the product is manufactured. Accordingly, as a practical matter, successor liability under Ramirez is likely to be imposed in most cases, if at all, for a limited period.")); New Mexico (*Garcia v. Coe Manufacturing Co.*, 933 P.2d 243 (N.M.1997)); Pennsylvania (*Dawejko v. Jorgensen Steel Co.*, 434 A.2d 106 (Pa.Super.Ct.1981)); Bogart v. Phase II Pasta Machs., Inc., 817 F.Supp. 547 (E.D.Pa.1993)); Washington (*Martin v. Abbott Labs.*, 689 P.2d 368 (Wash.1984); *Fox v. Sunmaster Prods., Inc.*, 821 P.2d 502 (Wash.Ct.App.1991) (the continued product line must be the one that harms the plaintiff)). Although the product line exception is still theoretically viable in Pennsylvania, if a plaintiff has a possible remedy against the predecessor, a recent opinion held the exception could not be invoked. *LaFountain v. Webb Indus. Corp.*, 951 F.2d 544 (3d Cir.1991).

In an earlier draft of these Reporters' Notes, New Jersey was categorized as a jurisdiction that employs a very liberal test for corporate successor liability, a test premised on maximizing recovery rather than on evidence of express agreement to be liable or substantial deprivation of remedies for plaintiffs against the predecessor corporation. In support of this position *Pacius v. Thermtroll Corp.*, 611 A.2d 153 (N.J.Super.Ct.Law Div.1992), was cited. In that case, the court held that any transfer of assets or use of the predecessor's goodwill entailed a de facto merger that, in turn, triggered successor liability. *Id.* at 157. Elaborating on the policy underlying this holding, the *Pacius* court quoted *Rawlings v. DM Oliver Inc.*, 159 Cal.Rptr. 119, 124 (1979) for the following proposition: Fundamental fairness has been sought through a balancing of the rights of the injured party against the rights of those engaged in business, including the latter's reasonable commercial expectations. Placing the economic burden on those best able to pay for those costs, while permitting the transfer to those most culpable is consistent with the equitable considerations inherent in the resolution of the difficult problems which have been judicially posed. The thrust from our high court as a matter of first priority has been to maximize recovery for the victim. *Id.* at 157 (emphasis added).

Recently, however, New Jersey has reigned in the "deep pocket" approach set forth above by the *Pacius* court. In *Saez v. S & S Corrugated Paper Machinery Co.*, 695 A.2d 740 (N.J.Super.App.Div.1997), the court expressed disagreement both with the decision of the *Pacius* court and with this Restatement's earlier characterization of New Jersey law. The court first noted that, in contrast to the holding in *Pacius*, in order for a successor corporation to be liable under New Jersey law, the corporation must not only benefit from the predecessor's goodwill but must also continue to manufacture the predecessor's product. *Id.* at 16. Moreover, the court stated that the question to answer in determining whether successor liability has been triggered is "not whether there was 'any benefit that the successor obtain[ed] from the acquisition of the assets of its predecessor' or if the successor eliminated a competitor [since] [s]o broad a test would be no test at all."@ *Id.*

Several other jurisdictions have imposed liability based on a continuation of the predecessor's business even when there was no stock transfer or a common identity of corporate directors. See, e.g., *Andrews v. John E. Smith's Sons, Co.*, 369 So.2d 781, 785 (Ala.1979); *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873 (Mich.1976); *MacCleery v. T.S.S. Retail Corp.*, 882 F.Supp. 13 (D.N.H.1994).

Comment d. Agreement for successor to assume liability.

1. For general authority that agreements to assume liability will be enforced in favor of plaintiffs with products liability claims, see cases cited in the Reporters' Note to Comment a.

2. General assumption of a predecessor's liability, even without specific mention of products liability, will be interpreted to include liability for products liability claims. See, e.g., *Bouton v. Litton Indus., Inc.*, 423 F.2d 643 (3d Cir.1970) (applying New York law); *Grugan v. BBC Brown Boveri, Inc.*, 729 F.Supp. 1080 (E.D.Pa.1990). If the contractual obligation as to the successor's assumption of products liability is subject to conflicting interpretations, the issue is for the trier of fact. See, e.g., *Gee v. Tenneco, Inc.*, 615 F.2d 857, 862-63 (9th Cir.1980) (applying California law); *Florum v. Elliott Mfg.*, 867 F.2d 570, 574-76 (10th Cir.1989) (applying Colorado law); *Davis v. Loopco Indus., Inc.*, 609 N.E.2d 144 (Ohio 1993).

3. Contractual agreements by the successor to repair or service a product sold by the predecessor do not amount to an agreement to assume products liability for injuries caused by the predecessor's defective products. See, e.g., *Schwartz v. McGraw-Edison Co.*, 92 Cal.Rptr. 776 (Cal.Ct.App.1971) (disapproved on other grounds in *Ray v. Alad Corp.*, 560 P.2d 3 (Cal.1977)); *Shane v. Hobam, Inc.*, 332 F.Supp. 526 (E.D.Pa.1971) (applying New York law). Whether agreements to service a predecessor's products may create an independent duty to warn about defects is discussed in connection with § 13.

Comment e. Fraudulent transfer in order to avoid debts or liabilities. For the reason set forth in the Comment, this exception has rarely been used to impose successor liability for products liability claims. However, in *Schmoll v. AC & S, Inc.*, 703 F.Supp. 868 (D.C.Or.1988), the court found that a complex corporate restructuring was undertaken to avoid both pending and future liability to persons who were certain to suffer asbestos-related illness and was thus the functional equivalent of a fraudulent transfer. See also *Morgan v. Cavalier Acquisition Corp.*, 432 S.E.2d 915 (N.C.Ct.App.1993) (reversing summary judgment when plaintiff's evidence raised a question of fact as to whether the defendant had purchased assets from the predecessor corporation in order to avoid creditors' claims); *Budd Tire Corp. v. Pierce Tire Co.*, 370 S.E.2d 267 (N.C.Ct.App.1988); *Mullen v. Alarmguard of Delmarva, Inc.*, No. CIV. A. 90C-11-40-1-CV, 1993 WL 258696 (Del.Super.Ct., Jun.16, 1993).

A much closer question is whether a successor corporation's actual or constructive knowledge that the predecessor's products are defective and likely to cause injury in the future is sufficient to render the transaction sufficiently tainted so as to come within the umbrella of this exception. There is little authority on the issue. In *Nissen Corp. v. Miller*, 594 A.2d 564, 569 n. 2 (Md.1991), the court noted that either knowledge of pending claims or knowledge of product defects might be sufficient to expose a successor liability since either would put in question the bona fides of the transaction.

Comment f. Consolidation or merger. For a discussion of what constitutes a "de facto merger," see *Fletcher, Cyclopedia Corporations*, § 7124.20; *American Law of Products Liability* § 7:10; *Frumer and Friedman, Products Liability* § 7.04[5]; *Comment, Successor Liability: The Debate Over the Continuity of Enterprise Exception in Ohio Is Really No Debate at All*, 21 *Ohio N.L. Rev.* 297, 313 nn.136-137 (1994) (describing de facto merger and "mere continuation" doctrines). When the successor purchases the assets of the predecessor for cash, a de facto merger will not be found to have occurred. See, e.g., *Travis v. Harris Corp.*, 565 F.2d 443, 447 (7th Cir.1977) (applying Indiana law); *Jordan v. Hawker Dayton Corp.*, 62 F.3d 29 (1st Cir.1995) (applying Maine law); *Niccum v. Hydra Tool Corp.*, 438 N.W.2d 96 (Minn. 1989); *Hamaker v. Kenwel-Jackson Mach., Inc.*, 387 N.W.2d 515, 518 (S.D.1986); *Leannais v. Cincinnati, Inc.*, 565 F.2d 437, 439-40 (7th Cir.1977) (applying Wisconsin law). Only courts applying the "continuity of enterprise" exception will impose liability when the successor corporation purchased the assets of the predecessor for cash and there is evidence of continuity of the original business. See Reporters' Note to Comment c.

Comment g. Continuation of the predecessor. For a discussion of the "mere continuation" exception, see *Fletcher, Cyclopedia Corporations* § 7124.10; *American Law of Products Liability* § 7:14; *Frumer and Friedman* § 7.04[4]. Also see *Winch v. Yates Am. Mach. Co., Inc.*, 613 N.Y.S.2d 980 (N.Y.App.Div.1994); *Swayze v. A.O. Smith Corp.*, 694 F.Supp. 619 (E.D.Ark.1988); *Florum v. Elliott Mfg.*, 867 F.2d 570, 578 n. 3 (10th Cir.1989) (applying Colorado law); *Johnston v. Amsted Indus., Inc.*, 830 P.2d 1141, 1146 (Colo.Ct.App.1992); *Nissen Corp. v. Miller*, 594 A.2d 564, 567 (Md.1991); *Tucker v. Paxson Mach. Co.*, 645 F.2d 620 (8th Cir.1981) (applying Missouri law); *Chemical Design*,

Inc. v. American Standard, Inc., 847 S.W.2d 488 (Mo. Ct.App.1993); U.S. v. Atlas Minerals & Chem., Inc., 824 F.Supp. 46 (E.D.Pa.1993); Hamaker v. Kenwel-Jackson Mach., Inc., 387 N.W.2d 515, 518 (S.D.1986).

In analyzing continuation questions, some courts require purchase of stock or other benchmarks in order to establish the requisite continuity. See, e.g., Gehin-Scott v. Newson, Inc., 848 F.Supp. 585 (E.D.Pa.1994); Pancratz v. Monsanto Co., 547 N.W.2d 198, 201 (Iowa 1996) ("[t]he exception has no application without proof of continuity of management and ownership between the predecessor and successor corporations"); Harris v. T.I., Inc., 413 S.E.2d 605 (Va.1992) (also requiring a common identity of officers, directors, and stockholders). Other courts deny a merger if no transfer of assets has taken place, as in Carreiro v. Rhodes Gill & Co., 68 F.3d 1443 (1st Cir. 1995). Contra, Jordan v. Hawker Dayton Corp., 62 F.3d 29 (1st Cir.1995) (applying Maine law) (holding that purchase of assets is not sufficient to warrant a finding of a de facto merger); Lemelle v. Universal Mfg. Corp., 18 F.3d 1268 (5th Cir.1994) (applying Louisiana law). But several other states have imposed liability based on a continuation of the predecessor's business even when there was no stock transfer or common identity of corporate directors. See, e.g., Andrews v. John E. Smith's Sons, Co., 369 So.2d 781, 785 (Ala. 1979); Turner v. Bituminous Cas. Co., 244 N.W.2d 873 (Mich.1976); MacCleery v. T.S.S. Retail Corp., 882 F.Supp. 13 (D. N.H. 1994). See generally Sweatland v. Park Corp., 587 N.Y.S.2d 54 (N.Y.App.Div.1992).

REPORTERS NOTES: *Comment b. Rationale.* In a muchcited case, *Polius v. Clark Equip. Co.*, 802 F.2d 75 (3d Cir.1986) (applying Virgin Islands law), the court stated that the imposition of successor liability on a company that has merely purchased the assets of a predecessor for cash and does not otherwise fall within the stated exceptions would encourage the dissolution of a financially troubled corporation by piecemeal sale of assets rather than as a going business concern. In this event the plaintiff would not be able to reach the assets when the accident occurred years after dissolution. The end result would be the needless destruction of an ongoing business enterprise with no net advantage to anyone. Other courts have observed that the imposition of successor liability on small corporations could spell financial disaster to them. See, e.g., *Bernard v. Kee Mfg. Co. Inc.*, 409 So.2d 1047 (Fla.1982); *DeLapp v. Xtraman Inc.*, 417 N.W.2d 219, 221 (Iowa 1987); *Nissen Corp. v. Miller*, 594 A.2d 564, 570 (Md.1991); *Niccum v. Hydra Tool Corp.*, 438 N.W.2d 96, 100 (Minn.1989). These courts have concluded that the imposition of strict liability on successor corporations is inconsistent with the principle of products liability law that imposes responsibility on the party who created the risk and was in a position to prevent its occurrence. See also *Johnston v. Amsted Indus., Inc.*, 830 P.2d 1141 (Colo.Ct.App.1992); *Downtowner v. Acrometal Prods., Inc.*, 347 N.W.2d 118 (N.D.1984); *Fish v. Amsted Indus., Inc.*, 376 N.W.2d 820, 827 (Wis.1985).

Corporate successor liability has been the subject of considerable law review commentary. See, e.g., Phillips, Product Continuity and Successor Corporation Liability, 58 N.Y.U.L. Rev. 906 (1983) (the article contains an exhaustive listing of law review literature; author supports the "product line" exception); Green, Successor Liability: The Superiority of Statutory Reform to Protect Product Liability Claimants, 72 Cornell L. Rev. 17 (1986) (criticizing the rationale offered by courts and commentators in support of the liability based on "product line" or "continuity of business enterprise" and suggesting a statutory solution to the problem by requiring dissolving corporations to provide products liability plaintiffs with adequate protection); Note, A Policy Analysis of a Successor Corporation's Liability for Its Predecessor's Defective Products When the Successor Has Acquired the Predecessor's Assets for Cash, 71 Marq. L. Rev. 815 (1982) (author criticizes the rationale offered to support expansive rules imposing liability on successor corporations and suggests expansion of independent duty to warn and fraudulent transfer category when the successor had actual or constructive knowledge of product defects); Rogala, Nontraditional Successor Product Liability: Should Society Be Forced to Pay the Cost?, 68 U. Det. L. J. 37 (1990) (economic analysis supports the retention of the four basic exceptions and the rejection of "product line" and "continuity of enterprise" theories); Comment, Successor Liability: The Debate Over the Continuity of Enterprise Exception in Ohio Is Really No Debate at All, 21 Ohio N.L. Rev. 297 (author criticizes both "product line" and "continuity of enterprise" exceptions and predicts that Ohio will follow four traditional exceptions). Much of the law review commentary supports liberalizing the rules imposing liability on corporate successors. The articles acknowledge, however, the overwhelming judicial rejection of the liberalizing rules. It is interesting that, after an early spurt of cases in the late 1970s and early 1980s arguing for more expansive liability, courts have refused to impose liability unless the plaintiff is able to come within the four traditional exceptions. See Green, Successors and CERCLA: The Imperfect Analogy to Products Liability and an Alternative Proposal, 87 Nw. U.L. Rev. 897, 909-10 (1993); Henderson and Eisenberg, The Quiet Revolution in Products Liability: An Empirical Study of Legal Change, 37 UCLA L. Rev. 479, 492 and n.64 (1990).

Several courts and commentators have recognized that the problems set forth in this Comment can best be addressed by legislation. For an insightful analysis and recommendation, see Green, *Successor Liability: The Superiority of Statutory Reform to Protect Product Liability Claimants*, 72 *Cornell L. Rev.* 17 (1986) (criticizing the rationale offered by courts and commentators in support of liability based on "product line" or "continuity of business enterprise" and suggesting a statutory solution to the problem by requiring dissolving corporations to provide products-liability plaintiffs with adequate protection). Courts have repeatedly espoused the same view. See, e.g., *Fish v. Amsted Indus., Inc.*, 376 N.W.2d 820, 829 (Wis.1985):

We conclude that the legislature is in a better position to make broad public policy decisions in actions based on products liability law. [Citation omitted]. The questions concerning the effect on the manufacturing business, the potential size and economic strength of successor corporations, the availability of commercial insurance and the cost of such insurance are all questions that . . . the legislature is in a better position to ascertain.

A similar sentiment was expressed in *Leannais v. Cincinnati, Inc.*, 565 F.2d 437, 441 (7th Cir.1977):

In recent years, for a variety of reasons, many have thought it necessary to turn to the courts in search of solutions to social problems. Courts are ill-equipped, however, to balance equities among future plaintiffs and defendants. . . . [S]uch broad public policy issues are best handled by legislatures with their comprehensive machinery for public input and debate.

See also *Myers v. Putzmeister, Inc.*, 596 N.E.2d 754 (Ill.App.1992); *Welco Indus. v. Applied Co.*, 617 N.E.2d 1129 (Ohio 1993); *Nguyen v. Johnson Mach. & Press Corp.*, 433 N.E.2d 1104 (Ill.App.Ct.1982); *Holifield v. Setco Indus., Inc.*, 168 N.W.2d 177 (Wis.1969), overruled on other grounds, *Hansen v. A.H. Robins, Inc.*, 335 N.W.2d 578 (Wis.1983).

One possible statutory approach might be to require that whenever a product manufacturer transfers a business or a product line as a going concern, some form of bond or other security must be posted by the predecessor manufacturer in an amount not to exceed the net value of the predecessor at time of transfer. The value of the bond or other security would be available to future tort plaintiffs to satisfy claims for harm caused by previously distributed defective products. The posting of such a security would, under terms of the statute, protect the successor from future liability for previously distributed products in excess of the value of the security. Presumably, obligations on the bond would be limited in time. Future plaintiffs injured by products previously distributed by the predecessor would be no worse off financially than if the transfer of assets had not occurred. The limit based on the value of the predecessor at the time of transfer, with an appropriate time limit, would render more calculable the amount of the security required, in contrast to the difficulty of calculating future liabilities without such limits under the more expansive successor liability rules applied in a minority of jurisdictions. The value of the predecessor's product line as a going concern, whenever that value exceeds the cost of the security against future liability, would be preserved without allowing the transfer of assets to prejudice tort plaintiffs' chances of recovery.

# FISCAL NOTE

**STATE OF ALASKA**  
**2002 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: HB 13  
 () Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Com & Econ Dev  
 Title Product Liability for Successor Liability BRU \_\_\_\_\_  
 Component \_\_\_\_\_  
 Sponsor Representative Rokeberg  
 Requester House Labor & Commerce Component No. \_\_\_\_\_

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2003	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2002) cost: 0.0  
 Check this box (X) if funding for this bill is included in the Governor's FY 2003 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

This legislation has no fiscal impact on state spending.

Prepared by: Representative Tom Anderson Phone \_\_\_\_\_  
 Division House Labor & Commerce Date/Time 4/12/03 1:49 PM  
 Approved by: Representative Tom Anderson Date 4/12/2003  
 Agency House Labor & Commerce

# Alaska Action Trust

P.O. Box 102323 • Anchorage, Alaska 99510  
Office: 813 West Third Avenue • Anchorage, AK 99501  
(907) 258-4040 • FAX (907) 258-8751

23 April 2003

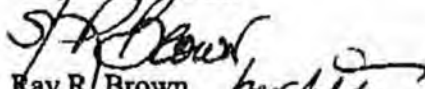
The Honorable Lesil McGuire  
House Judiciary Committee  
State Capitol  
Juneau, Alaska 99801

Dear Representative McGuire:

The House Judiciary Committee today hears House Bill 13 "An Act declaring legislative intent to reject the continuity of enterprise exception to the doctrine of successor liability adopted in Savage Arms, Inc...." The Alaska Action Trust strongly objects to this bill. This bill was offered during the last session and we testified at the request of the current bill's sponsor, Representative Rokeberg. That correspondence is attached. The Alaska Action Trust maintains its objection to this legislation.

This outcome is particularly unfair because Alaska is not now, nor is it likely to become, a manufacturing state. The burden borne by dead and injured citizens of Alaska will nearly always benefit corporate entities from other states and countries. Please do not pass legislation that hurts your constituents and neighbors.

Very Truly Yours.

  
Ray R. Brown  
Co-Chair, Alaska Action Trust

Post-It® Fax Note	7871	Date	# of pages 3
To	Judiciary Comm	From	ALASKA ACTION TRUST
Co./Dept.		Co.	
Phone #		Phone	907.258.4040
Fax #	907.465.6598	Fax #	907.258.8751

# FISCAL NOTE

**STATE OF ALASKA**  
**2003 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: HB 13  
 ( ) Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Law  
 Title "An Act declaring legislative intent to reject the BRU Civil Division  
continuity of enterprise exception to the doctrine of . . ." Component Commercial  
 Sponsor Representative Rokeberg  
 Requester House Labor and Commerce Committee Component No. 2211

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
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**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type-Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2003) cost: 0.0  
 Check this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)  
 This bill would reject the continuity of enterprise exception to the doctrine of successor liability adopted in *Savage Arms, Inc. v. Western Auto Supply*, 18 P.3d 49 (Alaska 2001) as it relates to product liability.

This bill concerns disputes between private parties, and will have no fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson Phone (907) 465-5370  
 Division: Attorney General's Office Date/Time 3/27/03 3:11 PM  
 Approved by: Joan M. Kasson for Gregg D. Renkes, Attorney General Date 3/27/2003  
 Agency: Department of Law

**HB**

**18**





CSHrs 18 (STR)  
Amendment # 1 - Adopted  
by Rep. McGuire

P1, Line 7

Delete "\$20,000"

Replace with "\$15,000"

# REPRESENTATIVE KEVIN MEYER


---

HOUSE DISTRICT 30

## MEMORANDUM

**DATE:** March 14, 2003

**TO:** Representative Lesil McGuire  
Chair, House Judiciary Committee

**FROM:** Representative Kevin Meyer 

**RE:** CS HB 18(STA) Parental Liability for Child's Damages

---

At your earliest convenience, please schedule CS HB 18(STA) Parental Liability for Child's Damages for a hearing in the House Judiciary Committee.

CS HB 18(STA) establishes the limit on recovery of property damaged by a minor at \$20,000. CS HB 18(STA) will allow for a person, municipal corporation, village, school district, or religious or charitable organization to recover in an amount not to exceed \$20,000 in damages from parents or guardians of a minor who knowingly destroys property.

Thank you for your time and consideration.

