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EDITOR'S BRIEF

In this edition of the Colonial Lawyer, the staff has attempted to address several issues that are on the forefront of state and national legal and social debate. The article concerning the Chesapeake Bay stresses the importance man has played in the decay of that estuary and the role we must all play in its resurrection.

Greg Tolbert's article addresses the issue of marital rape. The article is the second in a two-part series. In 1986 Virginia amended its code, abandoned the common law marital rape exemption and statutorily prohibited marital rape. The article examines the new law and analyzes its purpose, scope and limitations. Another current debate in Virginia centers around water rights and uses. Sherri Davis and Bruce McDougal suggest that reform is necessary.

Gary Close's article centers on a current crisis in zoning law as it affects churches and other religions organizations. This topic is of great debate in both Fairfax and Henrico counties in Virginia. The article analyzes the zoning law and suggests the analysis courts should apply when confronted with free exercise arguments offered by churches and religious organizations. The last article in this issue is a short commentary by Dale Barney emphasizing the need of a small-claims court in Virginia.

We, the staff of the Colonial Lawyer, welcome your comments and sincerely hope that this issue will alert our readers to the most current legal issues in Virginia and the nation.

J. Thompson Cravens
Senior Editor
VIRGINIANS, sound the alarm! Citizens of this nation pay heed. One of our nation's and surely Virginia's, most valuable resources is on the brink of destruction. Our state's magnificent and productive natural estuary, the Chesapeake Bay, is dying. Man, in all his grandeur, is responsible. For years, the unfettered drainage and dumping of chemical wastes, sewage, and agriculture fertilizers into the more than one hundred and fifty rivers, creeks, and streams which feed the Bay has limited the estuary's ability to cleanse itself. It is now in the hands of humans to attempt to reverse this course. If immediate steps are not taken to rehabilitate both the Bay and its tributaries, this marvelous body of water will become nothing more than an exhausted, polluted, dead natural resource laid waste by human development.¹

The day has come for man to both realize and react to his impact upon the fragile environment surrounding him. Lord Byron said it best almost two centuries ago when inspired by the "austere grandeur" of the Swiss Alps on a visit in 1816:

How beautiful is all this visible world!
How glorious in its action and itself!
But we, who name ourselves its sovereign, we,
Half dust, half deity, alike unfit
To sink or soar, with our mixed essence make
A conflict of its elements, and breath
The breath of degradation and of pride.
Contending with low wants and lofty will,
Till our mortality predominates.²

Concern has arisen recently over the complex ecosystem of our Bay. It is the largest and most productive estuary in the United States, providing food and a hub of commerce to Virginia, Maryland, and Pennsylvania since colonial times. The living resources of the bay constitute a vital part of the United States fishing industry. Unfortunately the Bay's seafood harvest has been declining steadily during the past several years due primarily to the

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¹ See Christian Science Monitor, Mar. 5, 1984, at B15, Col. 1; see also Marjorie Hutler, 4 VA. J. NAT. RESOURCES L. at 185, 1984-85.

² George Gordon, Lord Byron - Manfred: "A dramatic poem" referred to by Byron as "a drama of ideas." It is with humble intentions that we, the staff of the Colonial Lawyer, inspired by the great blue waters of the Chesapeake Bay, endeavor to write, that "she" may be saved - for us - and posterity.
deteriorating water quality of the Bay. The Bay and its tributaries are in the midst of the megalopolis that stretches from Boston to Richmond. It is not surprising that this carefully balanced system should be disturbed by the impact of intense and steadily increasing human activity. The Bay can be saved; however, to do so will require the prudent decisions of state legislatures and local governments across the eastern seaboard. Concerted efforts must be made at all levels to effectively inhibit the ability of pollutants to enter tributaries flowing to the Bay.

I. Problems Created by Bay Pollution

Pollutants which flow from tributaries and enter the Bay are not quickly dispersed or absorbed by its waters and flushed into the vast Atlantic Ocean. The circulation patterns in the Bay are unique, both in flowing fresh water and in-flowing ocean water. These conditions, which make Bay ecosystems some of the most biologically productive on earth, also act to hold within the estuary the pollutants that reach the Bay by tributaries. These pollutants have accumulated over the years and now are acting to gradually destroy the productive nature of the waters. Over-enrichment with nutrients (phosphorus and nitrogen), contamination by toxics, and a rapid decline in the amount of submerged aquatic vegetation (SAV) in the Bay are all a result of the pollution. Another problem involves the large areas of the Chesapeake Bay which have low or no dissolved oxygen (DO). Between 1950 and 1980, the size of these areas increased by a multiple of fifteen. The extent of the DO problem is evidenced by the fact that "from May through September [1983] in an area reaching from the Annapolis Bay Bridge to the Rappahannock River, much of the water deeper than 40 feet has no oxygen and, therefore, is devoid of life."

Can we as Virginians comprehend the magnitude of a Bay devoid of life? If this continues, if this trend is not immediately put to a halt, we could be faced with this devastating reality, and in our lifetime. The famed seaman Jacques Cousteau has warned such and pointed to the example of the Mediterranean Sea. This cannot be allowed to occur. If we fail to take both preventive and corrective (rehabilitative action); we may soon only remember those world renowned Chesapeake Bay Blue Point Oysters or the succulent blue and soft shell crabs, or Bay scallops. Already we have seen the striped bass population, the fish that at one time was the Bay's mainstay, eroded to levels such that the species now requires govern-

4 Eichbaum, Cleaning Up the Chesapeake Bay, 14 ENVTL. L. REP. 10237, 10238 (1984).
6 Eichbaum, supra note 4, at 10239.
7 Warner & Kindt, supra note 3, at 1111, citing EPA Chesapeake Bay Findings, supra note 5, at 22.
mental protection. The loss of these species will mean more than the mere loss of dietary delicacies. The pollution of the Bay and the decline in submerged aquatic vegetation (SAV) may have even more devastating effects on the nation's ecology.

Twenty species of SAV occur in the Bay, in water less than three meters deep. SAV stabilizes sediments, baffles current, reduces shore erosion, buffers against nutrient runoff, and serves as food for aquatic species and waterfowl. SAV zones provide some of the most favorable habitat in the Bay. The Bay is one of the flyway routes for Canada Geese, ducks and many other northern waterfowl. Quite possibly, this complex ecosystem could become so polluted that these transient birds will no longer survive the southern flight because of Bay pollution. These beautiful creatures could be forced to reroute natural flyways because of lack of food and clean water in the Bay region. The ramifications of a dead Bay are too astounding to calculate. Our only choice is to band together as a state and as a nation and save this resource from destruction.

II. Pollution Control Proposals

In 1976 the EPA began a five year project to research, study and identify the ecological problems threatening the fragile ecosystem of the Bay. Completed in 1981, the studies resulted in a practical set of recommendations. The final product of research and recommendations were five written essays, and they form the basis of most of the knowledge we have today about pollution of the Bay, the sources of that pollution, and its effects upon the Bay.

In the efforts to save the Chesapeake Bay, pollution controls must be implemented in several specific areas: 1) sewage treatment, 2) industrial pollution/waste product discharges, 3) reduction of non-point source agriculture pollution and 4) pollution limitation of industrial toxic waste disposal. If measures in these areas are not successfully undertaken, the environmental threshold could be crossed. Crossing this threshold - where
water quality moves just below that point which allows the survival of basic species — would bring death to most living organisms in the Bay. Because of the unique circulation of the Bay's waters — once this threshold is reached — the Bay will not quickly flush itself. Because of this severely limited assimilative capacity and "irreversible despoliation as the probable result"\(^{11}\) of crossing the environmental threshold, we as Virginians must work now to cleanse our waters, our life's blood.

**A. Sewage Treatment**

It is essential that states whose municipal sewage treatment plants drain into the tributaries flowing to the Bay impose more stringent regulations on those municipal treatment plants to remove excess nutrients. Wastewater treatment techniques currently employed by many municipalities across the east coast, but especially in Virginia, Maryland, and the District of Columbia, fail to remove many pollutants, particularly phosphorus. These pollutants are discharged in massive quantities into the upper Bay.\(^{12}\)

The magnitude and impact of sewage waste water on the Bay is illustrated by the fact that "[o]ver 1,000 sewage treatment plants are located on the Chesapeake Bay and its tributaries."\(^{13}\) Each day they contribute more than one and a half billion gallons of treated wastewater to our rivers and streams and [ultimately] to the Bay.\(^{14}\) As large as the Bay is, these numbers are astounding. They are astounding even if we assume that all of the wastewater reaching the Bay has been properly treated, but this is not always the case. Wastewater pumped into rivers and streams "frequently does not meet the requirements established by the government, even when those requirements are lax, as they often are."\(^{15}\) This is unacceptable! To resolve the crisis facing the Bay, much more must be done. If the Bay is inadequately assimilating the pollutants reaching it today — what will occur with development and increased sewage demands? If we know that the future will require greater amounts of wastewater to be dumped into the Bay and its tributaries, logic requires us to demand now treatment that will greatly reduce the amount of pollutants present in the dischargeable wastewater.

For years, many people believed that the Bay had an unlimited capacity to assimilate human wastes.\(^{16}\) Now we know this is not true. States have begun to take action, but we, as concerned citizens, must insure that legislation equates to compliance, which is often not the case with regard to environmental protection legislation. Our government has been far too lax in punishment and enforcement efforts. Penalties must be established that

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11 Warner & Kindt, supra note 3, at 1102.
12 See Eichbaum, supra note 4, at 10241.
14 Id.
15 Id.
16 See supra note 5, at 19.
will convey to polluters the severity and consequences of continued misuses of the environment.

