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Virginia Tort Reform: A Case of Crying Wolf?
By
Michael F. McAuliffe*

Introduction
The current debate on tort reform has resulted in ever-increasing cries of blame from all participants. As the factions become entangled in a battle of emotion, semantics and misrepresentation, the discussion of affordable, available liability insurance seems neglected at best, cast aside at worst.

While several thoughtful studies have emerged,¹ the relationship between liability insurance and tort reform is often tenuously connected by anecdotal recitals that lack depth and substance.² A systematic approach is needed to provide a forum for rational debate and evaluation. This article proposes a framework for the analysis of the recent tort reform action taken by the 1987 Virginia General Assembly.³ The article, using the reform legislation as a guide, evaluates the relevant tort variables within the proposed framework. The article concludes by

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² Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. Rev. 4 (1983).


suggesting appropriate future action concerning tort reform and
the insurance crisis in Virginia.

Framework for Discussion: A Two-Part Analysis

No established structure exists in which tort reform and its
relationship to the present insurance situation can be uniformly
addressed. The discussion is too often framed in conclusions.
Popular periodical articles unquestioningly assume a litigation
explosion is occurring.4 A recent Justice Department Tort Policy
Report confidently concludes that federal product liability
filings have increased 758 percent from 1974-1985 and, by
implication, state filings have also increased significantly.5
This is despite the fact that 95-97 percent of all tort cases are
filed in the state court system.6

The conclusory methods of many in regard to the complex
insurance liability crisis cloud the discussion of critical causal
variables. The relevant variables encompass both insurance related
and tort related issues. The tort related variables include (1)
the level of litigation, (2) the size and frequency of tort
awards, (3) substantive tort law and (4) court review
mechanisms. These variables are not meant to be exhaustive, but
represent a limited set of visible factors commonly used as
correlates of the insurance liability crisis.7 The proper
framework for the discussion of tort reform consists of a two-part
analysis. The tort variables should be (1) addressed in principle
and (2) subsequently quantified. The discussion of the tort
variables in principle focuses on the logical foundation that
links the variables to the insurance crisis. Further, the
purported net effect of the tort variables, insurance losses,
should be examined in addition to measuring the variables
themselves as part of the quantification discussion.

4 See supra, note 2.
5 Tort Policy Working Group, Report of the Tort Policy Working
Group on the Causes, Extent and Policy Implications of the Current
Crisis in Insurance Availability and Affordability, 45 (1986)
(hereinafter Tort Policy Working Group Report). The report simply
asserts, "There is no reason to believe that the state courts have
not witnessed a similar dramatic increase in the number of product
liability claims."
6 Roper, State Court Caseload Statistics: Annual Report 1984,
A systematic method of evaluating tort reform variables enables the analysis to remain focused. Thus, the methodology of this article provides the framework to discuss the relationship of the tort variables to the present liability insurance crisis and then examine their impact on the liability "landscape."

The Known "Crisis"

That an insurance rate crisis exists throughout the nation is not disputed. In Virginia, rates in several lines (including medical malpractice and day care) have experienced 100 to 300+ percent increases in premiums in the past two years. In obstetrics, Virginia insurers at one point stopped writing policies altogether. The areas most affected by the current insurance crisis are medical malpractice, small businesses (day care, manufacturing) and corporate directors and officers. The lack of affordable, available liability insurance has rocked the foundation of predictability that Virginia businesses, municipalities and professionals rely on to operate. The self-evident truth is that liability insurance is an economic necessity and the lack of that necessity has provided the catalyst for a quick-fix approach.

Nationally, the liability premium situation is much the same as in Virginia. Rates have risen drastically in many liability lines since 1984. In West Virginia, five leading insurers, in one sweep, cancelled coverage for over 6,500 health care insureds. Notably, Virginia and the nation endured a similar rate crisis during 1975-1977 when rates rose and coverage availability was restricted. Seven to ten year insurance business cycles have emerged that possess the same

7 National Center for State Courts (1986).
8 Tort Policy Working Group Report, supra note 5, at 34.
10 The companies were St. Paul's and the Virginia Insurance Reciprocal. Id. at 13.
11 For example, premiums for corporate directors and officers rose 50 to 500 percent in 1985 nationally. Tort Policy Working Group Report, supra note 5, at 6.
12 The West Virginia Attorney General subsequently filed suit in federal court seeking an injunction prohibiting the insurers from cancelling their policies. Brown Report, supra note 1, at 21.
characteristics at the bottom of each cycle: liability rates dramatically increasing, availability of liability coverage being severely restricted, frequent policy cancellations and a cry for change. The cry for change in 1985-87 has been answered by well-intentioned but erroneous legislation: tort reform.

The 1987 General Assembly

Virginia joined the majority of state legislatures in 1987 in passing legislation aimed at alleviating the extreme and recurring liability insurance crisis. The new tort legislation includes:

1. Senate Bill (SB) 402: A cap on punitive damages at $350,000.
2. SB 404: Liability limitations for corporate officers and directors.
3. SB 405: Modifies the statute of limitations for minors who suffer birth injuries.
4. SB 407: Sanctions against the filing of frivolous claims or pleadings.
5. SB 408: Liability protection for persons who are involved in emergency obstetrical care when the mother's medical records are unavailable and the personnel did not supervise prenatal care.
6. SB 409: Limited liability immunity for members of local government entities.
7. SB 665: Compensation fund for victims suffering injuries from vaccinations. Payment from the fund precludes tort recovery from the doctor and/or manufacturer.
9. HB 1315: Allows cities, towns or other political subdivisions to provide its employees and volunteers including local governments, commissions, boards and agencies with liability insurance coverage.

The session also produced three significant insurance measures.

1. SB 618: A fund to provide medical malpractice insurance when it is otherwise unavailable is restructured to lower rates for participating doctors.
2. HB 1234: A yearly filing requirement that details the type of payment (claim, settlement) and how much loss reserve is set aside by each insurer. Modeled after current medical malpractice reporting.
3. HB 1235: Requires at least 45 day notice of policy cancellations, reductions or significant rate increases. Also allows Bureau of Insurance to consider investment income in the determination of unfair rates.

The 1986 General Assembly appointed a joint subcommittee to study the liability crisis and the need for tort reform, and to report its findings to the 1987 General Assembly. The newly passed

12 Senate Document No. 11, supra note 9, at 5.
13 Id.
14 Bill references were found in Summary of the Regular 1987 Legislative Session of the Virginia General Assembly, prepared by
tort legislation is, in part, a reflection of the subcommittee's recommendations.\textsuperscript{15} Virginia Attorney General Mary Sue Terry also submitted recommended legislation that focused on the problems of the state's insurance regulatory scheme.\textsuperscript{16} The enacted legislation relevant to insurance reform reveals the Attorney General's position that the insurance industry is largely responsible for the present insurance crisis.

The tort reform legislation passed by the General Assembly also reflects the intense political maneuvering that often accompanies tort reform. As an example, SB 402, the punitive damages cap bill, started in the Senate as a cap on damages for "pain and suffering" (a form of non-economic damages). The House responded by changing the bill to punitive damages and forced a last minute compromise.\textsuperscript{17}

The change to a punitive damages cap was a victory for tort reform opponents because they viewed the cap on pain and suffering to be more intrusive to the rights of injured victims. However, the result of such distinct special interest lobbying is that the debate is missing the basic cooperation that is needed to find real causes and effective solutions to the liability crisis.

Despite the factional nature of the participants, the clear goal of the lawmakers in enacting the reforms was to reduce and stabilize insurance rates and to increase liability policy availability. The Virginia legislation reveals a well-worn emphasis on altering legal mechanisms and limiting court access in tort recovery to accomplish those goals. Senate Bills 404, 405, 407, 408, 409, 665, and House Bill 1216 all attempt to limit the "input" (disputes) of the legal system. Simultaneously, Senate Bill 402 limits the "output" (damages) of the legal system.

The Virginia legislation was passed in the belief that decreased use of the legal system will help "solve" the liability insurance crisis. The assumption that tort reform is the answer to the insurance crisis persists in the minds of the Division of Legislative Service (1987).

\textsuperscript{15} Senate Document No. 11, supra, note 9.
\textsuperscript{16} Senate Document No. 11, supra note 9 at Attorney General's Office submission.
\textsuperscript{17} Insurance Damage Limits Clear House, Times-Herald,
lawmakers and the public. If incorrect, these pervasive views on the tort system will misdirect much of the reform "mentality" that exists and will result in Virginia and the nation repeating the present insurance crisis experience.

The Framework Applied to Tort Reform

The Validity of the Variables

Placed under scrutiny, the selected tort variables provide a basic picture of how the tort system in reality affects the present liability insurance crisis. Tort reform advocates assert that (1) the increase in the level of litigation and (2) the lack of realistic damage assessment (specifically, the standards used in non-economic and punitive damage determinations) act in concert to remove stability in the rate-making process. Additionally, reform advocates claim that the size and frequency of jury awards result in high claim (loss) payments, thus eliminating insurance profitability. Both assertions combine to make the financial state of the insurers the nexus between the tort system and the insurance crisis, thus the discussion in this article reflects that emphasis.

The Level of Litigation

Numerous articles confidently conclude that the frequency of tort claims is a primary source of the current high insurance rates. Although the level of tort litigation may affect the cost structure of the insurance industry (ultimately seen in policy rates), the reverse conclusion, that because there are high insurance rates then there are necessarily high levels of litigation, does not follow. Simply, one cannot state a

February 27, 1987 at B4, col. 1.
18 See Lawpoll, A.B.A. J. Vol. 73 at 37 (1987); Public Attitudes Toward The Civil Justice System And Tort Law Reform, Survey by Louis Harris and Associates, Inc. for Aetna. Note, the results of the poll are somewhat inconsistent. For example, the poll indicates that a majority of respondents thought the present tort system is fair to both plaintiff and defendant. At the same time, the poll also indicated that the majority of respondents thought that plaintiffs were recovering excessive awards and the tort system needed reform.
20 See supra note 2; Hearings, supra note 1, at 144 (testimony of Richard Willard, Assistant U.S. Attorney General).
conclusion and claim that the conclusion alone justifies the
premise.

The relationship between insurance rates and litigation
levels is inherently more complex. Indeed, a given level of
litigation does not translate into a given level of claim payouts
(that would depend on individual dispute outcomes). Even if more
claims are being litigated, plaintiffs might be losing. Further,
even if the level of litigation is increasing, the qualitative
judgement that the increase is unwarranted is speculative at best.
The assumption that the recovery rate of ten or twenty years ago
is the optimum level of litigation is an unsupported fallacy of
opinion.

A recent research study of long-term civil filings in Arizona
suggests that civil filings are cyclical and tied to economic
conditions. The implication of such findings is that the level
of litigation itself is not an accurate measure of the general
incentive to litigate, but may reflect other external factors
outside the control of the tort system. For example, landlord-
tenant disputes might increase because landlords may have to seek
enforced remedies (e.g. back rent) that in better economic
conditions would not be as necessary because of replacement
tenants.

In addition, the majority of disputes (in civil litigation
generally and specifically with tort claims) never reach formal
litigation. A significant portion of claims are settled with
alternative dispute resolution methods. Thus, while litigation
levels change, a corresponding change (inverse or direct) may
occur with settlements. The relationship between litigation and
alternative dispute resolution is presently unclear, but any link

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21 Stookey, Economic Cycles and Civil Litigation,
22 90-95 percent of all disputes are resolved before trial. 
23 63 percent of civil cases are settled, and less than 10
percent are tried through verdict. Kritzer. The Lawyer as
Negotiator: Working in the Shadows, Paper presented at the
Conference on Frontiers of Research on Civil Litigation, Institute
of Legal Studies, University of Wisconsin Law School, 
September 20, 1985 at 12. (cited in Assault on Personal Injury
(hereinafter Public Citizen Report).
severely limits the theoretical accuracy of the "litigation explosion" argument as evidence of severe insurance losses.

However, a sustained and dramatic increase in the number of tort cases could conceivably act as a rough indicator of a system out of balance. The next question, given some "conceivable" relationship between the level of litigation and insurance loss payments, is whether the nation's courts are suffering the burden of increased filings.

The body of evidence is growing that shows no significant, disproportionate increases in tort filings. The National Center for State Courts' (NCSC) study of civil tort filings for 1978 through 1984 reveals a 9 percent increase in tort filings matched with an 8 percent increase in population. In the 1985 update of the tort filings study, the National Center for State Courts found an irregular checkerboard pattern. The study concludes:

Although, the same patterns exist among the states, i.e. some are experiencing increases, some decreases, and others no significant changes, the general downward trend appears to have abated...tort filings did not increase at all in New Jersey's general jurisdiction courts; increased between 1 and 4 percent in four other state courts; increased 5-8 percent in the general jurisdiction courts of five states; rose by at least 10 percent in five states; but were down in another five statewide general jurisdiction courts.

Importantly, no study of national scope that uses relatively comprehensive data has surfaced contradicting the NCSC's findings. Notably, Virginia Supreme Court Chief Justice Harry Carrico recently testified before Congress:

There is a widely held belief that our society is becoming ever more litigious, that we are far too willing to sue for damages and punitive awards. We have not experienced this explosion in Virginia...A new study by the National Center for State Courts has informed us...that we are not all that different (from the rest of the nation).

25 See, supra note 1, at ___.
26 See, Peterson, Civil Juries in the 1980's, Trends in Jury Trials and Verdicts in California and Cook County, Illinois, Rand Institute of Civil Justice (1987). The Rand study, though limited to San Francisco and Cook counties, revealed significant differences in litigation levels between the two sites. The results fail to quantify any consistent litigation trend and explicitly note the median jury awards in both sites are not indicative of an award explosion.
The objective determination that no tort litigation "explosion" exists in the nation's courts seems beyond serious contention. However, the perception of an increase in the level of litigation persists, in part due to the media coverage of the tort reform debate and an easily identifiable culprit (the legal system). Some have correctly asserted that tort filings may eventually increase, not because of the tort variables, but because of the media. The image of large verdicts and high levels of litigation may become a media induced, self-fulfilling prophecy. The risk is present that the media will provide unjustified reinforcement for the current attitudes of a failing tort system and ill-founded and misplaced reform will result.

**Jury Awards**

Possibly more relevant to insurance industry financial performance than general litigation level data is the size and frequency of jury awards broken down by specific types of cases. Tort reform advocates argue that the tort system unnecessarily allows excessive jury awards (specifically, non-economic and punitive damages). The foundation of the pro-reform argument is that plaintiffs litigate because of the built-in probability of over-recovery. The result is that insurers incur excessive payments which in turn fuels the liability insurance crisis.

The primary tort law indicators relevant to Virginia's legislation are non-economic and punitive damages. In principle, the concept of non-economic damages is in accordance with accepted notions of just compensation. However, if jury awards are not based on adequate proof, the probability of excessive awards increases. This concern is the rationale for legislative caps on damage awards similar to Virginia's SB 402. As of late 1986, twenty-five states had enacted some type of damage award limitation.

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28 Roper, supra note 1, at ___.
29 Id. at ___.
30 Figure is compiled from the following sources: National Conference of State Legislatures, Summary Report of 1986 Legislative Action on Liability Insurance, (1986); Smith, Battling a Receding Tort Frontier: Constitutional Attacks on Medical Malpractice Laws, 38 Okla. L. Rev. 195 (1985); Klein, Caps in the Hat: Legislative Lids on Runaway Verdicts, 28 For The Def. 19 (1986). Note, damage award caps have been the subject of
The subjective nature of non-economic damages, however, does not translate into a flawed tort system. Jury awards are subject to the review of the court through remittitur and the appellate process. Notably, the most common "war stories" cited by tort reform advocates concern excessive awards. The same cases also represent the most appropriate examples of a system capable of correcting itself. 31

Punitive damages have similar inherently subjective standards. However, unlike non-economic damages, punitive damages are fashioned to punish the defendant for actions deemed committed with unacceptable intent. Virginia courts use malice or recklessness with conscious disregard of others as the standard of conduct. 32 As with non-economic damages, the court can review the appropriateness of punitive damages and intervene when necessary. Thus, the quantifiable question is whether, despite the current court mechanisms, the frequency and size of non-economic and punitive awards are significantly affecting insurance performance.