# **REPRESENTATIVE KEVIN MEYER**

---

HOUSE DISTRICT 30

## **Sponsor Statement**

### **CS HB 18(STA)**

**“An Act relating to the liability of parents and legal guardians of minors who destroy property.”**

CS HB 18(STA) establishes the limit on recovery of damages caused by a minor at \$20,000. CS HB 18(STA) will allow for a person, municipal corporation, association, village, school district, or religious or charitable organization to recover up to \$20,000 in damages from parents or guardians of a minor who knowingly destroys property. Currently, under AS 34.50.020(a), the recovery limit is \$10,000.

Traditionally, Alaska has held that parents are accountable for their children's behavior, and that parents should pay restitution for damages caused by their children. In 1995, the limit for recovery was raised from \$2,000 to \$10,000. Often, cumulative damage to a facility exceeds the \$10,000 limit, thus leaving taxpayers or organizations to bear the cost of repairs and clean up.

The large discrepancy between the \$10,000 limit and the actual cost of damages incurred to property became apparent this past summer in Anchorage. The Anchorage School District reported that minors did nearly \$750,000 in damage over the summer to facilities and schools. By raising the limit, the Anchorage School District will be able to recover more in cases that involve serious damage to property, rather than expending money earmarked for technology enhancement, textbooks, and personnel.

By increasing the limit, children are deterred from making decisions to vandalize and destroy property. This will also impose an additional duty on parents and legal guardians to exercise reasonable care, supervision, protection, and control over their child.

Last Updated: March 14, 2003

# FISCAL NOTE

**STATE OF ALASKA**  
**2003 LEGISLATIVE SESSION**

Fiscal Note Number: 1  
 Bill Version: CSHB 18 (STA)  
 (H) Publish Date: 3/10/2003

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: \_\_\_\_\_  
 Title Parental Liability BRU Alaska Court System  
 Component Trial Courts  
 Sponsor Representative Meyer  
 Requester House State Affairs Component No. 768

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
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<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE** (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type-Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2003) cost: 0.0  
 Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

The court system does not anticipate any fiscal impact from the passage of CSHB 18 (STA).

Prepared by: Doug Wooliver, Administrative Attorney Phone 463-4750  
 Division: Alaska Court System Date/Time 3/10/03 10:50 AM  
 Approved by: Stephanie Cole, Administrative Director Date 3/10/2003  
 Agency: Alaska Court System

## Sec. 34.50.020. Liability for destruction of property by minors

(a) A person, municipal corporation, association, village, school district, or religious or charitable organization, incorporated or unincorporated, may recover damages in a civil action in an amount not to exceed \$10,000 and court costs from either parent, both parents, or the legal guardian of an unemancipated minor under the age of 18 years who, as a result of a knowing or intentional act, destroys real or personal property belonging to the person, municipal corporation, association, village, school district, or religious or charitable organization. However, for purposes of this subsection, recovery in damages shall be apportioned by the court between the parents or between the parents and legal guardian, or both, without regard to legal custody but with due consideration for the actual care and custody of the minor provided by the parents or legal guardian.

(b) A state agency or its agents, including a person working in or responsible for the operation of a foster, receiving, or detention home, or children's institution, is not liable for the acts of unemancipated minors in its charge or custody. A state agency or an agent of a state agency, including a nonprofit corporation that designates shelters for runaways under AS 47.10.392 - 47.10.399 and employees of or volunteers with that corporation, is not liable for the acts of a minor sheltered in a shelter for runaways, as defined in AS 47.10.399.

(c) A parent or, if any, a legal guardian of an unemancipated minor under the age of 18 years who is a runaway or missing minor is not liable under (a) of this section for the acts of the minor that are committed by the minor after a parent or, if any, a legal guardian of the minor has made a report to a law enforcement agency, as authorized by AS 47.10.141 (a), that the minor has run away or is missing. In this subsection, "runaway or missing minor" means a minor who a parent or legal guardian of the minor reasonably believes is absent from the minor's residence for the purpose of evading a parent or the legal guardian of the minor, or who is otherwise missing from the minor's usual place of abode without the consent of a parent or the legal guardian of the minor.



## Anchorage School District

4600 DeBarr Road  
P. O. Box 196614  
Anchorage, Alaska 99519-6614  
(907) 742-4000

### SCHOOL BOARD

Jake Metcalfe  
President

Tim Steele  
Vice President

Mary Marks  
Clerk

Harriet A. Drummond  
Treasurer

Rita Hollhouse

Debbie Ossiander

John Steiner

### SUPERINTENDENT

Carol Comeau

February 14, 2003

Representative Kevin Meyer  
State Capitol  
Juneau, AK 99801

Dear Representative Meyer:

On behalf of the Anchorage School Board and Administration, I want to commend you for sponsoring HB 18 which deletes the \$10,000 cap on vandalism caused by juveniles. This is one of our School Board's priorities and I believe it is essential to our collective efforts to protect schools and other public property from juvenile vandalism.

As I have stated many times since the Dimond High School incident in late December of 2001, I strongly believe that the offenders and their parents should be held fully accountable for restitution in recovering the \$158,000 damage done to the school under construction. The community, as well as the staff and students of Dimond High School were outraged at this completely needless and destructive act, as were the construction workers employed by Alcan General. Since the incident, Alcan General has had to not only repair all of the damage to the building and to the vehicles and equipment of the workforce, they have had to add the additional security staff in order to prevent other vandalism at the school site. These juveniles must be held fully accountable for their actions, and as a deterrent to other juveniles who might decide that there are minimum consequences for destroying public property.

The Anchorage community and taxpayers showed great faith and support for the District when the bonds were approved for the construction of this high school, the first one in over thirty years! These two juveniles were so uncaring and reckless that they decided to do all they could to destroy various parts of the building under construction. They had no concern for their own safety, or for the impact of their actions on the morale of the workforce and the community. The Anchorage Police Department devoted many hours to their investigation in developing their case which led to the successful apprehension of these juveniles; what a waste of their time and resources! It is time for the community to know that there are consequences for vandalism of public property, and that the court supports restitution for this act.

This was the first of a rash of major vandalism that occurred in the District last year. The other incidents seriously damaged Chugiak Elementary School and our Maintenance Department yard. Fortunately, the Anchorage Police Department's efforts paid off; all juveniles were apprehended. I have spent quite a bit of time in juvenile court in the past few months advocating for restitution and consequences. The parents of the Chugiak Elementary students have cooperated with the authorities

RECEIVED

FEB 24 2003

and their children have agreed to pay full restitution and perform community work service. Those students have clearly learned their lesson and I believe, are on the way to success in their lives. I cannot say that about the others who vandalized our property. Their advocates and parents have put up road block after road block in an effort to protect their clients from accepting their responsibility.

Currently the law restricts the ability of the court to impose full restitution in these cases; rather, the judge assesses how much a juvenile can pay in restitution while under the jurisdiction of the court. We feel this is intolerable and sends the wrong message to juveniles that they can get away from long-time consequences of crimes committed when they are under the age of 18, and that the records will be kept confidential. We believe that juveniles should have to sign a commitment to repay full restitution no matter how long it takes them to repay the costs of the vandalism. We believe this will reinforce the importance of parents knowing who their children are with when they are out of their parents' direct supervision.

Our community, the Anchorage Police Department, the Mayor, and our locally elected officials support this statutory change. We must do something to stop this type of juvenile crime! Please accept our thanks for your leadership on this issue. I applaud you and Senator Dyson for your efforts to change the statutes regarding juvenile crime and vandalism.

Please feel free to contact me if you would like me to testify at a hearing on this bill. I will be in Juneau during the AASB fly-in from February 22-25 and again in March and in April, and will try and meet with you to discuss this proposed legislation. I can also call in from the Legislative Information Office in Anchorage.

Sincerely yours,



Carol Comeau  
Superintendent

cc School Board members  
Senator Fred Dyson  
Mayor George Wuerch  
Assembly Chair Dick Traini  
Chief of Police Walt Monegan  
Lt. Gardner Cobb  
Larry Wiget

**Subject: AASB RESOLUTION SUPPORTING INCREASED LIABILITY FOR DESTRUCTION OF PROPERTY BY MINORS**

**Date:** Thu, 20 Feb 2003 08:40:50 -0900

**From:** Greg Giles <ggiles@aab.org>

**To:** Kevin Meyer <Representative\_Kevin\_Meyer@legis.state.ak.us>

ASSOCIATION OF ALASKA SCHOOL BOARDS

2.21 INCREASE LIABILITY FOR DESTRUCTION OF PROPERTY BY MINORS  
(Adopted Nov. 2002)

AASB encourages the Legislature to increase the maximum that may be recovered from either parent, both parents, or the legal guardian of an unemancipated minor under the age of 18 years who, as a result of a knowing or intentional act, destroys real or personal property belonging to a school district from \$10,000 to the actual amount of damages.

Rationale. Vandalism damages a school district's physical plant, has a negative impact on student learning, and demoralizes hard-working staff and students. Every dollar spent on repairing vandalism is a dollar we cannot invest in textbooks, teachers or technology.

Currently, school districts can recover a maximum of \$10,000 from either parent, both parents, or the legal guardian of an unemancipated minor under the age of 18 years who, as the result of a knowing intentional act, destroys real or personal property belonging to a school district. The current law forces taxpayers to bear the cost of vandalism even when a parent's liability insurance is otherwise available to pay the full cost.



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Anchorage Daily News (AK)  
June 25, 2002  
Section: Nation

Page: A1

## Vandals cost schools \$500,000

ARRESTS: Two boys, ages 13 and 14, charged in maintenance facility rampage.

Katie Pesznecker  
Anchorage Daily News

Staff

Two teenage boys were arrested late Sunday in connection with a weekend vandalism spree at the Anchorage School District's maintenance facility that racked up more than \$500,000 in damages, Anchorage police said. During the two-day rampage, the boys, ages 13 and 14, allegedly climbed behind the wheel of a John Deere tractor to rain buildings and storage sheds, police said. They destroyed roofs and boilers, ripped away chunks of walls and smashed windows.

The teens are charged with first-degree criminal mischief and resisting arrest. Police did not identify the suspects, who were taken to McLaughlin Youth Center, because they are charged in juvenile court.

"It's just so frustrating," Superintendent Carol Comeau said. "There is nothing that makes me more angry in this job than reckless, malicious vandalism. It's a real sad commentary on these young people. If I had it my way, I'd put their names on the front page of the paper."

Police in the past several days have responded to minor break-ins or vandalism reported at Rabbit Creek, Scenic Park, Homestead and Huffman elementaries, Central Middle School and East and West high schools. Damage ranged from shattered windows and busted copy machines to lewd graffiti.

The maintenance facility, at 1201 Labar St. in South Anchorage, was by far the worst hit. The complex contains offices, storage space for the district's maintenance, facilities and operations departments. Equipment on site includes vehicles and machinery the district uses for snow removal and construction and renovation projects.

Anchorage police said the boys initially broke into the facility a little after 10 p.m. Friday. They wrenched doors off and smashed windows of a dump truck, three street sweepers, two road graders and a tractor.

The boys were apparently driving around the fenced property on lawnmowers when a district employee approached them. The teenagers fled. The employee reported the incident to police, but no suspects were found.

Police said the boys showed up again late Sunday. They apparently fired up a John Deere tractor by using a lever.

The teenagers used the tractor to plow into a double-wide trailer used for storing heavy equipment. The impact caused part of the roof to collapse and obliterated the ramp to the trailer's main door.

The boys also bulldozed storage sheds in the northwest corner of the property, chewing chunks out of building walls. When it was over, the tractor's front wheels were bent at 45-degree angles.

"I'm surprised they didn't get hurt," said Stan Syta, district operations director.

Houses border the property's north side. Comeau is baffled that no one called police.

"They had to have heard breaking glass," she said. "That tractor ramming buildings -- I can't believe no one heard what was going on."

Another employee happened upon the boys and called police shortly after 10 p.m. When officers arrived, the teens bolted. Police caught the 14-year-old hiding in a nearby wooded area. The 13-year-old was later arrested at his home.

The boys admitted to Friday's vandalism at the site, police said.

The district budgets about \$250,000 a year for vandalism. Much of the damage occurs at empty schools during summer breaks. Property damaged Friday and Sunday will not be covered by the district's insurance policy, which in this case covers amounts exceeding \$1 million.

Comeau said the district will do everything in its power to see that the boys are held responsible for the damages, including a possible civil suit. State statute says that in a civil case, a school district can sue for up to \$10,000 and court costs from one or both of a minor's parents or legal guardians.

In the interim, Comeau is encouraging people who live near schools to watch out for strange activity. The district has recruited 15 volunteers this summer to live in motor homes and trailers at more than a dozen schools.

Syta said last summer the district invited a man to live in his trailer at Rabbit Creek Elementary. His presence basically erased vandalism there, Syta said.

But the family living there now didn't prevent Sunday night's window breaking. They were eating dinner while the vandalism took place on the back side of the school, Syta said.

Reporter Katie Pesznecker can be reached at [kpesznecker@adn.com](mailto:kpesznecker@adn.com) or 907 257-4589.

#### ILLUSTRATION SHOWS RECENT SCHOOL VANDALISM

Police have responded to the following Anchorage schools to investigate vandalism or possible break-ins.

- \* Dimond High School - On Dec. 31, vandalism at the new school resulted in spilled paint, smashed piping and sheetrock and windows. Damage totaled \$177,000. Two boys were arrested.
- \* Chugiak Elementary - On May 4 and 5, three boys reportedly broke windows, destroyed stereos, televisions and classroom globes and vandalized a car in the parking lot. Damage totalled about \$25,000. Three boys were arrested.
- \* Rabbit Creek Elementary - On ??? someone pryed boards off windows on the back side of the school and broke glass. No arrests.
- \* District maintenance facility - On June 21, two boys entered and damaged seven vehicles, smashed windows and drove around on lawn mowers. Police arrived after the boys fled. No arrests.
- \* West High School - A passerby on June 22 called police to report fowl graffiti on the auditorium's exterior wall. No arrests.
- \* Scenic Park Elementary - Security guards on June 23 found several doors propped open with rocks. There was no sign of vandalism or arrests.
- \* Homestead Elementary - Police responding to the school's alarm on June 23 found kids playing behind the school. There was no sign of vandalism or arrests.
- \* Huffman Elementary - Police responded to an alarm early June 23 and found a broken window and two people running through the building. The people got away. No arrests.
- \* William Tyson Elementary - On June 23, an intrusion alarm sounded. No arrests.
- \* District maintenance facility - Late June 23, an employee found two boys ramming vehicles and buildings with a tractor. The boys fled and were soon arrested. They admitted to Friday's vandalism also. Police estimate total damage at \$500,00.
- \* East High School - At 5:50 a.m. on June 24, police caught and arrested one person who had broken in and sprayed a fire extinguisher around the school.

\* Central Middle School - At 6 a.m. on June 24, police arrested a student who had broken in through a window. Police found damage to an interior window, a clock and a copy machine. No damage estimate.

Source: Anchorage School District

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Anchorage Daily News (AK)  
September 24, 2002  
Section: Metro

Page: B1

## Schools want damage limits erased

VANDALISM: District can sue for \$10,000 under current law.

Katie Pesznecker  
Anchorage Daily News

Anchorage School District officials want to erase limits that dictate the amount of money they can sue for when students vandalize school property. Current state law says the district can sue an 18-year-old culprit or a minor's parents for up to \$10,000. Sometimes that doesn't cover actual damages, Superintendent Carol Comeau said.

Members of the School Board's legislative subcommittee plan to lobby state lawmakers to do away with the cap. They want the freedom to sue for actual costs.

On Monday, the board voted unanimously to ask the Alaska Association of School Boards to make this move one of its 2002 resolutions. They want the backing of that group when time comes to persuade politicians.

Students smash windows and computers and trash Anchorage schools often enough that the district budget includes about \$250,000 a year to clean up.

But financial retribution is hampered by the \$10,000 limit. There used to be a \$2,000 ceiling on lawsuits but the Legislature increased it in 1995.

"We need to be able to recover the full cost of vandalism," Comeau said. "The current law limits recovery, and we think it's wrong because it penalizes the taxpayer."

School Board member Rita Holthouse said the subcommittee will push to change the law, whether or not the state school board association signs on.

The \$10,000 limit wasn't as noticeable with the more frequent lower-cost incidents, said Howard Trickey, one of the district's attorneys. But when kids do more than \$100,000 in damage, \$10,000 hardly helps. And the district's insurance policy applies only to damage amounts of more than \$1 million.

The most recent big-ticket vandalism came last summer when two teenagers destroyed buildings and equipment at the school maintenance facility in South Anchorage. District officials and the public were outraged.

"It looked like a tornado had been there," said Ed Conyers, then the district's maintenance director.

Vandalism at schools results mostly in small losses that quickly add up -- broken windows, gouges in

desks, busted locks.

The maintenance facility vandalism spree packed a financial wallop originally estimated by police at \$500,000. Later district officials said the sum was closer to \$100,000. It was one of the more costly attacks in recent years but not an isolated incident.

The new Dimond High School, currently under construction, sustained \$177,000 in damage last year when teenagers trashed the inside, which was just taking shape. Students broke into the then new Mirror Lake Middle School in Eagle River about five years ago and chewed through property with a forklift.

The roughly 120 employees in the maintenance department spend up to 15 percent of their time cleaning up this vandalism, Conyers said.

The district has tried to reduce the problem. Crews board up windows at more than a dozen schools during summer. Last summer, the district recruited volunteers who lived in motor homes at various schools to keep an eye out for troublemakers. Comeau has asked people who live near schools to watch for suspicious activity.

And whenever possible, the district sues.

Their legal success is mixed, Comeau said. She or other employees attend hearings, give the judge impact statements on damage, and work closely with police.

"We routinely get reimbursement just from kids breaking windows," Conyers said. "That may only be \$250, but we still get it."

Reporter Katie Pesznecker can be reached at [kpesznecker@adn.com](mailto:kpesznecker@adn.com) or 907 257-4589.

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Anchorage Daily News (AK)  
October 7, 2002  
Section: Metro  
Page: B5

## VOICE OF THE TIMES

Commentary

school vandals should . . . Pay the price

THE ANCHORAGE School District is on the right track in seeking approval from state lawmakers to sue for actual costs when vandals damage the schools and property it manages for taxpayers.

As it stands now, the district can demand only up to \$10,000 from the parents of minors or from 18-year-olds involved in school vandalism.

That amount -- increased from \$2,000 only a few years ago -- sometimes does not begin to cover the actual damages, Superintendent Carol Comeau said. She points to last year's \$100,000 in damages at the district's school maintenance facility as an example.

The School Board has voted to ask the Alaska Association of School Boards to lobby politicians for the increase, and Comeau said she believes the effort will find favor.

"The legislators we've had contact with . . . they've been very supportive," she said. "I think this is something that will resonate with legislators."

Each year, the school district budgets \$250,000 to \$300,000 to clean up vandalism, and "that's just for maintenance and repair costs," Comeau said. "That doesn't include labor or down time." That also does not reflect repairs to items such as photocopy machines or computers, she said.

Comeau credits additional police patrols and a policy of allowing campers to stay on school grounds with helping to keep vandalism in check this summer. And keeping it in check can save taxpayers hundreds of thousands of dollars.

The district is self-insured to \$1 million, Comeau said, and then its insurance kicks in. In construction areas, such as Dimond High School -- where vandals did about \$170,000 in damage last year -- the contractor's insurance is in force and its lawyers can go after the full amount.

There is no valid reason to bar the district from seeking the amount of actual damages from vandals or their parents. In fact, such a policy could act as a deterrent and encourage parents to know where their children are and what they are doing.

"That's what it comes down to in my mind," Comeau said, "good parenting."

We agree. While 99.9 percent of the kids in Anchorage's schools are good citizens, there is no reason to allow the other .1 percent to have a free ride when they damage the district's property. They and their parents rightly should pay the full amount.

The district should have the right to collect -- in full -- on the taxpayers' behalf.

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# LEGISLATIVE RESEARCH REPORT

SEPTEMBER 12, 2002



REPORT NUMBER 03.009

## LIMITS OF PARENTAL LIABILITY FOR PROPERTY DAMAGE BY MINORS

PREPARED FOR REPRESENTATIVE KEVIN MEYER

BY ROGER WITHINGTON

You asked for information regarding the scope of parental liability if a minor child willfully destroys property. Specifically, you asked for information on the parental liability laws for five western states and wished to know whether any of these state laws contain graduated limits to liability.

As you know, Alaska Statute 34.50.020(a) allows for a person, municipal corporation, association, village, school district, or religious or charitable organization to recover up to \$10,000 in damages in a civil action from either parent, both parents, or the legal guardian of an unemancipated minor who intentionally destroys property belonging to the person, municipal corporation, association, village, school district, or religious or charitable organization.<sup>1</sup> We were unable to obtain a fifty-state summary of similar parental liability statutes that included the monetary limits to the parents of a delinquent minor. However, we believe the most current information to be a 1999 report compiled by the National Center for Juvenile Justice (NCJJ) that states that at the end of the 1998 legislative session, 34 states had statutes that made the parent of a minor liable for restitution to the victim of a delinquent act. We include NCJJ's report as Attachment A.

In addition, in 1995 this agency completed a report that addressed questions similar to yours as well as the constitutionality of parental liability laws. In Legislative Research Report 95.068, we found that 34 states (not exactly the same 34 states identified in the NCJJ report) had statutes that established parental liability for damages caused by minor children. The dollar amount of the parental liability ranged from \$1,000 to \$25,000, with some states not capping the liability amount. We include Legislative Research Report 95.068 as Attachment B.

In an effort to provide you with more current information, we reviewed the current laws of five western states and British Columbia and found that California, Hawaii, Nevada, Oregon, Washington, and British Columbia all had statutes similar to AS 34.50.020(a). Table 1 provides a summary of the statutes from each of these jurisdictions. Attachment C provides the complete statute from each state.