Maryland, Virginia, Pennsylvania, and the District of Columbia have begun unified action, but citizens must press for further Bay relief programs. With regard to the Chesapeake Bay, there is no room for mistake, there is no place for mismanagement, and there is no time for delay. It is clear that much of what will occur to end the pollution of our rivers and streams will occur at the local and state level. Thus, small groups of concerned citizens can have a real impact on how local governments and city planning commissions approach and manage the problem of sewage treatment in their respective communities. Federal and state standards exist, but these are the minimal requirements. Communities should push themselves not to meet the standards, but to exceed these standards and by as much as possible. When we as a people begin to confront problems with this attitude, maybe, just maybe, immediate and substantial progress can be made.

There has been proposed federal legislation that could greatly enhance the ability of state and local government to fund intensified pollution control measures. On January 3, 1985, Maryland Representative Ray Dyson introduced Chesapeake Bay Legislation. This bill would amend the Clean Water Act to authorize EPA to disburse ten million dollars a year in matching grants to states, through fiscal year 1989, to implement the interstate management plans developed pursuant to the "Chesapeake Bay Agreement." The amendments would also authorize three million dollars annually for the states to study point source and nonpoint source discharges into the Bay. Funding for virtually any project is a source of

17 The District of Columbia has established a policy that will control urban runoff as well as concomitant sewer overflows by 1989. Maryland allocated over $70 million to the cleanup effort by authorizing: (1) the establishment of a comprehensive storm water management program, (2) an improved and upgraded system of treatment plants, and (3) a program to preserve land adjacent to tributaries. Virginia's 2 year contribution towards cleaning up the Bay was 13.3 million. the plan was directed at controlling point source pollution, identifying concentrations of organics and toxic metals, and providing controls on nonpoint source pollution caused by both agriculture and urban runoff. Pennsylvania established a plan for the Susquehanna River to curb the entrance of phosphates, from treated sewage discharges, and reduce the level of nutrients in washwater after treatment. These controls to limit pollutants in the Susquehanna are important because the river constitutes the largest source of freshwater entering the Bay. Warner, supra note 3, at 1122, 23.


20 The Chesapeake Bay Agreement of 1983 was a result of a conference of the Governors of Virginia, Maryland and Pennsylvania, the Mayor of Washington D.C., and the Administrator of the EPA. Each member proposed an "action agenda" which was to be implemented in a "joint initiative" to save the Chesapeake Bay. The text of the agreements is printed in, Citizens Program for the Chesapeake Bay, CHOICES FOR THE CHESAPEKE: AN ACTION AGENDA 6, 17 (1984).

21 Hutter, supra note 8, at 194.
great debate in the American political process, especially at the local level where even small projects have the potential to strain the budget. Therefore any federal assistance, such as matching funds, would surely help to alleviate some of the burden facing local planners when attempting to decide whether the implementation of heightened pollution control measures is possible.

If multistate cooperation is to succeed in controlling point source pollution of the Bay and its tributaries, local authorities must exercise their enforcement authority. No longer can violators be tolerated. Ironically, those communities in Virginia most concerned with the continued health and survival of the Chesapeake Bay are the communities whose sewer systems and inadequate sewage treatment plants are major Bay polluters. The inflow of urban rainwater runoff into sewer lines causes the capacity of sewage treatment plants located on the James River near Newport News, Hampton Roads, and Cape Charles, Virginia to often be exceeded. Those plants are then forced to discharge wastewater containing high levels of nutrients, bacteria, and sewage solids directly into the James. In the entire Bay region, this sewage problem is most serious in communities on the lower James in Virginia. Something must be done. Virginians must help themselves before seeking assistance from others. We must lead this charge by example. The battle has begun and the intolerable discharge of pollutant filled wastewater into the Chesapeake Bay and its tributaries must end. It must end in New York. It must end in Pennsylvania. It must end in the District of Columbia. It must end in Maryland, and certainly it must end in our own backyard. America is a nation founded with citizen action led by Virginians, and it would be a grave mistake to tarnish that heritage by the failure of Virginians to fulfill their obligation to state and country today.

B. Industrial Compliance

Our government must insure that industrial compliance with the Clean Water Act is fact rather than fiction. We as citizens of this Commonwealth have the legal right to protect our environment; with respect to industrial polluters, it is imperative that we exercise these rights. In a recent decision in Virginia, Gwaltney of Smithfield, Virginia was sued by the Chesapeake Bay Foundation, a citizens environmental organization.


23 Hutter, supra note 8, at 203 n. 128, citing Virginia Bay Initiatives, supra note 22, at C-2 (emphasis added).


A federal judge fined Gwaltney a total of $1,285,322. This award was affirmed by the United States Court of Appeals for the Fourth Circuit. This decision illustrates that private citizens and citizen organizations can play a major role in the protection of our precious environment. In Maryland, Chesapeake Bay Foundation suits have spurred the state officials to double the number of personnel assigned to industrial compliance. Actions filed by the state have increased dramatically. If anything, citizen awareness has spurred the state to take important action.

C. Reduction of Non-Point Source Agriculture Pollution

For years, the farming community failed to comprehend the devastating effects its land use practices had on Virginia's waters. The practice of cultivation of highly erodable soils dramatically increases the amount of sediment that reaches the Bay. The improvident use of fertilizers and pesticides also pollute our waterways with excessive amounts of nutrients, especially nitrogen, and toxics. Agricultural practices have significantly contributed to the decline of the Bay. The increase in nutrients stimulates growth of algae and phytoplankton and prevents the dissolution of oxygen. The lack of oxygen affects the survival of fish indigenous to the estuary, and will if not controlled, prevent the populations from ever returning.

For successful changes to be undertaken, state agriculture and conservationists must convince farmers that the containment of erosion problems are in the best interest of both the community and the farmer. The first problem with this approach is that the technical resources for advising farmers as to how to reduce runoff pollution and erosion have not been available at the soil conservation district level. The major problem however is that too little financial assistance has been made available to farmers to induce them to correct certain agricultural practices. Their livelihood is farming, and it is understandable that they irrigate wherever practicable and fertilize to get the most from each crop. The solution lies with more money and technical advice. We as a society should fund these projects because we are not blameless with respect to agricultural pollution. We cannot expect farmers to bear the burden of the cost of Bay cleanup. Incentive payments and matching grants to help farmers control erosion and runoff could benefit everyone. The Bay study, A Framework For

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26 Id., at 1565 (Merhige, D.J.).
27 Chesapeake Bay Foundation v. Gwaltney of Smithfield, 791 F.2d 304 (4th Cir. 1986).
28 A. POWERS, supra note 13, at 13.
29 Lindon & Gergen, Interagency Disputes Over Dry Fields or Clean Water: A Case Study of the Conflict Between Agricultural Drainage Programs and the Chesapeake Bay Cleanup, 4 VA. J. OF NAT. RESOURCES L.219, 221 (1985)
30 Id.
31 Eichbaum, supra note 4, at 10243.
Action, found that runoff from cropland and other non-point sources is the major source of nitrogen to the nutrient enriched areas of the Bay. The evidence clearly establishes that these farming practices must be eliminated, and they can. They cannot be eliminated, however, if we choose not to spend the money necessary to bring about meaningful change.

D. Limitation of Industrial Toxic Waste Disposal

Throughout the industrial revolution, America permitted industrial growth and advancement at both the expense of human and environmental health. With the New Deal in the 1930s our government began taking specific steps to restrict industrial exploitation of the work force. It was not until years later that substantive steps were taken to attempt to restrict industrial exploitation of our environment.

The Federal Water Pollution Control Act Amendments of 1972 announced a federal presence in efforts to restore and maintain the "biological integrity of the nations waters" by developing technology necessary to eliminate the discharge of pollutants into those waters. The 1977 Clean Water Act significantly amended the Federal Water Pollution Control Amendments of 1972. The Clean Water Act implemented an entirely new federal strategy for the control of toxics and the discharge of these materials into the nations waters, EPA "Best Available Technology Toxics", to be regulated by permits. The state of Virginia under the authority of the National Pollutant Discharge Elimination System (NPDES) permit program assumed control of the permit system in 1975 after the State Water Control law was amended to give authority to the State Water Control Board to enforce the federal and state regulations. Under the Act, States have the authority to establish standards more stringent than EPA limitations. Virginia has been reluctant to develop new and independent limitations regarding the discharge of toxic wastes into industrial waste streams and has been lax in enforcing existing standards.

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32 Lindon & Gergen, supra note 29, at 221, citing A FRAMEWORK FOR ACTION, supra note 9, at 61. Non-point source pollutants contribute 67% of the total nitrogen load to the Bay in a year of average rainfall. Farmland contributes 60-75 percent of that total figure.


36 Id. at 53, 91 Stat. at 1589 (codified at 33 U.S.C. §1317 (1982)). Best Available Technology (BAT) apply to entities discharging "priority toxic pollutants" of which there are 126. These pollutants are defined in NRDC v. Train, 510 F.2d 692 (D.DC 1976). See Watson, supra note 34, at 277 n. 88.


39 Watson, supra note 34, at 282.
The Environmental Defense Fund petitioned the EPA in 1984 to review the Virginia NPDES program charging that the Water Control Board was administratively continuing industrial and municipal permits. The State Water Control Board must strictly monitor all recipients of permits if the Bay is to be saved. Dilatorious administrative continuance of permits defies the entire process and minimizes the effect of legislation which is already years late. This intolerable defiance cannot be permitted, even if it means federal overseers doing spot checks at permit sites on a daily basis. Virginia cannot permit the few offenders to spoil the Chesapeake Bay for us all.

III. Current Crisis

On Thursday, November 6, 1986, President Reagan vetoed an $18 billion extension of the clean water act. This veto if not overridden by Congress, could have placed a padlock on that treasure chest of nature's bounty we call the Chesapeake Bay.