The sources of data most commonly cited concerning jury awards lack the depth and methodology of the litigation studies. The major organization currently used by both sides in the tort debate is Jury Verdict Research, Inc. (JVR). 33 The manner in which the data is packaged seems to dictate which side uses the (JVR) verdict information. Tort reform advocates point to the "average" award in tort cases (specifically medical malpractice) to show a whole system gone wild.

For example, the Justice Department Tort Policy Working Group Report points to an average medical malpractice jury award of $666,123 in 1984. 34 However, the median award is a more suitable figure to indicate a "representative" award because the presence of extremely large awards will skew the average jury award.

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31 Roper, supra note 1, at ___.
Importantly, JVR expressly notes that median awards are the applicable figure when discussing "representative" jury awards. The median medical malpractice award for 1984 was $200,000. Generally, when median awards are used, no dramatic increase in the size of awards is shown for any tort case type.

However, the data used and methodology employed by JVR limits its use. For example, only successful recoveries are computed into the statistical award figures published by JVR, when all verdicts should be included to accurately reflect jury determinations. Also, only original verdicts are included in the figures. A significant portion of verdicts are reduced, rendering verdict figures inaccurate when used in the context of measuring insurance payouts. A recent study tracking the final payout of the million dollar verdicts reported by JVR, reports the total value of the verdict awards was reduced by 57 percent. The study also showed that higher verdict amounts experienced the largest reductions and the most seriously injured received the largest net recovery. These relationships point not to a system out of control, but to a court system capable of rational review and adjustment.

The fundamental problems with JVR verdict figures limit their utility in the tort reform debate and provide the incentive for alternative sources of information to be developed. One recent study of civil jury verdicts in 43 counties in 10 states concluded (1) verdicts fell into fairly defined moderate ranges and (2) no significant pattern of short-term increases in verdict awards exists in the sampled courts. The study is not meant to be nationally representative, but does provide the most useful

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34 Tort Policy Working Group Report, supra note 5, at 35-36.
35 Hearings, supra note 1, at 171 (testimony of Philip J. Herman, Jury Verdict Research, Inc.).
36 See, supra note 23, at 19.
37 Id. at 18-19.
39 Id. at ___.
40 Daniels and Martin, Jury Verdicts and the "Crisis" in Civil Justice: Some Findings from an Empirical Study, 11 Just. Sys. J. ___ (1987). The study states, "The interquartile ranges are also modest for most sites. The 75th percentile is below $100,000 in 26 sites, and the interquartile range itself (from the 25th to 75th percentile) is less than $100,000 in almost two-thirds (28) of the sites, indicating that most awards fall
methodology and data on jury awards to date and should provide the basis for subsequent work.

Another recent study, limited to punitive damages, has concluded that the evidence indicates extremely limited use of punitive damages by the nation's courts. Specifically, the study indicates punitive damages were awarded in less than 2 percent of sampled product liability cases in 1984-1985.

When award figures are properly scrutinized, the findings suggest that (1) the jury system is not awarding excessive damages and (2) when large awards are given, the present court mechanisms often reduce the amounts substantially.

Insurance Industry Financial Performance

The tort variables are only relevant to the insurance crisis to the extent that they affect insurance industry financial performance. Therefore, if the industry is financially sound, the causal "impact" of the tort variables would be minimal. One can argue that despite a hypothetically high level of litigation and high jury awards, if the industry is profitable, the need to dramatically increase liability premiums would still be missing.

The evidence concerning insurance industry performance is a central point of disagreement between tort reform advocates and tort system supporters. The insurance industry (a tort reform advocate) uses statutory accounting methods to show financial performance, while others (insurance reform advocates, tort system supporters, and most industries other than the insurance industry) use Generally Accepted Accounting Principles (GAAP) to measure financial performance.

The weight of recent scholarly literature suggests GAAP more realistically reflects the operating performance and financial state of the insurance industry. Using the Generally Accepted Accounting Principles method, the industry has experienced a net gain of $83 billion dollars over the last ten years. Further,
the value of insurance industry stock doubled in 1985.\textsuperscript{45} Indeed, the industry, in its worst year, 1984, reported a profit.\textsuperscript{46}

In Virginia, the industry has, on average, lower payout rates than the rest of the nation and recently has experienced a 37 percent annual rate of return.\textsuperscript{47} Appropriately, the insurance reform measures, HB 1314 and 1315, allow (but do not require) state regulators to look at the industry's performance in Virginia (including investment income) when determining if Virginia rates are excessive.

The insurance industry is not suffering from deep, permanent organizational financial losses. While certain lines of insurance coverage may be experiencing losses, the evidence indicates that the insurance industry as a whole is performing profitably and in relative ignorance of the "runaway tort system" given the role of wolf.

Virginia's Response to the Variables

The Virginia General Assembly's response to the current insurance crisis is a legislative package of tort reform and a fleeting attempt at insurance rate oversight. The continuing adherence to quick, almost reflexive actions exemplifies the lack of depth taken by many lawmakers when confronted with insurance industry cries of abuse and instability. For example, the joint subcommittee report concludes that (1) punitive damages are not being excessively awarded, (2) a stable loss environment exists in Virginia for insurers, (3) no litigation "explosion" is present in Virginia and (4) the insurance industry is profitable.\textsuperscript{48}

Despite these findings, the report recommends tort reform legislation to achieve a "balance" of interests between consumers, insurers and injured persons.\textsuperscript{49} However, the interests that tort reform addresses (e.g. injured persons' recoveries, insurance

\textsuperscript{45}\addcontentsline{toc}{section}{Notes}
\textsuperscript{46}\addcontentsline{toc}{section}{Notes}
\textsuperscript{47}\addcontentsline{toc}{section}{Notes}
\textsuperscript{48}\addcontentsline{toc}{section}{Notes}
\textsuperscript{49}\addcontentsline{toc}{section}{Notes}
losses through recovery payments and loss predictions based on
levels of litigation) are the very issues identified in the report
as being "in balance." The only relevant variable not "in balance"
is the insurance rates presently forced on consumers.

The current Virginia tort legislation fails, not because the
lawmakers' goal of reducing insurance rates is inappropriate, but
because the focus on accomplishing the rate reduction is
misplaced. Given the empirical evidence of no litigation
explosion, no serious award abuse and a profitable insurance
industry, the continuing attention on tort reform is
unwarranted and, in the context of finding solutions to the
liability insurance crisis, simply wrong.

Alternative Variables

The level of tort litigation and size of damage awards are but
two of a set of factors that potentially affect the financial
performance of the insurance industry. With the elimination of the
tort variables as primary causal elements, the insurance oriented
variables (cash-flow underwriting, cyclicality of the industry,
poor risk assessment etc.) offer a sound alternative explanation
for the present insurance rate crisis.

While an in-depth analysis is beyond the scope of this
article, recent literature\(^\text{50}\) suggests that the insurance industry
underpriced and accepted riskier policies during the period of
high interest rates (1981-1983). Using this myopic strategy, the
companies attracted large amounts of investment capital. The high
rates of return on investment income during this period shielded
the industry from any purely premium/payout based losses. Indeed,
the industry more than covered any incidental premium/payout
losses.\(^\text{51}\) In addition, reinsurers bought the riskier policies
from the primary insurers and the process continued.

Only when interest rates fell in 1984 did insurers have to
cover the decreased income from investments and pure

\(^{50}\) Brown Report, supra note 1; Hearings, supra note 1 (testimony
of insurance industry executives and representatives in Part II);
McGee, The Cycle in Property/Casualty Insurance, FRBNY Quarterly
Review 22 (Autumn, 1986).

\(^{51}\) Hearings, supra note 1, at 4-6 (of the General Accounting
Office Report).
premium/payout losses with drastically increased premiums. Simultaneously, reinsurers stopped buying the riskier policies and the whole market contracted. Based on the foregoing explanation, many conclude that the insurance business cycle is the primary causal agent afflicting the insurance industry.

Conclusion

A two part analysis of the tort variables asserts a persuasive case for the elimination of the level of litigation and jury awards as causal elements in the present insurance crisis. Indeed, the analysis reveals a tort system operating with no national litigation trends and to a court system capable of self correcting any propensity to award excessive damages.

Any future action concerning Virginia's insurance problem should focus on insurance reform, not tort reform. Specifically, the Virginia Board of Insurance should promote stability through better analysis of the industry's financial performance, more control on fluctuations in rates and an authoritative role in the determination of the rates themselves.52

Tort reform in Virginia should be separated from the present liability insurance crisis and evaluated using independent theories of justification. For example, Virginia might address the role of contributory negligence and whether it provides adequate opportunity for just compensation.53 Another related consideration would be whether, under an alternative (comparative) negligence scheme, joint and several liability would remain a viable doctrine. Virginia tort reform represents ample debatable issues without the unnecessary and unwarranted linkage to the state's liability insurance crisis.

An independent evaluation of the tort system and concurrent investigation of insurance reform eliminates many of the predetermined conclusions presently hampering the insurance liability discussion, and may encourage reasoned, thoughtful change in both areas.

52 Senate Document No. 11, supra, note 9, at Attorney General's Office legislative recommendations.
INTRODUCTION

Since the mid-1970's, the American medical community has experienced greater and greater difficulty securing affordable malpractice insurance coverage. What began as a bona fide attempt to extend coverage at reasonable rates has rapidly evolved into an expensive, high stakes business venture. Doctors at one time paid nominal premiums to protect themselves from potential yet unlikely claims. Today, most physicians spend enormous sums just to obtain minimal coverage. For others, adequate coverage is simply unavailable. As a result, most health care providers must make the difficult decision of paying outrageous premiums, practicing without liability insurance, or leaving the profession altogether. The alternatives are unacceptable. In short, there seems to be a malpractice insurance crisis, at least on a national scale.

Although premiums are rising for a number of bona fide economic reasons, a much more fundamental and troubling phenomenon is at work. Malpractice claims currently are adjudicated by a method that permits damage awards that are grossly disproportionate to actual injuries incurred. At common law, awards traditionally encompassed the whole gamut of compensatory and exemplary damages. Moreover, because the plaintiffs' bar has routinely operated on a thirty-three percent contingency fee basis, prayers and awards for relief have often been grossly exaggerated. Although there is some degree of precision in measuring actual damages, such measurement remains highly subjective. The ability of claimants to secure disproportionately large settlement agreements also is enhanced by this process. For these reasons, insurance carriers must raise their premiums lest they go bankrupt, leaving truly meritorious claimants uncompensated.

In response to this perceived insurance crisis, many state legislatures took steps to modify the procedural and substantive aspects of medical malpractice law. In addition, various changes were made and implemented in state insurance laws. Some of the advances have been successful; others have been struck by subsequent judicial review on various constitutional grounds.

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The Commonwealth of Virginia has followed the trend of most other states. The General Assembly enacted the Medical Malpractice Act of Virginia, an elaborate statutory scheme providing for medical malpractice review panels, as well as other substantive and procedural changes. Aside from some adverse commentary, Virginia's prescreening process has been perceived as largely successful. Much more controversial, however, has been the statutory cap placed on medical malpractice awards by section 8.01-581.15.

Section 8.01-581.15 provides that "[i]n any verdict returned against a health care provider in an action for malpractice... the total amount recoverable for any injury to, or death of, a patient shall not exceed one million dollars." The effect of this provision is to preclude recovery of all damages, compensatory as well as exemplary, which exceed one million dollars, regardless of the severity of the injury. Like many other states' statutory cap provisions, the Act's legislative findings were stated in broad terms. However, they were specific enough to echo the general concerns expressed nationwide during the mid-1970s.

Response to the statutory cap was strong and poignant. One particularly adept article, authored by Edward Taylor and William Shields, thoroughly explores the history of the Act, Virginia's experience prior to the cap's enactment, and some of the more salient constitutional questions that the Act posed. The article specifically asserts that, contrary to the findings of the General Assembly, "[t]here was no demonstrated need for legislation in 1976 which limited recovery for malpractice." The article urges "[c]ourts [to] declare the cap violative of the Constitution of Virginia [and] apply a 'means focused' test to find it unconstitutional under the Equal Protection Clause of the United States Constitution." The concerns expressed by Taylor and Shields have recently been addressed by two courts sitting in Virginia.

The first case, Boyd v. Bulla, was decided by Judge Michael of the United States District Court for the Western District of Virginia. In Boyd, the plaintiffs claimed that their child was born with various mental and physical handicaps as a result of their doctor's negligence. The jury agreed and returned verdicts for a total of $8.3 million dollars. In its discussion of the constitutionality of the cap, the court refused to hold that it violated the equal protection clause of the fourteenth amendment. It did hold, however, that the cap impermissibly infringed the right to a jury trial under both the seventh amendment to the United States Constitution and article 1, section 11 of the Virginia Constitution.
In its equal protection analysis, the court found that the cap "creates neither a suspect classification nor infringes upon a fundamental right." Therefore, because the cap was nothing more than a classic example of economic regulation, the proper standard of review was the rational relation or nexus test. Under this standard, legislation is presumed constitutional and will be upheld if it is rationally related to the legislative objectives. The court simply found that "the medical malpractice cap is clearly a rational means to achieve the legislative goal of securing the provision of health care services by maintaining insurance at affordable rates." 

Judge Michael then turned to the jury trial issue. The court recognized that the jury has traditionally performed an important function in the history and jurisprudence of both the United States and the Commonwealth of Virginia. Part of its role is to serve as a fact-finding body, and "[s]ince the assessment of damages is a fact issue committed to the jury for resolution, a limitation on the performance of that function is a limitation on the role of the jury." Consequently, the cap imposed by section 8.01-581.15 was held to restrict the right to a jury trial, a violation of the seventh amendment to the United States Constitution. Similarly, in the courts view, because "article 1, section 11 of the Virginia Constitution is ... equivalent to the federal seventh amendment right," it held that the cap violated the Commonwealth's constitution as well.

The second case, Williams v. Van Der Woude, was decided by Judge Fortkort of the Nineteenth Judicial Circuit of Virginia. In Williams, the plaintiff claimed that the negligence of her doctor and a local clinic led to the failure to diagnose and treat her cervical cancer. The jury agreed and returned a verdict in the amount of three million dollars. In considering the plaintiff's motion to waive the statutory cap, the court rejected Judge Michael's jury right and equal protection analyses in Boyd. Instead, Judge Fortkort declined to rule on the jury question at all and held that the statutory cap violated equal protection under the federal constitution.

The circuit court first addressed the argument that the cap violated the right to a jury trial. Although the court opined that the cap "imposes severe limitations on the Constitutional [sic] right to a jury trial," it expressly refrained from ruling on that point. In a lengthy footnote, Judge Fortkort expressed reservations about the cap's constitutional invalidity in this regard and noted that "the [United States] Supreme Court may not conclude that the limitation on the jury as a fact finder is a violation of the Seventh Amendment." 

Although the court declined to rule on the jury issue, it did premise its equal protection analysis on the important function of the jury. The court explicitly found that the right to a jury trial is accorded greater protection under the Virginia Constitution than under
the federal constitution. "The Virginia right to a jury trial," wrote Judge Fortkort, "is more explicit than the Federal Constitutional [sic] grant and is a basic right of our people. Since... the right to a civil jury trial is not deemed a fundamental right under [federal constitutional] analysis, it is at least an 'important' right [in Virginia] demanding 'heightened scrutiny'." In support, the court cited article 1, section 11 of the Virginia Constitution which provides in part "[t]hat in controversies respecting property and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred." In addition to finding that the right to a jury trial in Virginia is an important right worthy of heightened scrutiny, the court also found that the statutory cap discriminated against a particularly sensitive class. The cap places a one million dollar limit on all damages recoverable in medical malpractice actions. Although persons sustaining one million dollars or less in damages are entitled to full compensation under the statute, those who incur greater damages are not. Thus, the sensitive class "is comprised of those persons most seriously injured by the negligence of medical care providers.