<sup>1</sup> A minor is defined as a person under the age of 18 years.

As you will see, the laws in Nevada, Oregon, and British Columbia limit liability at the same or lesser amount than does the law in Alaska. The laws in California, Hawaii, and Washington make a distinction in liability for the type of damage caused by the minor; one law in California caps liability at \$25,000, while laws in Hawaii and Washington provide for actual damages.

<b>Table 1: Limits of Parental Liability for Property Damage by Minors</b>			
<b>State / Province</b>	<b>Statutory Citation</b>	<b>Maximum Financial Liability</b>	<b>Comments</b>
California	Cal Civ Code § 1714.1	\$25,000	
	Cal Ed Code § 48904	\$10,000	Specifically addresses damage to school property.
Hawaii	HRS § 46-1.5	\$1,000 or actual cost to repair/replace damage.	Pertains to damage to county property.
	HRS § 577-3.5	Actual cost to repair/replace damage or community work service.	Pertains to damage caused by graffiti.
Nevada	Nev. Rev. Stat. Ann. § 41.470	\$10,000	
Oregon	ORS § 30.765	\$7,500	
Washington	Rev. Code Wash. § 4.24.190	\$5,000	
	Rev. Code Wash. § 28A.635.060	Actual cost to repair/replace damage to school.	Specifically addresses damage to school property.
British Columbia	S.B.C. 2001, c. 45, s. 6	\$10,000 CND <sup>(a)</sup>	
<b>Notes:</b> (a) \$10,000 CND equals \$ 6,413.26 USD as of 9/6/2002 per XE.COM, an online currency conversion site. The URL for XE.COM is <a href="http://www.xe.com/ucc/">http://www.xe.com/ucc/</a> .			
<b>Sources:</b> LEXIS Law Publishing.			

I hope you find this information to be useful. Please do not hesitate to contact us if you have questions or need additional information.

## **Attachment A**

Linda A. Szymanski, "Parental Responsibility for the Delinquent Acts of Their Children," *NCJJ Snapshot*, Volume 4, Number 7, July 1999

# NCJJ Snapshot

© National Center for Juvenile Justice  
 Research Division of the National Council of Juvenile and Family Court Judges

## Parental Responsibility for the Delinquent Acts of Their Children

Linda A. Szymanski, Esq., Director of Legal Research, NCJJ

### States that have a Parental Accountability Statement in their Juvenile Code Purpose Clause



☐ No Parental Responsibility Statement in Purpose Clause	(41)
■ Parental Responsibility Statement in Purpose Clause	(10)

Over the last fifteen years, juvenile courts have gained increasing power and authority over the parents of children who commit delinquent acts. While all states have had statutes making it illegal for parents to contribute to the delinquency of their children, a handful of states now make parents criminally liable for failing to supervise their minor who commits delinquent acts. There is a wide variety of parental responsibility laws in juvenile codes throughout the states.

For example, as of the end of the 1998 legislative session, 10 states, Alabama, Alaska, Florida, Idaho, Maryland, Nevada, North Carolina, Oregon, Texas, and Virginia, have added a parental

accountability statement in their juvenile code purpose clause.

Arkansas, California, Colorado, the District of Columbia, Florida, Idaho, Indiana, Kansas, North Carolina, Ohio, Oregon, Texas, Wisconsin, and Wyoming allow the juvenile court to order parents to attend a court-approved parental responsibility training program/parent education program.

Alaska, Mississippi, New Hampshire, New Mexico, and Wisconsin have statutes in their juvenile code that allow for public disclosure of the parent's name if his or her child commits specified serious offenses.

Eleven states, Kansas, Louisiana, Michigan, Montana, New Hampshire, North Carolina, Ohio, Pennsylvania, Texas, Virginia, and Wyoming, require parents to aid in the enforcement of court orders concerning their delinquent's rehabilitation program. Failure to aid in the enforcement of court orders can result in contempt sanctions being filed against the parent.

As of the end of the 1998 legislative session, two-thirds of the states have statutes that make the parent of a delinquent liable for restitution to the victim of the delinquent act: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Kentucky, Maryland, Michigan, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, West Virginia, Wisconsin, and Wyoming.

Thirty-nine jurisdictions currently have statutes that permit or require parents of delinquents to participate in family treatment/counseling/probation with their children: Alabama, Alaska, Arizona, Arkansas, California, Colorado, District of Columbia, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland,

Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

In all states, the parents of a delinquent can be held liable for the costs of confinement and/or services provided to their children, such as: the child's support while in an institution, the costs of probation supervision, costs of transporting and/or treatment for delinquent minors, court costs and legal fees, and payment for alcohol and other drug abuse services.

It remains to be seen whether or not these parental accountability laws actually lead to a decrease in juvenile crime.

**NCJJ Snapshot** is a copyrighted publication of the National Center for Juvenile Justice. NCJJ is a non-profit organization that conducts research, statistical analysis, and applied on a broad range of juvenile justice topics and provides technical assistance to the field.

For additional information or to request a custom analysis, contact NCJJ at 710 Fifth Avenue, Pittsburgh, PA 15219. Phone: (412) 227-8950.

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## **Attachment B**

Patricia Young, "Parental Liability Laws for Damages Caused by Minor Children,"  
Legislative Research Request 95.068, February 16, 1995

# Legislative Research Agency

Alaska State Legislature



130 Seward Street, Suite 218  
Juneau, Alaska 99801-2196

Phone: (907) 465-3991  
Fax: (907) 463-3351

February 16, 1995

## MEMORANDUM

TO:

FROM: Patricia Young *Pat Young*  
Legislative Analyst

RE: **Parental Liability for Damages Caused by Minor Children**  
Research Request 95.068

You wished to know the history behind AS 34.50.020, the law that caps at \$2,000 parents' liability for damages caused by their minor children. You also wished to know if and to what extent other states hold parents financially accountable for damages caused by their children.

In 1957, Alaska passed a statute providing that parents could be held responsible for damages maliciously and willfully caused by their minor children. Liability was capped at \$500. The cap was raised in 1967 from \$500 to the current level of \$2,000.

At least 34 states have laws addressing parental liability for damages caused by minor children. Many states, like Alaska, have traditionally held that parents are accountable for their children's behavior and that parents should pay restitution for damages caused by their children. The attached table shows caps for each state identified. As you will see, of the 34 states, eleven cap liability at \$2,000 or less and ten cap liability at \$5,000 or more. Five states do not specify a limit to parental liability. California's cap is the highest at \$25,000. These laws have been held constitutional in at least the following six states: California, Georgia, Maryland, North Carolina, Texas, and Wyoming.

I have attached copies of "Constitutional Limitations on State Power to Hold Parents Criminally Liable for the Delinquent Acts of Their Children," 44 *Vand. Law Rev.* 441 (1991) and "Parental Liability Law Upheld in California," *Youth Law News*, September-October 1993. I hope the information is helpful. Please let me know if you have questions or need more information.

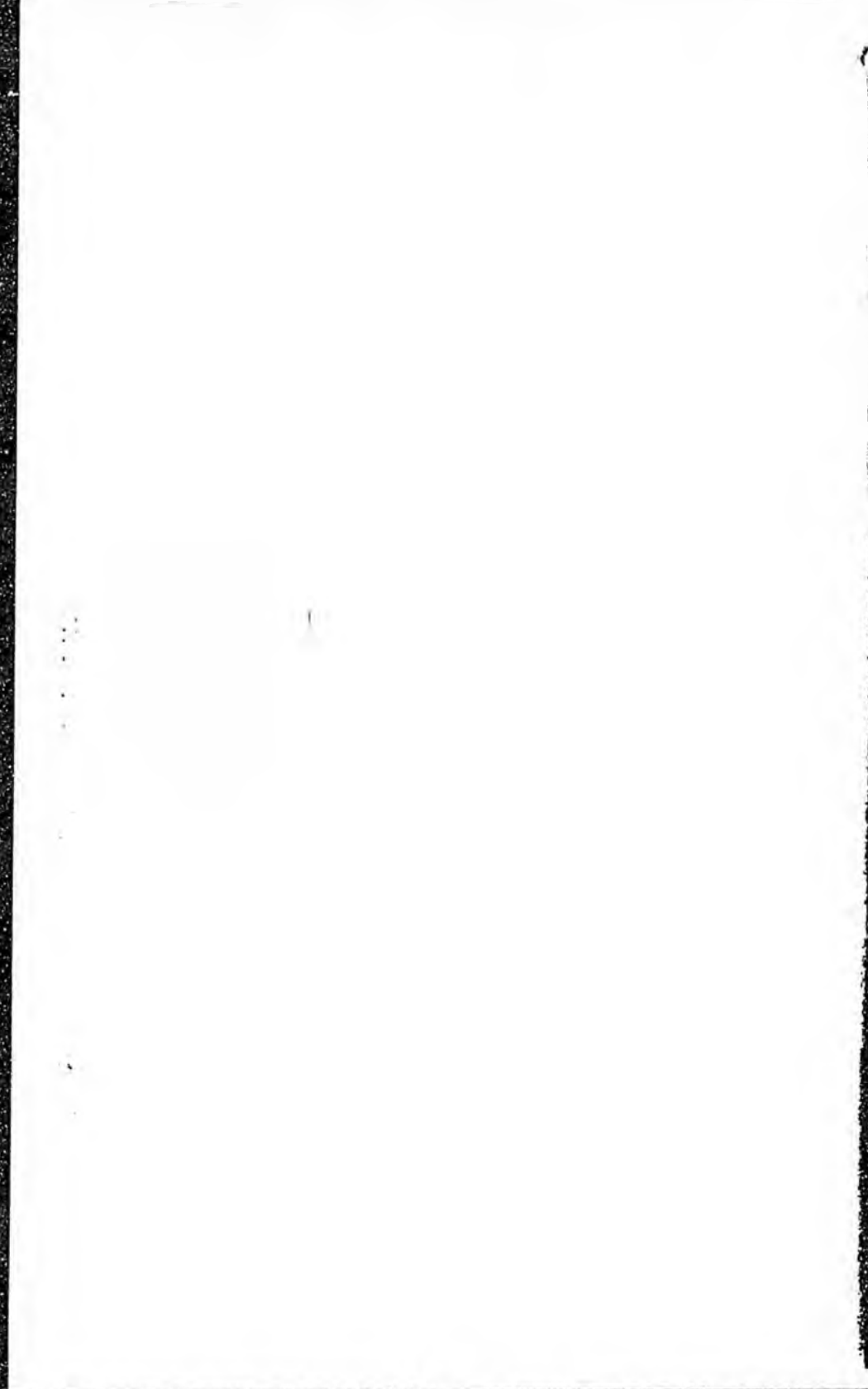
Attachments

### Parental Responsibility for Delinquent Acts of Children

State	Cap (\$)	Notes
Alabama	1,000	
Illinois	1,000	
Minnesota	1,000	
North Carolina	1,000	
Pennsylvania	1,000	
South Dakota	1,500	
Alaska	2,000	
Arkansas	2,000	
Missouri	2,000	
Utah	2,000	
Wyoming	2,000	
Florida	2,500	court may absolve parents of liability if it finds they have made good faith efforts
Michigan	2,500	
New York	2,500	
Wisconsin	2,500	
Indiana	3,000	
Ohio	3,000	
Colorado	3,500	court may absolve parents of liability if it finds they have made good faith efforts
New Mexico	4,000	
Connecticut	5,000	
Georgia	5,000	
Maryland	5,000	parents may be heard and present evidence on their own behalf
Massachusetts	5,000	
Washington	5,000	
Arizona	10,000	
Kentucky	10,000	
New Hampshire	10,000	
Texas	15,000	
California	25,000	cap to be adjusted every 2 years to reflect changes in cost of living
Hawaii	no cap	
Idaho	no cap	victims may be "made whole"
Montana	no cap	court may order parents to pay restitution
New Jersey	no cap	cap at \$1,000 for damage to a public transportation utility
Oklahoma	no cap	court may order parents to pay restitution

Source: NCJJ analysis of state juvenile codes in the Automated Juvenile Law Archive, current as of the end of the 1993 legislative session; NCSL annual state summaries of Children, Youth and Family Issues; and Legislative Research Unit Research Response, "Laws on Parental Responsibility for Child's Acts," File 10-419, September 9, 1992.

Prepared by the Legislative Research Agency, February 1995 (95.068)



# Constitutional Limitations on State Power to Hold Parents Criminally Liable for the Delinquent Acts of Their Children

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## I. INTRODUCTION

In late 1988 as part of a comprehensive effort to combat violent street gang activity,<sup>1</sup> the California legislature passed an amendment to section 272 of California's Penal Code,<sup>2</sup> commonly known as the Paren-

---

1. Abramovsky, *Parent's Liability for Child's Crime*, 202 N.Y.L.J. 3 (1989). The California legislature found that violent street gangs, whose activities presented a "clear and present danger to public order," had created a state of crisis. CAL. PENAL CODE § 186.21 (West Supp. 1990).

2. CAL. PENAL CODE § 272 (West Supp. 1990). In addition, the legislature passed the Califor-

tal Responsibility Law.<sup>3</sup> Section 272 originally stated only that every person who commits any act or fails to perform any duty that causes or tends to cause a minor to do a prohibited act is guilty of contributing to the delinquency of a minor, a misdemeanor under the California Penal Code, and subject to a maximum fine of twenty-five hundred dollars, one year in jail, or both.<sup>4</sup> When the California legislature amended section 272, it imposed an additional affirmative duty on parents and legal guardians "to exercise reasonable care, supervision, protection, and control over their minor child[ren]."<sup>5</sup> In essence, California's legislative package makes parents liable for failing to prevent their minor children from engaging in criminal activity.<sup>6</sup>

Although the State has not prosecuted anyone under the new laws,<sup>7</sup> the American Civil Liberties Union of Southern California (ACLU) has filed a taxpayers' lawsuit challenging the constitutionality of the Parental Responsibility Law.<sup>8</sup> The complaint alleges that the amendment is vague, overbroad, and an infringement on family privacy. The ACLU has requested that the court enjoin enforcement of the Parental Responsibility Law and declare it unconstitutional.<sup>9</sup>

California's Parental Responsibility Law reflects a recent trend among the states to make parents more responsible for the activities of

nia Street Terrorism Enforcement and Prevention Act (Street Terrorism Act). *Id.* §§ 186.20-186.27. The Street Terrorism Act criminalizes participation in a street gang with knowledge of the gang's patterns of criminal activity. *Id.* § 186.22.

3. *Law Challenged Holding Parents Criminally Liable*, L.A. Daily J., July 21, 1989, at 1, col. 4 [hereinafter *Law Challenged*].

4. CAL. PENAL CODE § 272 (West 1988), prior to the 1988 amendment, read: "Every person who commits any act or omits the performance of any duty, which act or omission causes or tends to cause or encourage any [minor] . . . to come within the provisions of Section 300, 601, or 602 of the Welfare and Institutions Code" is guilty of a misdemeanor. Sections 300, 601, and 602 define the types of minors who are subject to the juvenile court's jurisdiction. Section 300 governs minors who have been or are in danger of being physically, emotionally, or sexually abused or neglected or exploited by someone in the minor's home. CAL. WELF. & INST. CODE § 300 (West Supp. 1990). Section 601 covers habitually disobedient or truant minors. *Id.* § 601, and § 602 concerns minors who have violated any state or federal law or any city or county ordinance other than curfew ordinances. *Id.* § 602.

5. CAL. PENAL CODE § 272 (West Supp. 1990). A person is considered a minor in California until the age of 18. *Id.*

6. See Kantrowitz, Springen, Annin & Gordon, *Now, Parents on Trial*, NEWSWEEK, Oct. 2, 1989, at 64 [hereinafter *Parents on Trial*]; Abramovsky, *supra* note 1, at 3; *Law Challenged*, *supra* note 3, at 1, col. 4.

7. In April 1989 the Los Angeles city attorney filed charges under the Parental Responsibility Law against Gloria Williams after her son, a gang member, was arrested for rape. *Parents on Trial*, *supra* note 6, at 65. Williams was charged with failing to provide reasonable care for her son. *Law Challenged*, *supra* note 3, at 1, col. 4. Prosecutors dismissed the charges when they learned that Williams had taken a parenting class. *Id.*

8. *Law Challenged*, *supra* note 3, at 1, col. 4.

9. *Id.*

their minor children.<sup>10</sup> Some states have imposed certain duties on parents with the ultimate goal of discouraging various forms of undesirable behavior by their children.<sup>11</sup> Moreover, Kentucky<sup>12</sup> and New York<sup>13</sup> have legislation that greatly resembles California's Parental Responsibility Law. This trend has enormous potential for growth because many states could use existing criminal statutes to regulate parental conduct in the same manner as California's new legislation.<sup>14</sup>

10. Abramovsky, *supra* note 1, at 3; see also Shapiro, *When Parents Pay for Their Kids' Sins*, U.S. NEWS & WORLD REPORT, July 24, 1989, at 26.

City councils also have countered increases in juvenile crimes with ordinances to punish parents who do not keep their children out of trouble. See Gibson, *Make Parents Pay for Actions of Kids*, USA TODAY, Dec. 19, 1989, at 10A (final ed.) (discussing the success of a new city ordinance in Dermott, Arkansas that seeks to curb juvenile delinquency by prosecuting parents of delinquent children). For example, the Norwalk, California City Council voted to impose \$2500 fines on parents of delinquent children. Harris, *Norwalk Votes to Fine Parents of Lawbreakers*, L.A. TIMES, Feb. 11, 1990, at 1, col. 2 (home ed.). The Norwalk ordinance also enables the city to file civil suits against parents whose children are gang members. *Id.*

California State Senator Ed Davis has advocated federal and state tax subsidies to encourage mothers to stay home and raise children. Davis, *A Parental Presence Prevents Delinquency*, L.A. TIMES, Feb. 25, 1990, at 4, col. 1 (home ed.). According to Senator Davis, mothers should remain at home to teach children cultural values during the children's formative years. *Id.*

11. A Florida law requires parents to store securely any loaded guns or face a \$600 fine and 60 days in prison. FLA. STAT. ANN. §§ 790.173-790.174 (West 1978 & Supp. 1990). In Wisconsin parents who fail to support the offspring of their unmarried minor children may face a \$10,000 fine or a maximum jail term of two years. WIS. STAT. ANN. § 49.90 (West 1987 & Supp. 1990). Wisconsin legislators enacted the law to combat teenage pregnancy and abortion by making parents feel more responsible for the sexual behavior of their minor children. See *Parents on Trial*, *supra* note 6, at 64. Hawaii has a similar law. See Shapiro, *supra* note 10, at 26. The Arkansas legislature has passed a law that fines parents if their children miss school. *Id.*

12. "A parent, . . . is guilty of endangering the welfare of a minor when he fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming a neglected, dependent or delinquent child." KY. REV. STAT. ANN. § 630.060(1) (Michie/Bobbs-Merrill 1985). A neglected child is one whose parents have harmed or threatened to harm the child's physical or emotional welfare. *Id.* § 600.020(1) (Michie/Bobbs-Merrill 1990). A child is dependent if the child's parents unintentionally cared for the child improperly. *Id.* § 600.025(15). "Delinquency" is not defined in the Kentucky Code.

13. "A person is guilty of endangering the welfare of a child when: . . . (b) being a parent, . . . he fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming an 'abused child,' a 'neglected child,' a 'juvenile delinquent' or a 'person in need of supervision,' . . ." N.Y. PENAL LAW § 260.10(2) (McKinney 1989). An abused child is one whose parent physically or sexually abused the child or allowed another to abuse the child. A neglected child is one whose physical, emotional, or mental condition has been impaired or is in danger of being impaired because the parent has not provided a minimum degree of care. N.Y. JUD. LAW § 1012(e), (f) (McKinney 1983 & Supp. 1990). A juvenile delinquent is a child who has committed a crime. *Id.* § 301.2(1) (McKinney 1983). A child is in need of supervision if the child is habitually truant, incorrigible, ungovernable, habitually disobedient, or has a conviction for the unlawful and knowing possession of marijuana. *Id.* § 712.

14. See, e.g., ARIZ. REV. STAT. ANN. §§ 13-3612, 13-3013 (1988); GA. CODE ANN. § 16-11-2 (1990); *id.* § 16-12-1 (1988); NEV. REV. STAT. ANN. §§ 201.090, 201.110 (Michie 1986); R.I. GEN. LAWS § 11-9-4 (1981); S.D. CODIFIED LAWS ANN. §§ 26-8-6, 26-9-1 (1984 & Supp. 1990).

In addition, the police in Grand Rapids, Michigan have reactivated a 20-year-old city ordinance that holds parents criminally liable for their children's misbehavior. See *Parents Are*

This Note addresses the legal problems presented when states attempt to regulate parental conduct through statutes that penalize contributing to the delinquency of minors.<sup>16</sup> Part II of this Note discusses the current popularity of enforcing contributing statutes to deter juvenile crime indirectly. Part III reviews the void for vagueness doctrine and analyzes the nearly unanimous view of the state courts that contributing statutes are not void for vagueness. Part IV examines the argument that these statutes violate parents' constitutional right to privacy in child rearing decisions. Part V concludes that some contributing statutes are void for vagueness and most contributing statutes impermissibly interfere with the fundamental right of parents to make child rearing decisions.