Without adequate funding, adequate protection programs will not exist. Without these programs, the timeless beauty of the seven hundred miles of shoreline along the bay could cease to be timeless. Congress must address the actions of the President and Virginians must assert the necessity of saving the Bay. An $18 billion dollar expenditure to save the nation's waters is long overdue. Local governments across the United States are dependent upon those federal dollars to improve sewer systems that are in need of repair and rehabilitation.

Every American should realize just how much this money means to our health and future. The extension of the 1972 Clean Water Act will most likely be reintroduced in January of 1987 by Senator Daniel P. Moynihan, a Democrat from New York, who is in line to become the Chairman of the Environment Subcommittee on water resources in the new Congress. With public support, this time the legislation could be successful. We as Virginians must act to provide that necessary support.

Conclusion

If we as a society are to continue to enjoy the fruits of this precious earth on which we live, it is imperative that we act in concert to preserve and repair the elements that our lives wreak havoc upon. The problems which face our state in preserving the Chesapeake Bay, though national in character, can and must be addressed at the state and local level. This means that the private citizen or groups of concerned citizens can and must make their feelings known. They must utilize their voices and their votes to force state and local political leaders to address this important environmental issue. The preservation of the Chesapeake Bay is not a political issue nor a party issue. The magnitude and importance of the Chesapeake Bay to Virginia and the world transcends political bounds. Each and every living being on this planet today and those which will reside on the earth in the future are concerned parties. The problems can be solved,
but they will only be solved if states and localities begin to implement pollution control standards that exceed minimal requirements. Each state, each locality, bears the burden of doing everything within the bounds of reason to reduce the level of pollutants that enter the rivers and streams of this great state. When we reach this level of social awareness, we will have reached the point at which the Chesapeake Bay can begin a rebirth.
WATER RIGHTS LAW IN VIRGINIA: 
TIME FOR REFORM?

Bruce McDougal*
Sherri L. Davis**

Virginia, as an historically rural and agrarian state in the humid East, has only recently been forced to face the legal and institutional issues involved in managing and allocating water, a finite natural resource. Laws which have altered the basic common law principles governing water rights have been passed in response to rapid urban growth in Northern and Southeastern Virginia, several recent droughts in the state, and intergovernmental conflicts arising from localities' refusal to share their access to water resources. For the most part, Virginia enacted water rights legislation in the aftermath of water crises, and subsequently has been interpreted and adapted so that it has little effect on the underlying problems which it was meant to address.

This article will outline Virginia's common law of water rights, which is applicable to most of the state, discuss statutory law in its current state, and discuss the possibility of future legislative proposals.

Water rights in Virginia, absent statutory law, are governed exclusively by the common law; thus the only enforcement mechanism is the private lawsuit. The courts have retained the historic common law distinction between surface water and groundwater rights.

Surface water rights in streamflow are called riparian rights, while those in lakes are littoral rights. These two surface water rights doctrines are basically the same, but conflicts more often arise in connection with riparian rights. Riparian rights are incident to the ownership of land bordering or crossed by a stream. However, "riparian land is...limited in

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2 Town of Purcellville v. Potts, 179 Va. 514, 521, 19 S.E.2d 700, 702 (1942).
its extent by the watershed of the stream; in other words, lands beyond the watershed cannot be regarded as riparian, though part of a single tract, held in a common ownership, which borders on the stream." As a further restriction, only those parcels which are owned by one person, acquired in one transaction, and bordering a stream are riparian to that stream.

A riparian landowner's use of water must be for the benefit of the riparian land and the use must be reasonable. "Reasonable use" is defined in the context of the needs of all other riparian landowners: "A proprietor may make any reasonable use of the water of the stream in connection with his riparian estate and for lawful purposes within the watershed, provided he leaves the current diminished by no more than is reasonable, having regard for the like right to enjoy the common property of other riparian owners." Historically, there has been a hierarchy of reasonable uses:

First, the primary use is for natural and domestic purposes, in order to supply the wants of man and animal, and each owner of the land, through or by which the stream flows, is at liberty to take as much as may be necessary for these purposes, even if it be thereby entirely consumed in the use. Second, he may also use the same for agricultural purposes such as irrigation, and for manufacturing purposes, but for these purposes he shall use the same in a reasonable manner, so as not to destroy or render useless or materially diminish the flow, so as to affect the application of the water by the riparian proprietors below, and if...he temporarily diverts a part of the stream, he must cause same to be returned to the channel below.

Virginia ascribes to the reasonable use theory, whereby "in an action for damages or suit for injunction by a lower against an upper riparian landowner for wrongful diversion of water by the latter,...the plaintiff in order to prevail must show some substantial actual damage occasioned by the diminution of the quantity of the water which the plaintiff has the right to use." "The only question is whether there is actual injury to the lower estate for any present or future reasonable use. The diversion alone, without evidence of such damage, does not warrant a

4 Id. at 553, 106 S.E. at 512.
7 Town of Gordonsville, 129 Va. at 560, 106 S.E. at 514.
recovery even of nominal damages."8

Riparian rights are separable from the underlying land and may be conveyed through sale,9 condemnation,10 or prescription.11 It is a well settled doctrine that there may be a conveyance of water or water rights separate and apart from the land thereunder, and that such a conveyance is a conveyance of a property right.12 These separable riparian rights can only be used in conformance with the reasonable use doctrine; however one Virginia case indicates that diversion to non-riparian land is "an extraordinary and not a reasonable use."13

Rights in groundwater can take two forms: absolute ownership or reasonable use. The Virginia Supreme Court has not indicated which doctrine prevails in Virginia: in Clinchfield Coal Corp. v. Compton,14 the court discussed both forms of ownership, and finally refused to take a position, as the defendants' use of the land in coal mining operations qualified as either type of ownership.

The court said:

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\text{[The fee-simple owner of the land [is] the owner of everything above and below the earth, expressed in the maxim, "eius est solum, ejus est usque ad coelum et ad inferos." This doctrine allows a landowner to make any use he pleases of underlying percolating waters; he may even cut them off maliciously without liability to his neighbor.}
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Of reasonable use the court said:

The "reasonable use" rule does not forbid the use of percolating water for all purposes properly connected with the use, enjoyment, and development of the land itself, but it does forbid maliciously cutting it off, its unnecessary waste, or withdrawal for sale or distribution for uses not connected with the beneficial enjoyment of the land from which it is taken.16

This definition of reasonable use allows any use beneficial to the land; this differs from the definition of reasonable use of surface water, which compares on riparian user to all others

8 Virginia Hot Springs Co., 143 Va. at 467. See also supra note 5.

9 Hite v. Town of Luray, 175 Va. 218, 224, 8 S.E.2d 369, 371 (1940).

10 Potts, 179 Va. at 525, 19 S.E.2d at 704.

11 Town of Gordonsville, 129 Va. at 560, 106 S.E. at 514.

12 Thurston v. Town of Portsmouth, 205 Va. 909, 913, 140 S.E.2d 678, 681 (1965); Hite v. Town of Luray, 175 Va. at 224, 8 S.E.2d at 371.

13 Potts, 179 Va. at 521, 19 S.E.2d at 704.

14 148 Va. 437, 454, 139 S.E. 308, 313 (1927).

15 Id. at 451, 139 S.E. at 313.

16 Id. at 452, 139 S.E. at 313.
using the same source.

Although the common law has governed water rights in the Commonwealth since the colonial period, the various doctrines continue to be refined, clarified and adapted to meet contemporary needs. This has created both confusion and an unusual opportunity for creative advocates to shape the primary body of law relating to Virginia water rights.

Virginia's present statutory system of groundwater control is codified in Code of Virginia sections 62.1-44.83 et. seq., the Groundwater Act of 1973. It provides that any area declared by the State Water Control Board to be a "groundwater management area" is subject to the provisions outlined in the Act. Only two areas were declared in 1973 to be "groundwater management areas": Southeastern Virginia, south of the James River, including the counties of Prince George, Sussex, Southampton, Surry, Isle of Wight, and the cities of Norfolk and Virginia Beach; and the Eastern Shore of Virginia. Any locality or the State Board itself may initiate proceedings to have any area of the state declared a "groundwater management area", however, no additional areas have been established since 1973.

Generally, the Act requires a user to obtain a permit for withdrawal of groundwater or an increase in groundwater use, and the State Water Control Board approves or disapproves increased use based on statutory criteria specified in the Act.

Initially, the Act was criticized for its broad exemptions from the permitting system, which included agricultural uses, use for human consumption or domestic purposes, and certain industrial and commercial uses. These exemptions, coupled with an opinion of the Attorney General, which stated that withdrawal of water by municipalities for mixed domestic, industrial and commercial purposes falls within the exempted use category, rendered the Act virtually ineffective in controlling groundwater use within the "groundwater management area."

In the last session of the General Assembly, it was proposed that all categorical exemptions be eliminated and that a very narrow general exemption for water withdrawals of less than 10,000 gallons a day be imposed. The agricultural lobby opposed the elimination of the agricultural use exemption, thus, the legislature retained the exemption, with the condition that agricultural users of more than 300,000 gallons per month may be required to report the amount of their withdrawals.

Subsequently, the General Assembly passed a resolution giving agricultural water use reporting responsibilities to local Virginia Tech Extension Service agents. The bill's proposed

17 VA. CODE ANN. §62.1-44.87, (19).
10,000 gallons per day use limitation for exemption from permit requirements was amended before passage, to 300,000 gallons per month, and an exemption was added for uses by groundwater heat pumps, which fall under a separate permit requirement of Virginia Water Control Law. Thus, the amended section reads:

No certificate of groundwater right, permit or registration statement... shall be required for any water withdrawal of less than 300,000 gallons a month or for groundwater withdrawn for agricultural or livestock purposes.... [T]he Board may be regulation require persons in any groundwater management area who withdraw more than 300,000 gallons of water per month for agricultural and livestock purposes to report the amount of such withdrawal. Nor shall any certificate of groundwater right, permit or registration statement be required for the withdrawal of groundwater for use by a groundwater heat pump for which a permit has been issued by the Board....