In short, the court provides two reasons for adopting a rational basis with heightened scrutiny standard. First, the statute removes from the jury's consideration an assessment of damages above the cap's limit, a function traditionally assigned to the jury. Under the Virginia Constitution, the right to a jury trial is sacred and any curtailment of that right ought to receive heightened scrutiny. Second, the cap creates two classes amongst those injured by medical malpractice. One is entitled to receive full compensation, whereas the other is not. The dispositive question for the court, then, was whether the state had articulated legitimate objectives to justify the cap's enactment. At this juncture the court considered the legislative findings articulated in the Act's preamble. Judge Fortkort, citing the article by Taylor and Shields, found that "[c]ontrary to some representations made at the time the statute was enrolled, there was no real malpractice insurance crisis in Virginia. There was no evidence that health care providers were declining to practice in Virginia due to high premiums." The court further elaborated on the legitimacy of the state's objectives:
The number of cases involving the medical malpractice limitation may be fewer than 10 in the 10 years of its existence. The limitation is indiscriminate in that it is a general limitation regardless of the injuries proven. The beneficiary of the limitation has not been the general public since the size of the affected group is too small to have any effect on general insurance premiums. Plainly stated, the beneficiaries of the limitation are those who have committed a civil wrong and the disadvantaged class are those most severely injured by that wrong. Blocking full recovery in these cases by the artificial limitation achieves no discernibly legitimate state goals.

The court then summarized that

This legislation forms a small powerless group with no conceivable benefit to the public at large except an illusion of action. The function of the jury trial is altered so that regardless of the facts produced, the court must reduce the verdict to a predetermined limitation. A sensitive class is formed and the important fundamental right to trial by jury is diminished by this legislation.

Thus, the one million dollar cap imposed by section 8.01-581.15 was held to violate equal protection because it denied a sensitive class full compensation for damages incurred due to the negligence of medical practitioners and infringed upon the important right to a jury trial without achieving any legitimate state objectives.

**RAMIFICATIONS AND RECOMMENDATIONS**

When construed together, *Boyd* and *Williams* highlight some troubling questions. The first deals with the choice of different equal protection standards. The second relates to the reasons why differing standards were selected. The third concerns the ramifications of the respective equal protection analyses employed.

In *Boyd*, the statutory cap was held not to violate equal protection under the rational basis standard. This test was applied because the statute "creates neither a suspect classification nor infringes upon a fundamental right." However, the cap was found to deny the right to a jury trial, a right the maintenance of which "is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment ... should be scrutinized with the utmost care." Apparently, under *Boyd*, the seventh amendment right to a jury trial is of such importance—perhaps fundamentally so—that any infringement deserves very careful scrutiny. Yet under the equal protection clause, the very same right
merits only the most deferential review. The result is inconsistent. The court should have ruled either that neither equal protection nor the right to a jury trial was denied, or alternatively, applied a more rigorous standard of review in its equal protection analysis.

In contrast to Boyd, the same statutory cap was found to deny equal protection in Williams under the rational basis with heightened scrutiny standard. This test was selected because the right to a jury trial and heightened scrutiny standard of Cleburne was deemed controlling. Although the court acknowledged that Cleburne "was badly fragmented," and that its effect "is highly speculative since the holding remains something of a mystery," it agreed that the rational basis test was used. Cleburne used that test because "no fundamental rights were implicated." However, Judge Fortkort, relying on the dissenting portion of an opinion in which Justice Marshall concurred in part and dissented in part, interpreted the decision as authorizing a standard less deferential than the test used. In short, Judge Fortkort read Cleburne as creating a new level of equal protection review. Whether this interpretation of Cleburne is correct remains to be seen.

Under either approach, the results are at the very least partially disturbing. The use of the Boyd approach allows the imposition of a one million dollar cap, regardless of injuries incurred, leaving the most seriously injured partially uncompensated. The use of the Williams approach permits unrestrained judgments with awards grossly disproportionate to actual injuries incurred.

Whether or not the two equal protection standards were properly selected, the analyses in Boyd and Williams were correct under the respective tests. The courts could only assess the rationality and legitimacy of the statute by referring to the objectives cited in the Act's legislative history. The real crux of the problem then is the reason why the General Assembly acted at the time the statute was enrolled.

The preamble to the Medical Malpractice Act of Virginia provides that

Whereas, the General Assembly has determined that it is becoming increasingly difficult for health care providers of the Commonwealth to obtain medical malpractice insurance with limits at affordable rates in excess of $750,000; and Whereas, the difficulty, cost and potential unavailability of such insurance has caused health care providers to cease providing services or to retire prematurely and has become a substantial impairment to health care providers entering into practice in the Commonwealth and reduces or will tend to reduce the number of young people interested in or willing to enter health care careers; and
Whereas, these factors constitute a significant problem adversely affecting the public health, safety and welfare which necessitates the imposition of a limitation on the liability of health care providers in tort actions commonly referred to as medical malpractice cases . . ."44

As evidenced by the language used, the General Assembly's concerns were general and stated in very broad terms. Yet there is an appalling lack of evidence which would otherwise support the imposition of a cap on medical malpractice damages. Indeed, subsequent studies based on empirical evidence relating to Virginia's experience prior to the enactment of the cap demonstrate that there was no need for such action cap in 1976.45 In short, the legislature's actions were premature. The statutory scheme authorizing a cap on damages in 1976 was a hasty response to a general nationwide perception that a malpractice insurance crisis indeed existed.

The time has come for the General Assembly to complete its examination of the posture of medical malpractice insurance in the Commonwealth of Virginia. Steps in the right direction have already been taken. A joint subcommittee is currently reviewing Virginia's medical malpractice laws and their effects on the adjudication of malpractice claims.46 The subcommittee needs to specifically address how exemplary damages affect the cost and availability of malpractice insurance in the Commonwealth, and the propriety of only restricting the amount of noneconomic damages. The current statutory denies full compensation for those who receive actual injury greater than one million dollars yet permits others who have nominal injuries to earn windfall profits on exemplary damages. By the same token, the absence of any limitation will simply encourage awards that are grossly disproportionate to actual injuries received.

The General Assembly should enact legislation which amends section 8.01-581.15. A claimant should be entitled to receive full compensation for all economic damages incurred, but be denied awards for noneconomic damages that exceed a reasonable amount. A similar proposal has been endorsed by the Joint Subcommittee Studying the Liability Insurance Crisis and the Need for Tort Reform.47 The proposal suggests a limitation on "the total amount awarded for noneconomic damages against all defendants found to be liable,"48 including medical practitioners, to "the greater of three times the amount of damages awarded for economic losses or $250,000."49 Although the joint subcommittee's proposal provides otherwise,50 noneconomic damages should include punitive damages as well. Only in this way will all those injured by medical malpractice be able to receive full economic recovery. In addition, such an amendment would curtail grossly disproportionate exemplary awards, an evil that has contributed to the national medical malpractice insurance crisis.
FOOTNOTES


2. Id. at 6.

3. Id.


5. Many medical malpractice laws have been struck on the grounds of equal protection, separation of powers, and the denial of the right to a jury trial. See generally Woude, No. 70286 (Cir. Ct. County of Fairfax, VA, Dec. 19, 1986) (reviewing various state court opinions) and 647 F. Supp. 781, 785 n.2 (W.D. Va. 1986) (listing cases invalidating malpractice damages award limitations).


9. Id.


11. See Limitation on Recovery, supra note 7.

12. Limitation on Recovery, supra note 7, at 848.

13. Id. at 849.


15. Id. at 787-88.

16. Id. at 789.

17. Id. at 787.

18. Id. at 786.

19. Id. at 787.

20. Id. at 788-89.

21. Id. at 789.

22. Id.

23. Id.


25. Id. slip op. at 9.

26. Id. at 9 n.1.

27. Id. at 27.
29. 87 L.Ed.2d 313 (1985).
30. Williams, No. 70286, slip op. at 12.
31. Id. at 27.
32. See Limitation On Recovery, supra note 7.
33. Williams, No. 70286, slip op. at 20.
34. Id. at 28.
35. Id. at 29.
37. Id. at 788.
38. Williams, No. 70286, slip op. at 12.
39. Id. at 19.
40. Id. at 12.
41. Id.
42. 87 L.Ed.2d 313, 330-45 (1985) (Marshall, J., concurring and dissenting in the judgment).
43. Williams, No. 70286, slip op. at 13.
45. See Limitation On Recovery, supra note 7.
47. See Joint Subcommittee Report, supra note 1, at 17.
49. Id.
50. See id.
Surrogate Parenting Agreements in Virginia

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Due to the highly publicized Baby M trial recently decided in Hoboken, New Jersey, Americans have been forced to consider the issues raised by Surrogate Parenting arrangements. Cases testing the validity of such contracts have arisen in at least five states, but none have been brought in Virginia. It is only a matter of time before such a case arises. How will a Virginia court interpret a surrogate parenting contract, what legal issues are raised by surrogate parenting contracts, and what regulations should be put in place to control and manage Surrogate Parenting Agreements?

Surrogate parenting agreements are primarily used by married couples who have attempted to bear a child on their own and due to the woman's infertility or genetic disorder are unable or are afraid to conceive. Approximately seventeen percent of all couples of reproductive age have difficulty becoming parents. Such couples frequently turn to legally sanctioned adoption to obtain a child, and are informed that if they pass the standards set up by the particular adoption agency or board they may have to wait three to seven years to obtain a child with certain characteristics. The use of a surrogate mother allows the couple to have a child biologically related to the husband in less

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1 Stern v. Whitehead, ___ N.J. ___ (1987)
2 A recent poll published in Newsweek Magazine showed that 63% of Americans approved of Surrogate Parenting agreements when the woman was infertile, 54% approved when a pregnancy would present a risk to the health of the woman, and only 14% approved when the woman was able to but was afraid or unwilling to bear a child.
than a year.

This note will summarize the technology involved, the moral, ethical and legal issues presented, the issues of which an attorney should be aware, and will propose legislative action to deal with the issues presented by Surrogate Parenting Agreements.

Reproductive Technology

Three major methods of "artificial conception" are in use in the United States today, artificial insemination, in vitro fertilization, and embryo transfer.6 These methods overlap and are used together to overcome various reproductive difficulties.

Artificial insemination is the most common and widely accepted technology. In artificial insemination (AI) a woman is impregnated by means of an artificial instrument, usually a syringe. The sperm used can be from any donor. Sperm can be "frozen" for extended periods of time. AI is used when the male of a couple is impotent or has a low sperm count, or when a woman wants to bear a child without a relationship with a man.

In vitro fertilization occurs when the fertilization takes place in a laboratory medium outside any human body, and the growing embryo is then implanted in a woman's womb. Since the joining of the sperm and the ovum is conducted in a laboratory, they can come from any source. Embryos, like sperm, can be frozen. In vitro fertilization is used when a woman has blocked or damaged fallopian tubes but is capable of carrying a child to term.

Embryo transfer refers to the relocation of a developing embryo from a laboratory culture medium to a human womb, or from one human womb to another. There is no requirement that the carrying woman be biologically related to the embryo which she carries to term.

A "Surrogate Mother" is a woman carrying a fetus to term for another person or persons who intend to raise the child produced. The surrogate can get pregnant either by artificial insemination

with the father's sperm or the embryo can be produced in vitro and transferred to the surrogate's womb. This means that she may or may not have a biological relationship to the child. For purposes of this article, "surrogate mother" will refer to a woman carrying a child produced by the joining of her ovum and a man's sperm through artificial insemination. She is therefore the child's biological mother.

Moral, Ethical and Legal Issues

There is no technological limitation to the identity or relationship of the parties who may employ artificial conception in order to reproduce. A lesbian who wishes to bear a child without the burdens of a relationship or marriage can be inseminated with the sperm of a nameless donor. A widow can bear the child of her long-dead husband. A couple can have a number of embryos created in the lab, bear one and freeze the rest. A single man who wishes to raise a child could have his baby borne by a surrogate mother.

Each of these combinations produces its own moral, ethical and legal dilemmas. This note will discuss only the issues raised by a surrogate parenting agreement wherein a married couple, of which the woman is incapable of ovulating and carrying a child, seeks out and pays a woman to be impregnated through artificial insemination with the sperm of the father and to carry the resulting fetus to term. She agrees to maintain certain health standards: not to smoke, drink, use drugs or to abort the fetus. She will remain under the care of a doctor throughout the term of her pregnancy. She agrees to sever her parental rights to the child and give custody to the father, and her husband agrees to sever any claim he may have if she is married. The contracting couple agree to pay all of the mother's medical and legal expenses plus a fee which can be either for her service of carrying the child or for severing her parental claim. The father's wife will adopt the child as her own, and the couple agrees that they will not refuse to take the child.

Surrogate Parenting agreements raise a number of interesting moral issues:

Surrogacy agreements weaken the venerated bond between the mother who bears the child and the child and therefore cheapens "motherhood."\(^7\)

\(^7\) However, surrogacy allows an infertile woman the ability to
Surrogacy agreements exploit women by making them professional breeders. Rather than being mothers they are producers of a product, chosen for their health, sturdiness and genetic make-up.  

Surrogacy agreements will allow continued repression of the poor by the wealthy. Because of the cost of Surrogate Parenting arrangements only the wealthy will be able to consider it as a solution to infertility and it is likely that only poor women would consider being a surrogate.

The compelling human interest in allowing Surrogate Parenting as an option to infertile couples isn't present if busy professional women are allowed to hire other women to bear their children for them merely so they do not have to take time out from their careers.

Surrogacy agreements treat children as a commodity to be bought and sold, introducing the spectre of slavery which has been outlawed in this country.

The children born of surrogate mothers are illegitimate, born out of adultery between the married father and the surrogate.

The Roman Catholic Church believes that surrogate parenting, along with all forms of artificial conception, is unacceptable because the only appropriate way to produce a child is for the mother to bear it and experience motherhood to a child born of her husband, one step closer than an adopted child unrelated to either of them.

The counter-argument is that it's about time that women were allowed to profit from their unique ability to bear children: normal adoption procedures exploit women by prohibiting payment to the mother who bears the child while everyone else gets paid.

In a positive manner, Surrogate Parenting can be viewed as a new and possibly lucrative field for women. Rather than being demeaning to bear a child for another woman, it could be viewed as a noble and honorable profession, and pretty well-paying, too.

If the use of surrogates by fertile women is perceived as a problem, legislation could require a showing of infertility before being allowed to enter into a Surrogate Parenting Agreement.

Adoption procedures normally require the payment of a fee to the agency and frequently involve the services of an attorney. A Surrogate Parenting agreement would include a payment to the woman bearing the child which can be for her services as a womb and not a payment for the child itself.

child is naturally by married couples.\textsuperscript{13} Any involvement of medical experts, technicians and laboratory workers further removes the act of reproduction from the marriage where it properly belongs, this view holds. Further, the participation of the surrogate as a third party fornicatress or adulteress makes the arrangement more objectionable.\textsuperscript{14}

Ethical issues for attorneys include a possible conflict of interest if they represent both the contracting couple and the surrogate mother. If Surrogate Parenting Agreements continue to exist only in the twilight between legality and criminality then attorneys will be able to charge contracting couples exorbitant fees and may be tempted to coerce women who have not been informed of all of the physical and psychological risks they incur to be surrogate mothers.

Legal issues include state prohibitions against baby bartering, public policy issues, and a question of contract damages if the contract is to be acknowledged as valid.

Prohibitions against Baby Bartering

A couple's desire to have a child through a surrogate arrangement often is analyzed as conflicting with states' prohibitions on baby selling.\textsuperscript{15} Virginia has no express provision against baby-bartering, but does have prohibitions against payment of fees to physicians, attorneys or clergy in connection with recommendations for adoptions.\textsuperscript{16} A bill was introduced in the 1987 General Assembly which would add "any remunerated assistance provided to a parent... in locating or effecting the placement of a child" to the definition of "unauthorized placement activity."\textsuperscript{17} This statutory language may be interpreted to preclude payments to professionals in connection with Surrogate Parenting arrangements.