## II. BACKGROUND FOR STATUTORY TREND

### A. Prevailing Views on the Solution to Juvenile Crime

Between 1978 and 1987 overall arrests of juveniles for violent crime decreased.<sup>18</sup> In the same period, however, juvenile arrests increased 20 percent for forcible rape and 8.3 percent for aggravated assault.<sup>17</sup> Other assault arrests also rose,<sup>18</sup> and the number of juveniles arrested for weapons possession increased 16.9 percent.<sup>19</sup>

From 1987 to 1988 arrests of juveniles for violent crimes increased 7.7 percent.<sup>20</sup> Arrests for murder and nonnegligent manslaughter, which had decreased from 1978 to 1987,<sup>21</sup> grew 17.8 percent between 1987 and 1988.<sup>22</sup> The previous decline in arrests for drug abuse violations<sup>23</sup> reversed sharply from 1987 to 1988.<sup>24</sup> Moreover, arrests for aggravated and other assaults and for weapons possession continued to increase.<sup>25</sup>

*Charged After Crime by Kids*, Chicago Tribune, Feb. 6, 1990, at 3 (hereinafter *Parents Charged*). Although the city had not prosecuted anyone under the ordinance for fifteen years, seven people have been charged in the last four months. *Id.* Under the ordinance, parents who fail to exercise "reasonable control" over their children may face 90 days in jail and a \$500 fine. *Id.* The Assistant City Attorney has stated that parents will be charged only if their children have committed three or more serious offenses. *Id.*

16. This Note does not address the application of contributing statutes to defendants who are not parents of the minor.

17. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 489 (1989) (hereinafter *SOURCEBOOK*).

18. *Id.*

19. *Id.*

20. *Id.*

21. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE U.S. 176 (1989) (hereinafter *UNIFORM CRIME REPORTS*).

22. *SOURCEBOOK*, *supra* note 16, at 489.

23. *UNIFORM CRIME REPORTS*, *supra* note 20, at 176.

24. *SOURCEBOOK*, *supra* note 16, at 489.

25. *UNIFORM CRIME REPORTS*, *supra* note 20, at 176.

26. *Id.*

These unsettling patterns of juvenile violence prompted the Select Committee on Children, Youth, and Families of the House of Representatives to hold a hearing in May 1989 to consider causes of the violence and possible solutions to the problem.<sup>26</sup> Experts on juvenile delinquency testified that while the proportion of juveniles committing violent crimes is not increasing,<sup>27</sup> those juveniles currently involved are much more violent than delinquents were a few years ago.<sup>28</sup> The easy availability of drugs and weapons has aggravated the situation.<sup>29</sup> In addition, a new phenomenon has surfaced in that inner city men in their twenties are not growing out of adolescent violence, but instead are continuing to commit more violent crimes.<sup>30</sup> Many of the Committee's witnesses pointed to family breakdown as a major contributor to juvenile delinquency.<sup>31</sup> Other witnesses focused on factors such as the influence of peer groups on juvenile offenders<sup>32</sup> and poverty.<sup>33</sup> The most common

26. *Down These Mean Streets: Violence by and Against America's Children: Hearing Before the House Select Comm. on Children, Youth, and Families*, 101st Cong., 1st Sess. 4 (1989) (hereinafter *Down These Mean Streets*).

27. See *UNIFORM CRIME REPORTS*, *supra* note 20, at 172.

28. *Down These Mean Streets*, *supra* note 26, at 107 (statement of Dr. Delbert S. Elliott, Professor of Sociology, University of Colorado at Boulder); see also *supra* notes 18-25 and accompanying text.

29. *Down These Mean Streets*, *supra* note 26, at 107.

30. Dr. Elliott explained that violence in young people usually peaks around the age of 16 or 17 and ends by the age of 19. Today, almost 20% of delinquent teenagers are continuing their violent behavior into adulthood. In addition, these delinquent adults are committing violent acts more frequently. Dr. Elliott suggested that this phenomenon is caused in part by increased poverty and unemployment in urban areas. *Id.* at 107-08.

31. Representative Thomas J. Bliley, Jr. stated that "[v]iolence on the streets cannot be separated from what is happening in the home." *Id.* at 11. Another witness worried about the "deterioration of the family structure." *Id.* at 44 (statement of J. Reggie B. Walton, Associate Judge, Superior Court of the District of Columbia); see also *id.* at 115-16 (statement of Karl Zinsmeister, Adjunct Research Associate, American Enterprise Institute for Public Policy Research).

The Department of Justice statistics confirm that family breakdown is a factor in juvenile delinquency. Almost one-half of the juveniles in long-term institutions were raised by single mothers. Family breakdown cannot be the entire explanation, however, because almost 30% of incarcerated juveniles grew up with both parents at home. *SOURCEBOOK*, *supra* note 16, at 601.

32. Dr. Elliott testified that while inadequate parenting does make juveniles more likely to be violent, the more immediate cause of juvenile violence is association with violent peer groups. During adolescence the influence of peer groups far outweighs the influence of parents. *Down These Mean Streets*, *supra* note 26, at 109. Peer groups become the dominant factor perpetuating violent behavior because these groups teach members "techniques of moral disengagement which provides justification and rationalizations for engaging in crime." *Id.* Because violence is an "expression of group hostility," Dr. Elliott believes that any attempt to solve the juvenile delinquency problem that ignores peer groups is destined to fail. *Id.*

33. Parents need more social services before they can reclaim parental authority. "Parents . . . can exert power when they are seen as effective protectors; but when their resources . . . prohibit them from providing more than [the barest necessities], then they are seen as weak adult authority figures. They dare not say no because they fear their children will . . . leave them." *Id.* at 53 (statement of Deborah Meier, Principal of Central Park East Secondary School in East Harlem, New York, New York). See generally *STAFF OF HOUSE SELECT COMM. ON CHILDREN, YOUTH,*

recommendation made to the Committee was that parents should be held accountable for the violent activities of their children.<sup>34</sup>

Holding parents responsible for juvenile delinquency is not a new concept. Colorado enacted the first law holding parents criminally liable for their children's delinquent acts in 1903.<sup>35</sup> The reasoning behind the concept is fairly simple. The family is the primary influence in the lives of children and, therefore, is the institution best situated to prepare children to become productive members of society.<sup>36</sup> Consequently, the state should require parents not only to provide for the basic needs of children, but also to teach them fundamental societal values, including respect for authority.<sup>37</sup> Advocates of this solution suggest that lack of adequate parental control and guidance causes juvenile delinquency. Advocates also believe that through the imposition of fines or prison terms for delinquent parenting the state can force parents to control their children and, therefore, decrease the incidence of juvenile delinquency.<sup>38</sup>

#### B. The Hidden Potential in Present Criminal Laws for Expansion of the Trend

Many states are embracing this proposed solution to the growing problem of juvenile crime.<sup>39</sup> For example, California prosecutors lob-

AND FAMILIES, 100TH CONG., 2D SESS. REPORT ON CHILDREN AND FAMILIES: KEY TRENDS IN THE 1980s 3 (Comm. Print 1989) [hereinafter REPORT ON CHILDREN AND FAMILIES] (outlining the economic problems facing the modern family).

34. See, e.g., *Down These Mean Streets*, supra note 26, at 165 (response by Judge Walton to subsequent questions posed by Congressman Lamar Smith); *id.* at 119 (statement of Karl Zinmeister, Adjunct Research Associate, American Enterprise Institute for Public Policy Research). Zinmeister recommended positive family building laws, new penalties for persons who harm children, and new laws holding parents accountable for the actions of their children. "[T]he first step in reducing juvenile delinquency has to be to make negligent parents, who are just kind of not exerting themselves in a proper way, exert some control over their charges." *Id.*

35. For a discussion of the Colorado law, see Gladstone, *The Legal Responsibility of Parents for Juvenile Delinquency in New York State: A Developmental History*, 21 BROOKLYN L. REV. 172, 173-74 (1955). "This theory of [parental] criminal responsibility and causation [of juvenile crime] climbs upwards in popularity every now and then. When it has its effect we have increased punishment . . . of parents of delinquent children." S. RUBIN, CRIME AND JUVENILE DELINQUENCY 21 (3d rev. ed. 1970).

36. See *Children and Families in Poverty: Beyond the Statistics: Hearing Before the House Select Comm. on Children, Youth, and Families*, 99th Cong., 1st Sess. 64 (1985) [hereinafter *Children and Families*] (additional material submitted by Glenn C. Loury); S. KATZ, WHEN PARENTS FAIL: THE LAW'S RESPONSE TO FAMILY BREAKDOWN 1, 2 (1971).

37. S. KATZ, supra note 36, at 9-13.

38. See generally *Children and Families*, supra note 36, at 64 (discussing the role of the family in juvenile delinquency). But see S. RUBIN, supra note 35, at 21-31 (calling for the repeal of contributing statutes); Alexander, *What's This About Punishing Parents?*, 12 FED. PROBATION 23 (1948) (acknowledging the failure of Ohio's contributing statute).

39. See *Parents on Trial*, supra note 6, at 54; Shapiro, supra note 10, at 26.

bed for the adoption of the Parental Responsibility Law because they believed that it would divide children and gangs.<sup>40</sup> Most states already can force parents to take greater responsibility for their children through enforcement of statutes that prohibit contributing to the delinquency of minors.<sup>41</sup> Many contributing statutes contain general terms that could be used to punish parents for either acts or omissions later found to have promoted the delinquency of their children. A typical statute reads: "Contributing to [the] delinquency of [a] minor consists of any person committing any act, or omitting the performance of any duty, which act or omission causes, or tends to cause or encourage the delinquency . . ." of a minor.<sup>42</sup> This language is broad enough to include any activity of a parent, intentional or not, that an outside observer subsequently determines is detrimental to the child.

Other state contributing statutes contain language specifically applicable to parental behavior. Contributing statutes in California, New York, and Kentucky explicitly require parents to exercise reasonable control over their children.<sup>43</sup> Other states either bury the control provisions in the statutory definitions of delinquent or dependent children<sup>44</sup> or require parents to prevent their children from engaging in certain

40. Prosecutors stated that the new law would "drive a wedge between children and gangs." *Law Challenged*, supra note 3, at 22, col. 2.

41. See ALA. CODE § 12-15-13 (1988); ALASKA STAT. § 11.51.130 (1989); ARIZ. REV. STAT. ANN. § 13-3613 (1989); ARK. STAT. ANN. §§ 5-27-205, 5-27-220 (1987); CAL. PENAL CODE § 272 (West Supp. 1990); COLO. REV. STAT. § 18-6-701 (1988 & Supp. 1990); CONN. GEN. STAT. ANN. § 53-21 (West 1985); DEL. CODE ANN. tit. 11, § 1102 (1987); GA. CODE ANN. § 16-12-1 (1988); HAW. REV. STAT. §§ 709-904 (1989); ILL. REV. STAT. ch. 23, para. 2381a (1987); IND. CODE ANN. § 35-40-1-8 (Burns 1985); IOWA CODE ANN. § 233.1 (West 1985 & Supp. 1990); KAN. STAT. ANN. § 21-3608 (1989); KY. REV. STAT. ANN. § 530.060 (Michie/Bobbs-Merrill 1985); LA. REV. STAT. ANN. § 92 (West 1986); ME. REV. STAT. ANN. tit. 17-A, § 554 (1983 & Supp. 1989); MD. CTS. & JUD. PROC. CODE ANN. § 3-831 (1989); MASS. GEN. LAWS ANN. ch. 119, § 83 (West Supp. 1990); MICH. COMP. LAWS ANN. § 750.145 (West 1975); MINN. STAT. ANN. § 260.315 (West Supp. 1991); MISS. CODE ANN. § 87-5-39 (Supp. 1990); NEB. REV. STAT. § 28-709 (1989); NEV. REV. STAT. ANN. § 201.110 (Michie 1986); N.H. REV. STAT. ANN. § 169-B:41 (1990); N.J. STAT. ANN. § 2C:24-4 (West Supp. 1990); N.M. STAT. ANN. § 30-6-3 (1984); N.Y. PENAL LAW § 260.10 (McKinney 1989); N.C. GEN. STAT. § 14-316.1 (1980); N.D. CENT. CODE § 14-10-06 (Supp. 1989); OHIO REV. CODE ANN. § 2919.24 (Anderson 1987); OKLA. STAT. ANN. tit. 21, § 858.1 (West Supp. 1991); OR. REV. STAT. § 163.575 (1989); PA. STAT. ANN. tit. 18, § 4304 (Purdon Supp. 1990); R.I. GEN. LAWS § 11-9-4 (1981); S.C. CODE ANN. § 16-17-490 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 28-9-1 (Supp. 1990); TENN. CODE ANN. § 37-1-156 (1984); TEX. FAM. CODE ANN. § 72.002 (Vernon 1986); VT. STAT. ANN. tit. 13, § 1301 (1974); VA. CODE ANN. § 18.2-371 (Supp. 1990); WASH. REV. CODE ANN. § 9A.42.030 (1988); W. VA. CODE § 49-7-7 (Supp. 1990); WIS. STAT. ANN. § 948.40 (West Supp. 1990).

42. N.M. STAT. ANN. § 30-6-3 (1984).

43. See CAL. PENAL CODE § 272 (West Supp. 1990); KY. REV. STAT. ANN. § 530.060(1) (Michie/Bobbs-Merrill 1985); N.Y. PENAL LAW § 260.10(2) (McKinney 1989).

44. See, e.g., ARIZ. REV. STAT. ANN. §§ 13-3613, 13-3612 (1989); GA. CODE ANN. §§ 16-12-1, 16-11-2 (1988, 1990); NEV. REV. STAT. ANN. § 201.110 (Michie 1986); S.D. CODIFIED LAWS ANN. §§ 26-9-1, 26-8-6 (Supp. 1990).

behavior.<sup>46</sup>

Although in the past states generally have used contributing statutes to punish strangers for sexual or physical assaults on minors,<sup>46</sup> the statutory language permits a broader application. New York, for example, which previously has applied its contributing statute narrowly, soon may use its statute to police parental behavior.<sup>47</sup> Because New York and California are influential states, other states are likely to follow their lead. The majority of states would not require legislative action to punish parents; instead, state prosecutors simply could begin to enforce existing criminal statutes more strictly.<sup>48</sup>

### III. THE VOID FOR VAGUENESS DOCTRINE

#### A. Supreme Court Decisions

Defendants have challenged contributing statutes most frequently under the void for vagueness doctrine.<sup>49</sup> The United States Supreme Court developed the doctrine in a series of cases in which the Court held that a penal statute violates due process<sup>50</sup> if its terms are too vague and indefinite.<sup>51</sup> The purpose of the void for vagueness doctrine is to ensure fair warning of the effect of a penal statute and to prevent standardless law enforcement.<sup>52</sup>

If a statute's terms are too vague, ordinary citizens, forced to guess at the statute's meaning, inevitably will disagree about what conduct comes within the purview of the statute.<sup>53</sup> More importantly, a vague law allows policemen, judges, and juries to make subjective, and possi-

45. See, e.g., OHIO REV. CODE ANN. § 2919.24 (Anderson 1987); RI GEN. LAWS § 11-9-4 (1981); VT. STAT. ANN. tit. 13, § 1301 (1974).

46. See MODEL PENAL CODE § 230.4 comment, at 445-47 (1980).

47. Abramovsky, *supra* note 1, at 3.

48. See generally MODEL PENAL CODE § 230.4 comment (discussing broad reach of current contributing statutes); S. RUBIN, *supra* note 36, at 28 (stating that "[a]s long as 'contributing' statutes are on the books, the danger exists that they will be used, and when they are used, the danger exists . . . that they will be abused"); see also *Parents Charged* *supra* note 14, at 3 (discussing the current enforcement of a little-used city ordinance holding parents criminally liable for their children's misbehavior).

49. See, e.g., *Brockmueller v. State*, 86 Ariz. 82, 340 P.2d 992, cert. denied, 361 U.S. 913 (1959); *State v. Schriver*, 207 Conn. 466, 542 A.2d 686 (1988); *State v. Bachelder*, 565 A.2d 96 (Me. 1980); *State v. Simants*, 182 N.H. 491, 155 N.W.2d 788 (1968); *State v. Flinn*, 158 W. Va. 111, 208 S.E.2d 538 (1974).

50. See U.S. CONST. amend. V, XIV, § 1.

51. See *Kolender v. Lawson*, 461 U.S. 352 (1983); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *United States v. National Dairy Prods. Corp.*, 372 U.S. 29 (1963); *United States v. Petrillo*, 332 U.S. 1 (1947); *Thornhill v. Alabama*, 310 U.S. 89 (1940); *Connally v. General Constr. Co.*, 269 U.S. 385 (1926). For a good discussion of Supreme Court decisions in this area, see *Flinn*, 158 W. Va. at 111, 208 S.E.2d at 538.

52. *Kolender*, 461 U.S. at 367.

53. *Connally*, 269 U.S. at 391.

bly arbitrary, decisions.<sup>54</sup> Thus, the principal requirement of the vagueness doctrine is that criminal statutes establish at least minimal guidelines to limit discretionary law enforcement.<sup>55</sup>

The Constitution, however, does not require complete specificity.<sup>56</sup> At times the legislature must use general terms in a statute because the various behaviors required or prohibited cannot be described or listed adequately.<sup>57</sup> An ambiguous statute is not unconstitutional merely because of the possibility that in some marginal cases the exact application of the statute will be difficult to determine.<sup>58</sup> Moreover, courts may cure the constitutional shortcomings of potentially vague statutes by finding a specific intent element in the offense<sup>59</sup> or by determining that prior judicial decisions have eliminated the vagueness.<sup>60</sup>

In accordance with concerns for both discriminatory enforcement and due process, the Supreme Court has adopted two approaches to the vagueness problem, depending on whether the Constitution protects the activity governed by the statute. In *Thornhill v. Alabama*<sup>61</sup> the Court held that the Constitution requires a strict vagueness test when reviewing statutes that regulate first amendment rights.<sup>62</sup> The strict test requires a facial examination of an allegedly vague statute notwithstanding the particular conduct concerned in the case.<sup>63</sup> The *Thornhill* Court believed that the freedoms of speech and of the press deserved enhanced protection because of the importance of these rights in a democracy.<sup>64</sup> The Court was concerned that vagueness in statutes

54. *Thornhill*, 310 U.S. at 97-98. The subjective nature of vague statutes encourages harsh and discriminatory law enforcement. *Id.*

55. *Kolender*, 461 U.S. at 358.

56. *Petrillo*, 332 U.S. at 7-8.

57. One court has upheld a contributing statute on this basis, stating that the ways in which an adult may corrupt a minor are so numerous that "to compel a complete enumeration in any statute designed for protection of the young before giving it validity would be to confess the inability of modern society to cope with the problem of juvenile delinquency." *State v. McKinley*, 53 N.M. 106, 111, 202 P.2d 984, 987 (1949).

58. *Petrillo*, 332 U.S. at 7.

59. *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 342 (1952).

60. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

61. 310 U.S. at 88.

62. See *id.* at 96-98. In *Thornhill* the defendant was charged with violating an Alabama statute that prohibited persons from loitering or picketing, without just cause, on the property of a lawful business, with the intention of convincing customers not to trade with that business. *Id.* at 91. The defendant had been picketing the Brown Wood Preserving Company under a strike order issued by the American Federation of Labor. *Id.* at 94. According to the Court, the Alabama statute embraced almost every available means of informing the public about the causes of a labor dispute. *Id.* at 104. The Court stated that "freedom of speech and of the press . . . embraces at the least the liberty to discuss publicly . . . all matters of public concern without previous restraint or fear of subsequent punishment." *Id.* at 101-02 (footnote omitted).

63. *Id.* at 96-97; see *State v. Hodges*, 254 Or. 21, 26, 457 P.2d 491, 493 (1969).

64. *Thornhill*, 310 U.S. at 95.

regulating first amendment rights would deter constitutionally protected and socially desirable conduct.<sup>65</sup> Additionally, the Court feared that a vague statute would prove to be a convenient tool for harsh and discriminatory enforcement against disfavored groups.<sup>66</sup>

In *Papachristou v. City of Jacksonville*<sup>67</sup> the Supreme Court extended the strict test of *Thornhill* beyond first amendment rights to other constitutionally protected activities. *Papachristou* concerned a challenge to a Florida vagrancy ordinance that criminalized normally innocent activities, such as wandering without lawful purpose or objective and becoming economically dependent on a wife or minor child even though able to work.<sup>68</sup> The Court stated that although the Constitution and Bill of Rights do not list these particular activities specifically, these activities historically have been features of life in the United States.<sup>69</sup> Tolerance for this conduct has fostered American independence and creativity by inviting spirited dissent and nonconformity rather than submissiveness.<sup>70</sup> The Court consequently held that the ordinance was unconstitutional under *Thornhill* because the broad language of the ordinance allowed the police and the courts to violate the constitutionally protected right of citizens to determine their personal lifestyles.<sup>71</sup>

The *Papachristou* decision was not based on the first amendment or on any specifically enumerated constitutional right. The Court was concerned more about arbitrary enforcement of the vagrancy statute based on subjective statutory criteria and the potential that law enforcement officials could apply the statute inappropriately to deter socially desirable, historically protected conduct. This extension of *Thornhill* is not limited to vagrancy statutes, even though the *Papachristou* Court did mention the distinctive and familiar abuses of

65. *United States v. National Dairy Prods. Corp.*, 372 U.S. 29, 36 (1963).

66. *Thornhill*, 310 U.S. at 97-98.

67. 405 U.S. 156 (1972).

68. *Id.* at 156 n.1.

69. *Id.* at 164.

70. *Id.* The Court stated:

The difficulty [with the ordinance] is that these activities are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence.