The effect of this 1986 amendment is to eliminate the exemption of municipalities from permit requirements; its effectiveness in increasing state control over conflicts arising from use of limited groundwater in the southeastern portion of the state has yet to be seen.

The 1986 Session of the General assembly also enacted the Private Well Construction Act, which generally requires application for and receipt of a permit from the State Department of Health prior to construction of any well in the Commonwealth.

Thus, the role of the state in groundwater management remains limited in areas of the state not declared "groundwater management areas." In the majority of counties of the state, the common law governs allowable withdrawal of groundwater.

Legislative reform of water rights in Virginia is desperately needed; yet the General Assembly has not been able to effect a workable solution to water allocation problems, which become more acute with each drought that the state suffers. Legislators from the eastern portion of the state, which has been hit most hard by recent droughts, are eager to implement some type of permitting or other allocation system. On the other hand, legislators from the western part of the state do not perceive the problem as one which requires an immediate solution.

This legislative standstill has prompted the State Water Control Board to introduce bills to the General Assembly over the past several years. Prior to the 1986 session of the General Assembly, the State Water Control Board held statewide public hearings on its legislative proposals and fond public sentiment strongly against implementation of a statewide water use permitting system. Legislative reception to the State Board's initiative has also been less than enthusiastic; only the previously


mentioned legislation, extremely limited in its scope, was passed by the General Assembly in 1986. Thus the State Water Control Board will limit its legislative initiative in the upcoming 1987 session of the General Assembly. The Board's only anticipated introduction of legislation is a bill which would modify the newly implemented agricultural water use reporting system to make reporting mandatory. Although such a proposal, if 6ti is passed, may aid the state in monitoring one type of water use in other than "groundwater management areas", it is a far cry from needed use control reform.

Until a statewide permitting system or other use control system is implemented, the state of Virginia will be forced to deal with its seasonal water crises on an ad hoc basis. The inefficiency of this type of response to resource management calls for legislative reform of Virginia water rights law.
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Legal scholars are proud to point to the fact that law evolves over time. As societal values change, the law usually has witnessed a commensurate change. Few would deny that the law as we know it today has changed a great deal from 1736. However, the law has been very slow to depart from the marital rape exemption first articulated by English Chief Justice Matthew Hale, who stated that "the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself in this kind unto her husband, which she cannot retract."  

Although "[s]ociety recognizes rape as one of the most serious violent crimes, one which scars its victims emotionally as well as physically," two states are willing to abandon the common law exemption. As a result, the marital rape exemption "denies a married woman the right, which a single woman has, to legal recourse against her attacker."  

Today twenty-eight states continue to recognize the marital rape exemption and prohibit the prosecution of a husband for the rape of his wife. Only eight states (Florida, Kansas, Massachusetts, Nebraska, New Jersey, New York, Oregon and Wisconsin) have statutorily eliminated the marital rape exemption.  

The law governing marital rape in Virginia recently has been changed. While Virginia has not abandoned the marital rape exemption completely, it indeed has taken a step in that direction. The significance of the action by the Virginia legislature is still in question. However, Virginia has added itself to the list of jurisdictions that question Chief Justice Hale's vision of the marriage contract.  

This article explores the 1986 amendments to the Code of Virginia as they

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1 M. Hale, Pleas of the Crown, 629 (1736).
2 Comment, Marital Rape: The Legislative Battle, 15 Colonial Law. 21 (1986).
relate to the issue of marital rape. Initially, this article will explain the law governing marital rape in the Commonwealth of Virginia. It will examine the language used in the statute to determine the limits of the law. Finally, this article will analyze the barriers to complete statutory elimination of the common law marital rape exemption.

I. The Law Regarding Marital Rape in Virginia.

On January 20, 1986, House Bill 378 was introduced in the Virginia legislature. The bill was passed by the Senate on March 4, 1986, and by the House of Delegates on March 6, 1986. House Bill 378 is now codified as Section 18.2-61 of the Virginia Code. This section reads as follows:

B. If any person has sexual intercourse with his or her spouse and such act is accomplished against the spouse's will by force, threat or intimidation of or against the spouse or another, he or she shall be guilty of rape.

However, no person shall be found guilty under this subsection unless, at the time of the alleged offense, (i) the spouses were living separate and apart, or (ii) the defendant caused serious physical injury to the spouse by the use of force or violence.

Additionally, there shall be no prosecution under this subsection unless the spouse or someone acting on the spouse's behalf reports the violation to a law enforcement agency within ten days of the commission of the alleged offense. However, the ten-day limitation shall not apply while the spouse is physically unable to make such report or is restrained or otherwise prevented from reporting the violation.7

The enforcement section of the statute contains provisions for violators after they are found guilty as well as provisions for violators before a trial judgment is entered. The enforcement sections reads as follows:

C. A violation of this section shall be punishable, in the discretion of the court or jury, by confinement in the penitentiary for life or for any term not less than five years. In any case deemed appropriate by the court, all or part of any sentence imposed for a violation of subsection B may be suspended upon the defendant's completion of counseling or therapy, if not already provided, in the manner prescribed under Section 19.2-218.1 if, after consideration of the views of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and will be in the best interest of the complaining witness.

D. Upon a finding of guilt under subsection B in any case tried by the court without a jury, the court, without entering a judgment of guilt, upon motion of the defendant and with the consent of the complaining witness and the attorney for the Commonwealth, may defer further proceedings and place the defendant on probation pending completion of counseling or therapy, if not already provided, in the manner prescribed under Section 19.2-218.1. If the defendant fails to so complete such counseling or therapy, the court may make final disposition of the case and proceed as otherwise provided. If such counseling is completed as prescribed under Section 19.2-218.1, the court may discharge the defendant and dismiss the proceedings against him if, after consideration of the view of the complaining witness and such other evidence as may be relevant, the court finds such action will promote maintenance of the family unit and be in the best interest of the complaining witness.

interest of the complaining witness.\textsuperscript{8}

The Virginia statute quite clearly rejects the common law marital rape exemption. In Virginia it is now possible to prosecute a husband for raping his wife or a wife for raping her husband. However, the statute does not eliminate the marital rape exemption completely. In fact, the Virginia statute only allows prosecution for marital rape in two circumstances. The first situation in which it is possible to prosecute for marital rape is where the spouses were living \textit{separate and apart} at the time of the violation. The second situation is where the defendant caused \textit{serious physical injury} to the spouse by the use of force or violence. In either situation, the spouse or someone acting on the spouse's behalf must report the violation to a law enforcement agency within ten days of the commission of the alleged offense, unless the spouse is physically unable to make such a report or is restrained from reporting the violation. Since victims of rape by someone other than their spouse do not have to comply with the ten-day limit, this reporting requirement may violate the equal protection clause of the Constitution.\textsuperscript{9} The statute itself seems clear at first glance; however, interpretation of the statute may pose some problems.

II. \textbf{Interpretation of the Virginia Marital Rape Statute}

Since this statute should ultimately be judged by how effective it is at decreasing or eliminating the incidence of marital rape, it becomes imperative to examine the language of the statute and the possible implications of interpretation of the statute.

\textbf{Requirement of Separate and Apart}

Under the Virginia statute, absent a showing of serious physical injury, a marital rape prosecution can occur only if the spouses are living separate and apart. This separate and apart requirement is problematic, and will no doubt be the subject of much litigation.

Because the statute was enacted after the Weishaupt and Kizer decisions, there is a presumption that the legislature was aware of those decisions. Thus, if the legislature had wanted to overrule Weishaupt and Kizer it would have expressly done so. As a result, the statute must be interpreted in light of the existing case law.

The first concern of the separate and apart requirement is what length of time will suffice for the spouses properly being labeled as living separate and apart. The statute is noticeably silent on this issue and as a result it will be left to judicial interpretation. It is quite reasonable to suggest that courts will probably not find that a mere day or week satisfies the living separate and apart requirement. However, after that, it becomes harder to state what constitutes living separate and apart.

The inclusion of the term "living" before the phrase "separate and apart"


\textsuperscript{9} Constitutional analysis is beyond the scope of this article. \textit{See}, e.g., 24 J. FAM. L. 87 (1985); Comment, supra note 5; T. Clancy, \textit{Equal Protection Considerations of the Spousal Sexual Assault Exclusion}, 16 NEW ENG. L. REV. 1 (1980).
provides insight into the intent of this legislation. "Living" implies a certain continuousness of separation. Thus, "living" clarifies the separate and apart requirement, but it does not answer the question of how long the two spouses must actually be living separate and apart to fulfill that requirement. Insight may be gained by examining what length of time has been deemed by the Virginia courts to satisfy the requirement. Although these cases were decided prior to the enactment of the statute, they provide some guidance/precedent. In Weishaupt, the Virginia Supreme Court affirmed the conviction of Ronald Weishaupt who raped his wife after living separate and apart for a little over eleven months. In Kizer, the spouses were separate and apart for three weeks prior to the alleged rape (although in Kizer, the spouses had lived separate and apart previously), and the Virginia Supreme Court stated that "the evidence establishes that the parties lived separate and apart." One may conclude that the actual time limit for living separate and apart is relatively brief. This conclusion suggests there may be a related issue that is more important than the time limit of living separate and apart. That issue is consent.