In Ford v. Ford the United States Supreme Court held that custody contracts are not binding in Virginia courts due to Virginia's substantial interest in preventing the custody of

\textsuperscript{14} Although not all American Roman Catholics accept all of the teachings of their church, this view will affect the political discussion in those areas of the country with large concentrations of Roman Catholics. Virginia is 5.1% Roman Catholic, compared with approximately 25% nationwide.
\textsuperscript{15} New York and Kentucky have found that state prohibitions against baby bartering do not apply to Surrogate Parenting arrangements. Michigan has held that they do. See supra n. 2.
\textsuperscript{17} H.R. 1496, 87 Sess., 1987 Virginia Laws.
children from being the subject of barter. This indicates that a Surrogate Parenting arrangement which is worded so that the payment seems to be for the custody of the child would be opposed to stated Virginia policy.

A Virginia court may conclude that the concern with payments in connection with the custody of children is not applicable to a Surrogate Parenting Arrangement. The court could concur with the Kentucky court's reasoning in Surrogate Parenting Associates, Inc. v. Kentucky, that "there are fundamental differences between the surrogate parenting procedure...and the buying and selling of children as prohibited by the statute." Prohibition of baby selling is intended to prevent baby-brokers from pressuring parents with financial inducements to part with a child. Surrogate parenting arrangements involve an agreement voluntarily entered into before conception. Additionally, the payment is made by the natural father of the child, who presumably will act in the best interest of the child. Thus the evils sought to be prevented by prohibitions against baby-bartering are not present in Surrogate Parenting arrangements.

Given the stated policy in Virginia against payments to third parties for the placement of children, a court would probably disallow any fees charged in connection with such an arrangement.

The Custody Dispute

If a court does not recognize the contract, the conflict must be resolved as a traditional custody battle. Even if the court allows the contract as a custody agreement, in its role as parens patriae it is free to disregard the contract in determining the best interest of the child.

The first major hurdle is establishing paternity. Virginia has adopted a statute that presumes the legitimacy of a child born through artificial insemination to a married woman with the husband's permission. Only the natural mother, the child, or the woman's husband can challenge the existence or non-existence

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20 12 Fam. L. Rev. (BNA) 1207 (Ky. Cir. Ct. 1986).
21 Id. at 1207.
of the father-child relationship. Thus the biological father does not even have standing to challenge the paternity of the child.

Thus the surrogate must be single or the surrogate must have already given up the child to the father for the father to bring a paternity action. This goes against the recommendations of attorneys involved in Surrogate Parenting arrangements who prefer to use married women who have borne children before to ensure that they are able to bear children and that they will be emotionally more stable and therefore able to give up the children.

This result indicates the inapplicability of Virginia's artificial insemination statute to the situation. The custody of the child would depend on the surrogate's marital status and disregard the intent of the parties and what is best for the child. Thus the natural father could rely on Syrkowski v. Appleyard and attempt to convince the court that the artificial insemination statute was not meant to apply to Surrogate Parenting arrangements. Surrogate Parenting should be recognized as an exception and the biological father should be allowed to prove his paternity.

Assuming that the father can establish paternity, the court must then decide in whose custody to place the child. For the court to uphold a custody agreement, the contracting parents first have to show there was a voluntary relinquishment of custody by the parent of the child by clear, cogent and convincing evidence. Although the surrogate mother can claim that she was not informed of and did not understand all the ramifications of the agreement, surrogate arrangements usually require the mother to go through counseling to ensure that she understands the nature of her agreement. Evidence of this counseling could then be used by the contracting couple to prove the surrogate's understanding.

Even if the court upholds the contract as a custody agreement, it still has to apply conventional custody factors to determine the best interests of the child. The welfare of the

24 420 Mich. 367, 362 N.W.2d 211 (1985), (The Michigan Supreme Court overruled the Court of Appeals decision that the court lacked jurisdiction because the action was beyond the scope and purpose of the Paternity Act when a father sought an order of filiation declaring his paternity in a surrogate arrangement.), rev'd 122 Mich. App. 506, 33 N.W.2d 90 (1983).
26 Va. Code Ann. § 20-107.2(1) provides: "The court, in determining the custody...shall consider the following: a. The age and physical and mental condition of the child; b. The age and physical and mental condition of each parent; c. The relationship existing between each parent and each child; d. The needs of the child; e. The role which each parent has played, and will play in
child is the primary, paramount and controlling consideration of the court in custody disputes. 27 There is no presumption in favor of either parent. 28

In a Surrogate Parenting agreement the age and physical and mental condition of the child will have little influence in determining custody. The court may consider if one parent is better equipped to deal with a particular physical or mental handicap of the child.

In Stern v. Whitehead, the age and physical and mental condition of each parent had a significant effect on the court's decision regarding custody. Both the surrogate mother's mental stability and the reasons for the contracting mother's delay in childbirth were the subject of consideration, and the court's ultimate decision was affected by evidence about Mrs. Whitehead's mental health.

The court will also encounter circumstances such as a homosexual couple's desire to have a child, 29 and a single person's right to have a child. 30

In examining the relationship between each parent and the child, the court may examine the psychological bonding between the natural mother and the child and the prior mental "conception" of the child by the contracting couple. 31 However, the court is most concerned with the best interest of the child, and therefore examines with which parent the child has developed bonding. It is important who was given temporary custody, because the courts look to the primary caretaker first to see if there is bonding and are reluctant to jeopardize the child's stability by changing custody.

In assessing the needs of the child, the relative financial stability of the parents will be important. Surrogate Parenting arrangements usually involve a contracting couple which is wealthier than the surrogate and her husband, if any. Because the

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29 Jane Doe v. Jane Doe, 222 Va. 736, 284 S.E.2d 799 (1981), in which the natural mother's lesbian life-style was a proper factor to consider in determining her fitness as a mother and the best interest of the child.
30 See Note, Reproductive Technology and the Procreation Rights of the Unmarried, 98 Harv. L. Rev. 669 (1985).
court can consider who can provide better education and medical care, the wealthier couple will have the advantage.

Similarly, in assessing the role which each parent has played and will play in the future in the upbringing and care of the child, the wealthier contracting couple will have an advantage over the surrogate and her husband because of their ability to provide a greater variety of opportunity for the child.

Remedies for Breach of Contract

If surrogate contracts are upheld, the court is faced with the problem of deciding what are the appropriate remedies for a breach of contract. Monetary damages are inadequate. The only way the contracting couple would be adequately compensated is by ensuring that they get the desperately wanted child.

Some moral and legal problems arise when specific performance forces a mother to give up her child. Commentators note that a court is unlikely to wrest a child out of it's natural mother's arms.\(^{32}\) Research has shown that surrogate mothers develop an emotional attachment to the child which they carry.\(^{33}\) "This attachment between mother and child is apparent in the case histories of even those surrogates who have parted with their newborns."\(^{34}\) While the surrogate contracts that she will not form or attempt to form a bond to the child, "even the best intentioned surrogates develop an emotional attachment to the child they are carrying."\(^{35}\)

However, refusing to award specific performance when the natural mother breaches the surrogate contract would leave no adequate remedy for the natural father. Specific performance as an equitable remedy should balance the hardship to the defendant (surrogate) against the benefit to the plaintiff (contracting couple) that would ensue from the enforcement of the contract. In balancing the equities, the court should consider both the mental and physical aspects of conception: the contracting couple's intent to conceive predates the surrogate mother's physical conception, and her pregnancy would not have occurred but for the contracting couple's intent to have a child.\(^{36}\) Thus the use of the surrogate method, manifesting procreative intent, should

\(^{32}\) Cohen, supra n. 19, at 260.
\(^{34}\) Cohen, supra n. 19 at 260 & n. 130.
\(^{35}\) Id. at 261.
\(^{36}\) Stumpf, supra n. 35 at 195.
invoke the legal presumption that the child belongs to the
intenders. The court can then order specific performance of the
contract giving custody to the contracting couple.

By presuming that the contracting couple are the legal
parents after birth, but allowing the surrogate mother to contest
the presumption, both the pre-birth and after-birth psychological
and physiological factors can be factored in to the custody
decision.37 A parent seeking to change custody previously awarded
to the other parent (or relinquished) bears the burden of showing
that a return of the child is in the best interest of the child.38
Similarly where the court enforces a surrogate contract
and the father gets custody of the child, the mother would have
the burden of proving that a change in custody is in the child's
best interest.39 The contracting couple would know that the
surrogate could challenge the contract or custody but be willing
to risk it just as in adoption contracts. A liquidated damages
clause would establish the amount the surrogate would have to pay
for the breach.

This solution allows balancing of the competing interests in
the child and still allows new reproductive techniques. It allows
the mother some control over whether to give the child up while
also protecting the biological father and the original intent of
the parties. It is an appropriate remedy in Virginia where courts
consider the interests of both of the parents along with the
welfare of the child.

Policy Recommendations

Surrogate Parenting agreements serve a need by allowing
couples who want to have a child but are unable to conceive to
obtain a child biologically related to the male of the couple. It
has been acceptable for years to use artificial insemination to
obtain children biologically related to the female of a couple.40

37 In determining the custody of infants, the natural rights of
the parents are entitled to due consideration. Burton v. Russell,
190 Va. 339, 57 S.E.2d 95 (1958). But the welfare of the child is
to be regarded more highly than the technical legal rights of the
39 Shortridge v. Deel, 224 Va. 589, 299 S.E.2d 500 (1983), (Once
relinquishment of custody is established, the natural parent who
seeks to regain custody must bear the burden of proving that such
change is in the child's best interest.)
40 The Uniform Parentage Act, which is in force in 15 states
not including Virginia, (see supra. n. 12), serves to make
artificial insemination acceptable by legitimizing a child born to
a married woman through artificial insemination, protecting the
anonymity of the sperm donor and putting the woman's husband's
Confusion arises over Surrogate Parenting only because of the necessary involvement of a woman to carry and bear the child. Legislation must take into account and clearly define her legal status.

We propose that legislative action similar to the Uniform Parenthood Act be taken with the goal of legalizing and recognizing Surrogate Parenting agreements as an acceptable method of reproduction.

Parties which must be involved are: the contracting couple, the surrogate, physicians who will perform the insemination, care for the pregnant surrogate and deliver the baby, an attorney for the couple and an attorney for the surrogate.

A couple wishing to have a child would file a request with a clinic charged with approving couples for this purpose, and they would be evaluated as to whether or not they would provide a good home for the proposed child. This preliminary custody finding would be presumptively valid and could not be challenged unless at the time the child was born there had been a significant change in the position of the couple: they had separated or divorced, one of them had died, became disabled or mentally ill, or there had been a significant change in their financial position.

With a preliminary custody finding the clinic would proceed to employ the surrogate. She must have been evaluated medically and psychologically and be fully informed as to the medical, emotional and legal risks involved. The couple pays all of her medical and legal bills as they are incurred, take a life insurance policy on her for the benefit of her heirs, bond her for performance, and pay her one-half of the agreed upon fee at the time she is inseminated.

Upon the birth of the child the paternity is confirmed, the father is listed on the birth certificate and the surrogate gives up the child to the wife in a step-parent adoption after the court confirms the preliminary custody finding. When this is complete the second half of the fee is paid to the surrogate.

At two points the surrogate's special role as mother must be taken into account. While she is pregnant she has the right to decide to abort the fetus. If she does so she must reimburse

name on the birth certificate even though he is not the biological father. Va. Code § 32.1-257(D) (1950) has substantially the same effect by legitimizing the child born of artificial insemination to a married woman and maintains a fiction of the paternity of the woman's husband.

41 Roe v. Wade, 410 U.S. 113 (1973)
the couple for all expenses to that date and a performance bond in her name pays the couple liquidated damages. After the birth of the child, if she successfully challenges the preliminary custody finding and retains the child she must reimburse the couple for expenses and for liquidated damages.

We place a strong incentive on the surrogate to go through with the contract because she is only an accessory to the couple's decision to have a child. Were the couple fertile neither the state nor the surrogate would be able to interfere with that decision. In an adoption proceeding the state must decide if the couple is a fit pair to raise an existing child. Here, the child does not exist yet, and the state should have minimal control over whether or not a couple can become parents.

An ideal regulatory scheme will encourage the creation of licensed Surrogate Parenting clinics which would have staffs of trained doctors, counselors and attorneys. They would have contact with a number of surrogates of proven medical and psychological fitness. They would create standardized methods and procedures limiting the medical and legal risk to all parties involved, reducing the cost to interested couples and maximizing the availability of this solution to the problem of infertility.

Virginia would be in the forefront of states by legitimizing and regulating Surrogate Parenting Agreements and would provide a great service to its citizens who wish to become parents but are unable to do so.
SEX DISCRIMINATION IN ATHLETICS

By

Steven T. Buck*

Discrimination on the basis of sex in educational programs is prohibited both by federal law and by the Constitution. Despite this fact, intercollegiate athletics continue to be a male domain, resisting change and integration nearly as fervently as the post-Brown South. Disparity in treatment continues and a substantial basis exists, both constitutional and statutory, for asserting unequal protection of the law.

This Comment is an attempt to analyze the current state of gender discrimination in athletics. The applicability of Title IX of the Education Amendments of 1972 to Virginia athletic programs — particularly intercollegiate athletics — will be studied.

Effect of Title IX

Disparity between the rights of males and females in American society has been the norm, and athletics have proven to be no exception. While Congress, by enacting Title IX, was primarily attempting to eliminate sex discrimination in education, its effect on intercollegiate athletics has received the most public attention and caused the greatest controversy.

Congress' delegated formation and enforcement of regulations defining the statute's broad language to the Department of Health, Education, and Welfare (HEW). HEW's implementing regulations apply the statute's broad prohibition against sex discrimination to specific education programs, including intercollegiate athletics.

Title IX provides that "[n]o person...shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving federal funds." The conflict in interpretation has come in defining the term "program". A debate rages as to whether the statute should apply only to particular programs within an institution (the programmatic approach), or whether it should encompass all programs within institutions receiving federal funds (the institutional

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approach). This controversy especially applies to the area of athletics since very few federal grants are earmarked for athletic programs.\textsuperscript{10} Therefore, a strictly programmatic approach would tend to make Title IX virtually meaningless as it relates to athletics.

The legislative history of Title IX provides little evidence as to Congress' intentions regarding the statute's applicability to intercollegiate athletics.\textsuperscript{11} Only after Congress realized that HEW's regulations included athletic programs did Congress pause to consider the ramifications of such an action. Several efforts to exempt athletics from the statute's scope were thwarted.\textsuperscript{12} Congress chose instead to enact the Javits Amendment, which called for the Secretary of HEW to publish regulations implementing Title IX "which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports."\textsuperscript{13} Congress thus clearly felt that athletic programs fell within the scope of Title IX.

As the legislative history provides no clear indication of the intended meaning of the words "program or activity", parallels between Title IX and analogous statutes could prove helpful. The language contained in both Title VI of the Civil Rights Act of 1964\textsuperscript{14} and section 504 of the Rehabilitation Act of 1973\textsuperscript{15} is identical to that of Title IX\textsuperscript{16}, and similar issues have arisen under these statutes.

Under Title VI, the Fourth Circuit has held that even indirect federal aid\textsuperscript{17} to a university can trigger enforcement of Title VI on an institution-wide basis.\textsuperscript{18} The same rationale was adopted in \textit{Yakin v. University of Illinois},\textsuperscript{19} allowing Yakin to sue for wrongful dismissal under Title VI despite the fact that the psychology department in which he worked received no federal funds. In contrast, the Fifth Circuit took a strict programmatic approach.\textsuperscript{20}

Two recent district court decisions under section 504 of the Rehabilitation Act of 1973, \textit{Wright v. Columbia University}\textsuperscript{21} and \textit{Poole v. South Plainfield Board of Education}\textsuperscript{22} took an institutional approach to interpreting the statute. Both cases involved discrimination against the handicapped in athletics, making the issues involved significantly similar to those arising under Title IX.

In \textit{Wright}, the plaintiff claimed relief under section 504 claiming that Columbia University was discriminating against him by not allowing him to play football because he had sight only in his left eye. The plaintiff claimed, and his coaches agreed, that he was otherwise qualified to play. Columbia claimed that plaintiff had no section 504 action because Columbia's athletic program did not receive federal funds and therefore was outside the statute's scope. The court held that because the school as a whole received federal funds
and because the school administration (not the athletic department, which sided with the plaintiff) had discriminated against plaintiff, an institutional approach would best serve to effectuate the underlying policy of the statute in this case. The court enjoined the defendant's discriminatory actions.