*Id.*

71. *Id.* at 170. The Court stated that persons covered by the statutory language could be "required to comport themselves according to the lifestyle deemed appropriate by the Jacksonville police and the courts." *Id.*

vagrancy statutes by law enforcement officials.<sup>72</sup> In later cases the Supreme Court has stated explicitly that the *Thornhill* test applies to constitutionally protected activities other than first amendment liberties.<sup>73</sup>

In *United States v. National Dairy Products Corp.*<sup>74</sup> the Court developed a second, less exacting approach to the vagueness problem. The Court held that it would examine general penal statutes that do not implicate constitutionally protected activities both facially and in light of the particular conduct concerned in the case.<sup>75</sup> Thus, if the statute as applied would not violate the due process rights of the defendant, the Court will allow it to stand even if it might be unconstitutionally vague in another situation.<sup>76</sup> The Court usually tests economic regulatory statutes under this looser standard because of the narrower subject matter and because businesses are expected to plan their activities more carefully than individuals.<sup>77</sup> In these cases the Court has found the terms of statutes to be sufficiently certain by interpreting the statutes in light of the common understanding and general usage of the words.<sup>78</sup>

#### B. Analysis of State Court Decisions on the Vagueness of Contributing Statutes

State courts almost unanimously have rejected challenges to contributing statutes based on vagueness;<sup>79</sup> however, the rationale of the various courts has differed.<sup>80</sup> Some courts have looked to the legislative

72. The Court was worried that "a vagrancy prosecution may be merely the cloak for a conviction which could not be obtained on the real but undisclosed grounds for the arrest." *Id.* at 169. The Court quoted with approval Justice Felix Frankfurter's statement that "[t]hese [vagrancy] statutes are in a class by themselves, in view of the familiar abuses to which they are put . . . . Definiteness is designedly avoided . . . to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense." *Id.* (quoting *Winters v. New York*, 333 U.S. 607 (1948) (Frankfurter, J., dissenting)).

73. See *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

74. 372 U.S. 29 (1963).

75. *Id.* at 36. *National Dairy* concerned violations of the Robinson-Patman Act, 15 U.S.C. § 13a (1988), which prohibits selling goods at "unreasonably low prices for the purpose of destroying competition." 372 U.S. at 29. The Court distinguished *Thornhill* on the ground that *Thornhill* concerned first amendment activities, which are constitutionally protected and socially desirable. *Id.* at 36. The Robinson-Patman Act, on the other hand, is "directed only at conduct designed to destroy competition," activity that is neither constitutionally protected nor socially desirable. *Id.*

76. *National Dairy*, 372 U.S. at 33.

77. *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498 (1982); see *United States v. Petrillo*, 332 U.S. 1 (1947).

78. See *United States v. Vuitch*, 402 U.S. 82, 72-73 (1971); *Petrillo*, 332 U.S. at 5-8.

79. See, e.g., *Brockmueller v. State*, 88 Ariz. 82, 340 P.2d 992 (1959); *State v. Bachelder*, 565 A.2d 96 (Me. 1989); *State v. McKinley*, 63 N.M. 106, 202 P.2d 964 (1949); *State v. Cray*, 10 Ohio Op. 2d 36 (Common Pleas Ct. 1959); *Commonwealth v. Randall*, 183 Pa. Super. 603, 133 A.2d 276 (Super. Ct. 1957); *State v. Flinn*, 168 W. Va. 111, 208 S.E.2d 538 (1974). None of these cases concerns the type of parental conduct at issue in this Note.

80. See generally *Flinn*, 168 W. Va. at 118, 208 S.E.2d at 547-48 (discussing various state

intent behind the statute and narrowed the scope of the statute to demand only the conduct that would best achieve the legislative purpose.<sup>81</sup> Other courts have rejected vagueness objections because the statute so obviously prohibited the particular conduct concerned.<sup>82</sup> Many courts have upheld contributing statutes on the broad policy ground that the welfare of youth is such a vital state interest that the legislature must write statutes in general terms that preserve the flexibility necessary to handle the problem of juvenile delinquency effectively.<sup>83</sup> Other courts have found contributing statutes constitutional because these statutes have a long history at common law<sup>84</sup> or because a lack of prior challenges to the law indicates that no genuine vagueness problem exists.<sup>85</sup> One group of state courts upheld the statutes on the grounds that the terms were not indefinite.<sup>86</sup>

court decisions).

81. See, e.g., *State v. Simants*, 182 Neb. 491, 493, 155 N.W.2d 788, 790 (1968); *Crary*, 10 Ohio Op. 2d at 39; *Flinn*, 158 W. Va. at 137, 208 S.E.2d at 552-53.

82. See, e.g., *Bochelder*, 565 A.2d at 97 (stating that "it cannot be doubted in this instance that the children's natural mother, with whom they live, has . . . a duty . . . [that] extends to caring for their health, safety and mental welfare"); *People v. Owens*, 13 Mich. App. 469, 477, 164 N.W.2d 712, 714-15 (1968) (finding that encouraging a 16-year-old girl to leave home was exactly the type of conduct that the statute intended to prohibit); *Matthews v. State*, 240 Miss. 189, 193, 126 So. 2d 245, 246 (1961) (holding that defendant's failure to provide proper medical treatment for her child "indicated at least a negligent and careless attitude toward the care and well-being of her child"); *James v. State*, 635 S.W.2d 653, 655 (Tex. Ct. App. 1982) (holding that the language of the statute was sufficiently clear to inform a reasonable person that encouraging and aiding a 14-year-old to dance nude in a public bar contributed to her delinquency).

83. See, e.g., *People v. Deibert*, 117 Cal. App. 2d 410, 259 P.2d 355 (1953); *McDonald v. Commonwealth*, 331 S.W.2d 716 (Ky. Ct. App. 1960); *State v. Cialkowski*, 193 Neb. 372, 227 N.W.2d 406 (1975); *McKinley*, 53 N.M. at 106, 202 P.2d at 964; *State v. Cotterel*, 97 Ohio App. 48, 123 N.E.2d 438 (1953), appeal dismissed, 162 Ohio St. 112, 120 N.E.2d 590 (1954); *Birdsell v. State*, 205 Tenn. 631, 330 S.W.2d 1 (1969); *State v. Harris*, 105 W. Va. 155, 141 S.E. 637 (1928).

84. See, e.g., *Brockmueller*, 85 Ariz. at 84, 340 P.2d at 994 (stating that a long history of common-law interpretation renders the language of these statutes sufficiently clear and meaningful).

85. See, e.g., *State v. Friedlander*, 250 P. 453, 455 (Wash. 1926) (noting that no one previously had challenged the 1907 statute as unconstitutionally vague and that the objection had no merit).

86. See *Randall*, 183 Pa. Super. at 611, 133 A.2d at 279-81. In *State v. Sparrow*, 276 N.C. 499, 173 S.E.2d 897 (1970), the court held that because the words used in the statute were ordinary words of common usage, the statute gave adequate warning that "any person who knowingly does any act to produce, promote or contribute to any condition of delinquency of a child is in violation of the statute." *Id.* at 509, 173 S.E.2d at 903.

After rejecting the defendant's void for vagueness challenge to Utah's contributing statute on grounds of waiver, the Utah Supreme Court stated in dicta in *State v. Tritt*, 23 Utah 2d 365, 463 P.2d 806 (1970), that the terms "delinquency" and "contributing to delinquency" in the statute have such widespread usage that the statute had a clear and understandable meaning. *Id.* at 369, 463 P.2d at 808-09. The court found that these terms denoted any actions that caused a child to engage in conduct which "is contrary to law or which is so contrary to the generally accepted standards of decency and morality" that the result of this conduct would harm substantially the child's "mental, moral, or physical well-being." *Id.* at 369, 463 P.2d at 809. *But see State v. Val-*

A few courts, however, have found contributing statutes void for vagueness.<sup>87</sup> Most recently, the Connecticut Supreme Court held that a statute prohibiting any "act likely to impair the health or morals" of a child<sup>88</sup> was unconstitutionally vague as applied to a particular set of facts.<sup>89</sup> The Louisiana Supreme Court similarly struck down a statute penalizing an adult for enticing, aiding, or permitting a minor to perform an "immoral act."<sup>90</sup> In Oregon, the state supreme court found that the statutory language, "any person who does any act which manifestly tends to cause any child to become [a delinquent]," was void because it contained no standards by which a jury could determine guilt.<sup>91</sup> Moreover, the Wyoming Supreme Court struck down a statute prohibiting an adult from causing, encouraging, aiding, or contributing to the endangerment of a minor's health, welfare, or morals.<sup>92</sup> The court stated that determining what conduct was being prohibited based on the terms of the statute would be an utter impossibility.<sup>93</sup>

Very few of the state courts that have upheld contributing statutes

lery, 212 La. 1095, 1098-99, 34 So. 2d 329, 331 (1948) (rejecting a similar definition of "immoral").

87. See, e.g., *State v. Schriever*, 207 Conn. 466, 561-62, 542 A.2d 686, 689 (1988); *Vallery*, 212 La. at 1099, 34 So. 2d at 331; *State v. Hodges*, 254 Or. 21, 27-28, 457 P.2d 491, 494 (1969); *State v. Gallegos*, 384 P.2d 967, 968-69 (Wyo. 1963).

88. CONN. GEN. STAT. ANN. § 53-21 (West 1985).

89. *Schriever*, 207 Conn. at 466, 542 A.2d at 686. In *Schriever* the State of Connecticut charged the defendant with engaging in activity that was "likely to impair the health or morals" of a child. The court found that the statute, on its face, failed "to articulate a definite standard for determining whether the conduct [of this defendant was] permitted or prohibited." *Id.* at 461, 542 A.2d at 689. The court then discussed whether prior judicial decisions had added a gloss that could save the statute. The court concluded, based on prior decisions, that "grabbing the waist of a fully clothed minor while uttering a sexually suggestive remark is not the type of low conduct that § 53-21 proscribes." *Id.* at 466, 542 A.2d at 691.

90. *Vallery*, 212 La. at 1095, 34 So. 2d at 329. The Louisiana court determined that the term "immoral" was too vague to establish any standards for enforcement. The court rejected a statutory construction that defined "immoral" as conduct that violated "well established and well accepted standards of the community" because that definition was equally uncertain. *Id.* at 1098-99, 34 So. 2d at 331.

After *Vallery* the Louisiana legislature amended the statute to read "sexually immoral act." *State v. Fulmer*, 250 La. 29, 31, 193 So. 2d 774, 774 (1967). The Louisiana Supreme Court upheld the new statute on the grounds that "sexually immoral" had an "accepted meaning not susceptible to misunderstanding." *Id.* at 33, 193 So. 2d at 776.

91. *Hodges*, 254 Or. at 21, 457 P.2d at 491. The *Hodges* court held that the statute was void for vagueness because it was an "instrument of potential abuse" contrary to due process and because it violated the Oregon Constitution's prohibition on the delegation of legislative power. *Id.* at 28, 457 P.2d at 494. While some courts have interpreted *Hodges* as based solely on the state constitution, the decision also is based on the due process clause of the federal constitution. See *Flinn*, 158 W. Va. at 128-29, 208 S.E.2d at 548. *But see Comment, Contributing Survives Constitutional Attack: Confusion or Certainty*, 78 W. Va. L. Rev. 145, 149-50 (1976).

92. *Gallegos*, 384 P.2d at 967. Although the *Gallegos* court cited Supreme Court cases to support its discussion, the court ultimately based its holding on the Wyoming Constitution. *Id.* at 969.

93. *Id.* at 968.

have provided defensible reasoning for their decisions. The judicial decisions that avoided the constitutional question through statutory construction<sup>94</sup> effectively eliminated vagueness concerns. Courts frequently can construe statutes to avoid constitutional challenges.<sup>95</sup> On the other hand, state courts that have declared a potentially vague statute constitutional on grounds that no one had challenged it before<sup>96</sup> cannot defend this reasoning. In addition, a blanket assertion that protecting children is a vital state interest<sup>97</sup> circumvents the question of whether the statute is unconstitutionally vague.

Other state courts have yet to analyze their contributing statutes in light of the Supreme Court decisions on vagueness. While the egregiousness of a defendant's conduct<sup>98</sup> may be relevant to the court's determination, the court first must decide which constitutional test applies before evaluating the weight of the facts. The facts of a case are irrelevant under the *Thornhill* test because the court must judge the potential for vagueness problems on the face of the statute, while under the *National Dairy* approach, the court also must consider the statute in light of the facts.

The state court decisions holding that the language of the contributing statutes was not indefinite<sup>99</sup> require closer examination. In *Musser v. Utah*<sup>100</sup> the United States Supreme Court stated that a statute prohibiting a person from committing any act "injurious to public morals" was vulnerable to multiple subjective interpretations by judges and jurors depending on the fact finder's view of morality.<sup>101</sup> The Court did not strike down the statute, but hinted that unless the Utah Supreme Court construed the statute to supply more definite standards, the statute would be void for vagueness.<sup>102</sup> The *Musser* decision suggests that the contributing statutes phrased in terms of morality are facially vague.

94. See *Brockmueller*, 86 Ariz. at 84, 340 P.2d at 994 (interpreting statute in light of a long history of common law); *State v. Crary*, 10 Ohio Op. 2d 36, 39 (Common Pleas Ct. 1959) (limiting statute's application to certain specified types of conduct).

95. See *Fox v. Washington*, 236 U.S. 273, 277 (1915); *State v. McKinley*, 53 N.M. 106, 111, 202 P.2d 964, 967 (1949); *James v. State*, 635 S.W.2d 653, 656 (Tex. Ct. App. 1982); *State v. Flinn*, 158 W. Va. 111, 130, 208 S.E.2d 538, 547 (1974).

96. See *supra* note 85 and accompanying text.

97. See *supra* note 83 and accompanying text.

98. See *supra* note 82 and accompanying text.

99. See *supra* note 86 and accompanying text.

100. 333 U.S. 95 (1948).

101. *Id.* at 96-97; see also *Flinn*, 158 W. Va. at 130, 208 S.E.2d at 549 (stating that the phrases "immoral or vicious persons" and "injure or endanger the morals" are unconstitutionally vague).

102. See *Musser*, 333 U.S. at 96-98.

In *Commonwealth v. Randall*,<sup>103</sup> however, the Pennsylvania Superior Court upheld a statute that penalized adults whose actions corrupted or tended to corrupt the morals of a child. According to the court, the statute was not vague because the community easily could decide what particular conduct was forbidden based on commonly accepted notions of decency, morality, and common sense.<sup>104</sup> Although both *Randall* and *Musser* concerned interpretation of the term "morals," the Pennsylvania court apparently found the clear and obvious meaning that had eluded the Supreme Court. The Pennsylvania court distinguished *Musser* on the grounds that public morals was a much broader category than the morals of children.<sup>105</sup> Yet the court failed to explain how the term "morals" as applied to children could have an obvious, universal meaning when other courts have declared the term unconstitutionally vague.<sup>106</sup>

Other state courts have upheld contributing statutes because the terms "delinquency" and "contributing to delinquency" have clear meanings.<sup>107</sup> Because "delinquency" was not known at common law, however, all definitions of the terms are statutory.<sup>108</sup> Since nearly every state defines "delinquency" differently,<sup>109</sup> the term must lack a clear and obvious meaning. Moreover, when the courts considering these statutes attempted to define "delinquency," they based their definitions in terms of "morality."<sup>110</sup> As illustrated by the admonition of the Supreme Court in *Musser*, the term "morality" is unconstitutionally vague.<sup>111</sup>

### C. Application of the Void for Vagueness Doctrine to Contributing Statutes

Under modern void for vagueness doctrine, a court first must decide whether to apply the strict *Thornhill* test or the less exacting *National Dairy* standard. If the contributing statute infringes on constitutionally protected conduct, the court should apply the stricter *Thornhill* test. Under either test, however, contributing statutes that

103. 183 Pa. Super. 603, 133 A.2d 276 (Super. Ct. 1957), cert. denied, 355 U.S. 954 (1958).

104. *Randall*, 193 Pa. Super. at 611, 133 A.2d at 280.

105. *Id.* at 610, 133 A.2d at 278.

106. See *State v. Vallery*, 34 So. 2d 329 (La. 1948); *Flinn*, 158 W. Va. at 111, 208 S.E.2d at 538.

107. See *supra* note 86 and accompanying text.

108. See MODEL PENAL CODE § 230.4 comment, at 444-46 (1980).

109. For a sampling of the various definitions, see OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEPT. OF JUSTICE, A COMPARATIVE ANALYSIS OF JUVENILE CODES 23-24 (1980).

110. See cases cited *supra* note 86.

111. See *supra* notes 100-02 and accompanying text.

contain a specific intent element<sup>112</sup> pass constitutional muster. The contributing statutes pertinent to this Note<sup>113</sup> fall roughly into one or both of two categories, neither of which specify a requisite intent. These categories include: (1) statutes, like California's Parental Responsibility Law, that require parents to exercise reasonable or proper control over their children<sup>114</sup> and (2) statutes that require persons to prevent minors from engaging in certain conduct.<sup>115</sup>

The concerns that the Supreme Court articulated in *Papachristou*<sup>116</sup> are present in the context of contributing statutes that expressly require parents to exercise reasonable or proper control. Although parents have a limited duty in civil law to control the conduct of their children,<sup>117</sup> contributing statutes broaden parental liability because the statutes, unlike the civil law, may be used to impose criminal penalties on parents who neither know nor have reason to know the consequences of their conduct in relation to their children. Yet courts long have recognized parental discretion in child rearing as a fundamental precept in

112. See AIA CODE § 12-15-13 (1988) ("willfully"); ARK STAT ANN § 5-27-205, 5-27-220 (1987) ("knowingly"); DEL. CODE ANN. tit. 11, § 1102 (1987) ("knowingly" or "intentionally"); GA. CODE ANN. § 16-12-1 (1988) ("knowingly and willfully"); HAW. REV. STAT. § 709-904 (1988) ("knowingly"); ILL. REV. STAT. ch. 23, para. 2361a (1987) ("knowingly or willfully"); IND. CODE ANN. § 35-46-1-8 (Burns 1985) ("knowingly or intentionally"); IOWA CODE ANN. § 233.1 (West 1986 & Supp. 1989) ("knowingly"); LA. REV. STAT. ANN. § 92 (West 1986) ("intentional"); ME. REV. STAT. ANN. tit. 17-A, § 654 (1983 & Supp. 1989) ("knowingly"); MD. CR. & JUD. PROC. CODE ANN. § 3-831 (1989) ("willfully"); MISS. CODE ANN. § 97-5-39 (Supp. 1989) ("willfully"); NH. REV. STAT. ANN. § 109-B:41 (Supp. 1988) ("knowingly"); N.C. GEN. STAT. § 14-316.1 (1986) ("knowingly or willfully"); ND. CENT. CODE § 14-10.06 (Supp. 1989) ("willfully"); OR. REV. STAT. § 163.575 (1985) ("knowingly"); PA. CONS. STAT. ANN. § 4304 (Purdon 1989) ("knowingly"); S.C. CODE ANN. § 16-17-490 (Law. Co-op. 1985) ("knowingly and willfully"); VA. CODE ANN. § 18.2-371 (1989) ("willfully"); WASH. REV. CODE ANN. § 9A.42.030 (1988) ("recklessly").

113. This Note focuses solely on the statutory language. If the state judiciary has provided a limiting interpretation of these statutes, the statutes might not be void for vagueness. See *Musser v. Utah*, 333 U.S. 95 (1948) (remanding case to state supreme court for authoritative interpretation of statute in vagueness case).

114. See, e.g., ARIZ. REV. STAT. ANN. § 13-3612 (1989); CAL. PENAL CODE § 272 (West Supp. 1990); KY. REV. STAT. ANN. § 530.060 (Baldwin 1985); NEV. REV. STAT. ANN. § 201.000 (Michie 1986); N.Y. PENAL LAW § 260.10 (McKinney 1989); S.D. CODIFIED LAWS ANN. § 26-9-1 (1989).

115. The statutes in this category hold parents liable for behavior that tends to cause their children to engage in certain conduct such as growing up to lead an "idle, dissolute or immoral life," ARIZ. REV. STAT. ANN. § 13-3612 (1989), habitually associating with "vicious, immoral, or criminal persons," R.I. GEN. LAWS § 11-9-4 (1981), or acting in a way likely to "injure or endanger the health or morals of himself or others," OHIO REV. CODE ANN. § 2161.022 (Anderson 1987). See also NEV. REV. STAT. ANN. § 201.090 (Michie 1986); VT. STAT. ANN. tit. 13, § 1301 (1974).

116. See *supra* notes 67-71 and accompanying text.

117. Under civil law a parent has a "duty to exercise reasonable care so to control his minor child" to prevent the child from intentionally or recklessly harming others if the parent "knows or has reason to know that he has the ability to control his child, and . . . knows or should know of the necessity and opportunity for exercising such control." RESTATEMENT (SECOND) OF TORTS § 316 (1977).

our society,<sup>118</sup> premising the fundamental character of parental rights on the idea that the democratic system mandates individualized and independent parental decisions free of official interference.<sup>119</sup> The freedom of parents to choose how to raise their children is even more basic to our society than the freedom to wander and to enjoy a variety of lifestyles that was protected in *Papachristou*. By requiring parents to exercise reasonable or proper control over their children, contributing statutes in the first category attempt to regulate sensitive constitutional rights without any concrete guidelines to limit the subjective discretion of prosecutors, policemen, judges, and jurors. Thus, based on the reasoning in *Papachristou*, a court should apply the stricter *Thornhill* test to this category and judge the statutes facially.<sup>120</sup>

A statute requiring parents to exercise reasonable or proper control over their children may not appear unconstitutionally vague because the Constitution does not require complete specificity.<sup>121</sup> The Court, however, usually allows general language in a statute only if greater specificity is either impossible or impractical.<sup>122</sup> In the parental control context, the legislature could identify what type of parental behavior would be penalized.<sup>123</sup> In addition, even though courts and legislatures typically define legal standards in terms of reasonableness,<sup>124</sup> the risk of arbitrary law enforcement in the application of this standard is substantial when regulating parental control.<sup>125</sup> Without a concrete definition of what constitutes "reasonable" or "proper" parental control, prosecutors, judges, and jurors are free to make hindsight judgments about parental conduct based on their personal views of "reasonable" or "proper" behavior. No consensus exists concerning the proper or reasonable way to raise children, and the judiciary has no special competence in this area.<sup>126</sup> Unless prior judicial decisions have provided a

118. See *infra* subpart IV(B)(1).

119. See *infra* subpart IV(B)(2).

120. See *State v. Hodges*, 254 Or. 21, 26, 457 P.2d 491, 493 (1969) (stating that the "*Thornhill* rule is not invoked . . . unless the terms of the questioned statute are so broad that their application in a normal, nondiscriminatory way would violate the individual's constitutional rights").