The issue of consent is the foundation underlying the living separate and apart requirement. If the spouses are living together the marital rape exemption still applies (unless the defendant caused serious physical injury) based on the theory that the spouses have consented to marital sex. By living separate and apart, the consent to marital sex has been withdrawn. It is reasonable to equate the separate and apart requirement with a lack of consent in that actually living separate and apart is a manifestation of the withdrawal of consent. There are potential problems with this also, as the two previous court cases have used different standards to measure a manifestation of living separate and apart. In Weishaupt, a unanimous Virginia Supreme Court held:

A wife can unilaterally revoke her implied consent to marital sex where, as here, she has made manifest her intent to terminate the marital relationship by living separate and apart from her husband; refraining from voluntary sexual intercourse with her husband; and in light of all the circumstances, conducting herself in a manner that established a de facto end to the marriage.

Under this test, the length of time spouses are living separate and apart is not of primary concern. The critical element is whether the spouse intends to end the relationship. Judicial interpretation of the new statute may also require the spouse manifest an intention to end the marriage to fulfill the separate and apart requirement. Unfortunately, this test is complicated; less than six months after Weishaupt, the Virginia Supreme Court modified the Weishaupt rule in Kizer. The Kizer majority held:

[w]e think it is apparent that the wife subjectively considered the marriage fractured beyond repair when the parties separated in February. Nevertheless, we cannot say that this subjective

10 Black's Law Dictionary, 843 (5th ed. 1979), defines "living" as "[e]xisting, surviving, or continuing in operation. Also means to abide, to dwell, to eside and literally signifies the pecuniary resources by means of which one exists."


13 Id. at 261, 321 S.E.2d at 294.

14 Weishaupt, 227 Va. 389, 405, 315 S.E.2d 847, 855.
The significance of this modification of Weishaupt is that the spouse must manifest her intent to end the marriage to her spouse rather than to an objective observer. Unfortunately, this "modification, for which the court offered no rationale, undeniably increases the wife's burden of proof in a spousal rape case." In sum, it appears that the phrase "living separate and apart" will be construed to mean that the spouses are residing separate and apart and that a manifest intent to end the marriage has been communicated to the other spouse.

The spouses need not have commenced divorce proceedings to fulfill the statutory requirement of living separate and apart. Similarly, the statute does not speak to what amount of contact between the spouses will preclude viewing them as living separate and apart. Thus, the court will determine if the spouses were actually living separate and apart at the time of the rape in order to prosecute the spouse under the statute. If the Virginia Supreme Court continues to follow Kizer, it will require that the spouses behavior be unequivocal, definite, and certain to demonstrate an end to the marriage by living separate and apart. At a minimum this would require that the spouse refrain from voluntary sexual intercourse with the defendant and exhibit conduct that establishes an actual end to the marriage. This means that contact between the two spouses is permissible but there can be no ambivalence or uncertainty communicated between the spouses that would suggest that the marriage is not over. Considering the facts of Kizer, the Virginia Supreme Court was very firm regarding the requirement that the behavior be unequivocal, definite and certain.

As a result of these recent Virginia Supreme Court decisions, the statutory language "living separate and apart" should be construed to mean that the spouses are residing separate and apart and that an unequivocal, definite and certain intent to end the marriage has been manifested objectively to the defendant so that the defendant perceived or reasonably should have perceived that the marriage was ended.

### Requirement of Serious Physical Injury

Under the Virginia statute, if the spouses are not living separate and apart at

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16 Comment, supra note 5, at 383.

17 **Kizer**, 228 Va. at 262, 321 S.E.2d at 294.

18 **Weishaupt**, 227 Va. at 405, 315 S.E.2d at 855.

19 **Kizer**, 228 Va. at 261, 321 S.E.2d at 294.

20 The majority in **Kizer** characterized the wife's conduct as vacillating; thus, the husband did not know that the marriage was over. However, the husband and wife were on their way to consult a lawyer about obtaining legal separation. They did not see the lawyer because she did not want to put another emotional burden on her husband who was worried about his seriously ill father. Additionally, the husband already had initiated court action to obtain custody of their child, which seems to indicate that in fact he did perceive the marriage to be over. 228 Va. 256, 262, 321 S.E.2d 291, 294 (Thomas, J. and Carrico, C.J., dissenting).

the time of the rape, the spouse may not be prosecuted unless the defendant caused serious physical injury to the spouse by the use of force or violence. Because a significant number of the marital rape prosecutions will arise under this section, it is necessary to explore its meaning in some detail. The issues of consent and serious physical injury must be examined.

Because the spouses may still be living together and presumably no intent to end the marriage has been communicated, the issue of whether the spouse consented to marital sex with the defendant becomes a major concern. If the spouse freely consented to marital sex it would not be characterized as rape; thus, statute applies only in those cases where the wife does not consent to sexual intercourse. Most likely, courts will hold that as long as two spouses are living together; there will be consent to sexual intercourse. Therefore most prosecutions will result in cases involving serious physical injury.

The serious physical injury requirement establishes a formidable hurdle to prosecuting a spouse for marital rape. The language of the statute implies that any harm that occurs to the spouse during marital sex, short of serious physical injury, is not within the scope of this requirement. The statute does not allow marital rape prosecution for minor physical injury.

The use of the phrase "by the use of force or violence" only increases that hurdle. The Virginia legislature clearly wrote a statute that would limit the number of marital rape cases. The use of the word violence signifies a legislative concern that only extreme cases be prosecuted under this statute.

This statute will not allow prosecution of a defendant who rapes his spouse under the threat of serious physical injury. Serious physical injury must in fact occur. This requirement causes obvious problems. Suppose that a defendant rapes his spouse, threatening to harm a child if the spouse does not engage in sexual intercourse. Under the statute, this would not constitute marital rape, because the defendant did not cause serious physical injury. Consider the case where a defendant rapes his spouse at gun point. No one would deny that the spouse was raped, yet the defendant did not cause serious physical injury to the spouse. The language of the statute would indicate that while this behavior is certainly reprehensible, it is also beyond the scope of the statute. These examples clearly establish the inadequacy of the statute. Although there may be reasons for not enacting a more expansive statute, no one can deny that the scope of this statute is clearly limited.

The Virginia statute is silent as to psychological injury caused by the spouse. Because recent studies have indicated that the psychological harm suffered by the victim in a marital rape is significant, this should warrant prosecution.

In summary, the serious physical injury requirement imposes a heavy statutory

22 Black's Law Dictionary, 1408 (5th ed. 1979), defines "violence" as an "[u]njust or unwarranted exercise of force, usually with the accomplishment of vehemence, outrage or fury."

23 The Virginia legislature could have enacted a statute requiring that the defendant cause physical injury to the spouse by the use of force. This wording would have expanded the scope of protection afforded by the statute.

24 Marital rape victims, like their nonspousal rape counterparts, must live with the effects of being raped and the psychological torture that follows. Additionally, marital rape victims usually are faced with the devastating circumstances of living with their rapist and their betrayal. See D. Fussell, Rape in Marriage (1982).
burden on a prosecutor seeking conviction under the Virginia marital rape statute. It is likely that only a limited number of cases will surmount that hurdle.

**Penalties of the Virginia Statute**

Under the enforcement section of the statute, a court may sentence a violator to five years to life in the state penitentiary. In cases where the court deems it appropriate, all or part of the sentence can be suspended and the defendant may be recommended for counseling or psychological therapy instead. This alternative punishment is inappropriate in a rape statute.

The substitution of counseling or therapy for violation of the statute conveys the attitude that the offense is not serious. Nonspousal rape defendants are not afforded the luxury of having a court decide to let them forego a prison term and instead be placed in counseling. In addition, the counseling statute does not contain any durational requirements, though presumably the court would impose a specified period of treatment.

A second concern with the enforcement section of the statute is the emphasis it attaches to the promotion and maintenance of the family unit. It would be difficult to imagine a statute allowing a convicted murderer or one convicted of fraud to forego prison simply to preserve the family unit. Yet in a case where the defendant engages in an activity that is itself destructive of the family unit, the court is given the option of placing the defendant in counseling or therapy in order to promote or maintain the family unit. The statute treats marital rape as a social problem rather than a crime. The counseling or therapy option is a remnant of the common law attitude towards marital rape.

It is obvious that the option of counseling or therapy should not be available where the spouses are in the process of divorce, as there is no family unit to preserve. Similarly, the option of counseling or therapy should be unavailable in cases where the rape occurred while the spouses were living separate and apart.

The psychological counseling statutorily available to the court is an obvious escape clause in the enforcement of the marital rape statute. Given the destructive nature of the crime, "[j]udges should construe the counseling and therapy provisions narrowly and recognize that only the strongest of mitigating factors could justify the substitution of treatment for criminal penalties in this area of the law."27

The extent of the Virginia marital rape statute is limited, due in part to continuing allegiance to outdated common law ideas. While the statute is a step toward reform, it is not the giant step which is necessary.

Even after the passage of the Virginia statute, many spouses are not protected from the horrors of marital rape. The statute defines marital rape too narrowly. The statute must be amended to completely eliminate the marital rape exemption.

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25 Section 18.2-61(c)(6) of the Virginia Code only allows counseling if the defendant is prosecuted under Section B of the statute, which deals with marital rape; thus nonspousal rape defendants are not permitted to go through counseling under 18.2-61. VA. CODE ANN. §18.2-61 (Supp. 1986).

26 VA. CODE ANN. §19.2-218.1.

27 Comment, supra note 5, at 386.
Several states have already adopted statutes which prohibit all marital rape. Although these states have experienced considerable success, it is important to discuss the possible reasons for rejecting a similar marital rape statute in Virginia.

III. Barriers to Reform

Opposition to the complete elimination of the marital rape exemption generally revolves around three arguments. First is the inherent evidentiary problems presented by a marital rape prosecution. Second, legislators fear vindictive spouses who might use a claim of marital rape as a tool for coercion. Finally, some commentators argue that prosecution hinders marital reconciliation.