In *Poole*, a student with only one kidney brought an action under section 504 against the school board for denying him the right to participate in his high school's interscholastic wrestling program due to his handicap. Although the athletic department did not receive any federal funds, the court relied on the element of control exercised by the school board over the program in applying the institutional approach in this case.

Courts also have interpreted Title IX's "program or activity" term in contexts other than athletics. Two recent Supreme Court cases, *North Haven Board of Education v. Bell* and *Grove City College v. Bell*, have preempted the field on this question. These cases read in tandem answer many questions in the programmatic versus institutional debate, while raising many new questions.

*North Haven* involved a tenured school teacher who was not rehired after taking what was to be a one year maternity leave. The teacher filed a Title IX complaint with HEW claiming sex discrimination in a program receiving federal funds. HEW began to investigate the employment practices of the North Haven School Board. Asserting that HEW lacked authority to regulate employment practices under Title IX, the Board sought declaratory relief. The Second Circuit held for HEW and the Supreme Court affirmed.

The Court held that Title IX must be given a broad sweep to effectuate its remedial purposes; therefore, employment discrimination in federally financed education programs falls within its scope. The Court did not read "program or activity" so broadly however. "Title IX's legislative history corroborates its general program-specificity." The Court then refused to define "program", preferring instead to rely on a Fifth Circuit decision holding that federal funds may be terminated upon a finding that they "are infected by a discriminatory environment." If discrimination is found, the Court held that the federal funds would be so infected. Although the Court continually emphasized the program-specific nature of Title IX, the analysis it used appeared very similar to the institutional approach.

*Grove City* involved a suit by Grove City College and four of its students which sought to declare void a Department of Education (ED) action terminating federal financial assistance to students attending the college. This action was taken in response to the college's
refusal to execute an Assurance of Compliance with ED regulations prohibiting sex discrimination in educational programs receiving federal financial assistance. The college claimed both that it did not receive federal financial assistance within the meaning of Title IX and that the ED had never proven sex discrimination in any program or activity at the college.\textsuperscript{30}

The Court held that Grove City College did indeed receive federal funds within the meaning of Title IX. Federal funds which are funneled into the school through Basic Educational Opportunity Grants (BEOG) to students attending the school (so-called indirect aid) trigger Title IX coverage as surely as do federal funds going directly to the school. The Court cited Bob Jones University v. Johnson\textsuperscript{31} and the legislative history of Title IX as supporting that result.\textsuperscript{32}

The court then held that a finding of actual discrimination was not necessary before the termination of federal funds. A refusal to execute a proper Assurance of Compliance warranted the Department's action because Title IX requires compliance with all regulations adopted pursuant thereto.\textsuperscript{33}

Although these two issues were the only ones presented by this case, the Court went on to hold that the receipt of BEOG grants by the college's students did not trigger institution-wide coverage under Title IX. The BEOG funds represented financial assistance to the college's financial aid program; thus, that program was held to be properly regulated under Title IX. The fact that federal funds eventually reach the college's general operating budget cannot subject it to institution-wide coverage. The majority opinion spoke in no uncertain terms of the program-specific nature of Title IX, and applied it consistent with that nature.\textsuperscript{34}

Very vocal support was given the institutional approach by Justice Brennan writing in dissent.\textsuperscript{35} According to Brennan, the Court completely disregarded the broad remedial purposes of Title IX that controlled in North Haven. He also attacked the programmatic approach as contrary to congressional intent as shown by the legislative history.\textsuperscript{36}

Brennan's view of the majority opinion may be a bit pessimistic, however. The Court's opinion in Grove City did not reject institution-wide coverage in general, but only on the facts of that case.\textsuperscript{37} The Court seemed to suggest in dicta that nonearmarked grants, for example, would trigger institution wide-coverage.\textsuperscript{38} The Court merely disapproved of the "ripple effect" theory -- that funds earmarked for one program necessarily freed up funds for other programs creating an institution-wide effect in every case.
Several cases have dealt directly with Title IX's impact on athletic programs. Courts and jurisdictions are almost evenly split as to whether to apply Title IX using an institutional or programmatic approach.

The Third Circuit in Haffer v. Temple adopted the institutional approach to Title IX. Haffer involved a class action brought by Temple students alleging sex discrimination in the university's athletic programs. The Court found first that opportunities and expenditures for the men's programs were grossly disproportionate to those given the women's programs. The Court next found that although none of the $19,000,000 in federal assistance given to Temple was earmarked for the athletic department, the receipt of these funds benefitted all areas of the university and triggered institution-wide Title IX coverage. Haffer relied heavily on the Third Circuit's earlier ruling in Grove City College v. Bell. It remains unclear how Haffer's precedential value will be affected by the subsequent Supreme Court modification of Grove City.

The Sixth Circuit was unimpressed by this analysis, ruling in Othen v. Ann Arbor School Board that a fair reading of the plain language of Title IX demands the adoption of the programmatic approach. Othen involved an allegation of sex discrimination in an Ann Arbor athletic program. The only federal funds received by the school district were federal impact grants. Because these funds were indirect and nonearmarked, the court held that they could not be considered to bring athletic programs within the scope of Title IX. The authority of this holding, however, may be affected by dicta in Grove City College v. Bell suggesting that nonearmarked aid, either direct or indirect, could trigger institution-wide coverage.

In University of Richmond (UR) v. Bell, the university sought injunctive and declaratory relief to prevent the Department of Education from investigating its athletic program for Title IX violations. UR claimed that because its athletic department received no federal funds, it could not be subject to Title IX regulation. The court, relying heavily on the dicta in North Haven supporting the programmatic approach, rejected the ED's contention that BEOG funds combined with Library Resource Grants could be sufficient to trigger institution-wide Title IX coverage.

The court instead ruled that the Library Resource Grants could only trigger Title IX coverage for the library program, and that BEOG funds were not direct aid and could not trigger Title IX coverage at all. Therefore, the athletic program did not fall within the scope of Title IX and the ED was enjoined from investigating any program or
activity within the district court's jurisdiction "absent a showing that the program or activity is the recipient of direct federal financial assistance (emphasis added)." The authority of this case is, of course, questionable as its distinction between direct and indirect federal assistance was expressly overruled by the Supreme Court in Grove City College v. Bell.

It is readily apparent that the case law before 1984 can be only marginally useful in determining the present state of Title IX analysis. Grove City completely altered the Title IX landscape. It now remains for the courts of appeals to analyze and interpret this holding.

The Eleventh Circuit relied heavily on Grove City in Arline v. School Board of Nassau County. The case involved Arline, a school teacher who had been fired due to her relapses of tuberculosis. Arline sued in federal court alleging a violation of section 504 of the Rehabilitation Act. The court first considered whether federal impact aid qualified as "federal financial assistance" under section 504 and if so, whether such assistance triggered coverage of plaintiff's program. The court held that impact funds were clearly nonearmarked monies which, according to the dicta in Grove City, triggered institution-wide coverage. The court reasoned that adoption of this approach gave full effect to the broad legislative intent expressed in section 504.

A comprehensive and thoughtful analysis refining and analyzing the scope of Title IX as it relates to Grove City was provided in O'Connor v. Peru State College, an Eighth Circuit decision dealing with Title IX's application to athletic programs. This case involved a women's basketball coach who was not rehired and brought a Title IX sex discrimination action against the college.

The federal financial assistance relied upon by O'Connor was a Title III faculty research grant. A central research facility was established, and the physical education department was granted access to the facility and funds. The district court held that the funds did not constitute federal financial assistance under Title IX because the funds did not go "directly" to the physical education department and because other departments of the school also benefitted.

The appellate court overruled this finding, citing Grove City as expressly rejecting the direct/indirect funding distinctions. Just as the student aid in Grove City was no less federal funds for being channeled through students, the research funds were no less federal funds for being channelled through an administrative structure.

The district court concluded that granting Title IX coverage to the physical education department would be a ratification of the
institutional approach, a result the district court believed to be contrary to Grove City. The appellate court disagreed again, holding that the Supreme Court in Grove City did not reject institution-wide coverage in general, but only on the facts of the case. The Court contemplated that nonearned funds would trigger program-specific coverage. Consistent with this dichotomy, the Court explicitly rejected the "ripple effect" theory.

The Eighth Circuit Court believed that the earmarked/nonearned dichotomy was the appropriate approach in light of Grove City, and that it could be a workable standard if the term earmarked is correctly defined. The Court in Grove City held that the federal funds were "earmarked" for the financial aid program because Congress' purpose was to supplement the college's own financial aid resources. Thus, if Congress intended that Title III funds should be available to all departments within the college, all should fall within Title IX's coverage. The court held that this was indeed Congress' intent in this instance.

Analysis

Sex discrimination in athletics can be psychologically damaging to the woman athlete. Denial of the opportunity to participate in athletic programs may halt a woman athlete's further development thus denying her both the physical and psychological benefits of sport. Although women increasingly do participate in interscholastic and intercollegiate athletics, equality of opportunity and funding between men's and women's programs has not yet been attained.

The stated goal of Title IX is the elimination of sex discrimination in education. The legislative intent underlying the statute consisted of both a desire to ensure through educational opportunity that all Americans develop their full potential, and a desire to eliminate sex stereotyping in our society.

All that remains is to establish an approach which allows a court to reach a result that satisfies the spirit of Title IX without straining the statute's language beyond its logical meaning. The approach taken by the Supreme Court in Grove City goes far toward such a goal. The elimination of the direct/indirect financial aid dichotomy found in many lower courts substantially furthered the spirit of Title IX without contradicting its plain language.

The earmarked/nonearmarked financial aid dichotomy, with its express disapproval of the "ripple effect" theory, has been severely criticized by some commentators who claim that it undermines the spirit and underlying policy of Title IX. These commentators point out that this interpretation could allow institutions to circumvent the remedial purpose of Title IX.
Such an analysis, however, could be reading *Grove City* too broadly. The Supreme Court acknowledged that the legislative history contained evidence "that entire institutions are subject to the nondiscrimination provision whenever one of their programs receives federal assistance" but that such a condition was not warranted by the "circumstances present here."\(^6^5\) It is unfortunate that the Court did not elaborate as to what circumstances would trigger institution-wide coverage in the case of an earmarked grant.

*North Haven* provides an example of such a circumstance. While stressing the program-specific nature of Title IX, the Court stated that where federal funds in one program are "infected by a discriminatory environment" created by a second program, both programs must come within Title IX's scope.\(^6^6\) The Court quoted *Board of Public Instruction of Taylor County Florida v. Finch*,\(^6^7\) a case involving discrimination in admissions policies. Such discrimination was held to infect all programs within the system, subjecting all to Title IX coverage.

Another such circumstance may be analogized from the holdings in *Poole* and *Wright*. These cases stand for the proposition that if the university as a whole was the official or actual decisionmaker in promulgating the discriminatory rule or action, institution-wide coverage should apply.\(^6^8\) This approach prevents "programs" which are not really discrete entities but merely controlled subsidiaries from insulating themselves from Title IX coverage.

This earmarked/nonearmarked dichotomy, limited to the facts of *Grove City* by exceptions such as the aforementioned, would in reality not be the bane to sexual equality its critics claim. Very few athletic departments are not controlled by college presidents or university boards of visitors, and those very few that are totally independent clearly must come within the program-specific language of the statute.

**Conclusion**

Title IX actions are very rare in Virginia athletics. *University of Richmond v. Bell*, by applying a strictly programmatic approach, has had a chilling effect on the bringing of similar suits. Such a result sharply contradicts the legislative purpose behind Title IX. A new approach consistent with *Grove City*, *North Haven*, the language of the statute, and the legislative intent is needed.

Neither the strictly programmatic nor the strictly institutional approach to Title IX can successfully reconcile the program-specific language of the statute with its underlying policy goals. Courts are
obligated to honor the clear meaning of the statute, as revealed by its language, purpose, and history. Therefore, courts must look closely at the relationship between the federal assistance and the athletic department. If the athletic program benefits, either directly or indirectly from the federal funds, or is controlled by someone who does, it should be subject to the anti-discrimination policies of Title IX.

In this way, Virginia's courts can continue to honor the clear language of the statute, while still moving toward the statute's ultimate goal of sexual equality. Such a reading will not end sex discrimination in athletics, but it should land several well-aimed blows.
Footnotes


2. U.S. Const. amend. XIV.


8. 45 CFR §§ 86.1-71 (1977). The section dealing specifically with athletics is 45 CFR §86.41.


11. Athletics were mentioned twice in the congressional debate, 117 Cong. Rec. 30,407 (1971) (Sen. Bayh) (intercollegiate football and men’s locker rooms to remain segregated); 118 Cong. Rec. 5807 (1972) (Sen. Bayh) (personal privacy to be preserved in sports facilities).

12. See 122 Cong. Rec. 28,136 (1976) (redefining program or activity to include only curriculum requirements); 121 Cong. Rec. 23,845 (1975) (limiting Title IX coverage to programs directly receiving financial assistance); 121 Cong. Rec. 22,775 (1975) (reintroducing revenue producing sport exception); 121 Cong. Rec. 17,300 (1975) (disapproving proposed HEW regulations); 120 Cong. Rec. 15,322 (1974) (excluding revenue producing sports); 120 Cong. Rec. 15,322-23 (1974) (excluding athletics completely from Title IX coverage).


17. Indirect federal aid consists of aid accruing directly to students who in turn use the funds to attend the institution.


20. Board of Public Instruction v. Finch, 414 F.2d 1068 (5th Cir. 1969).


26. *Id.* at 521.

27. *Id.* at 537.

28. Board of Public Instruction of Taylor County, Florida *v.* Finch, 414 F.2d 1068, 1078-79 (5th Cir. 1969).

29. Due to administrative reorganization by the Carter administration, HEW was divided into two parts: 1) Health and Human Services (HHS) and 2) Department of Education (ED). The responsibility for implementation and enforcement of Title IX regulations was transferred to the Department of Education by 20 U.S.C. § 3441 (1981).


31. See *supra* at 601-04.


33. *Id.* at 574-75.

34. *Id.* at 570-74.


36. *Id.* at 583-92.

37. 465 U.S. at 570-71.

38. *Id.* at 573.

39. 688 F.2d 14 (3d Cir. 1982).

40. *Id.* at 16.

41. 687 F.2d 684 (3d Cir. 1982).


43. The plaintiff filed a complaint alleging that his daughter's removal from the golf team violated Title IX and state law. After the school established a separate women's team, plaintiff abandoned all claims except one for attorney's fees. Thus, the court decided all issues properly before it in order to rule on the claim for attorney's fees. *Id.* at 1378-79.

44. Where the federal government has placed financial burdens on a local school board, the government provides funds to the localities to compensate for these burdens. 20 U.S.C. § 236 (1965).

45. 465 U.S. at 573.


47. *Id.* at 325-27.

48. 20 U.S.C. § 1029 (1982) established the College Library Resources Program, under which these grants were made. The grants could be used only to purchase eligible library materials.

49. 543 F. Supp. at 333.

50. 465 U.S. at 563-70.


52. See *infra* at n.66.

53. 781 F.2d 632 (1986).
54. The grant was awarded pursuant to 20 U.S.C. § 1057 (1982), the stated purpose of which is to develop and improve academic quality.


56. O'Connor, 781 F.2d at 641.

57. The court went on to say that, even though the physical education department was within Title IX coverage, Title III funds were available only to "improve academic quality." Since plaintiff's allegations of discriminatory conduct went to her coaching rather than her teaching duties, she was denied a Title IX action.


60. Hearings, supra n.23 at 197 (Rep. McKinney).

61. See Gilbert & Williamson, Women in Sports, supra n.22.


63. See, e.g., Issue Manipulation by the Burger Court: Saving the Community From Itself, 70 Minn. L. Rev. 611, 646-50 (1986).

64. Id.

65. 465 U.S. at 570-71.

66. 456 U.S. at 539.

67. 414 F.2d 1068 (5th Cir. 1969).