121. *United States v. Petrillo*, 332 U.S. 1, 7-8 (1947).

122. *Kolender v. Lawson*, 461 U.S. 352, 381 (1983); see *Petrillo*, 332 U.S. at 7-8.

123. For example, the legislature could add a specific intent requirement and specify what type of behavior parents should discourage. While states regularly set minimum standards for the care, supervision, and protection of children, these statutes are much more specific than the contributing statutes. See S. KATZ, *supra* note 38, at 10-12.

124. See *Nash v. United States*, 229 U.S. 373, 377 (1913) (stating that "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree").

125. See Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 93 (1960).

126. *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (plurality opinion). Moreover, the Court

concrete definition of proper or reasonable conduct, these statutes are unconstitutionally vague.

One commentator has found that the Supreme Court has used the vagueness doctrine to create an insulating zone of protection around certain freedoms in the Bill of Rights.<sup>127</sup> Once a legislature attempts to regulate a constitutionally protected area, the Supreme Court's response will depend on a variety of factors including the nature of the threatened individual freedom and the potential deterrent effect of the risks of arbitrary enforcement.<sup>128</sup> Parental discretion in child rearing is an important right in our society, and this intrusion into family life could be extremely detrimental to the family unit.<sup>129</sup> These factors further suggest that contributing statutes requiring parents to exercise reasonable or proper control over their children are unconstitutionally vague.

The second category of contributing statutes requires persons to prevent minors from engaging in certain conduct. Although the statutes in this category may contain vague terms, they do not implicate parental discretion in child rearing expressly. These statutes should be judged under the *National Dairy* test because they contain only the potential for use against parents. If used against parents, these statutes would fail even the looser test of *National Dairy* because they contain morality language that is unconstitutionally vague.

In Rhode Island, for example, a parent could be held criminally liable for "permit[ting] or suffer[ing]" a child to "habitually associate with vicious, immoral, or criminal persons, or to grow up in ignorance, idleness or crime."<sup>130</sup> On its face, the Rhode Island statute contains inherently subjective criteria for punishment. While the term "permit" does have some element of specific intent, parents may disagree over whether particular persons are immoral. Other statutes in this category contain similar questionable language.<sup>131</sup> As illustrated by the Supreme Court in *Musser v. Utah*,<sup>132</sup> the term "morality" is unconstitutionally vague.

Even though the provisions concerning morality may be vague facially, these statutes also must be judged in light of the particular

stated that one central promise has emerged in this area: parents must have a substantial measure of authority over their children. *Id.*; see also L.A. Times, June 21, 1989, at 7, col. 6 (home ed.) (emphasizing the lack of definition in California's Parental Responsibility Law).

127. See Note, *supra* note 125, at 75.

128. *Id.* at 94.

129. See *infra* notes 228-36 and accompanying text.

130. R.I. GEN. LAWS § 11-9-4 (1981).

131. Most of the statutes in this second category prohibit some form of "immoral" conduct. See *supra* note 115.

132. 333 U.S. 95 (1948); see also *supra* notes 100-02 and accompanying text.

conduct at issue. Under the *National Dairy* test, if the behavior at issue in a particular case is so extreme that everyone generally could agree that it is immoral, a court probably would uphold the statute despite its facial vagueness. In addition, a court always could turn to prior judicial decisions to see if precedent had added a judicial gloss that would limit the application of the statute. A court also might declare statutes in this second category unconstitutionally vague if prosecutors, judges, or jurors used their own subjective views of correct parental behavior to penalize nonconforming parents.

#### IV. VIOLATION OF RIGHT TO PRIVACY IN FAMILY MATTERS

##### A. Substantive Due Process Methodology

While defendants have challenged contributing statutes as unconstitutionally vague rather than as violations of a constitutional right to privacy in family matters,<sup>133</sup> this latter constitutional objection may have a greater chance of success. The Supreme Court repeatedly has held that the state and federal governments cannot deprive citizens of life, liberty, or property without due process of law.<sup>134</sup> The due process clause provides both procedural<sup>135</sup> and substantive<sup>136</sup> protections. While in most cases a court will uphold a statute unless it lacks any rational basis,<sup>137</sup> if the statute infringes on a fundamental right, the governmental interest behind the statute must be compelling and the means must be closely related to the end.<sup>138</sup> If parental rights are not fundamental, a court will uphold the constitutionality of contributing statutes because under the rational basis test, a court will approve almost any reason for the statute.<sup>139</sup> If parents have a fundamental right to privacy in child rearing, however, a court will subject the contributing statutes to strict scrutiny.

Much of the litigation related to substantive due process has con-

133. Defendants probably have not raised the family privacy defense because most of the defendants convicted for violating contributing statutes were either strangers to the minor or relatives accused of sexually molesting the minor. See MODEL PENAL CODE § 230.4 comment 1, at 447 (1980).

134. U.S. CONST. amends. V, XIV, § 1; see, e.g., *Quilloin v. Walcott*, 434 U.S. 248 (1978); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

135. See *Stanley v. Illinois*, 405 U.S. 645 (1972). This Note does not examine procedural due process protections.

136. See *Roe v. Wade*, 410 U.S. 113 (1973); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

137. See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955).

138. Once a court finds a fundamental right the statute must pass strict scrutiny. See *Roe*, 410 U.S. at 113.

139. See *Williamson*, 348 U.S. at 483, 488.

cerned the definition of "fundamental right."<sup>140</sup> For a forty year period, beginning with *Lochner v. New York*,<sup>141</sup> the Supreme Court substituted its views of social and economic values for those of the state and federal legislatures under the guise of substantive due process.<sup>142</sup> Since the end of the *Lochner* era the Court has been wary of imposing its own value judgments in place of the legislative will;<sup>143</sup> however, the Court consistently has continued to look beyond the text of the Constitution to determine which substantive rights the due process clause protects.<sup>144</sup> According to the Court, fundamental rights are those rights that are "implicit in the concept of ordered liberty,"<sup>145</sup> or "deeply rooted in this Nation's history and tradition."<sup>146</sup> Recently, the Court has stated that the due process clause only protects those interests that society traditionally has protected.<sup>147</sup>

## B. Parental Rights As Fundamental Rights

### 1. Supreme Court Cases

The Supreme Court first addressed family rights in *Meyer v. Nebraska*<sup>148</sup> and *Pierce v. Society of Sisters*.<sup>149</sup> Both *Meyer* and *Pierce* concerned state statutes that interfered with parents' ability to choose how to educate their children.<sup>150</sup> In *Meyer* the Court stated that el-

140. See, e.g., *Michael H. v. Gerald D.*, 109 S. Ct. 2333 (1989); *Roe*, 410 U.S. at 113; *Griswold*, 381 U.S. at 479. See generally *Developments in the Law: The Constitution and the Family*, 83 HARV. L. REV. 1156, 1168-77 (1980) [hereinafter *Developments*] (discussing other aspects of substantive due process); McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975, 980-84 (1988) (briefly outlining the controversies surrounding the Supreme Court's use of substantive due process).

141. 198 U.S. 45 (1905).

142. *Developments*, supra note 140, at 1186-87.

143. "The Judiciary . . . is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or . . . the design of the Constitution." *Moore v. City of E. Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting).

144. See, e.g., *Roe*, 410 U.S. at 113 (concerning childbearing); *Loving v. Virginia*, 388 U.S. 1 (1967) (concerning marriage); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (concerning sterilization).

145. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

146. *Moore*, 431 U.S. at 603 (plurality opinion); see also *Griswold*, 381 U.S. at 479 (various Justices attempted to define fundamental rights).

147. *Michael H.*, 109 S. Ct. at 2333. While the traditional rationale was not followed in older cases such as *Roe*, 410 U.S. at 113, tradition does seem to be an important consideration to the current Supreme Court. See *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that the right to engage in homosexual sodomy traditionally has not been protected in our society).

148. 262 U.S. 390 (1923).

149. 268 U.S. 510 (1925).

150. In *Meyer* a Nebraska statute prohibited any person from teaching another language or a subject in any language other than English to a child who had not passed the eighth grade. 262 U.S. at 397. In *Pierce* an Oregon statute required parents to send their children between the ages of eight and sixteen to public schools. 268 U.S. at 530-31.

though it could not define the liberty protected by the due process clause exactly, that liberty undoubtedly included the right to marry and raise children.<sup>151</sup> Likewise the Court held in *Pierce* that the due process clause prevented the state from requiring all children to attend public schools because parents have the right and the duty to raise their children individually.<sup>152</sup>

While the Court purportedly applied strict scrutiny in these cases, the statutes ultimately failed because the legislation did not have a reasonable relationship to a permissible purpose.<sup>153</sup> Thus, these statutes arguably would have failed the looser rational basis test as well as the strict scrutiny test. *Meyer* and *Pierce* may not stand directly for the proposition that parental rights are fundamental<sup>154</sup> because of the narrowness of the holdings and the timing of the decisions.<sup>155</sup>

The Court reaffirmed these early family rights cases in *Wisconsin v. Yoder*.<sup>156</sup> The *Yoder* Court applied strict scrutiny to a state statute requiring children to attend school until the age of sixteen because the statute impermissibly infringed on the fundamental right of parents to raise their children.<sup>157</sup> In that case Amish parents had refused to send their children to school after the eighth grade because of the parents' religious beliefs.<sup>158</sup> Although the Court found no flaw in the statutory purpose, the Court decided that application of the statute in this case would not further the statutory purpose.<sup>159</sup> The Court clearly emphasized the importance of the parental right to raise children free from state interference,<sup>160</sup> yet the Court also focused on the freedom of religion claim.<sup>161</sup> Therefore, some commentators believe that *Yoder* may

151. *Meyer*, 262 U.S. at 399.

152. *Pierce*, 268 U.S. at 534-35.

153. *Id.* at 534-35 (stating that "the Act . . . unreasonably interferes with the liberty of parents . . . to direct the upbringing and education of children under their control"); *Meyer*, 262 U.S. at 403 (holding that "the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State").

154. See McCarthy, supra note 140, at 986-89 (suggesting that *Meyer* and *Pierce* are of limited significance in the family rights area).

155. Because the Court decided both *Meyer* and *Pierce* during the *Lochner* era, the Court's expansive view of substantive due process during that time could have tainted the Court's reasoning. See *id.* at 993; Rose, *Compulsory Education and Parent Rights: A Judicial Framework of Analysis*, 30 B.C.L. REV. 861, 878-79 (1989).

156. 406 U.S. 205 (1972).

157. *Id.* at 214.

158. *Id.* at 208-09.

159. *Id.* at 234-36.

160. *Id.* at 213-14, 232-34.

161. The *Yoder* Court stated that "when the interests of parenthood are combined with a free exercise claim . . . more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity" of the statute. *Id.* at 233.

have limited significance as a family rights case.<sup>162</sup>

The Court extended the reasoning of *Meyer*, *Pierce*, and *Yoder* in *Moore v. City of East Cleveland*.<sup>163</sup> In *Moore* a plurality of the Court applied strict scrutiny to a housing ordinance that limited the occupancy of a home to certain defined members of a family.<sup>164</sup> Although the ordinance had legitimate goals, the means used did not achieve those goals adequately.<sup>165</sup> Justice Lewis Powell, writing for the plurality, acknowledged that *Meyer*, *Pierce*, and *Yoder* had not dealt expressly with the problem raised in *Moore*,<sup>166</sup> but he explained that the due process clause protects the family rights implicated in those three cases because the rights are rooted in the Nation's traditions and history.<sup>167</sup> Justice Powell believed that tradition and history also compelled the Court to strike down the housing ordinance.<sup>168</sup> A plurality of the Court held that the due process clause prevented the state from forcing its citizens to live in particular family patterns.<sup>169</sup>

Although the Court has considered directly the parental right to raise children only in rare cases, it has continued to recognize the fundamental nature of parental rights in a variety of other situations. In these cases the Court has asserted broadly that precedent plainly establishes that parents' interest in raising their children deserves deference unless the state can show a powerful countervailing interest.<sup>170</sup> The Court has discussed the fundamental nature of parental rights in the context of state proceedings to terminate parental rights,<sup>171</sup> in cases concerning the rights of unwed fathers<sup>172</sup> and foster families,<sup>173</sup> and in

162. See *McCarthy*, *supra* note 140, at 990-01; *Rose*, *supra* note 165, at 880.

163. 431 U.S. 494 (1977) (plurality decision).

164. *Id.* at 496 & nn.1-2 (plurality opinion).

165. *Id.* at 499-500 (plurality opinion).

166. *Id.* at 500-01 (plurality opinion).

167. *Id.* at 503-04 (plurality opinion).

168. *Id.* at 500-01, 506 (plurality opinion). Justice Powell stated that "unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the . . . Due Process Clause, we cannot avoid applying the force and rationale of these precedents to the family choice involved in this case." *Id.* at 501 (plurality opinion).

169. *Id.* at 506 (plurality opinion). Justice Powell, analogizing the Cleveland ordinance to the statute in *Pierce*, which sought to "standardize" children by requiring them to attend public schools, stated that "[b]y the same token the Constitution prevents East Cleveland from standardizing its children . . . by forcing all to live in certain narrowly defined family patterns." *Id.*

170. See, e.g., *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 27 (1981) (stating that previous cases have "made plain beyond the need for multiple citation" that the parental right deserves deference "absent a powerful countervailing interest").

171. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (acknowledging "this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest"); *Lassiter*, 452 U.S. at 27.

172. See, e.g., *Michael H. v. Gerald D.*, 109 S. Ct. 2333, 2342 (1989) (noting the "historic respect" for family relationships); *Lehr v. Robertson*, 463 U.S. 248, 258 (1983) (stating that "the relationship of love and duty in a recognized family unit is an interest in liberty entitled to consti-

privacy cases concerning other family matters.<sup>174</sup> The Court also has upheld parents' authority over their children in light of challenges to that authority by the child.<sup>175</sup> Several lower federal courts explicitly have recognized a fundamental right to family integrity based on these Supreme Court cases.<sup>176</sup>

## 2. Justification for Protecting Parental Decisions

Even though the Court often speaks of the fundamental nature of parental rights, its opinions rarely offer a justification for this protection. An understanding of why the family has been protected historically may bolster the argument that the family rights at issue in the contributing statutes deserve constitutional protection. In a recent case, the Court explained that the fundamental character of family rights stems from the historic respect for the sanctity of familial relationships.<sup>177</sup>

tutional protection"); *Quilloin v. Walcott*, 434 U.S. 248, 255 (1978) (stating that the Court has "recognized on numerous occasions that the relationship between parent and child is constitutionally protected"); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

173. See, e.g., *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 842-47 (1977).

174. See, e.g., *Roe v. Wade*, 410 U.S. 113, 162-63 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1966).

175. See, e.g., *Bollotti v. Baird*, 443 U.S. 622, 628 (1979) (plurality opinion); *Parham v. J.R.*, 442 U.S. 584, 602-04 (1979).

176. See, e.g., *Doe v. Staples*, 706 F.2d 985 (6th Cir.) (challenging the summary removal policies and practices of the state welfare department), *cert. denied*, 465 U.S. 1033 (1983); *Lehman v. Lyncoming County Children's Servs. Agency*, 648 F.2d 135 (3d Cir. 1981), *aff'd*, 458 U.S. 602 (1982) (challenging a state adoption act); *Duchene v. Sugarman*, 566 F.2d 817 (2d Cir. 1977) (concerning an action for damages stemming from the conduct of the city child welfare bureau); *Doe v. Connecticut Dep't of Children & Youth Servs.*, 712 F. Supp. 277 (D. Conn. 1989) (discussing an action for damages caused by state child welfare officials); *McColister v. City of Keene*, 586 F. Supp. 1381 (D.N.H. 1984) (attacking the "facial validity of juvenile curfew ordinance"); *Sylvander v. New England Home for Little Wanderers*, 444 F. Supp. 393 (D. Mass.), *aff'd*, 684 F.2d 1103 (1st Cir. 1978) (challenging the constitutionality of a parental rights termination statute); *Roe v. Connecticut*, 417 F. Supp. 789 (M.D. Ala. 1976) (attacking a state child neglect law); *Alsager v. District Court*, 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd in part*, 645 F.2d 1137 (8th Cir. 1976) (challenging a state parental rights termination statute); see also *Developments*, *supra* note 140, at 1237-38 (discussing the effect of more widespread judicial recognition of the fundamental rights of parents).

177. See *Michael H.*, 109 S. Ct. at 2341-46. Although only two members of the Court fully endorsed the plurality opinion's view of the proper way to weigh tradition in the substantive due process analysis, the Court unanimously agreed that family rights traditionally have warranted protection. *Id.*; see *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Moore*, 431 U.S. at 494 (plurality opinion).

One commentator has suggested that the Supreme Court always uses tradition as a basis for recognizing fundamental rights for families. See *Developments*, *supra* note 140, at 1177. The Court first attempts to determine whether the interest at issue has been regarded historically as within a sphere in which the state's interference is disfavored. *Id.* at 1178. Even if the interest has been protected historically, the interest also must have contemporary validity. *Id.* at 1179. After the Court decides which characteristics of the interest are of constitutional importance, it must define

A plurality of the Court discussed its deference to parental rights more comprehensively in *Bellotti v. Baird*,<sup>178</sup> a case challenging the constitutionality of a statute requiring parental consent before a minor could obtain an abortion.<sup>179</sup> The *Bellotti* Court explained that the state should defer to parents in child raising matters because of the important role parents play in the child's development.<sup>180</sup> This role is essential to the creation of socially responsible citizens and largely beyond the competence of a large impersonal institution.<sup>181</sup> By entrusting child care to parents, the state fosters social pluralism and diversity, important ideals in a society that is committed to individual liberties.<sup>182</sup> Therefore, according to the *Bellotti* Court, parental authority is a basic presupposition of a free society.<sup>183</sup>

Commentators have agreed with the *Bellotti* Court's reasons for protecting parental judgments and have advanced additional justifications. One commentator has argued that by insulating the rights of parents to control the upbringing of their children, the state serves the interests of the parents, the child, and society.<sup>184</sup> Parents obviously have an interest in raising their children free from interference.<sup>185</sup> This parental control usually serves the interest of the child as well because parents can fulfill a child's needs in ways that an institution cannot.<sup>186</sup> Finally, parental control may help to preserve an individualistic society by precluding state attempts at standardization.<sup>187</sup> Parental rights may deserve different degrees of protection depending on which of the identified interests are present.<sup>188</sup>

Other commentators rationalize the protection given parental decisions through generalized analogies to the Bill of Rights.<sup>189</sup> Through these rights, the Constitution makes a statement about the form of government and society in the United States. The Constitution protects certain individual rights in part to guarantee the freedom of citizens to make certain personal decisions unfettered by conventional norms.<sup>190</sup> Under this theory, parental autonomy in child rearing decisions flows

the scope of that interest based on those characteristics. *Id.* at 1180.

178. 443 U.S. at 622.

179. *Id.* at 624.

180. *Id.* at 637-38.

181. *Id.* at 638.

182. *Id.*

183. *Id.*

184. See *Developments*, *supra* note 140, at 1353.

185. *Id.*

186. *Id.* at 1214, 1353-54.

187. *Id.* at 1215-16, 1354.

188. *Id.* at 1354.

189. McCarthy, *supra* note 140, at 1026-28.

190. *Id.* at 1026.

directly from the individual right to decide to have children.<sup>191</sup>

### C. The State's Compelling Interest

Even assuming that the parental right to raise children is fundamental,<sup>192</sup> the Constitution does not preclude the state from limiting that right. The state can interfere with a fundamental right only if the state has a compelling interest and the means chosen are closely related to that interest.<sup>193</sup> The state's compelling interest for contributing statutes is the protection of society from the wrongful acts of children, not the protection of children from the wrongful acts of parents.

The state's power to intervene in the family setting stems from two sources: the police power and the *parens patriae* power.<sup>194</sup> Under either of these powers, the state has a limited right to intervene in family affairs if the family situation evidences a threat to either the community or the welfare of the child. The state uses its police power to protect and promote all aspects of public welfare. Clearly, the state has the power to prevent and punish acts that directly threaten the existence or stability of the state or the personal safety or security of its citizens. Thus, California can defend its Parental Responsibility Law, and other states their contributing statutes, based on the state's need to protect society from the wrongful acts of children.<sup>195</sup> Under its *parens patriae* power, the state can protect and promote the welfare of only those individuals, such as minors, who lack the capacity to act in their own best interests.<sup>196</sup>

The Supreme Court has ruled that the states may circumscribe parental discretion.<sup>197</sup> In *Prince v. Massachusetts*,<sup>198</sup> for example, the Court upheld the conviction of a guardian for allowing her wards to sell

191. *Id.* at 1027. A joint commission of the Institute of Judicial Administration (IJA) and the American Bar Association (ABA) also has argued that state intervention in family decisions should be limited because of our society's commitment to individual freedom and diversity. STANDARDS RELATING TO ABUSE AND NEGLECT Standard 1.1, commentary at 49-50 (IJA-ABA Joint Comm'n on Juvenile Justice Standards 1981) (hereinafter IJA-ABA STANDARDS). Extensive intervention carries the risk of intervening to "save" the children of poor or minority parents. *Id.* at 49.