Because the major difference between marital sex and marital rape is the lack of spousal consent, many opposed to elimination of the exemption suggest it is difficult to determine consent when dealing with marital rape. This argument is illogical and hypocritical. If it were followed to its logical conclusion, this argument would not permit prosecution for crimes that are difficult to prove. Many crimes are difficult to prove [however] and no one has suggested removing them for that reason. In addition, "[d]ifficulties with evidence and proof in rape cases are not unique in the marital setting, but are characteristics of several crimes in general". Nevertheless, every state allows prosecutions for nonspousal rape. Although it is true that in a marital rape prosecution it is one spouse's word against the other's, the same is true outside of the marital context. Generally, the courts are not forced to rely merely on the spouse's testimony, "[t]he presence of bruises and contusions on the victim militates against the conclusion that the intercourse was consensual."

The marital rape exemption should not be retained simply because of evidentiary difficulties.

The second argument against eliminating the marital rape exemption is the "vindictive spouse" theory. This argument suggests that a spouse would use the charge of marital rape to harm the other spouse. Those opposed to statutory reform suggest that the marital rape charge would become a tool of coercion to be used in bargaining for alimony, child custody and property settlements. The fear of fabricated charges from vindictive spouses contradicts the argument concerning a lack of evidence. Certainly a spouse would be in a better bargaining position if she fabricated a charge that would be more readily accepted by our courts. If lack of evidence for a marital rape charge renders a conviction difficult, then a vindictive spouse...
could be expected to use other more effective false charges for coercion. Additionally, if the vindictive spouse argument is true, excluding marital rape charges would do little to stop a spouse who could claim charges of assault, false imprisonment, child abuse, severe emotional distress, fraud, or other charges. If this argument were true, court should be inundated with claims by vindictive spouses and their fabricated charges. Quite the contrary occurred in Oregon where the marital rape exemption was eliminated. Peter Sandrock, an Oregon district attorney, testifying before the Senate Judiciary Committee in the California legislature, said that Oregon had no problems after passage of a bill allowing wives to press charges against their husbands. The Georgia Supreme Court was adamant in its skepticism of this argument when it stated: "[t]here is no other crime we can think of in which all of the victims are denied protection simply because someone might fabricate a charge; there is no evidence that wives have flooded the district attorneys with revenge filled trumped-up charges." This may be due to the fact that a marital rape charge is very embarrassing for the victim, and most victims elect to privatize the experience. The misplaced fear of vindictive spouses should not stand in the way of legislative reform to afford married persons the same protection offered their unmarried counterparts.

The third argument advanced against elimination of the marital rape exemption is that allowing prosecutions for marital rape would undermine or prevent marital reconciliation. This argument neglects the fact that when rape occurs in a marriage the spouses very well may be better off apart. This argument does not justify denying a spouse a remedy when a rape has occurred. If the legislature truly believes that marital reconciliation is more important than prosecuting a spouse for rape, they should deny other causes of action that might be disruptive to marital reconciliation. Yet, spouses may still bring actions against each other on a variety of charges. There must be a weighing of concerns and statutory protection from the abuse of marital rape should outweigh the unlikely chance of marital reconciliation.

Conclusion

Virginia's new statute allowing prosecution for marital rape in a limited number of circumstances is a step in the right direction. One must realize however, that the scope of the Virginia statute is narrow, and it is only the first step on the road to reform. Virginia has cast aside the outdated common law view of Chief Justice Hale. Now is the time to statutorily eliminate the marital rape exemption, and afford everyone the same protection from rape. It should make no difference in

33 Comment, Spousal Exemption to Rape, 65 Marq. L. Rev. 120, 126 (1981).
36 Comment, supra note 31, at 107.
37 Note, To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment, 99 Harv. L. Rev. 1255, 1269 (1986).
38 Weishaupt v. Commonwealth, 227 Va. 389, 405, 315 S.E.2d 847, 855 (1984). "[I]f the marriage has already deteriorated to the point where intercourse must be commanded at the price of violence we doubt that there is anything left to reconcile." Id. See also, Comment, supra note 30, at 115.
the eyes of the law whether the victim of rape is a stranger or a spouse. Rape is a
violent crime that should be prosecuted.
In seventeen words the First Amendment prohibits Congress, and by incorporation through the Fourteenth Amendment, the states, from creating legislation which would prohibit the free exercise of religion. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." Any government action which touches on religious activity then is potentially an impermissible infringement on free exercise rights. However, the Supreme Court has not interpreted the First Amendment to give blanket immunity from governmental regulation to religious activity. The freedom to believe is absolute, but the right to act on those beliefs is sometimes subject to governmental regulation. Some level of regulatory interaction between church and state is inevitable. Churches do not exist in a vacuum.

The problem which zoning poses is at what level of governmental zoning regulation are free exercise issues brought to play? That is, when is a church's right to be left alone violated by a zoning ordinance? In Lemon v. Kurtzman, the Supreme Court expressly cited zoning regulations as a permissible governmental "contact" with religious conduct. The Court did not say when the permissible governmental contact becomes impermissible. State and lower federal courts have had to make this decision. These decisions have been inconsistent in large measure because the Supreme Court has yet to develop a clear test to determine when an infringement on free exercise rights has occurred. While Sherbert v. Verner is the accepted standard by which to judge free exercise issues, it is by no means clear. Sherbert balances the governmental interest against the church's First Amendment interest. But before it does so, the analysis asks whether the ordinance impacts on a central religious belief. Sherbert may make use of "religious belief" as part of

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1 Everson v. Board of Education, 330 U.S. 1, 8 (1947).
2 U.S. Const. Amend. I.
3 Reynolds v. United States, 98 U.S. 145 (1878).
its test, but the Supreme Court has constantly refused to define what constitutes a valid religious belief. Without knowing what constitutes a valid religious belief, protected by First Amendment heightened scrutiny standards, it is hard to know what uses of land are more central to religious belief and, therefore, are more likely to qualify for First Amendment protection.

This lack of a clear standard leaves lower courts with no guidance when faced with the competing interest of the state to control land use and the church's desire to operate free from governmental interference. Often municipalities argue, and courts accept, narrow definitions of religious activity. This places most church action in the secular field, such as building construction, and beyond the sticky standards of review required by Sherbert. Other courts rule that almost any activity undertaken by churches is protected by the First Amendment and, therefore, immune from zoning regulations.

Throughout the country churches and municipalities are clashing over zoning regulations. In Fairhaven, Massachusetts, local zoning administrators ruled that Bible studies were home occupations and, therefore, prohibited under the city's zoning ordinances. In Fairfax County, Virginia, a zoning administrator's attempt to define permissible religious activity, in the context of the county's zoning plan, raised a public furor among county congregations. He ruled that activity not within the county's definition was prohibited without a special permit. Presently, the City of Colorado Springs is seeking an injunction to halt worship services in a private home. The city argues the worship services are in violation of its zoning regulations.

The general consensus among many religious leaders is that churches more often than not are losing zoning cases once the issue gets to court. "The courts have been extremely skeptical of religious organizations claiming special dispensation," said Geoffrey Stone, a professor at the University of Chicago Law School, in a recent Washington Post article on the issue.

As one commentator has already noted, there is no guarantee

9 Id.; Zoning Interpretation Number 52, Fairfax County Zoning Department, Fairfax, VA, June 14, 1984.
11 Washington Post at A-B.
12 Id.
that the application of zoning laws, a twentieth century invention, will not over time undermine the protections granted churches in the constitution. What is needed, before the issue becomes more politicized, is an analysis of the competing interests and a clear test designed to fairly address those interests.


That there is a conflict between the land control interests of the state and the church's desire for unhindered activity seems to come as no surprise to anyone. Indeed, most commentators on the general subject find conflict between the two inevitable. One commentator found the conflict due to new roles taken on by churches, such as church schools and day care centers, and a concurrent furor on the part of zoning officials to regulate anything that moved.

Zoning is an outgrowth of the state's expanded role in society. It is a vehicle for public control and direction over private land use. In 1916, New York City passed the first comprehensive zoning ordinance. Others followed New York's lead. They did not go unchallenged, and in 1926, the Supreme Court ruled on the constitutionality of comprehensive zoning ordinances. In Village of Euclid v. Ambler Realty, the Court came down solidly on the side of zoning ordinances. They are a valid exercise of the state's broad police powers, and as such are valid unless they are clearly arbitrary, unreasonable, and have no substantial relation to the public's health, safety, morals or general welfare.

The zoning power of municipalities was reaffirmed and more strongly entrenched after the Supreme Court's Belle Terre decision. In that decision, Justice Douglas outlined the proper goals of zoning and the power from which the state may enforce ordinances to achieve those goals.


15 64 B.U.L. Rev. at 768, fn. 14.

16 76 NW U.L. Rev., supra note at 795.

17 272 U.S. 365 (1926).

18 Id. at 391.

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Creation of quiet neighborhoods is a valid governmental objective according to Belle Terre. Exclusion of churches from neighborhoods is often based on that very objective. The reasoning used is that churches create noise and traffic problems. Belle Terre encourages localities to exclude those activities that create noise and traffic, including churches, to preserve peace in residential neighborhoods.

However, where fundamental freedoms are involved, the Supreme Court has, since Belle Terre, placed some limits on a municipality's zoning powers. Two cases, Moore v. City of East Cleveland and Schad v. Mount Ephraim have carved out niches in the state's overall zoning power. In Moore, just three years after the Belle Terre decision, the Court held that where fundamental freedoms are infringed upon, zoning ordinances must come under a heightened standard of review -- the "rational relation" test outlined in Belle Terre does not apply.