68. Wright, 520 F. Supp. 789.

VIRGINIA'S NEW MANDATORY SEAT BELT LEGISLATION: 
DEATH KNEll FOR THE SEAT BELT DEFENSE

By E. Diana Hamner and John H. Pitcher, Jr.*

On March 27, 1987, Virginia joined twenty-four states plus 
the District of Columbia requiring mandatory seat belt use.1 
Passage of the legislation was the culmination of five years of 
consideration by the Virginia General Assembly.2 Across the 
nation state legislatures have given recent attention to seat belt 
laws because of intense lobbying by automobile manufacturers3 in 
response to the Department of Transportation's (DOT) enactment of 
the Occupant Crash Protection Rule in 1984.4 The DOT will 
require manufacturers to equip all cars with air bags or front- 
seat automatic belts beginning in 1990 unless states containing 
two-thirds of the population adopt seat belt laws by April 1, 
1989.5

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100a (West Supp. 1987); D.C. Code Ann. § 40-1601 (1986); Fla. 
Stat. ch. 95.5, para. 12-603.1 (Smith-Hurd Supp. 1986); Iowa 
Supp. 1987); Md. Transp. Code Ann. § 22-412.3 (Supp. 1986); 
1986); N.M. Stat. Ann. § 66-7-370 (Supp. 1986); N.Y. Veh. & 
Traf. Law § 1229-c (McKinney 1986); N.C. Gen. Stat. § 20- 
art. 6701d (Vernon Supp. 1987); Utah Code Ann. § 41-6-181 
Nevada also has a statute on the books, but effective date 
has not been determined. Nev. Rev. Stat. Ann. § 484.641 
(Michie 1986).

2Del. J. Samuel Glasscock (D-Suffolk), sponsor of the seat 
belt bill, introduced a similar measure during the 1983-1986 
Sessions of the Virginia General Assembly.

3In Virginia alone in 1986, approximately $200,000 went 
into a statewide educational program and lobbying on behalf 
of the seat belt bill. Richmond Times Dispatch, Feb. 5, 

449 C.F.R. § 571.208 (1985). The purpose of the rule is to 
reduce the number of traffic deaths and severe injuries to 
automobile occupants. See id.

5Id.
The DOT has outlined minimum criteria for state mandatory safety belt usage laws required to prevent enforcement of the passive restraint rule. One of the requirements is that the seat belt defense be allowed by the defendant in mitigation of damages. The seat belt defense "refers to attempts to have testimony regarding a plaintiff's failure to use an available seat belt at the time of an accident admitted into evidence to show either the plaintiff's negligence or failure to mitigate damages." A defendant who invokes the seat belt defense tries to prove that the plaintiff's failure to use a seat belt caused or aggravated the plaintiff's injuries, thus reducing or barring the recoverable damages. By denying plaintiff's full recovery for injuries resulting from automobile accidents if they fail to wear a seat belt, "the seat belt defense may prove to be far more incentive to use seat belts than a traffic ticket or a minor fine."

The new Virginia law fails to meet the federal requirements because it clearly outlaws the use of a violation of the section on the mitigation of damages issue, forbidding the use of the seat belt defense in Virginia. The General Assembly had previously mandated that the failure to use seat belts "shall not be deemed to be negligence nor shall evidence of such nonuse of

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6See id.
7The law must include:
   A provision specifying that the violation of the belt usage requirement may be used to mitigate damages with respect to any person who is involved in a passenger car accident while violating the belt usage requirement and who seeks in any subsequent litigation to recover damages for injuries resulting from the accident.
49 C.F.R. § 571.208.
8Marema, A New Perspective on the Duty to Buckle Up, 27 For the Def 23 (1985). This article's focus is on the use of the seat belt defense in the mitigation of damages.
10Id. at 29. But see Miller v. Miller, 237 N.C. at 237, 160 S.E.2d at 73 (1968).
11The Bill provides:
   A violation of this section shall not constitute negligence, be considered in mitigation of damages of whatever nature, be admissible in evidence or be the subject of comment by counsel in any action for the recovery of damages arising out of the operation, ownership or maintenance of a motor vehicle, nor shall anything in this section change any existing law, rule or procedure pertaining to any such civil action.
such devices be considered in mitigation of damages of whatever nature.\textsuperscript{12} Several other states have also specifically precluded the use of the seat belt defense in mitigation of damages despite the DOT's requirements.\textsuperscript{13} The possibility exists that if enough states adopt mandatory seat belt laws, the DOT requirement of a seat belt defense will be modified.\textsuperscript{14}

The Virginia Law: Va. Code § 46.1-309.2

Passage of Virginia's new mandatory seat belt use law was a long fought victory, but a weak one in terms of enforcement of the law and incentives to ensure usage of seat belts. The new law requires most drivers and front-seat passengers to use seat belts.\textsuperscript{15} The bill was passed only after much compromise. The law is essentially identical to the bill that the Senate approved during the 1986 session but was defeated on a tie-breaking vote by Lt. Gov. L. Douglas Wilder. During the 1987 session of the Virginia General Assembly, the Senate voted down a measure allowing a voter referendum to determine the fate of the seat belt law.\textsuperscript{16}

The mandatory seat belt law will become effective January 1, 1988.\textsuperscript{17} During 1987, the state police and the Department of Motor Vehicles will conduct a campaign to encourage compliance and public awareness. Legislators hope that the seat belt law's "mere presence in the code [will] encourage thousands of Virginians to buckle up."\textsuperscript{18}

The law includes several exemptions. If a licensed physician determines that use of a seat belt is impractical for medical reasons, a person will be exempt if he carries the doctor's statement with him.\textsuperscript{19} The law does not apply to law enforcement officers in certain situations.\textsuperscript{20} Rural mail carriers, rural newspaper route carriers, newspaper bundle handlers, newspaper

\textsuperscript{13}D.C., Ind., Kan. and Utah. See statutes cited supra note 1.
\textsuperscript{14}Richmond Times Dispatch, Feb. 21, 1986, at 1, col. 1.
\textsuperscript{15}Va. Code § 46.1-309.2 (March 27, 1987).
\textsuperscript{16}Richmond Times Dispatch, Feb. 17, 1987, at 1, col. 3. The Senate voted 23 to 16 against a seat belt referendum.
\textsuperscript{17}Va. Code § 46.1-309.2(2) (March 27, 1987).
\textsuperscript{18}Richmond Times Dispatch, Mar. 8, 1986, at A-6, col. 1.
\textsuperscript{19}Va. Code § 46.1-309.2(C)(1) (March 27, 1987).
\textsuperscript{20}Va. Code § 46.1-309.2(C)(2) (March 27, 1987).
rack carriers and taxicab drivers are all exempt from the statute.21

The only punishment for a violation of the law is a twenty-five dollar civil penalty that will be credited to the Literary Fund.22 A violation of the section can in no way be used against the violator in court.23 The greatest amount of debate in the 1986 session centered on the method of charging motorists with a violation. The approved version of the law restricts police to enforcing the seat belt law only after they have charged the driver for an unrelated motor vehicle violation such as running a stop sign or speeding. In 1986, the Senate urged a version allowing police to charge motorists any time they see a violation.24 The House would not approve this stronger version.25 Essentially, law-abiding citizens who refuse to wear a seat belt will never be charged with a violation of the seat belt law.

The Seat Belt Defense

The question of whether a plaintiff's nonuse of an available seat belt is admissible in mitigation of damages has produced a split of authority. A substantial number of courts which have considered the seat belt defense in terms of mitigation of damages have decided that evidence of nonuse may not be admitted. The minority position allows admittance of such evidence. This article surveys both positions to draw conclusions about whether the Virginia General Assembly might consider amending the new

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21Va. Code § 46.1-309.2(C)(3) and (C)(4) (March 27, 1987). "Del. William P. Robinson Jr., D-Norfolk, said that the exemption for taxi drivers was needed because some have had belts used to restrain them during robberies." Richmond Times Dispatch, Jan. 31, 1986, at A-10, col. 1.

22Va. Code § 46.1-309.2(D) (March 27, 1987). The Virginia law complies with DOT criteria which requires a penalty of not less than $25.00. 49 C.F.R. § 571.208.

23See supra n. 11.


25Some legislators feared that law enforcement officers would use the law to harass violators if given the freedom to charge motorists any time they saw a violation. Telephone interview with Delegate J. Samuel Glasscock, sponsor of the seat belt bill (Mar. 30, 1987).
mandatory seat belt statute in the future to include the use of the seat belt defense.26

**Jurisdictions Not Recognizing the Seat Belt Defense**

The use of the seat belt defense in mitigation of damages has encountered a number of obstacles. The most prevalent argument is that the seat belt defense for mitigation of damages conflicts with a number of traditional tort doctrines.27 In states adhering to the contributory negligence doctrine28, any negligent conduct by the plaintiff will bar all recovery. Most courts find this result unjust: "[i]t would be a harsh and unsound rule which would deny all recovery to the plaintiff, whose mere failure to buckle his belt in no way contributed to the accident, and exonerate the active tort-feasor but for whose negligence the plaintiff's omission would have been harmless."29 Alternatively, "[t]o admit such evidence of nonuse would permit the jury to 'compare the damages' which in practical effect might reach almost the same result as 'comparative negligence.'"30

Allowing evidence of plaintiff's nonuse of an available seat belt also runs counter to the traditional notion in tort theory that unless put on notice to the contrary, one is not required to anticipate another's negligence.31 The failure to anticipate another's negligence is insufficient negligence to provide a bar for recovery for injuries.32 No duty to anticipate another's negligence exists in the absence of a statute to the contrary.33

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26There are three possible applications of the seat belt defense: (1) negligence per se, (2) contributory negligence, and (3) mitigation of damages. The most successful application has been the mitigation theory, which will be the focus of this article.
27See Westenberg, supra note 9, at 788.
28Virginia, along with Alabama, the District of Columbia, Maryland, North Carolina and South Carolina, has not adopted the comparative negligence doctrine. Id. at 836-40.
29Miller, 273 N.C. at 237, 160 S.E.2d at 73.
The doctrine of avoidable consequences\textsuperscript{34} also precludes the use of the seat belt defense. This theory imposes a duty on the plaintiff to minimize damages after the accident has occurred. The doctrine of avoidable consequences is not applicable to the seat belt defense because the plaintiff's alleged negligent act, the failure to fasten the seat belt, occurred before the negligent act of the defendant.\textsuperscript{35} The seat belt defense simply does not fit into the doctrine of avoidable consequences\textsuperscript{36}, and most courts are not willing to stretch the doctrine to accommodate the seat belt defense.\textsuperscript{37}

In a negligence action, traditionally the defendant takes the plaintiff as he finds him once injury proximately caused by defendant's negligence is introduced. The seat belt defense changes this rule by allowing the defendant to modify his liability according to whether his innocent victim was wearing a seat belt at the time of the action. Courts are reluctant to modify this tort theory.

Another concern of courts in considering the seat belt defense on the mitigation of damages issue is jury speculation and conjecture. The seat belt defense "would tend to cause rampant speculation as to the reduction . . . in the amount of recoverable damages attributable to [a] failure to use available seat belts."\textsuperscript{38} Juries grapple with questions similar to the ones involved in a seat belt defense when they deal with proximate cause and future damages,

[b]ut at least in such instances, the judgment deals with what did in fact happen or what is reasonably probable to happen. In the seat belt area, we are dealing with what would have happened . . . if the seat belt had been used as well as what happened due to the failure to use the seat belt.\textsuperscript{39}

A further problem arises when the jury determines that the plaintiff's failure to use a seat belt did aggravate the injuries,

\textsuperscript{34} Also referred to as the doctrine of mitigation of damages.
\textsuperscript{35} Britton, 287 Ala. at 342, 242 So. 2d at 671.
\textsuperscript{36} Lipscomb, 226 A.2d at 917.
\textsuperscript{37} The sole exception is New York. Westenberg, supra note 9, at n. 13.
\textsuperscript{39} Lipscomb, 226 A.2d at 918.
but the jury has trouble separating the injuries caused by the plaintiff's own negligence. According to the rule of avoidable consequences, if the jury cannot make the division, the negligence of the plaintiff will bar all recovery. When the jury cannot make an apportionment of the damages, a harsh conclusion similar to contributory negligence results. Courts are not lightly dismissing the role of conjecture and the complexity of apportionment of damages involved in the seat belt defense.

Lastly, a number of courts have determined that evidence of plaintiff's nonuse of a seat belt should not be used to mitigate damages if the plaintiff has no statutory or common law duty to wear a seat belt. These courts indicate that the proper vehicle for adoption of a seat belt defense based on mitigation of damages is action by the legislature. "[I]t is apparent that acceptance of the seat belt defense can only be justified as a deviation from common law negligence on a public policy theory . . . The legislature, and not the judiciary, serves as the barometer of public policy . . ." In states where the legislature has spoken against the seat belt defense, the courts recognize that the legislature has foreclosed its use.

**Jurisdictions Recognizing the Seat Belt Defense**

The jurisdictions which do not permit nonuse of a seat belt to be introduced as evidence in mitigation of damages primarily focus on the accident as a single, undivided unit. The test used by these jurisdictions is whether the accident was the proximate cause of the injury. If the answer to this

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40Id. at 917.
41Id. (Dean Prosser's analysis of the rule of avoidable consequences).
42See Vizzini, 72 F.R.D. at 138; Miller, 273 N.C. at 240, 160 S.E.2d at 74.
45In other words, these courts do not consider the effect of a "second collision", i.e., the impact which occurs when the occupant is thrown against the interior of the motor vehicle. This issue is of particular importance in crashworthiness cases.
question is in the affirmative, the analysis is complete and the issue of whether the use of an available seat belt would have mitigated the extent of the injury is never raised.\textsuperscript{48} Jurisdictions that do recognize the seat belt defense\textsuperscript{49} view the accident as comprising separable stages, and consider not only the initial collision but also the impact that occurs when the occupant is thrown against the interior of the automobile. The leading case on the mitigation theory is \textit{Spier v. Barker}.\textsuperscript{50} In \textit{Spier}, the court decided that because of increased public awareness concerning the efficacy of seat belt use in preventing traffic injuries and fatalities, the failure of a plaintiff to use an available seat belt could be considered unreasonable in some circumstances.\textsuperscript{51} The court held that nonuse of an available seat belt is a factor the jury may consider\textsuperscript{52}, subject to two important limitations. First, the mitigation defense is limited to the issue of damages, and may not be considered by the jury with regard to the question of liability. Second, the defendant has the burden of producing competent evidence which demonstrates "a causal connection between the plaintiff's nonuse of an available seat belt and the injuries and damages sustained."\textsuperscript{53} By imposing these limitations, the court took into consideration the criticism directed at the seat belt defense, and in essence forged a compromise with the opponents of the theory.

\textsuperscript{48}Id. The use of this test would seldom, if ever result in a finding that failure to wear an available seat belt was the proximate cause of the injury. \textsuperscript{49}See Marema, \textit{The Seat Belt Defense - An Update}, 28 For the Def. 19, 20 (1986). The following states allow evidence of nonuse of an available seat belt to be introduced in mitigation of damages: Connecticut, New York, Pennsylvania, Wisconsin, and Wyoming. Louisiana, Maryland, Michigan, and Nebraska also allow mitigation, but limit the amount of damages which may be reduced. Florida recognizes the seat belt defense as evidence of comparative negligence, while California has been willing to view the defense as evidence of contributory negligence. \textsuperscript{50}35 N.Y.2d 444, 323 N.E.2d 164 (1974). \textsuperscript{51}Id. at 450, 323 N.E. 2d at 167. Although the court indicated that failure to use an available seat belt could be considered unreasonable depending on the circumstances of the particular case, it was unwilling to impose seat belt use as a standard of reasonable conduct because New York did not have a mandatory seat belt law at that time. \textsuperscript{52}Id. \textsuperscript{53}Id.
The primary concern was that adoption of the seat belt defense would be tantamount to finding the plaintiff contributorily negligent, resulting in a directed verdict for the defendant. If this procedure was accepted, the tort-feasor would be relieved of liability for his wrong, contrary to the desire of the courts to do substantial justice to both parties. This objection is eliminated by limiting the defense to the issue of damages only, so that the defendant is still answerable on the merits of the case. The second concern was the possibility that the question of damages would be subjected to open ended speculation by jurors, but this problem has not proven insurmountable. For the defendant merely to prove that the plaintiff failed to wear an available seat belt is insufficient to invoke the seat belt defense. The defendant must produce evidence competent to satisfy the court's nexus requirement that the failure to wear a seatbelt directly caused aggravation of the plaintiff's injuries. If the estimation of aggravated injuries is too speculative, the court will not allow the jury to consider mitigation of these damages. Furthermore, a calculation of the injuries caused by nonuse can be accurately measured by accident reconstruction experts.