192. See *Rose*, *supra* note 155, at 874-83 (discussing the fundamental nature of parents' rights to educate their children).

193. See *supra* notes 134-38 and accompanying text.

194. *Developments*, *supra* note 140, at 1198-1202.

195. For a discussion of the Parental Responsibility Law, see *supra* notes 1-7 and accompanying text.

196. See *Prince v. Massachusetts*, 321 U.S. 168 (1944).

197. See *Parham v. J.R.*, 442 U.S. 684 (1979). The *Parham* Court noted that a state constitutionally can control parental discretion in situations in which the physical or mental health of a child is jeopardized. *Id.* at 603.

198. 321 U.S. 168 (1944).

religious leaflets in violation of child labor laws.<sup>199</sup> The defendant claimed that the conviction violated both her freedom of religion<sup>200</sup> and her parental rights.<sup>201</sup> The Court balanced the substantial private interests of parents against the societal interest in protecting the welfare of children.<sup>202</sup> The Court recognized that under both *Meyer* and *Pierce* a private sphere of family life exists in which the state cannot interfere.<sup>203</sup> Nevertheless, the Court upheld the power of the state to limit the rights and duties of parents under its *parens patriae* power when the child's welfare was at stake<sup>204</sup> because of the state's independent interest in the welfare of children within its borders.<sup>205</sup> Although the Court upheld the statute, it cautioned that the holding was limited to the facts of the case.<sup>206</sup>

In later cases the Court has explained that parental rights are accompanied by duties.<sup>207</sup> The right of parents to educate their children that was recognized in *Meyer* and *Pierce* is coupled with the duty to prepare the child for a responsible place in society.<sup>208</sup> Indeed, the constitutional protection afforded family decisions is based on the presumption that parents will act in the best interests of their children.<sup>209</sup> When parents act contrary to that presumption, the state may intervene to protect the child.<sup>210</sup> In addition, Justice Byron White has argued that although parents have a fundamental right to make decisions about child rearing, some activities by parents, such as assaults on their children, are intrinsically outside the scope of the parents' fundamental rights.<sup>211</sup>

While the Court has recognized the power of the state to interfere with parental discretion, usually the state's compelling interest in the welfare of the child justifies the interference.<sup>212</sup> The purpose of California's Parental Responsibility Law and similar statutes, however, is to

199. *Id.*

200. *Id.* at 164 (citing U.S. CONST. amend. I).

201. *Id.* (citing U.S. CONST. amend. XIV).

202. *Id.* at 165.

203. *Id.* at 166.

204. *Id.* at 166-67.

205. *Id.* at 163-69; see also *Ginsberg v. New York*, 390 U.S. 629, 640 (1968).

206. *Prince*, 321 U.S. at 171.

207. *Lehr v. Robertson*, 463 U.S. 248 (1983).

208. *Id.* at 257-58.

209. *Parham v. J.R.*, 442 U.S. 584, 602-03 (1979).

210. *Id.*

211. *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 792 n.2 (1986) (White, J., dissenting); see also *McCarthy*, *supra* note 140, at 1027-28 (discussing Justice White's view).

212. See, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982); *Lasaiter v. Department of Social Servs.*, 452 U.S. 18 (1981); *Parham*, 442 U.S. at 584.

protect society from the wrongful acts of the child, not to protect the child.<sup>213</sup> Thus, these statutes are not justified based on the child's welfare. Protecting society from the wrongful acts of children is the only legitimate purpose for these statutes.

#### D. The Statutory Method Does Not Closely Fit the Goal

The Supreme Court has allowed the state to restrict parental discretion when necessary to protect the child's welfare only because the means closely fit that end.<sup>214</sup> Yet the state's only compelling interest in contributing statutes that regulate parental conduct is protecting society from juvenile crime. Thus, the question for a court is whether policing parental behavior is closely related to that goal.

Commentators long have argued that criminalizing parental behavior does not reduce juvenile crime.<sup>215</sup> While state officials readily have assumed that these statutes actually reduce delinquency rates, the only empirical study in this area revealed that these sanctions simply do not achieve the desired results.<sup>216</sup> In 1948 Judge Paul Alexander analyzed the effects of punishing parents under Toledo, Ohio's contributing statute over a period from 1937 to 1946.<sup>217</sup> When parents prosecuted under the statute received a suspended sentence, the conduct of those particular parents improved.<sup>218</sup> Despite massive publicity of ninety-one cases that resulted in actual punishment of the parents, however, the number of parents arrested increased steadily over the ten-year period.<sup>219</sup> Judge Alexander found no evidence that punishing parents had any effect on curbing juvenile delinquency.<sup>220</sup> Although delinquency rates remained

213. See *supra* notes 1-7 and accompanying text for a discussion of the purposes behind the California statute.

214. Even in this area, the state cannot interfere freely in family life. The Constitution does not permit the state to disrupt families in general simply because some parents abuse or neglect their children. *Parham*, 442 U.S. at 603. The *Parham* Court stated that the "notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition." *Id.* The state must show that intervention in a particular case will further its goal of protecting children. See *Santosky*, 455 U.S. at 745. Parents do not lose their fundamental rights because they have not been model parents. *Id.* at 763. The Court has recognized that parents who are threatened with state intervention need even more constitutional protection than model parents do. *Id.*

215. See, e.g., S. RUBIN, *supra* note 35, at 21-31; Ludwig, *Delinquent Parents and the Criminal Law*, 6 VAND. L. REV. 719 (1952); Note, *Criminal Liability of Parents for Failure to Control Their Children*, 8 VAL. U.L. REV. 332 (1972).

216. Alexander, *supra* note 38, at 23.

217. *Id.* Judge Alexander reviewed 1027 contributing cases, 600 of which involved parents as defendants.

218. *Id.* at 29.

219. *Id.* at 28-29.

220. *Id.*; see also Gladstone, *supra* note 35, at 174-88 (analyzing the failure of New York's adult delinquency statute).

steady during the first three years of the study, the rates increased sharply in 1943 and subsequently declined.<sup>221</sup> Regardless of this empirical evidence, state officials continue to believe that these statutes can reduce delinquency. This belief, however, faces broad opposition.

Contributing statutes do not reduce juvenile crime effectively because the statutes address only one aspect of the problem of juvenile delinquency, lack of parental control.<sup>222</sup> Although inadequate and irresponsible parenting is a factor behind delinquent behavior, other factors, such as social class, educational level, urbanization, living conditions, and social instability, are equally important.<sup>223</sup> Dr. James Austin, director of research at the National Council on Crime and Delinquency, testified before a congressional subcommittee that experts have linked juvenile delinquency to combinations of factors such as drug abuse, school failure, inadequate family relationships, antisocial values, child abuse, and association with delinquent peers.<sup>224</sup> The most important predictive factor of delinquent behavior is association with a delinquent peer group.<sup>225</sup> Because parental behavior may be one of many influences in the life of a delinquent child, determining whether the parental behavior at issue in a particular case actually caused the delinquency would be almost impossible.<sup>226</sup> Some states have avoided this causation problem by also criminalizing parental behavior that

221. Alexander, *supra* note 38, at 23.

222. See *supra* notes 32-34 and accompanying text; see also Nazario, *What Do We Know About Delinquency?*, 12 UPDATE ON LAW-RELATED EDUC 8, 8 (1988) (stating that experts cannot agree on a single cause of delinquency).

223. See Note, *supra* note 215, at 334; see also Nazario, *supra* note 222, at 8.

224. *Youth and the Justice System: Can We Intervene Earlier?* Hearing Before the House Select Comm. on Children, Youth, and Families, 98th Cong., 2d Sess. 89 (1984) (statement of James Austin, Director of Research, National Council on Crime and Delinquency). Mr. Austin reported several trends among juveniles: (1) rates of delinquency for serious juvenile offenders generally decrease over time; (2) rates of emotional problems for youth generally decrease over time; (3) rates of drug abuse generally increase over time; (4) serious delinquents have high rates of multiple drug use, emotional problems, school problems, and family problems; (5) serious delinquents are principally male and are associated strongly with delinquent peer groups; (6) association with delinquent peer groups is the most important predictor of serious delinquent behavior. *Id.* at 92-93.

225. *Id.*

226. See Stouthamer-Loeber & Loeber, *The Use of Prediction Data in Understanding Delinquency*, 6 BEHAVIORAL SCI. & L 333 (1988). The authors surveyed the research done in the area of prediction of juvenile delinquency. They concluded that many factors, including early childhood behavior, family situation, socioeconomic status, and peer groups, may predict later delinquent behavior, but cautioned against excessive reliance on any particular factor. *Id.* at 346. The authors believe that the "processes that lead to delinquency are still poorly understood." *Id.* The authors stated that "the fact that a particular factor predicts delinquency does not mean necessarily that such a factor is causal to delinquency." *Id.* Because many predictive factors are interrelated, a particular factor may predict delinquency "solely by virtue of its association with another, more causally related factor." *Id.*; see also Note, *supra* note 215, at 339-44 (discussing the legal requirements for criminal omissions and the causation problems associated with contributing statutes).

tends to cause delinquency regardless of whether the child actually becomes delinquent.<sup>227</sup>

Not only does punishing parents not reduce delinquency, but application of contributing statutes adversely affects the family unit.<sup>228</sup> In general, the fines under these statutes are too small to effect a change in the behavior of the parents,<sup>229</sup> but often reduce the already minimal resources available for parents to provide for the family.<sup>230</sup> Prison sentences can be even more detrimental for the entire family.<sup>231</sup> Removing the parent from the home may eliminate the one stable factor in the delinquent child's life and also may leave other children without any parental care.<sup>232</sup> Many commentators believe that these parents need society's help, not its punishment.<sup>233</sup> Delinquent children are frequently from lower economic levels.<sup>234</sup> Parents of these children often are unable to meet the mental, emotional, and social needs of their children because of a lack of resources, not a lack of will.<sup>235</sup> Punishing parents only exacerbates the problems that cause delinquency. Criminal sanc-

227. See, e.g., ARIZ. REV. STAT. ANN. § 13-3614 (1989); GA. CODE ANN. § 16-12-1 (1988).

228. See Hafen, *The Family As an Entity*, 22 U.C. DAVIS L. REV. 865, 909-16 (1989).

229. Most fines for violating contributing statutes are approximately \$1000. See, e.g., N.Y. PENAL LAW § 80.05 (McKinney 1987); S.D. CODIFIED LAWS ANN. § 22-6-2 (Supp. 1990). The maximum statutory fines, however, vary from \$100 to \$10,000. See, e.g., CAL. PENAL CODE § 272 (West Supp. 1990) (imposing maximum \$2500 fine); N.M. STAT. ANN. § 31-18-15 (Supp. 1990) (imposing maximum \$6000 fine); VT. STAT. ANN. tit. 13, § 1301 (1974) (imposing maximum \$100 fine); WIS. STAT. ANN. § 939.50 (West 1982) (imposing maximum \$10,000 fine).

230. See Ludwig, *supra* note 215, at 733. See generally REPORT ON CHILDREN AND FAMILIES, *supra* note 33, at 1-14 (outlining the economic problems in today's families).

231. In the majority of states, violation of the contributing statute could result in one year in jail. See, e.g., ARK. STAT. ANN. §§ 5-4-401(b)(1), 5-27-205 (1987); HAW. REV. STAT. § 706-663 (1988). In other states, prison terms could range from 30 days to 18 months to 10 years. See, e.g., CONN. GEN. STAT. ANN. § 53-21 (West 1985) (imposing 10 year term); IOWA CODE ANN. § 903.1 (West Supp. 1990) (imposing 30 day term); N.M. STAT. ANN. § 31-18-15 (Supp. 1990) (imposing 18 month term).

232. See IJA-ABA STANDARDS, *supra* note 191, Standard 9.1 commentary (arguing that imprisonment of a parent is against the child's psychological interest).

233. See S. RUBIN, *supra* note 35, at 24-25; Ludwig, *supra* note 215, at 731-36; see also Ripston, *No Parent Is Safe from Headline Justice*, L.A. TIMES, June 21, 1989, at 7, col. 6.

234. See *Children and Families*, *supra* note 36, at 64.

235. See *supra* note 33 and accompanying text; see also Ripston, *supra* note 233, at 7. A famous New York case illustrates this proposition. See *Hummann v. Rivera*, 272 A.D. 352, 71 N.Y.S.2d 321 (1947). A mother was arrested for being "indifferent and irresponsible" and for "failing in her responsibility" as a parent after her 14-year-old son shot three strangers with a stolen gun. The trial judge sentenced the mother to one year in jail under New York's contributing statute. Public interest groups became involved in the case on appeal and discovered that the mother had been mistreated by her own parents, abandoned by her husband and forced to raise two children alone, and was afflicted by mental and emotional problems. The appellate court reversed the conviction because of the admission of hearsay evidence and ordered a new trial if the authorities deemed necessary. For a discussion of this New York case, see S. RUBIN, *supra* note 35, at 24, and Ludwig, *supra* note 215, at 719-20. Because this mother did not encourage the delinquency of her son intentionally, criminal sanctions would have had no effect in this case.

tions simply may be ineffective in this setting.<sup>236</sup>

In addition, contributing statutes may be both overinclusive and underinclusive. By punishing parents for failing to exercise reasonable care for or control over their children, the state will punish some parents merely because their child is delinquent, even though the parents tried, but were unable, to control their children's behavior. Alternatively, some parents who do fail to control their children will escape punishment simply because their children did not become delinquent. Because these statutes do not contain a specific intent element, the only difference between these two sets of parents is that one set has a delinquent child. Even though some states do not require an adjudication of the child's delinquency before application of the contributing statute,<sup>237</sup> in practical terms the authorities rarely will discover inadequate parental control without some delinquent act by the child. Because of this detection problem, application of contributing statutes actually occurs too late to prevent delinquency.<sup>238</sup>

Finally, the use of contributing statutes against parents is an extremely intrusive method of achieving the state's goal. Contributing statutes are inherently ambiguous and difficult to apply because of their broad language. Judges and jurors must determine whether a parent used reasonable control over a child. Even though reasonableness is a common standard in criminal statutes, it is an inherently subjective inquiry.<sup>239</sup> Parents constantly will have to decide how a disinterested observer would judge a particular behavior. This area is too sensitive and subjective to allow outsiders to make these determinations. The Supreme Court has stated that no societal consensus on the correct way to raise children exists and that the judiciary has no special expertise in the matter.<sup>240</sup> In addition, the American Bar Association has recommended that because no best way to raise a child exists, states should limit themselves to protecting children from specific harms.<sup>241</sup>

Contributing statutes may have served a purpose when they were

236. See Ludwig, *supra* note 216, at 732-34 (arguing that criminal sanctions cannot deter unintentional parental misbehavior effectively and could have adverse consequences even if parental behavior is intentional); see also Comment, *BRI v. Leonard: The Role of the Courts in Preserving Family Integrity*, 23 *NEW ENG. L. REV.* 186 (1988) (arguing that the state should protect the family and encourage independent family decisions through the courts).

237. See *supra* note 227 and accompanying text.

238. Ludwig, *supra* note 216, at 732.

239. See IJA-ABA STANDARDS, *supra* note 191, at 49; S. KATZ, *supra* note 36, at 6 (stating that state laws describing the legal responsibilities of parents for their children are "expressions of community expectations about parenthood" and their interpretations "reflect prevailing middle-class mores").

240. *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (plurality opinion).

241. IJA-ABA STANDARDS, *supra* note 191, at 50.

first enacted,<sup>242</sup> but they are an anachronism in criminal law today. The Model Penal Code has substituted a more limited endangerment provision for its contributing statute largely because of the criticisms leveled against contributing statutes.<sup>243</sup> States have other more narrowly tailored statutes to penalize parents who intentionally harm their children or truly neglect them.<sup>244</sup> By relying on application of contributing statutes to reduce juvenile crime, state legislatures are avoiding the tough issues surrounding the failure of the juvenile justice system.<sup>245</sup>

While the state may have a compelling interest in preventing juvenile delinquency, no evidence suggests that policing parental behavior achieves that end. Contributing statutes unnecessarily infringe on parents' fundamental right to raise their children free from undue state interference. These statutes are difficult to apply and have detrimental effects on families. The statutes as applied to parents should fail the strict scrutiny test because the means do not closely fit the end.

## V. CONCLUSION

When states use contributing statutes to force parents to control their children, these statutes are vague and an impermissible infringement on the fundamental rights of parents. The statutes that require parents to exercise reasonable or proper control over their children are unconstitutionally vague because they lack even minimal guidelines to limit the discretion of law enforcement officials.<sup>246</sup> Although some parents will fail to fulfill the responsibilities that accompany the right to raise their children, the state can reach those parents through properly limited statutes that contain specific intent elements and concrete definitions of delinquency. A parent who knowingly, willfully, or intention-

242. Contributing statutes may have functioned at one time in the same manner as modern child abuse and neglect statutes.

243. MODEL PENAL CODE § 230.4 comment, at 444-52 (1980). The drafters of the Model Penal Code were concerned that the "range of behavior punishable as contributing to delinquency was as broad as the whole penal code and more." *Id.* at 446. The drafters advocated precise purposes for criminal laws. *Id.* at 449. According to the drafters, these broad contributing statutes are "meaningless criminological concept[s]" and are simply a way for legislatures to avoid hard decisions in this area. *Id.* at 450. Model Penal Code § 230.4 "is designed to state the appropriate limits of the function that the criminal law should perform." *Id.* That section requires knowing action by the parent and actual endangerment of the child before liability may attach. *Id.* at 450-52.

244. *Id.* at 450.

245. See Ripston, *supra* note 233, at 7. For a discussion of some of the problems of the juvenile justice system, see Kaufman, *The Child in Trouble: The Long and Difficult Road to Reforming the Crazy-Quilt Juvenile Justice System*, 60 *WASH. U.L.Q.* 743 (1982); Note, *Un-governability: The Unjustifiable Jurisdiction*, 83 *YALE L.J.* 1383 (1974); Middleton, *Punishment or Parenting for Child Criminals?*, *Nat'l L.J.*, Apr. 16, 1988, at 1, col. 1.

246. See *supra* notes 117-29 and accompanying text; see also Ripston, *supra* note 233, at 7 (discussing the arbitrariness of California's Parental Responsibility Law).

ally encourages a child to commit a violent criminal act should be punished. The generalized contributing statutes, which are not addressed specifically to parents, may be constitutional in some situations depending on the facts of the case, but these statutes also contain inherently subjective moral standards.<sup>247</sup> In addition, while inadequate parental control has been linked to juvenile delinquency, this linkage is too speculative to justify the extensive infringement on the fundamental rights of parents.<sup>248</sup> The state cannot interfere in the family setting because of the mere possibility that interference will solve the juvenile crime problem.

Violent juvenile crime is a problem in modern society.<sup>249</sup> Although state governments have the right to remedy the problem, the state cannot achieve that goal at the expense of the constitutional rights of parents. State governments should avoid the lure of this easy response to juvenile crime. The causes of juvenile delinquency remain unclear.<sup>250</sup> Even if inadequate parenting is a factor, the strong arm of the criminal law is not appropriate in the family context. The same reasons that justify deferring to parental decisions in the typical family situation apply with equal strength when the American family is breaking down.<sup>251</sup> Instead of penalizing parents for their failures, state officials should focus on solving the multitude of problems that face parents in the 1990s such as the lack of affordable housing, education, and health and child care.<sup>252</sup> Maybe if parents could provide better opportunities for their children, the children would be less inclined to commit violent acts.<sup>253</sup>

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247. See *supra* notes 130-32 and accompanying text.

248. See *supra* subpart IV(D).

249. See *supra* notes 16-26 and accompanying text.

250. See *supra* notes 31-33 and 222-27 and accompanying text.

251. See *supra* notes 177-91 and accompanying text.

252. See REPORT ON CHILDREN AND FAMILIES, *supra* note 33, at 1-50.

253. See *supra* note 33. Many states have implemented programs designed to help potential juvenile delinquents. See Natali, *Orange County Focus: Buena Park*, L.A. Times, June 19, 1990, at 3, col. 2 (Orange County ed.) (discussing program in which police attempt to reach potential gang members and offer family counseling); Rich, *Pre-school Care Linked to Drop in Delinquency*, Wash. Post, at A11 (final ed.) (discussing experimental program in Syracuse, New York); Sipchen, *Kids Out of Control*, L.A. Times, May 18, 1989, at 1, col. 4 (home ed.) (advocating "family preservation" projects); Thomas, *Pulling Teens Back from the Edge*, Wash. Post, Sept. 8, 1988, at J1 (final ed.) (describing Washington, D.C. Youth at Risk Program).

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### Reworking the Warrant Requirement: Resuscitating the Fourth Amendment

Phyllis T. Bookspan\*

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\* Copyright © 1991 by Phyllis T. Bookspan and *Vanderbilt Law Review*. Associate Professor of Law, Widener University School of Law. A.B., Lehman College, City University of New York, 1976; J.D., 1983, LL.M., 1987, Georgetown University Law Center. I wish to thank Professors Father Clark, James Diehm, Barry Feldman, and Leonard Sosnov for their thoughtful comments on an earlier draft of this Article. I also thank Jeffrey Silberman for excellent research assistance.