In Schad, the contested ordinance excluded all live entertainment, including nude dancing, from the municipality. The Court found this restricted expression protected by the First Amendment. The Court found the ordinance unconstitutional. The Court's rationale is especially relevant to the problem of this article. Although Justice White acknowledged the broad power of local governments to zone land, he also stressed that, "The zoning power must be exercised within constitutional limits." Where constitutional protections are threatened, White set out a two-tiered standard of review. First, White said the standard of review for a zoning ordinance is "determined by the right assertedly threatened or violated rather than by the power being exercised." Since the right being threatened in Schad was protected by the First Amendment, the Court used a strict

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20 Id. at 9.
23 Id. at 499.
24 Id., 452 U.S. at 60.
25 Id.
Secondly, White said a reviewing court must decide whether the proponent of the ordinance used the least restrictive means to further the legitimate state interest. If not, the ordinance fails.

The Supreme Court applied these two principles to the Schad case and found the city ordinance lacking.

As if to underscore in red ink Justice White's opinion, Justice Blackmun wrote a concurrence which reiterates much of what White wrote. He made unequivocally sure that the presumption of validity, usually given zoning ordinances, is destroyed when First Amendment questions are involved:

I would emphasize that the presumption of validity that traditionally attends a local government's exercise of its zoning power carries little, if any, weight where the zoning regulation trenches on the rights of expression protected under the First Amendment.

While municipal ordinances clearly enjoy a strong presumption of validity because of the state's broad police powers, the Schad opinion makes it equally clear that where protected rights are affected, the presumption is sometimes lost.

Euclid and Belle Terre stand for the proposition that zoning regulations are a proper expression of the state's police power and enjoy a presumption of validity. The Euclid court said a rational relation between the ordinance and the power upon which the ordinance was based is all that is required to remain valid upon judicial review.

Moore and Schad chilled this presumption of validity. Where fundamental freedoms, including freedom of worship, is restricted by a zoning ordinance, the zoning ordinance loses its presumption of validity. Schad specifically stands for the principle that when a zoning ordinance restricts a protected First Amendment activity, the ordinance must pass constitutional muster under a strict scrutiny standard. And that higher standard is triggered by the mere assertion that First Amendment activity is threatened.

Courts have not applied these principles to zoning disputes where churches are involved. The reason is simple. Churches claim the zoning ordinance restricts their free exercise rights. Courts react by applying the Sherbert free exercise analysis. Often, the analysis ignores Schad and Moore while emphasizing the presumption of validity zoning ordinances enjoy under Euclid and Belle Terre.

26 Id. at 71.
27 Id. at 70.
28 Schad, 452 U.S. at 77.

Once a religious group claims a zoning ordinance infringes on their free exercise rights, the courts turn to Braunfeld v. Brown\(^{29}\) and Sherbert v. Verner\(^{30}\) for guidance. These two cases set the standards by which courts determine whether a governmental regulation impermissibly restricts religious activity. The problem they present is two-fold. Firstly, the two cases create different standards of review. Sherbert does not overrule Braunfeld, but Sherbert gives a higher level of protection to First Amendment free exercise claims than does Braunfeld. Secondly, the Sherbert analysis, when applied by courts, is used in a way inconsistent with the Moore and Schad decisions.

In Braunfeld, the Supreme Court upheld a Sunday closing law against a free exercise challenge by an Orthodox Jew. He claimed the mandated Sunday closing prevented him from compensating for business he lost by closing on Saturday: the Sabbath according to his faith. The loss in business, he claimed, made it impossible for him to continue in his livelihood and remain true to his faith. The Court held that the statute was enacted to achieve a legitimate, secular state objective.\(^{31}\) It did not compel a choice between religious practice and criminal penalty; "the Sunday law simply regulated a secular activity and, as applied to appellants, operated so as to make the practice of their religious belief more expensive.\(^{32}\) Therefore, it passed constitutional muster. Braunfeld, then stands for the proposition that where the purpose of the law is secular, where it incidentally burdens religious activity and does not make a religious belief criminal --the statute has a presumption of validity.

While not overturning Braunfeld, Sherbert v. Verner greatly expanded the extent to which religious interests could be protected from state infringement. In Sherbert, the appellant was a Seventh-Day Adventist who was fired by her employer for refusing to work on Saturday--her faith's Sabbath. She could not find work and applied for unemployment benefits. The state denied her the benefits because she would not accept work when offered. Apparently, the work offered to the Seventh-Day Adventist required Saturday hours. The law required applicants for unemployment to look for work. If work was offered, the


\(^{31}\) Braunfeld, 366 U.S. at 606.

\(^{32}\) Id. at 605.
applicant had to accept the job. Failure to do so triggered cessation of the unemployment benefits.

The Court struck down the state law upon which unemployment benefits had been denied. To force her to accept work contrary to her religious beliefs in order to receive unemployment benefits was an impermissible infringement the Court said.

_Braunfeld_ and _Sherbert_ are inconsistent. The _Braunfeld_ Court held that where a law with a secular purpose incidentally burdens religious practice, the law has a presumption of validity. The _Sherbert_ Court held that a law with a secular purpose may be invalid when it has an incidental effect on religious practice. The conflict is obvious and noted by Justices Stewart, Harlan, and White in their concurring opinions to _Sherbert_. Despite this inconsistency, the majority opinion refused to overrule _Braunfeld_. The result is two separate tests for free exercise analysis.

Inconsistency is one legacy of _Sherbert_. Another legacy is the tripartite test outlined in the opinion. To determine whether or not legislation impermissibly infringes on free exercise rights, the Court will ask: (a) does the government action burden the practice of a particular religious belief,\(^33\) (b) if yes, is there a compelling state interest for doing so,\(^34\) and (c) if so, did the government use the means for accomplishing this interest which are least restrictive on the religious practice?\(^35\) If the public interest is compelling and no less restrictive means are available, then the regulation passes constitutional muster.

How have lower courts applied the _Sherbert_ test? _City of Chula Vista v. Pagard_\(^36\) and _Grosz v. City of Miami Beach_\(^37\) both offer an example of the test's application. A close reading of the two cases shows that the courts, in effect do not apply the _Sherbert_ test. Either court's ignore the religious nature of the activity regulated as in _Chula Vista_ or they ignore the _Sherbert_ analysis as in _Grosz_.

**Part III. Problems in the Current Analysis**

The problems in current free exercise analysis, when applied

\(^33\) _Sherbert_, 374 U.S. at 403.

\(^34\) _Id._ at 406.

\(^35\) _Id._ at 407.

\(^36\) 159 Cal. Rptr. 29 (1981).

\(^37\) 721 F.2d 729 (1983).
to zoning disputes, has not gone unnoticed. 38 Two of the more recent comments on the issue have summarized together the major flaws in the analysis touched upon by other commentators. 39

1. The Note Analysis. 40

A note in the 1984 Columbia Law Review specifically identifies three major problems in the court's free exercise test. the first, and perhaps most damaging problem from the perspective of churches, is the evaluation of the religious practice. In the Sherbert analysis, this is the first step courts should take. Whether they follow Sherbert or not, all courts evaluate the religious nature of the burdened activity if for no other reason than that churches claim a religious activity is burdened by the zoning regulations. "This is an important threshold inquiry, for if a burdened practice is not deemed to be religious, it merits no free exercise protection--regardless of whether the public interest is compelling and the regulation narrowly drawn." 41

There are two approaches to deciding whether a practice is of religious significance: (1) the sincerity of the group's claim 42 or, (2) the centrality of that practice to the group's religion. The note correctly points out that evaluation by sincerity, the court's assessment of the religious group's good faith, is more in keeping with Thomas v. Review board and its injunction against a court using secular standards by which to judge the validity of religious beliefs. In Thomas, a Jehovah's Witness quit his job at a steel plant because it produced steel for weapons. He felt working at the plant conflicted with his religious beliefs. The state refused to give him unemployment benefits. The state argued that Thomas resigned not because of religious reasons, but more because of personal philosophical preferences. Therefore, the state argued, it was not obligated to give Thomas unemployment benefits.

The trial court agreed with the state, but the Supreme Court did not. Wrote Chief Justice Burger:

Religious beliefs need not be acceptable, logical,


40 Note, supra note 64.

41 Id. at 1573.

42 See, Note, Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities. 90 Yale L. J. 350, 371 (1980) (the note suggests religious sincerity may be measured by the lack of profit or accumulation of material gains associated with the religious belief).
consistent or comprehensible to others in order to merit First Amendment protection... Courts are not arbiters of scriptural "interpretation." The Court accepted Thomas' good faith claim that he quit his job because of his religious beliefs.

The second approach to deciding whether a practice is of religious significance is the centrality approach. According to the note, the determination of what is "central"; to a religious faith and, therefore, worthy of First Amendment protection invites arbitrary judicial evaluation of what constitutes a religious belief or practice. In effect, a court uses its values in determining whether or not a religion's practices are worthy of protection. The Chula Vista analysis is a good example of this kind of process. In Chula Vista, a religious group's communal living arrangements was deemed in violation of zoning ordinances. The courts ruled against the religious group. The religious group's communal living was, according to the court's standards, a secular expression of belief, despite the fact that the defendants "sincerely believed" communal living to be "affected with religious character." The court decided communal living was not central to the sect's religion despite the fact that the sect defined communal living as central to its faith. Once the religious practice is deemed secular, the analysis stops. The state is not required to demonstrate a less restrictive means of regulation was unavailable. According to the note, the centrality analysis should not be a threshold test. Judging the centrality of a religious belief is at best slippery. It ought to be left to the end of the analysis, or a last resort, after sure and concrete First Amendment safeguards have been examined and found lacking.