A more difficult common law obstacle for the seat belt defense to overcome is the doctrine of avoidable consequences. According to this theory, a plaintiff is under a duty to mitigate all damages after an accident occurs which can be avoided. The best example of this doctrine is the requirement that the plaintiff seek medical attention as soon as possible after an accident. If the plaintiff delays in seeking medical attention resulting in an exacerbation of his injuries, the defendant is not liable for the effect of this delay. The seat belt defense, however, does not fit squarely within the perimeters of the

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54This position is consistent with the Restatement (Second) of Torts § 465 (1965).
55See Annot, 80 A.L.R.3d 1033, 1041 (1977). The defendant's attorney can readily procure the services of an expert from an undergraduate engineering school. See also Amend v. Bell, 89 Wash. 2d 124, 570 P.2d 138 (1977) (seat belt defense rejected on the grounds that it would lead to a battle of expert witnesses).
doctrine of avoidable consequences. The doctrine applies only to avoidance of post-accident damages, and does not require the plaintiff to mitigate damages prior to the accident. Many of the jurisdictions which have refused to adopt the seat belt defense have done so because of a reluctance to extend the doctrine of avoidable consequences to cover mitigation of pre-accident damages. According to these jurisdictions, the extension of the doctrine would impose a duty on the plaintiff to anticipate the negligence of others in direct contradiction to common law principle. This doctrine generally has not been applied to mitigation of pre-accident damages in the past because it has not been technologically feasible for a plaintiff to predict or prevent damages before an accident happens. The wide availability of seat belts in automobiles prompted the court in Spier to extend the doctrine to cover mitigation for nonuse. The court reasoned that "the seat belt affords the automobile occupant an unusual and ordinarily unavailable means by which he or she may minimize his or her damages prior to the accident." Motor vehicle studies support the court's position that traffic fatalities and injuries are reduced by use of safety belts.

The Seat Belt Defense in Virginia: Case Law

The only case in Virginia that has considered the seat belt defense is Wilson v. Volkswagen of America, Inc. Because this was a case of first impression, the district court had to predict whether the Virginia courts would adopt the seat belt defense. The court decided that in light of existing trends in Virginia case law, the courts of this state should adopt the seat belt defense. The court imposed the same limitations provided for in Spier, that is, that mitigation would apply to damages only, and must be based upon the production of competent evidence.

In adopting the seat belt defense, the court was faced with the

56 35 N.Y.2d at 452, 323 N.E.2d at 169.
57 See Richmond Times Dispatch, Feb. 16, 1987, at A-11, col. 1. It is estimated that use of safety belts would eliminate at least 100 of the 1,000 traffic fatalities in Virginia each year.
59 Id. at 1372.
60 Id.
problem that Virginia law did not allow nonuse to be considered as evidence of negligence.\textsuperscript{61} The court stated that the prohibition on establishing negligence from nonuse did not prevent a jury from considering such nonuse in mitigation of damages. The court reasoned that had the General Assembly intended to prevent evidence of nonuse from being introduced to mitigate damages, it explicitly would have provided for such a proscription.\textsuperscript{62} Within two years of this decision, the Virginia General Assembly overruled \textit{Wilson} by amending the seat belt law to include a provision that nonuse of a safety belt shall not "be considered in mitigation of damages of whatever nature."\textsuperscript{63} The addition of this provision foreclosed use of the seat belt defense in civil actions, by providing the courts with a clear indication of the Assembly's intent that the defense be disallowed.

\textbf{Conclusion}

The Virginia General Assembly has taken an important first step toward reducing the number of traffic deaths and injuries by passing the new mandatory seat belt law. Although the statute explicitly prohibits the seat belt defense in civil actions, support for the law was divided and exclusion of the defense was necessary in order to secure passage of the measure. The seat belt defense should be reconsidered for adoption by the Assembly in the near future. At the present time, the defendant is liable for all the plaintiff's injuries in an automobile accident, including those injuries which are in the plaintiff's exclusive power to avoid. The equities involved in the seat belt defense controversy are difficult to balance, and the defendant should be liable, as the principle tort-feasor, for those injuries over which the plaintiff has no control. With passage of the new mandatory seat belt law, the plaintiff no longer has an excuse for failing to buckle up, and the defendant should not be held liable

\textsuperscript{61}The statute at this time stated: "Failure to use such safety lap belts, . . . shall not be deemed to be negligence." Va. Code Ann. § 46.1-309.1(b) (Repl. Vol. 1974)

\textsuperscript{62}455 F. Supp. at 1371.

\textsuperscript{63}Va. Code Ann. § 46.1-309.1(b) (1986).
for the plaintiff's failure to do what is now legally required of all Virginians.

Correction: in "The Time is Ripe" discussing the need for a small claims court in Virginia, Vol 15, #2, p. 42, a citation for Mr. Barney's example of a landlord-tenant dispute was omitted. That citation is: Sandra Evans, "Small Claims Rules Confusing in Virginia," Washington Post, 9 November 1986, p.1, col. 1.
Adoption by the 1987 Virginia General Assembly of a non-binding Presidential primary for 1988 does not resolve which delegate selection process, caucus or primary, best represents the interests of Virginia voters. Both parties want a democratic process of selection, fiscal responsibility, adequate representation, and strong party organization. By opening the party nomination doors to registered voters, we can expect the names on the party ticket to more accurately reflect the choices of voters at large. Although seeking popular consensus in nominating candidates seems to be the truly democratic approach to this crucial election process, the benefit of centralized party strength endemic to the mass meeting system is sometimes lost amidst the primary.

Whichever process is used, Virginia remains under the strictures of select federal legislation, the Voting Rights Act of 1965. The Act was originally imposed upon seven states and certain counties in three other states for poll practices found to be discriminatory. Now, an affected jurisdiction cannot permissibly "bail out" of the bonds of the act until it obtains "prec clearance" from either the United States District Court for the District of Columbia or the United States Attorney General.

In the past, Republicans and Democrats have used both primaries and caucuses in an attempt to control the state government and the federal offices from Virginia. In recent years the caucus system has been criticized for being unrepresentative of Virginia's electorate. Is the primary system, given its checkered history, really better for Virginia? This

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article presents arguments supporting and opposing the use of the primary election in Virginia for nominating candidates for public office.

The Virginia Primary is an asset to the Virginia electorate.

The simplest alternative to the mass meeting nomination process for political candidates is delegate selection by state primary elections. Results of the relatively closed convention method often leave voters feeling stripped of their right to vote for lack of participation. A political party that does not reflect popular sentiment or that restricts itself to maneuvering by party "insiders" limits itself to accomplishing something less than the desired objective: nominating a candidate who most clearly reflects the goals and beliefs of the party and who is most likely to implement those views by achieving success in the general election.5

Following are arguments which bolster the use of primary elections rather than candidate selection by mass meetings, and why the former are more advantageous to a democratic society.

Primaries are more open and democratic than mass meetings.

The nature of party conventions causes introvertedness of the party, led by party activists. The chosen few control the direction that a party takes in selecting its nominees. Only one percent of the Virginia electorate participates in the mass meetings.6 Excluding 99 percent of Virginia's registered voters7 does not maintain an ideal democratic electoral system. Additionally, Republicans have charged a fee to participate in the mass meetings,8 a practice which hauntingly resembles the unconstitutional poll tax.9

The General Assembly's recent adoption of the primary nomination system for the 1988 Presidential race will create a

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6The Virginian-Pilot, April 22, 1985, at C4, col. 2.
7Richmond Times-Dispatch, April 18, 1985, at Section D-2, col. 1.
8See supra note 6.
9See U.S. Const. amend. XXIV.
party candidate selection process more accessible to rank and file party members, while avoiding practices sometimes perpetrated during party conventions.\textsuperscript{10} The possibility of corruption associated with mass meetings is shown by one example that tarnished the road to the 1985 governorship.

The site was the Charlotte County courthouse.\textsuperscript{11} The event was a caucus to elect delegates and alternates to the 1985 Virginia State Democratic Convention. Instead of holding a convention where interests were united to strengthen the party, the meeting evolved into a divisive battle between the Davis and Baliles camps.

The caucus was organized by a Baliles partisan who was in fact listed on the ballot as a Baliles candidate for delegate. Temporary rules governing the conduct of the meeting were not available at least a week in advance of the April 1, 1985 caucus, in violation of the Virginia Democratic Party Plan. The meeting was held in a courthouse with seating capacity of approximately 175 persons, but almost 300 attended. No access was provided for the handicapped.

Despite the fact that the crowd would exceed capacity became apparent about a half an hour before the 7:30 p.m. starting time, the chair did not make an effort to secure enough certification forms for registering everyone until immediately prior to 7:30. Thus, the meeting began late, and people entered the caucus through the courthouse doors that were left open after 7:30. Undermining the requirement to have different size ballots to vote for delegates and alternates, duplicate ballots of uniform size were copied and distributed. The result was chaos in distinguishing the ballots, creating the opportunity for a skewed tally through double balloting.

A feature of the Charlotte caucus was the racial division that occurred during the meeting. The chair requested that the

\textsuperscript{11}See, testimony concerning Charlotte County Grievance before the Temporary Credentials Committee of the State Democratic Party at the John Marshall Hotel, April 14, 1985, Richmond, Virginia.
crowd physically divide itself into respective camps on opposite sides of the room, which resulted in virtual black and white division. Peer pressure and public exposure directly influenced the participants; intimidation from the chair fueled animosity.

Order and control were poorly exercised in the distribution of the ballots to the crowd. Numerous electors voted for more than the apportioned number of candidates for delegates and alternates. The chair left the location with the ballots and certification forms. There was no verification that participants in the caucus were registered voters. The result of the uncontrolled caucus was the improper election of 9 Baliles delegates and 4 Baliles alternates to the 1985 Virginia State Democratic Convention.

If the mass meeting system and its heightened possibility of misfeasance were maintained, Virginia might never see the end of a political structure unresponsive to popular sentiment and generally desired results at the polls. Such a system might never stabilize for the five year period required to release the Virginia electoral process from the proscriptions of the Voting Rights Act. Enacting the primary system for the Presidential nomination is a positive step towards opening the availability of elected office to the selections of the masses, rather than to only the party regulars.

**Party autonomy and the open primary problem of "Crossover".**

A serious problem arises with the General Assembly's adoption of the primary because Virginia's primary is "open." Open primary states do not require voters to register with a particular party to exercise their right to vote. This characteristic creates the inevitable effect of "crossover," where members of party A raid party B's primary and vote in an attempt to influence the outcome, desirably leaving party A with an undue advantage relative to party B's result. The objective is to vote for the

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12See, Challenge Before the Temporary Credentials Committee of the 1985 Virginia Democratic State Convention.
14See supra note 10, at 84.
other party's underdog so that your party's first choice will face better odds in the general election should both candidates advance.\(^{15}\) Carried to its logical extreme, the result of voters participating in another party's primary may be the advancement of candidates other than the party's best to contend in the general election. This leaves all voters with two second choices and no first-choice candidate. Pragmatically, this scenario is unlikely. Nonetheless, the results in an open primary are not necessarily a reflection of the judgment of the party adherents.\(^{16}\) A party could shrink or grow unnaturally, limiting its ability to accomplish its political tasks.\(^{17}\)

Virginia is no stranger to elections tainted with crossover. In 1978, the Virginia Democratic party abandoned the use of primaries after losing control of its nominations when populist hopeful Henry Howell defeated Andrew P. Miller for the U.S. Senate nomination.\(^{18}\) Crossover was blamed for sparse voter turnout in 1949 and caused the Republican party to turn to mass meetings as an alternative nominating process.\(^{19}\)

The lack of major party membership does not render independents any less culpable with respect to crossover. They may register with a party in order to influence its primary,\(^{20}\) sometimes because of mere attraction to a particular candidate.

Loss of control by a party of its candidate selection is a threat to "party autonomy."\(^{21}\) In an attempt to preserve the structure and cohesiveness of a party, constitutional arguments based on a party's claimed right of free association have been advanced to limit a state legislature's ability to open its primaries to party "outsiders."\(^{22}\) Additionally, a state statute forbidding voting in primaries by non-party registrants is an

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\(^{15}\)Since voters are allowed to vote only once in a primary election, participating in another party's primary results in a trade-off in the power of a vote.

\(^{16}\)See supra note 5, at 182.

\(^{17}\)Id.

\(^{18}\)See supra note 6.

\(^{19}\)Id.

\(^{20}\)Id.

\(^{21}\)See supra note 10, at 97.

\(^{22}\)Id. at 100.
unconstitutional deprivation of a party's freedom of political association rights. 23

The associational rights claim was used in 1958 when the United States Supreme Court recognized that an individual's right of association under the First Amendment may be applied to a group as a whole when the organization consists of individuals supporting a common belief. 24 This rationale was expanded to find party autonomy for the National Democratic Party in 1975. 25 In the same year, the United States Circuit Court for the District of Columbia closed the gap in the application of associational rights analysis to political parties in holding that a national party's selection of a nominee deserves constitutional protection. 26 In Ripon, Chief Justice Bazelon declared that the rights of speech and assembly would be meaningless without an accompanying right of political association. 27 The U.S. Supreme Court voiced its opinion on the application of associational rights to political parties in 1981 when it affirmed its position in Cousins and held that national parties have a right of protection from intrusion by party outsiders, and further noted that this rationale supports extending associational rights to state political parties "as adherents to national parties." 28 In sum, parties may freely define their membership requirements under the associational rights protection, as long as they are not discriminatory.

In order to preserve party autonomy, some states enacted statutes requiring those voters who wish to participate in the upcoming election to register with a particular party well in advance of the primary election. 29 However, in some cases, these
requirements are held to be an excessive restriction on one's right to vote.\(^{30}\) The ultimate balance involves the individual's right of freedom of association and the party's inverse right of autonomy. The controlling factor in the balancing of the electoral interests is whether the voter can participate in the upcoming primaries if he acts promptly in changing his or her party affiliation.\(^{31}\)

Another objection to parties' self-protection efforts arose with the "white primary" cases\(^{32}\), where black voters were excluded from the nominating elections. In an unexpected variation from the exclusive status political parties seemed to have acquired under the party autonomy dispute, the Supreme Court found parties to be commissioned with a public responsibility that precludes the denial of access to the polls to black voters.\(^{33}\) Thus primaries are not the exclusive province of integral private associational organization.\(^{34}\)

Although the attempt to maintain a "private" party is clearly prohibited by Smith, this does not render party autonomy lifeless.\(^{35}\) Discrimination is distinguished from party adherence. Therefore parties are faced with the serious dilemma of trying to bolster party membership and enthusiasm while simultaneously screening out those infiltrators who may eventually skew the party's desired outcome. However, this is where the interest of the party should become subservient to the voters as individuals and let the democratic process run its course.

Party registration is the means by which a party can most effectively avert the danger of crossover. When viewed as


\(^{31}\)See supra note 10, at 90.

\(^{32}\)Id.


\(^{35}\)See supra note 10, at 92.
encouraging wide voter participation and supporting developed party autonomy, requiring voters to register is not overly burdensome. As it stands, the results of the 1988 Virginia primary will be non-binding without party registration.36

Giving party regulars more control by using mass meetings/conventions does not make the political parties stronger.