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TOC: [Colorado Revised Statutes](#) > [/.../](#) > [PART 9. POSTADJUDICATORY PROCESS](#) > [19-2-919. Sentencing - requirements imposed on parents](#)

Terms: "parent" w/20 "liability" ([Edit Search](#))

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C.R.S. 19-2-919

COLORADO REVISED STATUTES

\*\*\* THIS SECTION IS CURRENT THROUGH THE 2002 SUPPLEMENT (2002 SESSIONS) \*\*\*

TITLE 19. CHILDREN'S CODE  
ARTICLE 2. THE COLORADO JUVENILE JUSTICE SYSTEM  
PART 9. POSTADJUDICATORY PROCESS

**GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

C.R.S. 19-2-919 (2002)

19-2-919. Sentencing - requirements imposed on parents

(1) In addition to any of the provisions specified in sections 19-2-907 to 19-2-918, any sentence imposed pursuant to section 19-2-907 may require:

- (a) The juvenile or both the juvenile and his or her parent or guardian to perform volunteer service in the community designed to contribute to the rehabilitation of the juvenile or to the ability of the parent or guardian to provide proper parental care and supervision of the juvenile;
- (b) The parent or guardian of a juvenile or both the parent or guardian and the juvenile to attend the parental responsibility training program described in section 19-2-304. The court may make reasonable orders requiring proof of completion of such training course within a certain time period and may provide that any violation of such orders shall subject the parent or guardian to the contempt sanctions of the court.
- (c) The juvenile or both the juvenile and his or her custodial parent or parent with parental responsibilities or guardian to perform services for the victim, as provided in section 19-2-308, designed to contribute to the rehabilitation of the juvenile, if the victim consents in writing to such services. However, the value of the services required to be rendered by the parent, guardian, legal custodian of, or parent with parental responsibilities with respect to the juvenile under this paragraph (c) shall not exceed twenty-five thousand dollars for any one delinquent act.

(2) In addition to any sentence imposed pursuant to section 19-2-907 or subsection (1) of this section and regardless of whether the court orders the juvenile to pay restitution pursuant to section 19-2-918, the court may order:

- (a) The guardian or legal custodian of the juvenile or the **parent** allocated parental responsibilities with respect to the juvenile to make restitution to one or more victims pursuant to the terms and conditions set forth in this subsection (2); except that the **liability** of the guardian or legal custodian of the juvenile or **parent** allocated parental responsibilities with respect to the juvenile under this subsection (2) shall not exceed twenty-five thousand dollars for any one delinquent act. If the court finds, after a hearing, that the guardian or legal custodian of the juvenile or the parent allocated parental responsibilities with respect to the juvenile has made diligent, good faith efforts to prevent or discourage the juvenile from engaging in delinquent activity, the court shall absolve the guardian or legal custodian or **parent** allocated parental

responsibilities with respect to the juvenile of **liability** for restitution under this subsection (2).

(b) The juvenile's **parent**, so long as the **parent** is a party to the delinquency proceedings, to make restitution to one or more victims pursuant to the terms and conditions set forth in this paragraph (b); except that the **liability** of the juvenile's **parent** under this paragraph (b) shall not exceed the amount of twenty-five thousand dollars for any one delinquent act. Notwithstanding the provisions of this subsection (2), the court may not enter an order of restitution against a juvenile's parent unless the court, prior to entering the order of restitution, holds a restitution hearing at which the juvenile's parent is present. If the court finds, after the hearing, that the juvenile's **parent** has made diligent, good faith efforts to prevent or discourage the juvenile from engaging in delinquent activity, the court shall absolve the **parent of liability** for restitution under this paragraph (b). For purposes of this paragraph (b), "**parent**" is defined in section 19-1-103 (82) (a).

(3) Any order of restitution entered pursuant to this section may be collected pursuant to the provisions of article 18.5 of title 16, C.R.S.

**HISTORY:** Source: L. 96: Entire article amended with relocations, p. 1666, § 1, effective January 1, 1997; (2) amended, p. 1782, § 11, effective January 1, 1997. L. 98: (1)(c) and (2)(a) amended, p. 1408, § 69, effective February 1, 1999. L. 2000: (1)(c) and (2) amended and (3) added, p. 1042, § 3, effective September 1.

Editor's note: This section was formerly numbered as 19-2-703 (1)(l) and (4)(c).

Annotator's note. The following annotations include cases decided under former provisions similar to this section.

Three overriding requirements must be met before a restitution order can be valid: The person who is required to pay restitution must receive adequate notice that the victim or the victim's family claims damages, there must be notice of the amount of restitution requested, and the person obligated to pay must be given the opportunity to controvert the victim's claimed monetary damages. People in Interest of J.L.R., 895 P.2d 1151 (Colo. App. 1995).

Restitution order was entered without adequate notice or an opportunity to be heard since the **parent** did not receive notice of her potential **liability** nor of her opportunity to challenge the validity of the amounts sought. People in Interest of J.L.R., 895 P.2d 1151 (Colo. App. 1995).

Legislative intent underlying this section is that whenever possible, restitution should be required. People v. T.R., 860 P.2d 559 (Colo. App. 1993).

Former subsection (4) (now subsection (2)) and § 13-21-107 (2) do not limit a parent's restitution obligation to \$ 3,500 per delinquent act; rather, the "one delinquent act" limitation in that subsection, when read in conjunction with the "any person" language in § 13-21-107 provides that parental restitution payments cannot exceed \$ 3,500 to each person entitled to restitution as a result of each delinquent act. People in Interest of J.L.R., 895 P.2d 1151 (Colo. App. 1995).

Court not authorized to order a jail sentence against a parent pursuant to this section. People v. J.M., 22 P.3d 545 (Colo. App. 2000).

Source: [Legal](#) > [States Legal - U.S.](#) > [Colorado](#) > [Statutes & Regulations](#) > [CO - Colorado Revised Statutes](#) ⓘ

TOC: [Colorado Revised Statutes](#) > /.../ > [PART 9. POSTADJUDICATORY PROCESS](#) > [19-2-919. Sentencing - requirements imposed on parents](#)

Terms: "[parent](#)" w/20 "[liability](#)" ([Edit Search](#))

View: Full

Date/Time: Wednesday, February 19, 2003 - 8:43 PM EST



## Anchorage School District

4600 DeBarr Road  
P.O. Box 196614  
Anchorage, Alaska 99519-6614  
(907) 742-4000

### SCHOOL BOARD

Jake Mercette  
President

Tim Steele  
Vice President

Mary Marks  
Clark

Harriet A. Drummond  
Treasurer

Rita Holmhouse

Debbie Osslander

John Swiner

### SUPERINTENDENT

Carol Comeau

February 14, 2003

Representative Kevin Meyer  
State Capitol  
Juneau, AK 99801

Dear Representative Meyer:

On behalf of the Anchorage School Board and Administration, I want to commend you for sponsoring HB 18 which deletes the \$10,000 cap on vandalism caused by juveniles. This is one of our School Board's priorities and I believe it is essential to our collective efforts to protect schools and other public property from juvenile vandalism.

As I have stated many times since the Dimond High School incident in late December of 2001, I strongly believe that the offenders and their parents should be held fully accountable for restitution in recovering the \$158,000 damage done to the school under construction. The community, as well as the staff and students of Dimond High School were outraged at this completely needless and destructive act, as were the construction workers employed by Alcan General. Since the incident, Alcan General has had to not only repair all of the damage to the building and to the vehicles and equipment of the workforce, they have had to add the additional security staff in order to prevent other vandalism at the school site. These juveniles must be held fully accountable for their actions, and as a deterrent to other juveniles who might decide that there are minimum consequences for destroying public property.

The Anchorage community and taxpayers showed great faith and support for the District when the bonds were approved for the construction of this high school, the first one in over thirty years! These two juveniles were so uncaring and reckless that they decided to do all they could to destroy various parts of the building under construction. They had no concern for their own safety, or for the impact of their actions on the morale of the workforce and the community. The Anchorage Police Department devoted many hours to their investigation in developing their case which led to the successful apprehension of these juveniles; what a waste of their time and resources! It is time for the community to know that there are consequences for vandalism of public property, and that the court supports restitution for this act.

This was the first of a rash of major vandalism that occurred in the District last year. The other incidents seriously damaged Chugiak Elementary School and our Maintenance Department yard. Fortunately, the Anchorage Police Department's efforts paid off; all juveniles were apprehended. I have spent quite a bit of time in juvenile court in the past few months advocating for restitution and consequences. The parents of the Chugiak Elementary students have cooperated with the authorities

and their children have agreed to pay full restitution and perform community work service. Those students have clearly learned their lesson and I believe, are on the way to success in their lives. I cannot say that about the others who vandalized our property. Their advocates and parents have put up road block after road block in an effort to protect their clients from accepting their responsibility.

Currently the law restricts the ability of the court to impose full restitution in these cases; rather, the judge assesses how much a juvenile can pay in restitution while under the jurisdiction of the court. We feel this is intolerable and sends the wrong message to juveniles that they can get away from long-time consequences of crimes committed when they are under the age of 18, and that the records will be kept confidential. We believe that juveniles should have to sign a commitment to repay full restitution no matter how long it takes them to repay the costs of the vandalism. We believe this will reinforce the importance of parents knowing who their children are with when they are out of their parents' direct supervision.

Our community, the Anchorage Police Department, the Mayor, and our locally elected officials support this statutory change. We must do something to stop this type of juvenile crime! Please accept our thanks for your leadership on this issue. I applaud you and Senator Dyson for your efforts to change the statutes regarding juvenile crime and vandalism.

Please feel free to contact me if you would like me to testify at a hearing on this bill. I will be in Juneau during the AASB fly-in from February 22-25 and again in March and in April, and will try and meet with you to discuss this proposed legislation. I can also call in from the Legislative Information Office in Anchorage.

Sincerely yours,



Carol Comeau  
Superintendent

cc School Board members  
Senator Fred Dyson  
Mayor George Wuerch  
Assembly Chair Dick Traini  
Chief of Police Walt Monegan  
Lt. Gardner Cobb  
Larry Wiget

HB

23



# FISCAL NOTE

**STATE OF ALASKA**  
**2003 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: CSHB 23  
 ( ) Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Administration  
 Title An Act relating to restitution BRU Legal and Advocacy Service  
 Component Public Defender Agency  
 Sponsor Rep. Weyhrauch  
 Requester (H) JUD Component No. 1631

**Expenditures/Revenues (Thousands of Dollars)**

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE (Thousands of Dollars)**

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY2003) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** *(Attach a separate page if necessary)*  
 This bill would amend the criminal statutes to expand restitution orders and restitution as a condition of probation to include compensation for the value of labor and goods provided by volunteers to victims that are nonprofit organizations, when the volunteer labor or goods are necessary to alleviate or mitigate the effects of a crime. This bill would not have a significant fiscal impact on the operations of the Agency. The Agency represents indigent defendants in contested restitution hearings, a part of the sentencing process. This bill would authorize a sentencing judge to order a defendant to pay restitution to a nonprofit organization victim for the value of volunteer labor or goods provided to it when necessary to alleviate or mitigate the effects of a crime. This limited expansion of the statute will not noticeably increase the workload of the Agency.

Prepared by: Linda K. Wilson, Deputy Director Phone (907)-334-4416  
 Division: Public Defender Agency Date/Time 3/3/03 9:35 AM  
 Approved by: Mike Miller, Commissioner Date 3/3/2003  
 Agency: Department of Administration

# FISCAL NOTE

**STATE OF ALASKA**  
**2003 LEGISLATIVE SESSION**

Fiscal Note Number: \_\_\_\_\_  
 Bill Version: HB 23  
 ( ) Publish Date: \_\_\_\_\_

Revision Date/Time (Note if correction): \_\_\_\_\_ Dept. Affected: Administration  
 Title An Act relating to restitution BRU Legal and Advocacy Service  
 Component Public Defender Agency  
 Sponsor Rep. Weyhrauch  
 Requester (H) JUD Component No. 1631

**Expenditures/Revenues (Thousands of Dollars)**

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2004	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009
Personal Services	*	*	*	*	*	*
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
<b>TOTAL OPERATING</b>	*	*	*	*	*	*

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGE IN REVENUES ( )</b>						
-------------------------------	--	--	--	--	--	--

**FUND SOURCE (Thousands of Dollars)**

1002 Federal Receipts						
1003 GF Match						
1004 GF	*	*	*	*	*	*
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type—Do not abbreviate)						
<b>TOTAL</b>	*	*	*	*	*	*

Estimate of any current year (FY2003) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2004 budget proposal:

**POSITIONS**

Full-time						
Part-time						
Temporary						

**ANALYSIS:** (Attach a separate page if necessary)

This bill would amend the criminal statutes to expand restitution orders and restitution as a condition of probation to include compensation for the value of volunteer work.

This bill would have a fiscal impact on the operations of the Agency. The Agency represents indigent defendants in contested restitution hearings, a part of the sentencing process. This bill would authorize a sentencing judge to order a defendant to pay restitution to relatives, friends, co-workers and neighbors of a crime victim who spent time consoling the victim, helped clean up after a crime, or assisted the victim with tasks because the victim was too upset to attend to them. It is likely that more contested restitution hearings would result with the enactment of this proposed legislation. Some of the newly contested issues might be the value of the volunteer labor, whether the volunteer labor was directly related to the defendant's crime, or whether it alleviated or mitigated the effects of the crime. However, the Agency cannot accurately predict the increase in its workload. Therefore, an indeterminate fiscal note is submitted.

Prepared by: Linda K. Wilson, Deputy Director Phone (907)-334-4416  
 Division Public Defender Agency Date/Time 2/14/03 11:16 AM  
 Approved by: Mike Miller, Commissioner Date 2/14/2003  
 Agency Department of Administration

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES  
LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA

(907) 465-3867 or 465-2450  
FAX (907) 465-2029  
Mail Stop 3101

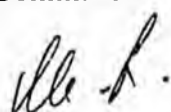
State Capitol  
Juneau, Alaska 99801-1182  
Deliveries to: 129 6th St., Rm. 329

## MEMORANDUM

February 24, 2003

**SUBJECT:** Crime victim restitution (CSHB 23(JUD))

**TO:** Representative Lesil McGuire, Chair  
House Judiciary Committee  
Attn: Vanessa

**FROM:** Michael F. Ford   
Legislative Counsel

The final CS you requested is attached. I wanted to point out that, as introduced, HB 23 made parallel changes to AS 12.55.045(a) and AS 12.55.100(a), intended to address restitution to certain crime victims. In the CS, the committee made changes to both provisions, but only part of the changes to AS 12.55.045(a) were also made to AS 12.55.100(a). The result is that now the two provisions no longer contain parallel provisions and the changes made to AS 12.55.045(a) have resulted in a very cumbersome clause in a subsection that probably should be rewritten. I understand that the committee has passed the bill out, so perhaps the next committee of referral, which I understand is to be the Rules Committee, can address these issues.

Please contact me if you have further questions.

MFF:med  
03-182.med

Enclosure

# ALASKA STATE LEGISLATURE

Rep. Lesil McGuire, Chair  
Rep. Tom Anderson, Vice-Chair  
Rep. John Coghill  
Rep. Jim Holm  
Rep. Ralph Samuels  
Rep. Les Gara  
Rep. Max Gruenberg



State Capitol, Room 120  
Juneau, AK 99801-1182  
(907) 465-4990  
Fax (907) 465-6592

## House Judiciary Committee

### Memorandum

**To:** Leg. Legal  
**From:** Vanessa Tondini, Committee Aide  
House Judiciary Committee  
**Date:** February 21, 2003  
**Re:** CS Request

---

Please create a final draft House Judiciary Committee Substitute for work order # 23-LS1341\S, HB 23: Restitution for Crime Victims. The bill passed out of committee today.

If you have any questions, please call me at 4990. Thank you very much!

The information attached to this memo is **CONFIDENTIAL** an/or privileged. It is intended to be reviewed initially by only the individual named above. If the reader of this Memorandum is not the intended recipient or a representative of the intended recipient, you are hereby notified that any review, dissemination, or copying of the information contained herein is prohibited. If you have received this in error, please immediately notify the sender by telephone and return this to the sender at the above address.

23-LS0134S  
Ford  
2/26/03

**CS FOR HOUSE BILL NO. 23( )**

**IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWENTY-THIRD LEGISLATURE - FIRST SESSION**

**BY**

**Offered:  
Referred:**

**Sponsor(s): REPRESENTATIVES WEYHRAUCH, Gatto, Gara**

**A BILL**

**FOR AN ACT ENTITLED**

1 **"An Act relating to court-ordered restitution and compensation following a criminal**  
2 **conviction."**

3 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

4 **\* Section 1.** AS 12.55.045(a) is amended to read:

5 (a) The court may order a defendant convicted of an offense to make  
6 restitution as provided in this section, including restitution to the victim or other  
7 person injured by the offense, to a public, private, or private nonprofit organization  
8 that has provided or is or will be providing counseling, medical, or shelter services to  
9 the victim or other person injured by the offense, or as otherwise authorized by law.

10 **The court may also order a defendant convicted of an offense to compensate a**  
11 **victim that is a nonprofit organization for the value of labor or goods provided by**  
12 **volunteers if the labor or goods were necessary to alleviate or mitigate the effects**  
13 **of the defendant's crime.** In determining the amount and method of payment of  
14 restitution **or compensation**, the court shall take into account the

1 (1) public policy that favors requiring criminals to compensate for  
2 damages and injury to their victims; and

3 (2) financial burden placed on the victim and those who provide  
4 services to the victim and other persons injured by the offense as a result of the  
5 criminal conduct of the defendant.

6 \* Sec. 2. AS 12.55.100(a) is amended to read:

7 (a) While on probation and among the conditions of probation, the defendant  
8 may be required

9 (1) to pay a fine in one or several sums;

10 (2) to make restitution or reparation to aggrieved parties for actual  
11 damages or loss caused by the crime for which conviction was had, including  
12 compensation to a victim that is a nonprofit organization for the value of labor or  
13 goods provided by volunteers if the labor or goods were necessary to alleviate or  
14 mitigate the effects of the defendant's crime;

15 (3) to provide for the support of any persons for whose support the  
16 defendant is legally responsible;

17 (4) to perform community work in accordance with AS 12.55.055;

18 (5) to participate in or comply with the treatment plan of an inpatient  
19 or outpatient rehabilitation program specified by either the court or the defendant's  
20 probation officer that is related to the defendant's offense or to the defendant's  
21 rehabilitation; and

22 (6) to satisfy the screening, evaluation, referral, and program  
23 requirements of an agency authorized by the court to make referrals for rehabilitative  
24 treatment or to provide rehabilitative treatment.

# ALASKA STATE LEGISLATURE

Rep. Lesil McGuire, Chair  
Rep. Tom Anderson, Vice-Chair  
Rep. John Coghill  
Rep. Jim Holm  
Rep. Ralph Samuels  
Rep. Les Gara  
Rep. Max Gruenberg



State Capitol, Room 120  
Juneau, AK 99801-1182  
(907) 465-4990  
Fax (907) 465-6592

## House Judiciary Committee

### Memorandum

**To:** Leg. Legal  
**From:** Vanessa Tondini, Committee Aide  
House Judiciary Committee  
**Date:** February 21, 2003  
**Re:** CS Request

---

Please create a final draft House Judiciary Committee Substitute for work order # 23-LS0134\D, HB 23: Restitution for Crime Victims, incorporating the attached four amendments. The bill was passed out of committee today.

If you have any questions, please call me at 4990. Thank you!

The information attached to this memo is **CONFIDENTIAL** an/or privileged. It is intended to be reviewed initially by only the individual named above. If the reader of this Memorandum is not the intended recipient or a representative of the intended recipient, you are hereby notified that any review, dissemination, or copying of the information contained herein is prohibited. If you have received this in error, please immediately notify the sender by telephone and return this to the sender at the above address.

CS FOR HOUSE BILL NO. 23( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-THIRD LEGISLATURE - FIRST SESSION

BY

Offered:  
Referred:

Sponsor(s): REPRESENTATIVES WEYHRAUCH, Gatto

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to court-ordered restitution and compensation following a criminal  
2 conviction."

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

4 \* Section 1. AS 12.55.045(a) is amended to read:

5 (a) The court may order a defendant convicted of an offense to make  
6 restitution as provided in this section, including restitution to the victim or other  
7 person injured by the offense, restitution to a public, private, or private nonprofit  
8 organization that has provided or is or will be providing counseling, medical, or  
9 shelter services to the victim or other person injured by the offense, compensation to  
10 the victim for the value of volunteer labor incurred to alleviate or mitigate the  
11 effects of the defendant's crime, or as otherwise authorized by law. In determining  
12 the amount and method of payment of restitution or compensation, the court shall  
13 take into account the

14 (1) public policy that favors requiring criminals to compensate for

1 damages and injury to their victims; and

2 (2) financial burden placed on the victim and those who provide  
3 services to the victim and other persons injured by the offense as a result of the  
4 criminal conduct of the defendant.

5 \* Sec. 2. AS 12.55.100(a) is amended to read:

6 (a) While on probation and among the conditions of probation, the defendant  
7 may be required

8 (1) to pay a fine in one or several sums;

9 (2) to make restitution or reparation to aggrieved parties for actual  
10 damages or loss caused by the crime for which conviction was had, including  
11 compensation to the victim for the value of volunteer labor incurred to alleviate  
12 or mitigate the effects of the defendant's crime;

13 (3) to provide for the support of any persons for whose support the  
14 defendant is legally responsible;

15 (4) to perform community work in accordance with AS 12.55.055;

16 (5) to participate in or comply with the treatment plan of an inpatient  
17 or outpatient rehabilitation program specified by either the court or the defendant's  
18 probation officer that is related to the defendant's offense or to the defendant's  
19 rehabilitation; and

20 (6) to satisfy the screening, evaluation, referral, and program  
21 requirements of an agency authorized by the court to make referrals for rehabilitative  
22 treatment or to provide rehabilitative treatment.