The second problem the note identifies in the present free exercise analysis is the nature of the permitted burden. The language of Sherbert allows for manipulation by courts to find only a very narrow range of burdens on religious practices. Sherbert invites courts to find at the outset that a practice is not religious. Chula Vista is an example of this. Because the religious burdens in zoning cases are not "severe, life-threatening economic sanctions," but rather burdens of "convenience, dollars or aesthetics," they are dismissed as unimportant. But the note correctly points out that nothing in the Sherbert decision indicates that the free exercise protections should be drawn so narrowly. Because they are drawn narrowly, most courts

43 Thomas, 450 U.S. at 714, 715, 716.
44 Chula Vista, 159 Cal. Rptr. at 36.
45 Lakewood, 699 F.2d at 306.
46 Grosz, 721 F.2d at 739.
find the asserted practice outside the protections of the First Amendment.

The third identified problem is the overwhelming strength of the asserted governmental interest in zoning matters. When the analysis reaches the balancing stage, it almost invariably tips in the government's favor. Zoning regulations are tied to the state's strongest interest—the health, safety, and welfare of society as a whole. The church's interest pales in comparison.

2. The Walker Test.47

Drawing on *Sherbert*, *Moore*, *Thomas v. Review Board* and a number of New York state cases, Walker argues that free exercise issues should be decided with sensitivity to First Amendment protections. He argues that presently in zoning cases courts try to ignore free exercise issues rather than grapple with their complexities. The most common approaches are to find the alleged religious use secular or to find it outside the "core" of religious belief. Once a use is found secular, courts apply a rational basis standard of review. Walker argues this unnecessarily restricts protected religious activity and opens up much religious activity to state regulation. The problem in present free exercise analysis in zoning cases according to Walker, stated simply, is that lower courts are not following the heightened standards of review required when religious activity is infringed upon. Part of the reason for this lapse is the narrow definitions of religious activity used.

3. Proposed Solutions.

The Walker article calls for use of the *Sherbert* analysis48 but within a more rigidly defined framework. First, he advocates an expanded conception of religious activity. This brings many more zoning cases under the *Sherbert* analysis. Secondly, he says to be consistent with *Moore* and *Thomas v. Review Board*, courts should address only the sincerity of the belief—not its centrality to the religious faith as a whole.

The note advocates a more radical change in the court's free exercise analysis. It lowers the threshold for free exercise issues to come into play, expands the concept of impermissible burdens on religion, restructures how we should evaluate the government's interest, and then balances the two interests. The new test will, according to the note, lessen the number of rejected religious claims based upon a threshold analysis.

First, the note calls for postponement of judicial inquiry into the centrality of the religious use until the end of the

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47 Walker, *supra* note 64.
48 *Id.* at 182, 183.
analysis. It adopts a "sincerity" standard, just as Walker does, in order for a free exercise analysis to be triggered. If a good faith claim is made by a religious group that its land use is protected from zoning ordinances because of religious belief—the court will accept the claim. This is in keeping with Schad, which held that judicial review should be based on the right "assertedly threatened" rather than the power being exercised. Postponing the centrality issue also forces the state to first make a case for the importance of its interest rather than dismissing the church's interest before a balancing analysis is started.

Secondly, the note would expand the concept of impermissible religious burdens. The note points to Wisconsin v. Yoder as support for this proposition. In Wisconsin, a neutral state education law affected a religious practice. The Supreme Court found it to impermissibly infringe on the free exercise rights of Amish parents to control the education of their children. Under Braunfeld, it would stand. But Yoder held even indirect effects of religious-neutral laws can create impermissible burdens. Again, this acts to expand the area in which free exercise analysis is applicable. Thus, the effect of this stage of the note analysis would be to bring any law that impacted on religious practice under a free exercise analysis.

Thirdly, the note shifts the emphasis on the government's interest. Rather than focus on whether the interest is "compelling," the note requires judicial inquiry into the possibilities for compromise. The burden falls upon the state to prove why compromise is not acceptable. Whether or not the state can show that compromise is impossible is a factual finding for courts to make.

Lastly, the note analysis requires balancing the burden on the religious practice against the governmental interest. The note suggests that severity of burden to the religious interest should be measured by the degree to which the regulation actually inhibits religious observances.

As a guidepost in determining the religious burden, the note suggests a "centrality" analysis. The Sherbert analysis, as is, tempts courts to make the determinations at the beginning of the inquiry. Here, it is near the end. The court initially determines if the regulation touches upon something that is "central" to the sect's belief and practice. The more central the regulated belief or practice, the greater the burden on the religion.

49 Schad, 452 U.S. at 71.
50 Note, supra note 64 at 1578.
The flaw with the "centrality" test as pointed out earlier is the substitution of judicial values and conceptions as to what is central to a sect's belief for the sect's own interpretation of its belief system.

**Part V. Conclusion**

What the note and Walker analysis does is give a presumption of validity to free exercise claims. It is up to the government to prove why a religious exemption should not be granted. There is nothing wrong with this shift. It flows logically from the Schad and Moore decisions. They indicated First Amendment freedoms, those fundamental to individual liberty, should be given a high degree of protection. Presently, in zoning cases, First Amendment freedoms are not being protected. Religious uses are found secular by courts and, therefore, outside free exercise analysis. The note analysis brings these uses into the free exercise realm as they should be. According to Schad, the right assertedly threatened should trigger the standard of review.

Does the note analysis mean life will be easier for zoning officials or for neighborhoods where yards are wide and blue-eyed children run free? The answer is no. Municipalities and home owners will have to accommodate religious uses of property. Increased traffic, loud hymn singing, church bells, and unruly church crowds will all have to be endured by neighborhoods where churches locate. First Amendment freedoms, in order to flourish, often require accommodation from other segments of society:

The courts have repeatedly held that citizens must endure a certain amount of inconvenience in order to protect First Amendment rights... There are numerous instances in which a citizen's lesser protected rights are forced to yield to the higher protection for a First Amendment right.52

The note analysis merely brings church use of land into the realm of First Amendment protection where it belongs.

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52 Comments, 76 NW. U. L. Rev. at 808.
A woman vacated her Northern Virginia apartment this Fall, and a common scenario ensued. Her landlord notified her that her $183 security deposit would not be returned due to damage the landlord claimed the tenant had done to the residence. Unlike many vacating tenants who acquiesce in this type of landlord embezzlement to avoid haggling, this woman sought to recover her deposit. Upon inquiry, she found that her only recourse was through the Virginia General District Court, where small claims can be pursued *pro se*. Unfortunately, the woman is not well versed in the intricacies of Virginia's landlord-tenant law; proceeding *pro se* was not a realistic option. She retained an attorney who recovered her $183 and then billed her $500, the fair value of his services. While the verdict vindicated the tenant's rights as a matter of principle, the final accounting failed to corroborate this result.

Virginia's lack of a special small claims court places claimants of small amounts in a quandary: either proceed *pro se* and hope that the District Court judge will help the litigants with points of law and that the other party will not have an attorney, hire and pay a lawyer of one's own, or forego a claim entirely. The first alternative is risky at best, the second is often prohibitive, and the third is patently unacceptable. A statutory small claims court is necessary so that such claimants have a forum where facts can be pled to a judge charged with aiding the parties, hearing the facts, and researching and applying the law.

The problem with Virginia's system of handling small claims is that the system often does not work in the interest of justice. Although the judges are competent and fair, and the litigants have an opportunity to be heard, this system does not serve the ideals of a small claims forum. Such a forum relaxes strict procedural and evidentiary rules to facilitate efficient resolution of disputes. Litigants face each other on equal footing without attorney manipulation, allowing judges to question witnesses in an informal proceeding. This type of proceeding can resolve a dispute over a small amount of money quickly, simply and inexpensively. In other words, such a forum makes the litigation of small claims feasible.

Virginia's present system of handling small claims through the General District Court appears workable on its face and in

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theory. The lack of standard small claims ground rules however, injects an element of uncertainty into these proceedings which reduces the potential for producing justice. Pro se litigants' haven't the ability to handle rules of evidence, thus the presentation of evidence is often haphazard, incomplete, and uninformative. Litigants must make the difficult choice of paying a lawyer to represent them on small claims matters, or of proceeding pro se and hoping that the opponent has also chosen to forego professional representation. Judges may or may not choose to assist pro se litigants with the presentation of cases; litigants may therefore lose cases simply because they fail to understand complex rules of procedure and evidence. The sum of these factors leads to the inevitable conclusion that the Virginia system of hearing small claims fails to provide a satisfactory forum for these cases.

Proposals for a special small claims court in Virginia meet the standard objections which await governmental expenditures in a state which is seemingly obsessed with minimizing budgets regardless of the social costs. Like the "pay-as-you-go" financing which held Virginia's highway development program hostage until bond financing was approved recently, taxations' perennial opponents' pat indignation at expenditures of any type threatens the future of a small claims court as well as the rights of litigants suing on small claims. While the creation of a small claims court will cost money, cases heard there will save docket time and costs in General District Court. More importantly, marginal increases in expenditures on the Virginia court system will result in major advances in the protection and vindication of the rights of citizens of this state.

Like the recent creation of Virginia's Intermediate Court of Appeals, the adoption of a small claims court is well overdue. While fiscal responsibility is a proper goal for the state legislature to pursue, such concerns are misguided when they prevail at the expense of a fair and accessible justice system. The citizens of Virginia hold the legislature responsible for limiting expenditures of state tax dollars. However, those same citizens require that state judicial remedies be equally available to all citizens, regardless of the size of the claim involved or the claimant's ability to hire a lawyer. A small claims court in Virginia can provide fair hearings to claimants with small disputes more fully than can the current General District Court structure. Despite the best efforts of competent judges in the General District Courts, the system used in these courts to hear small claims does not guarantee justice in many cases. Although the current small claims system may produce some injustices, the refusal of a powerful minority to allocate resources for a more efficient and accessible small claims court
in fairness to the majority of citizens creates a much greater injustice.