A popular argument supporting the use of mass meetings is that the inherent control exercised by party activists makes the party stronger. Party "activists" are those individuals devoted to serving their respective parties by donating their time and effort to attending party caucuses and serving as delegates to state conventions37, and in recent Virginia history have nourished convention life by continuing to serve as delegates to subsequent mass meetings.38 But given the presumed experience and established beneficial contacts party regulars acquire, the apparent party cohesiveness proves to be transparent. For example, approximately 40 percent of delegates polled during the Democratic state convention held in Richmond in June, 1980, responded that they would not actively support the successful nominee if their supportee, either Edward Kennedy or Jimmy Carter, did not receive the party's nomination.39 In contrast, an average of 10 percent of Republican delegates polled at the GOP convention the same month indicated noncommittal if their choice did not succeed.40

This alienage occurred in recent Virginia gubernatorial nominating conventions as well. An intraparty feud in 1985 between Democratic hopefuls led to accusations of delegate stealing, resulting in what the American Civil Liberties Union has termed a "debacle" in state nominating procedure.41 Both the Democratic and Republican conventions were blamed for clouding the

38Id. at 185.
39Id. at 190.
40Id.
41See supra note 7.
nominating process and leaving the position of leaders and laggers indistinguishable.

The weakness that tainted the Democratic party in 1980 was obvious to its victim and political observers: both the Democratic and Republican delegates considered the GOP convention to be the most effective.42

**Primaries are not more costly than mass meetings.**

Perhaps the most revealing method of analyzing the costs of conducting conventions and primaries is the dollar-to-vote ratio which emerges from the election results.

Consider the most recent local controversy concerning the cost of conventions which arose out of the 1985 gubernatorial race. Collectively, the two Democratic nominees and the two Republican nominees43 spent over $3 million seeking their respective party's candidacy.44 Be mindful that successful candidates had yet to begin spending on the then upcoming general election.45 Baliles' dollar-to-vote ratio, an oft-quoted figure, reached well over $400 for each delegate that his campaign sent to the Democratic state convention.46 Davis spent even more for fewer delegates.47 No Virginia primary has ever cost more than what was spent by the four prospective gubernatorial nominees in 1985.48 Opening the nominating process to Virginia voters will surely produce a less expensive result.49

Candidates nominated by the caucus system represent the interests of Virginians.

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42See supra note 37, at 193.
43The Democratic nominees were Lt. Gov. Richard Davis and Attorney General Gerald Baliles. The Republican nominees were Wyatt Durette and 8th District Rep. Stanford Parris.
44Virginian-Pilot, April 6, 1985, at A10, col. 1.
45Id.
46Id. See also supra note 7, col. 3.
47See supra note 44, col. 2.
48See supra note 46.
49Virginia Senate Majority Leader Hunter B. Andrews (D.-Hampton) estimated that the Presidential primary will cost about $1.2 million and that the legislature would appropriate about $500,000 to lessen the financial burden on locales. See supra note 36, col. 3.
The change from a primary candidate selection system to mass meeting selection twice in the past is an indication that both political parties realized that a primary is synonymous with defeat in the general election. Reeling from a disastrous primary that split the party, the Democrats have used the caucus method to regroup and regain control of the governor's mansion and five of the ten Congressional seats. The Republicans have not nominated a candidate by any other method than the caucus since 1949, in a embarrassing primary where only 9000 Virginians exercised their franchise.\(^{50}\)

The caucus system has been defended by both parties as the selection process that best represents the interests of the party and allows a democratic selection of the candidates. They present arguments to support this position.

**Caucuses are open and democratic.**

Under the guidelines established by both major parties, the selection process of delegates must be published for public information. All feasible efforts must be made, regardless of the selection process, to allow for full public participation.\(^{51}\) Full notice requires timely notice that would allow all registered voters to participate on the process even if they previously belonged to another party. The 1968 Democratic Convention Call and subsequent calls have provided for easily accessible meeting places at convenient times. The Virginia Call to Convention for 1985 required that the rules for the local caucuses be published no later than one week in advance, and provided for an appeal process for contested rules and delegate election.\(^{52}\) The Republican Party has similar provisions incorporated into its Convention Plan.\(^{53}\) Both plans provide for Saturday and evening caucuses in an attempt to encourage more participation. While the Republicans have charged a fee to be a delegate or a delegate.

\(^{50}\)Id.  
\(^{51}\)See supra note 5, at 208.  
\(^{52}\)Delegate Selection Plan and Call to Convention for the 1985 Virginia Democratic State Convention, p. 11 [hereinafter cited as Convention Plan].  
\(^{53}\)See supra note 5, at 209.
participant, the Democrats charge a fee for delegate participation only.

**Primaries create division within the party making it harder to unite for the general election.**

Primaries, with their inherent competitive element, are too divisive. The sharp division created between supporters of Henry Howell and Andrew Miller in the 1977 Primary was so severe that the party organization could not recoup sufficiently to mount a viable campaign against John Dalton in the general election.

The first ballot commitment requirement of the Democratic Party rules allows the candidates to assess their positions and either concede early and compromise with the future victor, or place themselves in a position to trade delegates for concessions to positions they represented before the convention, thereby unifying the platform and avoiding the possibility for factions. Unlike the primary selection method that is over in one day, the time spread for the compromise period can be several weeks.

The candidate in the convention method is selected by a majority, subject to a provisio for elimination on each ballot so that the eventual candidate is a majority choice and reflective of the delegates’ consensus. It is possible in a state that doesn't have a run-off provision to have a candidate that received only 21% of the vote to be the nominee of the party.

**Giving the party regulars control of the caucus/convention process makes the party stronger.**

Making the party stronger does not mean that the party regulars necessarily support a specific party leader, but that they support the party itself. Although the leadership reflects the party program, changes in the program direction often come from the support of the regulars. At the June 1985 Republican and Democrat Conventions in Richmond, 76% of the Democrats and 74% of the Republicans responded that party support was a very important
factor in their attendance. The strength of a party rests in its ability to elect candidates. Since the return of the Democrats to the Caucus system in 1981, they have won the last two gubernatorial elections and half of the Congressional seats. The caucus system allowed the party to regroup by providing a list of party activists that are willing to identify themselves as members of the party and who are willing to donate time, influence, and money to get candidates elected.

The caucus system best utilizes limited financial resources. Limited financial resources have not played as critical a role to the Republican Party as they have in the Democratic Party's decision to change to the caucus system. The Republican Party has always been a more effective fundraising organization than the Democratic Party. Utilization of modern mail and computer based fundraising techniques have given the Republicans a financial edge in the past, thus relieving them of the necessity of having to save funds as an excuse to return to primaries. Facing a limited pool of resources, the Democrats must use the process that requires the least expenditure.

In the Democratic Primary of 1977 for the governor's seat, Andrew P. Miller and Henry Howell spent a combined $1.5 million dollars. This averages out to $2.84 per primary voter in 1977 dollars compared to the average $400 per delegate spent by Baliles and Davis in the 1985 Democratic Convention process. The average total is only $1.4 million, compared to $1.5 million in the 1977 Democratic primary.

57 See supra note 37, at 183.
61 See supra note 7.
62 Attorney General Gerald Baliles and Lt. Gov. Richard J. Davis were candidates for the Democratic nomination.
63 Figures for the last Republican primary, held in 1949, were not available.
Conclusion

The use of the primary system for nominating candidates for public office can be deferential to the desires of the Virginia electorate and possibly detrimental to party strength. Choosing a primary over a mass meeting involves balancing competing interests at various points in history, hence the periodic change in selection process in Virginia.

Because the switch back to the primary for Virginia is non-binding, it will not give registered voters at large a stronger voice in the 1988 Presidential race. The implementation of the system achieves only half the objective of conducting a "truly democratic election." A caucus still will be required for actual selection of delegates to nominate Presidential candidates. Not until the Virginia electorate is required to register with a political party to avoid crossover will the primary work successfully. This preventive measure safeguarding the integrity of the primary is a reasonable compromise between maintaining party strength and giving voters more power in the election. In the meantime, the caucus is the determinative method of delegate selection.
EDUCATION IN VIRGINIA: SOLVING CULTURAL DIVISION
BY THE PROMOTION OF UNDERSTANDING

*J. Thompson Cravens

A black youth is struck and killed by an auto as he attempts to cross a busy highway in an effort to escape a gang of white hoodlums who were attacking him and his friends.\(^1\) A young black cadet at a military academy is hazed and threatened by white cadets, wearing white sheets and masks. Under threat, and unprotected by vacillating university officials, the cadet withdraws from school.\(^2\) On a television news program, high school students tell a reporter that they had never spoken to a black "in person". They further tell the reporter that they would be "afraid" to do so.\(^3\) Ironically, the city in which these students reside has a quite substantial black population. At a prestigious university, students angered by the outcome of an athletic event seen on television attack a group of black students, leaving one black student seriously injured.\(^4\) Civil Rights marchers in an all white locality are attacked and racial tensions are incensed when demonstrators along the march route, wearing white sheets and hats, throw rocks, bottles, and mud at marchers.\(^5\)

Our nation today is slowly sliding backward, sinking once again into the mire and stench of racial oppression. Americans proclaim that no master race exists, yet these events did not occur in Pretoria, Cape Town or Johannesburg, South Africa. These abominable pursuits, the acts of fear, hatred, misunderstanding, and cruelty wrought by one man on another, occurred here, in the United States. One can only wonder if those Klansmen and "white rights" protestors in Georgia were the same drought stricken southern farmers who a few months ago needed

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\(^1\) Howard Beach, New York, December 20, 1986. Twenty three year old Michael Griffith, after being beaten and chased by baseball bat wielding youths, crawled through a fence and onto Shore Parkway where in his attempt to escape his attackers he was killed by an auto.

\(^2\) The Citadel in South Carolina, Fall Semester 1986.

\(^3\) Television Interview, CBS 60 Minutes, Lansing, Michigan. Aired Fall 1986.

\(^4\) October 1986 - University of Massachusetts at Amherst. A fight erupted after the New York Mets won the World Series against the Boston Red Sox.

\(^5\) Ku Klux Klan members attacked civil rights marchers in January 1987 in Forsythe Co., Georgia.
feed for their livestock? Were these the same farmers who thanked the colorless heroes who grew, packed, and transported hay to their arid fields? In an era when Americans are allegedly returning to the church and the temple as no time since the fifties, this apparent rebirth of morality has not transcended racial or cultural barriers. One wonders what book is being studied, what morality is being taught. How ironic that on the eve of the two-hundreth anniversary of our Constitution, we as a people still have not come to terms with the racial and moral issues that have plagued this nation since inception. The tragedy is that Americans have chosen not to resolve the issues debated at Independence Hall prior to the signing of the Declaration of Independence in 1776.

When General George Washington stood on the shores of the York River in Yorktown, Virginia in October of 1781, he watched British ships laden with a defeated army sail into the Chesapeake Bay bound for England. He must have realized that it was the destiny of this great land to bear a free and independent people. It was unfitting, however, that that freedom would be restricted to certain classes of white males. Ironically, the first bloodshed in the struggle for American independence was that of a black man, Crispus Attucks, yet his people would remain enslaved in America for almost a century beyond the revolution. It would be another century after the signing of the Emancipation Proclamation before blacks in America could exercise the "inalienable rights" spoken of in 1776. It is time today for someone to say: No, we refuse to travel down that road again. We have been down that road - that road is darkness. It is time that everyone realized - socially, ethically, and morally, that people cannot be condemned because of social status or race. Herein lies a difficulty for both black and white alike. In many ways, the past we speak of is too recent to be forgotten. In many other instances, injustice has never abated.

The history books of today teach our children, if at all, but a small portion of the black struggle in America, especially during the civil rights era. Only a few short months ago America celebrated the birthday of one of its finest, the late Reverend Doctor Martin Luther King, Jr. This gesture was a glimmering ray of hope and a firm reminder to all that things have changed. America has made inroads to end legal segregation; but segregation in the mind and segregation in the hear can never be ended by statute. Some have chosen to continue practicing their prejudicial beliefs. The reason is surely ignorance. We as a society must begin to educate, and end this misunderstanding. Many political leaders speak of that noble movement of the 1950s.


7 Crispus Attucks and four other men were shot dead on March 5, 1770 in the streets of Boston, Massachusetts. He and his fellow citizens were victims of what has become known as the "Boston Massacre".
and 1960s not as the dawn of a new day in America, but as a time of turbulence and unrest. That movement has far too often been recorded in our history books and by the press as a physical reality rather than a moral awakening. The reason for this may lie in the fact that our society refuses to confess wrong. We refuse to tell our children and ourselves that our behavior and that of our parents and grandparents before us was ethically and morally contemptable. Events of the present demonstrate the need to begin recording, teaching, and remembering those years as the era when America changed course and for once made the morally correct decision. The humble ideals which forced a poor black woman to refuse to give up her seat on a bus and created a nonviolent revolution must be remembered today as vividly as those ideals were lived just a few short years ago. Those dreams can sustain us today and take us into the future. To do so, however, those words, those dreams, must be recorded in the history books and roll from the lips of educators.

Virginia has never been immune from racial conflict; one need only read of the current troubles in Colonial Heights, Virginia to discern that the civil rights issue is not dead in this state. The pivotal question is what can be done today to foster racial understanding and promote harmony among people. Virginia has always resided at the forefront of national politics, and it is only fitting that this state propose specific programs to aid in the struggle against racism and prejudice.

The key to ending prejudice is both understanding and a relaxation of tension that exists between many. The difficult task is in determining what types of programs can be undertaken to promote cultural understanding. Though many avenues exist, one area of concentration could prove the most beneficial. If we concentrate on our youth, if we fashion the textbooks that they read and provide opportunities for meaningful social interaction between races, classes, and cultures, substantial progress could be achieved.

One program that could prove mutually beneficial to all is a statewide student exchange program concentrating and operating predominantly with middle school aged children. For years many school systems have participated in exchange student programs with students from foreign countries coming to America and American students going abroad. The student lives with a family and attends an area school. It provides the student and the participating family an intensive and realistic opportunity to interact and learn to relate with and trust one another. The program could be conducted at the state level providing urban, rural, black, white, lower, middle, and upper class Virginians the opportunity to view themselves and society from a new and differing perspective fostering a new respect for those who live in

8 These are children generally in the 6th, 7th or 8th grades ranging generally in age from eleven to fourteen.
an environment different than one's own.\textsuperscript{9}

If a program such as this, so simple yet so practical, could be begun, the initial costs would be offset by the vast potential social gain. The program could be conducted virtually cost-free. School systems could, each term, interview and select volunteer candidates for the exchange program, and families willing to open their homes to an exchange student could be enrolled. A student would then enter the public school system in the area visited. The family of the student would provide transportation costs and normal allowance for the child. The host family would provide, at their own expense, housing, food and entertainment. School activities in which the student participates that require a fee would be paid by the students' parents. The state could earmark special funds for administrative costs and funds for program participants whose families cannot afford the initial transportation cost. Though this brief description of the financial arrangement is not exhaustive, it is apparent that cost would not be a critical factor. The student exchange could be done for an 8 or 9 week term or for an entire semester. The opportunities provided these students would likely prove a rare educational experience and the benefits to society would be lasting.

\textbf{Conclusion}

Our nation has arrived at a point in time where, as Doctor King said: "we must either learn to live together or die of our ignorance." A statewide student exchange program would allow students to take a meaningful step toward the goal of social harmony. There is something to be said for the age old idea of "walking a mile in another's moccasins". There are those who may oppose this idea as unnecessary or unwarranted. One may only ask, however, is deeper understanding ever unwarranted? If man has the ability to send rockets into space and communicate via satellite with the far reaches of our world, should we not allow our children the opportunity to interact and develop ties with those in their own state from different socioeconomic backgrounds? It is time to step forward and be counted. The struggle today is not so much equality or voting rights as it is understanding and empathy. This program could provide our state and the nation with a new generation of Virginians who comprehend the vast cultural divergence existing within the state/nation and will seek to utilize those differences to create a more positive society rather than excluding from their world those different from themselves whose lifestyles and ideas are not familiar to them.

\textsuperscript{9} Students from Rural areas would be sent to Urban areas, urban students to rural school systems. Black students would be sent to predominantly white school systems and white students to predominantly black school systems. The attempt would be to place the student in an environment dissimilar to his/her own.